



COMMERCE COMMISSION

## **Discussion Paper**

**The Interrelationship Between Part 2 of the Commerce Act  
1986 and the Telecommunications Act 2001**

**2 April 2007**

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## Introduction

1. The Commission has recently had to consider a number of issues relating to telecommunications and decide whether there are competition issues that the Commission should consider under Part 2 of the Commerce Act or whether section 63 of the Telecommunications Act applies. Section 63 expressly excludes the Commerce Act in certain circumstances.
2. The purpose of this discussion paper is to inform parties of the Commission's preliminary views as to the impact of section 63 of the Telecommunications Act, and to seek the views of interested parties. The discussion paper is intended to elicit comments from parties as to the interrelationship between section 63 of the Telecommunications Act and Part 2 of the Commerce Act. With the recent changes to the Telecommunications Act, the Commerce Act exclusion also applies when registered undertakings are made in lieu of regulation under the Telecommunications Act. The discussion paper comments on that interrelationship also.
3. The paper focuses on competition issues in telecommunications arising from unilateral conduct. It is possible the criteria outlined may also apply to collusive conduct.

## Key Statutory Provisions

### Commerce Act

4. The Commerce Act prohibits anti-competitive behaviour. Part 2 of the Act prohibits:
  - contracts, arrangements or understandings by businesses that could lead to a substantial lessening of competition and
  - the taking advantage of a substantial degree of market power to restrict entry into a market, or deter or eliminate competition.
5. The Commission has both an enforcement and adjudication role in relation to the anti-competitive practices prohibited by Part 2 of the Commerce Act.
6. The purpose of Part 2 of the Commerce Act is “to promote competition in markets for the long-term benefit of consumers within New Zealand”, which overlaps with the section 18 purpose statement of the Telecommunications Act.

### Telecommunications Act

7. The Commission's functions and responsibilities under the Telecommunications Act include:
  - resolving access disputes between carriers by:
    - making determinations for access to regulated services;
    - making determinations on the price payable for designated services;
    - conducting pricing reviews of determinations if requested to do so;
  - making or adjusting on its own initiative determinations of the standard terms and conditions on which regulated services must be supplied to all access seekers;

- assessing the cost and monitoring the Telecommunications Service Obligations (TSO) and determining how these costs will be allocated to other industry players;
  - development, monitoring and enforcement of an information disclosure regime including compliance with access principles incorporated in any determination;<sup>1</sup>
  - enforcement of the proposed Telecom Operational Separation Plan which requires arms length relationships between Telecom’s wholesale and retail arms and access units;
  - design and implementation of an accounting separation regime for Telecom;
  - conducting investigations into the desirability of regulating additional services or amending the regulation of services where necessary, and making recommendations to the Minister of Communications;
  - consideration and recommendation to the Minister of registered undertakings from access providers to supply a service to all access seekers on specified terms, in lieu of additional regulated services;
  - deciding whether to approve telecommunications access codes submitted by the Telecommunications Industry Forum; and
  - enforcement powers and tools for breaches of both the Act and determinations, codes and undertakings made under the Act, including requirements in them to provide equivalence of access.
8. The main purpose of the Telecommunications Act is “to regulate the supply of telecommunications services”. In addition, section 18 provides that the purpose of Part 2 (under which access determinations are made) and Schedules 1 to 3 of the Act is to:

Promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.

## **Interrelationship Between the Acts**

### **General**

9. Given the scope of the Telecommunications Act and the Commerce Act, there may be some uncertainty in the industry about the interaction between the two statutes. The Commission proposes to provide some guidance about the circumstances in which each statute prevails.
10. The statutes operate in different ways. Access determinations are forward-looking, and may direct a party to do or not do something that the Commission considers will assist competition. If the Commission makes such a direction, it is binding and enforceable in the High Court.
11. Part 2 of the Commerce Act applies to behaviour in the telecommunications sector, except where the Telecommunications Act expressly excludes or by necessary implication prohibits its application.

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<sup>1</sup> In connection with this, the Commission has sector monitoring, and information dissemination powers, and also information disclosure powers in relation to all providers of regulated services.

