

Information protection order in the matter of the price review of the UBA standard terms determination

Order made by the Commerce Commission under s 100 of the Commerce Act 1986, as
applied by s 15(i) of the Telecommunications Act 2001

Order made by: Dr. Stephen Gale
Telecommunications Commissioner

Date of Order: 22 October 2014

Interpretation

1. For the purposes of this order:

Act means the Telecommunications Act 2001

Commission means the Commerce Commission established under section 8 of the Commerce Act 1986

Confidential Information means any Information which the Commission determines qualifies for additional protection, over and above the protections given to Restricted Information

Commerce Act means the Commerce Act 1986

Deed of Undertaking means a deed of undertaking in the form of Schedule 1 to this order

Information means any information, documents or evidence given to the Commission by a Party for purposes of the Proceeding (including, for the avoidance of doubt, where that same material is also given to one or more Parties by another Party or by the Commission)

Nominated Counsel means the person appointed by a Party as its Nominated Counsel who is listed in Schedule 2 by the Commission at any given time

Nominated Person means a person nominated by a Party as a Nominated Person who is listed in Schedule 2 by the Commission at any given time

Owner means the person first supplying the Commission with Information

Party means a body corporate listed in Schedule 2 by the Commission at any given time, or who has provided Information to the Commission under a Section 98 Notice, or in a submission to the Commission in relation to the proceeding

Proceeding means the Commission's price review of the UBA service commenced on 16 January 2014 under section 42 of the Act

Protected Information means any Information that is Restricted Information or Confidential Information

Restricted Information means any Information that is Restricted Information under the terms of this order

Section 98 Notice means a notice issued to a Party by the Commission under section 98 of the Commerce Act in relation to the Proceedings

Section 98 Information means Information provided by a Party in response to a section 98 Notice (including, for the avoidance of doubt, where the Information was provided prior to the date of this order) issued by the Commission in relation to the Proceeding

Working Day means a working day as defined in the Commerce Act.

Application

2. This order applies to all Information, except where such Information is already in the public domain or that comes into the public domain otherwise than through a breach of this order.
3. This order does not apply to the Commission or any of its employees, agents, officers or contractors.
4. This order has effect until twenty Working Days from the date on which the Commission issues a determination for the Proceeding under section 51 of the Act, or the Proceeding is otherwise determined, including by withdrawal of all applications for review.

Appointment of Nominated Counsel

5. If a Party wishes to receive or provide Information pursuant to this order, then it must nominate for appointment as its Nominated Counsel a person who has a current certificate to practice as a barrister and solicitor of the High Court of New Zealand.
6. Where the Commission notifies a Nominated Counsel of any changes to Schedule 2, or any change in the status of Information or the protections applying to Confidential Information; he/she shall immediately inform all Nominated Persons of the Party that he/she represents of such changes.

Request for protection of Information, other than Section 98 Information, as Restricted Information

7. Where a Party seeks protection of Information, other than Section 98 Information, as Restricted Information, it must when providing Information to the Commission:
 - 7.1 clearly identify all Information over which it seeks protection as Restricted Information by –
 - 7.1.1 enclosing such Information within square brackets with the designation of Restricted Information next to those brackets (eg for

Vodafone New Zealand Restricted Information it would be designated using [] VNZRI); and

- 7.1.2 clearly marking documents containing Restricted Information with the word "Restricted" on the front page and in the footer on each page;
 - 7.2 provide a written statement setting out the grounds on which it considers that the Information should be protected as Restricted Information; and
 - 7.3 provide a written statement from its Nominated Counsel which certifies that he/she considers that protection of the Information as Restricted Information is necessary in order to avoid likely unreasonable prejudice to its commercial position, or the commercial position of a person that is the subject of the Information.
8. Where a Party complies with the requirements in clause 7 such Information is Restricted Information, unless the Commission determines that such Information is not Restricted Information.

Status of Section 98 Information

9. Where a Party provides Section 98 Information, and the Commission decides to make that Information available for the purposes of the Proceeding, that Information is Restricted Information, unless the Commission determines that such Information:
- 9.1 is Confidential Information; or
 - 9.2 is not Restricted Information.

