



COMMERCE COMMISSION

**Draft determination on the multi-party application for
determination of the functions and standards of 'local telephone
number portability service' and 'cellular telephone number
portability service' designated multinetwork services**

'Number Portability Functions & Standards Draft Determination'

Draft determination under section 36 of the Telecommunications Act 2001 ('the Act') in the matter of an application for determination for designated multi-network services under section 31(a) of the Act by:

**TELSTRACLEAR LIMITED
VODAFONE NEW ZEALAND LIMITED
TELECOM NEW ZEALAND LIMITED**

The Commission: Douglas Webb
Donal Curtin
Shaan Stevens

Summary of Application: TelstraClear Limited, Vodafone New Zealand Limited and Telecom New Zealand Limited jointly applied for a determination, under section 31(a) of the Act, in regard to (i) local telephone number portability service, and (ii) cellular telephone number portability service.

Date of Draft Determination: 12 May 2005

NO PARTS OF THIS REPORT ARE CONFIDENTIAL

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LIST OF TERMS AND ABBREVIATIONS¹

| | |
|-----------------------------|--|
| ACA | means Australian Communications Authority |
| ACIF | means Australian Communications Industry Forum |
| Access Provider | means every person who operates- (a) a PSTN to which numbers have been allocated; and (b) a telephone service that relates to that number portability service |
| Access Seeker | means any person who- (a) operates a PSTN to which numbers have been allocated; and (b) operates a telephone service that relates to that number portability service; and (c) seeks access to that number portability service |
| the Act | means the Telecommunications Act 2001 |
| Bilateral Agreement | means an agreement between a party to this determination and another party (who may also be a party to this determination). |
| BT | means British Telecom PLC |
| Cost Allocation Application | means the application made under section 31(b) of the Act by TelstraClear Limited, CallPlus Limited, Compass Communications Limited, ihug Limited and WorldxChange Communications Limited on 26 March 2003. |
| DNO | means Donor Network Operator |
| Donor Carrier or DC | means the Carrier that has been allocated the Number by the Numbering Administration Deed ('NAD'), or that is recognised by the NAD as having been allocated the Number. |
| FM Number Portability | Means porting a local telephone number between a fixed telephone network and a cellular telephone network where the cellular network provides a local telephone service |
| Functions Application | means the application made under section 31(a) of the Act by Telecom New Zealand Limited, TelstraClear Limited and Vodafone New Zealand Limited on 24 December 2004. |
| Gaining Carrier or GC | means the Carrier that will become the Host Carrier, after the completion of a Port. |
| Industry Portability | means the software, hardware and other shared facilities used to give |

¹ Where a term or abbreviation is defined in the Telecommunications Act, the statutory definition is adopted for the purposes of this list.

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| Management System or IPMS | effect to this determination. |
| LMNP | means Local and Mobile Number Portability |
| LMNP Code | means the draft Code for Local and Mobile Number Portability in New Zealand developed by the Telecommunications Carriers' Forum and annexed to the Functions Application |
| LMNP Terms | means the Terms for Local and Mobile Number Portability in New Zealand (attached as Annex 1 to this draft determination). |
| LNP | means Local Number Portability |
| Local Number | means an 8 digit number, in the form: area code + NXXXXXX where area code equals 3,4,6,7 or 9 and "N" equals digits 2 to 9 (excluding 50AB). |
| Local Number Portability or LNP | means a service that enables an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number within a local calling area. |
| Losing Carrier or LC | means the Carrier that is the Host Carrier prior to the completion of the Port. |
| MNO | means mobile network operator |
| MNP | means Mobile Number Portability |
| Mobile Number | means a number in the form 02N + XXXXXX[XX] where "N" equals 1,5,7 or 9 and other cellular numbers allocated by the NAD, or recognised by the NAD as having been allocated. |
| Mobile Number Portability or MNP | means a service that enables an end-user of a cellular telephone network service to change providers of that service but to retain the same telephone number (including the same cellular network access code). |
| Network | means the system comprising telecommunication links to permit telecommunication. |
| Network Code | means the draft Network Code for Local and Mobile Number Portability in New Zealand developed by the Telecommunication Carriers' Forum and annexed to the Functions Application. |
| Network Terms | means the Network Terms for Local and Mobile Number Portability in New Zealand (attached as Annex 2 to this draft determination). |
| NP | means Number Portability |
| Number | means a Local Number, a Mobile Number or both, as the case requires |

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| Numbering Administration Deed or NAD | means the organisation established under the Numbering Administration Deed dated 20 December 1998, or any such successor organisation or agreement that may be formed. |
| Number Portability Services | means the local telephone number portability and cellular telephone number portability regulated services under Schedule 1 of the Act. |
| Port or Porting | means a process which achieves LMNP. |
| PSTN | means Public Switched Telephone Network. A dial-up telephone network used, or intended for use, in whole or in part, by the public for the purposes of providing telecommunication between telephone devices |
| RNO | means Recipient Network Operator |
| Service Provider or SP | means any person providing a local service or mobile service to a customer and who has the billing relationship with the customer for that service. The same person may be both a Carrier and a Service Provider. |
| TCF | means the Telecommunications Carriers' Forum |

EXECUTIVE SUMMARY

- (i) Number portability enables customers to keep their existing local or cellular telephone numbers when changing their local or cellular access suppliers.
- (ii) The Commission issued a draft determination on 6 December 2004 setting out the Commission's view on the formula for the allocation of the costs of Number Portability Services amongst the industry, following a multiparty application on 26 March 2003² for determination in respect of the Number Portability Services (the 'Cost Allocation Application').
- (iii) On 24 December 2004, the Commission received a second application (the 'Functions Application' in respect of Number Portability Services from Telecom New Zealand Limited, TelstraClear Limited and Vodafone New Zealand Limited, under section 31(a) of the Act, requesting that the Commission determine terms relating to the functions that must be performed by a system for delivering the Number Portability Services and the standard to which those functions must be performed. The application requested that the Commission make a determination under section 31(a) of the Act that is in the form of the draft Network Code and the draft LMNP Code and for the areas that have not been agreed to seek submissions from the applicants and make a determination in respect of those matters accordingly.
- (iv) On 5 April 2005, the Commission issued a procedural Order under section 9(6) of the Act, confirming that a single multinetwork determination relating to both the Cost Allocation and the Functions Applications would be released.
- (v) In determining the Functions Application, the Commission is required to ensure that the determination will serve to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand.
- (vi) In respect of those terms that the Applicants have been unable to reach agreement on, the Commission's view is that:
 - the local telephone number portability service may extend to the porting of a local telephone number between a fixed network and a cellular network, where the cellular network provides a fixed wireless telephone service;
 - the processes set out in section 15 of the Network Terms dealing with exemptions are sufficiently robust to deal with all aspects (and not just equivalent service) of the Network Terms and any resultant pass-through to the LMNP Terms;
 - a requirement that limits the porting of local telephone numbers to within a local calling area, without requiring that the service is provided over a consistent set of attributes, is consistent with the description of the local telephone number portability service under the Act (which supports local telephone number porting

² TelstraClear, CallPlus Limited, Compass Communications Limited, ihug Limited and WorldxChange Communications Limited

between fixed telephone networks services within a geographically defined area);

- the provisions enabling an appointed enforcement agency to issue notices of breach, and in particular publicly censuring a party to the determination for non-compliance, provides an appropriate balance between the enforcement agency's role where a party is non-compliant with the service levels and equivalent service criteria, and the ability of a party to the determination to seek enforcement of the determination through the High Court under section 61 of the Act;
 - it is not necessary for the dispute resolution procedures to apply where disagreement arises regarding a decision as to whether an approved exemption exempts a carrier from meeting its obligations; and
 - in respect of the termination of internationally originated SMS, providers of cellular telephone services should be required to provide equivalent service to end-users when cellular telephone number portability becomes available.
- (vii) For the purpose of the draft determination, the Commission has addressed contextual inconsistencies in the structure and wording of the draft codes. Where terms are capitalised in this draft determination and are not defined, this draft determination adopts the definitions that are outlined in the draft LMNP Terms and Network Terms.
- (viii) The Commission considers that the appropriate date of inception for the determination is the date of the determination.
- (ix) The Commission's view is that the final determination, insofar as it relates to Local Number Portability should expire on the earlier of—
- (a) 19 December 2010; or
 - (b) the date on which the Local Number Portability ceases to have designated multinetwork service status because it has either—
 - (i) expired under section 65; or
 - (ii) been omitted from Schedule 1 under section 66.
- (x) The Commission's view is that the final determination, insofar as it relates to Cellular Number Portability should expire on the earlier of—
- (a) 19 December 2010; or
 - (b) the date on which the Cellular Number Portability service ceases to have designated multinetwork service status because it has either—
 - (i) expired under section 65; or
 - (ii) been omitted from Schedule 1 under section 66.
- (xi) Access providers are required to provide Number Portability Services consistent with this determination not later than 1 April 2007.

