

OCTOBER 2008

SECTOR MONITORING AND INFORMATION DISSEMINATION UNDER SECTION 9A OF THE TELECOMMUNICATIONS ACT 2001

Purpose of these Guidelines

The 2006 amendments to the Telecommunications Act 2001 (the **Act**) created new monitoring and information dissemination functions for the Commerce Commission (the **Commission**), which are set out in section 9A of the Act. These Guidelines provide a general overview of the Commission's functions and powers under section 9A.¹

The Commerce Commission

The Commission's purpose is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice. The Commission is responsible for enforcing the Commerce Act 1986, which prohibits behaviour that restricts competition, and the Act, which regulates the supply of certain telecommunications services in New Zealand.

Statutory provisions

Section 9A of the Act creates new monitoring and information dissemination functions for the Commission in telecommunications markets by providing that the Commission:

- (a) must monitor competition in telecommunications markets, and the performance and development of telecommunications markets;²
- (b) may conduct inquiries, reviews, and studies (including international benchmarking) into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within New Zealand;³ and
- (c) must make available reports, summaries, and information about the things referred to in paragraphs (a) and (b).⁴

Section 9A also provides that the Commission, in making available any reports, summaries, and information, is not required to release all documents that it produces or acquires under section 9A.⁵

1 Please note, these guidelines are not a substitute for legal advice and any decision by the Commission to take undertake monitoring, inquiries, reviews or studies, or to follow a particular process in respect of the above or other exercise of discretion by the Commission under section 9A, will be made on a case-by-case basis in accordance with the Act.

2 Section 9A(1)(a).

3 Section 9A(1)(b).

4 Section 9A(1)(c).

5 Section 9A(2).

The functions and powers set out in section 9A form only one component of the Commission's overall strategy to promote competition by regulating the supply of certain telecommunication services in New Zealand.

Monitoring

Under section 9A(1)(a), the Commission must monitor competition in telecommunications markets and the performance and development of telecommunications markets. In order to perform this function, the Commission proposes to undertake monitoring on a regular basis.

The Commission considers that in discharging this function its principal roles are to:

- assess the impact of regulation in segments of the telecommunication markets that are regulated;
- monitor for indications of competition problems in unregulated segments of telecommunication markets;
- generally track whether telecommunication markets in New Zealand are functioning efficiently, and identify any obstacles to efficient markets; and
- report on progress over time in developing more efficient markets.

Information that is likely to be useful for monitoring under section 9A(1)(a) includes:

- level and trend of prices;
- consumption patterns;
- quality of service;
- market shares;
- industry investment and developments; and
- international benchmarking.

The Commission currently meets its obligations under section 9A(1)(a) by issuing a series of quarterly reports using readily available key statistics about telecommunications markets in New Zealand and overseas. These reports draw together information focussing on broadband connections, OECD benchmarking, average prices, and notable price changes and market developments.

In addition, a more comprehensive set of statistics, commentary and analysis of New Zealand's telecommunications markets is presented in an annual 'state of the market' report. For example, the 2007 report examines retail activities and competitiveness, industry investment, and household use of telecommunications, with broad analysis of the mobile, fixed-line voice, broadband and wholesale markets.

The Commission also undertakes monitoring of broadband service levels to promote consumer education and understanding of telecommunication markets. Effective competition will be encouraged if consumers have access to a wide range of information about products in telecommunication markets. The Commission may also monitor service levels in respect of other telecommunication products from time to time.

These reports are made available on the Commission's website.⁶ The scope of this monitoring may develop over time in response to changing pressures and expectations in New Zealand's telecommunications markets.

Inquiries, studies and reviews

Under section 9A(1)(b), the Commission may carry out inquiries, reviews and studies (including international benchmarking) into any matter that relates to the telecommunications industry or the long-term benefit of end-users of telecommunication services in New Zealand. The Commission considers that the section 9A(1)(b) power will usually be used for targeted one-off, inquiries, reviews and studies.

The Commission views section 9A(1)(b) as a broad, formal discretionary function that will produce a published report or other information. This can be contrasted with informal inquiries, reviews or studies that do not have an information dissemination outcome. The Commission considers that the use references to "inquiry", "review" or "study" confers a general function with broad scope on the Commission, and allows the Commission to decide whether an "inquiry", "review" or "study" is more appropriate to a particular circumstance.⁷

The Commission considers that this power will most often be used to examine issues that are of special interest to the industry and consumers. Such issues may be identified as a part of the Commission's ongoing monitoring and reporting, through complaints received by the Commission, or identified by the Commission on its own initiative.