Status of Section 98 Information previously provided to the Commission

10. Where a Party has provided Section 98 Information prior to the date of this order, and the Commission decides to make that Information available for the purposes of the Proceeding, that Information is Restricted Information, unless the Commission determines that such Information:
- 10.1 is Confidential Information; or
 - 10.2 is not Restricted Information; and

Requests for additional protection of information

11. Where a Party seeks protection for any Information, other than Section 98 Information, over and above the protections given to Restricted Information, it must when providing Information to the Commission:
- 11.1 clearly identify all Information over which it seeks additional protection by –

- 11.1.1 enclosing such Information within square brackets with the designation of Confidential Information next to those brackets (eg for Vodafone New Zealand Confidential Information it would be designated using [] VNZCI);
 - 11.1.2 clearly marking documents containing such Information with the word "Confidential" on the front page and in the footer of each page;
 - 11.2 provide a written statement setting out:
 - 11.2.1 the grounds on which it considers that the Information should be given additional protection, including the name of the firm that owns the Information, the nature of the economic value of the Information and the existing restrictions on access to the Information; and
 - 11.2.2 the nature, extent and duration of the additional protection sought; and
 - 11.3 provide a written statement from its Nominated Counsel certifying that he/she considers that the additional protection requested is necessary in order to protect its interests, or the interests of a person that is the subject of the Information.
12. Where a Party seeks protection for any Section 98 Information, over and above the protections given to Restricted Information, it must when providing the Section 98 Information to the Commission:
 - 12.1 clearly identify all Information over which it seeks additional protection by providing the Commission with a list naming the documents containing the Information and, where additional protection is sought only in relation to specific Information in the document, the pages and line numbers at which that Information begins and ends; and
 - 12.2 comply with the requirements in clauses 11.2 and 11.3.
13. Where a Party has provided Information to the Commission, other than Section 98 Information, prior to the date of this order, it may request the Commission to grant additional protection to any part of such Information, over and above the protections given to Restricted Information, by complying with the requirements in clause 11.
14. Where a Party has provided Section 98 Information to the Commission prior to the date of this order, it may request the Commission to grant additional protection to any part of such Information, over and above the protections given to Restricted Information, by complying with the requirements in clauses 11.2, 11.3 and 12.1, no later than 4 November 2014.

15. Where the Commission receives a request for additional protection of Information, it will, in the case of Information other than Section 98 Information:
 - 15.1 give notice of the request to the other Nominated Counsels; and
 - 15.2 allow the other Parties to make written submissions on the matter within two Working Days of such notice, or such other period as may be specified in the notice.
16. The Commission will use reasonable endeavours to make a decision on any request for additional protection, within three Working Days of the expiry of the date for the Parties to make submissions in the case of Information other than Section 98 Information, and within three Working Days of receiving the request for additional protection in the case of Section 98 Information, on:
 - 16.1 what Information, if any, should be given additional protection;
 - 16.2 the nature, extent and duration of any such additional protection; and
 - 16.3 the persons entitled to access and the terms of such access.
17. The Commission will promptly communicate its decision on the matters referred to in clause 16 to all Nominated Counsels.
18. The Commission's decision shall become effective from 8.00am on the third Working Day after being communicated to the Nominated Counsels.
19. Unless otherwise directed by the Commission, any submissions containing Information reclassified under clauses 16 to 18 must, following any change to the status of that Information, be re-submitted within five Working Days of the Commission's notification of its decision.

Entitlement to access Restricted Information

20. Upon making this order, the Commission will promptly provide all persons nominated for appointment as Nominated Counsels with a copy of the order and publish the order on its website.
21. Parties must provide the Commission with signed Deeds of Undertaking for all persons they nominate for appointment as Nominated Counsels and Nominated Persons.
22. Upon receiving the signed Deeds of Undertaking the Commission will promptly:
 - 22.1 decide whether or not such persons should be approved as Nominated Counsels or Nominated Person;