INTRODUCTION

1. The Telecommunications Act 2001 ('the Act')³ regulates the supply of telecommunications services in New Zealand.
2. The Commerce Commission ('the Commission') has a range of responsibilities under the Act, including making determinations in respect of designated multinetwork services. Subject to sections 32 and 33, applicants may make an application to the Commission under section 31 for a determination of all or some of terms on which a designated multinetwork service must be supplied during the term specified in the Determination.
3. The local telephone number portability and cellular telephone number portability services (together the 'Number Portability Services') are both designated multinetwork services under the Act. The Commission considers that a determination on the functions and standards of the Number Portability Services is likely to best give effect to the purpose of Part 2, as set out in section 18.
4. The provision for Number Portability Services in the Act is based on the premise that number portability will provide long-term benefits to end-users, by enabling customers to switch service providers while retaining their existing telephone numbers. Switching costs are generally detrimental to welfare because they make entry more difficult and markets less competitive. The absence of number portability hinders the competitive process by imposing significant switching costs on customers when they change between service providers. Number portability removes this impediment to the development of competitive telecommunications markets by lowering switching costs.
5. The benefits of number portability include:
 - the benefits to customers who retain their telephone number when switching suppliers (internal benefit);
 - the benefits to all end-users through enhanced competition made possible by number portability (external benefit); and
 - the benefits to all end-users of fewer misdialled calls and fewer calls to directory enquiries (external benefit).
6. The provision of number portability in New Zealand will remove a current barrier for end-users wanting to change service providers, which will in turn increase service providers' incentives to compete for new customers and retain existing customers.

³ All terms and phrases that are defined within the Act have the same meanings in this Determination. All references to Parts, Schedules and sections are to the Parts, Schedules and sections of the Act.

Commission process and timetable

7. The views of the Commission in this determination are preliminary only, and the Commission will give consideration to all submissions received and to evidence provided at any conference convened to consider this determination before a final determination is released.
8. The Commission invites submissions from interested parties on this draft determination not later than 10 June 2005.
9. To promote an open and transparent process, the Commission intends to publish the submissions received on its website. The Commission discourages requests for confidentiality over submissions on the draft determination, as it is desirable to test all the information as fully as possible in a public manner. The Commission is unlikely to agree to any request that submissions in their entirety remain confidential.
10. Where it is necessary to include confidential information in written submissions, the material should be clearly marked as confidential, and preferably be included in an appendix to the submission or enclosed in square brackets []. Parties must advise the Commission if they require the confidential material to be protected under a confidentiality order, which is released under section 100 of the Commerce Act 1986 and section 15(i) of the Telecommunications Act 2001. In addition to the confidential copy, submitters should provide the Commission with a public copy of such submissions, which is clearly marked as public, with the confidential material deleted or amended appropriately so it is suitable for release in both electronic and hard copy form.

Address for submissions

11. Submissions on the draft determination should be sent to:

chris.abbott@comcom.govt.nz

Number Portability Draft Determination
Commerce Commission
PO Box 2351
Wellington

Enquiries: (04) 924 3673
Fax: (04) 924 3700

THE APPLICATION

12. On 24 December 2004, TelstraClear Limited ('TelstraClear'), Telecom New Zealand Limited ('Telecom'), and Vodafone New Zealand Limited ('Vodafone') jointly filed an application for determination of designated multinet network services under section 31 of the Act (the 'Functions Application').
13. The Functions Application sought a determination by the Commission in regard to:⁴
 - a. the local telephone number portability service; and
 - b. the cellular telephone number portability service.
14. Under section 31, an access seeker of a designated multinet network service may, subject to sections 32 and 33, apply to the Commission for a determination of:
 - a. the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - b. the formula for how the cost of delivering the service must be apportioned between the access seeker and all access providers of the service, ('the formula').
15. The Functions Application sought a determination in relation to section 31(a) only; that is, the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed.⁵ This Application was limited to section 31(a) on the basis that the Commission had already received an application under section 31(b) to determine a formula for how the cost of delivering the service must be apportioned between the access seekers and all access providers of the service (the 'Cost Allocation Application').
16. The parties advised the Commission that they had reached agreement on a number of terms related to the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed.
17. The agreed terms were submitted as an attachment to the application in the form of two draft codes that had been prepared by the Telecommunications Carriers Forum ('TCF') working parties. The TCF originally intended that the Commission would approve these draft codes under Schedule 2 of the Act.
18. The Functions Application requests that the Commission:
 - a. make a determination under section 31(a) of the Act that is in the form of the Network code and the LMNP code (Subject to sub-paragraph (b) below);
 - b. seek submissions from the Applicants and make a determination in respect of those issues not agreed by the TCF; and
 - c. Merge the section 31(a) and 31(b) determinations into a single final determination (including the alignment of dates for submissions on the determinations).

⁴ Section 31(a) Application for Determination for Determination of Multi-network access services, 24 December 2004, paragraph 1.

⁵ Ibid, paragraph 11.

19. On 28 January 2005, the Commission gave notice to the parties that it had decided to investigate the Functions Application, insofar as it concerned the number portability services.
20. On 18 February, the Commission requested submissions from those parties who the Commission had determined⁶ were eligible access seekers and access providers on the Application.
21. On 21 February, the Applicants submitted updated versions of the draft codes that contained further agreed terms to be considered by the Commission in preparing its determination.
22. On 2 March, the Applicants submitted a copy of the Network Code Operations and Support Manual to the Commission.
23. On 11 March, the Commission received three submissions from Telecom, TelstraClear and Vodafone on the Functions Application.
24. On 30 March, the Commission received a letter from Telecom⁷ responding to points raised by Vodafone in its submission of 11 March 2005. On 8 April 2005, the Commission received a letter from Vodafone in response to Telecom's letter of 30 March⁸.
25. On 7 April, the Applicants submitted an updated version of the LMNP draft code that contained minor amendments to be considered by the Commission in preparing its determination.
26. The major matters to be decided by the Commission are:
 - a. Porting of local telephone numbers from fixed to cellular telephone networks;
 - b. Additional future services and legislative amendments;
 - c. The scope of exemptions to be issued under the Network Terms;
 - d. Local calling area;
 - e. Ongoing Non-Compliance with Service Levels and Equivalent Service Criteria;
 - f. Contesting enforcement agency⁹ decisions in respect of exemptions; and
 - g. Internationally originated short-messages.
27. The Commission has had regard to the draft LMNP Code and draft Network Code in making this draft determination, together with the submissions received from the parties including the updated drafts of Codes submitted subsequent to the Functions Application.

⁶ Commerce Commission, *Application for determination of "Local telephone number portability service" and "cellular telephone number portability service", Preliminary statement on eligibility of access seekers and access providers*, 19 March 2004.

⁷ Telecom (Parkes) letter to the Commission (Abbott), *Number Portability Functions and Standards: Draft Determination*, 30 March 2005.

⁸ Vodafone (Huges) letter to the Commission, *Number Portability Functions and Standards: Termination of International SMS*, 7 April 2005.

⁹ The meaning of enforcement agency in this context is taken from the Network Terms definitions chart (page 9 of the Network Terms)

THE FRAMEWORK FOR THE DETERMINATION

28. Section 18 provides that the purpose of Part 2 and Schedule 1, under which this draft determination is made, is to promote competition in telecommunications markets for the long-term benefit of end-users¹⁰.
29. Section 36(1) requires that the Commission must make reasonable efforts to do the following things not later than 60 working days after giving written notice of its decision to investigate under section 35(b):
- a. prepare a draft determination; and
 - b. give a copy of the draft determination to all the parties to the determination; and
 - c. give public notice of the draft determination; and
 - d. include in the public notice-
 - (i) the closing date for submissions, which must not be earlier than 20, and not later than 40 working days after the date of publication of the draft determination; and
 - (ii) if a public hearing is to be held under section 38, the date of the public hearing.
30. Section 36(2) requires that, if, despite making reasonable efforts, the Commission is unable to do all the things set out in 36(1) within the time limit specified in that subsection, the Commission must give to the parties concerned written reasons for not meeting that time limit.
31. Section 37 sets out the matters to be included in a draft determination. Section 37(1) requires that, subject to section 37(2), the draft determination must include –
- a. a description of the functions that must be performed by a system for delivering the service and the standard to which those functions must be performed; and
 - b. the formula for how the cost of delivering the service must be apportioned between the parties to the determination and every person who becomes an access seeker; and
 - c. the reasons for the determination; and
 - d. the terms and conditions on which the determination is proposed to be made; and
 - e. the actions (if any) that a party to the determination must do or refrain from doing; and
 - f. the proposed expiry date of the determination.
32. Section 37(1)(a) applies only to the extent that the matters referred to in that paragraph have not already been provided for in an approved code. There are no approved codes relating to the multi-network services that are the subject of this application.

