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25 September 2009

Dr. Ross Patterson
Telecommunications Commissioner
Commerce Commission
By e-mail: ross.patterson@comcom.govt.nz

Dear Dr Patterson

MTAS PROCESS AND CONFERENCE

As you will have seen from my email to Shane Kinley of 16 September 2009, Vodafone had expected that the meeting on 23 September 2009 was an opportunity for Vodafone to raise general issues of substance and process. Mr Kinley advised that we were wrong in our view and the scope of the meeting was limited to any outstanding issues of clarification of substance or process in respect of the undertakings process. As a consequence, there does not appear to be any further forum at which Vodafone's concerns can be raised. For this reason, I take this opportunity to write to you setting out some of Vodafone's concerns around the broader process in the MTAS investigation.

Vodafone has fundamental concerns about the Commission's case for imposing regulation of MTAS. These are, of course, set out in our submissions but we had hoped that the Commission's process would enable us to truly engage with the Commission on these issues. This has not occurred.

At an early stage in the Commission's process, we raised concerns about the Commission having publicly expressed concluded views at an early stage of the process (see Vodafone's letter to the Commission of 14 July 2009). In response, we were advised that the views expressed were preliminary only and that the Commission would keep an open mind in respect of all final decisions to be made (Commission's letter to Vodafone of 20 July 2009).

We also raised with the Commission our concerns regarding the truncated process that the Commission had imposed for submissions, cross-submissions and preparation times for the conference. We do understand that the Commission wishes to be seen to be making progress but issues arise as to the integrity of the process if parties are not given proper and fair opportunities to set out their views to the Commission and respond to the views of others. If the conference had provided an opportunity for full and reasonably unconstrained engagement on the issues, some of these concerns regarding the truncated process could have been ameliorated. However, with a process that was based more on an interrogation, with very limited time for parties to present their openings and closings, the parties were also significantly pressured on submissions which hampered preparation and did not enable them to genuinely engage the Commission in regard to them.

Although we had prepared for the detailed agenda circulated by the Commission prior to the conference, the Commission did not follow the agenda, except by broadly following the main topics set out in the agenda. Instead, the conference was run as an interrogation, where the Commission asked specific questions to identified parties and responses were limited to those parties to whom the question was directed. The Commission's questions were clearly determined in advance, and although Vodafone requested that the Commission provide any questions to the parties in advance, it did not do so. This is not, with respect, the most effective way for the Commission to canvas the views of parties or to test its own views. This does leave us with lingering concerns regarding the Commission's readiness to engage and reconsider its views.

There was one specific matter during the conference which caused us particular concern. It was in relation to the pre-prepared whiteboard example presented by Commissioner Mazzoleni. Dr Small, was asked, without proper explanation or any opportunity to consider, to explain how the example did not represent market foreclosure. Richard York specifically asked the Commissioner to provide a short opportunity for the economists to consider the example. This was refused on the basis that it was "not a hard example". While it may not have been a difficult question for an economist given the opportunity both to understand what it was that the example was intended to represent and to consider the factors included or omitted from the example, we do not consider that a fair or reasonable opportunity was given to respond. This is obvious from the exchange between Commissioner Mazzoleni and Dr Small later in the day (page 83 of the conference transcript) where the Commissioner corrects Dr Small's understanding of what the example was intended to represent.

We asked Dr Small whether having had time to consider the example he would have had anything else further or different to say to the Commission. Dr Small was tied up with another matter last week but he has advised us that he had been considering this matter and is providing the Commission with a paper on this. In the circumstances we consider that the Commission is required to take these into account and we ask that it do so.

Vodafone would obviously appreciate the opportunity to engage with the Commission regarding its views. We understand that the Commission is determined to make progress with its process but we did not want it to be said that our concerns about the process adopted had not been raised with the Commission fairly and squarely.

Should you have any queries in relation to this matter, please feel free to contact me on 021 609 803.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'J. Jones', followed by a horizontal flourish.

Juliet Jones

Senior Corporate Counsel

Vodafone New Zealand Limited

