



**Telecom New Zealand Limited**

**Submission in respect of the**

**Commission's Draft Determination on the application from TelstraClear Limited, Telecom New Zealand Limited and Vodafone New Zealand Limited under s. 31(a) of the Telecommunications Act 2001 to decide certain functions and standards necessary to provide local and cellular telephone number portability services**

**10 June 2005**

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## A EXECUTIVE SUMMARY

- 1 The number portability solution that is offered to end-users in New Zealand will be largely shaped by the terms of the Number Portability Functions and Standards Final Determination ("Final Determination"). Telecom is committed to implementing number portability in New Zealand in accordance with the Telecommunications Act 2001 ("Act"), including the Commission's Final Determination. However, to ensure that commitment can be met, it is critical that the Final Determination terms are achievable and consistent with the Act.
- 2 Telecom largely agrees with the approach taken by the Commission in the Number Portability Functions and Standards Draft Determination ("Draft Determination"). In particular, Telecom agrees that:
  - 2.1 The Act does not permit fixed to cellular number portability;
  - 2.2 The exemption process should be available for exemptions to any aspect of the Network Terms<sup>1</sup>;
  - 2.3 The agreed provisions of the draft Network and LMNP Codes for enforcing non-compliance provide an appropriate balance and incentives;
  - 2.4 The dispute resolution process is unnecessary where disagreement arises regarding a decision whether an approved exemption exempts a carrier from meeting its obligations; and
  - 2.5 The parties should be required to provide equivalent service in relation to internationally originated SMS.
- 3 However, Telecom has serious concerns about some key issues which need to be addressed to ensure that the terms are achievable and consistent with the Act:
  - 3.1 ***Scope of local number portability:*** Telecom is encouraged by the Commission's recognition that Parliament intended to separate fixed and cellular number portability. There are important policy reasons for Parliament's distinction and the Commission must avoid blurring

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<sup>1</sup> On 24 December 2004 the parties made a Functions Application, attaching draft Network and LMNP Codes. The Commission has referred those Codes as Network Terms and LMNP Terms respectively. The terms "Network Code" and "Network Terms" and "LMNP Code" and "LMNP Terms" are used interchangeably throughout these submissions.

the line between the fixed and cellular number portability services. A clear distinction must be made between the two services. While Telecom agrees that fixed wireless services are covered by the local number portability service description, the Commission's description of a "fixed wireless" service in the Draft Determination is not a fixed service, and is therefore outside the scope of the local number portability service description.

- 3.2 The Act is unequivocal. Only those services that have a fixed network connection to an end-user's building/premises are covered by the local number portability service. The "fixed wireless" service described in the Draft Determination has no such connection and is clearly outside the scope of the local number portability service description. There are no arguments for expanding local number portability beyond the clear meaning of the Act and doing so may be to the detriment of end-users (contrary to section 18 of the Act).
- 3.3 **Granting exemptions:** The Commission has amended the Network Terms to allow it to grant an exemption on recommendation from the Telecommunication Carriers' Forum ("TCF"), outside the scope of sections 58 and 59 of the Act. The Commission does not have the power to amend a Determination outside the scope of section 58 and 59 and to do so would be *ultra vires* the Act. All exemptions should be made by application under section 58 or 59 of the Act.
- 3.4 **Local Calling Area:** The requirement that a local calling area is one in which a Donor Network's service has a consistent set of attributes does not impose any extra obligation on a Receiving Carrier. However, the distinction is important. Telecom proposes that any ambiguity can be avoided by bringing the "local calling area" definition in line with that used in the ACIF Code.
- 3.5 **International SMS:** In order to achieve equivalent service for internationally originated SMS, the Commission should specify the type of regime that it would expect to see implemented for international SMS. In addition, number ranges allocated to a cellular operator by the NAD should not be used without that operator's consent in other New Zealand operators' SMS interconnection arrangements with international operators.
- 3.6 **Implementation Dates:** If the Commission specifies a date of inception, it must be clear that the parties are not required to comply with the terms of the Determination until the implementation date. Telecom does not consider it necessary for the Commission to specify a date by which parties must be able to connect to the IPMS. There is a risk that such a date will be unworkable.