¹⁰ ‘The end-user is the ultimate user or consumer of telecommunications services. It is not restricted to subscribers, but extends to telecommunications’ users generally’, Commerce Commission Determination on the TelstraClear Application for Determination for Designated Services, Decision 477, 5 November 2002, p.10.

Accordingly, section 37(2) does not apply.

33. Section 37(1)(b) requires that this draft determination include ‘the formula for how the cost of delivering the service must be apportioned between the parties to the determination and every person who becomes an access provider after the determination is made’. In accordance with this requirement, the Commission issued a draft determination on 6 December 2004 setting out its view on that formula for how the cost of delivering the Number Portability Services must be apportioned between the parties.¹¹ The formula set out in that draft determination satisfies this requirement.

Single Final Determination

34. The Act contemplates a single designated multinet network determination for a designated multinet network service. Section 32(b) states that, despite section 31, no person may apply for a determination ‘if the Commission has already made a determination in respect of the designated multinet network service and the determination has not expired’.
35. The Applicants have indicated a preference that the Commission’s processes for the respective applications be synchronised.
36. As a consequence, the Commission has exercised its power under section 9(6) in relation to the Cost Allocation Application and the Functions Application. The Commission’s Order dated 5 April 2005 provides that the Commission will release a single final determination under section 39 for the Number Portability Services, and to the extent possible, will synchronise the processes and align the timetables for both applications.

Relevant access seekers and access providers

37. The Commission is required to determine the eligibility of both the access seekers and access providers of the Number Portability Services.
38. On 19 March 2004, the Commission issued a preliminary statement on eligible access seekers and access providers.¹² This followed the assessment of the access seekers in respect of the Cost Allocation Application individually, and the assessment of other telecommunications providers who may be eligible access providers under the Act. The purpose of that statement was to provide advice to the telecommunications industry on the status of access seekers and access providers for the Number Portability Services under the Act.
39. The Commission considered the submissions received from Telecom¹³ and TelstraClear¹⁴ on the eligibility of access seekers and access providers prior to the release of the Cost Allocation Draft Determination. In the Cost Allocation Draft

¹¹ Commerce Commission, *Draft determination on the multi-party application for determination of local and cellular telephone number portability designated multinet network services*, 6 December 2004.

¹² Commerce Commission, *Application for determination of “Local telephone number portability service” and “cellular telephone number portability service”, Preliminary statement on eligibility of access seekers and access providers*, 19 March 2004.

¹³ Telecom New Zealand: *Submission on Number Portability*, 18 August 2004.

¹⁴ TelstraClear Limited: *Submission on Local and Mobile Number Portability*, 18 August 2004.

Determination, the Commission upheld its preliminary view.¹⁵

40. The Commission also received submissions on the Cost Allocation Draft Determination on its preliminary view in respect of the relevant access seekers and access providers. The Commission will consider those submissions at the time that it issues its final determination in relation to the Number Portability Services.
41. The Commission notes that while the access providers of the Number Portability Services are likely to be consistent between the two applications as both applications deal with the same designated multinetwork Number Portability Services, the access seekers (those seeking regulated access to the service) differ.
42. The access seekers in relation to the Cost Allocation Application are TelstraClear, CallPlus Limited ('Callplus'), Compass Communications Limited ('Compass'), ihug Limited ('Ihug') and WorldxChange Communications Limited ('Worldxchange').
43. In the Functions Application, the access seekers are Telecom, TelstraClear, and Vodafone.
44. The Commission's conclusions as to eligible access seekers and access providers are as follows:

| COMPANY | Access Provider | | Access Seeker | | | |
|--------------|----------------------------|-------------------------------|-----------------------------|-------------------------------|----------------------------|-------------------------------|
| | | | Cost Allocation Application | | Functions Application | |
| | Local telephone NP service | Cellular telephone NP service | Local telephone NP service | Cellular telephone NP service | Local telephone NP service | Cellular telephone NP service |
| Telecom | ✓ | ✓ | - | - | ✓ | ✓ |
| TelstraClear | ✓ | ✓ | ✓ | ✓ | ✓ | ✓ |
| Vodafone | - | ✓ | - | - | - | ✓ |
| Callplus | ✓ | - | ✓ | - | - | - |
| Compass | ✓ | - | ✓ | - | - | - |
| IHUG | ✓ | - | ✓ | - | - | - |
| Worldxchange | ✓ | - | ✓ | - | - | - |

45. The Commission is aware that there is potential for entry into the local and cellular voice telephony markets, and will continue to monitor the eligibility of parties throughout the period of the determination, in order to ensure that an accurate register of access providers is maintained. The Commission notes that every person who becomes an access provider after the commencement date of the final determination is bound by the determination.

¹⁵ Commerce Commission, *Draft determination on the multi-party application for determination of 'local telephone number portability service' and 'cellular telephone number portability service' designated multinetwork services*, 6 December 2004, Appendix 1, Eligibility of Access seekers and providers.

MATTERS FOR DETERMINATION

46. The Functions Application requests that the Commission:
- a. make a determination under section 31(a) of the Act that is in the form of the Network code and the LMNP code (Subject to sub-paragraph (b) below);
 - b. seek submissions from the Applicants and make a determination in respect of those issues not agreed by the TCF; and
 - c. make this requested determination under section 31(a) of the Act in conjunction with the determination under section 31(b) of the Act, which the Commission is currently investigating, including aligning the dates for submissions on the determinations.¹⁶
47. The Applicants submitted two draft codes as attachments to the Functions Application. The draft Network Code and the draft LMNP Code are the product of industry negotiation on the development of a technical solution for delivery of the Number Portability Services.
48. Initially convened by the NAD, the task of developing an industry-wide number portability solution was transferred to the TCF in September 2003. The TCF set up the following working groups:
- a. Network Code Working Party ('NCWP'): this working party was tasked with developing a code defining the network aspects of the number portability services; and
 - b. Portability Specification Working Party ('PSWP'): this working party was tasked with developing a local and cellular telephone number portability functional specification code.
49. The draft Network and LMNP Codes were developed with the intention of submitting those codes to the Commission for approval under Schedule 2 of the Act. However, on 24 December 2004 the Applicants submitted the codes to the Commission as an attachment to the Functions Application.
50. The Commission has reviewed the draft codes and made all necessary amendments in developing the draft Network Terms and draft LMNP Terms of this draft determination.
51. The LMNP Terms and Network Terms are consistent with the determination framework under Part 2 of the Act. The LMNP Terms in Annex 1 and the Network Terms in Annex 2 form part of the determination under section 37(1)(a) and (d). The Commission has attached a marked up version of the Network Terms in Annex 3 and marked up version of the LMNP Terms in Annex 4 as guidance to the amendments that the Commission has made. The marked-up versions of LMNP Terms and the Network Terms in Annex 3 and 4 are for information purposes only and do not form a part of this determination.
52. The LMNP Terms (Appendix 1) and Network Terms (Appendix 2) attached as part of this Draft Determination are not identical with the 'agreed terms' submitted by the Applicants in the draft Network Code and draft LMNP Code attached to the Functions

¹⁶ Application for Determination of designated multinet network services, 24 December 2004

Application. Various clauses have been altered or omitted to best give effect to the purpose of the Act as prescribed by s 18. The differences between the LMNP Terms and the draft LMNP Code and between the Network terms and the draft Network Code include the following:

- The Network Terms incorporate terms from the TCF's draft Operation and Support Manual that the Commission considers to be functions or standards of the local or cellular telephone number portability services which should be determined by the Commission.
- The LMNP Terms expand on the customer authorisation process proposed in the draft LMNP Code, in order to provide increased assurance that unauthorised porting of customers' numbers (i.e. 'slamming') does not occur.
- The Network Terms include an exemptions process (section 15) in which the Commission is responsible for granting exemptions under the determination, in cases in which the TCF Management Committee recommends exemption.
- The Network Terms extend the equivalent service provisions to cover all services provided to end-users with ported numbers, rather than limiting the equivalent service to voice calls and short messages.

Discussion of terms upon which parties have not reached agreement

53. The following section sets out the Commission's views on specific issues that the Functions Application requests that the Commission determine:
- a. Porting of local telephone numbers from fixed to cellular telephone networks;
 - b. Additional future services and legislative amendments;
 - c. The scope of exemptions issued under the Network Terms;
 - d. Local calling area;
 - e. Ongoing non-compliance with Service Levels and Equivalent Service Criteria;
 - f. Contesting enforcement agency decisions in respect of exemptions;
 - g. Internationally originated short-messages.

