

COMMERCE COMMISSION

RESALE SERVICES INVESTIGATION CONFERENCE AGENDA

Wednesday 27 October 2010, 9.30 am - 2.00 pm

New Zealand Institute of Chartered Accountants

Wellington Conference Centre

Level 7, Tower Building

50 Customhouse Quay

Wellington

Commissioners:

Dr Ross Patterson - Chair

Ms Anita Mazzoleni

Mr Gowan Pickering

Mr Pat Duignan

Commission Staff:

Mr Brent Alderton - General Manager, Regulation

Ms Rebekah Henderson

Ms Rachel Chrystall

Mr Matthew Bailey

Mr Tom Forster

Stenographer - Ms Jacqui Kennedy

TRANSCRIPT OF PROCEEDINGS

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1 [9.48 a.m.]

2 **CHAIR:** Good morning everybody. Welcome to the Resale Services
3 Investigation Conference. My name is Ross Patterson, I'm
4 the Telecommunications Commissioner and I will be Chairing
5 this conference. Sitting with me from my far left,
6 Commissioner Pickering and Commissioner Mazzoleni, and on
7 my right Commissioner Duignan.

8 Now, the purpose of this conference is to seek your
9 views on matters to provide the Commission with sufficient
10 information to finalise its recommendations to the
11 Minister regarding the regulation of resale services. The
12 Commission is currently planning to release its final
13 report in December. The workshop is being recorded and a
14 transcript will be available on our website as is our
15 normal practice. Can you please identify yourself and the
16 organisation you represent before speaking so that Jacqui
17 our stenographer can associate your name from the voice.
18 Also, when you're not speaking can you turn the microphone
19 off as I'm told is gets a lot of feedback otherwise.

20 In terms of the agenda, we've set out the agenda and
21 the items that we wish to focus on in this conference and
22 the Commissioners will take turns to focus on each of
23 these items in turn.

24 Now, before we start there are a number of housekeeping and
25 health and safety issues I'm required to advise you of.

26 Please turn mobile phones off. Toilets are located next to
27 the lifts by the reception area, the disabled toilet is on
28 level 6. If you wish to smoke please use the designated
29 smoking area located on the north end of the front balcony,
30 access is via the doors next to reception on level 7. I'm not
31 sure why for health and safety reasons I tell you where you go
32 to smoke, but there you are. If the fire alarm sounds walk
33 down the nearest stairwell and assemble on Panama Street, there
34 will be a warden to direct you, do not use the lifts. In the

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1 event of an earthquake take shelter and do not leave the
2 building unless instructed to do so. There is a telephone area
3 in the small room by the reception area which can be used to
4 call conference centre staff, taxis or make local calls. If
5 you have any requirements during the event please see the
6 on-site conference centre staff who are trained in first aid.

7 Okay, so if we get to the agenda. The first item is opening
8 statements. I understand that Telecom, Vodafone and
9 TelstraClear would like to make brief statements. I'll start
10 with Telecom because they're closest to me and for no other
11 reason.

OPENING STATEMENT BY JOHN WESLEY-SMITH ON BEHALF OF TELECOM

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13 **MR WESLEY-SMITH:** I'm John Wesley-Smith from Telecom and I've
14 got Brendan Dempsey sitting here with me and David van der
15 Zouwe and Anton Nannestad down the end of the table, and
16 Jeremy Cain over there. I think we've got the most people
17 here today, probably just. And I can keep my opening
18 pretty brief because for a change we are in the happy
19 position of agreeing and supporting the majority of the
20 Commission's analysis and draft recommendations.
21

22 We support the removal of a resale regulatory backstop for
23 data and broadband products and for bundles. We support the
24 signals in the Commission's draft report, firstly and most
25 importantly that where workable competition exists we won't
26 regulate, and secondly, where workable competition develops we
27 will deregulate. Those are two pretty important principles
28 from Telecom's perspective and for the regulatory framework
29 that we operate.

30 We originally asked the Commission to commence this
31 investigation, I think it's February 2009, and at that point we
32 were advocating for the complete removal of resale from the
33 Act. Broadband and data resale had been largely superceded by
34 regulated access to largely cost-based input products and at

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1 that time the PSTN was scheduled to be replaced within an NGN
2 based voice platform. In the intervening 18 months through our
3 discussions with our wholesale customers and as our
4 understanding of the nature and basis of that PSTN to NGN
5 migration became, well as our understanding improved, that led
6 us to a slightly different place and that was to retain a
7 regulatory backstop for a core set of PSTN services for so long
8 as the PSTN remains as the primary platform for delivery of
9 fixed voice in our industry. I guess noting that there will
10 always be a competition test in place for the point in time
11 when mobile and other networks do start competing effectively
12 with that network.

13 So, we support and accept the proposal to retain a resale
14 Service for price capped residential calling service and we also
15 support the proposal to maintain a resale service for
16 non-priced capped local access and calling services for
17 business customers, for example.

18 We'd like to see some minor amendments to the proposal just
19 to make it clearer that it is intended to apply to only those
20 services that are truly required by an access seeker to compete
21 effectively in the market and we've got some other minor
22 changes and issues that we would like to raise in the service
23 description section, none of which should be contentious.

24 We also support the proposal to do away with regulated
25 resale of bundles. The service descriptions for resale bundles
26 have sat in the Act for almost 10 years now with almost no
27 usage. We currently have five bundles in our RSPL & DSPL list,
28 three of them have been grandfathered and the only one that has
29 any significant volume at all is not grandfathered and it's not
30 a regulated bundle either, it's a commercial bundle that we
31 sell voluntarily and wouldn't be caught by the Act.

32 And so that sort of brings me to the main, the most
33 important issue from our perspective today and that is just
34 maintaining perspective on this issue. Regulation should be

1 evidence-based, it can't be fear based and you can't regulate
2 for the just-in-case.

3 The draft report proposes to maintain effectively the status
4 quo for what is about 90% of current resale revenues. It
5 proposes to remove the backstop for broadband and data and
6 bundled products, all of which have either been grandfathered
7 or have almost ridiculously low levels of take-up today. So
8 we're talking about tweaks to the margins of what is the lowest
9 rung of the ladder of investment. We have every incentive to
10 maintain a viable resale business and the reason for that is
11 pretty simple, resale provides better revenues than the
12 counter-factual for us which is in most cases is selling
13 wholesale customers with a regulated largely cost-based input
14 product. No-one has had to use the regulatory backstop that
15 we've got today for years now and in the case of bundles, where
16 most of the submissions seem to focus their concerns on,
17 no-one's used that part of the Act for six years.

18 So, the evidence just isn't there from our perspective to
19 support the suggestion that there is any competition problem
20 for bundles. A mature regulatory framework has to allow for
21 the removal of regulation as well as its addition where
22 evidence supports it and, frankly, the evidence supports the
23 removal of resale for bundles. If you can't deregulate here
24 then we will never deregulate anywhere.

25 So, I hope that today we can focus on the facts and not the
26 fears and avoid getting caught up in arguments about
27 hypothetical scenarios where in some magical way resale becomes
28 the centre of our regulatory framework again. We know that's
29 not the case anywhere else in the world, we know from the last
30 nine years' experience here that it's not the case today here
31 and we shouldn't forget that even with the changes proposed in
32 the Commission's draft report, we are still going to have the
33 most comprehensive regulated resale framework anywhere in the
34 OECD that we're aware of outside the North America.

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1 So, I look forward to engaging in today's discussion which I
2 should note for the benefit of our stenographer I'm afraid
3 comes sandwiched between a TCF restructure workshop yesterday
4 and an industry MTAS STP conference tomorrow which I expect
5 will account for some of the groans and sighs that we're going
6 hear today, and I'm desperately hoping that we get out of here
7 before 2 o'clock.

8 **MR PICKERING:** He's talking about tiredness.

9 **CHAIR:** Thank you, John. Next in order of distance from me.

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OPENING STATEMENT BY ROSS YOUNG ON BEHALF OF TELSTRACLEAR

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MR YOUNG: Thanks. Ross Young for TelstraClear. Lloyd Thomas,
13 Business Support Manager, will be joining me. He
14 apologises for his lateness. He understands a little more
15 about the services than I do after two weeks at
16 TelstraClear.

17

First off I think it's fair to say that TelstraClear
18 supports the decision to retain resale regulation for
19 single service resale but is concerned about the proposal
20 to deregulate resale bundle broadband and data services.

21

I think while we all agree that, you know, we must look at
22 the degree of competition and the availability of inputs in the
23 market, I think it's also important to look at the long-term
24 interest of end users and that means looking at not only at
25 what is the situation today but having a bit of a feel of what
26 occurs in the future. And so I think it's important to
27 consider both the uncertainty that currently exists with UFB,
28 and we have some concerns about that. We also had some
29 concerns about migration in particular grandfathering around
30 these services. I'm pleased to say we've had discussions with
31 Telecom over the past two days and we feel we have resolved
32 those issues on the assumption that we can lock those in. That
33 should resolve Telstra Clear's major concerns on that matter.
34 So, just a short introduction from me.

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1 I think, assuming that migration or grandfathering can be
2 resolved, Telstra Clear's key concern remaining is whether the
3 time is appropriate now to make a decision on resale or whether
4 there should be a delay of several months until we see some
5 decisions coming out of UFB. Thank you.

6 **CHAIR:** Thank you Ross. Vodafone, David?

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8 **OPENING STATEMENT BY DAVID DIPROSE ON BEHALF OF VODAFONE**

9 **MR DIPROSE:** Okay, I think this is on now. I'm David Diprose
10 and I'm here today representing the Vodafone public policy
11 team along with Celine Gilbert here, and we have a few
12 reserves scattered around the room in case we need them
13 but, as you would expect, Vodafone supports rolling back
14 regulation where that regulation is no longer required to
15 ensure competition and where there is no negative price or
16 quality impacts to end users, and that's been touched on
17 already. The issue I guess key here is how far and how
18 fast a roll back that regulation given the current and
19 especially the likely future state of competition.

20 As we're all aware that resale is the initial rung on the
21 ladder of investment and as more LLU roll-out continues and the
22 more wireless becomes a real alternative and with UFB and RBI
23 on the way, you'd expect there would be more infrastructure
24 based competition in both the retail and wholesale spaces and
25 so the less necessary this regulation will be. However, the
26 situation is complicated because we have, I guess, a mix of
27 commercial services overlaid on regulation, and all provided as
28 an alternative to the threat of regulation, and Access Seekers
29 in this situation are relying on a combination of both I guess
30 regulated and commercial offerings. And in practice this
31 exercise I think has proved to be a little more controversial
32 than perhaps the Commission might have expected, I guess as
33 evidenced by the range of submissions suggesting that the
34 Commission may be looking at regulating too far too quickly.

1 But I guess our key points remain as per our submissions
2 last month, that we believe there is no need for resale
3 services that are no longer relevant to the market or to Access
4 Seekers. There's no need for resale services where a suitable
5 migration path to better services has been agreed. But as John
6 from Telecom's, I guess, already indicated it does make sense
7 to continue regulation for key PSTN based services including,
8 well, I had including bundles which do remain important for
9 Access Seekers as long as Telecom's PSTN infrastructure is
10 playing a key role in the provision of voice services to end
11 users.

12 That might not be the case I guess from our point of view if
13 Telecom were prepared to commit to the ongoing availability of
14 these services on terms no worse than they are currently, and I
15 guess looking at the specific agenda for today I think I've
16 touched on some of the key points already but with regards to
17 the service description we think that will be better if either
18 there was a clearer definition of what non-price capped
19 covered, or what it meant, or else a full list of the relevant
20 services that are intended to be included in that.

21 On the bundle front, Vodafone does purchase and is likely to
22 purchase more of at least one of the key bundles on offer and
23 then we would lose out if that bundle was removed. I guess
24 somewhat surprised by Telecom's emphasis on bundles as being
25 the place that we have to start removing this regulation, I'm
26 not sure why bundles are more important than any other aspect
27 of what's covered here but we think it is important that the
28 resale bundles offered, that they do align with retail bundles
29 that are available and also that resale prices should take
30 account of retail bundling discounts as well.

31 So, I think that's covered all the points we have an
32 interest in today. So, thank you.

33 **CHAIR:** Thank you, David. Now, 2degrees, do you wish to make
34 an opening comment?

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OPENING STATEMENT BY MR EDWARDS ON BEHALF OF 2DEGREES

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MR EDWARDS: Tex Edwards from 2degrees here. Thank you for making time for us.

