



COMMERCE COMMISSION

980984

CLARIFICATION OF A DETERMINATION UNDER SECTION 58 TELECOMMUNICATIONS ACT 2001

Introduction

1. The Telecommunications Act 2001 (Act) provides a range of mechanisms to amend a determination¹, including a:
 - pricing review determination under section 51;
 - clarification under section 58; and
 - reconsideration under section 59.
2. The objective of these Guidelines is to provide some guidance for Access Providers and Access Seekers on the clarifications mechanism under section 58 of the Act. These Guidelines include:
 - a diagram showing the likely key steps that the Commission may follow during the clarifications process (Appendix A); and
 - a template for an application for clarification (Appendix B).

These Guidelines provide generic information and should not be relied on as binding or as legal advice.

Clarification of Determinations

3. Section 58 of the Act allows the Commission to amend a determination for the purpose of making a clarification if²:
 - at any time the Commission, on its own initiative or on the application of any person, considers that a determination requires clarification; and
 - no appeal is pending in respect of the determination.
4. The Commission is not obliged to commence a clarification at any time but will assess each application for clarification and apply its discretion on a case by case basis.

¹ Other statutory mechanisms exist to amend standard terms determination: (a) a review under section 30R of the Act; and (b) a residual terms determination under section 30ZB.

² Section 58 was amended in December 2006 to remove subsection (1)(b) which had required the Commission to assess before amending the determination “if the clarification is either not material to any person affected by the determination or is agreed to by all those persons”.

5. In some circumstances, the Commission may consider a clarification is unnecessary and simply indicate its views to the applicant of how a clause should be interpreted.

Commencing a Clarification

6. As noted in paragraph 3 above, a clarification is either initiated by the Commission (which may occur in response to its own monitoring, research and analysis), or a party may apply for a clarification. In both cases, only the Commission may decide if a determination requires clarification.
7. Parties are encouraged to discuss with the Commission whether issues of concern could be dealt with by a clarification under section 58 or another statutory power (such as, section 30R or section 59 of the Act).
8. If a party wishes to apply for a clarification, they should provide sufficient information to enable the Commission to make a decision on whether a clarification is appropriate. The applicant is encouraged to submit joint views on non-price matters, whenever possible. The applicant must at a minimum include all of the information specified in the template for a clarification application (Appendix B).
9. Where there are objections to an application for clarification, or there are matters that remain unclear, the Commission may request further information from the applicant or other companies before deciding how to address the request under the Act.
10. The Commission will consider the substance of each application on a case by case basis. It may decide after consideration that the application may be better suited to guidance on interpretation or requires consideration under another statutory power. For example, if the application requests significant changes to a standard terms determination, the Commission may decide to initiate a review under section 30R of the Act rather than invoke section 58.

What can be done via a clarification?

11. The term “clarification” is not defined and is broad in scope. Any clarification made must best give, or be likely to best give, effect to the purpose set out in section 18. The Commission considers that the clarification process can be used to remove errors, or make a determination clearer, or less complex, ambiguous or obscure.
12. A clarification is not limited to addressing minor slips or errors made in the determination. On a case by case basis, substantive amendments can be made to a determination, where the amendment is, as per paragraph 11 above, to remove errors, or make a determination clearer, or less complex, ambiguous or obscure.
13. Examples of amendments made to determinations under section 58 are listed below in order to give applicants a guide as to what can be achieved with a clarification under section 58:
 - Decision 643 where new forecasting rules were included in the Unbundled Copper Local Loop Standard Terms Determination;
 - Decision 654 which made amendments to the UBA Backhaul Standard Terms Determination to correct inconsistencies as well as ensure definitions and

diagrams reflected where handover of the UBA Backhaul Service will occur in Telecom's network;

- Decision 679 which changed the rejection reasons in the UBA Operations Manual, and clarified the application of the modem installation service and connection and wiring charges;
- Decision 681 which made amendments to the UCLL Backhaul Service Description to make the appendices of the Schedules to the General Terms consistent in terms of the required technical interface specifications;
- Decision 682 where another exception was introduced to the cabinetisation notice provisions as well as an amendment to clarify who must pay for the costs of transferring customers moving from the exchange to the cabinet;
- Decision 688 which clarified the circumstances when an early termination charge is payable in the UBA Standard Terms Determination and made amendments to deal with pro-rating and introduced a quarterly adjustment process for the early termination charge; and
- Decision 689 which introduced batch processing of service and quarterly adjustments for the UBA Service during a quarter in order to streamline the process for implementing price adjustments. This Decision also amended the timings within which price adjustments are activated in Telecom's billing systems, to reflect current practice.