Porting of local telephone numbers from fixed to cellular telephone networks

54. The Applicants do not agree on the scope of the designated multinetwork Number Portability Services and, in particular, whether they allow porting of local telephone numbers used on a cellular telephone network. The Number Portability Services are defined as follows:

The local telephone number portability service description is:¹⁷

A service that enables an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number within a local calling area

¹⁷ Telecommunications Act 2001, Schedule 1, subpart 2, Local Number Portability Service.

The cellular telephone number portability service description is:¹⁸

A service that enables an end-user of a cellular telephone network service to change providers of that service but to retain the same telephone number (including the same cellular network access code)

55. Vodafone has requested that the Commission decide whether the designated multinet service of local telephone number portability extends to a service which enables an end-user to port a local telephone number between a fixed telephone network and a cellular telephone network where the cellular network provides a local telephone service (“FM Number Portability”).¹⁹
56. Vodafone’s submission on the Functions Application²⁰ states that:
- Vodafone considers that it is worth noting that there is a fundamental difference of views between the parties to the determination as to the correct interpretation of the description of the local telephone number portability service in Subpart 2 of Part 2 of Schedule 1 to the Act. This is relevant to various provisions of the draft LMNP Code, in particular, whether the service enables an end-user to port a local telephone number between a fixed network and a cellular network where the cellular network provides a local telephone service.
57. Telecom contends that there are good policy reasons for not permitting FM Number Portability, and that the Act excludes FM Number Portability.²¹ Telecom noted that its participation in the working party was based on the understanding that FM Number Portability was excluded and many elements of the Code were agreed to on that basis. Telecom considers that if the Commission were to determine that FM Number Portability is included, the working party would need to re-examine and re-negotiate parts of the submitted terms (for example, “Equivalent Service”).
58. Telecom argues²² that if FM Number Portability was introduced, the dialed number could no longer be relied on to inform the caller of the applicable charge. Telecom considers that this would create substantial customer confusion given that a customer dialing a local number could be charged if that number (unknown to the caller) had been ported to a mobile.
59. In relation to local number portability, Vodafone argues that the service need not be provided on a fixed telephone network:²³
- If Parliament intended to limit the portability of local numbers for use on fixed telephone networks, it could have required an access provider to operate a ‘fixed PSTN’, which is a defined term under the Act.
60. Vodafone submits that it satisfies the requirements of a person who operates a PSTN to which (local) numbers have been allocated, and that the only reason why Vodafone

¹⁸ Ibid.

¹⁹ Letter from Vodafone to the Commission dated 24 January 2005.

²⁰ Ibid.

²¹ Telecom’s Submission dated 11 March 2005 in relation to the Functions Application.

²² Ibid.

²³ Vodafone New Zealand Limited, Submission on the Functions Application, 11 March 2005.

does not currently meet the definition of an access provider is because it has not yet launched a local telephone service.

61. Vodafone argues that the focus of the provision of number portability is the service rather than whether or not the service is provided on a fixed telephone network. Vodafone acknowledges that the service, which must refer to the service associated with a local telephone number, is typically provided on a fixed telephone network. Vodafone considers, however, that the service need not be provided on a fixed telephone network and the service description captures the porting of a local number for use on a cellular network. Vodafone noted that the Number Administrator has allocated local numbers to Vodafone for use in accordance with the Number Allocation Rules, without any requirement that Vodafone establish a fixed network. The only requirement under the Number Allocation Rules is that geographic service code blocks (local numbers) are allocated for the provision of services with a geographic structure, which can originate or terminate calls over PSTNs. A service can have a geographic structure while being provided on a cellular network.
62. TelstraClear argues²⁴ that, on a fair reading, the service descriptions of local number portability and cellular number portability do not support FM Number Portability. TelstraClear suggest that although the definitions of ‘access seeker’ and ‘access provider’ are not expressly tied to fixed and mobile networks, the service descriptions appear to be network-specific.
63. TelstraClear notes that while the term ‘fixed telephone network’ is not defined in the Act, guidance on what Parliament intended by this reference comes from the definitions of ‘fixed PDN’, ‘fixed PSTN’ and ‘fixed telecommunications network’. TelstraClear argues that a cellular network could not fall within any of these ‘fixed’ network definitions and also should not be read into the definition of the term ‘fixed telephone network’. When Parliament intended to refer to both the cellular and fixed networks it used the generic defined term ‘PSTN’.
64. Telecom argues that a local service that uses a cellular network cannot be a ‘fixed telephone network service’. Telecom also notes that the description is limited to circumstances in which the end-user is remaining in the same local calling area and FM Number Portability would breach this requirement as a cellular end-user is not tied to a local calling area and is able to use its number to make or receive calls in any local calling area.
65. The Commission considers that the focus of local telephone number portability is the service associated with the local telephone number rather than the network by which the service is provided.
66. Whilst the service is typically provided on a fixed telephone network, it need not be provided on such a network. The service allows for the porting of a local number for use on a fixed wireless network or a cellular network that is configured to deliver a fixed wireless solution. In all cases, the end-user may utilise the local telephone number portability service in relation to a local telephone number within a particular local calling area.

²⁴ TelstraClear Submission, 11 March 2005.

67. The meaning of ‘fixed telephone network service’ in the service description may be ascertained from the text, context and purpose of the Act. Specifically, guidance on what Parliament intended by this term can be taken from the definitions of ‘fixed PDN’, ‘fixed PSTN’ and ‘fixed telecommunications network’ as they all refer to the term ‘fixed’. These definitions are not inconsistent with the view that a ‘fixed telephone network service’ includes a fixed wireless service (including one which is configured from a fixed wireless or cellular network). This interpretation is consistent with the Commission’s local loop unbundling report under s 64 and Schedule 3 of the Act. In that report, the Commission concluded that a ‘fixed PDN’ is one which excludes mobile data networks but includes fixed wireless systems that are both point-to-point and multi-point.²⁵ As fixed wireless systems qualify as part of a ‘fixed PDN’, consistency demands that a ‘fixed telephone network service’ extends to a service provided through fixed wireless systems that are both point-to-point and multi-point.
68. The Commission considers that a wireless network can provide a fixed telephone network service, provided the end-user is using a local telephone number and the service on the wireless network is limited to calls that are made, and received, in a geographic area that is bounded by a single transmission tower (or cell site). A ‘fixed telephone network service’ does not extend to a service that allows the end-user’s telephone device to perform call hand over between transmission towers or to calls made (and received) on that device which require the involvement of more than one transmission tower in the wireless network. Once calls are handed over between cell sites the service qualifies as a cellular telephone network service which is outside the scope of the local telephone number portability service.
69. If it was intended that local numbers could only be ported on fixed telephone networks, Schedule 1 of the Act would have required an access provider to operate a ‘fixed PSTN’ (which is a defined term under the Act) and the scope of the local number portability service could have been “a service that enables an end-user of a fixed PSTN service to change providers ...”.
70. The Commission considers that an interpretation that is neutral in terms of the underlying network that is capable of supporting a fixed telephone network service is likely to best give effect to the section 18 purpose statement and ensure that end-users are able to port their local numbers from one service provider to another. As a consequence, the local number portability service does not require the end-user to port a local number between networks of the same type. The Commission’s determination extends to the porting of these local numbers irrespective of the type of network, so long as the local numbers are being ported between fixed telephone network services
71. This approach is consistent with how local numbers are allocated under the Number Administration Deed. The Commission understands that local numbers are not allocated on the condition that the receiving party must operate or build a fixed PSTN. They are only required to be used in geographic service code blocks (local numbers) and are allocated for the provision of services with a geographic structure, which can originate or terminate calls over PSTNs.

²⁵ Paragraph 155 of the Commission’s Final Report under section 64 and Schedule 3 of the Act into Unbundling the Local Loop Network and the Fixed Public Data Network.

72. The description of the cellular telephone number portability service is limited to a ‘cellular telephone network service’. The cellular telephone network service comprehends fully mobile services, permitting inter-cell call handover. The Commission does not consider that the cellular telephone number portability service contemplates that an end-user may change providers whilst retaining the same cellular number where the gaining carrier is operating a fixed service on a fixed network.

Additional future services and legislative amendments

73. The Application requests that the Commission make a determination in respect of the inclusion of additional services under the draft codes.
74. Clauses 2.1.8 and 2.1.9 of the draft LMNP Code were originally drafted as part of an industry code under Schedule 2 of the Act, and are not appropriate in the context of a determination under Schedule 1 of the Act.
75. Amendments to a determination under Schedule 1 of the Act can be made only through an application to the Commission for clarification or reconsideration of a determination under sections 58 and 59 of the Act respectively.
76. If there is a change to the Act, or a decision of the Commerce Commission such that additional number porting services are provided for, these might be incorporated into the determination via an application to the Commission under Sections 58 or 59 of the Act.
77. The Commission’s view has been reflected in Clauses 2.1.8 and 2.1.9 of the LMNP Terms in this determination.