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We believe there's no incentive for like-for-like competition if these regulated services are withdrawn. We

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have a new regulatory environment on the way as a

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consequence of structural separation and UFB, and as a

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consequence it's premature and misguided to spend and

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allocate this much regulatory work into removing a service

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before proper competition exists.

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We highlight some of the Commission's findings in the

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2006 Mobile Market Review which specifically talked about

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bundling and the requirement for like-for-like

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competition. We think it's important that the

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Commerce Commission focus on the current product offerings

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of the three major operators and note the tone of the

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requirement for bundling of services to get a

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like-for-like product offering in all market segments.

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We're not talking about being hobbled into one market

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segment or being quarantined into a small market segment.

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For a like-for-like competition to exist as per the 2006

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Mobile Market Review it's essential that operators that

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have invested substantial amounts of capital can resell

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services to create a similar product.

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It's with great pleasure that I agree with some of the

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Vodafone submissions. So compelling are the Vodafone

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observations I feel desperate to make them, to make you aware

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of them again in my opening statement.

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Retaining access to these products on regulated terms is

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required because a commercial agreement is not easily reached

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with Telecom for services without a full regulatory backstop.

33

It's been my experience in ten years, 2 months in the industry

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that without a regulated backstop you're not going to get an

1 agreement. Simply put, the highlight or the top of the
2 iceberg, so to speak, in quite a substantial piece of work from
3 the Commerce Commission is the fact that today as you trawl
4 through the confused Telecom product offering you'll see that
5 Telecom offer calls to mobiles at 38 cents, to Telecom mobiles,
6 but they offer calls to other mobiles at 47 cents and that sort
7 of highlights at the top of the iceberg perspective, the
8 requirement for a new mobile operator to be able to offer a
9 comprehensive bundled service. And I again quote my colleagues
10 at Vodafone and commend them for a fabulous submission where
11 they say, "The end user customer will have no other option than
12 to move its services to Telecom".

13 I believe that the signalling of this report is misguided.
14 That there has been no proof that there is a successful market
15 structure in New Zealand. We characterise the New Zealand
16 market structure as a mess with geographic monopolisation and a
17 level of dominance which doesn't create any material utility
18 for New Zealand consumers.

19 A colleague from Telecom suggested that evidence must be,
20 that regulation must be evidence-based but we also suggest that
21 market failure should be cataloged to balance up the
22 requirement to pull back a regulation.

23 In summary of our opening statement we have a huge amount of
24 uncertainty with UFB and structural separation coming along.
25 We don't have a mature regulatory environment because we don't
26 have mature competition, and to quote my Vodafone colleagues
27 there's no incentive for Telecom to offer the products on a
28 like-for-like basis without the back drop of regulation. Thank
29 you.

30 **CHAIR:** Thank you, Tex. We now move to a discussion of the
31 Resale Service Description. You should have in front of
32 you a copy of table 2 from the Commission's draft report
33 which listed the retail products offered by Telecom that
34 the Commission anticipated was captured in its proposed

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1 service description of non-price capped local access and
2 calling services.

3 The services as defined in that draft report distinguished
4 between non-price cap services rather than using the word
5 "business" but was intended to catch all services in respect of
6 which there were no price caps; residential, local access and
7 calling being a price cap service.

8 Now, there have been submissions I think by all parties
9 seeking greater clarity in terms of the services that are
10 captured and there have been suggestions of changes in the way
11 of that description. I might ask Telecom first to discuss,
12 firstly I think, whether the services as listed are in fact
13 captured; whether they all should be captured; whether any are
14 missed; and, whether there is a more appropriate way to
15 describe the services that the Commission intended to capture.

16 Now, the reason for doing this first is so that we can all
17 be clear as to what the draft recommendation was intended to
18 capture, not necessarily setting in stone that the final will
19 be in the same shape as this. Thank you, John.

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SUBMISSIONS ON RESALE SERVICE DESCRIPTIONS BY MR WESLEY-SMITH

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ON BEHALF OF TELECOM

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MR WESLEY-SMITH: So, firstly we can confirm that all of the
24 products listed in table 2 in the Commission's draft
25 report are, in our view, captured by the proposed service
26 description. Our general take on the service description
27 is that it is pretty consistent with the current scope of
28 the resale, regulated resale services in the Act as far as
29 local access and calling, ie it will exclude broadband and
30 data services but not a lot else. So, we have - I think
31 we've got a table that we can hand round that has a look
32 at how many lines within our RSPL & DSPL tables would be
33 captured by this and it's pretty much all of them outside
34 of broadband and data.

1 When the Commissioners looked at this, or the previous
2 resale service descriptions in decision 525 and the other
3 one, I forget its number, it's the, by means of the fixed
4 telecommunications network that defines the extent of the
5 regulation and that is a constant between the previous
6 regulation and the current. So, apart from the local, the
7 words "local access and calling" those are the real
8 differences in our mind and all they do is exclude
9 broadband and data. So that's our understanding. I hope
10 it helps.

11 **CHAIR:** Thank you. In your submission you had suggested a
12 changed service description. Can you explain the thinking
13 behind that?

14 **MR WESLEY-SMITH:** Yes. So, our - we made two principal
15 suggestions. The first was to remove discretion for the
16 Commission to require resale regulation in competitive
17 markets.

18 **CHAIR:** We might come to that as a separate item. Just in
19 terms of the service description itself.

20 **MR WESLEY-SMITH:** The only other change was just to put in
21 place I guess another condition and that is that access to
22 the resold product is required for an Access Seeker to
23 compete effectively, and that is just about putting in
24 place what we think is a sensible bound on, by means of
25 fixed telecommunications network. So what we would want
26 to avoid is, you know, as we move towards a whole series
27 of voice based products or internet based products that
28 anyone can replicate quite easily that's got an ISP
29 infrastructure, that we don't start spilling beyond that
30 core set of PSTN type services that from our perspective
31 resale should be focused on.

32 **CHAIR:** And we'll come back to that in more detail. I thought
33 from memory you suggested adding the word "business" into
34 the service description. Was it not?

- 13 -

1 **MR WESLEY-SMITH:** I think that was Vodafone but we would
2 support that.

3 **CHAIR:** I think the reason we removed it was because if the
4 non-price cap actually captures everything other than
5 residential where it's using the word "business" you
6 needed to understand who the customer was to understand
7 what the service was. So --

8 **MR WESLEY-SMITH:** Yep.

9 **CHAIR:** -- you don't have a strong view on that?

10 **MR WESLEY-SMITH:** I don't, no we don't to be honest.

11 **CHAIR:** Okay, thanks. What is Telstra Clear's position on
12 service description?

13 ***

14 **SUBMISSIONS ON RESALE SERVICE DESCRIPTIONS BY MR THOMAS**
15 **ON BEHALF OF TELSTRACLEAR**

16 **MR THOMAS:** Our concern was just getting from -

17 **CHAIR:** Sorry, if you'd just give your name.

18 **MR THOMAS:** Sorry, Lloyd Thomas from TelstraClear --

19 **CHAIR:** Thanks.

20 **MR THOMAS:** -- I apologise for being late.

21 Our concern was just translating the actual
22 descriptions even from the non-capped level but from the
23 level below to the actual products that we purchase off
24 Telecom. That was all.

25 **CHAIR:** Would you prefer all of the products in the list were
26 actually specified in the description? The difficulty
27 with that is new products aren't caught.

28 **MR THOMAS:** Yes, so it's quite confusing when we tried to do an
29 analysis of exactly which of these products we bought off
30 Telecom and to find any actual product descriptions and
31 relating them to the things we deal with on a day-to-day
32 basis.

33 **MR YOUNG:** So, any additional clarity there is welcome.

34 **CHAIR:** And David, Vodafone's position?

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**SUBMISSIONS ON RESALE SERVICE DESCRIPTIONS BY MR DIPROSE ON
BEHALF OF VODAFONE**

MR DIPROSE: Yeah, this has been a slightly confusing area.

Certainly a list of all of the services that are or should be included in here rather even than just a list like this that, as the list says, illustrative only, but a complete list I guess it would need to be updated periodically to allow for potentially grandfathering of products and potentially new products. But clarity around what's included and what's not I think is important.

With regard to the word "business" too I think perhaps that wasn't appropriate because understanding now that all of the list of miscellaneous add-on services like call minder and stuff are only in the non-price capped category but equally apply to residential phone lines, then "business" probably is not appropriate to fit into that part of the description although obviously the business line network is as it's part of that. So on reflection leaving that word out of the description or that part of the description is helpful.

CHAIR: In terms of trying to get greater clarity for what products are included and what aren't has there ever been a dispute about whether or not a specific product falls within the regulated list or not in the last ten years?

MR DIPROSE: I guess one thing that does concern us is the Telecom suggestion that only a subset of these services would be included because when you are involved purchasing resale services to sell to your customers you're not actually providing the service. So, if you're providing a residential phone line and the customer wants add-on features like call minder, call waiting and any of the other list of things, you cannot provide that yourself because it doesn't connect to your own network. So, we

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1 are constrained by the list of services that Telecom is
2 offering us and if that list is not complete then we can't
3 necessarily offer our customers what they might want and
4 we can't necessarily be competitive with others.

5 So, the problem would come if that list was restricted to
6 too small a subset then we may not be able to be competitive.

7 **MR WESLEY-SMITH:** Just to clarify, I mean I think we're saying
8 the opposite. That there is no restriction that we can
9 see other than excluding broadband and data from this
10 list. What we've suggested is a condition for the
11 Commission can manage to question whether access to a
12 particular service is required -

13 **CHAIR:** We'll come to the condition in a minute. So, in terms
14 of the service description itself I mean it seemed to us
15 that the broad description was far preferable than trying
16 to list the products, and the test is whether or not it is
17 a local access or calling service offered by means of the
18 network pretty much captures more rather than less we
19 would have thought. Okay. 2degrees got any comment?

20 ***

21 **SUBMISSIONS ON RESALE SERVICE DESCRIPTIONS BY MR EDWARDS ON**
22 **BEHALF OF 2DEGREES**

23 **MR EDWARDS:** We reiterate the fact that new products aren't
24 caught, dominance is the problem. Actually this list
25 highlights the weak section 36 backdrop of the
26 Commerce Act. Respectfully, we feel that this report from
27 the Commerce Commission and the draft submissions, or
28 observations from the Commerce Commission don't have an
29 international benchmark -

30 **CHAIR:** Sorry, can you just answer the question. What we're
31 talking about is the specific proposed service
32 descriptions specifically.

33 **MR EDWARDS:** Yeah.

34 **CHAIR:** The myriad of other issues.

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1 **MR EDWARDS:** Yep. How it relates to the other issues is that
2 new products aren't caught. The definition -

3 **CHAIR:** No, the suggestion is that by using the description
4 that the Commission listed, which is new products will be
5 caught because they aren't specified, so you should be
6 happy with that approach. So, all non-price cap local
7 access and calling services which are offered by means of
8 a Telecom's fixed telecommunications network now and in
9 the future, whatever they may be, will be caught by that
10 service description, would seem to be what you would want.

11 **MR EDWARDS:** It is a constructive step forward but what we
12 really want is the test of dominance to be benchmarked and
13 managed.

14 **CHAIR:** I understand but we're talking about the definition of
15 the service at the moment.

16 **MR EDWARDS:** It's a step forward.

17 **CHAIR:** Thank you. If we can move then to Telecom's suggestion
18 of amending the conditions that relate to the service and
19 John, perhaps if you would like to go through the two
20 issues relating to that, that you've suggested in your
21 submissions.

22

23 **MR WESLEY-SMITH:** Sure. So, the first suggestion is to remove
24 the discretion for the Commission to require resale
25 regulation in markets that it has found are workably
26 competitive and I guess from our perspective that's a
27 discretion that I think in a - I guess it explores the
28 potential difference between the long-term benefits of end
29 users test and a standard traditional SMP dominance test,
30 and while we accept that the Act provides the potential
31 for the Commission to set a broader test than a
32 traditional competition test, in practice the Commission
33 hasn't done that ever and for resale which is the lowest
34 rung of the ladder, I guess, it's hard for us to see why

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1 the Commission would ever exercise that discretion, how
2 you would support its inclusion in the service
3 descriptions. We can see when it comes perhaps to rungs
4 higher up the ladder there might be an arguable case for
5 it but I can't see why you would want that in there for
6 resale.

7 And the second, as I've said, was just an additional
8 condition that is designed to work with a broader service
9 description but to give I guess clearer direction that the
10 intention of resale services is to only provide where they are
11 required, ie there is not a reasonably available intermediate
12 input or some other network by which Access Seekers can
13 replicate the resale services themselves.