The Commission may, with reviews for issues with significant impacts on stakeholders, issue a draft terms of reference for consultation on a proposed inquiry, review or study. For example, the Commission has initiated a study into next generation networks by seeking submissions from industry participants on the Commission's draft terms of reference. The Commission considers this to be an appropriate way to seek industry participation during the early stages of large reviews, although in some circumstances that may not be possible, appropriate or necessary. The Commission will set, at its discretion, any process that it intends to follow to gather information as part of the exercise of section 9A(1)(b) functions.

Where industry participation is desirable, the Commission will seek a high level of engagement from stakeholders to inform its inquiry, review or study. The Commission may use a range of information-gathering processes (including the use of formal information gathering where necessary), and may seek written submissions or consultant input. When seeking input from industry, the Commission will seek to clarify the scope and purpose of any information-gathering exercise so as to facilitate industry compliance with information requests. Where appropriate, the Commission may also seek to liaise with the Telecommunications Carriers' Forum to assist in avoiding duplication of engagement for the industry.

6 These can be found at:
<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/MonitoringandReporting/DecisionsList.aspx>

7 Although given the broad scope of this function, the distinction between an inquiry, review or study does not appear to be of great significance.

Publication of reports, summaries and information

Where the Commission carries out monitoring, an inquiry, review or study under section 9A, it will publish report summary or other information that it considers appropriate on its website. As expressly stated in the Act,⁸ the Commission is not required to release all documents that it produces or acquires under section 9A, for example for reasons of confidentiality, size or relevance.

Where the Commission considers it appropriate, it may make confidentiality orders for information obtained as part of any Section 9A inquiry, review or study. The Commission guidelines on confidentiality orders under the Act will apply in such circumstances.

The Commission considers that maintaining the Commission's independent analysis and presentation of information is important. However, the Commission may also seek industry comment on the Commission's approach to the presentation of information provided by industry, where such industry comment would be appropriate.

The Commission also has statutory obligations to make certain information available on request under the Official Information Act 1982.

Relationship with the Commerce Act 1986

The monitoring and reporting functions set out in section 9A of the Act explicitly relate to competition in telecommunications markets and the long-term benefit of end-users of telecommunications services within New Zealand.

The Commission is also responsible for enforcing both the Telecommunications Act (which regulates the supply of certain telecommunications services in New Zealand) and the Commerce Act 1986, which prohibits behaviour that restricts competition.

Section 1A of the Commerce Act provides that the purpose of the Commerce Act *is to promote competition in markets for the long-term benefit of consumers within New Zealand*. This purpose statement includes promoting competition in telecommunications markets. There is therefore some overlap between the Commerce Act and the Telecommunications Act.

Part 2 of the Commerce Act applies to behaviour in the telecommunications sector except where the Telecommunications Act excludes its application expressly or by implication.

Complaints to the Commission about anti-competitive behaviour in the telecommunications industry will be dealt with under the Commerce Act. Where applicable, the Commission may monitor the potential impact of the behaviour in the market place using section 9A to complement the Commerce Act regime.

⁸ Section 9A(2).

Relationship with existing statutory functions and powers

The Commission has a number of functions and powers under the Act and the Commerce Act in respect of:

- information gathering;⁹
- investigations;¹⁰ and
- information disclosure.¹¹

The Commission considers the functions and powers set out in section 9A complement these established functions and powers.

Relationship with section 98 of the Commerce Act

Under section 98 of the Commerce Act, the Commission may require persons to supply information or documents or give evidence that is necessary or desirable for the purposes of carrying out its functions or exercising its powers. Section 98 applies to the Commission's functions and powers under the Act as well as the Commerce Act.¹²

The Commission may request the provision of information for the purposes of section 9A where it is necessary or desirable for the purposes of exercising the functions and powers under section 9A.

Relationship with Schedule 3 of the Act

Under Schedule 3 of the Act the Commission may, on its own initiative, commence an investigation into making alterations to Schedule 1 of the Act and make a recommendation to the Minister of Communications as a result of that investigation. Schedule 1 relates to telecommunications services which are designated services and specified services under the Act.

For example, Commission action under section 9A may (where required) be used as a precursor to a Schedule 3 investigation. Section 9A inquiries may be similar in nature to the Commission's Mobile Services Review, which was a catalyst for the Commission's Schedule 3 investigation into amending the mobile roaming and co-location services.

9 See Commerce Act 1986, section 98 and Telecommunications Act 2001, section 15(f).

10 See Telecommunications Act 2001, Schedule 3.

11 See Telecommunications Act 2001, Part 2B, which requires access providers to disclose information about the operation and behaviour of aspects of their businesses.

12 Telecommunications Act 2001, section 15(f).