



**TelstraClear Limited**

**Submission in response to Commission's Draft Determination on the multiparty application for determination of "local telephone number portability service" and "cellular telephone number portability service" designated multi-network services**

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## 1. INTRODUCTION

1. TelstraClear is responding to the Commission’s draft determination on *the multi-party application for determination of “local telephone number portability service” and “cellular telephone number portability service” designated multi-network services, dated 6 December 2004 (draft determination)*.
2. The long saga surrounding number portability illustrates the failure of New Zealand’s previous approach of liberalising its telecommunications market without an adequate regulatory regime. The Commission’s proposed approach to cost allocation, together with the finalisation of the number portability technical codes, will finally bring the New Zealand market into alignment with the numbering portability arrangements which have existed in most other comparable markets for some time. The continuing disappointment is that, on Telecom’s proposed timeframes, full implementation of number portability is still more than 24 months away.
3. Figure 1 summarises TelstraClear’s response on the Commission’s proposed cost allocation approach:

Figure 1: Summary of TelstraClear Response

Cost category	Commission proposal	TCL response
Common industry costs	<ul style="list-style-type: none"> <li>• Capex and opex allocated between participants based on share of active numbers.</li> <li>• Subsequent participants contribute to capex on basis of depreciated value of assets.</li> </ul>	<ul style="list-style-type: none"> <li>• Agree.</li> <li>• Detailed provisions should be included in final determination to ensure enforceable against current and future participants.</li> </ul>
Per operator set-up costs	Each operator bears own costs.	Agree.
Per-line set-up costs	<ul style="list-style-type: none"> <li>• The DNO<sup>1</sup> can recover costs from the RNO<sup>2</sup>.</li> <li>• Only efficiently incurred per-line costs are recoverable.</li> <li>• Charges to be negotiated, and to apply on a reciprocal basis.</li> </ul>	Agree, provided that: <ul style="list-style-type: none"> <li>• end-user charges are prohibited;</li> <li>• pricing principles are more closely defined; and</li> <li>• Commission retains oversight given unequal bargaining power</li> </ul>

<sup>1</sup> Donor Network Operator (termed access provider in the Act).

<sup>2</sup> Recipient Network Operator (termed access seeker in the Act).

Cost category	Commission proposal	TCL response
		between Telecom and other participants.
End user charges	<ul style="list-style-type: none"> <li>Commission considering whether DNO should be prohibited from charging end users for out-ports.</li> </ul>	<p>DNO should be prohibited from charging end users for out-ports, as:</p> <ul style="list-style-type: none"> <li>out-port charges would substantially undermine the benefits of number portability in lowering barriers to customers changing providers; and</li> <li>would involve the DNO “double dipping” as RNO would also be paying per-line charges under Commission’s proposed approach.</li> </ul>
Additional conveyance costs	Each operator bears any additional conveyance costs in own network.	Agree, but commercial arrangements should apply where originating carrier relies on other operators to undertake number portability functions (e.g. donor carrier re-routing).

## 2. FRAMEWORK FOR THE DETERMINATION

4. The Commission states that “in the absence of an approved code dealing with the functions and standards of LMNP, or a further application under section 31(a) of the Telecommunications Act (**the Act**), the Commission will not issue a final determination in relation to the Application”.<sup>3</sup>
5. TelstraClear disagrees with the Commission’s interpretation of the relevant sections of the Act. However, this issue is likely to fall away if the Commission, as proposed by Telecom, Vodafone and TelstraClear, consolidates this Application with the technical functions and standards application<sup>4</sup> and proceeds to issue both determinations on the timeline for this Application.
6. However, if there is a risk that this Application would be delayed by more than 2 months waiting for the technical functions and standards application to catch up, TelstraClear requests that the Commission proceed to issue its final cost allocation determination. In case this should occur, TelstraClear sets out its views on the statutory interpretation of the relevant provisions of the Act in the Annex to this submission.

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<sup>3</sup> Draft number portability cost allocation determination, para 24.

<sup>4</sup> Joint application made on 24 December 2004.

### 3. COSTS ASSOCIATED WITH NUMBER PORTABILITY

Question 1: Has the Commission identified correctly the costs associated with number portability and who incurs them in the porting and subsequent porting process?

Question 2: Is the classification of costs appropriate?