14 **CHAIR:** And so just to be quite clear on that, your suggestion
15 is the regulations will only apply (a) where Telecom faces
16 limited competition and (b) only in respect of services
17 that Access Seekers need to compete effectively with
18 Telecom. So, if they have the ability to replicate or
19 acquire whatever the service is elsewhere, then they would
20 fail that test.

21 **MR WESLEY-SMITH:** Yeah, that's right. This is a regulatory
22 backstop from our perspective on the lowest rung of the
23 ladder. So, this is not to say that we're not going to be
24 offering products in those markets or in those
25 circumstances but we don't feel that regulation should be
26 providing the requirement that we do so, yeah.

27 **CHAIR:** Thanks. Invite TelstraClear first to respond with
28 their views.

30 **MR YOUNG:** Thank you. I think TelstraClear would agree in
31 principle with those ideas. I think the concern though is
32 in an environment with heightened uncertainty with UFB,
33 reducing the flexibility that is there currently in the
34 Act I'm not sure is the wisest move at present, and whilst

1 I think there may be situations in which are difficult to
2 contemplate I think until we get greater certainty on what
3 alternatives would arise through UFB, either through new
4 pricing structures for UBA or through whatever the price
5 may be for layer 2 bit stream or whether we get an average
6 UCLL price, it's comforting to have a little bit more
7 flexibility there.

8 **CHAIR:** If I can just explore that a little bit.

9 **MR YOUNG:** Mmm.

10 **CHAIR:** So if it was the case that competition was effective in
11 an area you presumably wouldn't be thinking that a product
12 should be regulated?

13 **MR YOUNG:** Correct.

14 **CHAIR:** And if you didn't need to acquire a service from
15 Telecom in order to compete effectively in the market, in
16 that market --

17 **MR YOUNG:** Mmm.

18 **CHAIR:** -- presumably you wouldn't think that regulation should
19 apply?

20 **MR YOUNG:** That's correct. Certainly you can take the test
21 there but we haven't seen that test applied yet.

22 **CHAIR:** Understand, but sorry, just the question, that is the
23 test that Telecom is suggesting should apply at the lowest
24 rung of the ladder and it appears on principle you can't
25 dispute or object to it.

26 **MR YOUNG:** I wouldn't dispute in principle, what I would say is
27 that a reduction of flexibility at this time of
28 Commission's powers seems premature given the level of
29 uncertainty in the market.

30 **CHAIR:** And if I can just explore then, we're talking about the
31 lowest rung of the ladder which is resale products,
32 wholesale products remain regulated in the copper world,
33 so in what respect is this flexibility at this very low
34 rung of the ladder affected by uncertainty under UFB or -

1 **MR YOUNG:** Sure. So, for example, if you take the ladder of
2 investment and we've, really we've seen now the
3 submissions in relation to post structural separation of
4 Telecom; we see that the Government will be making some
5 decisions soon on pricing of UCLL, which is one step of
6 the ladder; we don't know yet what pricing will emerge for
7 UBA; we don't know what prices will be under UFB for
8 layer 2, and there's also a block there, and so it seems
9 to me that what's happening is a focus on layer 2 is
10 reoccurring and we're almost removing several rungs below
11 and above and focusing on this layer 2. Now, that may be
12 all right and proper but it seems to me that there's a
13 risk there that if we allow that to occur without giving
14 ourselves flexibility to really evaluate those other rungs
15 below and above layer 2, that we may be in a difficult
16 situation. Now, I can't give you a specific example yet
17 but that's my concern.

18 **CHAIR:** Thanks. David?

19

20 **MR DIPROSE:** As we I think said in our submission we, we stated
21 support for Telecom in the removal of this on the basis
22 that if there's no longer a need to provide a service
23 because it is acceptable competition then that should be
24 good enough. I guess, as I said in my opening statement,
25 the key things are as long as there are, or removal where
26 there is no longer a need to ensure competition or where
27 there's no negative impact on end users, then apply them.
28 We do also I guess sympathise with Telstra Clear's
29 position that we're moving into uncertain times with UFB
30 and so forth, and there is a lack of clarity about what's
31 going to be available to Access Seekers in the future with
32 UFB with changes to pricing and structure around UBA and
33 that, and I think to some extent it comes back to if there
34 has to be a test at this point the Commission will have

1 the task of defining what competition is and whether there
2 really is competition that means that the resale
3 regulation is no longer necessary.

4 **CHAIR:** Yeah, I suppose that the application of the test you
5 would be required to satisfy us that a particular service
6 was needed by you to compete effectively and that there
7 were no alternatives and that there wasn't effective
8 competition but what you seem to be saying is those tests
9 seem to be reasonable in the circumstances.

10 **MR DIPROSE:** Yeah, well the safeguards are there in those
11 tests. We hope it doesn't come to having to test that
12 out.

13 **MR DUIGNAN:** So, just to be clear, Vodafone supports Telecom's
14 proposition whereas TelstraClear have given reasons why
15 you don't support it but Vodafone does support it?

16 **MR DIPROSE:** Yes.

17 **MR DUIGNAN:** Okay, thank you.

18 **MS MAZZOLENI:** Can I just ask -

19 **CHAIR:** Yes.

20 **MS MAZZOLENI:** Is this Telecom's wording or did you borrow that
21 from someone?

22 **MR WESLEY-SMITH:** No, this is our wording.

23 **MS MAZZOLENI:** There's no other regulatory precedent for -

24 **MR WESLEY-SMITH:** No, we can't find regulatory precedent for
25 the resale definition anywhere.

26 **CHAIR:** Nor for the existing conditions applied.

27 **MR WESLEY-SMITH:** No, the language comes from the EU, an
28 effective competition required, those type of principles
29 are fairly standard, and we're not wedded to the
30 particular drafting, just the principle I guess. And like
31 Ross I agree there's a whole lot of uncertainty with UFB
32 but I can't for the life of me see how it's relevant to
33 resale and those two principles.

34 **MR DUIGNAN:** We will have an agenda item specifically on that.

1 Just ask Vodafone, there are two points being raised by
2 Telecom. One is to remove the Commission's powers to have
3 regulation despite having concluded that Telecom doesn't
4 face limited competition, and the second would be that
5 there would be a further test that the regulation was
6 required in order for a competitor to compete, to put it,
7 so there are two. And so if we can just make sure that we
8 understand, TelstraClear are opposed to both, Vodafone I
9 think are supportive of both and as we go round we need to
10 get two comments, thank you.

11 **CHAIR:** And 2degrees' position? Answering specifically the
12 question.

13 **MR EDWARDS:** We're in support of TelstraClear.

14 **CHAIR:** Okay.

15 **MR YOUNG:** Sorry, could I just ask one question briefly. So is
16 there any sort of analysis of the policy that was set in
17 behind that second condition that you wish to get rid of
18 that you've researched?

19 **MR WESLEY-SMITH:** I'm not clear of the question.

20 **MR YOUNG:** So, you're proposing to get rid of that second
21 aspect of the condition (b) --

22 **MR WESLEY-SMITH:** Yep.

23 **MR YOUNG:** -- presumably that went into the legislation for a
24 reason. I was wondering if there was some background
25 policy that you've researched in coming to your view?

26 **MR WESLEY-SMITH:** The reason was that there is an arguable case
27 that says the test of promotion of long-term benefits for
28 end users is slightly different to a traditional SMP
29 competition test and I think the Commission in previous
30 investigations has looked at things like consumer
31 surplus versus total surplus. So, that was the policy I
32 think sitting behind it and, like I say, I think we would
33 have a particular view that there shouldn't be any
34 regulation as a principle, founding principle in effect in

1 workable competition, markets with workable competition
2 but, and we accept that there's an argument to be had for
3 that when it comes to wholesale services and what we're
4 saying is for the life of us can't see how you can even
5 have that argument when it comes to resale.

6 **MR YOUNG:** So, presumably, I mean in any analysis of this we'd
7 be looking back at those original policies and making sure
8 it's consistent with the Section 18 test and also some
9 consideration of where the onus would sit then, if it's
10 sitting on Access Seekers to make that argument.

11 **CHAIR:** I think while you would apply the Section 18 test, and
12 that's absolutely correct, I'm not sure why you would
13 necessarily look back to the policy reason for putting it
14 in five years ago if you determine that it may have been
15 appropriate then but it may not be appropriate now,
16 because a lot has changed in the last five years.

17 **MR YOUNG:** Oh, I agree, I just always think it's prudent to
18 look at the original reasons for making a decision.

19 **CHAIR:** Thank you. And then finally on the service description
20 you also suggested some change to the pricing principle as
21 well? I think.

22 **MR WESLEY-SMITH:** Did we? It was very clever of us if we did.

23 **CHAIR:** For both the IPP and the final pricing principle, do
24 you want some time to gather your thoughts --

25 **MR WESLEY-SMITH:** Yeah, if you can remind me.

26 **CHAIR:** -- and we can come back to that after the break --

27 **MR WESLEY-SMITH:** Yeah, that would be good.

28 **CHAIR:** Or -

29 **MR WESLEY-SMITH:** Obviously very important.

30 **CHAIR:** So in terms of the service descriptions other than the
31 pricing principle that we'll come back later in the course
32 of the conference are there any other issues or matters
33 relating to the service descriptions that we haven't
34 covered? I think from my perspective we've got the

1 feedback that we wanted on all of those issues. Thank
2 you. Well, we can move on then to migration plans and ask
3 Anita to lead off on that interesting subject.

4 **MS MAZZOLENI:** Interesting and made more tantalising by Ross'
5 opening comments I think. Well, it was largely -

6 **MS HENDERSON:** Two people are dialling in.

7 **CHAIR:** We'll just wait while we've got two people dialling in,
8 we're ahead of time.

9 (Teleconference begins at 10.35 a.m.)

10 **MR SHIRLEY:** Michael Shirley from Telecom Wholesale.

11 **CHAIR:** Welcome to the conference, can you hear us all right?

12 **MR DEMPSEY:** Have you got Tim with you, Michael?

13 **MR SHIRLEY:** Tim is just dialling in right now.

14 **MS MAZZOLENI:** You might have to speak up a little bit, you're
15 very faint.

16 **MR SHIRLEY:** Okay, can you hear me better now?

17 **MS MAZZOLENI:** That's much better.

18 **CHAIR:** That's good, thank you.

19 **MS MAZZOLENI:** All right. This topic was I guess largely
20 promoted by TelstraClear who offered -

21 **CHAIR:** Hello?

22 **MR PEGLER:** Hello, Tim Pegler here from Telecom Wholesale.

23 **MS MAZZOLENI:** Can you just speak up a little bit Tim?

24 **CHAIR:** Can you hear us okay? Is anybody there?

25 **MR PEGLER:** How's that?

26 **CHAIR:** Okay.

27 **MS MAZZOLENI:** All right, I'll start again. Third time lucky.

28 This topic was really promoted by TelstraClear who
29 suggested that if there was a reasonable migration plan in
30 place and they set out a number of indicative criteria
31 then they would be, I guess, predisposed or slightly
32 comfortable with the removal of the resold broadband and
33 the data services as the Commission had proposed in the
34 report.

1 **MS MAZZOLENI:** And so that removes all of your objection?

2 **MR YOUNG:** It does.

3 **MS MAZZOLENI:** You would be in a position once you concluded
4 your discussions with Telecom to inform us of that, that
5 what you've said in the submission?

6 **MR YOUNG:** I would indeed and hopefully we could get within a
7 week, a couple of days.

8 **MS MAZZOLENI:** Just in terms of a form of that you said it's
9 likely to be a variation to the WSA.

10 **MR WESLEY-SMITH:** Yes, I don't know if we've discussed the form
11 of that but we are more than happy to make a statement, a
12 public statement and put it in writing to TelstraClear to
13 confirm our interpretation of the current arrangements and
14 how we intend applying that interpretation to the
15 renegotiation of our Wholesale Services Agreement with
16 TelstraClear because in simple terms we've always intended
17 and been of the view that the undertakings require that we
18 can't make any changes to RSPL & DSPL without bilateral
19 agreement with TelstraClear. That the undertakings -
20 prior to the undertakings we had a quasi agreement with
21 the Commission to continue to operate RSPL and DSPL on
22 the same terms as was originally set out. We set that out
23 in the undertakings and confirmed that, and that requires
24 we agree any changes to TelstraClear's RSPL and DSPL
25 with them.

