

**INVESTIGATION INTO RESALE SERVICES UNDER PART 1 OF
SCHEDULE 3 OF THE TELECOMMUNICATIONS ACT 2001**

**Order made by the Commerce Commission
under section 100 of the Commerce Act 1986, as applied by section 15(i) of the
Telecommunications Act 2001**

Order made by: Dr Ross Patterson, Telecommunications Commissioner

Date of Order: 15 October 2009

Background

- A. The Commerce Commission (“**Commission**”) has commenced an investigation under clause 1(1) of Part 1 of Schedule 3 of the Telecommunications Act 2001 (“**Act**”) in respect of whether:
- (i) the following designated access resale services set out in sub part 1 of Part 2 of Schedule 1 of the Act:
 - (a) retail services offered by means of Telecom New Zealand Limited’s (“**Telecom**”) fixed telecommunications network (“**FTN**”);
 - (b) residential local access and calling services offered by means of Telecom’s FTN;
 - (c) bundle of retail services offered by means of Telecom’s FTN; and
 - (d) retail services offered by means of Telecom’s FTN as part of bundle of retail services,

(referred to in this Order as “**Resale Services**”), should be omitted from the Act; and
 - (ii) if the Resale Services are not omitted from the Act, the service descriptions of the Resale Services should be amended.
- B. On 1 October 2009, the Commission gave public notice under clause 1(6) of Schedule 3 of the Act of the commencement of the Investigation.
- C. The Commission makes this order (“**Order**”) in relation to the Investigation under section 100 of the Commerce Act 1986 (as applied to the Act by section 15(i) of the Act).
- D. This Order deals with protection of the confidentiality of Information in relation to the Proceeding which is designated as “Restricted Information” and provides for a procedure by which Parties may request additional protection, over and above that given to Restricted Information, in circumstances in which additional protection is shown to be necessary.
- E. This Order does not apply to information that is already in the public domain or that comes into the public domain otherwise than because of a breach of this Order.

Interpretation

1. For the purposes of this Order and related Deeds of Undertaking:

“**Deed of Undertaking**” means a deed of undertaking in the form prescribed in Schedule 1 of this Order.

“**Information**” means information, documents, and evidence (including email and any other electronic communications) arising from, or in connection with, the Proceeding.

“**Investigation**” means the investigation with respect to the Resale Services under clause 1(1) of Part 1 of Schedule 3 of the Act as described in Recital A of this Order.

“**Party**” and “**Parties**” means any one of the persons listed in Schedule 2 of this Order and any other interested person as designated by the Commission under this Order.

“**Proceeding**” means the Commission’s proceeding in relation to the Investigation.

“**Restricted Information**” has the meaning ascribed in clause 4 of this Order. For the avoidance of doubt, Restricted Information does not include Information that is already in the public domain or that comes into the public domain otherwise than because of a breach of this Order.

Request for Protection of Information

2. Where a Party seeks protection of any Information as Restricted Information in accordance with this Order, that Party must:
 - (a) set out the Information in respect of which Restricted Information protection is requested;
 - (b) clearly identify all Information for which protection as Restricted Information is requested; and
 - (c) state the specific grounds on which the Party considers that the Information should be protected as Restricted Information,
 in writing to the Commission and must attach their Nominated Counsel’s certificate made pursuant to clause 8.

3. Where a Party seeks additional protection for any Information over and above the protection given to Restricted information under this Order, that Party must:
 - (a) set out the Information for which additional protection is requested;
 - (b) clearly identify all Information for which additional protection is sought;
 - (c) state the specific grounds on which the Party considers that the Information should be subject to additional protection; and
 - (d) state the nature, extent and duration of the additional protection sought by the Party,
 in writing to the Commission and must attach their Nominated Counsel’s certificate made pursuant to clause 9.

4. The following Information shall be protected as Restricted Information:
 - (a) Information that the Commission designates as Restricted Information; and
 - (b) Information in respect of which the Commission has:
 - (i) received a request in compliance with clause 2 of this Order from the Party who provided that Information; and
 - (ii) not determined to treat otherwise than as Restricted Information.

5. Where the Commission receives a request pursuant to clause 3 of this Order, the Commission shall use its reasonable endeavours to determine within five (5) working days:
 - (a) what Information, if any, should be given additional protection; and
 - (b) the nature, extent and duration of any such additional protection,
 and shall promptly communicate its determination to the relevant Party.

