

20 August 2009

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PUBLIC VERSION

Shane Kinley & Tom Forster
Telecommunications Branch
Commerce Commission
WELLINGTON

Dear Shane & Tom

2degrees submission on AP Information

1. Introduction

- 1.1 I refer to the letter from the Commerce Commission to all interested parties to the MTAS Investigation dated 13 August 2009 setting out the Commission's decision that information about, and copies of, ICAs previously provided to the Commission should be reclassified as Additional Protection (**AP**) and that parties wishing to make submissions on AP Information should do so by 5pm Thursday 20 August 2009.
- 1.2 This letter sets out submissions on behalf of 2degrees on AP Information.

2. Full Disclosure of ICA terms is Required

- 2.1 Following objections from the incumbents to the disclosure of the full terms of current and former ICAs the Commission determined in its letter to all Interested Parties to the MTAS Investigation dated 30 July 2009 (**ICA Decision**) that ICA information may be provided in the form of a template ICA with an accompanying summary of any material variations from the template, or in the form of the full ICAs themselves.
- 2.2 Vodafone and Telecom have each responded to the Commission's determination by providing a summary of material variations which addresses only the price terms of their respective ICAs.
- 2.3 Neither Vodafone nor Telecom have provided a template ICA or addressed non-price terms.
- 2.4 The failure to provide a template ICA and/or address non-price terms is concerning, particularly given Vodafone's submission that "*many*" (ie not all) of Vodafone's ICAs have followed a standard template and "*differ to varying degrees*".² Telecom has submitted that some parties may have negotiated amendments to the standard Telecom ICA but these were "*not likely*"³ to be material.
- 2.5 Non-price terms are significant to the MTAS Investigation, particularly where they impact on the state of competition or foreclosure effects, which are considered by 2degrees to characterise the New Zealand market. For example, as noted in the 2degrees submission on the Draft Report, the [REDACTED]

[REDACTED] 2°/VAP2 contains non-price terms which [REDACTED]

[REDACTED] 2°/VAP2

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2.6 It is not clear from the incumbents' AP Information what they consider to be a "material" variation or whether non-price terms have been addressed at all.

3. Information Asymmetry

3.1 Clearly a provider of monopoly services should be subject to obligations of non-discrimination in respect of the price and non-price terms on which it supplies a monopoly service. Any discrimination must be on the basis of identifiable and objective cost grounds.

3.2 Neither 2degrees nor its advisors can accurately assess whether the incumbents offer preferential pricing (in relative terms) to retail customers, international operators or MVNO businesses as the incumbents have not made these agreements available, even on an AP basis, to Interested Parties. It is also not clear whether the Commission has been provided with the full data set necessary to assess these factors. As previously noted, 2degrees has concerns as to what information may have been selectively disclosed.

3.3 However, based on the Commission's cross checks, the extremely low rates offered by providers of calling card services such as V8 and 2degrees understanding that both Vodafone and Telecom have a number of agreements in place which facilitate inbound SMS termination on a BAK basis, it appears that the incumbents may offer preferential pricing. Put simply, their best rates to their best retail customers appear far more favourable than those they offer to competitors.

3.4 In relation to calling card services, V8 currently advertise retail prices for calls to a UK fixed line which provide for a 10 minute call at a cost of 6 cents a minute. On the face of it, the low prices offered by retailers such as V8 indicate Vodafone's real costs are very low, and significantly below the Commission's current benchmarks.

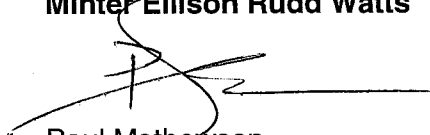
3.5 2degrees also believes MVNOs may receive more favourable terms than 2degrees itself receives, particularly when the roaming and interconnection fees payable by 2degrees are taken into account. Given the restrictive provisions of the [REDACTED] [REDACTED] 2°/VAP2 the non-price terms of MVNO arrangements should also be scrutinised.

3.6 The fact that MVNOs (such as CallPlus, Compas, M2 and Black & White) are able to offer on-net text bundles which include the Vodafone network may well indicate discriminatory pricing.

4. Please feel free to contact the writer if you would like to discuss any aspect of this submission.

Yours faithfully

Minter Ellison Rudd Watts



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¹ Vodafone Letter to Commission, 24 July 2009, page 5

² Vodafone Letter to Commission, 24 July 2009, page 5

³ Telecom Letter to Commission, 24 July 2009 page 4