26 **MS MAZZOLENI:** Okay. I guess in terms of some of the concerns
27 that were raised and I think including by TelstraClear
28 about subsequent changes then, provided the Commission
29 gets notified that TelstraClear is comfortable with the
30 actions you've taken we would have no further concern
31 about issues around enforceability that parties have
32 raised; is that a fair comment?

33 **MR WESLEY-SMITH:** Yep.

34 **MR YOUNG:** Mmm.

- 26 -

1 **MS MAZZOLENI:** Obviously we are interested in very much getting
2 that lock down so that we can move ahead as well.

3 **MR YOUNG:** Yep.

4 **MS MAZZOLENI:** So we would expect to hear from you within a
5 couple of weeks. Where does that leave other parties
6 then? I mean particularly Vodafone and I know Kordia
7 isn't here today but they raise the same issues. Perhaps
8 before we turn to David, did you want to talk about how
9 that would affect the other -

10 ***

11 **SUBMISSIONS ON MIGRATION PLANS BY MR WESLEY-SMITH**

12 **ON BEHALF OF TELECOM**

13 **MR WESLEY-SMITH:** So, DSPL & RSPL is specific because the
14 determination way back when was specifically between
15 TelstraClear and Telecom DSPL and RSPL is specific to
16 Telecom and TelstraClear agreements, and to that extent
17 there isn't the same protection built into the
18 undertakings for other Access Seekers. In all the time
19 that we've operated it we have never specifically singled
20 out TelstraClear and dealt with them any differently to
21 other Access Seekers and we've had no issues to date with
22 that. So, I'm delighted that we can make a positive
23 statement of how we currently interpret the arrangements
24 to assuage Telstra Clear's concerns but from our
25 perspective I'm not sure why anyone would be concerned
26 with migration to begin with. Like I say, we're largely
27 talking about broadband and data products on the migration
28 front and the data products are almost all, they were all
29 required to be grandfathered by the undertakings and in
30 fact we have grandfathered at retail but have chosen not
31 to grandfather at wholesale, that's the only difference.
32 So we've continued to provide again on a commercial basis
33 resale data products where we're not required to and on
34 broadband TelstraClear is the only party with resale to

1 broadband services still existing.

2 **MS MAZZOLENI:** I take your point but nevertheless Vodafone and
3 Kordia have both raised the same issue and Vodafone
4 particularly in relation to the data services, so perhaps
5 if David you would like to speak to that now, particularly
6 in light of the arrangement that TelstraClear and Telecom
7 have indicated as well, you know, how that could be
8 extended to give you the same level of comfort?

9 ***

10 **SUBMISSIONS ON MIGRATION PLANS BY MR DIPROSE**
11 **ON BEHALF OF VODAFONE**

12 **MR DIPROSE:** Sure, just a couple of points on that. I think
13 first of all the principle of their being a clear agreed
14 migration path is important. In practice with I guess
15 PSTN resale remaining we don't have many customers on
16 legacy data services so the issue for us is not as big as
17 it might be for TelstraClear. Our experience with product
18 migrations with Telecom has generally been cooperative.
19 For example, we're going through a UBS/TBA migration at
20 the moment and we've had a cooperative experience through
21 that but I think a public statement from Telecom
22 clarifying the migration situation there would be a
23 helpful thing to close this off. So we don't really have
24 any issues in this space.

25 **MR WESLEY-SMITH:** Which services in particular are you
26 concerned about or would you like a statement around?

27 **MR DIPROSE:** Well, as I said, we don't have many - I mean we
28 have some customers on things like frame relay but we
29 don't have that many and not that many products, so as
30 long as they were covered off. I mean I think what you
31 need to do to cover off Telstra Clear's concerns would be
32 more than enough to cover off our concerns.

33 **MR WESLEY-SMITH:** I'm sure we can absolutely take it away and
34 figure out what we could say to give comfort but we would

1 need to understand where are the concerns.

2 **MS MAZZOLENI:** Can I suggest John that perhaps, you know, as
3 well as finalising discussions with TelstraClear and
4 making your announcement you probably do need to talk to
5 Vodafone and Kordia because the Commission would probably
6 expect to have the same sort of notification from each of
7 those parties as to what they've said in terms of the need
8 for the migration plans in their submissions and their
9 cross submissions.

10 **CHAIR:** And CallPlus.

11 **MS MAZZOLENI:** Yep. Would, you know, that the situation that
12 you've now reached would satisfy those concerns, and I
13 think on that basis we could move forward.

14 **MR WESLEY-SMITH:** Look, we're happy to do it. I guess there's
15 still a fundamental - these are all services that have
16 already been grandfathered under the existing resale, so
17 regulation doesn't, has not, never has required migration
18 plans. They're grandfathered and we don't sell them any
19 more. So, it still just - we're happy to talk with these
20 guys and figure out what we can do to give them comfort
21 but in the regulatory sense it's really difficult for us
22 to get our head around what the relevance of it is. So,
23 you know, if regulation remained today we wouldn't - there
24 wouldn't be a migration path requirement. I guess it's a
25 thing that commercially and through common sense you do
26 with your customers as we have in the past. So we're
27 happy to have those conversations but I'm just a little
28 wary of linking that in some way to this process.

29 **CHAIR:** Except that all of the submissions have raised it, by
30 Access Seekers, have raised that as a reason to impose the
31 deregulation that the Commission has recommended, so -

32 **MS MAZZOLENI:** Which was perhaps why we were going to suggest
33 that --

34 **CHAIR:** Yeah.

1 **MS MAZZOLENI:** -- on an interparties basis you all needed to
2 sort that out and have that removed. So, I mean I
3 understand your point in principle but there's a practical
4 matter. As Ross said, they have all been tabled and we do
5 need to move past this point in order to, I guess, move
6 forward with the report as proposed.

7 **MR WESLEY-SMITH:** We're happy to talk to them and try and
8 understand better what it is they might want to receive
9 from us. So we can have those conversations.

10 **MS MAZZOLENI:** The alternative of course is that you make your
11 announcement and they make their own views and the
12 Commission may need to ask them whether they have any
13 concerns, I guess we would prefer to not be involved in
14 that.

15 **MR DUIGNAN:** I mean one way, can I just propose this to
16 Telecom, would you consider that Telecom does not have any
17 legitimate grounds for discriminating in favour of
18 TelstraClear regarding migration of currently regulated
19 services should that arise, which is to say that you would
20 be saying that you regard yourself as bound by the
21 non-discrimination provisions and that you have no
22 proposition to put forward that would justify your
23 claiming to make a distinction. So, that would go a long
24 way towards putting everybody on the same playing field,
25 on a level playing field.

26 **MR WESLEY-SMITH:** (Nods). We'll take that one away, thanks.

27 **CHAIR:** And if I can just explore, John you made the comment,
28 suggestion this whole issue is completely irrelevant in
29 relation to the Commission's --

30 **MR WESLEY-SMITH:** Yeah.

31 **CHAIR:** -- draft recommendations. So can you just explain for
32 me again why in fact we shouldn't be concerned at all
33 about migration of the existing resale services that may
34 have been removed from regulation?

1 **MR WESLEY-SMITH:** Sure. So, the resale regulation is about
2 setting resale regulatory requirements and there's a
3 separate series of regulations governing wholesale input
4 products and then there's the undertakings which govern
5 migration. And the undertakings have already set out our
6 migration path for data and they have required us to stop
7 selling all of our legacy data services and replace them
8 with wholesale inputs. So, we have stopped selling and
9 grandfathered ATM, UNS, frame relay, one office, metro IP,
10 mega link, DDS, high speed DDS and replaced those with
11 HSNS, UPC, HSNS light, HSNS fibre and something called
12 ELI. So, that's already been set out for us by the
13 undertakings. And in the resale context we have now
14 grandfathered almost all of those services, although as I
15 say on a commercial voluntary basis we've kept some of the
16 wholesale data, legacy data services going even though
17 we've grandfathered at retail. So, the undertakings have
18 set a migration path and resale has never been about
19 regulating off resale and on to something else so it's
20 difficult for me to see in a resale context what more you
21 can add to the undertakings and how in resale you'd set a
22 migration path or consider a migration path off products
23 that under the resale rules are already grandfathered.

24 **CHAIR:** So, perhaps David I could ask you, how do you respond
25 to that? Is the plea for robust migration plan and for us
26 not to move to deregulate until one is locked in place
27 actually an over-statement of what's required?

28 **MR DIPROSE:** Well, the undertakings do give us a reasonable
29 level of protection and that may well be enough in the
30 case of these products, given as I said we don't have many
31 customers who are impacted in this situation anyway.

32 **CHAIR:** So I suppose some statement from Telecom, because there
33 were some issues raised about variations and what's going
34 to happen and these may be varied, so some commitment to

1 continue come what may, to work through and presumably
2 it's in your commercial interests anyway to do, so.

3 **MR WESLEY-SMITH:** Yeah, so we can absolutely do this. I think
4 like David said, especially when you come to Kordia and
5 CallPlus I think it's probably based on a fear that
6 somehow PSTN is caught up in all this. Because, you know,
7 frankly apart from these guys, no-one buys legacy data
8 resale or broadband from us.

9 **CHAIR:** Do you have any -

10 **MS MAZZOLENI:** No. So, I guess unless anyone else has got
11 anything to raise on this subject I think that probably
12 deals with it.

13 **MR EDWARDS:** I wouldn't mind raising, the 2degrees position is
14 if these migrations are going to take place isn't that
15 shutting the door to new entrants in the ladder of
16 investment and what provision is made for potential new
17 entrants? We've heard from Telstra and Voda, we haven't
18 heard from CallPlus or Vector, or Kordia for that matter,
19 and aren't we closing a basic ladder?

20 **MS MAZZOLENI:** Well, we have heard from CallPlus and Kordia,
21 and I don't think we heard from Vector on this point but
22 certainly, I mean that's been part of the discussion that
23 John rather than ourselves goes back, once you've made
24 this announcement goes back and discusses Kordia and
25 CallPlus's concerns with them so we're probably going to
26 get to the same point.

27 **CHAIR:** I think in terms of the ladder of investment and
28 Telecom in its submissions made quite detailed reference
29 to the principle of removing at the time the lower rung as
30 investment develops up the ladder, and these migration
31 plans have all been about moving to new wholesale
32 products, and certainly from Access Seekers' perspective,
33 if they're happy with the migration plans that are in
34 place it seems difficult to understand why you would

1 retain regulation of those particular products when there
2 are alternative products available to newcomers into the
3 market. And, in fact, I think one of the comments, John
4 was going to come back to this, you raised the commercial
5 incentives that Telecom had, that in fact the margins you
6 earn on resale products are far greater than wholesale
7 products and you would probably prefer to be selling
8 resale products to everybody if you could.

9 **MR WESLEY-SMITH:** Yeah, we have - I can honestly tell you we
10 have no intentions of removing any resale products from
11 the market and the only real credible reason we would do
12 that is because where the cost of maintaining the service
13 exceeds the number of people that are paying us for it,
14 and that might happen because we've got an incredibly
15 large number of resale services with almost no-one buying
16 them but, yeah, there are really strong commercial
17 incentives.

18 **CHAIR:** And Access Seekers have an incentive to move to
19 wholesale products away from resale products as quickly as
20 they can --

21 **MR WESLEY-SMITH:** Yeah, which is what is happening.

22 **CHAIR:** -- for the other reason, for the converse reason.

23 ***

24 **SUBMISSIONS ON MIGRATION PLANS BY MR EDWARDS**
25 **ON BEHALF OF 2DEGREES**

26 **MR EDWARDS:** But it's 2degrees' position that for new entrants
27 outside the existing club of participants in this part of
28 the ladder of investment there is an incentive for Telecom
29 to drop prices and, on that particular service, because
30 they're still earning way above their cost of capital in
31 that asset class, in that part of the business. So, if
32 other new entrants who have invested in other activities,
33 as highlighted by Vodafone's position, are forced to
34 participate in that part of the business, in that unique

1 series of services, then the new entrants will be at a
2 disadvantage.

3 **MR WESLEY-SMITH:** Broadband and data is what we're talking
4 about here though, and they've got UBA and any number of
5 data services they prefer to our resale services I guess
6 is the point.

7 **CHAIR:** I mean the analysis in the draft report was that there
8 was very limited uptake of the broadband and data resale
9 products because there was a clear move to the alternative
10 wholesale products, and given the numbers on those
11 products it must be getting close to a tipping point where
12 the revenues don't justify the cost in any event, which is
13 why there's that migration.

14 **MS MAZZOLENI:** Ross wanted I think to finish off, did you?