The scope of exemptions issued under the Network Terms²⁶

78. The Applicants request that the Commission make a determination in relation to exemptions from particular obligations under the draft LMNP Code and the Network Code. The Commission understands that the Applicants have agreed on the prescribed process as set out in section 15 of the draft Network Code, but have not reached agreement on the scope of the provision.
79. Section 15 of the draft Network Code sets out the process for a Carrier to apply to the TCF Management Committee or the Telecommunications Commissioner for a “relaxation” from specific obligations imposed on it by the draft Network Code, and sets out procedures that the TCF Management Committee must follow in deciding whether or not to grant a relaxation.
80. Sections 2.1.4 and 7.6.1 of the draft LMNP Code allow a party that has been granted a relaxation under the draft Network Code to be exempted from relevant provisions of the draft LMNP Code.

²⁶ Issue Highlighted: LMNP Code - section 2.1, Network Code - section 15.

81. Vodafone considers that a relaxation granted under the draft Network Code should only be available in respect of compliance with the Equivalent Service criteria established in the draft Network Code.²⁷
82. Vodafone is concerned about the potential implications of clauses 2.1.4 and 7.6.1 of the draft LMNP Code. Clause 2.1.4 provides that, if a relaxation has been granted to a Carrier²⁸ under the draft Network Code, the Carrier will be exempted from any relevant provisions in the draft LMNP Code that relate to the specific period and purposes, customers or classes of customers, or conditions for which the relaxation was granted under the draft Network Code.
83. Consistent with clause 2.1.4, clause 7.6.1 of the draft LMNP Code provides that:

The Audit IPMS Client²⁹ may advise the Enforcement Agency³⁰ of an approved relaxation under clause 15 of the Network Code, exempting the Audit IPMS Client from meeting some of its obligations under this Code in respect of the Service Levels. If the Enforcement Agency is satisfied that the relaxation under the Network Code will prevent the Audit IPMS Client from carrying out any sanction that has been imposed by the Enforcement Agency under this Code within the timeframe provided for by the Enforcement Agency, the Enforcement Agency will have the discretion to suspend the sanction for so long as, and to the extent that, the approved relaxation exempts compliance with the Service Levels. The Enforcement Agency will notify all interested parties of any such decision.

84. Vodafone submits³¹ that there is no practical justification for these exceptions to a Carrier's obligation to provide number portability in accordance with the processes and service levels established in the draft LMNP Code. Vodafone makes the following comparison between the draft LMNP Code and the draft Network Code:

In broad terms, the Network Code requires a Carrier to make changes to its network so that it can meet the equivalent service criteria, which include the criteria for post-dialling delay where a Carrier routes calls to or from a ported number...

The LMNP Code sets out the processes whereby local and mobile numbers may be in-ported and out-ported by Carriers and Service Providers in conjunction with the IPMS System.

85. Vodafone presents the following example of how clauses 2.1.4 and 7.6.1 could undermine the principle of number portability:

If Telecom is granted a relaxation in relation to its 025 customers (and therefore, is not required to meet the Equivalent Service Criteria in respect of calls to and from those customers), Telecom could then argue that it is not required to enable its 025 customers to port their mobile numbers to another carrier.

²⁷ Vodafone New Zealand Limited, *Submission on Functions and Standards Application*, 11 March 2005.

²⁸ A Carrier is defined in the both the Network and LMNP Codes as "an entity that operates a public switched telephone network (or a functionally equivalent system) that originates, transits or terminates voice calls or short messages. The same person may be both a Carrier and a Service Provider. If a party to this code has more than one Network, it can be classified as more than one Carrier."

²⁹ An Audit IPMS Client is defined in section 7.4 of the LMNP Code as a service carrier or service provider that does not meet the service levels (as defined in the LMNP Code).

³⁰ An Enforcement Agency is defined in the LMNP Code as "A person appointed by the TCF, whose role is to monitor compliance with service levels".

³¹ Vodafone New Zealand Limited, *Submission on Functions and Standards Application*, 11 March 2005.

86. Telecom considers that relaxations should extend to any obligation under the Network Code. Additionally, Telecom argue that if a relaxation under the draft Network Code affects the ability of a party to meet an obligation under the draft LMNP Code, then the obligation under the draft LMNP Code should also be relaxed.

87. Telecom justifies this position on the following basis³²:

- *Maximum Flexibility*: The relaxation should be future-proof. For example, it is conceivable that relaxations could be granted so as to provide that a carrier does not need to comply with Equivalent Service criteria at all (does not need to provide number portability). However, this would be in direct conflict with clause 2.1.4 of the draft LMNP Code, which requires that a carrier provide number portability.

Similarly the draft LMNP Code imposes an obligation on a carrier to provide number portability. If a new technology is implemented which temporarily renders number portability impossible, then a relaxation from Equivalent Service will be inadequate to prevent a carrier from breaching the draft LMNP Code.

- *A robust relaxation process*: The prescribed process will ensure that relaxations will only be permitted for legitimate reasons.
- *Encourages innovation and technology investment*: Rigidity of the exemptions policy may lead to inefficient commercial incentives, and contradict with the purpose of the Telecommunications Act.

88. TelstraClear submits³³ that the relaxation clause in section 15 of the draft Network Code should exempt a carrier from any requirement in the draft Network Code.

Given the checks and balances inherent in the exemptions process as outlined in the code, TelstraClear does not consider that any further restrictions on the scope of relaxation applications under the Network Code are required.

However, TelstraClear considers that the TCF Management Committee should be expressly required to address how, if at all, the relaxation impacts on the Carriers' obligations under the LMNP Code. Accordingly, TelstraClear suggests clause 15.4.9(a) of the Network Code (which sets out what the TCF Management Committee must set out in writing if a relaxation is approved) is amended to add a new clause 15.4.9(a)(iv): "set out how, if at all, the relaxation impacts on the LMNP code"

89. TelstraClear argues that the impact of a relaxation under the draft Network Code on the obligation of a party under the draft LMNP Code is correctly dealt with in the wording in square brackets in clauses 2.1.4 and 7.6.1 of the draft LMNP Code. However, to ensure the impact on the draft LMNP Code is considered when a relaxation is granted, TelstraClear considers that the TCF Management Committee should expressly state how the draft LMNP Code is impacted.

³² Telecom's Submission dated 11 March 2005 in relation to the Functions Application.

³³ TelstraClear Submission, 11 March 2005, Page 7.

Commission's view

90. The Commission notes that the disagreement between the Applicants is with respect to sections 2.1.4 and 7.6.1 of the draft LMNP Code. These sections specifically relate to the scope of an exemption under section 15 of the draft Network Code.
91. The Commission has considered it necessary to amend clause 15 of the draft Network Code so that any exemptions from the determination are decided by the Commission on the recommendation of the TCF Management Committee. Given that the exemption process relates to obligations under a determination rather than an approved code, exemptions to the determination should be granted by the Commission. The Commission considers that this ensures that the exemption process is consistent with the scheme and purpose of the Act.
92. Clause 15 of the draft Network Terms requires that a party applies to the TCF Management Committee, which may recommend that the Commission grant a limited exemption from the obligation to comply with specific obligations under the Network Terms for a specified period and sets out procedures that the TCF Management Committee must follow in deciding whether or not to recommend an exemption.
93. The application for exemption requires that the applicant set out specific reasons why it might require exemption from compliance with the draft Network Terms. For an exemption to be recommended, a unanimous vote (of those members present and voting) will be required.
94. The Commission has amended clause 15.3 of the Network Terms accordingly.
95. If a party to the determination chooses not to submit an application for exemption to the TCF Management Committee, that party could apply to the Commission for clarification or reconsideration of the determination under either section 58 or section 59 of the Telecommunications Act (clause 15.7.1).
96. Similarly, clause 15.8.1 of the Network Terms provides that if the TCF Management Committee does not recommend exemption to the Commission, a Carrier may apply to the Commission for a clarification or reconsideration of the determination under sections 58 and 59 of the Telecommunications Act. Whether and how sections 58 and 59 apply in any particular case will depend on the circumstances of that case.
97. The Commission notes that section 15 of the Network Terms would be likely to ensure that robust consultation is undertaken with all affected parties and that any exemption under the draft Network Terms must be sufficiently specific and not inconsistent with the Act.
98. The Commission's view is that it is appropriate that the exemption process is potentially available in relation to any aspect of the Network Terms. The Commission considers that Section 15 of the Network Terms provides appropriate processes to ensure that any exemption from compliance is restricted to the minimum scope that would be necessary.