- 4 Telecom is concerned that the Commission has amended terms of the draft Network and LMNP Codes over and above those terms not agreed between the parties. Separate submissions on these issues are being made jointly by the parties, and Telecom supports those submissions. The Act clearly anticipates that the purpose of codes under the Act is to allow for industry self-regulation. However, an anomaly in the Act (which means determined codes are unenforceable) has meant that parties have had to apply for determination of the Network and LMNP Codes under section 31 of the Act. Consistent with the purpose of industry self-regulation, Telecom considers that the Commission should only amend those terms not agreed between the parties. The agreed drafting was considered carefully by the parties in the context of the requirements of the Codes. Amendments may upset the balance that has been achieved.

## **B SCOPE OF THE LOCAL NUMBER PORTABILITY SERVICE**

5 Telecom has serious concerns that the Commission's interpretation of the local number portability service description departs from the clear and intended definition.

6 The service description in Schedule 1, Part 2, Subpart 2 of the Act defines local telephone number portability as:

*" 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 the local calling area." (emphasis added)*

7 In the Draft Determination, the Commission proposes that local number portability:

7.1 Includes fixed wireless services (including a service which is configured from a fixed wireless or cellular network);

7.2 Includes fixed wireless services, but is limited to a service where calls that are made, and received, in a geographic area that is bounded by a single transmission tower (or cell site); and

7.3 Does not include a service that allows the end-user's telephone device to perform call hand over between transmission towers or calls made (and received) on that device which require the involvement of more than one transmission tower in the wireless network.

8 It is not clear from the Draft Determination whether the Commission intends that:

8.1 A fixed wireless service is one that can utilise more than one cell site, or whether it is one that can only use a single "home" cell site;

8.2 A service provider can provide a "bridging service" to allow service handover during the call between the "fixed wireless call" a cellular call.

9 The Commission justifies its interpretation of the local number portability service description on the following basis:

9.1 The definitions of "fixed PDN", "fixed PSTN" and "fixed telecommunications network" are not inconsistent with the view that "fixed telephone network services" include fixed wireless services; and

9.2 In LLU, the Commission concluded that fixed PDN excludes mobile data networks, but includes fixed wireless systems that are point-to-point and multi-point.

10 While Telecom agrees that a fixed service may include a fixed wireless service, the Commission's description of a fixed wireless service is inconsistent with the plain and intended interpretation of the Act.

## The Act

*What is a fixed telephone network service?*

11 The local number portability service only applies between "fixed telephone network services".

12 While the term "fixed telephone network service" is not defined in the Act, the terms "fixed telephone network" is defined as meaning:

- (a) *any lines between user's premises and the local telephone exchange or equivalent facility;*
- (b) *any fixed PSTN;*
- (c) *any telecommunications links between fixed PSTNs;*
- (d) *any fixed PDN;*
- (e) *any telecommunications links between fixed PDNs;*
- (f) *any value-added telecommunications services associated with telecommunications services provided by those assets.*

13 In turn, the Act also defines the following terms:

### **Fixed PDN –**

- (a) *means a PDN, or that part of a PDN, that connects an end-user's building (or, in the case of commercial buildings, the building distribution frames) to a data switch or equivalent facility; and*
- (b) *includes the data switch or equivalent facility and that part of the overall telecommunications link within the building that connects the end-user's equipment.*

### **Fixed PSTN -**

- (a) *means a PSTN, or that part of a PSTN, that connects an end-user's building to the local switches or equivalent facilities; and*
- (b) *includes those local switches or equivalent facilities.*

14 All terms using the word "fixed" which are defined in the Act make reference (directly or through other defined terms that are used) to the fact that the network must be connected to the end-user's building or user's premises. This is a clear and common theme:

14.1 "fixed PDN" is defined as a PDN, or that part of a PDN that connects an end-user's building (or, in the case of commercial buildings, the building distribution frame) to a data switch or equivalent facility. It includes the data switch...and that part of the overall telecommunications link within the building that connects to the end-user's equipment;