15 **MR YOUNG:** I just wondered whether it would be helpful to set a
16 date for when we should come back to you. Two weeks from
17 today?

18 **CHAIR:** Thank you.

19 **MS MAZZOLENI:** We're closing the session now so did Mike or Tim
20 have anything they wanted to add?

21 **MR SHIRLEY:** No, fine thank you.

22 **MR PEGLER:** Just a comment to back up a comment previously made
23 by John, on a broadband point of view, and I think from a
24 commercial point of view that resale products that we
25 currently offer that are more expensive for our wholesale
26 customers, I mean we have looked to progressively replace
27 those are our wholesale UBA services but there's actually
28 been, I mean there's no particular driver to keep those
29 plans in the market except from a commercial point of
30 view. So I think that really just backs up that comment,
31 that there is actually little market for those kind of
32 services. The preference really is for the wholesale
33 services.

34 **MS MAZZOLENI:** Okay, thank you.

- 34 -

1 **CHAIR:** Okay, thank you and it is morning tea and we'll be back
2 here at 11.15, thank you.

3 (Conference adjourned from 10.59 a.m. until 11.19 a.m.)

4 **CHAIR:** Okay, if we reconvene. What we'll do is run through
5 the next agenda items and have lunch at the end rather
6 than a lunch break in the middle. On this occasion we do
7 have sandwiches and I'm told that you are not regarded to
8 see this as a precedent.

9 **MR PICKERING:** But surprise for getting through in time.

10 **CHAIR:** But lunch is catered for and will be available at the
11 end of the session so we'll start off with the issue of
12 bundles with Gowan leading the discussion on that.

13 ***

14 **MR PICKERING:** Thank you Ross. Well, you've already mentioned
15 bundles in all opening statements so it's obviously an
16 issue. Just to set the framework, the Commission propose
17 to remove the bundle retail service and parts of bundle
18 retail services from the schedule and in the
19 Access Seeker's submissions there was relatively strong
20 push back on that. So, we're really keen to understand
21 first of all be sure that we're all on the same page in
22 terms of what are the bundles at stake and then why is it
23 that people feel so strongly about the bundles being
24 removed. We have had the argument that there will be some
25 impact or could be impact in terms of the return to the
26 Access Seekers but it's not clear that there's market
27 failure.

28 So, I would like first of all to just be sure that we
29 have it clear that, as John said in his opening remarks,
30 there are five bundles at stake here; the Family, the
31 Smartline, the Messageline, they're all grandfathered.
32 There's the Access + Message Wholesale product - a Commercial
33 Wholesale product - so that's not under regulation, and the
34 Smart Bundle which seems to be the one left. So, could I

- 35 -

1 ask the Access Seekers, first of all can I ask Telecom, is
2 that the right list?

3 **MR WESLEY-SMITH:** Yep, that's right.

4 **MR PICKERING:** Anybody dispute those are the bundles that we're
5 talking about, can we go round; Telstra?

6 **MR YOUNG:** No.

7 **MR PICKERING:** Vodafone?

8

9

SUBMISSIONS ON BUNDLED RESALE BY MR DIPROSE

10

ON BEHALF OF VODAFONE

11 **MR DIPROSE:** An issue that I'm still coming to grips with in
12 this space I guess is the relationship of this list of the
13 bundles to see bundles that are available to Telecom's
14 retail customers and the way when you are a retail
15 customer of Telecom you can buy services, for example call
16 minder, call waiting and if you buy them as a bundle with
17 the home line and other products you get a discount on
18 those, and so given that there are bundles and bundle
19 discounts available to Telecom's retail customers how do
20 they relate to what is available on a resale perspective?
21 There certainly is a lot more available in the retail
22 space than just this list, or the one remaining one of
23 these resale bundles.

24 **MR PICKERING:** Telecom, how would you answer that?

25

26

SUBMISSIONS ON BUNDLED RESALE BY MR WESLEY-SMITH

27

ON BEHALF OF TELECOM

28 **MR WESLEY-SMITH:** Um, so, look I guess there are lots of retail
29 bundles.

30 **MR PICKERING:** Yes.

31 **MR WESLEY-SMITH:** Most of them deal with broadband and calling
32 and access, and the broadband and the calling aren't
33 covered by resale. So, you're just left with calling
34 which is from our retail bundling it is just the Access +

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1 Message and call waiting I guess. So, that's the extent
2 of almost all of our retail bundles. So, those are the
3 same components covered by the, I guess the current resale
4 bundles that we offer.

5 **MR DIPROSE:** So, if I can ask Telecom if it considers that the
6 one remaining one of -

7 **CHAIR:** Sorry Dave, can you speak into the microphone, it's
8 very hard to hear you.

9 **MR DIPROSE:** Sorry, I'm just checking if Telecom considers that
10 the one remaining bundle in this list is considered to
11 cover the extent of the bundling discounts available to
12 retail customers when they purchase call minder, call
13 waiting and the other features like that?

14 **MR WESLEY-SMITH:** Well no, the point is it's the one - we
15 haven't actually managed to sell any of the one regulated
16 resale bundle because you guys prefer the commercial
17 option that we've put up called Access + Message, that's
18 the one that we sell the most of. So, I think the
19 Smart Bundle is the one that we've got that does take a
20 retail minus off what we've got in the retail market but
21 we haven't actually managed to sell it.

22 **CHAIR:** I think David's question I think was does retail offer
23 a different set of bundles that aren't subject to
24 regulated resale, is the question. So, is there another
25 range of bundle products that actually aren't caught by
26 the retail regulation that retail sells?

27 **MR WESLEY-SMITH:** Not that I'm aware of. As I say, I'm not
28 aware of any other bundles that don't cover this Access +
29 Message.

30 **MR PICKERING:** David, you don't look like you're convinced by
31 this and we've got to get this right because you all say
32 this is a problem for Access Seekers but unless we
33 actually understand what we're talking about we may be
34 speaking at cross-purposes, so.

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1 **MR DIPROSE:** Okay, well, with Telecom retail there have been
2 various different bundles, I mean there's the total home
3 packages available at the moment, there's been Any Time.
4 I just wanted to clarify is it Telecom's view that those
5 bundles are not covered by this situation, and then when
6 you have those bundles then there are further bundle
7 discounts available on, you know, the other services and
8 you're saying that all of those are covered by the Access
9 + Message resale offering, is that correct?

10 **MR WESLEY-SMITH:** So the components are, because if you look at
11 Total Home, that's a bundle of access and international
12 and national calling and broadband with message and call
13 waiting. So, that's the sum total of the offer.

14 **MR DIPROSE:** And that's available on resale terms to us through
15 this Access + Message, is that -

16 **MR WESLEY-SMITH:** Well, no. So, only the access and the
17 message components are. The calling component isn't
18 because I don't think anyone ever wants to resell calling,
19 and the broadband, I guess the broadband isn't because
20 no-one wants to resell broadband either. So we don't have
21 a resale version of the Total Home package because no-one
22 has ever asked for it and I can't see any circumstance
23 where you guys would ask for it because you'll purchase
24 our PSTN and our Access + Message stuff and bundle that
25 with UBA and you're own calling that you purchase on the
26 market, and I think that's - I've got a little thing down
27 here that says it's called the Vodafone Ultimate Pack,
28 that's your version of it, and you combine our access
29 resold products with your own broadband and calling.

30 **MR DIPROSE:** I guess the two concerns to us out of this are
31 that the features that when we are reselling a PSTN line,
32 whether it's residential or business, that the features
33 like call minder, call waiting and that set of features
34 are available to us on similar price terms to retail

1 customers. So, if you get a discount at retail when it's
2 bundled there, then the similar arrangement should be
3 available through the resale process. And secondly, that
4 the resale prices are reflective of the discounting that
5 happens in the retail space when different products are
6 bundled together. But they are the concerns we have in
7 this space, primarily that we are able to have resale on
8 similar terms to - I mean the resale is a true reflection
9 of the retail market place.

10 **MR PICKERING:** Well, from what I can hear you're saying that
11 they would still get these discounts for that type of
12 product.

13 **MR WESLEY-SMITH:** Yeah, as I say, we don't resell the total
14 bundles because we've never been asked to and in fact our
15 retail bundles tend to be more expensive than the bundles
16 these guys put together in almost every case.

17 **MR PICKERING:** Right.

18 **MR WESLEY-SMITH:** So, the only things that we've ever been
19 asked to bundle are the Messageline, call waiting and
20 Access. For the life of me that's all I can see anyone
21 would want to bundle. And, like I say, we've never
22 managed to get a regulated resale bundle that people want
23 to buy so we've got this commercial offer that people buy
24 in reasonable volumes but not great.

25 **MR PICKERING:** So, in your submission when you commented that
26 you're going to lose \$24,000 a month or something, what
27 were you talking about?

28 **MR DIPROSE:** Yeah, sorry, that relates to the resale bundles
29 that we do currently buy, if they were removed that would
30 be the impact. So, we are currently buying the resale
31 bundle that Telecom refers to, in relatively small
32 volumes and I think part of that is reflective of we
33 haven't had focus on that. We would actually save more
34 money if we focused on selling more of that rather than

1 the individual products that we purchase at present. But
2 yes, if the bundles were removed that would be a direct
3 loss to us from missing out on the discount that we
4 currently get. So, there is that component of it but also
5 the other point that I made earlier.

6 **MR PICKERING:** All right. Well, let's leave that there. One
7 of the other assertions that Access Seekers made is that
8 Telecom Wholesale would have no incentive to offer bundled
9 resale products. Now, I would have thought it is actually
10 the reverse. So, could you explain to me, please,
11 Access Seekers.

12 TelstraClear, would you like to have a crack at this?
13 See, what I'm trying to get at here folks is, is there a
14 problem here or is this just the way you feel and it's
15 always better to leave things intact, and you shouldn't
16 leave things intact unless there is really good reason
17 that it's causing market failure.

18 **MR THOMAS:** So, we were only concerned for exactly the same
19 reasons that David has said. The first thing, we wanted
20 more detail than is contained in the cross-submission.

21 **MR PICKERING:** Yep.

22 **MR THOMAS:** The second thing was we were concerned whether the
23 product was grandfathered or not that the discount would
24 be removed.

25 **MR PICKERING:** Okay.

26 **MR THOMAS:** Which would also cost us an unspecified amount of
27 money.

28 **MR PICKERING:** Okay. Vodafone?

29 **MR DIPROSE:** I'm just referring back to what we actually did
30 say in our submission.

31 **MR EDWARDS:** Here it is.

32 **MR DIPROSE:** Thank you, Tex.

33 **MR PICKERING:** Why don't you let Tex answer it.

34 **MR EDWARDS:** I would be happy to. "In some instances the

1 difference between the current bundle wholesale price and
2 the potential price combining the price of each single
3 resale price is more than \$7 a month. Even worse, for
4 some of those bundles we would have to incur a loss if we
5 would want to maintain competitive resale prices while
6 offering the services. Removing the bundle of resale
7 services from the Act will remove Telecom's incentive to
8 provide bundle services at a wholesale price that enables
9 Access Seekers to compete with it".

10 **MR PICKERING:** Okay.

11 **CHAIR:** Thank you Tex.

12 **MR PICKERING:** So really, it comes back I think to that
13 previous discussion of an understanding of what you're
14 going to get discount on in the future and what you're not
15 and I found it a little hard to follow that because there
16 are so many plans in place but I think you're going to get
17 what you would have got previously and therefore it's not
18 an issue.

19 **CHAIR:** Isn't the nub of the issue of the incentives? The
20 argument I think from Access Seekers is if remove the
21 regulation Telecom's got no incentive to continue to offer
22 those discounts so I would like to hear Telecom's response
23 to that particular proposition.

24 **MR PICKERING:** Yes.

25 **MR WESLEY-SMITH:** And look, the Access + Message is about the
26 best example you could have of this.

27 **MR PICKERING:** Yes.

28 **MR WESLEY-SMITH:** You know, there is no retail comparator to
29 that bundle. We've pulled it together at Wholesale to try
30 and actually sell some of this to wholesale customers, so
31 that's a voluntary product we've been offering for some
32 time now with no regulatory requirement and there's no
33 intention to change that. So, we have natural incentives
34 to try and sell this stuff and on the other side we've got

1 a set regulator. So I just don't see what the evil is out
2 here that we're trying to protect against.

