



Response to Telecom Draft Separation Undertakings

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INTRODUCTION

1 Approach

- 1.1 The mission of InternetNZ, the Internet Society of New Zealand Inc, is to protect and promote the Internet in New Zealand. We advocate the ongoing development of an open and uncaptureable Internet, available to all New Zealanders. The Society is non-partisan and is an advocate for Internet, and related telecommunications, public and technical policy issues on behalf of the Internet Community in New Zealand – both users and the Industry as a whole.
- 1.2 InternetNZ welcomes this opportunity to provide submissions to the Minister on the draft Undertakings (*Telecom Draft Separation Undertakings*) prepared by Telecom in response to the Minister’s Determination (*Telecommunications (Operational Separation) Determination 2007*).
- 1.3 As with all our previous submissions in this matter, InternetNZ has taken a thorough and careful analytical approach in comparing the Undertakings with the Determination. For operational separation, “*the devil is in the detail*”.
- 1.4 Firstly, we consider the legal framework and the obligations that were placed on Telecom.
- 1.5 Then, in the main body of the submission we outline some key issues and our recommendations using the following format:
 - Overview of the issue
 - Summary of the relevant part of the Determination
 - Summary of Telecom’s response to the Determination
 - InternetNZ comments
 - InternetNZ recommendation

- 1.6 Finally, in the attached Appendix, InternetNZ covers many of Telecom's departures from the Act and the Determination in detail.
- 1.7 For convenience, references in the footnotes to the Minister's Determination are to "MD" and to the Telecom Draft Undertakings are to "TU".

LEGAL FRAMEWORK

2 The Determination and the Act

- 2.1 The Determination specifies minimum requirements for the Undertakings¹. These minimum requirements are in addition to the substantial obligations on Telecom under Section 69D of the Act (*Telecommunications Act 2001*), which Telecom must also comply with in the Undertakings².
- 2.2 The Act required Telecom to provide the draft Undertakings in a form that included at least those minimum requirements in the Determination, plus fulfilment of the Act's requirements in s69D³. Anything less than this does not meet the Act's requirements.
- 2.3 In numerous respects the draft Undertakings do not meet the minimum requirements in the Determination, let alone the requirements in s69D. Often, this is happening in ways that substantially erode the objectives of the Minister's Determination (and the objectives of the legislation).
- 2.4 Additionally, even where Telecom fulfils the requirements of the Determination, it generally does no more than that, when a more expansive approach is required, given in particular the requirements of s69D. Further, any uncertainty in the Determination should be interpreted by reference to the overarching robust operational separation provisions in s69D (this requirement does not appear to have been applied by Telecom).
- 2.5 In isolation, many of the changes and departures from what is required are not substantial. Together, they lead to death by a thousand cuts.
- 2.6 Telecom cannot now submit that the minimum requirements, required by the Minister and by the Act, should be diluted. Telecom was, and remains, obligated to meet the Determination's minimum requirements in its Undertakings, along with s69D requirements.
- 2.7 If, in due course, experience shows that the minimum requirements should be diluted, Telecom can later seek variation of the Undertakings, as that is provided for in the legislation⁴. This is an important observation. InternetNZ submits that the Minister should take into account this ability to change the plan later if the implementation of the Undertakings in practice produces problems. In this way, the Minister can be reassured that a robust approach to drafting the Undertakings is appropriate, knowing that change is possible later if the Undertakings end up over-reaching in practical application. For example, if the minimum requirements in the Determination prove to be unfairly onerous on Telecom. This is exactly what has happened with the BT Undertakings, where various post-Undertaking changes have been permitted under the UK regime.

¹ Section 69F Telecommunications Act

² Section 69H(1) Telecommunications Act

³ Section 69H(1) Telecommunications Act

⁴ Section 69T Telecommunications Act

- 2.8 Having noted that ability to vary the Undertakings, InternetNZ does not consider that the requirements in the Determination and the Act are unduly onerous, given what operational separation seeks to achieve. InternetNZ strongly endorses the Minister's approach in the determination, which carefully covers the many and complex issues for effective operational separation. The Determination was an exceptionally challenging document to prepare: it has succeeded in implementing the policy and legislative requirements.
- 2.9 All this is challenging for Telecom (as is illustrated by the numerous points at which the draft Undertakings erode the Minister's determination and the Act). But substantial change at Telecom is what is needed if operational separation is to work. Operational separation was brought in to solve major problems, and dilution will lead to failure to solve those problems, which reference back to the enduring economic bottleneck within Telecom's control. InternetNZ is firmly supportive of the Minister and the Ministry taking a strong line to ensure the Undertakings are robust.

ISSUES

3 Death by a Thousand Cuts

- 3.1 **Overview:** As Ofcom pointed out in respect to the BT Undertakings, "*the devil is in the detail*". Fulfilling the policy objectives requires close attention to the specifics. Telecom has eroded the minimum requirements in the Determination in numerous and often subtle and complex ways.
- 3.2 **Determination:** Provides detailed requirements that must be in the Undertakings.
- 3.3 **Telecom's Draft:** Erodes and departs from the requirements of the Determination in numerous and often subtle and complex ways.⁵
- 3.4 **Comment:** The combined effect is substantial erosion of the policy objectives. Death by a thousand cuts.
- 3.5 Given Telecom's approach in the draft Undertakings, there is little reassurance that Telecom will voluntarily make all the necessary behavioural and other changes which are a key factor in operational separation. As the MED Consultation Document notes: "*It will be important for Telecom NZ to display strong leadership to achieve the Undertakings...*". The draft Undertakings do not provide comfort that there will be such leadership. Therefore, the Minister should err on the side of more prescriptive and detailed undertakings.
- 3.6 **Recommendation:** That the Minister require compliance with the Determination and s69D and a more prescriptive and detailed approach. That the Ministry closely reviews the draft Undertakings as against the Act and the Determination.

4 Governance

- 4.1 **Overview:** For operational separation to be effective, there must be a "*cultural shift amongst personnel of each of the separated units whereby they are making*

⁵ Many of these are referenced throughout these submissions including in the Appendix

*decisions that are in the best interests of their unit, even where those decisions may be unfavourable to Telecom's retail units*⁶

- 4.2 While that suggests that there should be total autonomy for each of ANS and Wholesale, there is still a need for input and communications between units within Telecom. In particular, the Board and the CEO need to have a measure of involvement as they are managing one company.
- 4.3 **Determination:** The determination contains a substantial number of provisions which seek to balance these competing tensions.
- 4.4 **Telecom's Draft:** The draft Undertaking dilutes and changes that approach in numerous places, many of which are identified in the Appendix.
- 4.5 **Comment:** This is a key risk area for the success of operational separation.
- 4.6 A simple example illustrates how far Telecom has diluted its responsibilities. The draft Undertakings state, as part of one of the most important provisions of the Undertakings:
- “[T]hese Undertakings do not apply to:
- (a) the duty or role of the Board, a TCNZ director or the CEO to act in a manner that they, he or she believes is in the best interests of Telecom;
- (b) any decision, act or omission of any part of Telecom (including any Employee, agent or contractor...)...where that decision, act or omission is done to act in accordance with the directions of the Board or CEO, whether or not to do so would otherwise be contrary to these Undertakings.”⁷
- 4.7 Stated simply, the Board and the CEO are excepted from the draft undertakings. Taken to the extreme, if the Board or the CEO decide that the Undertakings are not in Telecom's best interests, they can be ignored or overridden. In practice that is an unlikely scenario, but there are ample other opportunities for less radical overriding of the Undertakings, in ways that may never be detected by the Independent Oversight Group.
- 4.8 **Recommendation:** That Telecom's departures from the Determination and s69D are not accepted (many of which are identified in the Appendix). A more detailed and prescriptive approach is taken, as appropriate, in light of Paras 2.5-2.6 above.

5 Independent Oversight Group

- 5.1 **Overview:** The BT equivalent of the IOG, the Equality of Access Board (EAB) is regarded as one of the key success factors in the BT separation. It is important to get the IOG involvement right.
- 5.2 **Determination:** A comprehensive regime to enable the IOG to get information, monitor and report on compliance with the Undertakings.
- 5.3 **Telecom's Draft:** Numerous carve outs and qualifications on the IOG's powers and its ability to get information.

⁶ MED Consultation Document para 182

⁷ Cl 7 TU (compare with cl 15 MD)

- 5.4 **Comment:** The IOG must have wide ranging powers to get information, and the ability to monitor and report. The draft Undertakings hamstringing the IOG in undertaking this task.
- 5.5 An example illustrates this. The Determination requires Telecom to give IOG access to information in order to demonstrate compliance or otherwise with the Undertakings⁸. However Telecom strongly limits what information can be seen by the IOG. For example, an important control is the IOG's review of decisions by the CEO or the Board that over-ride, in respect of a business unit (e.g. ANS), a decision that that business unit would not otherwise resolve to do, in its own interests. Such decisions must be reported to the IOG.⁹ To be able to review the decision (for example, as to whether ANS should do a particular fibre build or not), the IOG will generally need to see the business unit's "commercial information"¹⁰. However the draft Undertakings stop the IOG from seeing such commercial information in any situation whatever¹¹. To be effective for much of its work, the IOG needs access to commercial information. Without it, the IOG is heavily hamstrung.
- 5.6 **Recommendation:** Remove the carve-outs and qualifications (see Appendix). Take a more detailed and prescriptive approach in light of Para 2.5-2.6 above

6 Wholesale Unit

- 6.1 **Overview:** Going forward, in an NGN world, the Wholesale unit occupies a significant role, along-side ANS, in achieving, in the medium to long term, the overall success of the outcomes required under operational separation.
- 6.2 **Determination:** Requirements for robust Chinese walls, transparency, non-discrimination and behavioural changes for Wholesale, even though in some respects these requirements are lower than for ANS.
- 6.3 **Telecom's Draft:** Dilutes this approach in numerous ways including as identified in other parts of this submission.
- 6.4 **Comment:** There should be particular focus on the Wholesale unit's separation commitments. It is appropriate to take into account likely or possible developments in the medium to long term, given the long range effect of operational separation. The operational separation structure established now will affect the medium to long term.
- 6.5 InternetNZ submits that the approach in the Undertakings requires a strong forward-looking perspective. For example, roll-out of LLU should take priority ahead of legacy products. Trade-offs should generally favour future services (LLU, sub-loop unbundling, FTTP, Next Generation Access, improved bitstream, etc) ahead of legacy services and issues.
- 6.6 InternetNZ therefore welcomes the express inclusion, within Wholesale's services, of future bitstream access services that connect to the NGN Core.¹² This type of access can conveniently be included within what Ofcom have

⁸ CI 82(e) and 87(2) MD

⁹ CI 15 MD

¹⁰ Widely defined in Clause 11 MD

¹¹ Schedule 2 Part 2 TU

¹² CI 49(2) MD

described as *Next Generation Access*¹³. The key aspect of Next Generation Access is enhanced local connectivity (by a variety of means such as FTTP, FTTC, etc), which may or may not involve connectivity to Telecom's NGN core. For example, Next Generation Access could support connectivity to another service provider's NGN core. For this reason, InternetNZ agrees to Telecom's addition of a demarcation point as the first aggregation point or equivalent¹⁴, but only as a demarcation point in addition to the Determination's approach (connectivity to the core NGN)¹⁵.

- 6.7 Operational separation and LLU come to New Zealand at a time when developments such as cabinetisation and sub-loop unbundling are imminent. A number of factors such as constrained space in cabinets, RMA hurdles, and the limited customer base serviced from a cabinet (which often makes LLU commercially non-viable for third party providers) indicate that bitstream services are of greater relative significance than when, for example, the BT Undertakings were given in 2005. Telecom's choices on 21 November 2007, when announcing its cabinetisation programme, further confirm this point. LLU remains important but bitstream access can be expected to have increasing significance over the medium term.
- 6.8 Bitstream services (including Next Generation Access that include fibre components (such as FTTC and FTTP)), are to be sold by Wholesale not ANS.
- 6.9 Next generation access presents challenges, as Ofcom identifies in its September 2007 Consultation paper, *Future Broadband – Policy approach to next generation access*. From a forward-looking perspective, setting the scene for improved bitstream services is increasingly important for optimal outcomes for end-users. As Ofcom note in its report¹⁶:

“Due to the practical concerns about future passive unbundling remedies [e.g. LLU], a wholesale product, giving competitors access to active bottleneck assets, may be required as well. It is essential that such a remedy [e.g. bitstream services] gives those relying on it the maximum possible control over the underlying network's innovation potential.”

- 6.10 The Ofcom report analyses in detail the regulatory and competition challenges and options around Next Generation Access¹⁷, which largely apply in the New Zealand context.
- 6.11 For Next Generation Access, Ofcom is considering, in relation to Fibre to the Cabinet, two “remedies” (which are equivalent to regulated services under our Act). Ofcom have stated the two remedies would compliment each other¹⁸. The first of the two services is LLU with sub-loop unbundling. The second of the two services (“*which will compliment each other*”¹⁹) is “*a new high quality, flexible, Ethernet based, active line access product available at a number of points on the network.*”²⁰.