Nominated Counsel

6. If a Party wishes to receive or provide Restricted Information pursuant to this Order, then it must:
 - (a) appoint as its nominated counsel a person who has a current certificate to practise as a barrister and solicitor of the High Court of New Zealand (“**Nominated Counsel**”); and
 - (b) notify the Commission in writing of the appointment, or change in appointment, of its Nominated Counsel.
7. The Nominated Counsel for each Party shall supervise and ensure compliance by the Party nominating him or her with all the requirements of this Order and the relevant Deeds of Undertaking.
8. If a party requests protection of particular Information as Restricted Information, then Nominated Counsel for that Party must, at the time the request is made, certify in writing to the Commission that he or she considers that protection of the relevant Information as Restricted Information in accordance with this Order is necessary in order to avoid likely unreasonable prejudice to the commercial position of the person who supplied or who is the subject of the Information.
9. If a party requests additional protection of particular Information over and above that given to Restricted Information, then Nominated Counsel for that Party must, at the time the request is made, certify in writing to the Commission that he or she considers that:
 - (a) protection of the relevant Information as Restricted Information in accordance with this Order would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the Information; and
 - (b) additional protection of the nature, extent and duration sought is necessary in order to avoid likely unreasonable prejudice to the commercial position of the person who supplied or who is the subject of the Information.

Provision of Information

10. If a Party wishes to provide Information to the Commission in relation to the Proceeding, then:
 - (a) The Party must provide the Information to the Commission (including all Information for which protection as Restricted Information is requested or for which additional protection is requested) no later than 5 pm on the due date or at such other time as may be specified by the Commission;
 - (b) Subject to clause 11 of this Order, a Party must provide to the other Party or Parties a copy of the Information including the Restricted Information not later than 5 pm (or at such other time specified by the Commission) on the next working day following the day on which the Information is provided to the Commission under clause 10(a) of this Order;
 - (c) A Party must provide to the Commission a public version of the Information which excludes all Restricted Information, for publication on the Commission’s

website, not later than 5 pm (or at such other time specified by the Commission) on the next working day following the day on which the Information is provided to the Commission under clause 10(a) of this Order;

- (d) In order to comply with the requirements in clauses 2(b) and 3(b) of this Order, a Party must:
- (i) enclose any Restricted Information within square brackets with the designation of the Restricted Information next to those brackets (eg Vodafone New Zealand designated Restricted Information [] VNZRI);
 - (ii) Clearly mark documents containing Restricted Information with the word "Restricted" on the front page; and
 - (iii) Enclose any Information in respect of which additional protection is requested within square brackets with an appropriate designation next to those brackets (eg Information for which Telecom New Zealand Limited seeks additional protection [] TNZAP); and
- (e) Where a document contains only Restricted Information and public information, a party shall be considered to have clearly expressed the designation of every piece of Restricted Information in that document provided that Party includes a clear statement at the beginning of the document that all the Information in the document (as identified in brackets []) is of the same designation and clearly marks the relevant designation (e.g. "Restricted Information") on the front page of that document.

Access to, and use and disclosure of, Information

11. The Commission orders that:

- (a) No person may obtain access to, or publish, or communicate, or give evidence in relation to any Restricted Information except as provided for in this Order;
- (b) No person may obtain access to, or publish, or communicate, or give evidence in relation to any Information which the Commission has determined should be given additional protection, except on the terms communicated by the Commission to the relevant Party or Parties;
- (c) Nominated Counsel may disclose Restricted Information to the following persons only:
 - (i) Other counsel (including internal counsel) who are actively engaged on behalf of the Party in relation to the Proceeding;
 - (ii) Partners, associates, secretaries, assistants, and employees of counsel; and
 - (iii) External consultants or external experts under the supervision of counsel retained to render professional services in relation to the Proceeding, and provided that:
 - (iv) disclosure to such person is reasonably necessary for the purpose of rendering professional services in relation to the Proceeding; and
 - (v) such person has first delivered to the Commission a duly executed Deed of Undertaking;

- (d) Nominated Counsel must not disclose Restricted Information to any person except in accordance with clause 11(c) and:
 - (i) where no review of that person's entitlement to receive the Restricted Information is sought, after the expiry of the period during which review could have been sought pursuant to clause 21; or
 - (ii) where a review of that person's entitlement to receive the Restricted Information is sought, after notice of the Commission's decision in favour of that person's entitlement to receive the Restricted Information; or
 - (iii) where that person's entitlement to receive the Restricted Information is confirmed by the supplying Party, after receipt of the supplying Party's notice in writing to that effect; and
- (e) Any person (other than those referred to in clause 19) who receives Restricted Information pursuant to this Order:
 - (i) must use the Restricted Information only in the conduct of the Proceeding; and
 - (ii) must not use the Restricted Information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings.

