

**COMMERCE COMMISSION**

Decision 521

**Decision to Clarify Determination on the TelstraClear  
Application for Determination for “Wholesale” Designated  
Access Services (Decision 497)**

Clarification under section 58 of the Telecommunications Act (“the Act”) of the Commerce Commission’s Decision 497, a Determination under section 27 of the Act in the matter of an application for determination for designated access services by:

**TELSTRACLEAR LIMITED****and****CLEAR COMMUNICATIONS LIMITED**

**Commission:** Douglas Webb  
Paula Rebstock  
Donal Curtin

**Summary of Application:** On 8 April 2004, TelstraClear Limited and Telecom New Zealand Limited (“the Parties”) advised the Commission that the Parties had agreed on a clarification, under section 58 of the Act, of the Designated Services Price List (“DSPL”) audit process as determined in Decision 497.

**Decision:** Under section 58, the Commission has decided to amend Decision 497 for the purpose of clarifying the DSPL audit process as determined in Decision 497.

**Date of Clarification:** 13 May 2004

## INTRODUCTION

1. The Telecommunications Act 2001 (“the Act”) 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 clarifications of determinations under section 58 of the Act.
3. The Commission may amend a determination for the purpose of making a clarification under section 58 of the Act, if the Commission, on its own initiative or on the application of any person, considers that:
  - a determination requires clarification;
  - the clarification is either not material to any person affected by the determination or is agreed to by all those persons; and
  - no appeal is pending concerning the determination.

The Commission is required to give public notice of an amendment to a determination made under section 58.

## THE APPLICATION

4. On 12 May 2003, the Commission issued Decision 497 on the TelstraClear Application for Determination for “Wholesale” Designated Access Services. As part of that Determination, the Commission determined that Telecom must provide to TelstraClear and the Commission a comprehensive Designated Services Price List (“DSPL”) of all services to be supplied to TelstraClear under that Determination<sup>1</sup>. The Commission also determined that an audit of the DSPL must take place quarterly to verify the correctness of the calculations made by Telecom in determining standard retail prices<sup>2</sup>.
5. On 16 February 2004, Telecom wrote to the Commission proposing that the DSPL audit process set out in Decision 497 be amended to reduce Telecom’s compliance costs arising from Decision 497<sup>3</sup>.
6. On 2 March 2004, TelstraClear provided written comment to the Commission on Telecom’s proposed limited scope audit process<sup>4</sup>. TelstraClear stated that it was prepared to accept Telecom’s proposals subject to a number of

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<sup>1</sup> Commission, *Determination on the TelstraClear Application for Determination for “Wholesale” Designated Access Services* (Decision 497), 12 May 2003, paragraphs 653-656.

<sup>2</sup> *ibid* paragraphs 657-660.

<sup>3</sup> Letter from Telecom (Parkes) to the Commission (Webb), *Designated Services Price List: KPMG audit scope*, 16 February 2004.

<sup>4</sup> Letter from TelstraClear (Wells) to the Commission (Webb), *Wholesale Determination Decision 497: KPMG DSPL Audit Scope*, 2 March 2004.

additional safeguards.

7. On 10 March 2004, the Commission received a response from Telecom to TelstraClear's proposed additional requirements for a limited scope DSPL audit<sup>5</sup>. Telecom's letter set out a counter-proposal to TelstraClear's 2 March 2004 proposal.
8. On 17 March 2004, TelstraClear wrote to the Commission setting out its views on Telecom's counter-proposal.<sup>6</sup> This letter indicated that the Parties appeared to agree on all but one of the conditions (item 4(g)) set out in TelstraClear's 2 March letter.
9. On 26 March 2004, the Commission informed the Parties in writing that it was considering whether to amend Decision 497 by way of a clarification under section 58 of the Act<sup>7</sup>. The Commission stated that 'subject to any further comments from TelstraClear concerning item 4(g), the Commission will need to consider whether the clarification is material'<sup>8</sup>.
10. On 8 April 2004, the Parties advised the Commission in writing that they had mutually agreed a clarification under section 58 of the Act following Telecom's request to move to a limited scope audit process<sup>9</sup>. The Parties attached the terms of the agreed clarification to that letter.

## THE FRAMEWORK FOR THE DECISION

11. Section 58 of the Act states that:

**58 Clarification of determination**

- (1) The Commission may amend a determination for the purpose of making a clarification if –
  - (a) at any time the Commission, on its own initiative or on the application of any person, considers that a determination requires clarification; and
  - (b) the clarification is either not material to any person affected by the determination or is agreed to by all those persons; and
  - (c) no appeal is pending in respect of the determination.
- (2) The Commission must give public notice of an amendment to a determination made under subsection (1).

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<sup>5</sup> Letter from Telecom (Parkes) to the Commission (Borthwick), *Designated Services Price List: KPMG audit scope*, 10 March 2004.

<sup>6</sup> Letter from TelstraClear (Wells) to the Commission (Borthwick), *Designated Services Price List: KPMG Audit Scope*, 17 March 2004

<sup>7</sup> Letter from the Commission (Webb) to TelstraClear (Wells) and Telecom (Parkes), *Wholesale Determination Decision 497: Scope of the DSPL Audit*, 26 March 2004

<sup>8</sup> *ibid* paragraph 9.

