

Regulatory Impact Statement

«DESIGNATION OF MOBILE TERMINATION ACCESS SERVICES»

AGENCY DISCLOSURE STATEMENT

This Regulatory Impact Statement has been prepared by MED.

It outlines the decision to add mobile termination access services ("MTAS") to the list of designated services in Schedule 1 of the Telecommunications Act 2001.

The Commerce Commission commenced its investigation into this issue on 6 November 2008. It delivered its final reports to the Minister on 22 February and 16 June 2010. In the intervening 18 months, the Commission prepared two draft reports and sought and received submissions and cross-submissions on both. It engaged reputed economic consultants to assist it in its investigations.

The Minister for Communications and Information Technology has held two public consultations on the reports produced by the Commission. He has also received in-depth advice from officials at the Ministry of Economic Development.

This Regulatory Impact Statement does not contain additional substantial analysis by the Ministry of Economic Development. However, the Ministry has read and understood all the analysis undertaken by the Commission. The Ministry's preferred option is to accept the Commission's recommendation.

The conclusions on impacts in this Regulatory Impact Statement are contingent on subsequent decisions taken by the Commission when setting the precise terms for mobile termination.

I do not consider that the decision to add MTAS to the list of designated services will, in any material way, impose additional costs on businesses, impair private property rights, market competition, or the incentives on businesses to innovate and invest, or override fundamental common law principles (c.f. Chapter 3 of the Legislation Advisory Committee Guidelines).

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STATUS QUO AND PROBLEM DEFINITION

Mobile termination access services (“MTAS”) are currently unregulated, meaning that the price and non price terms of their provision are negotiated commercially between the mobile network operator and the access seeker. However, since April 2007, one sub-category of MTAS (voice calls from New Zealand fixed-line networks to Telecom and Vodafone mobile phones) has been subject to price and non-price terms set out in Deeds Poll signed voluntarily by Telecom and Vodafone in April 2007.

The Commerce Commission has examined the wholesale and retail markets related to MTAS and determined that there is limited competition.

The Commission has proposed that the Minister add MTAS to the list of designated services in Schedule 1 of the Telecommunications Act 2001, because it considers that designation is the option that is likely to best promote competition for the long-term benefit of end-users within New Zealand.

OBJECTIVES

To promote competition in telecommunications markets for the long-term benefit of end-users within New Zealand.

REGULATORY IMPACT ANALYSIS

Under clause 6 of Schedule 3 of the Telecommunications Act 2001, the Minister for Communications and Information Technology has limited options when receiving a recommendation from the Commerce Commission: he is able only to accept, reject or require reconsideration of that recommendation.

In the present case, then, the Minister must accept the recommendation to designate, reject the recommendation to designate, or require the Commission to reconsider its recommendation to designate.

In graphical form, the three statutory options open to the Minister and their likely results for voice termination rate trends (in cents per minute with a second plus second billing increment) can be broadly represented as follows:¹

Opt	Decision	Other variable	2010	2011	2012	2013	2014	2015
1	Reject MTAS Recommendation in favour of 2007 Deeds	n/a	17.72	16.42	15.14	<u>13.91</u> (est)	<u>13.11</u> (est)	<u>12.95</u> (est)
2	Require reconsideration	Commission recommends Undertakings	17.72	16.42	9	8	6	<u>5</u> (est)
		Commission STD ² sets designation at upper bound rates	17.72	16.42	9.90 6.05 ³	5.45	4.9	4.41
		Commission STD sets designation at lower bound rates	17.72	16.42	8.25 4.49 ⁴	4.22	3.96	3.73
3	Accept MTAS Recommendation	Commission STD sets designation at upper bound rates	17.72	10.18 6.72 ⁵	6.05	5.45	4.9	4.41
		Commission STD sets designation at lower bound rates	17.72	9.44 4.77 ⁶	4.49	4.22	3.96	3.73

¹ Figures are based on analysis by the Commission: see Final Report, Table 1, at p.12. Underlined figures are estimates only.

² A standard terms determination (STD) process is the process by which the Commission determines the precise terms an access seeker can demand for the supply of a regulated service

³ Precise figure depends on whether or not, during the STD process, the Commission decides that a glidepath is appropriate.

⁴ Precise figure depends on whether or not, during the STD process, the Commission decides that a glidepath is appropriate.

⁵ Precise figure depends on whether or not, during the STD process, the Commission decides that a glidepath is appropriate.