12. Section 63 of the Telecommunications Act limits the application of the Commerce Act in respect of determinations made regarding designated and specified services.<sup>2</sup> It states:

Part 2 of the Commerce Act does not apply in respect of a determination made under this Part or any matter necessary for giving effect to a determination made under this Part.

13. In addition, with regard to registered undertakings, clause 9 of the Schedule 3A of the Telecommunications Act states:

Part 2 of the Commerce Act does not apply in respect of

- (a) a registered undertaking **and**
- (b) any matter necessary for giving effect to a registered undertaking.

### **Section 63 and Clause 9 of Schedule 3A**

14. Section 63 and Clause 9 are similar to sections 58A and 69 of the Commerce Act. Section 58A provides that Part 2 does not apply to the giving effect to any contract, arrangement or understanding covered by a restrictive trade practices authorisation. Section 69 provides that sections 27 and 47 do not apply to any acquisitions “in accordance with a clearance or authorisation”.
15. Section 63 and Clause 9 have two separate “limbs”:
- that Part 2 does not apply “in respect of” a determination or registered undertaking; and
  - that Part 2 does not apply to “any matter necessary for giving effect to” a determination or registered undertaking.

### ***In Respect of***

16. The use of the wording “in respect of” may allow for a broad interpretation of section 63 and Clause 9. The Shorter Oxford Dictionary defines “in respect of” to mean “with reference or regard to”.
17. The purposes of the first limb of section 63 and Clause 9 (like sections 58A and 69 of the Commerce Act) appear to be to:
- prevent (and avoid the associated cost and uncertainty of) re-litigation of an access price and/or other dispute under Part 2 of the Commerce Act where it has been considered and resolved by a determination or registered undertaking under the Telecommunications Act; and
  - in the event of non-compliance with a determination or registered undertaking, to limit enforcement options to those provided under the Telecommunications Act.
18. In view of the statutory purpose of the Commerce Act, the Commission considers that Part 2 of that Act may apply to conduct which has only an indirect connection to the determination or registered undertaking.

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<sup>2</sup> Similar wording is used in section 78 of the Telecommunications Act regarding the TSO. Section 78 states: Part 2 of the Commerce Act does not apply in respect of a TSO instrument or a contract, arrangement, or understanding to which the TSO instrument relates or any matter necessary for giving effect to the TSO instrument or the contract, arrangement, or understanding.

19. Conduct which does have a direct connection to a determination or registered undertaking, such as an obligation to charge a price set by a determination or made in a registered undertaking, is protected from challenge under Part 2 of the Commerce Act. Similarly, where a determination or registered undertaking specifically sets non-price terms and conditions, conduct which implements these terms cannot be challenged under Part 2 of the Commerce Act.
20. This interpretation is consistent with the purposes of section 63 and Clause 9, and the scheme and purpose of the Telecommunications Act more generally. If the Commission has made a determination of access rights under the Telecommunications Act it would be inappropriate to consider the issue again under Part 2 of the Commerce Act. Action under the Commerce Act would similarly be inappropriate where the Commission has made a recommendation to the Minister on an undertaking and the Minister has accepted and registered the undertaking and its terms and conditions in lieu of regulation.
21. Where the Commerce Act does not apply, parties concerned about the outcome of a regulatory process should consider what further regulatory options are available to deal with the issue. These may include enforcement of a determination, a price review, clarification, reconsideration or adjustment of a determination, or a fresh determination.
22. Standard terms determinations set the terms of supply for all seekers of the regulated service. For bilateral determinations, while they are binding only on the parties to the dispute, Telecom has tended to offer the same regulated prices on a commercial basis to the entire industry. Even though section 63 might not prevent Commerce Act action in respect of these prices, the Commission is unlikely as a matter of prosecutorial discretion to challenge such prices. Any such action would involve the Commission challenging the equivalent of a determined price under the Telecommunications Act, which would be inconsistent with the policy intent of section 63.
23. Registered undertakings are similarly only binding on the parties who offer them. However an undertaking constitutes an offer from an access provider to supply a service to all access seekers on the terms and conditions of a written undertaking. A registered undertaking, therefore, has the same effect as a standard terms determination.