Deeds and entitlements to access

12. A Nominated Counsel who wishes to gain access to Restricted Information must deliver to the Commission a duly executed Deed of Undertaking and must, on the same working day, provide a copy or copies of that Deed of Undertaking to the other Party or Parties.
13. The Commission will provide a copy of each Deed of Undertaking it receives in relation to the Proceeding to the other Parties within two working days of receipt, unless Nominated Counsel for the relevant Parties notify the Commission that the Parties have agreed the terms of access by 5 pm on the next working day after the day that the Deed of Undertaking is provided to the Commission and other Parties.
14. The Commission will update Schedule 2 of this Order on the Commission website as soon as reasonably practicable, to indicate the persons from whom Deeds of Undertaking have been received.
15. Where the Nominated Counsel of a Party (requesting Party) seeks to disclose any Restricted Information provided by another Party (supplying Party) to persons other than those specified in clause 11(c) of this Order, the Nominated Counsel for each of the requesting Party and the supplying Party will negotiate in good faith to reach agreement within two working days on the terms of access. Where the Nominated Counsel for the requesting Party and the supplying Party agree on the terms of access, the Nominated Counsel for the supplying Party will advise the Commission in writing of the agreement. Where the Parties cannot agree on the terms of access within two working days, the Nominated Counsel for the requesting Party may request a review pursuant to clause 21.
16. Where the Nominated Counsel of one Party seeks to disclose Information designated by the Commission as Restricted Information to persons other than those specified in clause 11(c), the Nominated Counsel for that Party may request a review pursuant to clause 21.

17. Any person who receives Restricted Information under the terms of this Order may disclose, describe, or discuss the Restricted Information in any written material submitted to the Commission in relation to the Proceeding, provided that:
 - (a) the written material is identified as Restricted Information in accordance with clause 10(d) of this Order; and
 - (b) the written material is also submitted to the Commission and the other Party in accordance with clause 10 of this Order.
18. For the avoidance of doubt, a Party supplying Information to the Commission in relation to the Proceeding may use and disclose that Party's own Information (including its own Restricted Information) at its discretion and is not required to comply with the requirements of clause 11(a) to (e) of this Order in relation thereto.
19. Restricted Information may be disclosed to Commission members and Commission employees, the Minister and his or her staff and to any person involved in the proceeding who is designated by the Commission on terms the Commission considers appropriate.
20. Any person (other than those referred to in clause 19) must return or destroy all copies of the Restricted Information, except for Restricted Information belonging to that person and except for electronic back-up copies of Restricted Information which are stored on tape or mass storage unit and not readily accessible on a live server, in accordance with the applicable Deed of Undertaking.

Commission review of persons' entitlement to receive Restricted Information

21. The Commission may in its discretion review whether or not a person should become or remain or cease to be entitled to receive Restricted Information:
 - (a) at any time, on its own initiative, upon notice in writing to the Parties; or
 - (b) upon receipt from any Party of a written request which is contemporaneously copied to Nominated Counsel for the other Party or Parties and:
 - (i) made within two working days of the requesting Party's receipt of the Deed of Undertaking executed by the person; or
 - (ii) made promptly following negotiation pursuant to clause 15; or
 - (iii) made pursuant to clause 16.
22. The Party who provided Information that is the subject of a review pursuant to clause 21 may make written submissions to the Commission within two working days of receipt of either:
 - (a) the Commission's notice of review pursuant to clause 21(a); or
 - (b) a copy of the other Party's request for review pursuant to clause 21(b).
23. In relation to a review pursuant to clause 21, the Commission shall:
 - (a) have regard to any written submissions in relation to the review made by a relevant Party in compliance with clause 22; and
 - (b) make reasonable efforts to decide on the person's entitlement to receive Restricted Information within five (5) working days of giving notice of the review.

Commission review of status of Information

24. The Commission may in its discretion, on its own initiative or upon written request by any Party, at any time review the status of, or the terms of access to, any Information, including:
 - (a) public Information;
 - (b) Restricted Information; or
 - (c) Information in respect of which additional protection has been requested or given.
25. If the Commission decides to undertake a review pursuant to clause 24, the Commission shall:
 - (a) give notice of any such review to the Party who supplied the relevant Information and any other Party or Parties to the Proceeding;
 - (b) allow affected Parties to comment, where circumstances permit, within such period as may be specified by the Commission; and
 - (c) notify the Parties of the outcome of its review.
26. The Party requesting a review pursuant to clause 24 must provide a copy of its request to the supplying Party and any other Party or Parties.
27. The Party who provided the Information that is the subject of a review pursuant to clause 28 and any other Party or Parties to the Proceeding may make written submissions to the Commission within such period as is specified by the Commission or, if none is specified, within two (2) working days of receipt of the Commission's notice that it is undertaking a review.
28. In relation to a review pursuant to clause 24, the Commission shall:
 - (a) have regard to any written submissions in relation to the review made by a relevant Party in compliance with clause 27; and
 - (b) make reasonable efforts to decide on the person's entitlement to receive Restricted Information within five (5) working days of giving notice of the review.
29. The Party who provided Information the status of which or the terms of access to which the Commission has decided, following review, should change must provide the Commission with versions of the Information appropriately amended to reflect the change in status of, or terms of access to, that Information, by the date specified by the Commission.