¹³ This term was adopted by Ofcom in its September 2007 Report, *Future Broadband – Policy approach to next generation access*

¹⁴ CI 45.2 (a) (iv) TU

¹⁵ CI 49 (2)

¹⁶ Para 1.11

¹⁷ See for example Section 6 of the Ofcom report

¹⁸ See the Ofcom Report at Paras 6.47-6.58 for further detail

¹⁹ Ofcom at para 6.52

²⁰ Ofcom at para 6.52

6.12 For Fibre to the Premises, Ofcom concludes, in its Consultation Paper, that exactly the same type of Ethernet based service is the most appropriate regulatory offering.²¹

These would be substantially improved services compared to current regulated bitstream services in New Zealand. If overseas developments are a guide an enhanced bitstream offering for Next Generation Access is likely to be introduced in New Zealand in the medium term

Such services of course would require a decision under the Act to include them as regulated services or a Schedule 3A service.

In the case of Fibre to the Premises, there is a danger that a wholesale Ethernet service could become by default a new enduring economic bottleneck.

6.13 Although the type of enhanced bitstream services proposed by Ofcom do not yet have to be supplied to access seekers, Telecom Wholesale must build and develop relevant services to be EOI compliant.

6.14 In summary:

- The Wholesale unit, for several reasons, has a much more significant role in the operational separation model in the short, medium and long term;
- The Wholesale unit, in an NGN world, will play an increasingly important role alongside ANS.
- It is a more important component of the model than its BT equivalent was in 2005;
- Consistent with the requirements of the Determination and the Act, the Undertakings should ensure robust separation in relation to Wholesale, taking a forward looking perspective. This approach is available under the Determination and s69D. InternetNZ are not suggesting a deviation from the Determination or the provisions of the Act.

6.15 **Recommendation:** That provisions related to the Wholesale unit are reviewed and drafted having regard to the increased importance of the Wholesale unit, from a forward-looking perspective, and the issues at Para 2.5-2.76 above.

7 Fibre to the Premises (FTTP)

7.1 **Overview:** A key requirement of operational separation is the need for a forward-looking approach, which includes appropriate transparency about future developments. Network design decisions should take into account, access seekers legitimate needs. Fibre roll-out is important and InternetNZ strongly welcomes the Determination's inclusion of these balanced and fair requirements as to FTTP, which are not unduly intrusive on Telecom.

7.2 **Determination:** The Undertakings must "contain Telecom's commercial policy for access to the relevant network access service known as fibre to the premises"²². This requires full disclosure of Telecom's FTTP policies and plans relating to:

²¹ Ofcom at para 6.57

²² CI 23 MD.

- service development
- pricing
- marketing and intelligence
- service launch dates
- costs
- non-price terms, including payment terms
- products specific forecasting
- network coverage and capabilities²³

7.3 **Telecom’s Draft:** Hardly any of this “commercial policy” is included.²⁴

7.4 **Comment:** While Telecom’s FTTP plans and policies going forward may not yet be fully formulated, Telecom will regardless have detailed policies and plans than that contained in the draft Undertakings. Telecom has, for example, announced the trialling of FTTP. Beyond this trial, Telecom will have medium to long term policies **and** plans (the “commercial policy” definition is appropriately wide), which must be disclosed.

7.5 While a primary purpose of requiring disclosure is to inform third party access seekers as to future developments, and to encourage new developments in a non-discriminatory manner, if some of the “commercial policy” is truly confidential, then it can be treated as such in the Undertakings. Commercial confidentiality is not a reason to exclude inclusion of commercial policy in the Undertakings. However, the Minister should keep confidentiality to a minimum.

7.6 Including this requirement in the Determination, to disclose the FTTP commercial policy, is consistent with the Act and with policy.²⁵

7.7 Telecom’s acknowledgement that it will consult industry on the nature and design of NGN services is welcomed²⁶. Given the issues noted above about the need for a more prescriptive approach, InternetNZ encourages the Ministry and Telecom to consider establishing a consultation regime similar to the NGN UK initiative. This could sit within the terms of reference of the TCF. Since its inception, in the UK, this initiative of Ofcom has proven to be a successful industry forum, and a model that can be applied in New Zealand.

7.8 As access via the FTTP service may instead, or also, be available from the ANS (via a different type of service than a service from the Wholesale unit), consultation should mesh with the ANS unit’s consultation obligations, as noted below.

7.9 **Recommendation:** That Telecom be required to comply with the Determination by including full FTTP “commercial policy” details. That more comprehensive consultation details are included, ideally modelled on NGN UK, but based within the TCF.

8 Consultation and Next Generation Access

8.1 **Overview:** As previously noted, the Undertakings must be forward looking, and NGN Access is key issue in this regard. Service providers should be consulted on

²³ As that is the definition of “commercial policy” in cl 11(1) MD.

²⁴ CI 20 and 65 TU.

²⁵ See InternetNZ’s submissions to MED on the Consultation Document where the position is outlined.

²⁶ CI 65 TU

design and implementation decisions to minimise decisions that inappropriately and adversely impact them.

- 8.2 **Determination:** ANS is required to consult with service providers before making significant decisions that affect relevant network access, such as new and varied services. This extends to cabinetisation and fibre roll-outs (that is, changes that are fundamental to Next Generation Access).
- 8.3 **Telecom's Draft:** As identified in the Appendix, the Draft dilutes and changes the provisions in the Determination.
- 8.4 **Comment:** If this is not remedied, a key component of the regime will likely be lost. An industry consultation mechanism similar to NGN UK needs to be fully explored. There would be some logic to this role being sponsored by the TCF given the success of the LLU working parties
- 8.5 Telecom's cabinetisation announcement on 21 November 2007 demonstrates the challenges that are faced. Telecom has unilaterally stated its programme, and targeted exchanges which would otherwise be some of the most suitable LLU exchanges for access seekers. Thus, LLU investment appears less attractive by reason of the exchanges that Telecom has chosen to target. If a comprehensive and effective consultation process was already in place, a consultative approach, recognising the needs of both Telecom and access seekers (and, ultimately, end users), would have been possible.
- 8.6 Telecom has been able to make its pro-Telecom decisions before Separation Day (31 March 2008) in a manner that substantially impacts on operational separation and the position of service providers, post-Separation Day. Operational separation starts with this overhanging legacy. This demonstrates the importance of a robust and effective consultation process.
- 8.7 **Recommendation:** Remove the carve-outs, and add further prescriptive detail (including more comprehensive consultation details, ideally based on the NGN UK/TCF model) in part for the reasons noted at Para 2.

9 Incentives: ANS and Wholesale Employees

- 9.1 **Overview:** *"Adoption of [localised incentive arrangements] is considered essential to delivering on a robust operational separation of Telecom NZ and facilitating responsiveness by Telecom in meeting its wholesale customers' needs ..."*²⁷
- 9.2 **Minister's Determination:** Except for allocation of Telecom shares to Wholesale staff (capped at no more than what retail unit staff receive), incentives for performance unrelated to Wholesale and ANS respectively are not permitted.²⁸
- 9.3 **Telecom's Draft:**
- Up to 80% of the Wholesale Manager's incentive remuneration can reflect the objectives and performance of Telecom as a Group.²⁹

²⁷ Para 208 MED Consultation Document.

²⁸ CI 39 and 65 MD.

²⁹ CI 60.5

- ANS and Wholesale staff can have short-term incentives based on measures of Telecom’s customer satisfaction.³⁰
- Up to 20% of a Wholesale employees’ remuneration can be Telecom equity, based on unspecified performance and/or employment criteria. For example, there is nothing precluding that from being the performance of Telecom retail, and there is no cap relative to what retail unit staff receive.³¹

9.4 **Comments:** These are strong signs that Telecom does not intend to implement the intent of the Undertakings. Further, Telecom has incorporated these incentives when that is expressly precluded by the Determination.

9.5 Operational separation requires ANS and Wholesale to act in the interests of their own units. These incentives distort that key objective.

9.6 InternetNZ expects Telecom’s wholesale customers would be less than 100 in number, but its retail customers are in the millions. Retail revenue is around 95% and wholesale is around 5%.³² No matter how well crafted the customer satisfaction metrics, they will inevitably be based on Telecom retail performance, producing distorting incentives. Incentives should be based on ANS and Wholesale direct customers (wholesale customers including Telecom Retail units).

9.7 Clearly having the Manager of Wholesale (who is also on the senior executive team) remunerated on Telecom Group performance is not permitted.

9.8 The greater concern is the sign that Telecom is not proactively implementing well known key features of the operational separation model.

9.9 **Recommendation:** Require Telecom to comply with the determination by removing the provisions allowing these incentives.

10 Implementation Timeframes

10.1 **Overview:** Migration to EOI needs to be balanced by practical realities (for example to achieve an optimal cost-benefit balance and to reduce the risk of adverse outcomes). Consequently, the implementation plan is of paramount importance in achieving the intent of the Undertakings.

10.2 **Determination:** Detailed plans are required, achieving the highest level of equivalence as soon as practicable.³³

10.3 **Telecom’s Draft:** Most of Telecom’s transition plan³⁴ is non-binding (and even the parts stated to be binding contain non-binding and/or vague commitments). Due dates are generally pushed out to the maximum. For example, EOI on all relevant products is to be achieved on the last date stated in the Determination. However, that is not intended by the Determination or the Act, nor is sufficient justification given for that approach, as is required.

³⁰ Cls 35.4 and 60.4 TU

³¹ Schedule 5 TU

³² As stated by Telecom to the Finance and Expenditure Select Committee during the Telecommunications Amendment Bill 2006 hearings.

³³ Schedule I MD

³⁴ Schedule I TU

- 10.4 **Comment:** The issue of the “devil is in the detail” applies equally to implementation timeframes
- 10.5 For example, common OSS platforms are key to operational separation success: the failure to carry forward, from the Determination to the draft Undertaking, common access to business-to-business gateways “in the same way”³⁵ superficially appears minor, yet could have a substantial impact .
- 10.6 InternetNZ expects that industry service providers will submit in detail on timelines. However, their focus may be around particular issues (eg: LLU roll-out). Those submissions are important. However, not all service providers will have regard to broader and longer-term issues such as development of wider facets of Next Generation Access. Given the importance of a forward-looking approach, InternetNZ considers that the Ministry has an important role to review and develop the implementation plan, having regard to issues that are not raised by industry. Further, neither the industry nor InternetNZ have the detailed knowledge available to the Ministry, to enable appropriate handling and balancing of interests, including regarding bitstream and LLU. The Ministry has an important role to play in this regard as well.
- 10.7 **Recommendation:** The Ministry and the Minister review and seek major changes and additions to the implementation plan, having regard to forward-looking objectives, particularly Next Generation Access, bitstream and LLU.

³⁵ CI 8 Schedule I MD

Appendix

To InternetNZ's "Response to Telecom Draft Separation Undertakings"

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Part 1 Introduction

- 1.1 InternetNZ expects that the Ministry will have undertake a very thorough word-by-word comparison and analysis between the Determination (and s69D of the Act) and the Undertakings. InternetNZ has not endeavoured to replicate the results of that sort of analysis in this document. Instead, InternetNZ has highlighted some of the key changes that either dilute or conflict with the requirements of the Act and the Determination.
- 1.2 For the approach to interpretation of the draft Undertakings, and the relationship between that draft, the Determination and the Act (particularly s69D) refer to the Introduction to these submissions. In particular, the draft Undertakings must contain at least the requirements of the Determination without carve-outs; the draft Undertakings should go into more detail, guided by s69D; any Determination interpretation issues can be informed by Part 2A of the Act, in particular s69D; and the Undertakings must incorporate the requirements of Part 2A, particularly s69D.
- 1.3 Many of the issues raised in this document are done so on an indicative basis. The volume of changes made by Telecom mean that there is a significant and lengthy interpretation exercise to get to the bottom of what is, or is not, likely to cause problems. Additionally, some of the points identified in this Appendix, may, on closer review by the Ministry, turn out to be of no concern. For example, it appears that Telecom has sought to make some changes and improvements in layout, approach, etc, but whether or not more is involved, so that the Determination is diluted, in many instances will require a more thorough review than has been possible for InternetNZ. Thus, many issues are raised for detailed consideration by the Ministry as part of its review process, while other issues have been more completely analysed by InternetNZ and a more conclusive view is proffered.
- 1.4 By way of overview, InternetNZ considers that the Undertakings have been compromised in the following ways:
 - (a) omission of key requirements;
 - (b) addition of provisions that are contrary to the Determination and Act;
 - (c) definitional changes; and
 - (d) diluting changes.
- 1.5 For the sake of simplicity this document refers to:
 - (a) clauses in the Telecom Undertakings by using the abbreviation "TU" after the clause reference (for example, clause 4 of the Undertakings is referred to as cl 4 TU); and
 - (b) clauses in the Minister's Determination by using the abbreviation "MD" (for example, clause 4 of the Determination is referred to as cl 4 MD).
- 1.6 Part 2 sets out some overarching issues and changes with the Undertakings as a whole. The following Parts address some of the key features of the operational separation model that are at risk as a result of the Undertakings proposed by Telecom.