7. TelstraClear agrees with the four categories of costs and description of each, with the following minor amendments:
- a. “common industry system set up costs” would be more accurately described as “common industry system costs”, as this category comprises (as the Commission’s description notes) future capex cost and recurrent operations and maintenance costs<sup>5</sup>; and
  - b. there needs to be a clear demarcation point between the common industry system costs and the per-operator set-up costs. The access point to the common industry system is an agreed centralized location and each operator should be responsible for the costs they incur on their side of that access point, including:
    - building and operating the links they require to access the common industry system;
    - the adaptation of their information systems necessary to make the common industry platform work effectively; and
    - setting up a maintenance system on their side of the access point.
8. TelstraClear is concerned that the wording of the draft determination may leave open an interpretation which treats these costs as common industry set-

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<sup>5</sup> The IPMS will comprise:

- a Ported Number Database containing the Ported Number Register;
- programmed logic containing the business rules and systems for managing port requests;
- secure network interfaces enabling carriers and service providers to physically connect to the IPMS;
- an Applications Programming Interface (API) for a consistent transactional interface with Carriers and Service Providers to the IPMS;
- a web server for browser based sessions using the same rules and capabilities that the API uses; and
- management applications, reporting, logging, and security reports.

up costs<sup>6</sup>, whereas in TelstraClear's view, all costs incurred on the operators side of the access point should form part of the per operator set-up costs.

Question 3: Are the cost drivers and the magnitude of individual costs accurate?

9. TelstraClear broadly agrees with the Commission's relative weighting of costs set out in Table 1 of the draft determination, subject to the following comments:
- a. **industry common costs:** TelstraClear believes these costs should be ranked as "medium", not as "medium to high". TelstraClear anticipates there will be some economies between the IPMS and the existing number portability system for Tollfree numbers.<sup>7</sup> The same third party vendor is involved and it should be possible to utilise some of the existing interfaces and other infrastructure;
  - b. **operator-specific set-up costs:** TelstraClear believes these costs should be ranked as "medium to high" not just as "high". The costs each operator faces will depend on the extent of IN capability existing within the operator's network; and
  - c. **per-line set-up costs:** TelstraClear believes these costs will be "very low" for both a DNO and RNO. It is appropriate that these costs be assessed on a forward looking basis, which would assume the use of an IN solution to process porting requests.

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<sup>6</sup> Para 48, draft number portability cost allocation determination.

<sup>7</sup> Tollfree Number Administration System (TNAS).

#### **4. OBJECTIVES AND PRINCIPLES FOR ALLOCATING COSTS**

10. TelstraClear agrees that the principles set out in paragraph 57 of the draft determination should guide the allocation of number portability costs.
11. In relation to the “cost causation” principle, TelstraClear reiterates its view that number portability costs, particularly system set-up costs and additional call conveyance costs, are not “caused” by the RNO or its customer. The ability to recognise and route calls to ported numbers is a necessary function which the originating operator must undertake to complete (and therefore charge for) calls originating on its network. Without number portability systems, the originating operator (whether or not the DNO for the called number) would not be able to offer any to any calling services to its own customers. Accordingly, as discussed in paragraph 15, an operator which elects only to participate as a DNO (as Telecom apparently has decided to do in relation to fixed network number portability) still benefits from number portability functionality within its network.
12. Hence, the costs of number portability systems are part of the necessary costs of participating in a competitive market and of meeting user demands to take full advantage of the ability to switch between competing suppliers at a minimum cost.

## 5. BENEFIT OF NUMBER PORTABILITY

13. TelstraClear agrees with the description of the benefits of number portability set out in paragraphs 58 to 62 of the draft determination.
14. In particular, TelstraClear agrees with the Commission's view that "the percentage of customers porting their numbers is only a partial indicator of the benefits and effect of number portability".<sup>8</sup> As set out in our first submission, and as has been universally recognized by other regulators when allocating number portability costs:
  - a. all customers, not just ported customers, benefit from number portability. This is because all customers will benefit from the greater competition that results from number portability through lower prices, etc regardless of whether they actually switch suppliers/exercise the option to port;
  - b. allowing a customer to take his or her number substantially reduces the barriers to switching between operators and makes a larger portion of each operator's customer base more directly contestable; and
  - c. all customers will benefit from the greater range of services offered as a result of enhanced competition arising from the implementation of a cost effective and efficient number portability system.
15. It is also true that in an environment in which number portability is available, all operators, whether as DNOs, RNOs or both, benefit from number portability. Number portability, of course, will not work unless all operators participate as DNOs and so there is usually, as in the New Zealand Act, an obligation to participate as a DNO. Most operators will choose to additionally participate as an RNO and, therefore, benefit from number portability in that additional role. However, even if an operator chooses to participate only as a DNO, it still benefits from number portability because:
  - a. unless the operator has the ability to identify the current network location of a ported number (whether that operator or another operator is the DNO), it would not be able to complete calls from its