3 **MR DUIGNAN:** Could I take that, or rather the point that I
4 think Access Seekers have to answer is that there is a
5 product which is cheaper than the regulated product being
6 offered by Telecom today, so it's not apparent as to why
7 the removal of the regulated product suddenly affects that
8 product. I mean, if you see what I mean? Here is a case
9 where the product that the industry or the Access Seekers
10 want is different from the regulated product and is being
11 supplied at a price that on the face of it is not being
12 controlled by the regulated products price. If it was
13 being controlled by the regulated product price then
14 surely it would be priced up to that level. And so the
15 evidence of the situation as Telecom is, I'm just really
16 paraphrasing the argument, not saying we accept it but I'm
17 putting it to you, what is - how would you refute it, if
18 you can?

19 **MR DIPROSE:** I think from a principal perspective it can accept
20 Telecom's position, they have an incentive to continue
21 offering resale services but I'm not at all sure that the
22 incentive for offering discounts on those is quite as
23 strong. But it seems to me in terms of what's a regulated
24 product and what's a commercial offering, there's a lot of
25 history tied up in that and that the principle that we
26 would like to see is that where there are discounts
27 available in the retail space, that they are also
28 available in resale, and the commercial offering that
29 Telecom refer to I guess is the attempt to reflect that,
30 and the regulated offering, that Telecom have commented
31 doesn't have much uptake, I guess that's based on being
32 set some distance back in time and what we want to see is
33 as things change in the retail space and as discounts are
34 made available for add-ons to the home line and things

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1 Telecom Retail are offering in the market that Access
2 Seekers want to be sure that they are going to get within
3 a bundle the same price for the same bundled products,
4 that the worry seems to be that remove the regulation and
5 you are going to be disadvantaged or there's a risk of
6 being disadvantaged competitively. So, John, can you
7 respond to that? It comes back again to wholesale
8 incentives and those things but I would just like you
9 to -

10 **MR WESLEY-SMITH:** So, what I would say is we've had it for
11 ten years and we've had no issue that I'm aware of at all
12 with regulated resale or non-regulated resale of bundles,
13 so if you have got a bundle you want then come and talk to
14 Telecom Wholesale because they're out there trying to sell
15 this stuff.

16 **MR DUGNAN:** Could I then address this point to Telecom. I
17 think we don't necessarily have to preface this, we don't
18 necessarily need this to come to a view but the bit I
19 don't think you actually provided at the end of the day is
20 actually a numeric demonstration that Wholesale's pricing
21 of the bundles that it delivers in the - you know, on a
22 voluntary or just a normal commercial basis are actually
23 currently priced at levels that involves discounts as
24 compared to the single products, that takes the price or
25 rather the costs well below what would result from the
26 application of the current regulation, so that there is a
27 gap, in which case that is prima facie evidence that there
28 is a commercial incentive and it could only be refuted by
29 some rather exaggerated notion of some long-run predatory
30 pricing plot but that the fact that it's been in place for
31 a considerable time would tend to refute that proposition.
32 So, that is the point that I perhaps - the little bit of
33 evidence that isn't literally being presented but which
34 you have asserted to be the case and actually has been,

1 not been refuted by the Access Seekers so we kind of take
2 it that that is the facts.

3 **MR WESLEY-SMITH:** Yes. So, what I can say is the regulated
4 resale bundle we have provides a discount of, and these
5 are average model prices so they move around, so between
6 []COI and [] COI when compared to the individual components
7 on resale basis, and the commercial product we've got sets
8 that discount at []COI so between []COI and [] COI
9 extra discount on the commercial product over what Access
10 Seekers would get under regulation.

11 **MR DUIGNAN:** You've been providing that sort of gap for how
12 many years would you suggest?

13 **MR WESLEY-SMITH:** I don't know the answer to that.

14 **MR DUIGNAN:** It's not a new product.

15 **MR WESLEY-SMITH:** Yeah.

16 **MR DUIGNAN:** So, that's prima facie evidence that there is an
17 incentive to price in that sort of way. The only way you
18 could refute it is that Telecom's been sitting there
19 maintaining that gap for a long period of time in the
20 hopes of seducing the Commission into deregulating which
21 is hard to sort of, you know, support. Okay.

22 **MR YOUNG:** Just one point to make, incentives are often simply
23 a question of trust and as things shift from I think
24 Schedule 1 and out of Schedule 1 the natural place is they
25 should perhaps form part of the Commissioner's monitoring
26 under 9(a). So it may be the Commission might wish to
27 consider examining these in some sort of monitoring
28 process going forward.

29 **CHAIR:** Thank you. Okay. Now, before we go to the impact of
30 UFB I just record that there was an issue of the change to
31 the pricing principles for the resale products that
32 Telecom had outlined in its submissions and needed a bit
33 of time to remember why it had done that.

34 **MR WESLEY-SMITH:** Yep.

1 **CHAIR:** So, are you in a position to, is your memory refreshed?

2 **MR WESLEY-SMITH:** I am. The Commission has informed me - the
3 staff have informed me of what we said which is very
4 helpful, and it's actually just a consequential change so
5 it's the same point where we've suggested the Commission
6 remove the discretion to regulate a competitive market the
7 proposed service description set initial and final pricing
8 principles for markets where there's limited competition
9 and markets where -

10 **CHAIR:** I see, understand.

11 **MR WESLEY-SMITH:** So we've just as consequential change taken
12 out the pricing principle for markets where there is more
13 than limited competition.

14 **CHAIR:** Okay, so it's a consequential wording change that if
15 (b) was removed then the price that related to (b).

16 **MR PICKERING:** Mmm.

17 **MR WESLEY-SMITH:** Yes.

18 **CHAIR:** Okay. UFB?

19

20 **MR DUIGNAN:** Right. So, we're turning to the issues raised by
21 some submissions regarding the impact of, in fact
22 uncertainty which then has clearly been practice, being
23 identified as the Government's UFB initiative, and the
24 arguments, first there is a general argument of
25 uncertainty over how Telecom will be regulated in the
26 future should be viewed as an obstacle making decisions
27 about resale regulation. The uncertainty about
28 Telecom's - the regulatory framework for Telecom is of
29 course directly linked unfortunately perhaps but facts, to
30 the fact that that separation proposition is now in the
31 public domain and as so it's not a matter of speculation,
32 it is, there is some proposition there.

33 The other more general argument is that the UFB initiative
34 itself creates such uncertainty and that there is a, you know,

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1 an argument being advanced, and I think one has to question
2 that argument and you will, that because there is a major
3 initiative, regardless of how it impacts on Telecom as such,
4 that it should be a reason for delay in completing this review
5 which the Commission has begun.

6 The first, I would like to just in fact take those matters
7 in the reverse order actually. The first issue then to hear
8 both Telecom and Access Seeker's views on is the proposition
9 that as a general matter, that because of a clearly major
10 initiative potentially affecting or likely to affect the
11 structure of the industry, that it is in some sense a reason
12 for the Commission to not complete this review.

13 I'd like to ask Telecom that first and then Access Seekers,
14 but in asking Access Seekers I would like them to explain just
15 how broad a proposition that is and whether in fact it is
16 appropriate to be sort of trying to anticipate matters.

17 I note finally that the Vector submission which seems to -
18 it's unfortunate they're not here, but seems to have it both
19 ways because they, if you look at their first three paragraphs
20 there they seem to argue both that we shouldn't take into
21 account things and then come back to a proposition that because
22 of the general uncertainty we shouldn't do anything. So, I'll
23 start with Telecom please.

24 ***

25 **SUBMISSIONS ON IMPACT OF UFB BY MR WESLEY-SMITH**
26 **ON BEHALF OF TELECOM**

27 **MR WESLEY-SMITH:** Look, the sad reality is we've got these, had
28 these types of substantial policy initiatives in one form
29 or another on the go since 2006. Just about every year.
30 We've had the 2006 Amendment Act that came into place,
31 followed by operational separation. Now we've got
32 separational UFB and we've got Labour saying if they get
33 power next year they'll rewind UFB. So, I don't know
34 whether and how you can say that a regulator should pause

1 work while any particular initiative is pursued because
2 the nature of our industry and the nature of our political
3 system is we're going to have these initiatives probably
4 at regular junctures right out into the future.

5 On the specific initiative, I still fail to see how it will
6 affect any of the decisions that the Commission has to make in
7 respect of resale regulation or the markets that it's looking
8 at today. If anything UFB will set in place a more open access
9 and wholesale type products in the market which in time might
10 lead to less reliance on resale, but I can't see under any
11 scenario how it makes resale deregulation more risky or gives
12 you any reason why you wouldn't go ahead with the analysis and
13 recommendations you've got today

14 **MR DUIGNAN:** Well, now, you've completed your - if we deal with
15 the general proposition because there's some points you've
16 made which are regarding the specifics and Access Seekers
17 might want to respond to them but I would ask that they
18 don't do so on this round because we should come back to
19 taking the specifics and focusing on that separately
20 otherwise we'll get confusion, thank you.

21 ***

22 **SUBMISSIONS ON IMPACT OF UFB BY MR YOUNG**

23 **ON BEHALF OF TELSTRACLEAR**

24 **MR YOUNG:** As a general point there is always a level of
25 uncertainty and as I'm sure you're aware regulators are
26 obliged to make decisions on the state of law as it is
27 today and those types of decisions. I think the question
28 to ask is, is there heightened uncertainty at this point
29 in time, and does that uncertainty, the risk of that
30 perhaps be balanced by a delay of a few months?

31 To my mind we have no decisions yet on how Telecom
32 would be structurally separated, what services would be
33 set in what part. We have not as an Access Seeker seen
34 any draft legislation. We do not know what the prices

1 will be for layer 2 UFB. We do not know how UCLL prices
2 may adjust. And we do not know how UBA pricing may
3 adjust. Now, it may be that all of that turns out to have
4 no impact but the level of uncertainty at this time I
5 think is high and a delay to early to mid-2011 I don't
6 think is too high a price to pay, the cost of that delay
7 compared with the additional certainty that the Commission
8 will then have to make its decision. So, that's sort of
9 my broad view.

10 **MR DUIGNAN:** We'll come back to some of those specific points
11 in a minute, but thank you. Vodafone? We're dealing with
12 the general proposition, I mean, that it cannot be the
13 case that just because of uncertainty the Commission
14 should not make decisions or complete a review of this
15 nature because we'd never do anything, so what is the
16 actual argument?

17 ***

18 **SUBMISSIONS ON IMPACT OF UFB BY MR DIPROSE**
19 **ON BEHALF OF VODAFONE**

20 **MR DIPROSE:** Well, Vodafone certainly agrees that the UFB and
21 the potential structural separation of Telecom probably
22 increases the uncertainty compared with a lot of what's
23 been going on in the past. But I guess in terms of the
24 impact on resale we stand by what we've said in our
25 submissions and earlier in this conference, that the
26 principles of removing resale where it's no longer
27 relevant is, we're still okay with that, and keeping the
28 regulation of PSTN services, because they are still
29 relevant to us, that needs to be done. And so we don't
30 think that this needs to - we certainly understand and are
31 aware of the uncertainty but we don't think it needs to
32 stop what is going on here.

33 **MR DUIGNAN:** Okay.

34 ***

1

2

SUBMISSIONS ON IMPACT OF UFB BY MR EDWARDS

3

ON BEHALF OF 2DEGREES

4 **MR EDWARDS:** We applaud the removal of regulation where markets
5 are functioning. There is always heightened - there is
6 always uncertainty in telecommunications regulatory
7 environments. The only certainty is uncertainty.
8 However, at the moment the UFB regulation before us passes
9 the test of an order of magnitude intervention. It's a
10 once-in-a-generation Government intervention into the
11 market as a consequence of catastrophic market failure
12 which has persisted for well over two decades. The UFB
13 investment passes the order of magnitude test. It's not
14 some routine fine-tuning, or altering, or massaging as a
15 consequence of new products. It passes a test of order of
16 magnitude and as a consequence we believe the Commission
17 should postpone this.

18 **MR DUIGNAN:** So you support Telstra Clear's position kind of as
19 opposed to Vodafone's position? Because Vodafone I take
20 it are saying the general issue is not grounds for delay
21 but we'll come to specifics if you want to be satisfied -

22 **MR DIPROSE:** That's correct.

23 **MR DUIGNAN:** So 2degrees support TelstraClear?

24 **MR EDWARDS:** I don't really understand Vodafone's position on
25 this one, is it written down somewhere?

26 **MR DUIGNAN:** No need for a dialogue there but I think you've
27 answered the question. If you don't understand it you
28 don't support it by definition. So thank you. I turn to
29 this, we're burrowing down to some specifics here and so
30 this next question is for Telecom.

