



COMMERCE COMMISSION

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To all Interested Parties to the MTAS Investigation

Reviews of classification of information about commercial interconnection agreements under the MTAS Confidentiality Order

Background

As part of the MTAS Schedule 3 investigation, the Commission has received information about, and copies of or extracts from, commercial interconnection agreements (**ICAs**) from interested parties which those parties consider is confidential or commercially sensitive. Protection of confidential information in respect of the MTAS Investigation is governed by the Confidentiality Order issued by the Commission (the **Order**) for the purposes of the investigation. A copy of the Order is available on the Commission's website.

On 22 and 30 July 2009 the Commission wrote to interested parties:

- commencing a review of the classification of information about ICAs and requesting that Telecom, Vodafone and 2degrees provide information about ICAs; and
- advising its preliminary views in relation to the classification of information about ICAs and repeating its request for information about ICAs.

The Commission has now received the requested information, as well as submissions from Telecom, Vodafone, 2degrees, and CallPlus, Woosh and Kordia.

This letter advises the Commission's views on these matters and the actions required from interested parties. Comments received from interested parties on these matters are available on the Commission's website.¹ The Commission has considered all comments from interested parties in reaching its views in this letter.

Classification of information about current ICAs

The Commission considers that the information about, and copies of, ICAs provided by Vodafone, Telecom and 2degrees, which have previously been classified as COI should be reclassified as Additional Protection (**AP**).

¹ See

<http://www.comcom.govt.nz/IndustryRegulation/Telecommunications/Investigations/MobiletoMobileTermination/mobiletomobiletermination.aspx>.

The AP classification is provided for in clause 9 of the Order, which states:

- “9. If a party requests additional protection of particular Information over and above that given to Restricted Information, then Nominated Counsel for that Party must, at the time the request is made, certify in writing to the Commission that he or she considers that:
- (a) protection of the relevant Information as Restricted Information in accordance with the relevant Order would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the Information; and
 - (b) additional protection of the nature, extent and duration sought is necessary in order to avoid likely unreasonable prejudice to the commercial position of the person who supplied or who is the subject of the Information.”

AP classification was sought by Telecom, which proposed in its submission of 2 August 2009 the additional condition that information about ICAs:

“... is provided only to people that have signed up to the Commission’s confidentiality order and who agree not to participate in any negotiations for domestic ICAs for a period of 12 months from the date of this letter.”

A similar condition was initially proposed by CallPlus, Woosh and Kordia in their submission of 27 July 2009. Vodafone also raised concerns that RI did not provide sufficient protection to this information.

The Commission considers that granting of access to this information on an AP basis appropriately balances the interests of all parties to be able to meaningfully submit on the Commission’s draft Report and the interests of Telecom, Vodafone and 2degrees in safeguarding their sensitive commercial information in a competitive market.

The Commission considers that a consistent approach to the classification of this information is important and has, therefore, proposed that this condition should apply to information provided by Telecom, Vodafone and 2degrees.

The Commission therefore orders that the nominated counsel for Telecom, Vodafone and 2degrees make available to any other nominated counsel all information about, and copies of, ICAs provided to the Commission in relation to the MTAS Investigation (the **AP information**), subject to the following AP conditions:

1. the nominated counsel seeking the AP information must be a current signatory to the Deed of Undertaking under Schedule 1 of the Order (the **Deed of Undertaking**);
2. the nominated counsel seeking the AP information must provide the nominated counsel for Telecom, Vodafone or 2degrees, as required, with an undertaking that they will not participate in, or advise in relation to, any negotiations for domestic ICAs for a period of 12 months from 12 August 2009;
3. the nominated counsel seeking the AP information may disclose the AP information to other signatories to the Deed of Undertaking, subject to those other individuals also providing an undertaking to the nominated counsel for Telecom, Vodafone or 2degrees, as required, that they will not participate in, or advise in relation to, any negotiations for domestic ICAs for a period of 12 months from 12 August 2009;
4. the nominated counsel seeking the AP information must provide copies of any undertakings under condition 3 or 4 above to the Commission at the same time as they are provided to nominated counsel for Telecom, Vodafone or 2degrees; and

5. the nominated counsel seeking the AP information must supervise compliance with the undertakings required under condition 3 above in relation to those parties that the nominated counsel provides the AP information to in accordance with condition 3 above.

These AP conditions are in addition to the requirements of clause 11 of the Order, which applies to the use of RI information for the purposes of the MTAS Investigation, and the conditions in clause 11 also apply to AP with all necessary modifications.

The Commission requires that Vodafone, Telecom and 2degrees provide the AP information within 24 hours of a request being received and the above conditions being met.

Parties wishing to make submissions on the AP information are due no later than **5pm Thursday 20 August 2009**. Cross-submissions on any submissions received are due no later than **5pm on Tuesday 25 August 2009**. These submissions will be limited to matters directly related to the AP information, including the assessment of the counterfactual and how ICAs should impact on the counter-factual. Parties are reminded that submissions and cross-submissions must themselves be classified in accordance with the Order, including identifying any information that should be treated as AP information due to its connection with the AP information regarding ICAs.

Reserved position regarding international interconnection agreements and details of the Vodafone / 2degrees ICA

The Commission received submissions from 2degrees and CallPlus, Woosh and Orcon/Kordia that the Commission should seek disclosure of international ICAs.

The Commission is reserving its position, and will separately communicate a decision, in relation to international ICAs.

The Commission notes that details of the Vodafone / 2degrees ICA have been published in the media in New Zealand and overseas, possibly in breach of the Order. The Commission has requested that an internet publication of these details be removed and has issued a media advisory that further publication of these details would potentially be in breach of the Order.

The Commission is currently investigating whether there has been a breach of the Order in relation to these publications of the details of the Vodafone / 2degrees ICA. As this matter remains under investigation there will be no further comment at this stage on the potential breach. The Commission is, however, reserving its position to make further decisions in relation to the review of the confidentiality status of the Vodafone / 2degrees ICA under the Order, as a result of this investigation.

Should you have any queries in relation to this matter, please contact Shane Kinley on (04) 924 3686 or by email at shane.kinley@comcom.govt.nz.

Yours sincerely



Dr Ross Patterson
Telecommunications Commissioner