



COMMERCE COMMISSION

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Paul Reynolds
Chief Executive
Telecom Group

BY EMAIL: paul.reynolds@telecom.co.nz

Dear Paul

I am writing in respect of the following statement (in bold) made by you today:

*"Commerce Commission announced today, an attempt to take legal proceedings into this matter, which we find very disappointing. Telecom has worked very hard over the past couple of years to get away from that litigious nature of the industry, to clear out legal resolution of problems. And in this particular case, where **actually months ago we asked the Commission for guidance on whether we were pricing in the right framework and didn't get any guidance, and to now find accelerated court action, we find a disappointing trend, but it's their choice.**"*

A similar statement was made by Telecom's General Counsel, Tristan Gilbertson, in a media release today:

*"**On receiving complaints in April, we spoke to the telecommunications branch of the commission, but received no guidance or indication of concerns under the undertakings.**"*

While I do not intend to comment on the decision of the Commission to take enforcement action, I do wish to set the record straight in relation to Telecom's assertion that it sought guidance from the Commission about the loyalty offer pricing and that the Commission did not provide any guidance. This statement is in my view misleading, as I set out below, and I would expect Telecom to make a public retraction

The second loyalty offer was announced on 24 March 2009. Telecom Wholesale made a presentation to the Commission on 20 April. The Commission consulted with market participants, and provided its preliminary views of the offers to Telecom Wholesale by letter dated 14 May 2009. The letter addressed both Commerce Act concerns, and in so far as the Undertakings were concerned, set out the process which was underway in accordance with the Commission's *Complaints (Operational Separation) Handling Under Part 4A of the Telecommunications Act 2001 Guidelines*.

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In terms of the Commerce Act, the Commission advised that *"Telecom's offers raise potential concerns as they might breach the Commerce Act"*. The letter set out in some detail the Commission's concerns at the effect of what the letter describes as *'discriminatory pricing'* *"If providers with UCLL investments were to accept Telecom's offer, their UCLL investments would become idle. Not to take up Telecom's offer in contested areas means losing the entire discount."* Bearing in mind that the Commission had not fully investigated the offers, it is difficult to understand what clearer "guidance" could have been provided by the Commission to Telecom.

In relation to the position under the Undertakings, the Commission was operating in accordance with its published guidelines (which had been subject to consultation with Telecom and others before they were adopted; indeed Telecom had insisted that the Commission not be involved until the self-regulatory process had run its course). This required that complaints about the Undertakings be handled first by Telecom, and then by the Independent Oversight Group (IOG) before coming to the Commission. Vodafone had complained to Telecom on 9 April, and Kordia on 15 April; in other words the complaints process was already in train before the Commission was briefed by Telecom.

As this was the first major Undertakings complaint, the Commission met with the IOG early in May to ensure the Commission and the IOG each understood their respective roles under the Undertakings. The Commission confirmed the agreed process with the IOG, and advised that in its view a complaint of this sort that alleged anti-competitive behaviour with the potential for significant market detriment needed to be dealt with in a timely way.

In its letter to Telecom, the Commission advised that it understood that the IOG would review the matter after the IOG Support Office had received a report from Telecom, and that the Commission would consider its response in light of the timeliness of the IOG and Telecom processes for dealing with the matter. For the Commission to offer views on compliance with the undertakings at this stage would have inappropriately cut across both the role of the IOG and the Commission's stated procedure. While the letter was signed by the Director of the Competition Branch, the part dealing with the IOG process was drafted by the Telecommunications Branch.

In a subsequent letter of 4 June, Group General Counsel Tristan Gilbertson firstly suggested the Commission was not following its published Guidelines, and then said Telecom had expected, if the Commission had concerns about the Offers from an Undertakings perspective, it expected to take guidance from the Commission. As the Commission's letter of 14 May clearly recorded that issue was being handled by the IOG in accordance with the Guidelines, any intervention by the Commission at that stage would have been contrary to the Guidelines.

The time to seek guidance would have been before the offers were made, and before complaints had been received. However the Commission's letter of 14 May, notwithstanding it was in a Commerce Act context, gave clear guidance to Telecom as to the Commission's concerns.

As the Commission's investigation has been completed, the Commission does intend to provide further guidance on its view of the non-discrimination and EOI obligations in the Undertakings.

Yours sincerely,

A handwritten signature in blue ink, appearing to be 'Ross Patterson', with a long horizontal flourish extending to the right.

Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission
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