### ***Matter Necessary for Giving Effect to***

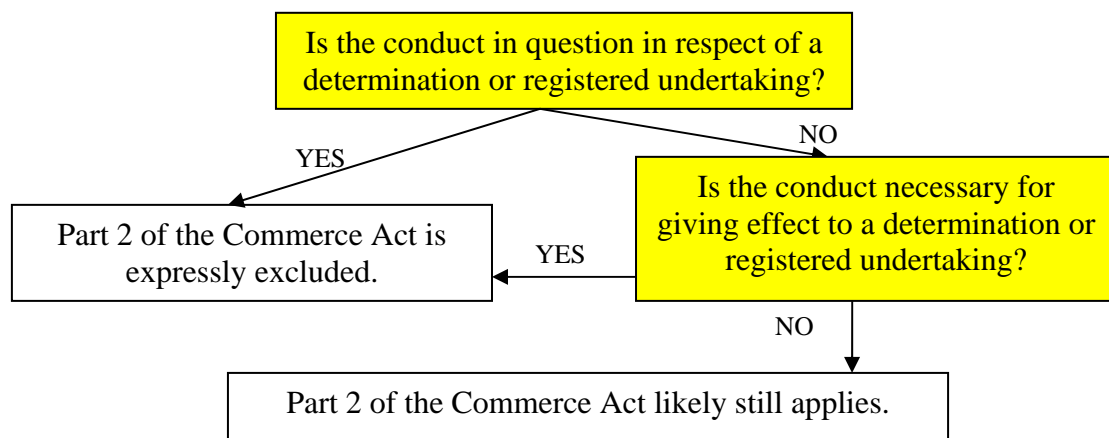
24. The second limb of section 63 and Clause 9 limits the application of Part 2 of the Commerce Act in respect of any matter necessary for giving effect to an access determination or registered undertaking. It is more limited than the first limb as it requires that the matter is “necessary” for giving effect to such a determination or registered undertaking before it applies.
25. The Concise Oxford Dictionary defines “necessary” to mean “requiring to be done ... essential ... inevitable”. This means that, for example, if a determination requires that a party to a determination has no option but to engage in the conduct at issue for the purpose of giving effect to the determination then the conduct would be “in respect of a matter necessary for giving effect to” that determination. That a determination may create an incentive to engage in the conduct is insufficient and does not mean that it is necessary to act in that way.

26. While more limited, the second limb is not necessarily a subset of the first. There could be conduct which is “necessary for giving effect to” a determination or registered undertaking, but not “in respect of” a determination or registered undertaking. An example might be mechanisms which operationalise terms and conditions set by the Commission, but which are not themselves terms and conditions set by the Commission in a determination or registered undertaking.
27. Nor are the two limbs necessarily mutually exclusive. There may be situations where conduct satisfies both limbs.

### **Summary**

28. The Commission considers that in most cases it will be clear whether or not the exclusions in section 63 or Clause 9 apply.
29. Where the Commission has made a determination or there is a registered undertaking under the Telecommunications Act which sets specific terms and conditions which govern particular conduct of an access provider, Part 2 of the Commerce Act will not apply.
30. Where there is no such determination or registered undertaking, the Commerce Act will apply. However, the Commission is unlikely to take action when conduct is related to another determination or registered undertaking.
31. Some ambiguity may arise where the Commission has made a determination, or there is a registered undertaking, which does not set specific terms and conditions which govern particular conduct capable of being addressed under the Commerce Act. For example, non-price conditions around service quality might not be specified in a determination or registered undertaking but addressed by the parties via separate contractual arrangements. The Commission will decide on a case-by-case basis whether the Commerce Act continues to apply when such ambiguities arise.
32. The diagram below outlines the relevant questions that need to be asked, and addressed, in respect of the application of section 63 or Clause 9 of the Telecommunications Act.