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<sup>8</sup> Draft number portability cost allocation determination, para 59.

non-ported numbers and charge its customers for those calls, as discussed in paragraph 11. Further, customers may be reluctant to connect to or remain connected to an operator if they know that it cannot offer “any to any” calling capability because it does not participate in the number portability system;

- b. similarly, an operator will not be able to offer competitive inbound calling services to foreign carriers if it cannot route calls to ported local numbers. While inbound calls to the incumbent’s customers will represent the majority of inbound calls, the incumbent’s international business typically offers inbound calling services to any domestic number, including numbers associated with other networks. An incumbent’s ability to compete in the provision of inbound services will be significantly undermined unless it can continue to offer ubiquitous termination after number portability is introduced. A foreign carrier obviously cannot distinguish at its end between called numbers which are ported and not ported. Accordingly, if the incumbent does not have number portability capabilities, the foreign carrier will give all inbound calls to a competitor of the incumbent which does have that capability, even if most inbound calls which the foreign carrier hands over terminate on non-ported numbers of the incumbent; and
- c. customers may be more reluctant to choose to connect to an operator’s network in the first place if it does not offer out-porting capabilities. Many customers are likely to be concerned that they will be “locked into” that operator and will not be able to take advantage of better offers from competing operators in the future.

## 6. ALLOCATION OF COSTS

### 6.1 Industry Common Set-up Costs

16. TelstraClear agrees that “allocating industry common set-up costs amongst operators on the basis of market share defined by the number of subscribers to local and mobile access respectively will best fulfill the objectives of cost allocation and the cost allocation principles”.<sup>9</sup>
17. While TelstraClear agrees that this “methodology is straightforward to implement”, it is important that the Commission’s determination set out the required methodology in clear, detailed terms, for the following reasons:
- a. to ensure that the methodology is in a form which can be enforced by a court under section 61 of the Act. A statement of principles, such as set out in paragraphs 81 and 82 of the draft determination, may not be considered by a court to be sufficiently certain to enforce because it would require important details to be “filled in”, which the court may have no power to do;
  - b. Telecom has taken the view that the Commission’s powers under sections 58 and 59 of the Act to revisit a determination once made are constrained. The Commission indicated in the course of the Residential Wholesale Determination that it may share Telecom’s views. TelstraClear disagrees with these views.<sup>10</sup> However, we are concerned that if the Commission sets out high level principles and leaves it to the participants to negotiate detailed terms consistent with those principles, the Commission may subsequently decline to determine the detailed terms if the parties cannot agree. This could leave the parties deadlocked and potentially stall implementation. The history of the industry’s attempts to reach agreement on cost allocation, and the

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<sup>9</sup> Draft number portability cost allocation determination, para 81.

<sup>10</sup> TelstraClear’s view, as stated in the Residential Wholesale proceedings, is that either:

- a. the Commission can provide in the terms of its determination that matters which the Commission provides are to be agreed between the parties can be referred back to the Commission in the event the parties cannot agree. Courts typically take this approach in their orders without that referral back being challenged as a rehearing of the court’s order; and/or
- b. the concept of “clarification” in section 59(1)(b) is broad. If the Commission states general principles, and the parties cannot agree on their implementation, the Commission’s further elaboration of the details of its principles is a “clarification” as commonly understood. The Commission is not revising or revisiting its original determination but only explaining how it should be implemented.

strongly opposing positions between Telecom and most other industry participants, suggest that there is a high risk of disagreement; and