99. The Commission notes that an exemption granted under the Section 15 of the Network Terms may prevent a carrier from meeting service requirements set under the LMNP Terms. The Commission's view is that the TCF Management Committee should identify any likely consequences for compliance with the LMNP code, and specify the extent of those consequences in its exemption recommendation. Additionally, the Commission supports TelstraClear's proposal that the TCF Management Committee should limit any resultant pass-through to the LMNP Terms from an exemption granted under the Network Terms to the minimum necessary.

Local Calling Area

100. The draft LMNP Code allows a customer to relocate premises coincident with, or after the porting of their local number, provided the local number remains in the same donor carrier local calling area³⁴. The 'Local Calling Area' is defined in the draft code as being:

The geographic area defined by the Donor Carrier within which customers have access to a local service with a consistent set of attributes

101. Vodafone supports the use of local calling areas as geographic boundaries for the porting of local numbers. However, Vodafone is concerned that the definition of 'Local Calling Area' in the LMNP Code may undermine Vodafone's ability to participate in local number portability.
102. Vodafone's concern is that the requirement that a local service has a consistent set of attributes, which are not specified, may reinforce the paradigm that a local telephone service must be provided on a fixed network. Accordingly, Vodafone considers that the words 'with a consistent set of attributes' should be removed from the definition.
103. Vodafone also disagrees with the requirement in Clause 4.1.8(a) of the LMNP code that a ported local number 'physically remain' within the donor carrier's relevant local calling area. Vodafone notes that a donor carrier could rely on this provision to prevent or restrict Vodafone's ability to participate in local number portability by arguing that, where a local number is ported for use on a cellular network, the local number will not 'physically remain' within the donor carrier's local calling area. Vodafone contends that this is an unnecessary requirement that could equate to a barrier to entry to number portability.
104. Telecom considers that the local calling area is an appropriate geographical boundary for the porting of numbers. Telecom notes that this is consistent with the service description, which refers to:
- A service that enables an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number **within a local calling area** (Emphasis added).
105. TelstraClear considers that, in accordance with its view that the service descriptions do not allow for fixed to mobile portability, the local calling area as defined in the draft Codes is the appropriate geographic boundary for local number portability.

³⁴ LMNP Code: Section 2.2.1(b) page 8, and Section 4.1.8(a) pg 15.

Commission's view

106. The local telephone number portability service as described in Schedule 1, subpart 2 of the Act enables 'an end-user of a fixed telephone network service to change providers of that service but to retain the same telephone number within a local calling area.' The Commission's view is that the requirement in the draft LMNP Code that a ported local number physically remain within the donor carrier's relevant local calling area, is consistent with the designated multinetwork service.
107. Further, the Commission notes that the Australian Communications Industry Forum ('ACIF') Code on local number portability defines the geographical porting boundary as being within the 'same ported number service area'. Specifically, section 2.2.1(b) of the ACIF Code identifies one objective of the code as being:
- To put in place operational arrangements which will enable a customer to relocate premises within the same ported number service area and retain the same Telephone number.³⁵
108. The ACIF Code defines the 'Ported Number Service Area' as being the geographical area serviced by that Carrier and/or Carrier Service Provider's telephone exchange.³⁶
109. The Commission considers that a requirement proposed by Telecom and TelstraClear that a 'local calling area' have a 'consistent set of attributes' is not consistent with the relevant service description in the Act, and could potentially restrict a customer from porting to a carrier and/or service provider that qualifies as an access seeker or access provider of number portability under Schedule 1 of the Act. The Commission notes that the term 'attributes' is not defined in the draft codes. Therefore, a requirement that a local calling area have a 'consistent set of attributes' is not clear or useful.
110. The Commission notes that a fixed telephone network service could be provided over differing sets of attributes. For example, a 'fixed telephone network service' could include a service provided by means of a fixed wireless system.
111. The Commission notes that the ACIF Code on local number portability does not include a requirement that a local service have a consistent set of attributes within the geographical area serviced by a telephone exchange.
112. Therefore, the Commission's view is that this requirement is not consistent with the Act, and should not be included in a determination. Accordingly, the Local Calling Area definition in the proposed terms does not include any requirement that the local service have a consistent set of attributes.
113. The Commission considers that Clauses 2.2.1(b) and 4.1.8(a) of the draft LMNP Code are consistent with the Local telephone number portability service description in Schedule 1 of the Act. Accordingly, these clauses have been incorporated into the LMNP Terms of this draft determination.

³⁵ Australian Communications Industry Forum, *ACIF C540:2003 Industry Code Local Number Portability*. Pg.3.

³⁶ *ibid.* Pg.12.

Ongoing Non-Compliance with Service Levels and Equivalent Service Criteria³⁷

114. Section 14.5 of the draft Network Code provides that ‘[i]f the Enforcement Agency considers that it has reasonable grounds to do so, it may conduct audits of the Carriers’ documentation supporting compliance with the equivalent service criteria. Section 14.5.3 deals with failing an audit:

14.5.3 Failing an audit

- (a) If an Audit Carrier is determined by the Enforcement Agency to be in breach of the Equivalent Service criteria set out in this Code, the Enforcement Agency may issue that Audit Carrier with a written:
- (1) Caution Notice of Breach;
 - (2) Warning Notice of Breach; or
 - (3) Public Censure Notice

115. The Network Code defines Enforcement Agency as³⁸:

A person appointed by the TCF, whose role is to monitor and, if necessary, measure Equivalent Service compliance with clause 14.4

116. The draft LMNP Code contains an analogous clause that enforces the service levels defined in the draft LMNP code. Clause 7.4 of the draft LMNP Code reads:

- 7.4.1** If a Service Provider or Carrier does not meet the Service Levels (“Audit IPMS Client”), the Enforcement Agency may issue that Audit IPMS Client with a written:
- a) Caution Notice of Breach;
 - b) Warning notice of Brach; or
 - c) Public Censure Notice

117. The Applicants agree that failure to meet service levels under the draft LMNP Code, and failure to meet equivalent service criteria under the draft Network Code, should have consequences. However, the Applicants disagree as to the consequences of ongoing non-compliance with the service levels defined in the draft LMNP Code and the equivalent service criteria in the draft Network Code.

118. Vodafone and TelstraClear support the inclusion of additional enforcement provisions for use by the enforcement agency, in addition to those currently provided in the codes. Specifically, Vodafone and TelstraClear propose that additional remedies be put in place if a public censure does not resolve non-compliance with the codes. Any additional step would occur prior to a party exercising the enforcement provisions of the determination under section 61 of the Act. Telecom submits that additional processes are unnecessary.

119. TelstraClear³⁹ considers that the agreed terms set out in section 14.5 are not sufficient to ensure compliance with the draft codes. TelstraClear considers it important for there to be ‘an additional consequence for ongoing non-compliance prior to and distinct from the ability of a party to seek to enforce the determined code in the High Court’⁴⁰.

³⁷ Network Code: Section 14.5.4 and 14.5.5(b), page 37.

³⁸ Network Code: Section 4.2 Definition, p. 9.

³⁹ TelstraClear Submission, 11 March 2005. pg.11.

⁴⁰ TelstraClear Submission, 11 March 2005. pg. 11.

120. TelstraClear notes that the Australian regime also includes a technical regulator in the form of the Australian Communications Authority ('ACA') for issues of compliance with registered codes. In instances of non-compliance for number portability, the ACA has the power to formally direct a number portability access provider to comply.⁴¹ Under this regime, a party who fails to comply with an ACA direction may be subject to substantial fines.
121. TelstraClear submits that, due to the absence of an ACA-equivalent in New Zealand, further consequences are required in addition to the agreed terms in the draft Network Code. Accordingly, TelstraClear proposes barring the non-compliant carrier from using the IPMS to in port numbers.
122. TelstraClear recommend that Clause 14.5.4 (in dispute) of the draft Network Code be adopted by the Commission as an additional consequence of failure to comply with the Codes. Clause 14.5.4 of the draft Network Code provides that:
- 14.5.4 Ongoing Non-Compliance**
- a. If an Audit Carrier is determined by the audit to not be complying with the Equivalent Service criteria set out in this Code in all material respects, and the Enforcement Agency has issued a Public Censure Notice to the Audit Carrier within a period of 12 months prior to the date of the audit report from the Enforcement Agency, the Enforcement Agency may:
- i. Suspend the Audit Carrier from using the IPMS System to in-port numbers for 10 Business Days from the date advised by the Enforcement Agency; and
- ii. If this is the third (or greater number) material failure of an audit by that Audit Carrier within a period of 12 months prior to the date of the audit report from the Enforcement Agency, suspend the Audit Carrier from using the IPMS System to in-port numbers for 20 Business Days or such longer time as the Enforcement Agency is satisfied in its discretion that the Audit Carrier has taken appropriate steps to rectify its network processes and implementation to ensure future compliance with the Equivalent Service criteria set out in this Code (upon the suspension being removed).
123. Telecom⁴² submits that the agreed procedure (the sections of the code not contained in square brackets) provides the appropriate balance and incentives. Telecom considers that the two additional proposed consequences for non-compliance are unnecessary, inappropriate and inconsistent with the scheme of the Act. Therefore, Telecom proposes that Clauses 7.5 of the draft LMNP Code and 14.5.4 of the draft Network Code be omitted.
124. Vodafone⁴³ considers that further measures are required in addition to the agreed terms to address ongoing non-compliance, but does not consider that suspension from the IPMS System is an appropriate penalty due to its customer impact implications. Vodafone contends that a clause providing for the imposition of fines would be a more appropriate sanction for ongoing non-compliance with the equivalent service criteria and service levels.

