



COMMERCE COMMISSION

**APPLICATION BY TELSTRACLEAR LIMITED UNDER SECTION 20 OF  
THE TELECOMMUNICATIONS ACT 2001 FOR THE DESIGNATED  
ACCESS SERVICES “ACCESS TO, AND INTERCONNECTION WITH,  
TELECOM’S FIXED PDN” AND “ACCESS TO TELECOM’S FIXED PDN  
BACKHAUL”**

**Order made by the Commerce Commission  
under section 15(i) of the Telecommunications Act 2001  
and section 100 of the Commerce Act 1986 and section 9(6) of the  
Telecommunications Act 2001**

Order made by: Douglas Webb, Telecommunications Commissioner

Date of Order: 9 November 2004

## **Background**

1. On 4 November 2004, TelstraClear Limited (“TelstraClear”) submitted an application (“the Application”) for a determination for the designated access services of “access to, and interconnection with, Telecom’s fixed PDN” and “access to Telecom’s Fixed PDN backhaul” under section 20 of the Telecommunications Act 2001 (“the Act”).
2. The Commission makes this order (the “Order”) in relation to the Application, the parties to which are Telecom New Zealand Limited (“Telecom”) and TelstraClear (each a “Party”, and collectively known as the “Parties”), to prohibit the disclosure of any Information provided to the Commission during the course of the Proceeding and identified by any Party or the Commission as being confidential on and from 4 November 2004.
3. This Order deals with one category of Information in relation to the Proceeding, namely “Restricted Information”.
4. Where either Party requires greater protection for any Information over and above what is already provided for in this Order, the Party must write to the Commission, setting out the details of the Information in question, the reasons why greater protection is required for the Information and the type of protection required. Where necessary, the Commission will decide on the matter and will determine the applicable requirements of clause 9 of this Order.
5. This Order does not apply to information that is already in the public domain or that comes into the public domain (other than because of a breach of this Order).
6. For the purpose of this Order, a Party wishing to receive the other Party’s Restricted Information must appoint as a Nominated Counsel a person who has a current certificate to practise as a barrister and solicitor of the High Court of New Zealand. The Nominated Counsel for each Party is responsible for ensuring that all the requirements of this Order and including the relevant Deeds of Undertaking are satisfied. The Nominated Counsel must supervise all persons who receive access to Restricted Information under this Order. Each Party must advise the Commission who is the Nominated Counsel at any particular time.

## **Interpretation**

7. For the purposes of this Order:  
  
“Deed of Undertaking” means the deed of undertaking in the form prescribed in Schedule 1 of this Order;

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

“Proceeding” means the Commission’s proceeding to determine under the Act the terms on which the relevant designated services must be supplied as requested by, or arising from, the Application; and

“Restricted Information” means any Information which is claimed by either Party or the Commission as being confidential. Restricted Information does not include Information that is already in the public domain or that comes into the public domain (other than because of a breach of this Order).

### **Provision of Information**

8. Where a Party is providing Information to the Commission in relation to the Proceeding, the Commission orders that:
  - (a) The Party must provide the Information to the Commission (including all Restricted Information) no later than 5 pm on the due date or at such other time specified by the Commission;
  - (b) The Party must clearly identify Information that is to be regarded as Restricted Information including describing it as falling within one or more of the following categories:
    - (i) Financial;
    - (ii) Cost/price;
    - (iii) Trade secret;
    - (iv) Future business plans/strategic planning documents;
    - (v) Customer and customer related information;
    - (vi) Another category of Restricted Information specified to, and accepted by, the Commission.
  - (c) In order to comply with the requirement in clauses 8(a) and 8(b) of this Order that a Party providing Information to the Commission must clearly identify Information that is to be regarded as Restricted Information, that Party must clearly express the designation of every piece of Restricted Information it provides to the Commission by placing any Restricted Information inside square brackets with the designation of the Restricted Information next to those brackets (e.g.: Commission-designated Restricted Information, [ ] CRI, or Telecom-designated Restricted Information, [ ] TCNZRI, TelstraClear-designated Restricted Information, [ ] TCRI). That Party must also clearly mark documents containing Restricted Information with the word “Restricted” on the front page. However, where a document contains only one designation of Restricted Information, a party is deemed to have clearly expressed the designation of every piece of Restricted Information in that document provided that Party includes a clear statement at the beginning of the document that all the Restricted

Information in the document (as identified in brackets [ ]) is of the same designation and clearly marks the word “Restricted” on the front page of that document; and

- (d) Subject to clause 9 of this Order, a Party must provide to the other Party a copy of the Information including the Restricted Information no later than 5 pm (or at such other time specified by the Commission) on the same working day as the Information is provided to the Commission under clause 8(a) of this Order; and
- (e) A Party must provide to the Commission a public version of the Information (excluding all Restricted Information), which is suitable for disclosure on the Commission’s website, five working days after the Information is provided to the Commission under clause 8(a) of this Order.