- c. the determination will be binding on those who become access providers at a future date.<sup>11</sup> It will be in the interests of all participants if there are no details left open for debate, dispute or negotiation by future participants which may overturn or undo the arrangements on the basis of which the number portability system had already been implemented. There is even a risk that future would-be participants might argue that the agreement between current industry participants on implementation terms is a horizontal restraint which impairs competitive entry by subsequent competitors and, therefore, is in breach of the Commerce Act. A determination by the Commission on these matters should, in effect, protect participants from such allegations being made in the future as they would be acting in accordance with a lawful direction from the Commission.
18. TelstraClear is not proposing that the Commission itself, at least in the first instance, determine the detailed implementation terms. Instead, TelstraClear proposes that the Commission should provide parties with the substantive reasons for its final determination and request them to submit agreed detailed terms for implementation within a specific period, say 30 business days. The Commission can incorporate any agreed wording into its final determination or if agreement cannot be reached, invite further submissions on the implementation terms and make its own determination.
  19. Examples of the implementation issues the parties will need to work thorough in preparing detailed implementation terms for inclusion in the Commission's final determination include:
    - a. who will apply the allocation methodology to the actual common industry set-up costs. Options include the party which performs TCF secretariat functions or an accounting firm appointed by the TCF;
    - b. what happens if there is a dispute about how the allocation has been applied. The dispute mechanism which is used may differ depending on the nature of the dispute. A simple dispute over quantum could be resolved by a standard third party arbitration process (which the terms

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<sup>11</sup> Section 61(5) of the Act.

of the determination would need to provide for). On the other hand, a dispute over methodology may require the Commission's review;

- c. what is the appropriate point in time to measuring the active numbers. The total number of active numbers and the relative proportion of those numbers for which each participant accounts obviously will vary over time, but the proportions will need to be fixed at a given point in time to allocate costs. This is true not only for the set-up costs but also in allocating recurrent costs. Options for allocating recurrent costs include allocating on the basis of the proportion of active numbers which each party has at the commencement of each year, or averaging the proportions over a longer preceding period to capture trends, or adjusting the allocations half way through the year, or retrospectively adjusting at the end of the year or quarterly or six monthly periods;
  - d. when and how often and by whom will invoices be issued for the common industry set-up costs and on-going operational costs, who will the amounts be payable to, what are the consequences of late payment (e.g. interest) and who will disburse funds to third parties. Options for the invoicing, collection and payment functions include the party which performs TCF secretariat functions or an accounting firm; and
  - e. the form of and allocation of the cost of any performance guarantees required in the event the TCF requires these for any vendors.
20. TelstraClear understands the Commission's proposal on contribution by later participants<sup>12</sup> to the initial common industry set up costs to be as follows:
- a. the value of the initial capital investment would be written down annually in accordance with the Inland Revenue Guidelines;
  - b. a new participant's contribution to the initial capital costs would be calculated on the basis of the written down asset value as at the date the new participant joins. This would be calculated based on all

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<sup>12</sup> A later participant is an operator which is not either one of the access providers or access seekers listed in the Commission's preliminary decision of 19 March 2004.

participants' market shares as represented by their share of active numbers; and

- c. the capital contribution made by the new participant would be returned to parties who had previously made a capital contribution (including other participants who entered after the original parties but before the latest participant), pro rata to their total capital contribution.
21. While TelstraClear agrees with the philosophy behind this approach, it foresees some difficulties in its practical application. The current industry participants have built up market share over a number of years and, while those market shares may change in the future (including as a result of number portability), the current shares of active numbers provides a reasonable basis for allocating common industry costs. However, a subsequent access seeker is likely to join the number portability system before it has any or many customers: why would a new entrant enter the market without number portability when its competitors all have number portability? If the new access seeker's contribution was assessed at that point, its contribution would be negligible.
22. TelstraClear, therefore, proposes the following "two part tariff" approach for contribution to the set-up costs<sup>13</sup>:
- a. the participant makes a contribution of a fixed amount on joining the number portability system. This amount would be assessed at a relatively low level to be fair to small competitors. This is the approach taken in the TollFree Database Access Agreement covering access to the TNAS for the porting of tollfree numbers. The fixed contribution for TNAS is \$40,000 plus GST. TelstraClear proposes that, applying the approach in paragraph 18, the Commission require the TCF to attempt to agree an appropriate charge which would form part of the agreed terms which are submitted to the Commission for inclusion in the final determination. This would ensure that the Commission can satisfy itself that the charge is at a level which is fair and is not a barrier to entry;

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<sup>13</sup> A new later participant would contribute to ongoing costs after it had joined in the same manner as the contribution of existing participants to those costs is calculated.

