



COMMERCE COMMISSION

15 September 2005

**Review of Designated and Specified Services under the  
Telecommunications Act 2001:  
Preliminary view on decision to investigate and procedural matters**

**Background**

1. On 19 December 2006, the thirteen designated and specified services originally incorporated within Schedule 1 of the Telecommunications Act 2001 ('the Act') are due to expire.<sup>1</sup> The Commission may investigate whether or not to recommend to the Minister of Communications that the period of designation or specification of any or all of these services be extended for up to two years.<sup>2</sup> Should the Commission decide to initiate such investigations, these must commence at least one year prior to the expiry of the services.<sup>3</sup>
2. Additionally, at any time the Commission may initiate an investigation into whether to recommend that various aspects of a service listed in Schedule 1 of the Act be amended.<sup>4</sup> If the Commission considers that there are reasonable grounds to investigate whether to amend any of the existing services, it may be appropriate to combine such an investigation with its review of extension of the service.
3. The Commission must follow the procedure set out in Part 1 of Schedule 3 to the Act when conducting an investigation into whether to extend a regulated service.<sup>5</sup>
4. The Commission notes that on 8 August 2005, the Office of the Minister of Communications released a cabinet paper on the Implementation Review of the Telecommunications Act 2001 ('the Cabinet Paper').<sup>6</sup> This paper contains a number of recommendations relating to the Schedule 3 investigation process for considering whether to extend an already regulated service.

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<sup>1</sup> Section 65(1)(a) of the Act provides that every designated or specified service expires on the expiration of 5 years from the date on which the designated service or specified service came into force unless the period is extended in accordance with this section.

<sup>2</sup> Refer to sections 65 and 68 of Act.

<sup>3</sup> Refer to clause 1(1)(b) of Part 1 of Schedule 3 to the Act.

<sup>4</sup> Refer to section 66(c) of the Act.

<sup>5</sup> Refer to section 68 of the Act.

<sup>6</sup> Office of the Minister of Communications, *Implementation Review of the Telecommunications Act 2001* (Cabinet Paper), 8 August 2005.

5. The proposed amendments to the extension review process include:<sup>7</sup>
  - the ability to extend a regulated service for a maximum of five years where a full Schedule 3 investigation process is used;
  - the introduction of a simpler test based on an assessment of whether competitive conditions in the market have changed significantly such that regulation is no longer justified. Where such a test is used, regulation may be extended for one period of up to three years;
  - the availability of a reserve power to extend the period of regulation of existing services by up to two years without further investigation where the Commission considers that there is a case for investigating extension of the period of regulation, but is unable to carry out a review in the time available;
    - where the reserve power provision is triggered, the service could not be extended for a three year period using the simple test above.
6. The Commission is required to conduct any investigations into whether to extend the regulated services in accordance with the current legislation. Any investigation will be conducted by the Commission in accordance with the current process set out in Schedule 3, unless the Act is amended in relation to this process in the meantime.
7. However, if the proposals set out in the Cabinet Paper are incorporated within the Act prior to, or during, any of the substantive investigations, the Commission will apply the amended process to the extent that it is appropriate to do so.
8. On 4 August 2005, the Commission sought comment from interested parties on procedural matters related to the upcoming review process. The Commission has decided to set out its preliminary view on whether there are reasonable grounds to investigate extension of the original regulated services. The Commission is also providing its preliminary view on a number of procedural matters, for the guidance of interested parties.

### **Reasonable Grounds to Investigate**

9. In compliance with Schedule 3 process for investigating whether to extend a regulated services, the Commission may only initiate such an investigation where it is satisfied that there are reasonable grounds to do so.<sup>8</sup>
10. Where the Commission has previously considered whether to initiate a Schedule 3 investigation, the factors that were taken into account before making a decision to investigate included whether there were competition concerns regarding the service under review. For example, in its decision to investigate mobile termination rates, the Commission referred to ‘indications that mobile termination prices in New Zealand may exceed cost by a significant margin’ and

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<sup>7</sup> *ibid* pp 5-6.