31 By virtue of the fact that you've sought variations based
32 upon the UFB, variations to your EOI obligations based upon the
33 UFB and that you've put a structural separation with a lot of
34 regulatory proposals around it formally on the table in some

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1 sense, doesn't that - I mean does that trigger the argument
2 that this initiative and your own actions have kind of taken it
3 across a threshold of elevating the uncertainty?

4 **MR WESLEY-SMITH:** Before I start I'm obviously constrained in
5 what I can say but I will stick to what's public. We have
6 put forward our view publically of how regulated services
7 will transition into the structurally separated model if
8 we win the UFB tender. We see resale services going to
9 ServiceTel and just about every other regulated service
10 maintaining, continued to be provided by either ServiceTel
11 or Chorus. We haven't proposed any significant changes to
12 resale, we've got the same principle that we would see
13 regulating, regulation for resale applying to the core
14 PSTN services. What we have proposed is changes to the
15 way that regulated input services are priced. We proposed
16 that, or agreed that UBA prices should be priced on some
17 cost orientated basis rather than retail minus. That will
18 just increase the attractiveness of UBA in layer 2
19 services relative to resale. So, to my mind that isn't
20 particularly relevant here, that just reinforces the
21 conclusions the Commission's made in respect of broadband
22 resale.

23 We've also said that we see a need for a voice, what's
24 called a base band service in a structured separated world
25 which is designed to encourage the entire market to
26 provide their own voice services in preference to
27 reselling PSTN services from ServiceTel. So, that would
28 be a base band input service that ServiceTel would
29 purchase for its voice services and that Access Seekers
30 would have open access and non-discriminatory access to as
31 well. So, again that should decrease reliance on PSTN
32 resale in time.

33 Ross has referred to the change that we've proposed for UCLL
34 pricing which is to average - we've supported averaging of UCLL

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1 if you are going to average everything else as the MED has
2 proposed. That will result in an increase in the UCLL price in
3 urban areas, but again, that's a price that will be paid by
4 ServiceTel as well as other Access Seekers. So, that will flow
5 through into retail pricing in one form or another which will
6 then flow back into resale but there's nothing in any of those
7 proposals, that I can see, structurally changes any of the
8 analysis in your report. The sum total of UFB is it's going to
9 reduce reliance on resale rather than increase it.

10 **MR DUIGNAN:** Okay. So, I mean there might be a lot of
11 questions we could ask about that but I think the
12 appropriate course of action is to let the Access Seekers
13 ask them but let's be specific what, I think it does need
14 a preface. The preface is this: That the Commission has
15 a review underway, for, you know, that is the facts. In
16 order to progress that review the Commission could make
17 all sorts of assumptions about the future or get into a
18 very complicated discussion about the potential future or
19 delay things, but rather than that there is an alternative
20 course of action, so I'm just asking Access - I'm not
21 saying we're adopting this, I want to be clear, but I just
22 want to ask Access Seekers why what I'm about to say would
23 be, or any objections to it, and that proposition would be
24 that the Commission should assume that UBA/UBS continues
25 to be regulated, so there is a regulated bit stream
26 service, and that that is the - if under the proposition,
27 that is UFB, that being in place is sort of the core piece
28 of regulation in the future and that these other matters
29 such as averaging of prices, averaging of UCLL or any big
30 change like, of that nature, would really imply that it
31 would be a Governmental intervention to change the
32 regulatory framework and it would be inappropriate for the
33 Commission to go sort of trying to even begin to sort of
34 work that one out, but rather we should take the view that

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1 we proceed with our review, that we do it on the basis of
2 our decisions in these other areas. We have our - the
3 centre of what we are proposing in the paper, in the draft
4 report, is deregulation of data essentially, so there's
5 no longer, resale data is no longer regulated. That is
6 done on the basis of essentially the availability and
7 competitive force coming from UBS and UCLL under the
8 current arrangements. If the Government, that is
9 Parliament, is going to change that then of course they
10 will have to reconsider what's happening to all sorts of
11 things. We don't need to take the responsibility for
12 that. In fact, it would be inappropriate for us to
13 concern ourselves with that because when Parliament
14 decides to intervene and override our decisions
15 effectively in those areas, well then naturally we or MED
16 or anybody will simply say to them you better do the job
17 properly and consider resale so we shouldn't let some
18 possible discussion about radical changes to the entire
19 regulatory framework come into the discussion and in some
20 sense it would be inappropriate to do so. Because, if you
21 think about the principle here, that is the principle
22 under which we ought to be operating, we don't want to
23 create a precedent that simply because there's noises off
24 about major Government interventions of different types
25 that the Commission ceases to in effect discharge its
26 obligations under the current Act.

27 So, that's the proposition I want to put to
28 Access Seekers and see whether you have, or what your view
29 is on that.

30 **MR. YOUNG:** I think my first response would be that
31 theoretically yes, practically no. Theoretically,
32 absolutely you're right, and this goes to the level of
33 uncertainty. The Commission should always proceed on the
34 basis of current law and to take into account all relevant

1 considerations. I'm sure it will be advised admirably on
2 what those considerations are.

3 Practically, however, if the Commission were to take
4 one scenario, make a decision on, say, UBA and it knew
5 that Parliament had before it a Bill about to amend UBA,
6 that would seem an odd use of the Commission's resource at
7 that time and I think, I don't think it is an irrelevant
8 consideration to look at major changes within a market.

9 To my mind there are I suppose three possible
10 scenarios. One is that the Commission proceeds on the
11 basis of the current law and lists perhaps its
12 assumptions, and then if there are major changes in UFB it
13 then has to commence another Schedule 3 again perhaps and
14 reconsider those assumptions in light of that.

15 Alternatively, the Commission, it could be a scenario
16 which the Commission reports to the Minister and at that
17 period the Minister looks at these types of factors that
18 the Commission hasn't looked at and hasn't had an
19 opportunity to advise on, in fact there may be a request
20 for a reconsideration.

21 Thirdly, there is the option of a short delay whilst
22 greater certainty emerges from UFB and this goes to my
23 earlier point about the degree of uncertainty. I think
24 that the level of changes in the market here is high and
25 the potential for changes, both in terms of where services
26 will go. I mean John was talking earlier about, you know,
27 this is what is being proposed for Telecom and this is how
28 it might be split and we're all taking that into account.
29 Well, no decisions have been made on that at all, and we
30 as an Access Seeker haven't got any surety of where those
31 decisions will be locked down. Now, I understand that
32 there are some timeframes in place, so it seemed to me
33 perhaps sensible to say well, if we're near the end of a
34 process wouldn't it be practical to wait maybe three to

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1 six months and get greater clarity on what those are.

2 **MR DUIGNAN:** Okay, Vodafone please.

3 **MR DIPROSE:** Vodafone's not expecting anything out of this
4 structural separation proposals from the MED that would
5 impact this but I guess unlike Telecom we don't also see
6 that that's likely to have a big impact, certainly no
7 reduction in the importance of PSTN at this stage. It's
8 only peripheral things around that that might lead to a
9 reduction in the importance of resale PSTN and such as the
10 advent of other services over fibre or other wireless
11 infrastructure, it's still going to remain important. But
12 the uncertainty in this space I guess mainly rests with
13 what might happen in terms of Telecom's EOI obligations on
14 their regulated services and there certainly is some lack
15 of clarity around what might happen in that space, that
16 that could bring about concerns here. That's I think the
17 key risk that we face.

18 **MR DUIGNAN:** I take it you don't, though, advocate that we
19 suspend this inquiry until such time as the UFB is
20 settled?

21 **MR DIPROSE:** No, as we said earlier, we haven't changed our
22 position on that, but yeah.

23 **MR DUIGNAN:** Right. Tex?

24

25

SUBMISSIONS ON IMPACT OF UFB BY MR EDWARDS

26

ON BEHALF OF 2DEGREES

27 **MR EDWARDS:** We believe that it would be appropriate for the
28 Commerce Commission to suspend this review of regulation
29 until UFB is in place. It's our position that we would
30 change that position if the Commerce Commission would fix
31 the fundamental problem. The fundamental problem that's
32 caused UFB to be the bane of the Kiwi taxpayer is that
33 section 36 of the Commerce Act has failed competition in
34 New Zealand -

1 **MR DUIGNAN:** We -

2 **CHAIR:** If we can just -

3 **MR EDWARDS:** I'm desperately serious.

4 **CHAIR:** But the Commerce Commission cannot fix that, that's a
5 matter for Parliament.

6 **MR EDWARDS:** Absolutely and as a consequence -

7 **MR DUIGNAN:** But I think it is important, because I mean if we
8 could just put on the record that the problem is that the
9 Commerce Commission hasn't done something about section 36
10 so could we agree that that wording doesn't make sense
11 because the Commerce Commission has to work, has to -
12 basically, section 36 is the legislative requirement on
13 the Commerce Commission, we do not control it.

14 **MR EDWARDS:** Your point is understood and respected, thank you.
15 Let me rephrase my observation here. The issue here is
16 that -

17 **MR DUIGNAN:** Sorry, but I mean just because we do need to get
18 back to the specifics of how UFB is or is not a reason for
19 delay. I mean, what you're explaining and I'm not trying
20 to deny your explanation, is the fundamental reasons for
21 UFB but that isn't actually directly relevant to the issue
22 in front of us which is to delay, that is to suspend or
23 not to suspend.

24 **MR EDWARDS:** It is 2degrees's position that you must suspend it
25 because until the behaviour regime which caused UFB is
26 fixed, until market behaviour, market dominance is fixed,
27 then there must always be a regulatory back drop and the
28 very logical principles that our industry colleagues from
29 Vodafone set out whereby there is a requirement for
30 regulation, this regulatory uncertainty will continue
31 until the market dominance or the market power matter that
32 has created the UFB back drop, that created the 2006
33 legislative change which created this demand for
34 structural separation, which created the UFB investment,

1 is the back drop of that market dominance issue hasn't
2 been resolved and as a consequence we believe -

3 **MR DUIGNAN:** So that's the grounds for delay. Now, could I
4 just come back to TelstraClear who are advocating delay to
5 say doesn't your request for delay or your argument for
6 delay then raise the question, well, exactly what would be
7 the basis for us to then recommence vis-a-vis the inquiry,
8 what would be the tests and would we not, if we accepted
9 this proposition, be in a situation where we would then
10 have to consider having a conference about whether the
11 situation had changed sufficiently because there is no,
12 certainly no guarantee that the actual development of the
13 UFB process I mean will come to something that is a clear,
14 it's finished. Won't there then be a whole set of
15 uncertainties so that in what sense will we -

16 **MR YOUNG:** That is a fair point and so perhaps, I mean what you
17 could choose is either when legislation is introduced or
18 when legislation is being passed by the House would be an
19 appropriate point perhaps. When maybe bidders or
20 contracts have been signed, there are various points in
21 which there will be an announcement to bidders. I
22 understand there will be draft legislation produced to the
23 House, there will be a Select Committee considering
24 things, so you could choose any of those particular points
25 that give a greater level of certainty.

26 Now, I agree that, you know, it may not happen; you
27 can't have it open-ended, absolutely, and you wouldn't
28 want to draw it on and I'm not advocating that in any
29 situation of uncertainty this should be a reason for
30 delay. All I'm suggesting is that the degree of
31 uncertainty at the moment is such that you could choose a
32 point that related to one of those and if that point
33 wasn't met within your timeframe you could proceed. But
34 the alternative seems to me to say well, okay, we make our

1 decision now then we may need to revisit this in a few
2 months, and it seems to me a better use of resources to
3 delay and get it right.

4 **CHAIR:** Can I just pursue that a bit. Given that what we do in
5 this process ultimately is make a recommendation to the
6 Minister which the Minister will then consider and go
7 through another round of consultation, clearly and we've
8 seen it in the case of MTAS, if there's a material change
9 of circumstance during that process the Minister has sent
10 it back for reconsideration based on changed
11 circumstances. So, given that the level of uncertainty is
12 actually an ongoing matter, and I'm sure it's not going to
13 be set in concrete in February or March and that's it, and
14 we already know that Labour has said "if we get back in
15 we're going to change it", so it's continually changed.
16 So, isn't it the case that the recommendation will be made
17 to the Minister, the Minister is the same Minister who is
18 making the other decisions relevant and if we clearly set
19 out the assumptions upon which our recommendation is
20 based, if that changes the far more likely, and the
21 process is actually designed for him to refer it back
22 rather than the Commission wait in limbo for some obscure
23 certainty. That's not a -

24 **MR YOUNG:** I mean that's my second scenario I describe there,
25 what that does, of course, is limit the Commission's
26 ability to recommend what the Minister should do. The
27 Minister may not refer it back to the Commission. It's
28 also unclear to what extent the Minister would take into
29 account these other factors and also the Minister hasn't
30 had the benefit of sitting here and listening to this.
31 So, with those factors I'd say yes, that is an alternative
32 scenario. I mean to some - to, you know, I agree there is
33 a need to define a point in the future. I think you could
34 choose a point. But, you know, I take your point that you

1 don't want it to be open-ended as well.