### **Access to, and use and disclosure of, Information**

9. The Commission orders that:

- (a) No person may obtain access to, or publish, or communicate, or give evidence in relation to any Restricted Information except as provided for in this Order;
- (b) A Nominated Counsel who wishes to gain access to Restricted Information must sign and deliver to the Commission a Deed of Undertaking. The Nominated Counsel may disclose Restricted Information only to one or more of the following persons provided disclosure is reasonably necessary to render professional services in relation to the Proceeding:
  - (i) Other counsel (including internal counsel) who are actively engaged on behalf of the Party in relation to the Proceeding;
  - (ii) Partners, associates, secretaries, assistants, and employees of counsel; and
  - (iii) External consultants or external experts under the supervision of counsel retained to render professional services in relation to the Proceeding,

and provided that any such person has first signed and delivered to the Commission a Deed of Undertaking prior to receiving any Restricted Information. Such person becomes entitled to receive Restricted Information either:

- (iv) Where the person’s entitlement is unchallenged, two working days after the date on which the Commission releases a copy of the Deed of Undertaking; or
- (v) Where the person’s entitlement is challenged, on the day upon which the Commission decides in favour of the person’s entitlement to receive Restricted Information; or

- (vi) Where the Commission receives written confirmation from the other Party of the person's entitlement.
- (c) The Commission will provide a copy of each Deed of Undertaking it receives in relation to the Proceeding to the other Parties within two working days of receipt. The Commission will update Schedule 2 of the Order on its website where practicable;
- (d) Any challenge by a Party to a person's entitlement to receive the Restricted Information must be made in writing to the Commission (and copied to the other Party's Nominated Counsel) within two working days of that Party's receipt of the Deed of Undertaking. The Nominated Counsel for the other Party must deliver any written submissions in support of access to Restricted Information to the Commission within one working day of receipt of the challenge. The Commission will make reasonable efforts to decide on the person's entitlement to receive Restricted Information within three working days of receipt of submissions from the Nominated Counsel;
- (e) Where the Nominated Counsel of a Party wishes to disclose Restricted Information (which is claimed as Restricted by the other supplying Party) to persons other than those specified in clause 9(b) of this Order, the Nominated Counsel must apply to the supplying Party for approval of the terms of access to Restricted Information (including the period and scope of access). The Nominated Counsel and the supplying Party will endeavour in good faith to reach agreement on the terms of access within two working days. Where the Nominated Counsel and the supplying Party agree on the terms of access, the Nominated Counsel will advise the Commission in writing of the agreement. Where the Parties cannot agree on the terms of access within two working days, the Nominated Counsel may submit a written application to the Commission (and copied to the supplying Party) requesting access for certain persons and outlining the reasons for access and the details of the Restricted Information. The Commission will make reasonable efforts to decide on the person's entitlement to receive Restricted Information within three working days of receipt of the application;
- (f) Where the Nominated Counsel of one Party wishes to disclose Restricted Information (as designated by the Commission) to persons other than those specified in clause 9(b), the Nominated Counsel must submit a written application to the Commission requesting access for certain persons and outlining the reasons for access and the details of the Restricted Information. The Commission will make reasonable efforts to decide on the person's entitlement to receive Restricted Information within three working days of receipt of the application;
- (g) The Restricted Information may be disclosed to Commission members and Commission employees involved in the Proceeding, and to any person designated by the Commission on terms the Commission considers appropriate;

- (h) Any person (other than those specified in clause 9(g)) who receives the Restricted Information pursuant to this Order:
  - (i) must use the Restricted Information only in the conduct of the Proceeding;
  - (ii) must not use the Restricted Information for any other purpose, including business, governmental, commercial, or other administrative or judicial proceedings; and
  - (iii) must return or destroy all copies of the Restricted Information, except Restricted Information belonging to them, in accordance with the applicable Deed of Undertaking:
- (i) Any person who receives the Restricted Information under the terms of this Order may disclose, describe, or discuss the Restricted Information in any written material submitted to the Commission in relation to the Proceeding, provided that the written material is identified as Restricted Information in accordance with clause 8 of the Order, and provided that the written material is also submitted to the Commission and the other Party in accordance with clause 8 of the Order; and
- (j) For the avoidance of doubt, a Party supplying Information to the Commission in relation to the Proceeding (and which is not the other Party's Restricted Information) may use and disclose that Information (including its own Restricted Information) at its discretion and is not required to comply with the requirements of clause 9(a) to (i) of this Order in relation thereto.

