



TelstraClear Limited

*Comments on Review of Designated and Specified Services
under the Telecommunications Act 2001: Preliminary View on
Decision to Investigate and Procedural Matters*

30 September 2005

1 Introduction

1. On 15 September the Commission released its preliminary view¹ as to whether there are reasonable grounds to investigate extension of the 13 designated and specified services subject to review. The Commission requested comments on this preliminary view.

2 Reasonable Grounds to Investigate

2. As the Commission states, the Schedule 3 process for investigating whether to extend a regulated service requires that the Commission may only initiate such an investigation where it is satisfied that there are reasonable grounds to do so.² The Commission has indicated that the factors it takes into account before making a decision to investigate include whether there are competition concerns regarding the service under review.³
3. The Commission notes that the 13 designated and specified services were regulated as a result of competition concerns that had been identified in relation to those services.⁴ The Commission, therefore, reasons that for these regulated services it is not necessary to conduct a market and competition analysis and identify further specific competition concerns in order to make a decision to investigate.
4. TelstraClear agrees with this view. Extensive market and competition analysis was conducted prior to the Telecommunications Act 2001 being passed, and this led to the 13 designated and specified services being regulated. The Commission will need to examine whether there will be ongoing competition concerns for these services going forward in order to decide whether to recommend continued regulation of these services. However, this analysis is not necessary for a decision to investigate. All that is required for such a decision are positive indications that there may be competition concerns with these services.
5. The Commission also reasons that if an access seeker 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.⁵ TelstraClear also agrees with this reasoning. Where an access seeker has made reasonable attempts at obtaining a service through commercial negotiations but has been unsuccessful, and where access has competitive implications for the access provider, competition problems are a likely cause of the access seeker seeking a determination in respect of that service.

¹ Commerce Commission, *Review of Designated and Specified Services under the Telecommunications Act 2001: Preliminary view on decision to investigate and procedural matters*, 15 September 2005.

² *ibid*, paragraph 9.

³ *ibid*, paragraph 10.

⁴ *ibid*, paragraph 11.

⁵ *ibid*, paragraph 12.

3 Commission's Preliminary View on which Services it Proposes to Investigate

6. TelstraClear therefore agrees with the Commission's 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:
 - a) Interconnection with Telecom's fixed PSTN;
 - b) Interconnection with fixed PSTN other than Telecom's;
 - c) Retail services offered by means of Telecom's fixed telecommunications network (FTN);
 - d) Residential local access and calling service offered by means of Telecom's FTN;
 - e) Bundle of retail services offered by means of Telecom's FTN;
 - f) Retail services offered by means of Telecom's FTN as part of a bundle of retail services;
 - g) Local telephone number portability service; and
 - h) Cellular telephone number portability service.
7. As the Commission notes, TelstraClear has sought, either by itself or together with other parties, determinations for all of these services, with the exception of (b).⁶ The reason that TelstraClear sought access to these services through a determination was because it was unable to obtain satisfactory access to these services through commercial negotiations.
8. The Commission can only give a determination for a service where the Commission has identified a substantive competition problem. Because the Commission made determinations for all of these services, the threshold for a decision to investigate - that a competition concern has been identified - has therefore been passed for all of these services. This is also the case for (b) as the Commission has made a determination for that service.
9. While a number of the Commission's determinations in respect of these services have expired and TelstraClear is negotiating commercial arrangements for these services with Telecom, it is still an open question whether the parties will be able to reach agreement and avoid the need for a determination by the Commission. In any event, TelstraClear remains firmly of the view that the current regulated status of these services provides the framework for the negotiations and provides Telecom with an incentive to reach commercial agreement. The continuing need for the Commission to address basic terms of supply in proceedings such as those relating to Private Office illustrates the importance of the Commission's role through the determination process.
10. The Commission is also of the preliminary view that there are reasonable grounds to investigate whether to extend the period of regulation of the specified services of:
 - a) National roaming; and
 - b) Co-location on cellular mobile transmission sites.

⁶ *ibid*, footnotes 10, 12-17.

