



COMMERCE COMMISSION

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Reasons for Commerce Commission decision to investigate Resale Services

Purpose

1. The Commerce Commission (the **Commission**) considers there are reasonable grounds to commence a Schedule 3 investigation into whether the Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001 (the **Act**). The Commission also considers that any investigation should consider whether the service descriptions of the Resale Services should be amended, if the Resale Services are not omitted from Schedule 1.
2. The purpose of this document is to set out the reasons for the Commission's decision to commence an investigation into Resale Services.
3. This reasons document and other documents relating to the investigation are available on the Commission's website at:

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Inquiries,ReviewsandStudies/DecisionsList.aspx>

Background

4. On 13 February 2009, Telecom New Zealand Limited (**Telecom**) requested that the Commission investigate whether certain designated access services should remain regulated in the **Act**. The services that Telecom has requested an investigation into are commonly referred to as **Resale Services**. These services which are included in Part 2 of Schedule 1 to the Act are:
 - Retail services offered by means of Telecom's fixed telecommunications network (FTN);
 - Residential local access and calling services 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 bundle of retail services

5. Telecom's main arguments in requesting the investigation were that:
 - the costs involved in maintaining access to the Resale Services are excessive, rendering these services inefficient and an unnecessary burden on Telecom; and
 - industry and end-users have the option of using regulated unbundled copper local loop ("UCLL") and unbundled bitstream access ("UBA"), which are more efficient.
6. The Commission sought the views and feedback of interested parties on Telecom's request in a letter dated 25th March 2009. The Commission received six (6) submissions (submissions from Telecom, Vodafone, TelstraClear, NZ Communications (now Two Degrees Mobile), Kordia Group (including Orcon) and CallPlus).
7. The key points from the submissions were:
 - Access Seekers generally agreed with Telecom's view that New Zealand should have "good regulatory practice" which means removing regulation in areas where there is effective competition;
 - In some cases, Access Seekers indicated that regulation can be removed as long as there is a clear migration path to a new product over a reasonable timeframe; and
 - Access Seekers indicated that regulation of Resale Services should be retained as a regulatory backstop in certain markets where there is clear evidence of market failure.

Decision-making Framework

8. Under clause 1(1) of Schedule 3 of the Act, the Commission may commence an investigation only if it considers that there are reasonable grounds to do so. Clause 1(5) of Schedule 3 requires the Commission to commence an investigation within 15 working days if it considers that there are reasonable grounds to investigate whether a designated or specified service should be omitted from Schedule 1 of the Act.
9. In determining whether to commence a Schedule 3 investigation, the Commission is required to make the decision that is likely to best give effect to the section 18 purpose which is to promote competition in telecommunications markets for the long-term benefits of end-users, and is required to consider efficiencies as part of that decision.

Commission's Assessment

10. The Commission considers that the benefits for consumers and New Zealanders are largest where markets are open, new entrants can compete against incumbents, and investment and innovation are encouraged.
11. The Commission agrees that regulation should be removed in areas where there is effective competition and that the Commission should keep the regulatory regime under regular review.

12. The Commission has concluded that there are reasonable grounds to commence a Schedule 3 investigation in relation to Resale Services for the following reasons:
- the Resale Services that are offered by Telecom are currently provided on commercial terms (all previous Determinations of Resale Services have expired);
 - there are significant numbers of Resale Services and products that have minimal or no uptake.
13. The Commission also considers it appropriate to review all Resale Services in the light of Telecom's Separation Undertakings and the UCLL and UBA Determinations, as these regulatory instruments were not in the market when Resale Services were originally included in the Act in 2001.
14. During the first review of Resale Services in August 2006, the Commission recommended that Resale Services be extended for a further 2 years until December 2008, given the importance of regulated resale services as a source of competition in the market. In the 2006 review, the Commission noted that if regulation were allowed to lapse, there may be little incentive for Telecom to grant commercial access to competitors as there would no longer be a regulatory backstop in place.
15. The Commission's determinations for Resale Services have all expired. In the last few years Resale Services have been offered to Access Seekers on commercial terms by Telecom. This suggests that market conditions may give sufficient incentives for Telecom to continue providing Resale Services, and therefore that a regulatory backstop may no longer be necessary.
16. A Schedule 3 investigation would allow the Commission to assess whether Telecom (Wholesale) would continue to make Resale Services available to access seekers if regulation were removed. There may also be scope for Telecom to provide such services through Schedule 3A Undertakings.
17. Information gathered from Telecom and from the Commission's sector monitoring exercise indicates that the uptake of a number of resale products by Access Seekers has been declining in recent years, whilst there has been an increase in the uptake of Telecom's business line rental and residential line services. As of June 2009, the volume of resold business line rental and residential line services was approximately 326,000 lines¹, representing a 2% increase since June 2008.
18. On the other hand, resold broadband services have declined by 44% over the last 2 years (March 07 – 09)². The decline in take-up of wholesale broadband services (WBS) may be due to the increasing take up of UBA, a newly regulated service. For example, Telecom data indicated fewer than 6,464³ WBS were supplied to wholesale customers, compared to in excess of 270,000⁴ unbundled bitstream services.

¹ Telecom's Management Commentary as at 30th June 2009.

² Source: Telecom

³ Commission's Quarterly Monitoring as at 31 March 2009

⁴ Telecom's Management Commentary as at 30th June 2009

19. These figures suggest that some regulated resale services (e.g. WBS) are no longer making a significant contribution to promoting competition for the long-term benefit of end-users. On this basis there are reasonable grounds to commence an investigation into removing or amending the regulated resale services, where there is little demand for the service in question. Access Seekers have indicated that a clear migration path to a new product over a reasonable timeframe, on terms no worse than the current ones, should be in place before regulation can be removed.
20. The Commission considers that maintaining some of these regulated products and their associated price points in the Designated Services Price List (DSPL) and Residential Services Price List (RSPL) may be unreasonably burdensome on Telecom. There are many price points which are not utilised, which suggests that unnecessary costs are being imposed which will impede efficiency.
21. In the Commission's view, any such investigation should assess whether the Resale Services should be omitted from Schedule 1 of the Act, or alternatively whether the service descriptions for the Resale Services should be amended so that only services with significant uptake are included in those service descriptions in Schedule 1.

Commission's decision

22. After considering the issues outlined in this reasons document and having regard to the submissions received, the Commission is satisfied that there are reasonable grounds to commence an investigation into whether or not the Resale Services in Schedule 1 of the Act should cease to be a regulated service under Schedule 1 of the Act. The Commission also considers that any investigation should consider whether the service descriptions of the Resale Services should be amended, if the Resale Services are not omitted from Schedule 1.

Next steps

23. The Commission has announced today that it will commence an investigation under Schedule 3 of the Act into Resale Services. Under clause 15 of Schedule 3A of the Act, Telecom (as the Access Provider) may, if it wishes, make an undertaking not later than 40 working days after the day the Commission's public notice in the *Gazette* announces the date of the commencement of the investigation into the proposed regulatory change under clause 1 of Schedule 3.

DATED at Wellington

24 September, 2009



Dr. Ross Patterson
Telecommunications Commissioner