<sup>8</sup> Refer to clause 1(1)(a) of Part 1 of Schedule 3 to the Act.

the ‘substantial degree of market power that mobile operators appear to have in terminating calls on their mobile networks’.<sup>9</sup>

11. The Commission considers that it is useful to distinguish between an investigation into whether to regulate a new service and an investigation into whether to extend the period of regulation of an already regulated service. It is apparent that the thirteen designated and specified services subject to review were regulated due to competition concerns in relation to those services at the time of enactment. Accordingly, the Commission considers that it is not necessary to conduct a market and competition analysis and identify further specific competition concerns with any of the regulated services when the Commission is making the decision to investigate.
12. In these circumstances, the Commission considers that it is appropriate to consider whether or not there has been active interest in regulated access to each of the designated and specified services subject to review during the current period of regulation. Where an access seeker or access provider has lodged an application for an access determination in relation to a designated or specified service, this indicates that there may be competition problems in respect of that service. The threshold for investigating an application for an access determination includes a requirement that the person making the application has made reasonable attempts to commercially negotiate the terms of supply of the service. The Commission is not forming a view as to whether the competition problems persist for all services that have been the subject of an application. It is only having regard to this factor for the purposes of forming a preliminary view as to whether to investigate extension of regulation of these services.
13. Accordingly, the Commission is of the preliminary view that there are reasonable grounds to investigate whether to extend the period of regulation of the following designated services under Schedule 1 of the Act:
  - Interconnection with Telecom’s fixed PSTN<sup>10</sup>
  - Interconnection with fixed PSTN other than Telecom’s<sup>11</sup>
  - Retail services offered by means of Telecom’s fixed telecommunications network<sup>12</sup>

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<sup>9</sup> Commerce Commission, *Decision to Investigate Mobile Termination Rates*, 29 April 2004.

<sup>10</sup> In May 2002, both Telecom and TelstraClear filed applications for determination concerning price and non-price terms in respect of interconnection with Telecom’s fixed PSTN. The Commission released its final determination (Decision 477) on 5 November 2003. This determination was based on the initial pricing principle. Subsequent to the release of Decision 477, both Telecom and TelstraClear filed applications requesting the Commission review the interconnection price set in that determination. The Commission is currently investigating these pricing review applications.

<sup>11</sup> All The applications referred to in footnote 7 also related to interconnection with TelstraClear’s fixed PSTN.

<sup>12</sup> In May 2002, TelstraClear filed an application for an access determination concerning price and non-price terms in respect of a number of retail services offered by means of Telecom’s fixed PSTN (to business customers). The Commission released its final determination (Decision 497) on 12 May 2003. In November 2002, TelstraClear filed a similar application concerning retail services offered to residential customers. The Commission released its final determination (Decision 525) on 14 June 2005.

Both Telecom and TelstraClear have requested that the Commission review the wholesale discount set in both these wholesale determinations. The Commission is currently investigating these applications.

- Residential local access and calling service offered by means of Telecom's fixed telecommunications network<sup>13</sup>
  - Bundle of retail services offered by means of Telecom's fixed telecommunications network<sup>14</sup>
  - Retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services<sup>15</sup>
  - Local telephone number portability service<sup>16</sup>
  - Cellular telephone number portability service<sup>17</sup>
14. The Commission is of the preliminary view that there are also reasonable grounds to investigate whether to extend the period of regulation of the specified services of:
- National roaming; and
  - Co-location on cellular mobile transmission sites.
15. Although the Commission has not received an application for determination for access to either of these services, at least one potential cellular network operator has recently approached the Commission expressing concerns in relation to the markets for national roaming and co-location on cellular mobile transmission sites.
16. Finally, it is the Commission's preliminary view that there are no reasonable grounds to investigate whether to extend regulation of the following three services:
- Co-location of equipment for fixed telecommunications services at sites used by Broadcast Communications Limited;
  - National toll-free telephone number portability service; and
  - Telecom's fixed PSTN to mobile carrier pre-selection service.