2 **MR DUIGNAN:** And could I just follow up to that, that isn't it
3 more appropriate that in as much as some of the matters
4 for example you've raised in your latest submission, your
5 cross submission that relate to what the Government might
6 do and the effects of that, should be built by the
7 Minister into his considerations because he is actually
8 the party that's, you know, in fact most able to judge
9 what it is that the Government intends to do rather than
10 us sort of taking that responsibility on?

11 **MR YOUNG:** I think the Minister benefits highly from the
12 Commission's recommendations.

13 **MR DUIGNAN:** Okay. Then I want to do two things. The first is
14 to ask Telstra - sorry, let Telecom comment upon the
15 discussion we've just had but just one last question for
16 TelstraClear: Does your proposition that radical degree
17 of uncertainty justifies us not proceeding with a review
18 in principle apply to reviews regarding the potential to
19 regulate matters, or do you put forward an asymmetric
20 proposition here?

21 **MR WESLEY-SMITH:** UBA with SLES might be a good example.

22 **MR DUIGNAN:** It could be a big topic --

23 **MR YOUNG:** Yes.

24 **MR DUIGNAN:** -- but just in principle, you do push forward?

25 **MR YOUNG:** I do and I think the reason for that is because when
26 there's a whole, when there's a high degree of change
27 Access Seekers feel more comfortable with the Commission
28 retaining a degree of ability to deal with things. If
29 you're moving to a deregulated environment then that means
30 the Commission has less able, ability to change things and
31 in a new environment it's unclear what may need to be
32 changed.

33 **MR DUIGNAN:** Okay, thank you. Telecom?

34 **MR WESLEY-SMITH:** Look, I don't have much to add. I mean, I

1 support of a lot of what's been put forward that I think
2 the most sensible course of action is to proceed on
3 evidence that you've got now and state your assumptions
4 and I think the Minister is best placed, if there is some
5 reason to delay this decision that he's best placed to
6 make that call. I don't know how you operate a regulatory
7 framework on this basis of uncertainty, on a threshold for
8 uncertainty where you decide to start delaying decisions,
9 it would be making, breaking new ground internationally I
10 suspect. I just don't know how would you do that in a
11 principled way still exercising your statutory duties.

12 **MR DUIGNAN:** Okay, I think we'll wrap it up with, I suppose we
13 should just say as they say in debates, no new matter but
14 if there is any further comment that kind of is provoked,
15 I don't think actually Telecom's limited themselves so I
16 don't think there is anything else is there.

17 **MS MAZZOLENI:** Can I just ask a question?

18 **CHAIR:** Sure.

19 **MS MAZZOLENI:** Just going back to the migration plan
20 discussions you're having at the moment I assume like any
21 agreements that Telecom's entering into, it's robust under
22 either scenario? In other words, if we head to structural
23 separation you're still going to be comfortable with the
24 arrangements that you're going to be putting in place,
25 TelstraClear this is directed to, in the next couple of
26 weeks?

27 **MR YOUNG:** Hopefully. I mean that's something we need to
28 consider.

29 **MS MAZZOLENI:** Thank you.

30 **CHAIR:** That's the end of the actual items on the agenda but
31 before we get to closing statements is there any other
32 issue rising out of the draft report that parties
33 themselves wanted to raise?

34 **MR EDWARDS:** Or omissions from the draft report?

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1 **CHAIR:** Relating to the draft report.

2 **MR EDWARDS:** The draft report doesn't cover off the impact on
3 the cost of capital of new entrants of the removal of
4 regulation.

5 **CHAIR:** We'll note that, thank you.

6 **MR WESLEY-SMITH:** I have one that I'll be kicked if I don't
7 raise because I forgot to raise it during the service
8 description session but it was just a note that the word
9 "retail" seems to have fallen out completely from the
10 title of service description in the proposed single
11 service resale description, and I think because we're
12 talking about resale I can't see that it's going to be
13 interpreted any other way but it was just to note that if
14 we could find a way to make sure that the retail is in
15 there that would somehow avoid the potential for further
16 confusion down the track.

17 **CHAIR:** Okay, thank you. And I just have really one question
18 for Telecom. In relation - and it goes back to migration
19 plans and processes, and a concern that came through I
20 think in the submissions was a worry that Telecom might
21 agree to something now and then once things aren't
22 regulated what's to stop Telecom reversing that decision,
23 changing its mind, deciding that it wasn't going to deal
24 with the degree. So I just want an understanding in terms
25 of the arrangement you're going to put in place, the
26 extent to which that will be irrevocable in the sense that
27 the Commission can have confidence that even in a
28 situation where maybe the undertakings disappear or
29 whatever, that this is going to remain in force so that
30 migration will occur and that can have absolute certainty
31 and not be subject to any doubt or uncertainty. So, I
32 suppose my question is can you ensure that the proposition
33 that you put in place covers off that?

34 **MR WESLEY-SMITH:** That's an interesting question. I don't know

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1 what I can ensure, I guess is the answer.

2 **CHAIR:** Ensure that you take into account -

3 **MR WESLEY-SMITH:** We will absolutely take into account - we

4 will go away and we will set out what are the services

5 we're talking about, what are the migration paths at

6 present and, look, I think we will be able to comfortably

7 say that we are going to commit to having services under

8 any future scenario that enable Access Seekers to migrate

9 off legacy data services and on to comparable wholesale

10 data services. I expect we'll be able to go that far but

11 I don't know that, I don't know what else will be on the

12 table.

13 **CHAIR:** Exactly, as long as you're aware that the firmer the

14 commitment, the more satisfaction and comfort

15 Access Seekers and Commission will have.

16 **MS MAZZOLENI:** I think we're largely going to be relying on

17 Access Seekers saying they're comfortable with the

18 arrangement and I'm sure they're sensible enough to take

19 enforceability, future enforceability under whatever

20 entity they're dealing with and other arrangements into

21 account.

22 **CHAIR:** Okay, if we turn now to closing submissions, we'll

23 reverse the order. So we'll start with 2degrees. Time

24 limit three or four minutes I think.

25 ***

26 **CLOSING STATEMENT BY MR EDWARDS ON BEHALF OF 2DEGREES**

27 **MR EDWARDS:** Thank you, Commissioner. It's the position of

28 2degrees that there's market failure in New Zealand for

29 the New Zealand consumer. Investment is low, competition

30 is clubby, there's no marketing in New Zealand, it's only

31 a perpetuation of the network affect, 80% of new

32 investment in New Zealand's telecommunications is in

33 wireless, not in fixed line, bundling is the essential DNA

34 of a competitive response to any new entrant struggling to

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1 climb up that ladder of investment. A new entrant puts
2 his money at the bottom of the ladder of the investment
3 and tries to claw up that ladder to be able to offer
4 like-for-like products. Not one product range and then
5 join the club of cosy incumbents and hold hands behind the
6 scenes. Real competition is like-for-like,
7 product-for-product.

8 Today we've heard evidence discussing bundling.
9 Bundling is a competitive response. The new entrant today
10 is having the bottom leg, the bottom rung of the ladder
11 kicked away from him, or her for that matter. One of my
12 industry colleagues said "what is the evil we are trying
13 to protect from"? What a fabulous quote. What is the
14 evil that this room of industry experts is trying to
15 resolve? The evil is market dominance.

16 Dominance has forced UFB to be imposed upon us by a
17 Government who has no respect for internal equity.
18 Dominance was the underlying theme of the
19 2001 Telecommunications Act, the 2000 Ministerial Inquiry,
20 the 2006 Telecommunications Act as a consequence of being
21 gained of the 2001 Telecommunications Act, the structural
22 separation, and the UFB investment. Dominance was the
23 reason Saturn failed, dominance was the reason Clear
24 failed. Today's seminar, today's conference hasn't dealt
25 with dominance. We are looking backwards, we're not
26 looking forwards. There hasn't been any drama about this
27 jolly resale thing in the last ten years but we're not
28 looking forward as an industry, where's the vision in this
29 room? The barriers to entry are like-for-like
30 competition, not parrot competition from our friends who
31 dominate the movie industry.

32 In our closing statement we would like to submit to the
33 Commerce Commission that they gracefully withdraw and
34 postpone this removal of regulation until UFB is resolved

1 and enquire closely on asking where the other new entrants
2 are today. This is a table full of a club. We've got a
3 club on one side of the table and a new entrant struggling
4 to climb up the ladder on the other end of the table.
5 Denmark has 400 telecommunications companies. How many do
6 we have in New Zealand? Two. It's 2degrees' submission
7 that the Commerce Commission should gracefully withdraw
8 the regulation until the UFB matter is resolved. Thank
9 you.

10 **CHAIR:** Thank you. David?

11 ***

12 **CLOSING STATEMENT BY MR DIPROSE ON BEHALF OF VODAFONE**

13 **MR DIPROSE:** Well, we don't have anything to add to what we've
14 said at the start of this and during the conference.
15 We've welcomed the opportunity to discuss the areas of
16 service description and migration and bundling that have
17 perhaps been a little bit unclear through this process.
18 We hope we haven't done too much to damage Tex's faith in
19 Vodafone's position by not supporting the firm of your
20 considerations of this but we certainly look forward to
21 the final outcome of this once you've completed your
22 review.

23 **CHAIR:** Thank you, David. Ross?

24 ***

25 **CLOSING STATEMENT BY MR YOUNG ON BEHALF OF TELSTRACLEAR**

26 **MR YOUNG:** I'll make a very short closing. Firstly to say
27 thank you, I've enjoyed this, my first conference in this
28 chair and just as a comment talking to my Australian
29 colleagues how much they admire the New Zealand Commerce
30 Commission's openness and discussions compared to their
31 Australian counterparts is something they're continually
32 reminding me of. I suppose just two points.

33 The first was on migration to say that I think on the
34 assumption we can lock something in, we've got a positive

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1 option there and that we will get back to the Commission
2 by the 10th of November I think is two weeks from today.
3 So that looks like that should deal to that point.

4 On delaying a decision, I think it would be possible to
5 choose a date such as when submissions are made to Select
6 Committee on amendments to the Telecommunications Act, or to
7 choose a point when bids are announced but I also understand
8 the Commission's desire to make a decision and move on, and so
9 that's essentially it. Thank you very much

10 **CHAIR:** Thank you.

11 ***

12 **CLOSING STATEMENT BY MR WESLEY-SMITH ON BEHALF OF TELECOM**

13 **MR WESLEY-SMITH:** Well, look, I want to echo some of what
14 David's said. I think it's been a somewhat frustrating
15 day and I think we have struggled to define some of the
16 problems that we're asking you guys to try and solve for
17 us. And I think we have to take it back, you can't
18 regulate just in case or because of an undefined fear, and
19 from my perspective it's like that old chestnut, you can't
20 disprove something that can't be proved either.

21 I think you've got to take it back to first principle,
22 you have to regulate based on evidence and on standard
23 competition assessment principles and the Commission has
24 done a competition assessment, you've found there's no
25 competition problem with resale data, you've found there's
26 no competition problem with resale broadband, and you've
27 found there's no competition problem with resale bundles.
28 And from what I've seen, no-one has provided any evidence
29 to dispute those findings or cause you to question them.
30 There's just hypothesising of things that might happen,
31 that we can't define.

32 So, I don't know how you can try and attempt to deal
33 with those. You've got to take it back to the evidence
34 that we've got in front of us from nine years of operating

1 this framework and what standard economics tells you about
2 the incentives that sit on Telecom Wholesale and what the
3 evidence says, and the evidence that supports that
4 economic theory. And all of that suggests that the
5 Commission has got its draft report and its analysis just
6 about right.

7 So, I think Tex and I were at a slightly different
8 conference today based on our closings but I just don't
9 see any evidence to change where you've got to.

10 **CHAIR:** Thank you. Thank you everybody, that draws the
11 conference to the end. As I said, in an unprecedented
12 move lunch is served. I have no idea where it is but if
13 you can find it you're welcome to join it.

14 (Conference concluded at 12.30 p.m.)

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