### **Commission review of designations**

10. The Commission may on its own initiative review the status of, or the terms of access to, any Information claimed as confidential under this Order. Where circumstances permit, the Commission will give notice of its review and allow the Parties to comment within such period as specified by the Commission. The Commission will notify the Parties of the outcome of its review. Subject to this Order, any Information under review may not be disclosed to any person (other than at the discretion of the supplying Party) until the Commission has made a final decision on the matter.

### **Other challenges to designations and requests for access to Information**

11. Clause 11 applies where either Party is unable to invoke clause 9 of the Order in terms of challenging designations and requests for access to Information. Either Party may challenge the status of, or the terms of access to, any Information claimed as confidential under this Order, or request access to Information. Such an application for challenge (or request for access) must be submitted in writing to the Commission and outline the terms of access or the details of the Information in question and the reasons in support of the application.

12. The Party must provide a copy of its application, which satisfies the requirements of clause 11, to the supplying Party except where the Restricted Information in question is designated by the Commission. Subject to this Order, any Information subject to an application under clause 11 may not be disclosed to any person (other than at the discretion of the supplying Party) until the Commission decides the matter.
13. The supplying Party must make written submissions to the Commission within two working days of receipt of the application. The Commission will make reasonable efforts to decide on the application within two working days of receipt of the supplying Party's submissions or the application in relation to Commission-designated Restricted Information. Where the Commission decides that any person may access the Restricted Information, the Commission will determine the applicable requirements of clause 9 of this Order.

**Other matters**

14. The Commission may, at any time, modify, vary or revoke this Order.
15. For the avoidance of doubt, information not designated as Restricted Information and provided to the Commission by any Party during the course of the Proceeding and in the Commission's possession may be made available by the Commission to the public (including via the Commission's website) as if the Commission had received a request for disclosure of such information under the Official Information Act 1982 and no grounds for withholding the information exist under that Act.
16. This Order has effect until 20 working days from the date on which the Commission issues a determination under section 30 of the Act.

DATED this 8 day of November 2004

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Douglas Webb  
Telecommunications Commissioner  
Commerce Commission

## SCHEDULE 1

### DEED OF UNDERTAKING AS TO THE RETURN OF DOCUMENTS

1. This Deed of Undertaking (“Deed”) is made in relation to an Order (the “Order”) issued by the Commerce Commission (the “Commission”) pursuant to section 15(i) of the Telecommunications Act 2001 (the “Act”), section 9(6) of the Act and section 100 of the Commerce Act 1986 (the “Commerce Act”) on 9 November 2004, a copy of which is annexed marked Schedule 1. This Deed adopts the terms defined in the Order.
2. I, \_\_\_\_\_  
\_\_\_\_\_  
of, \_\_\_\_\_  
hereby irrevocably undertake to the Commission and to every person supplying the Restricted Information to the Commission as follows:
  - (a) not to use or refer to the Restricted Information in any way except in relation to the Proceeding; and
  - (b) not to disclose the Restricted Information or any part thereof to, or discuss it with, any person other than a person who has been provided with the Restricted Information and has given an undertaking to the Commission in the same terms as this undertaking (a list of whom is attached in Schedule 2 to this Deed); and
  - (c) not to make notes, summaries, copies, or records in any other form, of the Restricted Information except as is necessary for me to prepare for and present submissions to the Commission.
3. I understand that the list of people set out in Schedule 2 of this Deed may be varied from time to time and that the Commission will endeavour to update me of changes to this list where practicable.
4. On, or before, the expiry of the later of:
  - (a) the Order; or
  - (b) 20 working days following the date on which the Commission issues a determination under section 30 of the Act;

I undertake to:

- (d) return; or
- (e) destroy,

all copies of the Restricted Information obtained from the Commission, including any notes, records, summaries, or recordings in any other form which I may have made of the Restricted Information, except Restricted



**SCHEDULE 2**  
**PERSONS WHO HAVE SIGNED THE DEED OF UNDERTAKING AS TO**  
**CONFIDENTIALITY**

**Telecom Corporation of New Zealand Limited**

[ ]

**Telecom New Zealand Limited**

[ ]

**TelstraClear Limited**

[ ]

**SCHEDULE 3**  
**PARTIES WHO MAY RECEIVE RESTRICTED INFORMATION**

**Telecom Corporation of New Zealand Limited**

**Telecom New Zealand Limited**

**TelstraClear Limited**