- b. however, as local and mobile number portability (**LMNP**) will involve more numbers and transactions per competitor than Tollfree number portability, it is appropriate that there should be a contribution by new access seekers based on their share of active numbers. The initial contribution, therefore, should be re-assessed 12 months later, based on the Commission's proposed methodology.

## 6.2 Per-Line Set-up Costs

23. TelstraClear accepts the Commission's proposal that the DNO should be able to recover per-line set up costs, but believes the following safeguards should be put in place:

- a. there should be a clear statement of the pricing principles;
- b. the Commission should be able to determine disputes between parties over the per-line charge; and
- c. the DNO should be prohibited from charging end-users an out-port charge.

24. As the Commission itself noted, use by consumers of number portability is highly sensitive to the charges they pay. This is illustrated by the EU survey to which the Commission refers in paragraph 70 of the draft determination.

25. TelstraClear is concerned that the Commission underestimates the unequal bargaining power between the incumbent(s) (which will mainly be DNOs) and entrants (which will mainly be RNOs), particularly in the case of fixed number portability. The Commission states:

*"It is easier for a RNO to ensure that per-line set-up costs are not inefficiently high as RNOs are in a better position to scrutinise the level of such costs, and have a stronger incentive and a better ability to negotiate down payments to an efficient level than any individual customer."*<sup>14</sup>

However, this has not proven to be true for other designated services, such as PSTN interconnection, because even if an access seeker can benchmark costs on its own network, the incumbent's unequal bargaining power means that it simply rejects or ignores the access seeker's views on costs.

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<sup>14</sup> Draft number portability cost allocation determination, para 91.

26. The Commission's proposed requirement that per-line charges be reciprocal is likely to have little effect in leveling up the bargaining position between Telecom and other participants. Telecom has been careful to state that it will not be an RNO/access seeker for fixed number portability. However, even if Telecom was an RNO/access seeker, the balance of porting is likely to be away from Telecom. While symmetrical charges usually will provide parties with an incentive to negotiate low charges, Telecom would have an incentive to push for a symmetrical charge which is set at a high level to discourage out-porting, even if it increases Telecom's costs in winning or winning back customers.
27. Accordingly, TelstraClear requests that the pricing principles for per-line charges specify:
- a. the per-line costs do not include the capital costs which properly fall within the category of operator set-up costs. It is likely that the same number portability system which each operator installs to support number portability within its network also will be used for per-line porting functions, with only limited additional functions, equipment or interfaces to solely support the per-line porting function. Where systems are shared, it is appropriate that only those costs which are incremental to the per-line set-up functions should be included in the calculation of the charge payable by the RNO. Otherwise, both the incentive to ensure that the DNO minimises the costs of its number portability system would be diluted and the impact of the per-line charge as a barrier to switching would increase;<sup>15</sup>
  - b. the costs recoverable from the RNO should be the incremental cost of receiving and processing the port request; and
  - c. the systems and processes used for out-ports often will be used for in-ports and, therefore, there should be an allocation of any shared or common costs between the two processes. Although Telecom may not

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<sup>15</sup> In the UK, General Condition 18 requires Communications Providers to make number portability available. Per-line charges for portability must be based on incremental costs and cannot include "System Set-up Costs" or "Additional Conveyance Costs" (General Condition 18.2(b)). This approach has also been adopted in Hong Kong where the Telecommunications Authority has distinguished between system set-up costs additional conveyance costs and per subscriber set-up costs, commenting that per subscriber set-up costs would consist "mainly of the costs incurred for administrative work and for updating the databases and other support systems [required for mobile number portability]": OFTA, Number Portability for Public Mobile Services in Hong Kong: Cost Recovery Framework, 28 August 1998 at para 19.

currently propose to be an RNO, its systems are likely to support that functionality and there should be an allocation of these costs between out-ports and in-ports. Based on overseas experience, it seems highly unlikely that over the life of the Telecom number portability system it will maintain its hard line stand that it intends never to be an RNO.

28. As an incumbent DNO has strong incentives to delay agreement on per-line charges or to push for unreasonably high charges, the Commission must retain a role to determine disputes over the per-line charges. If there is any doubt about the Commission's future jurisdiction to do so,<sup>16</sup> then given the significance of per-line charges to competition based on number portability, the Commission should determine the per-line charges in its final determination. The Commission could do this by benchmarking the per-line charge against overseas charges. This benchmark charge could apply until the parties agreed on a cost-based charge.
29. If the Commission does consider it has ongoing jurisdiction to determine disputes over the per-line charge, the final determination should provide that if the parties are unable to agree, the Commission can set an initial per-line charge based on benchmarking overseas charges. This would ensure number portability implementation is not held up by cost studies to determine on final price.