Part 2 Overarching Issues and Changes

Involvement of the Corporate Centre

- 2.1 We deal elsewhere with the role of the Board, CEO and Executive in relation to ANS and Wholesale. This is a critical issue for the Undertakings and here we highlight one feature: Telecom has not, as it is required to do, applied clauses 90 and 91 of the Ministerial Determination in the required manner. It is important to do so. For example, in relation to cl 90 MD, participation in policy must follow a carefully planned process, involving the personnel referred to in Part 2 of Schedule 2. Significantly that excludes particular members of the Executive Committee, depending on which business unit is involved.
- 2.2 In practice this means that the way the Executive Committee functions must change. It is what is required here for operational separation to work.
- 2.3 The proposed undertaking, on this point, has a mechanism based on Part A, B and C people. This does not meet the requirements of the Determination or the underlying policy.
- 2.4 Overall, the various provisions show a Telecom trying to retain the old governance model. Change is challenging, but it is necessary for this model to work.
- 2.5 InternetNZ considers that it is particularly important to ensure that clauses 90 and 91 MD are implemented in their entirety.
- 2.6 If in practice, after the Undertakings are in place, this is too onerous, there can be amendments (including by the Commission under clause 92 MD).

Dilution of absolute requirements

- 2.7 Telecom have qualified a number of the absolute requirements in the Determination with terms such as “best endeavours”, “reasonable”, “material”, “significant”, etc. The inclusion of such qualifications creates a number of problems such as:
- (a) interpretation and threshold issues that require non-transparent judgement calls by Telecom that, if not appropriately made by Telecom, may compromise robust operational separation;
 - (b) opportunity for disputes that could lead to delays (even delay tactics – one of the types of discriminatory behaviour that operational separation is intended to address); and
 - (c) if there are differences of opinion as to the scope of the qualifications, those issues would tend to be addressed with the affected parties after the fact (and after the “horse has bolted”).
- 2.8 For example, compare cl 15(4) and (5) MD with cl 7.4 TU. In this case the introduction of qualifiers such as “reasonable”, “material”, and “significant” creates the opportunity for a loss of transparency at a Board and CEO level. In this instance, it is preferable for the IOG to get all information from Telecom, which can then sift through and decide what to pursue and what not to pursue, rather than permit Telecom to limit the information flows.

- 2.9 As these qualifications were not considered necessary in the Determination, InternetNZ considers they should not be included in the Undertakings.
- 2.10 Where it is found that qualifications are absolutely necessary the following should be considered:
- (a) how any potentially significant judgment calls can be made in a transparent manner; and
 - (b) the circumstances in which the qualifications should and should not apply (for example, by clarifying when something won't be "reasonable").
- 2.11 An example (there are many others) is the repeated use by Telecom of "formal plans" in place of "plans" (see, by way of illustration, cl 87.5 TU). That alteration should be deleted, given that plans, often when they are of real significance, may not be "formal" (and what is "formal" anyway?).

Application of Part 2A of the Act

- 2.12 The draft Undertakings make no express reference to the application of Part 2A of the Act, nor do its requirements appear to have been included in the Undertakings: "This determination determines further requirements with which the separation plan ... must comply" (cl 3(1) MD). The Undertakings should expressly confirm application of Part 2A and should specifically contain provisions that implement Part 2A, particularly s69D. There is little sign that this has happened. As the Determination notes, "These requirements [in the determination] are additional to those in section 69D" (cl 3(2) MD).

Changes to definitions

- 2.13 Any changes to the definitions in the Determination need to be carefully assessed to ensure that the downstream implications do not undermine the intent of the Act and Determination. Obviously, one change to a definition may substantively change a number of the Undertakings. (Others may be neutral in effect.) Set out below are two examples that could cause problems. There are other changed definitions that do, or may, cause problems (some of which are detailed in this Appendix).

"Access Seekers"

- 2.14 The terms "service provider" and "access seeker" are both defined in the Act and used throughout the Determination. Telecom has not adopted these terms but has instead used its own defined term of "Access Seeker".
- 2.15 This change is significant. For example, the reference to "service provider" (a provider of telecommunications services) is much broader than "Access Seeker" (someone who seeks access to a Relevant Service).

"Telecom Fixed Network Business Units" (and, generally, scope limitation)

- 2.16 Telecom have made material changes to the definition of "Telecom Fixed Network Business Units". In particular, the scope of the original definition in the Determination has been reduced by moving away from units that "provide functions" in relation to Telecom's fixed network to a unit that "controls fixed network assets predominantly for the provision of Relevant Services (excluding

Resale Services)". InternetNZ is concerned that this change may have unexpected and detrimental consequences.³⁶

- 2.17 Note also that subclause (b) of the definition means that a Telecom Fixed Network Business Unit may be a part of a "Telecom Business Unit" (i.e. an operational division of Telecom). InternetNZ is not sure if that creates problems. The definition of "Telecom Business Units" also seems wide.
- 2.18 This is an example of the frequent change of approach in the Undertakings, which needs careful review, by which Telecom changes the scope of the application of the Undertakings. For example, the Telecom definition restricts these business units to those where Relevant Services are involved, when the original definition does not do that. This occurs frequently in the Undertakings, yet this will not always be a correct application of scope provisions such as cl 6 and 8 MD.

"Cellular Mobile System"

- 2.19 This definition should be reviewed to ensure it does not include systems outside what is normally regarded as cellular services (such as different wireless services) and assets which should be available for fixed network purposes.
- 2.20 Similarly as to "Mobile Services".

"Employee"

- 2.21 Contrary to the Determination definition, "Employee" excludes the CEO, which is a major carve-out and cannot be justified. The Undertakings generally have expansive carve-outs in relation to the CEO which do not fulfil the Determination or the Act.

"Executive"

- 2.22 While the definition is appropriate, this is a reminder to ensure that there is no erosion of the barriers established by the Determination in relation to the Executive as defined. For example cl 90 and 91 MD, and the people within "Corporate Centre" in Schedule 2 Part 2 MD, limit exchange of information and involvement in certain decisions, as between members of the Executive. Certain members of the Executive are excluded from the Corporate Centre in relation to some information and decisions. The aim is to provide appropriate operational separation but there are apparent endeavours to dilute this. A further example is the carve-out, in relation to decision-making and sharing of information, in cl 7.5(b) TU which seeks to enable "the CEO's day-to-day management of the Executive".

"FTTP Access Network Architecture" and "Fibre to the Premises Access Service"

- 2.23 The "FTTP Access Network Architecture" definition should include active optical networking technology, in addition to passive. For example, connection to Telecom's NGN Core, as envisaged by cl 49(2)(a)(iv) MD may require active optical components.
- 2.24 The "Fibre to the Premises Access Service" definition demonstrates a disconnect with the description in cl 49(2)(a)(iv) MD. However, it may be

³⁶ This defined term is used in clauses 69 to 74, 88.2, 89.2, 90.2 and 100.2 (all TU).

appropriate to define the service, in addition, in a way that does not reference back to Telecom’s NGN core, as FTTP should not only be an access service that solely links to Telecom’s NGN core.

Part A, B, and C Persons

2.25 We deal elsewhere with these significant categories, but note that the wide array of people and entities that are included (agents, contractors, functional groups and external advisors).

“Equivalence of Inputs”

2.26 Unless the Ministry is fully satisfied that the changes made by Telecom do not erode the EOI obligation, the original wording in the Determination should be used.

“Telecom personnel”

2.27 The Determination included a definition of “Telecom personnel” which included the TCNZ Board. Telecom have not included this definition but have instead dealt with separate groups such as “Employee” (see comment above), “Executive”, “Board”.

2.28 This approach means that it looks like a number of the provisions that were intended in the Determination to apply to the Board now do not. For example:

Clause from Determination	Clause from Undertaking	Impact of Telecom’s change
14(1)	87.1	The Board is not expressly required to act in a way that gives effect to Part 2A of the Act, the Determination and the separation undertakings.
82(a)	78.1(a)	The terms of reference for the IOG is not required to provide that the IOG is to consult on the preparation of codes of conduct for the Board.
87(1)(b)	83.1(b)	Telecom is not, in consultation with the IOG, required to provide codes of conduct for the Board and have those considered by the IOG.

Priority of Part 2

2.29 Telecom has provided that Part 2 of the Undertakings prevails over any of the other Parts in the event that there is any inconsistency (cl 8 TU). This priority regime was not considered necessary in the Determination and its introduction may well result in unintended consequences. It is not appropriate that the provisions in Part 2 of the Undertakings should always “trump” the rest of the Undertakings.

2.30 Clause 7.1 TU demonstrates that this is a problem. It states:

“[T]hese Undertakings do not apply to:

(a) the duty or role of the Board, any TCNZ director or the CEO ... to act in a manner that they, he or she believes is in the best interests of Telecom ...;

(b) any decision, act or omission of ... any part of Telecom (including any Employee, agent or contractor ...) where that decision, act or omission is done to act in accordance with the directions of the Board or CEO, whether or not doing so would otherwise be contrary to these Undertakings.”³⁷

- 2.31 Stated simply, the Board and the CEO can decide to do what they want if it is in the best interests of Telecom. Such steps by them, and by staff implementing their directions, are outside the Undertakings. At its extreme, if the Board or the CEO decide that the Undertakings are not in Telecom’s best interests, they can ignore them. There’s ample other opportunities for less radical overriding of the Undertakings.
- 2.32 That Part 2, including this provision, trumps the rest of the document, demonstrates that cl 8 TU should be deleted.
- 2.33 InternetNZ notes that while Telecom has chosen to include the generic provisions relating to the role of the Board and CEO in this priority Part, they have not included the similarly important general rules in relation to all personnel (which were also in the section of the Determination (cl 14 MD) dealing with the general arm’s-length rules).

Application of Undertakings limited to Relevant Services, and to certain types of services

- 2.34 Clause 6 of the Determination sets out a general qualification that the Determination applies only to Telecom business units to the extent that they provide, purchase or are otherwise involved with relevant services. Telecom have potentially expanded the scope of this general rule by not just referring to “Telecom business units” but to all of Telecom or any specific part of Telecom (cl 4 TU).³⁸
- 2.35 While InternetNZ has not extensively analysed this issue, it considers the potential and uncertain consequence to be such that it may be an unnecessary qualification to the Determination.
- 2.36 By way of example, the definition of “Customer Confidential Information” in both the Determination and Undertakings refers to any information that is provided to “Telecom”. The change proposed by Telecom now means that the Customer Confidential Information is now constrained to the information that is provided or held by Telecom in relation to Telecom’s provision, purchase or involvement with Relevant Services. This constraint was not anticipated in the Determination and InternetNZ is concerned that it may have unexpected and adverse consequences for some service providers.
- 2.37 The draft Undertakings at cl 6 TU appear to dilute the approach in cl 8 MD. The former does not reflect the breadth of the latter and is inconsistent with an interpretation taking into account Part 2A of the Act. Clause 8 MD does not limit services to those where determinations have been made or Schedule 3A undertakings given, nor is there a limitation (where there is no standard terms determination or Schedule 3A undertaking) to services where there is a binding

³⁷ Cl 7 TU (compare with cl 15 MD).

³⁸ Note also cl 2.3 TU.

commercial agreement (cl 6.2(a) TU). The commercial agreement requirement can lead to discriminatory outcomes. It is well known among service providers that Telecom has a “take it or leave it” approach to “negotiation” of commercial agreements. Those agreements will not be the same as the documented transfer arrangements between Telecom business units for the supply of the same services. This is a significant equivalence challenge.

- 2.38 The interface between “relevant services”, services yet to be provided, and services that must be provided now, requires, we submit, careful drafting.

Compliance with the Act and Determination

- 2.39 InternetNZ is concerned that given the volume of changes to the requirements imposed by the Determination, and the issue of information asymmetry, there will be a number of unforeseen and detrimental consequences associated with Telecom’s changes. With this in mind it is of concern to InternetNZ that Telecom has refused, in a number of provisions, to ensure that its employees and contractors act in a way that gives effect to certain parts of the Act and the Determination (and not just the Undertakings). For example, compare cl 14 MD with cl 87.1 TU; cl 98 MD with cl 97 TU.
- 2.40 Also, Telecom have replaced requirements to ensure compliance with “a robust operational separation of Telecom” with requirements not to “circumvent the intent of these Undertakings” (compare cl 97(b) MD and cl 96.1(b) TU; cl 100 MD and cl 99 TU).

Two general drafting points

- (a) Telecom have in several places replaced references to “in relation to” with “in respect of” (see for example, clause (a) of the definition of “Commercial Information” and the definition of “Regulated”). These may well be innocuous but this at least should be checked.
- (b) In many cases, where the Determination required that Telecom “must” do something, Telecom has replaced it with an undertaking that it “will” do that thing. This may not be significant but the mere fact that this change has been made should be checked to ensure that it is no more than stylistic.

Role of the CEO generally

- 2.41 Telecom has specifically excluded the CEO from the definition of “Employees”. This exclusion looks like it could be significant in a number of places.
- 2.42 For example, clause 14 of the Determination (which is now catered for in clause 87 of the Undertakings) sets out high level prohibitions against discrimination and participation in policy (etc) that, as a result of the definition of “Employees”, now do not apply to the CEO. Given the CEO’s key role, and as the managers of ANS, Wholesale, and other Telecom business units report to him, this is a particularly serious dilution.
- 2.43 This is just one example. InternetNZ has not checked to see whether there are any similar issues elsewhere in the document but there appear to be other places where this issue arises. For example, allowing, without careful qualification, the CEO to exercise “day to day management of the members of the Executive” (cl 7.5 TU) clearly needs either elimination or tightening. Under this and other provisions, Telecom want to be able to preserve an Executive

team that communicates with each other as fully as other large companies. That simply is not possible given the nature of operational separation and the requirements of the Determination (for example, cl 90 and 91 MD). Telecom must find a different way of operating their management team (as BT has had to do).