The Commission compared the likely impact of each option (effectively, each set of wholesale prices) on competition in the two retail “telecommunications markets” for which MTAS is a wholesale input, namely:

- the retail market for mobile-to-mobile communications; and
- the retail market for fixed-to-mobile and toll call communications.

It performed this task both quantitatively (through an examination of consumer and total surpluses) and qualitatively (through an examination of smaller operators’ ability to compete for customers).

At the quantitative level:

- For the mobile-to-mobile market, the Commission noted that the complexities of quantitatively assessing competitive impact on a mobile-to-mobile retail market were enormous and that, as a result, a full quantitative assessment would not be undertaken. However, it had regard to the quantitative examples provided in submissions from interested parties.
- For the fixed-to-mobile market, the Commission concluded that designated wholesale prices would be the option with the best impact, the total surplus from designation (compared to the undertakings) being up to \$15 million, with the consumer surplus being up to \$39 million.

Subject to the caveats mentioned above, the Commission’s estimates of consumer and total surplus effects of designating, over the period 2010-2015 (at 2009 present value) can be broadly represented as follows (these estimates are highly sensitive to assumptions):

	Consumer surplus	Total surplus
Mobile-to-mobile	\$169m	\$44m
Fixed-to-mobile	\$119m-\$322m	\$60m-\$137m

At the qualitative level:

- For the mobile-to-mobile market, the Commission concluded that designated wholesale prices would be the only option that would enable 2degrees to compete effectively with Telecom and Vodafone.
- For the fixed-to-mobile market, the Commission initially considered that the wholesale prices under the undertakings and the wholesale prices under designation would both enable fixed-only operators such as TelstraClear and Orcon to compete with the integrated fixed-mobile operators Telecom and Vodafone. However, although it did not revisit this issue in its Final Reconsideration Report, the reasoning in that report refutes the hypothesis in the initial Final Report that fixed-only operators could compete effectively with Telecom and Vodafone in the provision to fixed-to-mobile calls, and more broadly in the fixed to mobile and tolls market.

Following a process of thorough consultation over the course of approximately 18 months, the Commission thus concluded that designation was the option that best promoted competition for the long-term benefit of end-users.

⁶ Precise figure depends on whether or not, during the STD process, the Commission decides that a glidepath is appropriate.

While the Minister must bring an independent mind to bear and not merely 'rubber stamp' the Commission's recommendation, he is **[withheld under section 9(2)(h) of the Official Information Act 1982 – legal advice]**.⁷

The Minister nevertheless undertook public consultation. Submission and cross-submissions did not convince him that rejecting the recommendation, or requiring its reconsideration, were options that would promote competition for the long-term benefit of end-users better than accepting the recommendation.

Furthermore, the Ministry of Economic Development is satisfied that the Commission has made its cost-benefit analysis in compliance with best practice.

In this context, the Minister relies on the impact analysis performed by the Commission.

CONSULTATION

Treasury and the Ministry of Foreign Affairs and Trade have been consulted. DPMC has been informed. The Commerce Commission has been consulted on technical details.

In relation to consultation with affected parties, the Commission followed the consultation process specified in the Telecommunications Act 2001 and responded to all issues raised in consultation in its subsequent reports.

The Minister's consultation process provided affected parties the opportunity to make submissions and cross-submissions on any residual concerns about the Commission's final reports. These issues concerned in particular the Commission's use of quantitative and qualitative analysis.

CONCLUSIONS AND RECOMMENDATIONS

Designation of MTAS is the option that is likely to best promote competition for the long-term benefit of end-users within New Zealand

IMPLEMENTATION

Following the Minister's decision to accept the Commission's recommendation, he will ask the Governor-General to issue an Order in Council amending the list of designated services in Schedule 1 of the Act.

The Commission will then begin a process to set the precise terms on which access seekers can request the provision of MTAS by New Zealand mobile operators. This process could take up to 9 months.

MONITORING, EVALUATION AND REVIEW

Upon publication of the Order in Council, the Commerce Commission will commence a standard terms determination process, the purpose of which will be to define the price and non-price terms on which mobile termination must be provided to access seekers.

Pursuant to Clause 1(3) of Schedule 3 of the Act, the Commission will be obliged to consider, within five years of the date on which the designation of MTAS comes into force (which will be upon completion of the standard terms determination process), whether there are reasonable grounds to commence a Schedule 3 investigation into omitting MTAS from Schedule 1.

⁷ **[withheld under section 9(2)(h) of the Official Information Act 1982 – legal advice]**