11. The Commission notes that while it has not received an application for determination for access to either of these services, at least one potential cellular network operator has recently expressed concerns to the Commission in relation to the markets for national roaming and co-location on cellular mobile transmission sites.⁷
12. TelstraClear agrees with the Commission that there are grounds to investigate extending the regulation of these services. While a determination has not been sought in relation to these services, TelstraClear considers that they are essential for overcoming the substantial barriers to entry to the cellular telephony market. Regulation provides an important backdrop to commercial negotiations where market power exists, such as in the provision of these services, by addressing discrepancies in bargaining power. As such, regulation creates incentives for efficient commercial outcomes. TelstraClear notes that:
 - a) Due to factors such as initial technical issues and the international downturn in sentiment towards 3G and telecommunications in general that occurred over the period of 2001-2003, the launch of 3G services, including by the current incumbents, is occurring much later than the timeframes that the industry had in mind when roaming was first regulated in 2001. Market entry by new operators that was expected to occur with the benefit of roaming in the early years after the commencement of the Act is only now a realistic prospect. Accordingly, due to these external market factors, the regulation of roaming has not been able to fulfil its intended purpose; and
 - b) Given the timeframes typically required to roll out mobile networks, the five year period for regulated roaming was most probably too short and, even without the delays which have occurred in 3G deployment, consideration of an extension in the regulated roaming service would be warranted.
13. TelstraClear would also note in relation to co-location on cellular mobile transmission sites that, while the Telecommunications Carriers' Forum voted in favour of a code for this service, TelstraClear as a likely access seeker, voted against the code. In addition, the Commission expressed competition-related concerns about the code,⁸ which the Forum is attempting to address at present. The fact that the issues identified have yet to be satisfactorily resolved gives further weight to the need for the Commission to investigate whether there are grounds to extend regulation of this service. In addition, the delays in market entry of alternative mobile operators discussed above have also meant that the intended benefits of site sharing are yet to be fully realised and consideration of an extension is warranted on these grounds as well.
14. The Commission's preliminary view is that there are no reasonable grounds to investigate whether to extend regulation of the following services:
 - a) Co-location of equipment for fixed telecommunications services at sites used by Broadcast Communications Limited;

⁷ *ibid*, paragraph 15.

⁸ Letter from Mr Douglas Webb, Telecommunications Commissioner, to Mr Malcolm Alexander, Chair Telecommunications Carriers' Forum, *Draft Code for Co-location of Radiocommunications Services*, 20 June 2005.

- b) National toll-free telephone number portability service; and
 - c) Telecom's fixed PSTN to mobile carrier pre-selection service.
15. The Commission notes that it has received no applications or expressions of concern in relation to any of these services. The Commission also notes that satisfactory commercial arrangements are in place for access to these services.
16. TelstraClear agrees with the Commission that there are no reasonable grounds to investigate the extension of regulation of these services for the reasons that the Commission identifies.

4 Procedural Matters

17. TelstraClear requests that the Commission issue a timetable for the Review, and requests that this identify the indicative timeframe for each investigation process.
18. In order to ensure that the investigations are completed within a satisfactory timeframe, TelstraClear recommends that the Commission should avoid seeking to finalise one investigation process before it starts another. Rather, the Commission should allow the completion of one proceeding to overlap with the commencement of the next in order to ensure that both the parties and the Commission use time and resources efficiently. For example, while the Commission is finalising its report in respect of one group of services, the parties could be preparing their submissions on the next group of services earmarked for investigation.
19. TelstraClear also agrees with the Commission's view that there will be efficiencies in considering in parallel with the issue of extending a service any suggested amendments to the service, as related competition issues will arise. While we accept that the decision to amend a service has a different threshold to the decision to extend a service in its current form, much of the analysis and submissions will address the same issues and therefore the Commission should take a pragmatic approach to combining the consideration of the two issues.

5 Implications of Proposed Amendments to Telecommunications Act

20. The Commission has noted the previous Government's proposed amendments to the extension review process.⁹
21. The proposed amendments should simplify the process of investigating whether to extend the current services and involve a less extensive review process. Accordingly, it should be feasible for the Commission to switch from the process it initially embarks on under the current Act to the new procedures without having to restart the whole process.
22. The proposed amendments will provide several options for the Commission, such as the truncated 2-year renewal process and the "fallback" of an automatic rollover pending the Commission completing its reviews (but then

⁹ Commerce Commission, *Review of Designated and Specified Services under the Telecommunications Act 2001: Preliminary view on decision to investigate and procedural matters*, 15 September 2005, paragraph 5.

without the availability of the truncated process). The option that the Commission chooses for each service (including not to take up any of the new options) will have consequences for the parties. Accordingly, if the new Government adopts the proposed amendments, TelstraClear proposes that the Commission consult with the relevant parties on how to proceed, so that it is in a position to progress the investigations once the amendments to the Act are passed.

TelstraClear