### **Criteria as to Whether Section 63 or Clause 9 Applies**



## Verizon v Trinko

33. The issue of the interrelationship between regulation and competition law has arisen in other countries. Perhaps the best known example is the decision of the Supreme Court of the United States in *Verizon v Trinko* (2004) (“*Verizon*”). However, the Commission considers that *Verizon* does not apply as a basis for determining that section 63 or Clause 9 of the Telecommunications Act prevents the application of Part 2 of the Commerce Act to the telecommunications industry. The legislative context of the *Verizon* case is different and, furthermore as discussed in this discussion paper, the Commission considers that the Telecommunications Act has a limited application in excluding Part 2 of the Commerce Act. In addition, it is notable that there are other overseas international precedents that support the concurrent application of competition law and telecommunications regulation in specific contexts.<sup>3</sup>
34. In *Verizon*, the US Supreme Court considered whether the standard anti trust legislation in the Sherman Act would apply to the telecommunications services delivered under a legislative scheme for requiring access to telecommunication networks. The relevant industry-specific legislation specifically preserved the application of general anti trust laws. The issue considered by the Court was whether merely failing to comply with the access obligations imposed by the industry-specific legislation amounted to a breach of the anti trust laws. The Supreme Court decided that it would not (page 7): “But just as the 1996 Act preserves the claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing anti trust standards.”
35. The Commission does not consider that *Verizon* is authority for the proposition that the existence of industry-specific regulation for certain services limits the application of the Commerce Act to services that are subject to regulatory control. Further, *Verizon* does not support the proposition that where regulatory intervention is available, the Court should be slow to apply Part 2 of the Commerce Act. However, where regulatory intervention has taken place, there are stronger arguments to support a more limited role for Part 2 of the Commerce Act.

## Conclusion

36. The Commission wishes, to the fullest extent possible, to remove barriers to entry and promote competition in telecommunications markets. Conduct consistent with determinations and registered undertaking made under the Telecommunications Act are excluded from Part 2 of the Commerce Act. Where parties believe the outcomes from a determination or registered undertaking are inconsistent with the Telecommunications Act, then regulatory remedies should be sought. Where conduct occurs when no determination or registered undertaking is in place, but is consistent with a determination or registered undertaking for similar circumstances, then the Commission may exercise prosecutorial discretion not to prosecute and will encourage the parties to seek regulatory solutions. Where conduct is in breach of Part 2 of the Commerce Act and no determination or registered undertaking applies, the Commission will consider taking action under the Commerce Act.

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<sup>3</sup> *Deutsche Telekom*, OJ L 263, 14 October 2003.

## APPENDIX: Background Reference Material

### (a) Decisions and judgments

*Covad Communications Co. v. BellSouth Corp.*, 374 F.3d 1044 (11th Cir. 2004)

*Deutsche Telekom*, OJ L 263 of 14 October 2003

*NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 (6 October 2004)

*Telecom Corporation of New Zealand Ltd v Commerce Commission*. [1992] 3 NZLR 429

*Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 (2004)

### (b) Papers

Brennan, “Regulation and Competition as Complements” in M Crew (ed), *Obtaining The Best From Regulation And Competition* (2004) ch 1

Economides, “Vertical Leverage and the Sacrifice Principle: Why the Supreme Court Got Trinko Wrong” (2005)

Geradin and O'Donoghue, “The Concurrent Application of Competition Law and Regulation: the Case of Margin Squeeze Abuses in the Telecommunications Sector” (2005) 1 *Journal of Competition Law and Economics* 355

Monti, “Competition and Regulation in the New Framework”, Public Workshop on The .Electronic Communications Consultation Mechanism Provided for by Art. 7 of the Framework Directive 2002/21/EC, Brussels, 15 July 2003

Petit, “The Proliferation of National Regulatory Authorities alongside Competition Authorities: A Source of Jurisdictional Confusion” (2004)

Rubin, “Regulation-Based Antitrust Quasi-Immunity” (2005)

Semeraro, “A Comment Respecting the Accommodation of Antitrust and Telecom Regulation” (2003) 71 *Antitrust LJ* 147; and Rubin, “Regulation-Based Antitrust Quasi-Immunity” (2005)

Weiser, “The Relationship of Antitrust and Regulation in a Deregulatory Era” (2005)