### **6.3 DNO Charges to End Users**

30. TelstraClear agrees that the Commission has power under section 40(1)(g) of the Act to prohibit the DNO charging out porting customers for the out-port and that the Commission should do so.
31. TelstraClear agrees, that in the absence of regulatory oversight, an out-porting charge levied by the DNO can deter end-users from utilising number portability because<sup>17</sup>:
  - a. there is a risk that the incumbent will have an incentive to set an inflated DNO charge to discourage consumer uptake of MNP; and
  - b. there is a risk of double recovery by DNOs as the customer out-port charge potentially overlaps with the per-line charge levied by DNOs on

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<sup>16</sup> See para 17 discussion of differing views on the scope of sections 58 and 59.

<sup>17</sup> Draft number portability cost allocation Determination, para 90.

RNOs.

32. The EU Directive dealing with number portability requires that:
- a. regulators must ensure that direct charges to subscribers (if any) do not act as a disincentive to porting; and
  - b. any regulated charges for retail porting tariffs must not distort competition.<sup>18</sup>
33. In both the UK<sup>19</sup> and Hong Kong<sup>20</sup>, a DNO is not permitted to charge end user out-port charges. Other countries which are currently introducing number portability, such as Jordan, have prohibited end user out-port charges<sup>21</sup>.
34. In Australia, the ACCC's pricing principles for number portability permit the DNO to charge an out-port fee to end users, but the DNO is not allowed to recover any per-line charges from the RNO.<sup>22</sup> As the per-line charge and an end-user out-port charge would appear to cover substantially the same process, permitting the DNO to charge end-users an out-port charge on top of the per-line charge paid by the RNO would involve "double dipping" by the DNO.
35. If the per-line set-up costs of the DNO are to be recovered, TelstraClear believes it is more appropriate in New Zealand to do so through a DNO charge to the RNO rather than a DNO charge to the end-user:
- a. New Zealand is introducing number portability significantly later than in comparable economies, and therefore has some distance to catch up. A zero out-port cost is more likely to promote the quick uptake of porting than an out-port charge at any level;
  - b. competition is less developed in New Zealand than in overseas markets, particularly mobile. New Zealand, for example, does not have

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<sup>18</sup> Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive) at Article 30.

<sup>19</sup> General Condition 18, BT licence.

<sup>20</sup> *Number Portability in Hong Kong*, presentation by OFTA, October 2003 at [http://www.ofta.gov.hk/speech-presentation/cte\\_20031010\\_2.pdf](http://www.ofta.gov.hk/speech-presentation/cte_20031010_2.pdf)

<sup>21</sup> Telecommunications Regulatory Commission, *Instructions for Implementing Mobile Number Portability in Jordan*, 5 January 2005.

<sup>22</sup> ACCC, *Pricing Principles for Local Number Portability – A Guide*, June 1999, para 6.3. Telstra does charge RNOs for porting outside normal business hours.

developed resale competition in mobile services that can allow competition on the same network without number portability. Australia had both more mobile network operators and a well developed resale mobile sector before number portability was introduced; and

- c. the Commerce Commission has less extensive powers over operators' retail charges and therefore is not able to supervise DNO out-port charges as closely as overseas regulators. By contrast, the ACCC has separate powers over retail tariffs to ensure that the end-user out-port charge is not a barrier to switching. The ACCC has intervened to require Telstra to reduce its end-user out-port charge from AU\$30 to AU\$8.<sup>23</sup> The Commerce Commission does not have equivalent powers under the New Zealand Act. While section 40(1)(g) would readily support an outright prohibition of out-port charges, it would be a more difficult (although not legally impossible) exercise to use that power to introduce a process for the lodgment and approval of retail out-porting charges.