- 2.44 The correct and robust handling of the roles of the Board, CEO and the Executive in the Undertakings will be critical to success of operational separation.
- 2.45 The CEO and Board powers to amend the ANS scope of business appears to be too uncontrolled even though there is IOG oversight (to the extent the scope reduces). (cl 13.2 TU). This should be amended or removed. Similarly as to the qualification in cl 17.1(d) TU and the approval of plans by the CEO (cl 27.1 TU).

Contractor and outsourcing compliance

- 2.46 To be effective, the requirements for a robust operational separation of Telecom must extend to Telecom's contractors and outsourced providers (together in this part of these submissions called the external providers). If material external providers have not bought into, and agreed to abide by, the key rules, standards and behaviours mandated by the Determination, that will subvert the overall model. This is highly important for Telecom, as it contracts out and outsources so much of its operation.
- 2.47 The Determination is clear in its expectations from Telecom in this area: Telecom must ensure that its external providers comply with the separation undertakings (cl 96 and 97 MD). This is an absolute obligation. However, Telecom says it will not provide the absolute commitment, and, in the case of contractors, the position is diluted where the contractor's binding contractual commitments do not permit this, or it is not in the contractor's own best interests (cl 95 and 97 TU).
- 2.48 InternetNZ appreciates that giving an absolute commitment is challenging when there are existing contracts and Telecom is dealing with third parties.
- 2.49 A carefully controlled "best endeavours" approach seems reasonable on the following basis:
 - (a) It must be closely monitored by IOG (their involvement is envisaged anyway).
 - (b) Commitments short of absolute, by Telecom, in the past have encountered turbulence. "Best endeavours" provisions inherently have challenges. The provision should be very carefully defined beyond just "best endeavours". For example, if Telecom is to escape the rigours of the absolute obligation, it must expressly be required to achieve external provider buy-in at whatever cost that involves. Telecom must, if necessary, act contrary to its commercial interests (which may be maintaining the status quo of the commercial relationship). This is not likely, however, to be a substantial cost (but even if it is, that is a cost appropriately payable by Telecom: that is part of operational separation). For example, in relation to Telecom's large outsourcing agreements (and, very likely, most of its other agreements) it is likely that there are provisions for change control which enable change to accommodate the Undertakings' requirements. There are also likely to be provisions to cover the effects of regulatory change. If Telecom, in discussions with the

Ministry, indicate that they are locked into long term contracts that do not permit change, they should be required to produce the contracts to demonstrate that the position differs from the standard position in IT and telecommunication provider supply and outsourcing contracts. They should also be called upon to demonstrate why, even if there is a binding contract, steps can't be taken to meet the commitment anyway, such as by acquiring additional services.

- (c) Clause 95.3 TU should be removed: a targeted "best endeavours" provision covers this without creating excessive carve-outs.
- (d) Clause 96.2 TU should allow use of the same contractor to supply outsourced services subject to IOG approval (which can involve IOG being reassured that adequate Chinese walls and the like are in place). Outsourcing is such a substantial part of the Telecom operation that heavy IOG input is appropriate. As Telecom is not permitted to let an employee work for both the ANS Unit and Wholesale Unit, is it acceptable that an outsourcing provider should be permitted to provide "outsourcing services" to both units? Obviously there is a need for there to be some practicality here – but there should be limits.
- (e) The obligations are absolute and dilution of the determination's requirements are not permitted. A work-around, which is appropriate, is to add suitable provisions to the force majeure provision (cl 94 TU).

2.50 In its covering note provided to the Ministry with the draft Undertaking, Telecom seeks until July and December respectively to complete arrangements with contractors and agents. It is understood that Telecom deals with numerous providers and that there are challenges. However:

- (a) This project can get under way quickly, before the Undertakings are completely implemented. It does not primarily involve scarce resource such as engineers.
- (b) Telecom need to more clearly justify the timelines of what should be capable of being handled by a team reasonably smoothly.
- (c) In any event, having only two timelines is inadequate. More detailed timelines are appropriate, with demonstrated deliverables early in the process in respect of those contracts that have greater impact on operational separation than others.

Part 3 Arm's-Length Rules

General Application of Arm's-Length Rules

- 3.1 Clause 7 of the Determination sets out a general qualification to the arm's length rules that any activities and decisions in the arm's-length rules apply only where they relate to or affect relevant services. Telecom have changed this approach in cl 5 TU to a general qualification of ALL of the arm's length rules (not just in relation to activities and decisions). Given the significance of the arm's-length rules, and Telecom's cl 8, this could be significant. The position is not clear however, without a careful review of the implications throughout the document, which InternetNZ has not undertaken. InternetNZ submits that the Ministry should review this change carefully. The main issues here appear to be:
- (a) Do "activities and decisions" basically cover everything anyway? Is it broad enough to cater for omissions?
 - (b) Did the Determination intend that the arm's-length rules that aren't "activities and decisions" should not be constrained by application only in relation to the relevant services (i.e. they should apply more generally)?
 - (c) Whether the arm's-length rules should apply only to the extent that they describe "activities and decisions". Telecom's approach seems to create uncertainty and should not be accepted.
- 3.2 There is an unusual exception to the arm's-length rules in respect of the the general exclusion of Access Planners from the arm's-length rules (cl 87.4 TU). Should they still be subject to same constraints as others, or modified constraints. InternetNZ's enquiries indicate that an access planner typically is involved in network design. If that is so in this instance, clearly there should be no exception. The role should be defined and then a decision made as to whether to exclude the access planners (and whether that is possible under the determination in any event).
- 3.3 The Undertakings express the arm's-length commitments as being in accordance with the requirements of these Undertakings (cl 24.1, 52.1 and 69.1 TU). It may be that this dilutes the requirements of the Determination and the legislation.

Omission of the ordinary meaning of "arm's length"

- 3.4 Contrary to the Determination, Telecom has not included in its requirements to act on an arm's-length basis (in clauses 24, 52 and 69 TU) the clarification that these requirements do not limit the ordinary meaning of the expression "arm's-length" (see clauses 28(4), 57(4) and 73(4) MD). The position as to cl 24.3 TU should be reviewed.

Development of services by Wholesale: arm's-length rules

- 3.5 Clause 52.3 TU is particularly problematic as a dilution of the arm's-length rules. It enables interaction between Telecom Retail and Wholesale where a service is not yet "Regulated" for the purpose of developing new services and to facilitate new innovation. In the main submissions, this issue has been addressed broadly. The effect would be discriminatory and constitute a major carve out

from the operational separation regime. It constitutes sharing of commercial information when that is not shared, as required, with other providers (see for example cl 14 MD). The provision should be removed and replaced by a proactive obligation such as the NGN UK/TCF initiative referred to in the main body of these submissions.

ANS and Wholesale Unit Employees may work for other business units

- 3.6 Telecom, have in clauses 26.2, 38.2, 45.2, 62.3 and 70.2 (all TU), inserted a significant exception to the foundational principle and requirement that employees of the ANS, Wholesale and other Telecom Fixed Network Business Units may not work for any other part of Telecom.
- 3.7 Telecom has endeavoured to ameliorate the impact of this exception by providing that the two relevant business units must have entered into a written agreement on an arm's-length basis. Further, Telecom will provide these agreements to the IOG if requested. These steps are insufficient because:
- (a) an agreement between two business units does not overcome the significant risks of discrimination, unauthorised disclosure and unauthorised influence that may occur (intentionally or unintentionally) by permitting an employee to work in two business units.
 - (b) The IOG probably will never know when these circumstances arise so as to request the relevant information from Telecom.
- 3.8 This new exception could easily subvert the robust operational separation of Telecom. If this is permitted, it should be allowed only with prior approval of the IOG. This should not prove unduly onerous for Telecom or the IOG as standard practices and policies can be developed for the most common situations where this occurs (in this way, particular categories of staff can be handled "automatically").

The role of the Board and CEO

- 3.9 Under the Determination, all Telecom personnel (which includes the Board) have wide ranging obligations (see in particular cl 14 MD). This is subject to some carve outs (for example, in cl 15 MD).
- 3.10 The broad (even unfettered) discretionary rights of the Board and CEO to act in the best interests of Telecom, and the role of Telecom business units to follow Board and CEO directions, in cl 7.1 TU, are problematic as described above and do not meet the requirements of the Determination and the legislation.

Board and CEO directions

- 3.11 Telecom have, in clause 7.2 TU, markedly diluted the disclosure, certification and reporting requirements that apply to the Board and CEO when they direct Telecom business units to act in a certain way.
- 3.12 Clause 7.1(b) TU differs from clause 15(1) of the Determination in that it does not just refer to a "Telecom business unit" but to all of "Telecom" (including employees, agents or contractors of Telecom). However, this expansion has not been carried across to clause 7.2 TU.

- 3.13 This at least compromises the overall requirement of transparency as the disclosure requirements (etc) in cl 7.2 TU will not apply to directions of the Board or CEO to any person or entity that is not a Telecom Business Unit (i.e. an operational business division of Telecom).
- 3.14 The inclusion of “reasonably believes”, “could not” and “in accordance with these Undertakings” in clause 7.2 TU reduce the circumstances in which clause 15 of the Determination anticipated that the steps in (a) to (c) would occur.
- 3.15 The insertion of “reasonably believes” may have unwanted downstream affects.
- 3.16 In particular, the difference between “may not” in the Determination and the combination of “reasonably believes” and “could not” in the Undertakings lends itself to more judgement calls (as “could not” is an absolute standard) that will likely mean in practice that less directions will get disclosed.
- 3.17 The inclusion of the word “whether” in cl 7.2(c) TU means that the Board and CEO no longer have to certify that in their opinion the requirements in (i) and (ii) have been fulfilled. They may now certify that they have not been fulfilled. The Board and CEO should not make a direction unless they are willing to positively certify that it complies with cl 7.2(c)(i) and (ii) TU.

Participation in ANS and Wholesale related decisions

- 3.18 Clause 7.4 TU relates to the participation of the Board and CEO in ANS and Wholesale Unit decisions. Telecom has made a number of significant changes to the requirements of clauses 15(4) and (5) of the Determination.

Only “significant decisions” must be transparent

- 3.19 Telecom has provided that the participation of the Board or CEO must be in a “significant decision” (cf any decision). As noted above at paragraph 2.7 there are risks associated with inserting a qualification such as this (for example, who decides what is significant? How is significance measured?).
- 3.20 In the interests of transparency this qualification should not apply.

Decisions must be “of” the relevant unit

- 3.21 Telecom have provided that the decision must be “of” the [ANS / Wholesale] Unit “in relation to a Relevant [Network Access / Wholesale] Service” instead of just “related to the [ANS / Wholesale] Unit”. So, for example, the CEO is not required to disclose details of his participation in a decision of the Wholesale Unit that relates to the ANS Unit.

Transparency

- 3.22 The transparency confirmation at cl 15(4)(b) is omitted but should be included.

Less documentation has to be disclosed

- 3.23 Clause 15 the Determination was generic in requiring that any “draft and final documentation” relating to a decision must be provided to the IOG. Telecom have provided in cl 7.4(a) and (b) TU that they only have to provide “any documentation provided to the Board or CEO that contains formal recommendation and any documentation that records the different formal decision”. This:

- (a) excludes documentation prepared by the Board or CEO; and
- (b) seems to exclude draft documentation (at least to the extent that it is not the “formal recommendation”).

Threshold of 10% of annual capital budget for investment decisions

3.24 Telecom has qualified clause 15(5)(a) MD in cl 7.4(a)(i) TU so that instead of disclosing documentation for any investment decision it now only has to do so if the decision involves capital expenditure in excess of 10% of the annual capital budget. Quite apart from the ability of Telecom to split capex into segments, each less than 10%:

- (a) 10% is still substantial;
- (b) sometimes even a small spend can be relevant; and
- (c) the Determination does not allow for this 10% delineation or any other, appropriately so.

Decisions must materially impact on the Undertakings

3.25 Also, in cl 7.4(a)(ii) TU Telecom has provided that instead of disclosing documentation if the decision relates to any matter relevant to Part 2A of the Act, the Determination or the Undertakings (see cl 15(5)(a) MD), Telecom just has to disclose if the decision relates to “any matter that materially impacts on the operation of these Undertakings”. This substantially reduces the scope of disclosure and raises the issues noted at paragraph 2.7. All must be disclosed and the IOG can decide what it wants to pursue. Over time, the handling of information will become streamlined. Additionally, the occasions when the CEO or Board must make disclosure in this way should be rare: if the position is otherwise, operational separation is not working.