What can't be done via a clarification?

14. Section 58 may not be invoked to address more significant and serious matters that are more suited to a review under section 30R (e.g. a review of the application of the competition conditions) or a reconsideration under section 59. A clarification cannot achieve all of the outcomes contemplated by other provisions, such as:
 - making changes that the Commission considers are significant changes to price terms or non-price terms;
 - revoking and replacing a determination; or
 - inserting an entirely new pricing schedule or a new operations manual in a standard terms determination.³
15. The reconsideration power under section 59 applies where the Commission (on the application of a party to a determination) revokes or amends the determination, or revokes a determination and makes a further determination in substitution for it, where there has been a material change of circumstances since the date on which a determination was made or last reconsidered⁴ or where the determination was made on the basis of information that was false or misleading in a material particular.⁵
16. The application of the review power under section 30R is discussed at <http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx>.

³ Amendments that could be made by way of a clarification, may also form part any amendment by way of a section 30R inquiry or section 59.

⁴ Section 59(1)(a) of the Telecommunications Act 2001.

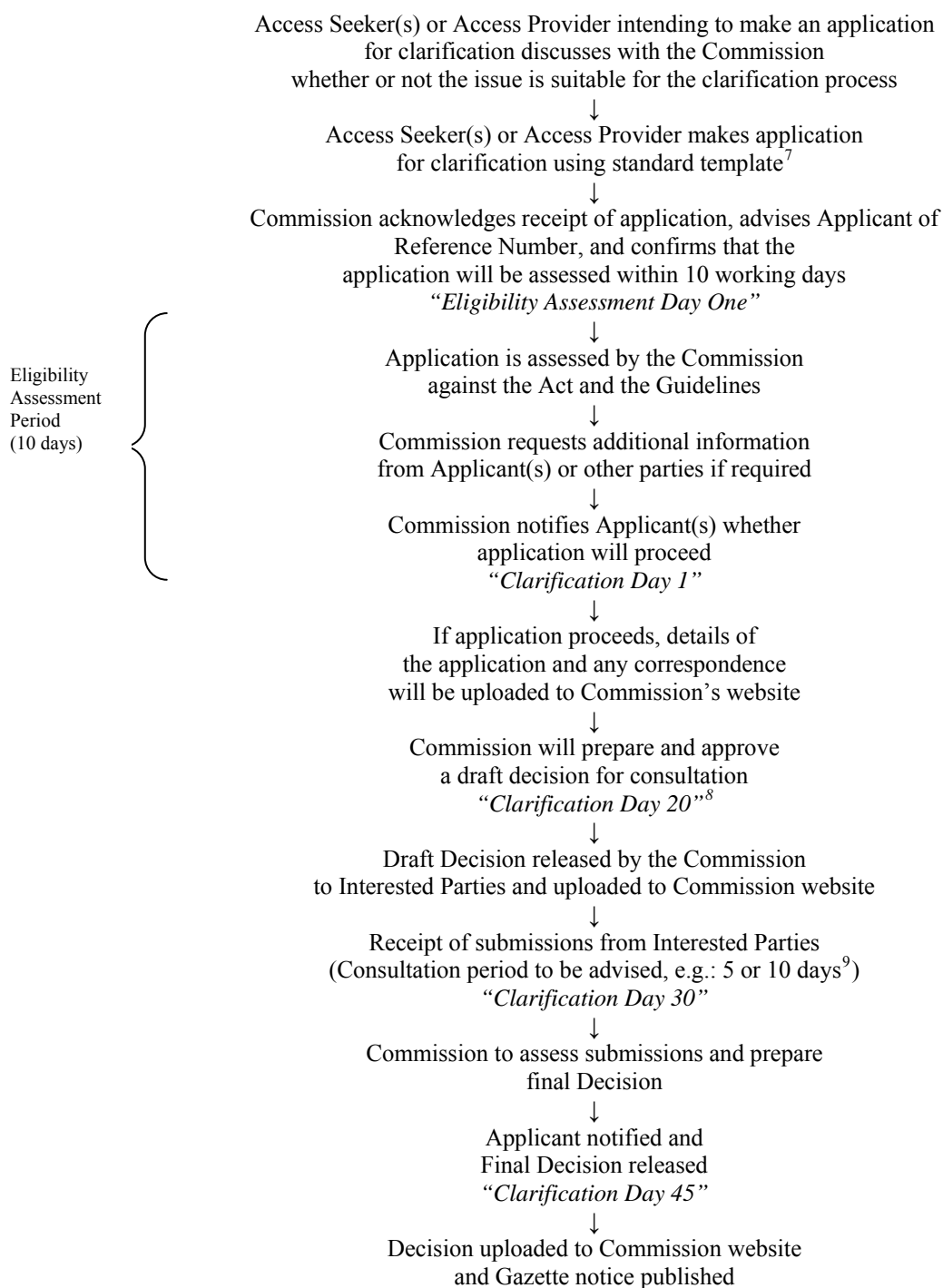
⁵ Section 59(1)(c) of the Telecommunications Act 2001.