#### **6.4 Conveyance Costs**

36. TelstraClear agrees that each operator should bear its own costs of additional conveyance. Under the approach in the TCF codes, each party will be able to choose whether to implement a full IN solution, a partial IN solution or call forwarding within its own network. Access seekers should not be exposed to the costs of additional call conveyance because the DNO chose a less efficient network solution.
37. Additionally, as TelstraClear pointed out in its Initial Submission, as the additional call conveyance occurs on the access seeker's (i.e. the originating party's) side of the Pol, accepted interconnection principles require that it bears the costs of that conveyance. That is, it would be contradictory for the access provider of the terminating service (the RNO) to be both a supplier of terminating access on its side of the Pol and a buyer of "originating" access on the access seeker's (originator's) side of the Pol.

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<sup>23</sup> ACCC media release, *Telstra asked to explain its \$30 mobile transfer charge*, 29 August 2001. [telstra.com.au/customerterms/docs/fixed\\_general.pdf](http://telstra.com.au/customerterms/docs/fixed_general.pdf); [telstra.com.au/customerterms/docs/mobilegeneral.pdf](http://telstra.com.au/customerterms/docs/mobilegeneral.pdf)

38. TelstraClear notes, however, that operators may choose not to directly interface with the IPMS but to use other arrangements for number portability. These include:
- a. routing calls to DNOs, which then undertake the number analysis to determine if the call is to a ported number and, if so, then on-route the call to the RNO (called Donor Carrier Re-routing); or
  - b. routing the call to another operator (a transit carrier) which undertakes the number portability analysis.

These and other similar scenarios are described in diagrams 1 to 5 of the TCF LMNP Network Code.

39. Where the originating carrier does not undertake number portability analysis itself, there will be additional call conveyance involved, although usually over another network and not its own. These scenarios are not, strictly speaking, exceptions to the Commission's principle that each carrier should bear its own additional call conveyance costs. However, it would be useful for the Commission to expressly note that its proposed principle does not apply where the originating operator does not interface with the IPMS.
40. TelstraClear notes that the TCF LMNP Network Code requires each participant to have in place Donor Carrier Re-routing to deal with system failures in the IPMS platform or other temporary problems which prevent the originating operator undertaking its own number portability analysis.

## **7. TERM OF DETERMINATION**

41. TelstraClear agrees with the Commission's proposal that the determination expire 5 years from the date the determination is made (subject to renewal of the designated services).
42. TelstraClear notes that work is currently progressing on the common industry platform and costs are being incurred. At the moment, those costs are relatively modest but will escalate in the second quarter of this year. Currently the costs are being shared in an agreed proportion between Telecom, Vodafone and TelstraClear.
43. It is appropriate that these costs should be allocated in accordance with the Commission's approach to industry common costs and the three parties should be reimbursed for them if applicable. This could be achieved by providing for the commencement date to be 29 October 2004, which is the date on which the vendor supplying the IPMS was appointed by the TCF.

**ANNEX**  
**COMMISSION'S POWER TO MAKE COST ALLOCATION DETERMINATION IN ABSENCE  
OF TECHNICAL SOLUTION**

44. As noted in paragraph 5 of the main body of the Submission, TelstraClear disagrees with the Commission's view that "in the absence of an approved code dealing with the functions and standards of LMNP, or a further application under section 31(a) of the Telecommunications Act (**the Act**), the Commission will not issue a final determination in relation to the Application".<sup>24</sup>
45. This issue may not have a substantive impact on these proceedings as the result of the consolidation with the technical functions and standards proceedings. However, the direction and conduct of the technical functions and standards proceedings may not go as predicted and if unanticipated delays are encountered, it may be necessary to proceed to resolve the cost allocation issues if the implementation of the third party vendor contract for the IPMS is to continue on track. Accordingly, TelstraClear wishes to set out its views on the Commission's interpretation of the relevant provisions of the Act which lead it to the view that a final determination of cost allocation cannot be made in the absence of the detailed technical solution.
46. The Commission bases its view on its comparison of the wording in section 37(1)(a) of the Act, which requires the draft determination to include "a description of the functions that must be performed by [the number portability system]", and section 40(1)(a), which requires that the draft determination must include "the functions that must be performed by [the number portability] system".
47. TelstraClear considers that the Commission reads too much into the difference in wording between the two sections. The Commission's reading assumes that a "description" means the statement of functions can be less specific or detailed. However, the different wording between the two sections is just as capable of the opposite construction. Section 40(1) of the Act could be interpreted as requiring a "bare list" of the functions to be performed, while the "description" required by section 37(1)(a) could be read as requiring a narrative of what those functions will do and how they will operate: e.g.

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<sup>24</sup> Draft number portability cost allocation determination, para 24.

“donor carrier re-routing” is one of the list of functions that each operator’s number portability system must perform which would be included in the list of required functions under section 40(1)(a), while clause 9 of the TCF LMNP Network Code<sup>25</sup> and diagrams 1 and 3 provide a detailed “description” of that function.

48. There is no sound policy reason to read sections 37(1)(a) and 40(1)(b) of the Act in the way the Commission proposes or equally in the opposite way posited above.

49. The Commission’s views do not square with how it has read sections 31(a) and 31(b). These sections provide:

*“An access seeker of a designated multinet network service may apply to the Commission for the 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.”*

50. Accordingly, those two sections mirror sections 40(1)(a) and 40(1)(b) and sections 37(1) and 37(1)(b), but for the words “of the description” at the start of section 37(1)(a).

51. The Commission said of the relationship between sections 31(a) and (b) in its Investigation Decision:

*“[T]he Act is sufficiently flexible to allow the Commission to address a number of possible scenarios arising in relation to applications for determinations on multinet network services. .... For example, where there is agreement between the access seeker and the access providers on the functions and standards of the system but not on the cost apportionment formula, an access seeker may apply for a determination on the cost apportionment formula under section 31(b), (subject to section 32).*

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<sup>25</sup> Draft Telecommunications Industry Network Code for Local and Mobile Number Portability dated 24 December 2004.

*Similarly, where the access seeker and the access providers agree on the cost apportionment formula but not on all or some of the functions and standards, an application on the functions and standards may be submitted to the Commission, (subject to section 32). These scenarios are consistent with the Commission's approach to investigating applications for designated access services and specified services under section 20 of the Act.”<sup>26</sup>*

52. In other words, the Commission accepted that sections 31(a) and 31(b) are disjunctive. It would be odd that an access seeker can choose to apply only for a cost allocation determination under section 31(1)(b) but the Commission's determination of that application must still include a full statement of the functions of number portability. That is, on the Commission's reading, the statement of functions apparently would have to be as detailed in a determination of an application made only under section 31(b) as it would be in a determination of an application made under section 31(a) (or under both sections 31(a) and (b)).
53. Logically, if sections 31(a) and (b) of the Act are disjunctive, this must flow through to sections 37(1)(a) and (b) and sections 40(1)(a) and (b), or at least must determine the level of detail required in specifying the functions when the determination is primarily about cost allocation. TelstraClear acknowledges that a cost allocation determination sensibly would have to set out the functions in enough detail to identify the different cost categories and to explain the allocation of costs in each of those categories. But the draft determination does this when it describes the industry's decision to adopt an IN solution (paragraphs 44-45 of the draft determination) and identifies and describes the cost categories of industry common costs, per operator set up costs, per-line set up costs and additional conveyance costs (paragraphs 48 to 53 of the draft determination).
54. The Commission also acknowledged in its Investigation Decision the significant benefits, illustrated by overseas experience, in resolving cost allocation in advance of finalisation of the technical solution. This is because cost allocation will directly influence the choice of technical solution. As the Commission said:

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<sup>26</sup> Decision whether to Investigate an application for determination for designated multi-network services, 29 July 2003, paras 26 and 29.

*“The Commission considers that it is possible to develop a workable cost apportionment formula, which promotes competition in telecommunication markets for the long term benefit of end-users of telecommunications services in New Zealand, although the specifics of a technical solution have yet to be developed. The Commission notes that in other jurisdictions such as Australia, cost apportionment formulas have been developed independently from the technical solution.”<sup>27</sup>*

55. Much of the value in addressing the cost allocation principles before finalisation of the technical solution would be lost if the Commission could only go as far as issuing a draft determination. The Commission has reversed or substantially changed its position between draft determinations and final determinations in other investigations (for example, in relation to the Commission’s recommendations on LLU). A draft determination would not provide sufficient certainty for industry participants to proceed to finalise the technical solution, which was the point of publishing the cost allocation principles first.
56. For these reasons, TelstraClear believes that, properly read, the Act allows the Commission to proceed to issue its final determination on the cost allocation principles prior to a determination of, or approval of a code dealing with, the details of the technical solution.

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<sup>27</sup> Decision whether to Investigate an application for determination for designated multi-network services, 29 July 2003, para 32.