<sup>9</sup> Letter from Telecom (Oakley) and TelstraClear (Wells) to the Commission (Abbott), *Wholesale Determination Decision 497: Scope of DSPL Audit*, 8 April 2004.

12. Section 58(1)(a) provides that the Commission may amend a determination on its own initiative or on the application of any person, if it considers that the determination requires clarification. The Parties have jointly requested that the Commission issue a clarification under section 58. The Commission is satisfied that a clarification of Decision 497 is required, to enable Telecom to reduce its compliance costs while maintaining the integrity of the DSPL auditing process set out in Decision 497.
13. Section 58(1)(b) requires that the clarification is either not material to any person affected by the determination or is agreed to by all those persons. The Parties have jointly agreed a change to the DSPL audit process. The Commission is satisfied that no other persons would be materially affected by this clarification as Decision 497 is a binding determination on Telecom and TelstraClear only. In addition, the proposed change to the audit does not change the auditing process per se, but rather the frequency with which it occurs. Accordingly, the Commission does not consider that the agreed change in scope would be likely to materially affect any person other than Telecom and TelstraClear.
14. The Commission notes that no appeal is pending on Decision 497.

## **COMMISSION DECISION UNDER SECTION 58 OF THE ACT**

15. Following the proposal to amend the DSPL audit process received from Telecom, the subsequent consultation process with both the Parties, and applying section 58 of the Act, the Commission has concluded that Decision 497 requires clarification.
16. The Commission makes the following amendments to Decision 497 for the purpose of clarifying the DSPL audit process:

*(i) Full audit once every 12 months*

A full audit of DSPL will take place every 12 months for one of the DSPL quarters in accordance with KPMG's terms of reference as approved by the Commission from time to time. The actual DSPL quarter for the full audit is to be selected by the Commission (after consultation with Telecom, TelstraClear and other relevant access seekers<sup>10</sup>). The Commission will notify Telecom, TelstraClear and other relevant access seekers of the selected quarter no later than the commencement of that quarter. If the Commission has not nominated a quarter for a full audit within any 12 month period, the full audit will be conducted for the last quarter of Telecom's financial year.

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<sup>10</sup> 'Relevant access seekers' is defined as those access seekers who were supplied by Telecom with DSPL services during the quarter covered by the limited scope audit.

*(ii) Additional full audits in exceptional circumstances*

- (a) If KPMG identifies in any audit that that audit shows widespread or systematic problems (in the opinion of KPMG), the Commission may require that a full audit be conducted in the next quarter. Full audits would continue to be conducted until such time as the widespread or systematic problems had been eliminated. If the problems are identified as being confined to a particular product family or set of product families, the Commission can require that those product families be included in the next limited scope audit.
- (b) If any relevant access seeker considers that there are widespread or systematic problems with an audit, but KPMG has not expressed this opinion, that access seeker has 15 working days from the issuing of the final audit to raise this matter with the Commission. The Commission will then within 10 further working days consider whether the complaint is well-founded and if so may require a full audit, or an audit of certain product families, to be conducted in accordance with paragraph (a).

*(iii) Limited scope audit in all other cases*

- (a) Each limited scope audit would cover one third of the product families (comprising all the individual products and services within each of those product families) within the DSPL. The audit of product families within a limited scope audit is to be conducted in the same manner as the audit of product families would be conducted in a full audit. Each successive third of the DSPL will be audited over each of the three DSPL quarters within each 12 month period in which the annual full audit is not conducted. The order would be as the product families are ordered within DSPL. The limited scope audits would be conducted in accordance with KPMG's terms of reference approved by the Commission from time to time.
- (b) If Telecom releases a new product during a DSPL quarter covered by a limited scope audit, the product family into which that new product falls will be included in the limited scope audit.
- (c) If Telecom has announced any major changes in its standard prices ( $\geq 5\%$  increase or decrease) for major wholesale products (defined as Streamline Data, Megalink, Access, and Jetstream) during a DSPL quarter covered by a limited scope audit, the product families within which the price changes have occurred will be included in the limited scope audit relevant to the first billing month impacted by the changes. This would allow verification that major changes in Telecom retail prices, which will affect retail level competition between Telecom and access seekers, have flowed through to wholesale pricing.

- (d) Product families added to a limited scope audit pursuant to either paragraph (b) or (c) will be in addition to the one third of product families due to be included in that limited scope audit (unless those added product families are already included in the third). For the avoidance of doubt, product families which have been included in a limited scope audit within a 12 month period by reason of paragraphs (b) or (c) will still be included in a subsequent limited scope in that 12 month period when it is their turn to be included in accordance with paragraph (a).

*(iv) Implementation*

- (a) The KPMG terms of reference will be amended to reflect these arrangements. KPMG will submit amended terms of reference for approval by the Commission within 10 working days of the Commission amending Decision 497 to incorporate these agreed terms.
- (b) If KPMG requires clarification or interpretation of these arrangements, KPMG must notify the Commission. The Commission will provide Telecom and TelstraClear with an opportunity to put their views to the Commission on the matters on which KPMG seeks clarification from the Commission.

DATED this 13th day of May 2004



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Douglas Webb  
Telecommunications Commissioner  
Commerce Commission