Manner and timeframe of Clarification

17. The Commission is required to give public notice of a clarification to the determination. In practice, the Commission will inform the applicant of the decision made on the application, publish the decision on the Commission's website, and publish a notice of the matter in the Gazette.
18. The Commission is not required to consult on a proposed clarification, nor to issue a draft clarification. The Commission may decide where a clarification is non-contentious, is agreed by all parties materially affected by the clarification, or approved by the Telecommunications Carriers Forum, that it can be processed more quickly. In those circumstances, the Commission may decide consultation is not required. However, such circumstances are likely to be rare, and the Commission will decide whether consultation is required in any such case on a case by case basis.
19. It is the Commission's intention to consult with, and obtain views from, the industry whenever possible and appropriate. Any consultation undertaken by the Commission will be done in a manner and within a timeframe, as the Commission thinks fit. Any consultation carried out will not be as extensive as other consultation processes under the Act, such as those undertaken for standard terms or pricing review determinations.

Appendix A: Clarification Process Flowchart⁶

[Note that the timeframes shown in this Flowchart are best efforts only and at times where Commission resources are constrained it may not be possible to meet the timings indicated]



⁶ Note that the timeframes set out in the flow chart use working days, so 'Clarification Day 20' is 20 working days after 'Clarification Day 1'.

⁷ Before, or at the same time as the application is submitted to the Commission, the Access Seeker(s) or Access Provider making the application may submit the application to the Telecommunications Carriers Forum requesting endorsement. The Commission notes that clarification requests are often considered at the TCF before they are submitted to the Commission.

⁸ At this time, the Commission may also decide if a clarification is non-contentious and can therefore be processed more quickly (for example, deciding that consultation is not required).

⁹ These timeframes are a guide only, and the consultation required for each clarification will be assessed on a case by case basis.

Appendix B: Template for the Clarification Application

APPLICATION FORM FOR AMENDMENT OF DETERMINATION UNDER SECTION 58 OF THE TELECOMMUNICATIONS ACT 2001

NOTES ON PROCEDURE

Section 58 of the Telecommunications Act 2001 (Act) allows the Commerce Commission (Commission) to amend a determination for the purpose of making a clarification if at any time the Commission, on its own initiative or on the application of any person, considers that a determination requires clarification.

A person cannot apply for a clarification under section 58 of the Act if the matter does not qualify as a clarification or an appeal is pending in respect of the determination.

Please review and consider the Commission's Guidelines on "Clarification of a Determination under Section 58 of the Telecommunications Act 2001" before submitting a completed application form to the Commission. The Commission's guidelines are available at:

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/StandardTermsDeterminations/makingandreviewingstds.aspx>

The Commission requests that a party submitting an application for clarification to the Commission does so in the format of this document.