IOG requests must be reasonable

3.26 Telecom has qualified clause 15(5)(b) of the Determination in cl 7.4(b) TU so that any request by the IOG for documentation must be reasonable. Generally, by the introduction of qualifiers such as “reasonable”, “material”, “significant” in cl 7.4 TU Telecom have created opportunity for both argument, delay and a loss of transparency. This change is not permitted, and it should be for the IOG to determine what it wants.

No notification to the Commission of IOG requests for documentation

3.27 By only referring to cl 7.4(a) TU in 7.4(c) TU Telecom has, contrary to the Determination, provided that it is not required to notify the Commission of provision of documentation to the IOG under clause 7.4(b) TU (i.e. provision of documentation when requested by the IOG).

No transparency if the CEO is participating in day-to-day management of the Executive

3.28 Telecom have introduced a qualification in cl 7.5(b) TU such that it is not required to comply with the transparency requirements in cl 7.4 TU in the case of the CEO’s day-to-day management of the Executive. As noted above, this is not appropriate.

Freedom to deal with annual and long-term plans

- 3.29 Clause 31(2) of the Determination provides the TCNZ board with a broad right to deal with the annual and long-term corporate plans and technology plans of the ANS Unit as they see fit provided that there was compliance with the requirements in clause 15 of the Determination. Telecom has increased the scope of this carve out in clause 7.3 TU. That is not available to Telecom, nor is it appropriate. The Minister has carefully reconciled the tensions between business unit autonomy and involvement from the center.

No requirement to comply with disclosure rules

- 3.30 Contrary to the requirements of the Determination, Telecom has not expressly included the important caveat that broad rights to deal with annual and long-term plans as the Board see fit are still subject to the provisions in clause 7 of the Undertakings.
- 3.31 In particular, Telecom have expressly provided in cl 7.5(c) TU that they do not need to comply with the disclosure requirements in cl 7.4(a) TU in relation to those annual and long-term plans that relate to the ANS and Wholesale Units.

The CEO may now deal with annual and long-term plans as he/she thinks fit

- 3.32 Telecom have expanded the scope of clause 31(2) to include the CEO.

Non-discrimination

Additional carve outs

- 3.33 Clauses 31.2 and 56.2 of the Undertakings introduce some new qualifications to the general rule that the ANS and Wholesale Unit and its employees (etc) are not to discriminate between those that use the Relevant Services.

The ANS and Wholesale Units can act as an independent company

- 3.34 Telecom has provided that the ANS and Wholesale Units may act towards service providers in the manner that an independent company would act on a stand alone and arm's-length basis. This change is not permitted by the Determination. It is potentially highly significant as it can distort the non-discrimination regime. Telecom is its own biggest customer by a very considerable margin. A company acting "independently" is likely to favour its biggest customer, to the detriment of others.

Discrimination permitted where there are different requirements or circumstances

- 3.35 Telecom has provided that it may discriminate by acting differently towards recipients of a service where their requirements or circumstances are different (but not on the basis that a recipient is or is not a Telecom Business Unit).

Customer Confidential Information

- 3.36 A foundation requirement of operational separation is the appropriate use and disclosure of Customer Confidential Information.
- 3.37 InternetNZ first addresses issues with the changed definition of "Customer Confidential Information" and then deals, on an indicative basis, with some of

the specific areas in which the requirements of the Determination have been diluted.

Reduction in what is treated as Customer Confidential Information

- 3.38 Telecom has made a significant number of changes to the definition of Customer Confidential Information. If the changes remain they could result in a level of discrimination that could undermine the robust operational separation of Telecom.

Access Seekers vs service providers

- 3.39 Contrary to the clear intention of the Determination, and the approach in the BT Undertakings, Telecom has replaced the broadly defined term of “service provider” with the more narrow term of “Access Seeker”. This means, for example, that the confidential information about telecommunications providers that have not yet sought access to a Relevant Services may be disclosed in a manner that later adversely affects them.

Customer Confidential Information tied to the provision of Relevant Services

- 3.40 Telecom limits the set of information that is confidential to that which has been provided in relation to the provision of a Relevant Service or that otherwise relates to the provision of a Relevant Service (a similar issue is raised in relation to cl 4 TU at paragraph 2.36). The Determination does not include these limitations and there does not seem to be good reason why they should apply. For example, the current wording means that, the ANS Unit will be permitted to disclose and permit access to confidential information that is not strictly in relation to the provision of a Relevant Service (for example, more generic service provider or customer capabilities) that should not find its way into the hands of the Wholesale Unit or Retail Unit).

Customer Confidential Information must be “specifically and identifiably” about that Access Seeker

- 3.41 Telecom requires that the information must be “specifically and identifiably” about that Access Seeker. This constraint is not included in the Determination. The Consultation Document made it clear that the approach of referring to a “particular customer” (as in the Interconnection Terms) was not going to be adopted.

Customers aren’t included

- 3.42 Contrary to the clear requirements of the Determination, Telecom provides that only information about end users, and not customers, of Access Seekers is considered to be “Customer Confidential Information”.
- 3.43 The term “end users” is specifically defined in the Act (in short, someone who is the “ultimate recipient” of the service) and so it is clear that the inclusion of “customers” in the Determination was intended to increase the scope of this definition.

Commercial Information not included

- 3.44 Telecom has included an additional carve out from what should be considered Customer Confidential Information: all Commercial Information. There may well be an overlap between Commercial Information (such as marketing intelligence

and predicted sales volumes) and information that should be considered Customer Confidential Information.

- 3.45 The current wording may mean that a person or group that is not permitted to receive Customer Confidential Information (such as Group Technology and Group Strategy and Development) may actually receive that information in the form of Commercial Information (see Part 2 of Schedule 2 of the Undertakings).

“Relates to” vs “confidential to”

- 3.46 The Determination merely refers to confidential information that “relates to” another service provider whereas Telecom provides that the information must be “confidential to” the Access Seeker. InternetNZ is concerned that:
- (a) “confidential to” may denote some sort of ownership; and
 - (b) that “confidential to” may also mean that confidential information about an Access Seeker that it may not even be aware of (such as risk assessment information) may fall outside the definition.
- 3.47 There may also be situations in which the combination of Access Seeker provided non-confidential information may be combined with other information that Telecom has to result in information that should be considered to be confidential.

Employee access to Customer Confidential Information

- 3.48 The general requirements on non-ANS and Wholesale Unit Telecom employees in clauses 14(4)(a) and 15(5)(a) of the Determination in relation to their access to Customer Confidential Information have been diluted by Telecom in a number of ways.

No protection for information about non-regulated Required Services

- 3.49 Telecom provides that the restrictions on access to Customer Confidential Information only apply to relation to the Relevant Services that the ANS / Wholesale Unit is “required to provide Access Seekers with” cl 87.5 TU. The Determination contains no such restriction (see cl 14(4) MD). Telecom’s change means that a non-ANS Unit Telecom employee is permitted to access Customer Confidential Information that’s relevant to soon-to-be regulated service. Access to such information could result in the inappropriate decisions or actions in relation to certain service providers.

Employee access

- 3.50 The circumstances in which Telecom employees are able to have access to Customer Confidential Information, have been changed from those specified circumstances that are available to

“all other service providers on an equal basis” [cl 14(4)(c) and 14(5)(c) MD]

to

“all Access Seekers who purchase those Relevant ... Services on an equal basis” [cl 87.5(c) and 87.6(c) TU]

- 3.51 This change lowers the threshold for which employees are permitted to access Customer Confidential Information. As noted above, the reference to “service

providers” in the Determination is intended to be broader than Telecom’s definition of “Access Seeker”. We’re not sure about the rationale for this change.

Protections limited to a Unit’s Customer Confidential Information

- 3.52 In addition to prohibiting access to certain Customer Confidential Information the Determination requires that the ANS Unit, Wholesale Unit and other Telecom Fixed Network Business Units be prohibited from such information in certain circumstances (see clauses 37, 63 and 78 MD).
- 3.53 Telecom has constrained the information that the ANS, Wholesale units and Telecom Fixed Network Business Units are prohibited from disclosing by requiring that in each case the Customer Confidential Information must be that particular Units’ Customer Confidential Information (for example, by using the term “Wholesale Unit Customer Confidential Information”) (see clauses 33, 58 and 74 TU).
- 3.54 It appears that to permit the ANS and Wholesale Units to disclose any other Customer Confidential Information that may be in their possession would be to undermine the clear behavioural and non-discriminatory drivers of operational separation.
- 3.55 As noted above, in each of clauses 33, 58 and 74 (all TU) Telecom has replaced the term “service provider” with “Access Seeker”, thereby reducing the scope of what should be considered Customer Confidential Information.

Additional carve outs for the Wholesale Unit

- 3.56 Telecom have provided for some additional circumstances in which the Wholesale Unit is not required to keep confidential Customer Confidential Information.

Disclosure of Customer Confidential Information

- 3.57 Similar issues apply. In setting out the rules on who may receive customer confidential information of the ANS Unit or the Wholesale Unit (see cl 90 TU) Telecom have significantly rearranged the structure of the regime proposed in the Determination (cl 91(2) MD). It may be of no moment that the disclosure rules are set out another way, however, it is of concern to InternetNZ that a number of the requirements of the Determination’s disclosure regime have not been reflected in Telecom’s Undertakings.
- 3.58 InternetNZ has identified some of the gaps/differences between cl 91(2) MD and cl 90 TU. Examples of the effect of Telecom’s changes include:
- (a) the Retail Unit is no longer constrained by the “legitimate need” and “reasonable and necessary disclosure” rules. Where the Determination refers to “any required Telecom business unit” in cl 91(2)(b) MD, Telecom refers only to the ANS Unit and the Wholesale Unit in its cl 90.1 TU.
 - (b) ANS Unit customer confidential information may be shared with the wholesale unit, the retail unit, and a Telecom fixed network business unit. This permits the type of non-price discrimination that operational separation is intended to prevent and is in direct opposition to the

principles set out in the MED Consultation Document.³⁹ Telecom appears to have omitted the words “do not” (set out in bold square brackets below) from cl 90.2 TU (the counterpart to Part 4, Schedule 2 MD relating to the Executive Committee):

Clause 90.1 is subject to the following limitations:

- (a) the ANS Unit can only disclose summaries of the ANS Unit Customer Confidential Information to members of the Executive who **[do not]** manage the Wholesale Unit, the Retail Unit or another Telecom Fixed Network Business Unit; and
- (b)
- (c) Wholesale Unit customer confidential information may be shared with the ANS unit and the retail unit. Telecom again appears to have omitted the words “do not” (set out in bold square brackets below) from cl 90.2 TU (the counterpart to Part 4, Schedule 2 MD relating to the Executive Committee):

Clause 90.1 is subject to the following limitations:

- (a) ...
- (b) the Wholesale Unit can only disclose summaries of Wholesale Unit Customer Confidential Information to members of the Executive who **[do not]** manage the ANS Unit or the Retail Unit.
- (d) From our analysis so far, we do not know if the following issue is of significance. The “reasonable and necessary” limitation has been diluted. The Determination requires (in cl 91(2)(a)(i) MD) that summaries of customer confidential information must contain no more information than is “reasonable and necessary” to enable a person to fulfill their role. Telecom has not adopted the words of the Determination but instead has employed the phrase “reasonably necessary”. Thus, the two separate thresholds to be met under the Determination (the disclosure must be both *reasonable* and *necessary* to enable a person to perform their role) have been transformed into a single, watered down threshold (the disclosure now need only be *reasonably necessary*). Reasonableness should be a threshold test of its own, not merely a qualifier of the necessity threshold.
- (e) Telecom has expanded the grounds on which a member of the executive committee may receive customer confidential information. The Determination (in cl 91(2)(a)(i) MD) permitted disclosure of commercial information to enable members of the Executive Committee to perform their role *as that role is specified in the undertakings*. Telecom have omitted this qualifier thereby expanding the grounds on which it may later be argued that disclosure was permissible. InternetNZ recommends that the qualifier be inserted at the end of each of cl 90.1(b) TU and cl 90.3(a)

³⁹ Telecommunication Act 2001: Development of Requirements for the Operational Separation of Telecom (April 2007) Consultation Document, para 195.

TU, and that the roles of the executive committee be specified in the undertakings as the Determination requires.

- (f) Customers may be identified in summaries. Where the Determination (in cl 91(2)(a)(ii) MD) requires that any summaries of customer confidential information must be in a form that could not reasonably be expected to identify any *customers*, Telecom has adopted the word *end-users*. “End-user” denotes someone who is the ultimate recipient of a service. This may not always be Telecom’s direct customer. Consequently, Telecom’s wording potentially allows the disclosure of customer confidential information which identifies its customers (albeit not its customers’ end-users).
- (g) Disclosure permitted when a limited group of service providers is also provided with commercial information. The Determination permits disclosure of customer confidential information if the information is also available to all other *service providers* on an equal basis (see cl 91(3)(b) MD). Telecom instead refers to the narrower group of *Access Seekers* (see cl 90.5 TU) thereby lowering the threshold at which disclosure to Telecom is permitted.

3.59 The restricted disclosure of commercial information is key to operational separation. Telecom’s Undertakings dilute a number of important aspects of the Determination’s regime. InternetNZ is of the view that the Undertakings should more closely match the Determination regime for disclosure.

Commercial Information

Definition of Commercial Information

3.60 The Determination merely refers to information that is “confidential”. Telecom refers to information that is “confidential to a Required Telecom Business Unit ...”. This suggests they are trying to limit the set of information that qualifies as Commercial Information. For example, if a Required Telecom Business Unit is in possession of commercial information that is “confidential to” another Telecom business unit but still relates to a Relevant Services (perhaps network capabilities or marketing intelligence?), should the RTBU still be permitted to disclose it.

3.61 This may only be an issue in relation to those clauses where the term Confidential Information is prefaced with “ANS Unit” or “Wholesale Unit” etc. In the Determination there is no such preface in clauses 9(1)(a)(4) and 91 and in Parts 2 and 3 of Schedule 2. Note that there is a similar issue with “Commercial Policy”.

Employee access to Commercial Information

3.62 The general requirements on non-ANS and Wholesale Unit Telecom employees in clauses 14(4)(a) and 15(5)(a) of the Determination in relation to their access to Customer Confidential Information have been diluted by Telecom in a number of ways.

No protection for commercial information about non-regulated Required Services

3.63 Telecom provides that the restrictions on access to Commercial Information only apply to relation to the Relevant Services that the ANS / Wholesale Unit is

“required to provide Access Seekers with” cl 87.5 TU. The Determination contains no such restriction (see clauses 14(4) and 14(5) MD). Telecom’s change means that a non-ANS Unit Telecom employee is permitted to access Commercial Information that’s relevant to soon-to-be regulated service. Access to such information could result in the inappropriate decisions or actions.

Employee access

- 3.64 The circumstances in which Telecom employees are able to have access to Commercial Information, have been changed from those specified circumstances that are available to

“all other service providers on an equal basis” [clauses 14(4)(b) and 14(5)(b) MD]

to

“all Access Seekers who purchase those Relevant ... Services on an equal basis” [clauses 87.5(b) and 87.6(b) TU]

- 3.65 This change lowers the threshold for which employees are permitted to access Commercial Information. As noted above, the reference to “service providers” in the Determination is intended to be broader than Telecom’s definition of “Access Seeker”. It’s not clear if that is an issue.

Disclosure by Fixed Network Business Units

- 3.66 Telecom has limited the Commercial Information that cannot be disclosed in clauses 34, 59 and 75 (all TU) to information “in respect of a [the] ... Relevant Service”. This means, for example, that ANS commercial information that doesn’t relate to a Relevant Network Access Service may be disclosed to other parts of Telecom. This undermines the stand-alone nature of the ANS Unit. However, if the fact that the references to “commercial information” are all preceded by “ANS”, “Wholesale” etc perhaps it was intended that this relationship to the relevant service should apply.

Reduced threshold for disclosure

- 3.67 The Determination permits Commercial Information to be disclosed by the ANS, Wholesale and Fixed Network Business Units only if the information is available to all other “service providers” [wide] on an equal basis (see clauses 38, 64 and 79 MD). Telecom permits disclosure if the information is available to Access Seekers who are actually being provided with the relevant service [narrow] (see clauses 34, 59 and 75 TU). This qualification should not be included. At the very least, potential Access Seekers may suffer as a result of this lack of transparency in relation to their plans and strategy. Further, all Access Seekers may suffer from this lack of transparency during the time that they wait for a particular service to become regulated.

Additional carve outs

No protection in relation to Wholesale Services that are not provided or required to be provided

- 3.68 Should the Wholesale Unit and Telecom Fixed Network Business Unit (other than ANS – see cl 72.2 TU) be permitted to disclose Commercial Information in relation to a Relevant Service that it does not provide and is not required to provide? This seems to relate to Commercial Information in respect of future

Required Services. Note that this exclusion is expressly included in cl 34.2(a) TU in relation ANS Commercial Information.

No protection in relation to the provision of Resale Services

- 3.69 Should the Wholesale Unit be permitted to disclose Commercial Information where it's necessary for it to meet its Resale Services obligations in the Undertakings cl 59.2(d) TU? This seems like a relatively broad carve out. A word search for "resale services" in both the Determination and Undertakings may better reveal the scope of the issue.
- 3.70 Note that new carve out in cl 75.2(b) TU. This broadly replicates the similar carve outs in clauses 38(2)(b) and 64(2)(a) of the Determination for the ANS Unit and Wholesale Unit. The issue is whether the same operational carve out should be permitted for other fixed network business units.

Disclosure of Commercial Information

- 3.71 In setting out the rules on who may receive commercial information of the ANS Unit or the Wholesale Unit (see cl 89 TU) Telecom have significantly rearranged the structure of the regime proposed in the Determination (cl 91(1) MD). It may be of no moment that the disclosure rules are set out another way, however, it is of concern to InternetNZ that a number of the requirements of the Determination's disclosure regime have not been reflected in Telecom's Undertakings.
- 3.72 InternetNZ has identified some of the gaps/differences between cl 91(1) MD and cl 89 TU. Examples of the effect of Telecom's changes include:
- (a) the Retail Unit is no longer constrained by the "legitimate need" and "reasonable and necessary disclosure" rules. Where the Determination refers to "any required Telecom business unit" in cl 91(1)(b) MD, Telecom refers only to the ANS Unit and the Wholesale Unit in its cl 89.1 TU.
 - (b) ANS Unit commercial information may be shared with the wholesale unit, the retail unit, and a Telecom fixed network business unit. This permits the type of non-price discrimination that operational separation is intended to prevent and is in direct opposition to the principles set out in the MED Consultation Document.⁴⁰ Telecom appears to have omitted the words "do not" (set out in bold square brackets below) from cl 89.2 TU (the counterpart to Part 2, Schedule 2 MD relating to the Executive Committee):

Clause 89.1 is subject to the following limitations:

- (a) the ANS Unit can only disclose summaries of the ANS Unit Commercial Information to members of the Executive who **[do not]** manage the Wholesale Unit, the Retail Unit or a Telecom Fixed Network Business Unit; and
- (b)
- (c) Wholesale Unit commercial information may be shared with the ANS unit and the retail unit. Telecom again appears to have omitted the words "do not" (set out in bold square brackets below) from cl 89.2 TU (the

⁴⁰ Telecommunication Act 2001: Development of Requirements for the Operational Separation of Telecom (April 2007) Consultation Document, para 202(b).

counterpart to Part 2, Schedule 2 MD relating to the Executive Committee):

Clause 89.1 is subject to the following limitations:

- (a) ...
 - (b) the Wholesale Unit can only disclose summaries of Wholesale Unit Commercial Information to members of the Executive who **[do not]** manage the ANS Unit or a Retail Unit.
- (d) It is not clear, without further checking, if the following is an issue. The “reasonable and necessary” limitation has been diluted. The Determination requires (in cl 91(1)(a)(i) MD) that summaries of commercial information must contain no more information than is “reasonable and necessary” to enable a person to fulfill their role. Telecom has not adopted the words of the Determination but instead has employed the phrase “reasonably necessary”. Thus, the two separate thresholds to be met under the Determination (the disclosure must be both *reasonable* and *necessary* to enable a person to perform their role) has been transformed into a single, watered down threshold (the disclosure must be *reasonably necessary*). Reasonableness should be a threshold test of its own, not merely a qualifier of the necessity threshold.
- (e) Telecom have expanded the grounds on which a member of the executive committee may receive commercial information. The Determination (in cl 91(1)(a)(i) MD) permitted disclosure of commercial information to enable members of the Executive Committee to perform their role *as that role is specified in the undertakings*. Telecom have omitted this qualifier thereby expanding the grounds on which it may later be argued that disclosure was permissible. InternetNZ recommends that the qualifier be inserted at the end of each of cl 89.1(b) TU and cl 89.3(a) TU, and that the roles of the executive committee be specified in the undertakings as the Determination requires.
- (f) Customers may be identified in summaries. Where the Determination (in cl 91(1)(a)(ii) MD) requires that any summaries of commercial information must be in a form that could not reasonably be expected to identify any *customers*, Telecom has adopted the word *end-users*. “End-user” denotes someone who is the ultimate recipient of a service. This may not always be Telecom’s direct customer. Consequently, Telecom’s wording potentially allows the disclosure of commercial information which identifies its customers (albeit not its customers’ end-users).
- (g) Disclosure permitted when a limited group of service providers is also provided with commercial information. The Determination permits disclosure of commercial information if the information is also available to all other *service providers* on an equal basis (see cl 91(3)(b) MD). Telecom instead refers to the narrower group of *Access Seekers* (see cl 89.5 TU) thereby lowering the threshold at which disclosure to Telecom is permitted.
- (h) Commercial information not permitted to be disclosed to the IOG. Telecom’s table of Part B persons who may receive commercial information appears to deny disclosure to the IOG (see the table in

Schedule 2, TU). The Determination (in Part 3, Schedule 2) anticipates that the IOG will receive commercial information.

- 3.73 The restricted disclosure of commercial information is key to operational separation. Telecom's Undertakings dilute a number of important aspects of the Determination's regime. InternetNZ is of the view that the Undertakings should more closely match the Determination regime for disclosure.

Participation in plans and policy

Employee participation

- 3.74 The general requirements on non-ANS and Wholesale Unit Telecom employees in clauses 14(4)(a) and 15(5)(a) of the Determination in relation to their participation in plans and commercial policy have been diluted by Telecom in a number of ways.

No protection against participation in relation to non-regulated Required Services

- 3.75 Telecom provides that the restrictions on participation only apply to relation to the Relevant Services that the ANS / Wholesale Unit is "required to provide Access Seekers with" (cl 87.5 TU). See also the references to "relate to" and "in respect of" in clauses 87.5(a)(i) to (iii) TU and 87.6(a)(i) to (iii) TU. The Determination contains no such restriction (see cl 14(4) and 14(5) MD). Telecom's change means that a non-ANS Unit Telecom employee is permitted to participate in the plans and Commercial Policy of future Required Services to the detriment of Access Seekers who eventually obtain access to the regulated services.

Employee access

- 3.76 The circumstances in which Telecom employees are able to have access to Commercial Information, have been changed from those specified circumstances that are available to

"all other service providers on an equal basis" [clauses 14(4)(a) and 14(5)(a) MD]

to

"all Access Seekers who purchase those Relevant ... Services on an equal basis" [clauses 87.5(a) and 87.6(a) TU]

- 3.77 This change lowers the threshold for which employees are permitted to participate. As noted above, the reference to "service providers" in the Determination is intended to be broader than Telecom's definition of "Access Seeker".

Indirect participation not prohibited

- 3.78 In the Determination Telecom Employees are prohibited from "directly or indirectly" participating in the formulation etc of policy and plans. Telecom have removed this reference and just referred to "participate". The inclusion of "directly or indirectly" assisted in making the prohibition comprehensive and reducing the risk gaming. InternetNZ considers that the reference to "directly or indirectly" should remain.

Formal plans only

- 3.79 Telecom have restricted the reference to “plans” in clause 14(4)(a)(ii) TU and 14(5)(a)(ii) TU to “formal plans” of the relevant unit in relation to the relevant services. “Plans” encompass a wider array than formal plans. What are formal plans anyway. The Determination does not permit this dilution.

Retail influence

- 3.80 The circumstances in which Telecom employees are permitted to influence Commercial Policy of any Telecom Fixed Network Business Unit have been changed from those specified circumstances that are available to:

“all other service providers on an equal basis”

to

“Access Seekers of that service on an equal basis” [cl 71 TU]

- 3.81 This change lowers the threshold for which employees are permitted to influence . As noted above, the reference to “service providers” in the Determination is intended to be broader than Telecom’s definition of “Access Seeker”.

ANS Unit to act in its own best interests

- 3.82 Telecom have in cl 30 TU diluted the requirement that ANS Unit Employees must act in the ANS Unit’s best interests.

Qualification of “best interests”

- 3.83 The standard of “best interests” has been changed to “best commercial interests”.

Limited to the ANS Unit’s scope of business

- 3.84 “best commercial interests” only applies within the ANS Unit’s scope of business.

Decisions must be on behalf of the ANS Unit

- 3.85 Telecom has further diluted the requirement by providing that it only applies when Employees make decisions “on behalf of” the ANS Unit in relation to relevant network access services (instead of just in relation to relevant network access services). It is not clear if this is a significant issue.

Disclosure of trading arrangements

- 3.86 The Determination requires that the ANS and Wholesale units are required to disclose all of the terms of the transactions with other Telecom Business Units and Retail Unit, respectively, for the provision of relevant services (see cl 32 TU and cl 57 TU). Telecom have qualified this obligation by providing that it only has to disclose the “terms of supply”. InternetNZ is concerned that this could result in a failure to disclose the full terms of the transaction.

- 3.87 The disclosure obligations should be clear and wide. Ascertaining and disclosing full details of transfer arrangements is key to the operational

separation model. This is an area on which, InternetNZ submits, the Ministry should particularly focus.

- 3.88 In their covering note with the draft undertakings, Telecom seek additional time to provide details of transfer arrangements. Any delay needs to be amply justified given the importance of this information. In any event a series to deadlines, focussing first on the most significant arrangements, should be in place.