Other matters

30. The Commission may, at any time, vary or revoke this Order.
31. For the avoidance of doubt, Information provided to the Commission by any Party during the course of the Proceeding which is not Restricted Information and to which the Commission has not decided to give additional protection may be made available by the Commission to the public (including via the Commission's website) unless grounds for withholding the information exist under the Official Information Act 1982 or other applicable legislation.
32. For the avoidance of doubt:

- (a) any person whose entitlement to have access to Restricted Information is the subject of a review under clause 21 shall continue to have or shall continue not to have (as the case may be) access to the Restricted Information in question; and
- (b) any Restricted Information which is the subject of a review under clause 24 remains subject to this Order and may not be disclosed to any person (except at the discretion of the supplying Party),
unless and until the Commission decides otherwise.
33. The Commission makes further orders in relation to information claimed by interested parties to qualify as confidential information and which was submitted by interested parties, prior to the date of this Order, during the period in which the Commission was assessing, pursuant to the Act, whether there were reasonable grounds to commence the Investigation (**'Pre-Launch Period'**). The Commission orders that such information provided to the Commission is prohibited from disclosure subject to the terms of this Order. The Commission orders that such information will, where necessary, be disclosed by the Commission under this Order for the purposes of the Investigation. For the avoidance of doubt, interested parties will not be required to exchange this information with other parties in accordance with this Order prior to the release of the Commission's draft report on the Investigation, except where the Commission considers necessary.
34. The Commission requests those interested parties which submitted information claimed to qualify as confidential information during the Pre-Launch Period to comply with the terms of clauses 2 and 3 of this Order with respect to such information. Compliance with these requirements will ensure that the Commission holds Nominated Counsel certificates for such information.
35. This Order has effect until conclusion of the Investigation. For the avoidance of doubt, the Investigation concludes when the Commission delivers its final report to the Minister in accordance with Schedule 3 of the Act.

DATED this 18th day of October 2009



Dr Ross Patterson
Commerce Commission

SCHEDULE 1

**INVESTIGATION INTO RESALE SERVICES UNDER PART 1 OF SCHEDULE 3 OF
THE TELECOMMUNICATIONS ACT 2001**

DEED OF UNDERTAKING AS TO THE RETURN OF DOCUMENTS

1. This Deed of Undertaking (“**Deed**”) is made in relation to an Order (“**Order**”) issued by the Commerce Commission (the “**Commission**”) pursuant to section 15(i) of the Telecommunications Act 2001 (“**Act**”) and section 100 of the Commerce Act 1986 (“**Commerce Act**”) on 15 October 2009, to which this Deed is annexed as Schedule 1. This Deed adopts the terms defined in the Order.

2. I, _____

 of, _____
 hereby irrevocably undertake to the Commission and to every person supplying the Restricted Information to the Commission as follows:
 - (a) to comply with the Order in carrying out the functions of the Party for whom I act and otherwise so far as its terms apply to me; and
 - (b) not to use or refer to the Restricted Information in any way except in relation to the Proceeding and in compliance with the Order; and
 - (c) not to disclose the Restricted Information or any part thereof to, or discuss it with, any person other than a person who has been provided with the Restricted Information and has given an undertaking to the Commission in the same terms as this undertaking (a list of whom is attached in Schedule 2 to the Order); and
 - (d) not to make notes, summaries, copies, or records in any other form, of the Restricted Information except as is necessary for me to prepare for and present submissions to the Commission in respect of the Proceeding; and
 - (e) to notify the Commission, as soon as reasonably practicable, of any change in my employment circumstances or role that may be relevant to my continuing access to Restricted Information pursuant to the Order.

3. I understand that the list of people set out in Schedule 2 to the Order may be varied from time to time and that the Commission will endeavour to update me of changes to this list where practicable.

4. Subject to clause 6 of this Deed, I undertake to the Commission and to every person supplying the Restricted Information to the Commission to return or destroy all copies of the Restricted Information obtained from the Commission, including any notes, records, summaries, or recordings in any other form which I may have made of the Restricted Information, except:

SCHEDULE 2

**INVESTIGATION INTO RESALE SERVICES UNDER PART 1 OF SCHEDULE 3 OF
THE TELECOMMUNICATIONS ACT 2001**

**PERSONS WHO HAVE SIGNED THE DEED OF UNDERTAKING AS TO
CONFIDENTIALITY**