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In November 2004, TelstraClear filed an application for an access determination in respect of a number of business retail services (including Private Office Networking) not already covered by Decision 497. The Commission is yet to make a determination on this application.

<sup>13</sup> The Commission's Residential Wholesale Determination (referred to in footnote 9) also concerned the residential local access and calling service offered by means of Telecom's fixed telecommunications network. Similarly, the wholesale discount for this service is also the subject of the pricing review applications.

<sup>14</sup> The Commission's Residential Wholesale Determination (referred to in footnote 9) also concerned a number of bundles of retail services offered by means of Telecom's fixed telecommunications network. Similarly, the wholesale discount for this service is also the subject of the pricing review applications.

<sup>15</sup> TelstraClear's May 2002 application for an access determination (referred to in footnote 9) also requested access to a number of retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services. The Commission declined to investigate this aspect of the application as TelstraClear did not show that it had first made reasonable attempts to commercially negotiate with Telecom the terms of access to any parts of bundles.

<sup>16</sup> In March 2003, the Commission received a multiparty application for determination of the allocation of costs for provision of local and cellular number portability amongst the industry. In December 2004, the Commission received a multiparty application for determination of the functions and standards necessary to provide number portability. On 31 August 2005, the Commission released its final Determination on both of these applications.

<sup>17</sup> Refer to footnote 13.

17. The Commission has received no applications or expressions of concern in relation to any of these services. Market indications are that access to these services is not a source of concern to actual or prospective access seekers or access providers. With respect to national toll free number portability, in April 2003 a telecommunications industry joint venture developed a common industry database system (TNAS) in order to introduce toll-free number portability in New Zealand. With respect to co-location at BCL's sites and the carrier pre-selection service, the Commission understands that satisfactory commercial solutions are in place between industry participants.

## **Procedural Matters**

### *Combination of Investigations*

18. The Commission sought comment on whether it is appropriate to group the designated and specified services together for the purposes of the investigations and, if so, how best to group the services. The submissions were generally supportive of the Commission's proposal to group the services together. Broadcast Communications Limited (BCL) is the only party that suggested that the Commission should conduct a separate investigation process for each service. BCL argued that 'grouping services together will lead inevitably to the grouping of submissions and issues, which would be to the detriment of the individual consideration required for the investigation of each service'.<sup>18</sup>
19. The Commission does not consider that BCL's concerns necessitate the separate investigation of each service. Even if the Commission combines the services for the purposes of conducting the investigations, it will still be required to assess each individual service and make a separate recommendation to the Minister of Communications regarding each service.
20. Telecom suggested that the carrier pre-selection service should fall within 'Interconnection Services' as it is an access method for interconnect origination.<sup>19</sup> In the event that the Commission decides to investigate the carrier pre-selection service, it will include carrier pre-selection within this category.
21. The Commission intends to conduct four investigation processes by grouping the 10 designated and specified services under review as follows:

#### Interconnection Services:

- Interconnection with Telecom's fixed PSTN;
- Interconnection with fixed PSTN other than Telecom's.

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<sup>18</sup> Broadcast Communications Limited, *Review of Designated and Specified Services under the Telecommunications Act 2001: Request for Comment on Procedural Matters*, 17 August 2005.

<sup>19</sup> Telecom, *Review of Designated and Specified Services under the Telecommunications Act 2001: Request for Comment on Procedural Matters*, 19 August 2005.

Retail Services:

- Retail services offered by means of Telecom's FTN;
- Residential local access and calling service offered by means of Telecom's FTN;
- Bundle of retail services offered by means of Telecom's FTN; and
- Retail services offered by means of Telecom's FTN as part of a bundle of retail services.