Reference Number: (The Commission will allocate this number upon receipt of the application and will advise the Applicant)	
Particulars of Applicant(s):	
Legal name of Applicant(s):	
E-mail:	Contact Numbers:
Business Address:	
Employee/officer Submitting Application:	
Name:	Position:
Address (if different from above):	
Telephone Numbers (if different from above) & Email Address:	

A. PROPOSED AMENDMENT (attach a separate document if preferred)

Please identify the determination(s) including the decision number and the subject matter of the determination (i.e. the name of the relevant designated or specified service):

.....
.....

Please explain what the application relates to (amendment name – e.g. ‘Distribution Cabinet Notifications’) and why a clarification is required:

.....
.....

Please identify the clauses of the determination(s) to be amended:

.....
.....

Please identify clearly your proposed amendments to the clauses of the determination(s):

.....
.....

B. IS THE PROPOSED AMENDMENT A ‘CLARIFICATION’?

Please tick any applicable box below and provide comment on why the statement applies to your application:

The proposed amendments are required for the purpose of making a clarification of the determination. (Please consider the Commission’s Guidelines on section 58 of the Act).

.....
 The proposed amendments satisfy the requirements of section 18 of the Act, i.e. the amendments promote competition for the long-term benefit of end users.

.....
 The determination in question is a standard terms determination and the proposed amendments should not be addressed under an inquiry under section 30R of the Act.

.....
.....

C. TELECOMMUNICATIONS CARRIERS' FORUM (TCF)

Please tick the relevant box (if applicable) and, if appropriate, provide comment on the involvement of the TCF in relation to the proposed amendments.

- The proposed amendments have been discussed by the following TCF Members.
..... Include Date(s)
- The proposed amendments have been supported by the following TCF Members.
..... Include Date(s)
- If TCF members objected to the proposed amendments please identify who objected and on what basis.
.....
.....

D. SUPPORTING DOCUMENTATION AND CONFIDENTIALITY

Please attach any relevant documentation in support of your application such as, documents addressing the requested content of this application form.

If you wish to submit confidential information as part of your application, please identify clearly any confidential information in square brackets. Please also explain why the information qualifies as confidential. It would be helpful if you could frame your request for confidentiality in terms of the criteria for withholding information under the Official Information Act 1982 (OIA) and provide supporting reasons/information similar to those set out in the OIA.

E. DECLARATION

THIS application is made by

.....*[individual/s and company].....

*[The company/I/We] hereby confirm/s that:

- all information specified by the Commerce Commission in this form has been supplied;
- all information known to the applicant/s which is relevant to the consideration of this application has been supplied; and
- all information supplied is correct as at the date of this application.

*[The company/I/We] undertakes/s to advise the Commission immediately of any material change in circumstances relating to the application.

Dated this [] day of [], [] year

Signed by [name of applicant]:

Director/Chief Executive Officer/General Manager/other – specify

I am a [director/officer/employee – specify] and am duly authorised to make this application.

PLEASE NOTE:

- If there is more than one applicant to the application, the declaration must be completed by each applicant (unless the TCF Forum Administrator is making the application for the TCF on behalf of a number of applicants (access seekers/ access providers), whose names must be listed in the application).
- The declaration may not be made by a solicitor or other adviser acting on the applicant’s behalf.
- The wording in this declaration may not be varied by the applicant.
- If this declaration is not completed, the Commission may decline to register the application.
- An application can, if desired, be effected by the receipt by the Commission of a facsimile copy or email attachment of a fully completed application.
- Please send completed application to the Manager, Telecommunications Operations and/or telco@comcom.govt.nz

*Notification of receipt of Application for Amendment of Standard Terms Determination via
Clarification
Section 58 Telecommunications Act*

For Office use only:

To:

The Commission hereby acknowledges receipt of application for clarification dated:

Your application is:

- Is being attended to;
 - Not complete. Please provide....
 - Other
-

An assessment will be made within 10 working days to determine if this application fits the criteria of a clarification or not.

Date:

Acknowledgement: