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19 April 2011

Dr Ross Patterson
Telecommunications Commissioner
Commerce Commission

Via email: ross.patterson@comcom.govt.nz

Tuesday 19th April 2011

Dear Ross,

Commission Consultation on Draft Terms of Reference for Study on Demand Side Issues

Vodafone appreciates the opportunity to comment on the Commission's draft terms of reference for its study of demand side issues.

The telecommunications sector is a very dynamic sector of the economy. But even this dynamism is eclipsed by the pace of the commercial battle between information and entertainment service providers. Large international providers like Facebook, Amazon and Google tussle with others with a greater local footprint like Trademe, Sky and TVNZ to satisfy customers.

Propositions for customers, commercial models, and the ownership and use of networks to access customers vary widely. The nature of competition takes unpredictable forms and changes rapidly. As just one set of examples, we can see internet services providing competition for subscription and advertising-supported television.

- YouTube users uploaded about 35 hours of video to the site every minute or 50,400 hours every day in November 2010.
- The BBC's iPlayer delivered 94 million TV shows over the internet in February 2011.
- In the USA, Hulu (an internet joint venture of leading broadcasters) had 143 million viewing sessions in the same month.

The dynamism and innovation of the information and entertainment sector make it particularly difficult to envisage how regulation would benefit consumers in the long term and considerably heighten the risks of harming consumers through unnecessary intervention. We note that the Government stopped the policy work that was widely expected to lead to a converged broadcasting/telecommunications regulator when it gained power in 2008. Presumably this reflects a view of the value of regulation of this sector.

While bottlenecks exist in telecommunications networks these have now been regulated. As we have said before, the Commission's role should be shifting towards monitoring and

regularly testing the necessity for continuing to regulate where workable competition makes continued regulation unnecessary. A good example of this trend is the Commission's reviews of resale and UBA regulation; a methodical reduction in regulation where that is justified.

In the context of the pace of change in the information and entertainment sector and the mature state of telecommunications network regulation, the Commission's study of demand side issues raises two main concerns for Vodafone:

- Sufficient problem identification; and
- Clarity on the Commission's role

Firstly, we do not believe that the first step - sufficiently identifying the problem that might warrant further investigation - has been met. Vodafone believes that the Commission needs to provide more evidence that there are "*any factors that may impede the uptake of ultra-fast broadband in New Zealand*", and how addressing these "*will contribute to the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand.*" From our perspective, the terms of reference lack substantial identified problems.

The Commission provides a few details under the heading of Analysis and Research as follows:

- To analyse the drivers of uptake of high speed fibre broadband access in other jurisdictions.*
- To identify whether there are any barriers likely to inhibit the uptake of high speed fibre broadband services in New Zealand, including peering, IP interconnection, data caps and content arrangements.*
- To determine whether network neutrality (where all data on the internet is treated equally, whatever its source or destination) is an issue in New Zealand.*

This explanation appears to include a range of activities in which the Commission moves away from its core purpose under the Telecommunications Act. The Commission says it is conducting this study under section 9A of the Telecommunications Act 2001. The Commission also quotes the first part of section 18 (1) "*to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand*". But it does not mention the second part of section 18 (1) which states "*by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers.*"

The Act provides for regulation of wholesale services while in contrast many of "the drivers of uptake of high speed fibre broadband access" are retail services and come in the form of a vast and expanding array of information and entertainment services. While peering and IP interconnection are clearly within the meaning of section 18 (1), data caps are a retail plan structure and it is unclear what 'content arrangements' are. Nonetheless, the Commission already has powers under the Commerce Act to deal with arrangements that substantially lessen competition or abuse market power whether they involve content or not.

Already the Commission's study is being interpreted by a number of commentators as a move towards regulating Sky TV. We have real doubts about this being a wise use of Commission resources. UFB will simply increase the distribution channels available to Sky. Moreover, our

experience with Sky is that it is happy to work with all operators to distribute its programming. We also note that Ofcom's lengthy investigation of BSkyB in the UK led to recommended regulation of the wholesale price of 2 sports channels, which is under challenge by Sky. We suspect that the costs of this investigation were much greater than forecast benefits. We therefore suggest that the Commission thoroughly think through the objectives of this study.

The Commission proposes to investigate whether net neutrality is an issue in New Zealand. We believe the Commission needs to better define net neutrality as it encompasses just about every conceivable ill, real or or imagined, on the internet. While net neutrality is nebulous, network quality of service is a growing and important issue. Mobile operators are facing explosive growth in smart phones. The increasing data usage that this will drive will cause significant costs for mobile networks, in particular, as they require much more variable capex to keep pace with demand. Vodafone will price its capacity in a way that best matches these growing customer demands. Competitors are free to price their capacity differently if they believe that better meets customer demand. This is the rough and tumble of competition.

The critical issues for mobile network operators facing growing pressures on network capacity are transparency and providing for customer demand for quality services. Vodafone does not support proposals that would ban networks from charging up stream content providers for quality of service if they wish to buy it. Banning such pricing would discourage investment and innovation on the internet and deny potential benefits to customers. Existing competition law is the appropriate tool to tackle any anti-competitive behaviour by content or network players in the internet value chain.

The study envisaged by the Commission is arguably something that is more appropriately done by a policy arm of the Government rather than the competition regulator, for example, led by the Ministry of Economic Development with advice and input from the Commission. Vodafone is concerned about the increasing lack of clarity about the roles of key Government agencies with responsibilities for our sector. This is underlined by the pace of change, the policies and the various agency roles proposed in the Telecommunications Amendment Bill with its regulatory holiday for LFCs, regulation by private contract of long-term pricing, and significant changes to regulated copper prices. In Vodafone's view a more considered and consistent approach would be beneficial.

To summarise, Vodafone is wary of intervention in such as fast changing and dynamic sector of the economy and wonders whether the Commission would be better off focusing on its core mandate. Given that all material telecommunications bottlenecks are regulated, in our view the Commission's mandate is testing the rationale of maintaining regulation in increasingly competitive wholesale telecommunications markets. In addition, Vodafone believes the Commission should identify and define what it is seeking to analyse more clearly. This should include some elucidation of the problems that it is expecting to find. It should also delineate better what it is not studying and under what mandate it is investigating the various areas it has outlined. This would help it to focus on areas that might justify its time and effort. As noted above, Vodafone has doubts about using the Telecommunications Act to encompass the vast ambit covered by information and entertainment services and concerns about the tangled roles of Government agencies dealing with telecommunications.

We would be happy to meet to discuss and tease out any aspect of this letter.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'P. J. MacIntyre', written in a cursive style.

Peter MacIntyre
Regulatory Manager
Vodafone New Zealand Limited