- 22.2 add the names of the persons granted the status of Nominated Counsels and Nominated Persons to Schedule 2;
 - 22.3 promptly inform the Nominated Counsels of its decision and provide them with a copy of Schedule 2; and
 - 22.4 publish Schedule 2 on its website.
23. Nominated Counsels and Nominated Persons listed on schedule 2 are entitled to access to Restricted Information from the time and date as notified by the Commission to the Nominated Counsels.
24. Where a Party seeks access to Restricted Information by additional persons, it shall attempt to reach an agreement with the other Parties.
25. Where the Parties reach agreement:
 - 25.1 the Party seeking access for such persons must provide the Commission with signed Deeds of Undertaking by the additional persons;
 - 25.2 all Parties must advise the Commission in writing of the terms of the agreement.
26. Where the Parties are unable to reach agreement within two Working Days, the Party seeking access to the Restricted Information by the additional persons, may in writing request the Commission to make a determination on the matter by:
 - 26.1 setting out the grounds why it considers that the additional persons should be given access to Restricted Information;
 - 26.2 attaching a written statement from its Nominated Counsel which certifies that he/she considers that it is necessary and/or desirable for the additional persons to be granted access to the Restricted Information; and
 - 26.3 providing the Commission with a duly executed Deed of Undertaking by the additional persons.
27. Where the Commission receives a request pursuant to clause 26 it will:
 - 27.1 give notice of the request to the Nominated Counsels; and
 - 27.2 allow all other Parties to make written submissions on the matter within two Working Days of such notice, or such other period as may be specified in such notice.
28. The Commission shall use reasonable endeavours to make a decision within three Working Days of the expiry of the date for the Parties to make submissions.

29. Where the Parties reach agreement or the Commission decides to grant access to Restricted Information by the additional persons, the Commission will:
- 29.1 add the names of such persons to Schedule 2;
 - 29.2 promptly inform the Nominated Counsels of its decision and provide them with a copy of the amended Schedule 2; and
 - 29.3 publish the amended Schedule 2 on its website.
30. Unless the Commission otherwise directs, the additional persons are entitled to access to Restricted Information from 8.00am on the third Working Day after the Nominated Counsels are given notice of the Commission's decision.

Disclosure and use of Protected Information

31. A Party that owns Protected Information and any of its Nominated Counsel or Nominated Persons are not bound by this order in relation to that Information
32. Subject to clause 31, no person may:
- 32.1 publish, communicate, or give evidence incorporating the content of any Restricted Information, except as provided for in this order;
 - 32.2 publish, communicate, or give evidence incorporating the content of any Confidential Information, except on the specific terms advised by the Commission; and
 - 32.3 use any Protected Information for any other purpose other than the conduct of the Proceeding.
33. All Parties, Nominated Counsels and Nominated Persons must return or destroy all copies of Protected Information, including any notes, records, summaries, or recordings in any other form made of the Protected Information, except Protected Information which belongs to such Party, Nominated Counsel or Nominated Person, within twenty Working Days of expiry of the order, unless they are provided with a written waiver from the Owner of such Information, and certify in writing to the Commission that they have complied with this clause.
34. A person entitled to access to Protected Information may disclose Protected Information to the Commission and any other person who is entitled to access to the same Protected Information under this order.
35. Where a Party provides Information to the Commission containing any Protected Information, it must:
- 35.1 clearly identify all Protected Information and the Owner of the Protected Information by –

- 35.1.1 enclosing the Protected Information within square brackets with the designation of the category of Protected Information next to those brackets (eg for Vodafone New Zealand Restricted Information it would be designated using [] VNZRI, or Vodafone New Zealand Confidential Information [] VNZCI); and
- 35.1.2 clearly marking documents containing Protected Information with the category of the Protected Information, "Restricted" or "Confidential" on the front page and the footer of each page;
- 35.2 no later than 5.00 pm on the first Working Day following the day on which it provided the full version of the Information to the Commission, provide –
 - 37.2.1 the Commission with a public version of the Information which excludes all Protected Information; and
 - 37.2.2 the Commission and the Nominated Counsels of all other Parties with a version of the Information which includes the Restricted Information, but excludes any Confidential Information.
- 36. Where a document contains only Restricted Information and public information, or only Confidential Information and public information, a Party shall be considered to have complied with clause 35.1 if it includes a statement at the beginning of the document that all the Information in the document (as identified in brackets []) is of the same designation and clearly marks the relevant designation (e.g. "Restricted Information", or "Confidential Information") on the front page of that document.