Part 4 Equivalence Standards

Definition of Equivalence of Inputs

- 4.1 It is not clear whether the following issue is material without checking further detail. The reference to the plural "Access Seekers" throughout the definition could, despite clause cl 2.6(c) TU and the introductory words of cl 1.2(a) TU mean that the EOI standard does not apply to a situation in which there is only one Access Seeker that desires access to the Relevant Service? Note that cl 1.2(b)(iv) TU specifically includes a singular reference to Access Seeker – could this mean that Telecom can make changes to the equivalence standard for all Access Seekers if it has agreed to a particular change for a particular Access Seeker?
- 4.2 The changes to the EOI definition (cl 9 MD; cl 1.2 TU) should be reviewed carefully by the Ministry.

Services and systems ready for EOI

- 4.3 The general requirement that the ANS and Wholesale Units will build services and systems ready for the EOI standard in clauses 27 and 55 of the Determination have been diluted in clause cl 23 TU and cl 50.1 TU in the following ways:
- (a) The requirement no longer applies to "associated systems" (is this significant?).
 - (b) The time that the EOI service must be ready seems to have been delayed from the time that the services become regulated to an "as soon as reasonably practicable" which must, in any event, be after 31 December 2011.
- 4.4 Telecom have not carried across into the Undertakings the clarification in the Determination that clauses 51, 54 and 56 of the Determination (now clauses cl 47, 49 and 51 of the Undertakings) are not limited by cl 50 TU.

Part 5 ANS Unit

Scope of business of the ANS Unit

- 5.1 As noted above Telecom have added a provision to confirm the scope of business for the ANS Unit (cl 13 TU). This scope statement was not included in the Determination and InternetNZ is concerned that it may have unforeseen and unacceptable consequences. This new section should be deleted insofar as it could lead to reduced scope.
- 5.2 The scope of the ANS is as in the Determination, not, for example, fixed line local access services, etc (cl 13.1 TU).

Disclosure of asset related documentation

- 5.3 In clause 14.4 TU the scope of the documentation that has to be disclosed to the IOG has been restricted by referring only to the supply of a copy of "written arrangements entered into" rather than "the documents relating to the arrangement."

ANS Unit control over assets

- 5.4 The Determination provides that the ANS Unit needs to have sufficient control over the assets it did not control but that were needed to "discharge its responsibilities under these requirements in relation to the delivery of relevant network access services" (see clause 19(1) MD).
- 5.5 Telecom has varied this requirement so that the ANS Unit will only have sufficient control over the assets "used" to provide the Relevant Network Access Services to the extent "required to provide those services in accordance with these Undertakings" (cl 16.1 TU). It is not clear if this change is significant.
- 5.6 The requirement that certain arrangements be in writing in clause 16.2 TU (which are then disclosed to the IOG in 16.3 TU) may have been diluted from the standard set by the Determination by requiring that such arrangements be entered into "for the purpose of clause 16.1". In other words, it looks like arrangements that actually provide for the ANS Unit to have influence over network assets, but that were not entered into for the purpose of providing RNAS in accordance with the Undertakings, do not have to be in writing or disclosed. Is this of concern? Note that the same issue occurs in relation to cl 44.2 TU and cl 44.3 TU (and so comments in the Wholesale Unit section may also be required).
- 5.7 As with clause 14.4 TU, the scope of the documentation that has to be disclosed to the IOG has been restricted by referring only to the supply of a copy of "written arrangements entered into" rather than "the documents relating to the arrangement".
- 5.8 The Ministry's review may show it is significant that Telecom has added in clause 16.1 TU that the ANS Unit only has to have sufficient control over "Telecom" network assets.

Definition of Relevant Network Access Services

- 5.9 Telecom have removed the reference to "regulated mobile services" from the definitions of "Relevant Network Access Services" and "Relevant Wholesale

Services” and have replaced it with a reference to “Mobile Services” (clauses 18.2(c)(iv) and 45.2(b)(iv) TU). So, it seems that Telecom has expanded the scope of the mobile services to be excluded from the Relevant Services to include non-regulated mobile services. Note that the phrase “regulated mobile services” was defined in the Determination and has not been included in the Undertaking.

Fixed Wireless Access

- 5.10 Reference to fixed wireless access systems (FWA) has been removed from the definition of “Local Access Network” in clause 14.2 TU by deleting it from clause 14.2(b)(iii) TU and specifically excluding it from the definition in clause 14.2(c)(v) TU.
- 5.11 A reference to FWA has been inserted in the definition of “Relevant Network Access Services” in clause 18.2(b) TU by referring to clause 15.1(b) TU. However, clause 15 TU imposes some constraints, for example:
- (a) FWA only applies to an area where there is “no” Telecom Local Access Network (cf the reference to copper “substitute” or “replacement” in clause 14.2 TU).
 - (b) The ANS Unit is only permitted to use the system for the purpose of offering “local access services” (undefined).
 - (c) Any service provided by the ANS Unit must be one that “exclusively or mainly” uses the relevant systems.
- 5.12 Basically, it seems that the Relevant Network Access Services only include services that utilise fixed wireless access systems where those systems are used by Telecom in an area without any copper.

Consultation about changes to the Access Network

- 5.13 Service providers need to be consulted and informed about changes to the access network and related services to comply with the core requirements of equivalence, non-discrimination and transparency. If service providers are not kept up to date with these changes, and are not given appropriate opportunities to influence (for example, forecasting and prioritisation of service developments), this will undermine a robust operational separation of Telecom.
- 5.14 Telecom have in clause 39 TU degraded the key consultation requirements for the ANS Unit that were specified in clause 43 of the Determination.

Limitation to Required Telecom Business Units

- 5.15 Telecom’s obligation to consult on a wide basis is limited to those circumstances in which it consults with a “Required Telecom Business Unit” and not any Telecom business unit (cl 39 TU).
- 5.16 Telecom constrains the consultation required to the specific significant decisions related to the circumstances in (a) to (c) that affect the relevant services, whereas the Determination requires consultation in relation to any significant decision that may affect relevant network access services in relation to (a) to (c) (i.e. a broader are in which consultation is required). For example, Telecom limits its consultation to a significant decision that relates to a change to the network that access the relevant services whereas the Determination may

require consultation on a decision that is not specifically on a change to the network but still affects the relevant services.

Decisions must “materially affect” Access Seeker’s use or experience

- 5.17 Instead of requiring consultation in relation to any significant decisions that “may affect” relevant network access services (cl 39 TU), Telecom limits this to significant decisions that may “materially affect an Access Seeker’s use or experience” of the service. As noted in paragraph 2.7 the inclusion of “material” is unhelpful (there is already a qualification in respect of “significance”). Further, the reference to “use or experience” imposes an unnecessary qualification.

Consultation only with affected Access Seekers

- 5.18 Telecom is not required to consult with all “service provider customers” (as required in the Determination) but only with “affected Access Seekers”. For example, this may result in no or limited consultation depending on who at the time is actually seeking access to the relevant services.

Limited to provided services

- 5.19 Telecom is only required to consult on changes to the specifications or functionality of the relevant network access services that it actually provides to Access Seekers. So, there will be no consultation on services that may become regulated in the future or that are not regulated and are provided by Telecom anyway. The Consultation Document makes it clear in para 163(a) that there should be equivalence in the ability to influence the forecasting and prioritisation of new service developments.
- 5.20 Telecom is also required to only consult on new relevant network access services “that it intends (at the time) to provide to Access Seekers” (cl 39(c) TU). This sort of qualification creates a relatively subjective loophole in which information about service developments can be disclosed to other Telecom business units but withheld from competitors. If the ANS Unit is going to consult about required service developments with any other Telecom business unit it should be doing the same with service providers.

Inequality of consultation

- 5.21 Telecom has provided that it may vary the levels and periods of consultation as is “reasonably justified in the circumstances” provided that Access Seekers still have “sufficient opportunity for meaningful consultation” (cl 39.2 TU).
- 5.22 This qualification was not thought necessary in the Determination and leaves uncertain what criteria will be used to determine the “reasonable justification”. Given the critical need to appropriate consultation it is preferable that this qualification be removed or at least any issues around the scope of the consultation be approved by the IOG.
- 5.23 Telecom’s approach does not address the core need of equality of consultation – service providers may not know what extent of consultation has been occurring with Telecom’s other business units to determine what is or is not “meaningful consultation”.

Process for Access Network Services requests

- 5.24 Telecom has not included in clause 41 TU the requirement that there be a process for making, considering, advising and implementing decisions about the requests in relation to assets controlled by the ANS Unit.

Part 6 Wholesale Unit

Introduction

- 6.1 Many of the issues applicable to the ANS apply also to the Wholesale Unit structure so they are not repeated.

Fibre to the premises

- 6.2 Clause 23(2) of the Determination, which confirms when Telecom can refuse access to FTTP, has been significantly varied in clause 65.4 of the Undertakings in the following ways:
- (a) The reference to “anywhere in New Zealand” in the first paragraph and then the specific exclusion of geographic and scope considerations seems to indicate that to get FTTP a service provider needs to be able to deploy something similar for Telecom anywhere in NZ.
 - (b) In cl 65.4(e) TU Telecom needs to establish that the refusal is in keeping with the Undertakings – this omits the further requirements in clause 23(2) MD that the refusal be “reasonable and appropriate” and in keeping with Telecom’s obligations under Part 2A of the Act and the Determination.

Wholesale Unit influence over assets

Influence not just over Telecom assets

- 6.3 Telecom has provided that the Wholesale Unit need only have sufficient influence over the *Telecom assets* that are used to provide relevant wholesale services (cl 44.1 TU). The Determination does not limit the requirement to Telecom assets but rather refers to assets generally (cl 48 MD).
- 6.4 Telecom’s change here waters down the requirement for sufficient influence. For example, where assets are owned by a third party but used by Telecom to provide relevant wholesale services, the clause in Telecom’s Undertakings would not apply. InternetNZ expects that Telecom may outsource services necessary for the provision of wholesale services and, consequently, the Wholesale Unit should be required to set up its arrangements with those third parties in a manner which permits sufficient influence over those third party assets in line with the Determination. That is consistent with clause 97 MD.

ANS assets excluded

- 6.5 Telecom have excluded from those assets over which the Wholesale Unit must have influence those assets controlled by the ANS Unit (cl 44.1 TU). This limitation is not present in the Determination (cl 48(1) MD).
- 6.6 InternetNZ is of the view that the Wholesale Unit could still obtain “sufficient influence” over the necessary assets through transparent, arm’s length agreements with the ANS Unit.

Relevant Wholesale Services

Mobile services

- 6.7 The Determination excludes “any regulated mobile services” from the definition of “Relevant Wholesale Services” (cl 49(2)(b)(iv) MD). Telecom’s counterpart provision employs the wider term “Mobile Services” (cl 45.2(b)(vi) TU). Telecom has thus expanded the exclusion. As identified above, this approach by Telecom should be reviewed.

Responsibilities of the Wholesale Unit

Commission determinations

- 6.8 Telecom have carved-out certain matters from the responsibility of the Wholesale Unit where those matters “have been determined by the Commission under Part 2 of the Act” (cl 46.1 TU, compare to cl 50(1) MD).
- 6.9 Such a carve-out may well be appropriate. However, InternetNZ is of the view that Telecom’s change should be amended so as to be clear that the mere fact of determination does not relieve the Wholesale Unit of responsibility; rather that a determination that prescribes otherwise will. For example, the Undertakings could read “have been determined **otherwise** by the Commission under Part 2 of the Act”.

Providing services on an EOI basis

Not all services provided on an equivalence standard

- 6.10 The Determination requires Telecom to provide each relevant wholesale service on the applicable standard of equivalence (cl 51(1) MD). Telecom dilutes this requirement by undertaking only to provide the service on the applicable standard “if the Wholesale Unit is required to provide Access Seekers with a Relevant Wholesale Service” (cl 47 TU).

Newly Regulated Relevant Wholesale Services

- 6.11 Where a Relevant Wholesale Service is regulated after the Approval Date, Telecom has committed to providing that service on the applicable standard of equivalence in accordance with a migration plan approved by the Commission (cl 49(c) TU).
- 6.12 InternetNZ is concerned that this works against the obligation on Telecom to build all of its relevant wholesale services and associated systems to be EOI compliant in the event that the services become regulated, ie EOI compliant immediately.

Building services ready for EOI standard

Associated systems not provided for

- 6.13 The Determination requires that the wholesale unit must build all services *and associated systems* in such a manner as to ensure the services can be purchased on an EOI basis (cl 55(1) MD).
- 6.14 Telecom have committed only to building its *services* in such a manner; “associated systems” is not specified in Telecom’s counterpart clause (cl 50.1 TU). InternetNZ is not sure whether this departure from the Determination is material or not, but as it is the systems that ultimately provide the services, it feels these should also be subject to the provision.

Services should be available on EOI basis immediately

- 6.15 The Determination requires wholesale services to be built in such a manner as to ensure they can be purchased on an EOI basis in the event that they become regulated (cl 55(1) MD).
- 6.16 Telecom has diluted this obligation by committing only to build the services so they can be purchased on an EOI basis “as soon as reasonably practicable” in the event that Telecom becomes required to provide the service (cl 50.1 TU).
- 6.17 InternetNZ submits that Telecom’s change introduces a lower threshold than that set by the absolute standard in the Determination. As equivalence is a key driver behind operational separation the higher standard of the Determination should be adopted.