Number Portability Services:

- Local telephone number portability service;
- Cellular telephone number portability service;

Cellular Roaming and Co-location:

- National cellular roaming;
- Co-location on cellular mobile transmission sites; and

#### *Amendments to Services*

22. As noted above, the Commission may at any time initiate an investigation into whether to recommend that various aspects of a service in Schedule 1 of the Act be amended. Such amendments may include changes to the scope of the service, the applicable conditions, the description of access seekers and access providers, and the access and pricing principles. The Commission is also able to consider whether to designate a service that is currently specified by omitting it from Part 3 of Schedule 1 and adding it to Part 2 of that Schedule.
23. The Commission sought comment from interested parties on whether it would be appropriate to consider amendments at the same time that it is considering whether to extend regulation of the services.
24. BCL and Telecom both consider that any investigation into whether to amend a service should be separate from the investigation into whether to extend the period of regulation of that service.<sup>20</sup> Both parties consider that the Commission should complete its extension review before it considers amendments to any of the services that are extended. Vodafone also argued that the two processes should not run in parallel, unless the proposed amendments are minor or technical in nature.<sup>21</sup> TelstraClear considers that the Commission should also consider amendments.<sup>22</sup>
25. If the Commission initiates an investigation into whether to amend a service, it must decide that there are reasonable grounds to do so. The Commission considers that the threshold for deciding whether to amend a service is different

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<sup>20</sup> Broadcast Communications Limited, *Review of Designated and Specified Services under the Telecommunications Act 2001: Request for Comment on Procedural Matters*, 17 August 2005. Telecom, *Review of Designated and Specified Services under the Telecommunications Act 2001: Request for Comment on Procedural Matters*, 19 August 2005.

<sup>21</sup> Vodafone, *Vodafone comments on procedural matters relating to the review of designated and specified services*, 25 August 2005.

<sup>22</sup> TelstraClear, *Telecommunications Act: Review of Regulated Services*, 19 August 2005.

from that for deciding whether to extend a service. The Commission has not considered whether to amend any of the services but will do so once the substantive investigations into extending the services are underway.

26. The Commission agrees with BCL and Telecom that separate consideration must be given to the issue of extending a service. It is likely however that there will be some efficiencies in considering in parallel any suggested amendments to the service, as related competition issues will arise. The Commission will decide on the balance of advantage in running parallel or sequential processes once it has examined any proposals for amendment.

#### *Process Going Forward*

27. The Commission is seeking comment from interested parties on its preliminary view as to whether there are reasonable grounds to investigate extension of the 13 designated and specified services subject to review. After considering these submissions, the Commission will finalise its view and issue decisions to investigate in relation to the relevant services.
28. The Commission anticipates that it will issue all decisions to investigate simultaneously. Once the substantive investigations are underway the Commission intends to stagger these investigations to a certain extent, to avoid administrative burden and inconvenience to parties as a result of all submissions being due at the same time or conferences falling too closely together.
29. The Commission is mindful of the fact that some investigations will be more complex and resource intensive than others, particularly if the Commission subsequently decides to investigate whether to make amendments to any of the services. The Commission agrees with TelstraClear that it would be sensible to begin the most complex and controversial investigations first. When it issues its decisions whether to investigate, the Commission will set out its intentions regarding timeframes for these investigations.
30. The Commission must make reasonable efforts to provide its final report on the extension of the regulated services not later than 120 working days after the giving of public notice of the commencement of the investigation. The Commission expects to complete all of the investigations as early as possible in 2006 in order to provide the Minister of Communications with sufficient time to consider and act on the recommendations before the services expire. However, should legislation be passed to amend the Schedule 3 investigation process in the manner described in the Cabinet Paper mentioned above, the Commission will reassess this timetable.

#### **Address for Submissions**

Please provide all written comment by 30 September to:

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