Agreement to change in status of Protected Information

- 37. Where the Owner of Protected Information informs the Commission and all other Parties in writing that it waives the protected status of Information, such Information is no longer Protected Information.
- 38. Where the owner of Confidential Information informs the Commission and all other Parties in writing that it waives the confidential status of Information, such Confidential Information becomes Restricted Information.

Commission review of status of Information and protections applying to Confidential Information

- 39. The Commission may on its own initiative at any time review the status of Information or the protections applying to any Confidential Information.
- 40. Where a Party seeks to amend the status of any Information or the protections applying to Confidential Information, it shall attempt to reach an agreement with the other Parties.

41. Where the Parties are unable to reach an agreement within two Working Days, the Party seeking to amend the status of the Information or the protections applying to Confidential Information may request the Commission to make a determination by complying with the requirements in clauses 7, 11 or 12 (as applicable).
42. Unless the Commission has previously determined the same matter, it shall review the status of such Information or the protections applying to Confidential Information if a Party complies with the requirements in clauses 40 and 41.
43. If the Commission conducts a review, it will:
 - 43.1 give notice of the review to all Parties; and
 - 43.2 allow all Parties to make written submissions on the matter within two Working Days of such notice, or such other period as may be specified in the notice.
44. The Commission will use reasonable endeavours to make a decision within three Working Days of the expiry of the date for the Parties to make submissions.
45. The Commission will promptly communicate its decision on the status of the Information and the protections applying to Confidential Information to all Nominated Counsels.
46. The Commission's decision will become effective from 8.00am on the third Working Day after being communicated to the Nominated Counsels.
47. Unless otherwise directed by the Commission, any submissions containing Information reclassified under clauses 44 to 46 must, following any change to the status of that Information, be re-submitted within five Working Days of the Commission's notification of its decision.

Commission review of persons' entitlements to access to Protected Information

48. The Commission may on its own initiative at any time review a person's entitlement to access any category of Protected Information.
49. Where a Party seeks to amend the entitlement of a person to access any category of Protected Information, it shall attempt to reach agreement with the other Parties.
50. Where the Parties cannot reach agreement within two Working Days, the Party seeking to amend the entitlement of a person to access any category of Protected Information, may in writing request the Commission to make a determination on the matter by setting out the grounds why it considers that such persons entitlement to access Protected Information should be revised.

51. The Commission shall review whether or not a person should remain or cease to be entitled to access any category of Protected Information if a Party complies with the requirements in clauses 49 to 50.
52. If the Commission conducts a review, it will:
 - 52.1 give notice of the review to all Parties; and
 - 52.2 allow all Parties to make written submissions within two Working Days of such notice, or such other period as may be specified in the notice.
53. The Commission shall use reasonable endeavours to make a decision within three Working Days of the expiry of the date for the Parties to make submissions.
54. Where the Parties reach agreement, or the Commission decides to revise any person's entitlement to access, it will:
 - 54.1 amend Schedule 2 accordingly;
 - 54.2 promptly inform all Nominated Counsels of its decision and provide them with a copy of the amended Schedule 2; and
 - 54.3 publish the amended Schedule 2 on its website.
55. A person whose entitlement to access Protected Information is withdrawn must by 8.00am after the third day of notice of the Commission's decision being communicated to the Nominated Counsels:
 - 55.1 return or destroy all copies of Protected Information, including any notes, records, summaries, or recordings in any other form made of the Protected Information, or hand over all such Information to the Nominated Counsel of the Party they are employed by, providing services to, or representing; and
 - 55.2 certify in writing to the Commission that they have complied with clause 55.1.

Other matters

56. The status of Protected Information remains unchanged where it is disclosed by the Commission or any Party to any other person.
57. The Commission may, at any time, vary or revoke this order.
58. Any notice or decision of the Commission given under this order shall be sufficiently given if it is given in writing by an employee of Commission.
59. Any reference to time means New Zealand time.

60. A period of time described as beginning from a specified act, or event does not include the day of the act or event.

Dated this 22 day of October 2014

A handwritten signature in blue ink, appearing to be 'S. Gale', written in a cursive style.