- 14.2 "fixed PSTN" is defined as a PSTN, or that part of a PSTN, that connects an end-user's building to the local switches or equivalent facility; and
- 14.3 The definition of "FTN" includes any lines between user's premises and the local telephone exchange or equivalent facility.
- 15 It is clear from these definitions that, when using the term "fixed" in the Act, parliament intended the term only to apply to services that were offered via a fixed network connection to the end-user's building or user's premises.
- 16 The conclusion that a "fixed telephone network service" must be connected in some way to an end-user's premises is consistent with the fact that:
- 16.1 "Fixed" also has a well acknowledged industry meaning<sup>2</sup>: including fixed-wire copper or cable networks. It can also include fixed wireless networks, where a fixed receiver is attached to an end-user's building and transmits a wireless signal between two fixed points.
- 16.2 On a "plain meaning" interpretation, the word "fixed" is defined as: attached or positioned securely<sup>3</sup>.
- 16.3 This definition would be consistent with commonly used cordless phones which require the handset base station to have a network connection to the building (via a network termination point that connects the device to the end-user's copper wires i.e. fixed network). The base station then transmits a wireless signal to the handset.
- 17 A fixed telephone network service is only one which is provided via a network connected to an identifiable, fixed physical premises used by the user/end-user.

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<sup>2</sup> The Commission accepted that industry views were relevant to interpretation in the Local Loop Unbundling Report, paragraph 150.

<sup>3</sup> Concise Oxford English Dictionary. The Commission accepted that reference to a dictionary definition is acceptable where a term is not defined in the Act in the Local Loop Unbundling Report, paragraph 94.

*How the Commission's "fixed wireless" service description fits with the Act*

- 18 The Commission's draft determination, and specifically the description of a fixed wireless service, is a significant departure from this clearly intended interpretation.
- 19 The Commission's description of a fixed wireless service requires neither:
- 19.1 A network connection to an end-user's building;
  - 19.2 A network connection to the user's premises; or
  - 19.3 That the service be used at an identifiable, fixed location.
- 20 In fact, the fixed wireless service described by the Commission allows a service to be provided at any location within the cell site coverage area, and does not require the service to be "fixed" on any interpretation of the word.
- 21 The Commission's conclusion that fixed wireless services are "fixed telecommunication network services" is partly based on its conclusion in the LLU determination that "fixed PDN" included Telecom's fixed wireless solutions for the purposes of LLU. However, what was not considered, or concluded, in LLU was:
- 21.1 Whether those fixed wireless solutions only include those offered via a network connection to the end-user's building or premises; and
  - 21.2 Where the line is drawn between fixed wireless solutions and mobile solutions.<sup>4</sup>
- 22 These issues are key to determining exactly what fixed wireless services are "fixed telephone network services" under the Act. The conclusion that fixed wireless services are included within the definition of "fixed PDN" is not sufficient in itself to justify moving away from the clear meaning of the term "fixed".
- 23 In LLU, the Commission was considering the definition of "fixed PDN" and it is notable that the Commission only concluded that fixed wireless solutions were included, not all wireless solutions.

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<sup>4</sup> The Commission expressly stated at paragraph 155 of the Local Loop Unbundling Report that it had not addressed the boundaries between mobile data networks and fixed wireless networks and would do so in future applications if necessary.

- 24 For the reasons set out above, a fixed wireless solution can only be one which has a network connection to the end-user's building/user's premises. Any description of a service that moves away from this requirement is clearly contrary to the plain meaning of the Act.
- 25 Parliament clearly designated two separate services: fixed number portability and cellular number portability. The services are mutually exclusive. There is no suggestion that cellular services were intended to be included within the definition of "fixed telephone network services" for the purposes of local number portability.
- 26 The Commission must avoid blurring the line between the two distinct services in the Act. The Commission states that it agrees that the Act does not permit fixed to cellular portability. However, the "fixed wireless" service described in the Draft Determination is not a "fixed telephone network service". By departing from the clear interpretation of the Act, the distinction between the two services becomes ambiguous. This is contrary to Parliament's intention, the ordinary words of the Act, and the best interests of end-users.

#### *Local Calling Area*

- 27 The service description in Schedule 1, Part 2, Subpart 2 of the Act defines local telephone number portability as:
- " 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 the local calling area." (emphasis added)*
- 28 Accordingly, a fixed number can only be ported to a service offered in the same local calling area within which the Donor Carrier offers the service.
- 29 The Commission's description of the "fixed wireless" service is also unworkable bearing in mind the additional requirement that numbers can only be ported within a local calling area.
- 30 As set out in section D of these submissions, it is critical that the local calling area be defined by the Donor Carrier. That local calling area must be one in which there is a consistent set of attributes between the Donor Carrier's local services. In Telecom's case, this is usually the exchange service area.
- 31 The "fixed wireless" service described by the Commission is likely to breach this requirement, as the service would allow a ported customer to move outside the Donor Carrier-defined local calling area while continuing to receive the "fixed wireless" service. In fact, it would allow ported

customers to move their permanent premises outside the Donor Carrier-defined local calling area.