Further limitations on the need to build to the EOI standard

- 6.18 Telecom has included further limitations on the need to build services ready for the EOI standard (see cl 50.3 TU). While the Determination anticipates some limitations on the general rule, it requires that certain criteria be met, namely, the service must be identified and the standard of equivalence that will apply to that service must be specified in the undertakings (cl 55(2) MD). Telecom has not met these criteria for the limitations it proposes in its cl 50.3 TU.
- 6.19 Further, Telecom has created a large carve-out from the rule for any services it does not think that it will consume (cl 50.3(b) TU). The Determination requires that Telecom propose another standard of equivalence for those services to be built to (see cl 55(3) MD). However, Telecom has not proposed a standard of equivalence, but rather states that it will build the service “in a manner that will allow it to be supplied on fair and reasonable terms” (cl 50.3 TU). InternetNZ is of the view that this introduces uncertainty and the opportunity for gaming.
- 6.20 The example that Telecom sets out at the end of its cl 50 TU is at odds with the general thrust of the Determination counterpart cl 55 MD. The example refers to a service that only Telecom itself will use, however, cl 55(2) MD anticipates limitations to the general rule only where Telecom expects that it will *not* use the service itself. InternetNZ submits that a different example be used in order that confusion is not introduced into the interpretation of Telecom’s cl 50 TU.

Relevant services Telecom chooses to supply

- 6.21 The Determination provides a back-stop regime for any relevant services that Telecom chooses to supply to “service providers”: Telecom must supply these on commercial terms (cl 56 MD).
- 6.22 In its counterpart clause Telecom refers to the narrower group of “Access Seekers” (cl 51 TU). As discussed earlier in this paper this reference should be to the wider group of “service providers” as provided for in the Determination.

Wholesale Unit must act at arm’s-length

Ordinary meaning of “arm’s-length” omitted

- 6.23 Telecom have omitted to state that their cl 52 TU does not limit the ordinary meaning of the expression “arm’s-length” (cf cl 57(4) MD).

Limitations do not meet criteria of Determination

- 6.24 The Determination permits limitations to the general rule that the Wholesale Unit must act at arm’s length to the Retail Unit (cl 57(5) MD). However, Telecom’s

limitations (see cl 52.3 and cl 52.4 TU) do not meet the criteria for limitations set down by the Determination.

- 6.25 InternetNZ is also of the view that the Determination anticipated that any limitations would be set out with greater specificity than Telecom has so far done.

Precedence of the Act not reflected in Undertakings

- 6.26 The Determination states that nothing in cl 57 MD limits s 69D of the Act. There is no counterpart provision in Telecom's cl 52. The importance of the arm's-length principle mandates that this provision be included in Telecom's Undertakings.

Employees may not work for the Retail Unit

- 6.27 Telecom have created a large exception to the rule that no person working for the Wholesale Unit may work for the Retail Unit (cl 54.2 TU, compare cl 59 MD). Telecom's exception tends to subvert the purpose of the Determination because, despite the written agreement that work will be done on commercial terms, the employee will (inadvertently or otherwise) still have access to the thinking, culture, and policies of that other unit.
- 6.28 InternetNZ suggests this exception be deleted from the Undertakings, as noted above in more detail.

Formulation of commercial policy

- 6.29 Telecom has provided that the Wholesale Unit may formulate its commercial policy taking into account retail services that correspond to its Resale Services (cl 55 TU, compare cl 60 MD).
- 6.30 This tends to subvert the general rule that the Wholesale Unit should act at arm's-length to the Retail Units. As such, InternetNZ suggests that the exception be removed from the Undertakings.

Wholesale Unit not to discriminate

- 6.31 Telecom has created some exceptions to the rule that the Wholesale Unit must not discriminate between access seekers (including Telecom itself) (cl 56.2 TU).
- 6.32 The first limitation, at cl 56.2(a) TU, seems unnecessary if Telecom is in compliance with the general rule at cl 56.1 TU.
- 6.33 The second limitation, at cl 56.2(b) TU, may be appropriate if the other service providers are given sufficient information to make an informed choice about the different service it receives.

Part 7 Enforcement and Oversight

- 7.1 Telecom does not need to consult with the Commission in relation to removing a non-independent member of the Board (compare cl 77.5 TU with cl 81(f) MD).
- 7.2 There is no timeframe for preparing the terms of reference (cl 78 TU). Arguably, the terms of reference should be included in the Determination and not resolved later. If to be resolved later there should be a mechanism for resolution of issues (eg, if IOG and Telecom can't agree terms of reference, they are determined by the Commission).
- 7.3 Telecom have restricted the terms of reference for the IOG from the "functions contemplated for it" in the Determination to the functions expressly set out in cl 78 TU (compare with cl 82 MD).
- 7.4 The IOG's ability to request information and carry out investigations in cl 78.1(c) TU has been qualified by "reasonably necessary".
- 7.5 The IOG only has to review reports by the Support Office prepared "in accordance with these Undertakings" cl 78.1(e) TU.
- 7.6 It is essential that the IOG has broad powers to ask for information as it so decides, rather than being restrained by the form of the Undertakings and the terms of reference. Information includes verbal as well as documentary information, and what people can tell the IOG (Telecom staff should be available for questioning). Note the main submissions and the identification of the restriction on the IOG getting "commercial information".
- 7.7 Reflecting the reality that Telecom has provided minimal detail in this draft Undertaking, there is the omission of clause 82(o) in the Determination. The Ministry and Telecom should proactively determine additional matters or there should be specific provision for this to be considered as part of formulation later, of terms of reference.
- 7.8 The inclusion of "for the IOG" in clause cl 79.1(g) TU significantly reduces the scope of the documentation that Telecom must make public.
- 7.9 The change to the definition of Employee means that a code of practice for the CEO does not need to be prepared cl 83.1(b) TU or made public cl 79.1(g)(ii) TU.
- 7.10 Reports on KPIs and codes of conduct only need to be provided in the manner and form "reasonably required", and within "reasonable" timeframes specified, by the IOG and Commission cl 83.3(a) and (b) TU.
- 7.11 Clause 87(4) in the Determination is omitted and should be included.
- 7.12 Significance of the inclusion of "will" in cl 85 TU which means it is mandatory for the IOG to remove confidential or commercially sensitive information from report that are to be made public. Note that the Determination included a further qualification of referring to information that "can be removed" (which seems to acknowledge that at times confidential/commercial information should not be removed. This clause could be used by Telecom to cut across the overall approach to transparency.
- 7.13 Telecom has inserted a new confidentiality requirement in clause 86 TU that, if not well understood, could cut across the overall need for transparency. Note

that the Minister is not permitted to use the specified confidential information for performing his/her functions in respect of the Undertakings.

Part 8 Miscellaneous

Force Majeure

- 8.1 As permitted by the Determination (cl 95 MD), Telecom has included a force majeure provision in their Undertakings (cl 94 TU).
- 8.2 InternetNZ is of the view that Telecom should at least be expected to adopt a force majeure regime similar to that in the UCLL general terms.
- 8.3 See Schedule 1 of this submission which sets out a comparison of Force Majeure clause in the Telecom Undertakings with Force Majeure clause in the Commerce Commission's UCLL Standard Terms.⁴¹
- 8.4 To that end, InternetNZ recommends the following changes to Telecom's clause 94:
- (a) **Industrial disputes:** subclause (b) to have the following text inserted so the subclause reads (additional text bold and enclosed in square brackets):
 - (b) strike, lockout, work stoppage or other labour hindrance **[(provided that, in circumstances where the industrial dispute involves Telecom's own employees, Telecom must have taken reasonable actions to prevent such industrial dispute from arising)]**;
 - (b) **Collisions:** clarify in subclause (d) that collisions are "nuclear" collisions.
 - (c) **Telecom contractors:** delete the word "services" in subclause (f). In line with the UCLL force majeure provision Telecom should be responsible for all of its contractors.
 - (d) **Amendments:** include limits on subclause (h) which deals with amendments to the Act. While such a category of force majeure event may be appropriate, relief must only be in circumstances where Telecom cannot reasonably meet the requirements of the amendment before it comes into force.
- 8.5 Telecom's Undertakings requires that the IOG and the Commission are to be notified of a force majeure event (cl 94.2 TU). InternetNZ considers that this notification requirement could helpfully be extended to include those service providers who are likely to have been affected by that force majeure event.

Withholding and delaying consent

- 8.6 Telecom's new requirement in cl 108 TU seem unacceptable. For example, Telecom could make judgment calls on this without consultation. There should be other ways of addressing delays.

⁴¹ Standard Terms Determination for Telecom's Unbundled Copper Local Loop Network Service (Public Version), 7 November 2007.

Schedule 1 – Force Majeure clause comparison between the Undertakings and the Standard Terms Determination for UCLL

In this comparison the differences between the Telecom force majeure clause and the STD for UCLL force majeure wording are demonstrated as follows:

* struck out text is from the STD for UCLL provision; and

* underlined text is from clause Telecom's draft Undertakings.

~~22~~ Force Majeure majeure

~~22.1~~ In this section ~~22~~:

~~22.1.1 Force Majeure Event means any event beyond the reasonable control of a Party, including:~~

94.1 A "force majeure event" is any:

(a) act of God ~~or force of nature (including~~ fire, earthquake, ~~flood, landslide and weather of exceptional severity);~~ storm or flood;

~~(b) public mains electrical supply failure;~~

~~(c) serious accident the cause of which is unconnected to the Party relying on the Force Majeure Event (including explosion and radioactive contamination);~~

~~(d) requirement or restriction of or failure to act by any government, regulatory or judicial entity (including any requirement to comply with a statutory or regulatory obligation) other than any exercise of power under the Act in relation to the UCLL Terms itself;~~

(b) strike, lockout, work stoppage or other labour hindrance;

(c) inability to obtain or delay in obtaining adequate labour, suitably qualified Employees or contractors, equipment, materials, transport, services or supplies at a reasonable cost;

(d) explosion, nuclear accident or collision;

(e) sabotage, riot, civil disturbance, insurrection, epidemic, ~~or national or local~~ emergency (whether in fact or law) or act of war (whether declared or not);

~~(f) sabotage, riot, insurrection, terrorism or civil disorder;~~

~~(g) military operations or war (whether declared or not);~~

~~(h) industrial dispute of any kind (provided that, in circumstances where the industrial dispute involves its own employees, the Party relying on the Force Majeure Event must have taken reasonable actions to prevent such industrial dispute from arising); or~~

~~(i) acts or omissions of strangers for whom the Party relying on the Force Majeure Event is not responsible (for the avoidance of doubt, the Access Seeker and Telecom are responsible for all of their respective contractors, employees, servants and agents);~~

(f) the failure of any equipment, materials, services or supplies provided to Telecom by any other person;

(g) unavoidable accident;

(h) amendment or proposed amendment to, or regulation made pursuant to, the Act; and

(i) other event beyond the reasonable control of Telecom; but

~~but~~ does not include:

(j) loss of supply of any essential services where such loss of supply is caused by Telecom's action or negligence;

~~(k) any event which the Party relying on the Force Majeure Event~~ Telecom could have ~~avoided~~ prevented or overcome by ~~exercising a standard~~ the

exercise of reasonable ~~care~~ diligence and at a reasonable cost; or

~~(k) any~~ lack of funds for any reason or any other inability to pay.

~~22.2 Notwithstanding anything in the UCLL Terms, neither the Access Seeker nor Telecom is liable for any cost, liability, loss, damage or expense (including legal and other professional costs) for not meeting or for any delay in meeting any obligation under the UCLL Terms (other than any obligation arising under the UCLL Terms to pay money in the ordinary course of business) caused by a Force Majeure Event.~~

~~22.3 Where the Access Seeker or Telecom rely on a Force Majeure Event in respect of any failure or delay in meeting its obligations under the UCLL Terms, it must forthwith give Notice to the other Party of the estimated extent and duration of its inability to perform or delay in performing its obligations.~~

~~22.4 Upon cessation of the effects of a Force Majeure Event any Party relying on it must forthwith give Notice to the other Party of such cessation.~~

~~22.5 A Force Majeure Event does not discharge any Party relying on it from any obligation accrued beforehand. Any Party relying on a Force Majeure Event must continue to perform those of its obligations not affected by the Force Majeure Event.~~

~~22.6 Any Party affected by a Force Majeure Event will use all reasonable endeavours to mitigate as soon as practicable those consequences of that Force Majeure Event which have affected its obligations under the UCLL Terms, and will keep the other Party fully informed about the status of the Force Majeure Event and the extent to which it is preventing the first Party from performing those obligations.~~

~~22.7 To the extent that Telecom is prevented as a result of a Force Majeure Event from providing all or part of the UCLL Service, the Access Seeker is not required to pay the Charges that apply to that part of the UCLL Service that is not provided by Telecom during the Force Majeure Event.~~

94.2 If Telecom fails, or believes it might fail, to meet an obligation under these Undertakings because of a force majeure event, it will:

(a) give notice to the IOG and the Commission of the event and the likely effect of the event as soon as is reasonably practicable after it becomes aware of the event; and

(b) do all it reasonably can to meet the obligation as soon as is reasonably practicable.