Dr Stephen Gale
Telecommunications Commissioner

SCHEDULE 1

DEED OF UNDERTAKING

1. This Deed of Undertaking (“Deed”) is made in relation to the Order (“Order”) issued by the Commerce Commission (the “Commission”) pursuant to section 15(i) of the Telecommunications Act 2001 (“Act”) and section 100 of the Commerce Act 1986 (Commerce Act) on 22 October 2014, and for purposes of its price review of the unbundled bitstream access (UBA) service, to which the form of this Deed is annexed as Schedule 1. This Deed adopts the terms defined in the Order.

2. I acknowledge that I have been provided with a copy of the Order and have read and understood its terms.

3. I, _____, of _____ hereby irrevocably undertake to the Commission and to every person supplying Protected Information to the Commission as follows:
 - 3.1 to comply with the Order in carrying out the functions of the Party for whom I act and otherwise so far as its terms apply to me;
 - 3.2 not to use or refer to Protected Information in any way except in relation to the Proceeding and in compliance with the Order;
 - 3.3 not to disclose Protected Information or any part thereof to, or discuss it with, any person other than a person who is entitled to access to the same Protected Information under this Order;
 - 3.4 not to make notes, summaries, copies, or records in any other form, of protected information except as is necessary for the conduct of the Proceeding;
 - 3.5 to notify the Commission, as soon as reasonably practicable, of any change in my employment circumstances or role that may be relevant to my continuing access to Protected Information.

4. I understand that the list of people set out in Schedule 2 to the Order may be varied from time to time and that the Commission will update the Parties of any changes by notifying the Nominated Counsels of any changes and publishing the amended Schedule 2 on its website at <http://www.comcom.govt.nz/regulated-industries/telecommunications/regulated-services/standard-terms-determinations/unbundled-copper-local-loop-and-unbundled-bitstream-access-services-final-pricing-principle/>.

5. Subject to clauses 7 of this Deed, I undertake to the Commission and to every Party supplying Protected Information to the Commission to return or destroy all copies of Protected Information, including any notes, records, summaries, or recordings in any other form which I may have made of the Protected Information, except:
 - 5.1 Protected Information which belongs to me or my employer or client and which I am specifically authorised to retain; and
 - 5.2 electronic back-up copies of Protected Information which are stored on tape or mass storage unit and not readily accessible on a live server,before the expiry of the Order.
6. Subject to clause 7 of this Deed, I undertake to the Commission and to every Party supplying Protected Information to the Commission to provide the Commission with written confirmation that I have:
 - 6.1 destroyed, in a secure and confidential manner, all Protected Information; or
 - 6.2 returned all Protected Information except for Protected Information I am authorised to retain,within 20 Working Days of expiry of the Order.
7. Clauses 5 and 6 of this Deed shall not apply if I am notified in writing of waiver of the obligation to comply with those provisions by:
 - 7.1 the Commission; and
 - 7.2 the Owner of the Protected Information.
8. I acknowledge and understand that any publication or communication of any information or document or evidence contrary to the Order is a criminal offence under s 100(4) of the Commerce Act 1986. In addition to the specific covenants above, the matters stated in the Order are, to the extent permitted by law, deemed set out in this Deed as if they were covenants in, and of, this Deed binding on me and also binding upon my employer or that person whose interest I represent in this proceeding (as the case may be) and any failure to comply with the terms and conditions of the Order shall be construed by this Deed as a breach of this Deed. After the Order ceases to have effect I acknowledge that I continue to be bound by this Deed unless expressly released by the Commission.
9. This Deed is governed by the laws of New Zealand.
10. Any failure to enforce any provision of this Deed shall not constitute a waiver of that provision nor of any other provision of this Deed.

11. I unconditionally submit to the exclusive jurisdiction of the courts of New Zealand in relation to any matters arising under this Deed.

DATED this _____ day of _____ 2014

Signature

Name

Position

Signed and dated in the presence of:

[Justice of the Peace] [Solicitor of the High Court of New Zealand] [Notary Public]

SCHEDULE 2**PERSONS WHO HAVE SIGNED THE DEED OF UNDERTAKING**

Nominating Party	Nominated Counsel	Nominated Persons
Spark New Zealand Limited		
Chorus Limited		
Vodafone New Zealand Limited		
Vodafone New Zealand Limited		
CallPlus Limited		