## Policy

- 32 The ambiguity created by the Commission's description of a "fixed wireless" service creates a risk that a cellular service will be able to have a local number ported to it. As well as clear legislative intention, there are good policy reasons for not permitting fixed to cellular portability, and the Commission has acknowledged that the Act does not permit fixed to cellular portability.
- 33 Telecom set out those policy grounds in its 11 March 2005 submissions on the Functions Application. In summary:
- 33.1 New Zealand's numbering system divides the numbering plan into a series of different numbering ranges, with each number range being allocated for a different purpose. A key feature of the numbering plan is that the number dialled indicates the type of service that is being called.
- 33.2 The dialled number is also relied on by carriers in setting and signalling their retail charges to customers.
- 33.3 If fixed to cellular portability was introduced, the dialled number could no longer be relied on to inform the caller of the applicable charge. This would create substantial customer confusion.
- 33.4 The free calling provisions for local residential voice telephone service in the TSO Deed are not based on dialled numbers and expressly exclude calls to devices connected to cellular, mobile radio, paging or other similar networks. To date the use of local and mobile numbers has aligned with this TSO charging distinction. Allowing local numbers to be ported to cellular networks would break this link, and potentially cause significant customer confusion as to the charges likely to be incurred for any call to a local number.
- 34 Issues around consumer confusion and number portability have been recognised by other regulators, as set out in Telecom's 11 March 2005 submissions:
- 34.1 Oftel required all mobile phones to have one easily identifiable number range to eliminate consumer confusion about when they were actually calling a mobile phone; and

- 34.2 While fixed to mobile number portability is available in the US, in the US the receiving party pays.

### **Vodafone is not an access seeker or access provider of local number portability**

- 35 Telecom agrees with both the Commission and Vodafone's view that Vodafone is not an access provider for the local number portability service.
- 36 In order to be an access seeker or access provider of local number portability, Vodafone will first need to operate a fixed telephone network service. The cellular service operated by Vodafone does not satisfy the access seeker or access provider definitions for local number portability.

### **Other issues**

- 37 As detailed above, the Act is clear that the local number portability service only applies to services offered via a fixed network connection to the end-user's building/premises. The "fixed wireless" service described in the Draft Determination is a departure from this. Without prejudice to Telecom's view that such a departure is unjustified under the Act, Telecom makes the following comments about the "fixed wireless" service proposed in the Draft Determination.
- 38 It is not clear exactly what services the Commission intends to be covered by its description of a "fixed wireless" service. For example, it is not clear:
- 38.1 Whether the Commission intends its "fixed wireless" service to be one that can utilise more than one cell site, or whether it is one that can only use a single "home" cell site;
- 38.2 Whether a service provider can provide a "bridging service" to allow service handover during the call between the "fixed wireless call" a cellular call.
- 39 It is critical that these ambiguities are clarified to ensure that the Commission's intentions are clear, and to ensure that there is not further departure from the plain meaning of the Act. Any further departure would not only be clearly contrary to the Act, but would also potentially have wide ranging consequences for interconnect charging and market structure of telecommunications in New Zealand (amongst other things).
- 40 Telecom understands that the Commission intends that its "fixed wireless" service could only be used within the coverage area of one "home" cell site. For the avoidance of doubt, this should be clarified in the final determination.

- 41 Telecom presumes that the Commission does not intend its “fixed wireless” service to be one that can be used within the coverage area of any cell site at a given time. For example, a customer using such a “fixed wireless” service should not be able to make one call while at home in Brooklyn (serviced by a fixed wireless transmission tower in Brooklyn), then drive to work in island Bay and make another call while being serviced by the Island Bay transmission tower. Such an approach would be a further departure from the plain meaning of the word “fixed”, as there would be no one permanent fixed point to which to tie the service. A service which allows a customer to make and receive calls within multiple separate service areas is clearly more akin to a cellular service than a fixed service.
- 42 Telecom understands that the Commission does not intend its “fixed wireless” service to cover a service that includes call handover. For the avoidance of doubt, the Commission should clarify that this also means that a service that allows service handover (i.e. handover between a fixed call and a cellular call) is excluded. The Commission should clarify that calls to and from customers using a local telephone network service must be dropped if the customers leave the “local calling area”.

## C GRANTING EXEMPTIONS

### *Scope of Exemptions*

- 43 The Commission has correctly identified that the parties have agreed the *process* for obtaining exemptions should be as set out in the draft Network Code. The outstanding concern is the *scope* of any exemptions.
- 44 Telecom agrees with the Commission's view that the exemption process should be available for exemptions to any aspect of the Network Terms<sup>5</sup>. Telecom also agrees that the Network Terms are sufficiently robust to ensure that any exemption is restricted to the minimum scope necessary. Telecom set out its reasons in support of this view in its submissions on the Functions Applications, dated 11 March 2005, and reiterates, but does not repeat, those submissions here.
- 45 The Commission has also correctly identified that a relaxation under the Network Terms may affect a party's ability to meet an obligation under the LMNP Terms. The Commission has stated 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<sup>6</sup>. Telecom understands the Commission to mean that exemptions under the LMNP Terms will be granted as permitted by the Network Terms.

### *Decisions on exemptions*

- 46 The Commission has amended the Network Code so that any exemptions from the Code/determination are decided by the Commission on recommendation of the TCF Management Committee. Alternatively, a party can apply directly to the Commission for an exemption under sections 58 or 59 of the Act.
- 47 The effect of the Commission's amendment is to give the Commission the power to amend a determination, other than is permitted by sections 58 and 59 of the Act. Telecom disagrees that the Commission can grant itself such a power. The Act provides a specific process by which a determination may be clarified or amended, and for the Commission to provide itself with an additional power would subvert this process and be *ultra vires* the Act.

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<sup>5</sup> Commerce Commission Draft Determination, paragraph 98

<sup>6</sup> Commerce Commission Draft Determination, paragraph 99

- 48 While Telecom agrees that applying under section 58 or 59 to amend the determination to permit an exemption may be cumbersome in the present circumstances, this does not justify a move away from clear processes set out in the Act.
- 49 The Act clearly anticipates that the purpose of codes is to allow for industry self-regulation. On this basis, when developing the Network and LMNP Codes, the parties considered it appropriate that the TCF Management Committee be the body to grant exemptions. However, an anomaly in the Act (which means that approved codes are not enforceable) has meant that the parties have had to apply for determination of the Codes<sup>7</sup>. Accordingly, the Codes (or Terms) will have the status of a determination under section 39 of the Act.
- 50 As a result, the only workable solution, and solution that is permitted by the Act, is to require that a party apply under section 58 or 59 of the Act for the Commission to grant a relaxation to the determined Network and LMNP Terms.

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<sup>7</sup> This issue is dealt with in more detail in section I

## D THE LOCAL CALLING AREA

51 While Telecom does not consider the Commission's proposed changes to the "local calling area" definition materially alters the effect of that provision, Telecom does have some concerns that the Commission's proposed definition of "fixed telephone service" conflicts with the definition of "local calling area".

52 The definition of "local calling area" submitted in the draft Network and LMNP Codes was:

*"The geographic area defined by the Donor Carrier within which customers have access to a local service with a consistent set of attributes."* ("**original definition**")

53 In response to Vodafone's concerns that the last words of this definition could preclude its qualification as an access seeker for local number portability, the Commission has amended this definition of "local calling area" to:

*"The geographic area defined by the Donor Carrier within which customers have access to a local service."* ("**revised definition**")

54 The words "with a consistent set of attributes" relate to a consistent set of attributes within the Donor Carrier's local service. The words do not relate to the Gaining Carrier's service in any way. Vodafone has misunderstood the meaning of the definition, and the inclusion of the additional words are not relevant to Vodafone's qualification or otherwise as an access seeker for the local number portability service. Indeed, in preparing the Code, Telecom did not consider the requirement that the Donor Carrier's local service have a consistent set of obligations implied any extra obligations on the Gaining Carrier other than those set out in clause 4.1.8 of the LMNP Terms.

55 Rather, the words serve to clarify the purpose of the definition – which is to allow the Donor Carrier to define the geographic area within which a ported number from its network must physically remain. This is imperative for three reasons:

55.1 If a number is allowed to be ported outside of the donor carrier's "local calling area", this will threaten the integrity of the donor carrier's call routing rules and outcomes and may prevent equivalent service being provided to the ported customer under the Network Terms;

- 55.2 Allowing a number to be ported outside of the donor carrier's "local calling area" will in many cases preclude that carrier from winning that customer back, as its network and systems will have a hard-wired assumption that that number is located within the "local calling area". This will not be to the long term benefit of end-users; and
- 55.3 To prevent customer confusion as to when a call to a local telephone number will be free, and when it will be charged as a toll call. If a number out-ported from a given Telecom toll area is allowed to serve a customer who moves geographically outside the Telecom toll area boundary (eg from the Wellington calling area to Kapiti) this immediately raises the question of whether a call dialled to it from inside the Telecom toll boundary is to be a free call or a toll call.
- 56 Local telephone numbers are allocated on a geographical basis – from international and area code prefixes down to exchange service area number groups. As a consequence, many telecommunications systems and services rely on the implicit geographical indicators of local telephone numbers. In Telecom's network for example, the specific geographical position implied by each number is fundamental to the integrity of all call routing rules and outcomes. The most obvious example of this is the area code suffix that sits in front of every local number, but other examples include:
- 56.1 At a broad regional level, emergency service (111) calls are routed to the appropriate emergency services communications centre based on the geographical area implied by the calling party's local number;
- 56.2 Similarly, at an exchange service area level, calls to certain types of freephone numbers, such as the Pizza Hut 0800 number, are routed to the 0800 customer's nominated (often the nearest) call centre or outlet based on the geographical position of the ESA implied by the calling party's number; and
- 56.3 More fundamentally, all of Telecom's call routing is based on its network of exchange service areas. Number ranges are "assigned" to ESAs and as a general rule, Telecom's network relies on an assumption that numbers within one ESA's number range will be connected only to that ESA. For this reason, Telecom does not, other than in very rare instances, provide geographic porting between ESAs to its customers.
- 57 Unless the Donor Network retains the right to define the "local calling area" within which any of its numbers may be ported, the integrity of such call routing rules and outcomes is lost – meaning that ported customers may not be provided with equivalent service for some calls (eg calls to some

0800 numbers), and the ability of the Donor Carrier to compete for out-ported customers' business is removed.

- 58 In this context, the words "with a consistent set of attributes" clarify that the local calling area is an area which is limited to the area in which to those numbers which, from the donor network's perspective, have a consistent set of attributes, which would include geography for the purposes of routing. In Telecom's network, this is likely to be an exchange service area.
- 59 This definition was intended to be consistent with the ACIF Code's definition of "Ported Number Service Area". The ACIF Code's definition of "Ported Number Service Area" makes specific reference to the geographic area serviced by a carrier's telephone exchange, and Telecom would accept a revised definition of "local calling area" that was consistent with the ACIF Code:

*"The geographic area defined by the Donor Carrier which is serviced by the Donor Carrier's local exchange."*

- 60 Such a definition would address the issues detailed above.

**E ONGOING NON-COMPLIANCE WITH SERVICE LEVELS AND EQUIVALENT SERVICE CRITERIA**

61 The Commission's view is that the agreed provisions of the draft Network and LMNP Codes enabling the enforcement agency to:

- (a) A warning;
- (b) A letter of caution;
- (c) Public censure; and
- (d) Enforcement by the High Court pursuant to section 61 of the Act

provide an appropriate balance and incentives. 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 draft determination<sup>8</sup>.

62 Telecom agrees with the Commission's view and notes it is consistent with the Commission's views in other contexts. The two additional proposed consequences for non-compliance are unnecessary, and inconsistent with the scheme of the Act. Telecom provided detailed submissions in support of its position in its submissions on the Functions Application dated 11 March 2005. Telecom refers to the submissions and does not repeat them here.

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<sup>8</sup> Commerce Commission's Draft Determination, paragraph 125

**F CONTESTING ENFORCEMENT AGENCY DECISIONS IN RESPECT OF EXEMPTIONS**

- 63 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<sup>9</sup>. 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 draft determination.
- 64 Telecom agrees with the Commission's view. Detailed reasons for Telecom's position were set out in its submissions on the Functions Application dated 11 March 2005. Telecom refers to those submissions and does not repeat them here.

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<sup>9</sup> Commerce Commission Draft Determination, paragraph 134

## **G INTERNATIONALLY ORIGINATING SHORT MESSAGES**

- 65 The Commission has expressed a view in its Draft Determination that cellular operators should be required to provide equivalent service in relation to internationally originated SMS. Telecom supports this view and welcomes guidance from the Commission to facilitate commercial arrangements.
- 66 However, the Commission does not express any view as to what regime cellular operators should be required to implement to ensure that equivalent service is able to be provided for these short messages. Instead, it has suggested that the cellular operators should agree this between themselves. As is clear from the submissions received from Telecom and Vodafone, bilateral agreement on the appropriate regime may not be possible on this issue without guidance from the Commission.
- 67 Treatment of internationally originated short messages was a contentious (and unresolved) issue in Australia for some time after mobile number portability was implemented there, and Telecom is concerned that there remains a risk this experience will be repeated in New Zealand.
- 68 Therefore, Telecom requests that the Commission go further in its Final Determination and indicate to the cellular operators:
- 68.1 What type of regime it would expect to see implemented for internationally originated SMS; and
- 68.2 that it would not consider it appropriate for cellular operators to agree interconnection arrangements with overseas parties which cover number ranges allocated to any other cellular operator by the NAD.
- 69 In paragraphs 154 and 155 of its Draft Determination, the Commission suggests Telecom should rely on the NAD to prevent Vodafone or other New Zealand Mobile Operators using its number ranges in SMS interconnection arrangements with international operators. The NAD contains no provisions covering this issue. This issue has arisen as a result of the introduction of number portability, and as such, it should be dealt with in the Commission's number portability determination.

### *Achieving equivalent service for internationally originated short messages*

- 70 Telecom and Vodafone have submitted two differing possible industry arrangements which would allow for equivalent service for internationally originated short messages:

- 70.1 Vodafone has suggested that all New Zealand cellular operators agree to donor routing between themselves, but only for internationally originated messages sent to ported numbers from international operators with which both the RNO and the DNO have SMS interconnectivity;
- 70.2 Telecom has suggested that all New Zealand cellular operators agree to open up all New Zealand number ranges in their SMS interconnection arrangements with international operators, and provide donor routing for all short messages to and from New Zealand mobile numbers to international mobile numbers. Where two or more New Zealand cellular operators agree SMS interconnection arrangements with the same international operator, each would remove the others' number ranges from the ambit of their arrangements with the international operator.
- 71 The Act requires the Commission to satisfy itself that the regulatory options it chooses best promote the section 18 purpose statement, and while each of these proposals would address the simple issue of equivalent service, they would have very different consequences for broader competitiveness in mobile markets going forwards. Vodafone's proposal would allow it to open up all of the New Zealand number ranges in its SMS interconnection arrangements with international operators, effectively preventing Telecom (or any other New Zealand cellular operator) from agreeing an SMS interconnection arrangement with those operators. Vodafone could then drop any short messages it received that were destined for a non-Vodafone customer. The equivalent situation in the fixed telephony world would be:
- 71.1 Telecom asking all international operators with which it has interconnection agreements for voice services, to send it all voice traffic destined for New Zealand; and
- 71.2 Telecom discarding any voice calls received which were destined for TelstraClear, CallPlus, or any other parties' customers.
- 72 Telecom's proposal would give all New Zealand cellular operators, and their customers, SMS access to the same international operators. Importantly, all New Zealand operators would retain the right to allow or prevent another operator from opening up their number range in agreements with international operators. This proposal is likely to best give effect to the section 18 purpose statement.

## H DATE OF INCEPTION AND EXPIRY

### *Date of Inception*

- 73 The Commission has stated that the "date of inception" is the date of the determination. The Commission states that the purpose of setting a date of inception is to ensure parties take the necessary steps to ensure they meet the "go live" dates specified in the terms and conditions of the determination.
- 74 Telecom submits that it is not necessary to specify such a date in order to ensure parties take the necessary steps to meet their obligations by the implementation date. On the implementation date, parties will have legally enforceable obligations under the determination. This logically provides an incentive for parties to take the necessary steps to ensure compliance by that date.
- 75 If the Commission does specify a date of inception, it must be explicit that parties are not required to meet any of the terms of the Determination, and that the terms of the Determination are not enforceable under section 61 of the Act, until the "go live date".

### *Date of Expiry*

- 76 The Commission has proposed that a 10 year period for Number Portability is appropriate.
- 77 While Telecom agrees that such a period will ensure consistency and provide certainty for parties going forward, the term may be unworkable. Technology is likely to change significantly over the next 10 years. There is a risk that a Number Portability determination in 2005 may quickly become outdated and obsolete. While there are mechanisms for amending a determination (sections 58 and 59), ad hoc amendments may be inappropriate and cumbersome.
- 78 Telecom proposes that a 5 year timeframe is more appropriate. It is consistent with the "sunset" clauses in the Act, and is also consistent with the forward looking approach the Commission commonly adopts.

### *Implementation of the Determination*

- 79 Clause 1.4 of the Commission's Draft network Terms places a requirement on parties to the Commission's Final Determination to:

*"be able to connect to the IPMS and use it to test their systems and processes [not later than 1 April 2006]"*

- 80 As the parties to the Final Determination are not wholly responsible for the design, construction and implementation of the IPMS, it is inappropriate to place this requirement on them. Even the words "be able to" do not provide sufficient protection to the parties. It is entirely feasible for example that work on the IPMS may be delayed through no fault of the parties, such that:
- 80.1 The IPMS is not available to be connected to on 1 April 2006; and/or
- 80.2 Sufficient information on the IPMS is not available to the parties in sufficient time to allow them to be able to connect to the IPMS on that date.
- 81 Already Telecom understands that the IPMS may not be available for carrier integration testing at 1 April 2006.
- 82 As Hewlett Packard (who are providing the IPMS) is not a party to the Determination, the Final Determination will not be binding on them. Accordingly, parties will have no power to enforce the terms of the Determination against Hewlett Packard.
- 83 While parties may have contractual remedies if Hewlett Packard were not to meet a set date, this would not remedy a breach by the parties of date determined by the Commission.

*A date for connecting to the IPMS is not necessary*

- 84 Telecom considers it is unnecessary for the Commission to include any date in its Final Determination other than the final implementation date for Local and Mobile Number Portability. The TCF currently has an implementation project underway, which includes provision for carriers to interface with and test the IPMS. This project includes a detailed project plan and timeline, and should be sufficient to ensure that all Carriers connect to the IPMS in time to provide Number Portability by the final implementation date. Importantly, this plan can be amended as need be (if for example, construction of the IPMS is delayed).
- 85 Clause 1.4 of the Draft Network Terms indicates that the purpose of the connection to the IPMS is to enable Carriers to test their internal systems and processes. The timing of this step in a Carrier's implementation project should be at that Carrier's discretion, as each project will have its own timeline. Typically in such projects, integration testing with an external database such as the IPMS, will not be appropriate until the internal systems and processes are completed.

- 86 In relation to Telecom's Mobile Number Portability project for example, those systems are unlikely to be completed before the second half of 2006 at the earliest. This project is already working to very tight timeframes, so any requirement that forced Telecom to connect to the IPMS to test its systems and processes for Mobile Number Portability in April 2006 would introduce unnecessary and potentially damaging complexity and disruption. Telecom is therefore strongly of the view that it is would not therefore be appropriate for the Commission to include this date for IPMS integration testing for Mobile Number Portability access providers/seekers.

## **I AMENDMENTS TO THE NETWORK AND LMNP CODES**

- 87 We note that the Commission reviewed the Codes in their entirety and, in addition to ruling on the areas of disagreement, changed the wording of several aspects of the Codes which were agreed between the parties.
- 88 The parties intend to comment on various aspects of the changes made by the Commission in a joint submission.
- 89 Generally Telecom is of the view that the Commission should be reluctant to change Codes which have been agreed by the parties and which have been carefully constructed over a number of months. The changing of even minor words may have large repercussions for the parties.
- 90 The Act clearly anticipates that Codes will be developed as a form of industry self-regulation. However, an anomaly in the Act means that determined codes will not be enforceable. To ensure that the Network and LMNP Codes were enforceable, the parties applied for a determination under section 31 of the Act.
- 91 Consistent with the intention of industry self-regulation, the Commission should be reluctant to amend terms that have been agreed between the parties.