⁴¹ Sections 121 and 122 of the Telecommunications Act 1997.

⁴² Telecom's Submission dated 11 March 2005 in relation to the Functions Application.

⁴³ Vodafone New Zealand Limited, Submission on Number Portability Functions Application, 11 March 2005.

Commission's view

125. The Commission's view is that the agreed provisions of the draft codes enabling the enforcement agency to issue notices of breach, and in particular to publicly censure a carrier for non-compliance, provide an appropriate balance between the enforcement agency's role where a party is non-compliant, with the ability of a party to the determination to enforce the determination through the High Court. Accordingly the Commission has not included section 14.5.4 of the draft Network Code or section 7.5 of the draft LMNP Code in its determination.
126. The Commission is not satisfied that suspension from using the IPMS to in-port numbers, as suggested by TelstraClear, would be likely to best give effect to the statutory purpose. If by failing to comply with the determination, a party to the determination is suspended from using the IPMS to in-port numbers, customers would be prevented from porting to that carrier and achieving the benefits that number portability would provide.

Contesting Enforcement Agency decisions in respect of exemptions

127. The Applicants do not agree how disagreements with the decision of an enforcement agency should be dealt with. Specifically, the parties do not agree on whether the audit procedure should include the ability for the parties to use the dispute resolution procedure if there is a disagreement over the enforcement agency's view as to whether an exemption granted under the Network Terms exempts a carrier from meeting its obligations under the Terms. Section 14.5.5(b) of the draft Network Code (in dispute) notes that:

If any interested party disagrees with decision of the Enforcement Agency that an approved relaxation under the Network Code exempts the Audit Carrier from meeting its obligations under this Code, that party may raise this as a Dispute to be dealt with [in] accordance with clause 16.2

128. Section 16.2 of the draft Network Code sets out the dispute resolution processes.
129. Telecom considers that the dispute resolution procedure should not be available to parties that disagree with a decision as to whether an approved relaxation exempts a carrier from meeting its obligations.
130. Telecom argues that this is not an appropriate venue for such a dispute, as it allows for a re-litigation of the relaxation that has been granted. Telecom considers that if a carrier does not agree with a relaxation that has been granted it should pursue its remedies in respect of the relaxation, rather than in the context of the application of that relaxation in the audit procedure. Accordingly, Telecom proposes that Clauses 7.6.2 of the draft LMNP Code and 14.5.5(b) of the draft Network Code be removed.
131. TelstraClear contends that:
- there are likely to be issues of interpretation as to whether and how a relaxation granted under the Network code applies to the non-compliance of equivalent service criteria under the Network code or aspects of the LMNP code. Accordingly, TelstraClear accepts the square

bracketed wording set out in clause 14.5.5 (b) of the Network code, and Clause 7.6.2 of the LMNP code which addresses this concern by giving interested parties a mechanism to dispute a decision by the enforcement agency on the applicability of a relaxation to the issue'.⁴⁴

132. Vodafone notes⁴⁵ that Clause 14.5.5(b) of the draft Network Code and clause 7.6.2 of the draft LMNP Code arose from a concern that a carrier may be granted a relaxation under the Network Code without members of the TCF Management Committee fully appreciating the consequences of the relaxation.
133. Vodafone considers that the dispute resolution procedure should not be available to parties which disagree with a decision as to whether a relaxation exempts a carrier from meeting its obligations. Accordingly, Vodafone does not support the inclusion of Clause 7.6.2 of the draft LMNP Code and 14.5.5(b) of the draft Network Code.

Commission's view

134. The Commission's view is that the dispute resolution process is unnecessary where disagreement arises regarding a decision whether an approved exemption exempts a carrier from meeting its obligations. The Commission notes that the exemption approval process provided under the Network Terms should be sufficiently rigorous to ensure that the disputes mechanism is not required to deal with exemptions approvals.
135. The Commission agrees with the views expressed by both Telecom and Vodafone that this is not the appropriate mechanism to address the scope of exemptions granted under section 15 of the Network Terms. The Commission considers that if a carrier does not agree with a exemption that has been granted under the Network Terms, it should pursue its remedies in respect of the exemptions, rather than in the context of the application of that exemption in the audit procedure.
136. The Commission considers that the TCF Management Committee's exemption recommendation process or the reconsideration provisions under section 59 of the Act, would ensure that robust consultation is undertaken with all affected parties, and that any exemption notice is required to be sufficiently specific such that the concerns expressed by TelstraClear are unlikely.
137. Accordingly, the Commission has not included clause 7.6.2 of the draft LMNP Code or 14.5.5(b) of the draft Network Code in its determination.

Internationally originated short messages

138. The applicants have requested that the Commission make a determination with regard to the process that enables international short messages (SMS) to be terminated to the ported mobile number. Clause 6.7 of the draft Network Code provides the following process description⁴⁶:

⁴⁴ TelstraClear Submission, 11 March 2005. paragraph 31, pg. 11.

⁴⁵ Vodafone New Zealand Limited, Submission on Number Portability Functions Application, 11 March 2005.

⁴⁶ Network Code: Section 6.7 page 14.

Short message traffic destined for a New Zealand Network from a foreign operator may be delivered to a national Network based upon the number allocations by the NAD. It will be the Donor Network Carriers responsibility to determine if the destination mobile has been ported. It will then be the Donor Carriers responsibility to determine if the short message will be terminated on their Network, transited to an alternate national Network Carrier or to discard the short message

139. Vodafone argues that in the absence of bilateral agreements between carriers, SMS messages from international mobile network operators ('MNOs') may not be passed on to the recipient network. Vodafone considers that failure to setup a transit function for SMS traffic destined for ported numbers would constitute a breach of equivalent service requirements defined in section 14.3.1 of the draft Network Code.
140. Telecom expressed a similar concern that clause 6.7 of the draft Network Code allows a carrier to 'discard short messages' that are received from international operators. Telecom contends that this allowance may result in carriers discarding SMS traffic that is addressed to customers who have ported their numbers to another service provider
141. Vodafone proposes that clause 6.7 of the draft Network Code should be redrafted to ensure that MNOs be required to transit short messages received from international operators with whom both the donor network operator ('DNO') and the recipient network operator ('RNO') have SMS connectivity.
142. Telecom contends that Vodafone's proposal will not solve the difficulties involved in the receipt and delivery of internationally originated SMS traffic to ported numbers⁴⁷. Telecom notes that Vodafone intends to request international operators to deliver to it all international SMS traffic destined for New Zealand mobile number ranges. According to Telecom, this may result in Telecom being locked out of SMS interconnection agreements with those international operators whom Vodafone has current SMS interconnection agreements with.
143. Under Vodafone's proposed approach, if the DNO was not able to establish its own SMS interconnection agreements with all of the international MNOs with whom the RNO has an agreement, then equivalent service could not be provided by the RNO (since Vodafone's approach would require the DNO to transit international SMS traffic to the RNO only where both the DNO and the RNO have SMS interconnectivity with the originating international MNO).
144. Telecom notes that while extensive negotiation will be required between domestic and international operators in order to meet international SMS equivalent service criteria, it remains confident that a solution to this issue can be found. Telecom contends that the only acceptable solution is for all MNOs to open up all New Zealand number ranges in their international SMS agreements, and transit any messages received which are destined for customers on another MNOs network, to that MNO.
145. Telecom recommends that the Commission replace Clause 6.7 of the draft Network Code with the following wording:

⁴⁷ Telecom New Zealand Limited, *Letter to the Commission*, 30 March 2005 (Bruce Parkes).

Section 14.3.1 applies to internationally originated and destined SMS in full. With respect to internationally originated or destined SMS, no Carrier (Carrier 1) may use another Carrier's (Carrier 2) NAD-allocated number range in any agreements Carrier 1 has with overseas operators, without Carrier 2's prior written permission.⁴⁸

Commission's view

146. The Commission's view is that cellular operators should be required to provide equivalent service in relation to internationally originated SMS, and that the current timeline for the provision of cellular number portability provides the parties with sufficient time in which to establish the necessary systems, facilities, and commercial arrangements in order to meet equivalent service requirements in the provision of international SMS services.
147. The Commission notes that ubiquitous equivalent service requirements are an integral factor in maximising the benefits of the Number Portability Services. Accordingly, the Commission will not incorporate clause 6.7 of the draft Network Code into the Network Terms of this determination.
148. The ability to send and receive SMS is an important function for cellular telephone end-users more generally, and the Commission notes that an end-user may be less willing to change providers if the new provider was unable to offer customers with ported numbers with equivalent international SMS services to customers with non-ported numbers.
149. The ACIF has incorporated a clause into its industry specification manual for number portability that provides for donor routing. The analogous clause states that⁴⁹:
- Where internationally originated SMS is supported donor routing must be supported [sic] wherever bilateral agreement exists for the national leg, as international networks are not likely to access an Australian mobile number portability database prior to routing the message
150. The Commission appreciates the practical difficulties involved in establishing new arrangements with overseas based operators to correctly route internationally originated SMS messages to ported numbers. Additionally, the Commission recognises that there is not currently an agreement in place between Telecom and Vodafone for the on-forwarding of SMS messages received to a ported number.
151. However, since the start date for mobile number portability is 1 April 2007, the Commission considers that cellular network operators have a sufficient time period over which to make the necessary commercial arrangements in order to provide equivalent service in the delivery of internationally originated SMS.
152. The Commission considers that the appropriate means of excluding a particular service or feature from the equivalent service provisions is through the formal exemption arrangements available to parties through this determination.

⁴⁸ Ibid.

⁴⁹ Australian Communications Industry Forum, *Industry Specification: Mobile Number Portability – Network Plan for SMS*, ACIF G565, February 2001. Section 1.3.4.

153. This approach is consistent with that taken by the Australian Communications Authority (ACA). The ACA ruled that:⁵⁰

the appropriate means of temporarily excluding a particular service or feature from equivalent service provisions is through the formal exemption arrangements under Part 6 of Chapter 11 of the Numbering Plan.

154. In its submission, Telecom raised a concern relating to the use of numbering ranges that are owned by another New Zealand carrier in international SMS agreements. The Commission notes that the NAD sets out the rules for numbering allocation. The NAD includes the following clause in relation to the internal use of code blocks:⁵¹

1.1.12. Some NAD Parties may have Internal Use Code Blocks activated within their Networks. There is no obligation on NAD Parties to cease using or to change their use of these Internal Use Code Blocks, except:

(a) where they have been allocated to a NAD Party who has notified the Number Administrator under Rule 1.2.11 of their intention to have them Assigned, and

(b) where their continued Internal Use Code Blocks would cause problems or conflicts with the intended use of the Code Blocks by the Applicant that holds the Code Block.

155. The Commission notes that responsibility for the administration or enforcement of the numbering deed lies with the NAD administrator. Accordingly, the Commission refers any related issues or queries to the NAD administrator.

DATE OF INCEPTION AND EXPIRY

Date of Inception

156. The Commission considers that the appropriate date of inception is the date of the determination.
157. The Commission notes that setting the date of inception at the date of the determination will ensure that parties to the determination are required to take the necessary steps after the date of the determination to ensure that they meet the go live dates specified in the terms and conditions of the determination.

Date of Expiry

158. The Commission is required under section 37(1)(f) of Schedule 1 of the Act to determine the expiry dates for the final designated multinet network determination.
159. In the Commission's draft determination on the cost allocation formula, the Commission determined that:

⁵⁰ Australian Communications Authority, *Report on Equivalent Service Criteria for Mobile Number Portability*, July 2001, Clause 3.51.

⁵¹ Numbering Administration Deed Committee, *Telecommunications Numbering Plan: Number Allocation Rules*, 10 September 2004. Clause 1.1.12.

The date of expiry should be 19 December 2006, or such later date within the period of any extension of the designated service and being five years after the date in this determination.⁵²

160. Telecom argued that the Commission should determine that the final determination will expire five years from the date of the final determination. Telecom noted that if the local or cellular number portability services expire before that date, the determination will expire automatically in accordance with section 62(b).
161. TelstraClear agreed with the Commission's view in the Cost Allocation draft determination that the determination expire five years from the date the determination is made, subject to renewal of the designated services.

162. Section 62 of the Act provides for the expiry of determinations:

62. Expiry of determinations—

Every determination expires on the earlier of—

- (a) the expiry date stated in the determination; or
- (b) the date on which the designated service or specified service to which the determination applies ceases to have that status because it has either—
 - (i) expired under section 65; or
 - (ii) been omitted from Schedule 1 under section 66.

163. Section 65 provides for the expiry of designated and specified services. It states:

65. Expiry of designated services and specified services—

- (1) Every designated service or specified service expires on—
 - b) 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; or
 - b) if the period is extended in accordance with this section, the expiration of that extended period, unless that extended period is again extended in accordance with this section.
- 7.4.1 Before the expiry of the period concerned, the Governor-General may, by Order in Council made on the recommendation of the Minister, extend—
 - a) the period referred to in subsection (1)(a):
 - b) any extended period.
- (3) Each extended period must not be more than 2 years.
- (4) The Governor-General may exercise the power conferred by subsection (2) more than once, but not more than once in respect of a particular period.

164. Both of the Number Portability Services came into force on 19 December 2001, and therefore are currently due to expire on 19 December 2006.

165. The Commission considers that the expiry dates for the Number Portability Services should, logically, occur after the go live date of the IPMS system, and the commencement of the Number Portability Services. Furthermore, the Commission notes that investments made in the technology used to provide number portability are

⁵² Commerce Commission, *Draft determination on the multi-party application for determination of local and cellular telephone number portability designated multinet network services*, 6 December 2004, page 23.

realised over a long period, and accordingly it is appropriate to set a term for the determination that reflects the nature of this investment.

166. The Commission understands that the availability date for both local and cellular number portability is expected to be April 2007. Therefore, it is apparent that the availability date for number portability will occur after the initial five year period of the number portability services has expired. Setting an expiry date at the date of the initial service expiry would limit the effectiveness of the determination.
167. Accordingly, the Commission considers that the term of determination should allow for a five year term, subject to section 62 of the Act.
168. The Commission's view is that the final determination, so far as it relates to the local telephone number portability service should expire on the earlier of—
- (a) 19 December 2010; or
 - (b) the date on which the local telephone number portability service ceases to have designated multinetwork service status because it has either—
 - (i) expired under section 65; or
 - (ii) been omitted from Schedule 1 under section 66.
169. The Commission's view is that the final determination, so far as it relates to the cellular telephone number portability service should expire on the earlier of—
- (a) 19 December 2010; or
 - (b) the date on which the cellular telephone number portability service ceases to have designated multinetwork service status because it has either—
 - (i) expired under section 65; or
 - (ii) been omitted from Schedule 1 under section 66.

IMPLEMENTATION OF THE DETERMINATION

170. The provision of Number Portability Services to end-users requires that access seekers and providers, both individually and collectively, undertake further work to satisfy the terms of this determination. The Commission understands that the current timeframes for implementation of these work streams may not coincide with the date of inception of the Determination.
171. The Commission has jurisdiction under section 37(1)(d) and 40(1)(f) of the Act to determine that the Number Portability Services must be provided by a specified date. Specifically, section 40(1)(f) of the Act provides that the Commission must include –

The terms and conditions (if any) on which the determination is made

The Industry Portability Management System

172. The TCF, representing access seekers and access providers, is developing the IPMS. The TCF's expected availability date of the IPMS is 1 April 2006. The successful implementation of the IPMS by this date requires that all access seekers and access providers, as collectively represented by the TCF, use their best efforts to ensure that

each eligible access provider and each eligible access seeker is able to connect to the IPMS and use it to test their systems and processes for Local Number Portability and Mobile Number Portability not later than this date.

Availability of Number Portability Services to End-users

173. The TCF has indicated, on the basis of its implementation programme that Number Portability Services will be available to end-users on 1 April 2007. The Commission understands that the TCF has requested specific information from its members on implementation in order to assess whether the availability date for local telephone number portability might be brought forward.
174. The Commission strongly supports the earliest availability of both local and cellular telephone number portability, and seeks comment from the industry as to whether the availability might be brought forward.
175. Access providers and access seekers are required to provide the Number Portability Services consistent with this determination not later than 1 April 2007.
176. Individual access providers and access seekers are required to provide written confirmation to the Commission three months prior to the Number Portability Services' availability date that all work required within their networks, agreements with other carriers and connection to and testing with the IPMS system required by this determination will be completed by the Number Portability Services' availability date.