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Tēnā koe Tom

Line of business restrictions: concerns regarding Chorus' conduct

1. Vodafone has raised concerns that Chorus' conduct in retail broadband markets is in breach of the line of business (**LOB**) restrictions in the Telecommunications Act 2001 (the **Act**).
2. In particular, Vodafone raised concerns with the following conduct by Chorus related to the LOB restrictions:¹
 - 2.1. the installation of Optical Network Terminals with the capability to offer services at layer 3 and above (the **RGW ONT**); and
 - 2.2. attempts to distort the retail telecommunications market towards fibre services through offers made to RSPs and consumers (the **Other Offers**).²
3. We acknowledge the delay in providing a response on this matter, which raised complex issues that required careful consideration and analysis. We progressed our assessment of Vodafone's complaint on its merits and relative to other priorities in our work programme, including finalising fibre price-quality path and information disclosure determinations under Part 6 and our retail service quality work under Part 7 of the Act. We have completed our assessment of the issues involved and, for the reasons set out below, have decided not to take any further action in this matter. This letter sets out the reasons for this decision.

¹ *Letter to Commission on Line of Business restrictions, Vodafone, dated 9 November 2020.*

² Including providing credit to RSPs for moving customers onto fibre and providing pre-paid payment cards to households that connect to fibre.

Line of business restrictions

4. As a condition of participation in the UFB initiative, Chorus entered into an open access fibre deed (the **Fibre Deed**) under section 156AD of the Telecommunications Act 2001. The Commerce Commission has the power to monitor and enforce compliance with the Fibre Deed and the LOB restrictions.
5. The LOB restrictions restrict Chorus in the following ways:
 - 5.1. Section 69O prohibits Chorus from participating in the supply of a telecommunications service to a person if 25 per cent or more of the services supplied by Chorus to that person in any year are or will be supplied for that person's own use or consumption. This prevents Chorus from supplying any telecommunications services to an end-user.
 - 5.2. Section 69R requires the Fibre Deed to prohibit Chorus from participating in services above layer 2 services. The Fibre Deed contains this prohibition at clause 7.5.
 - 5.3. Section 69S prevents Chorus from providing telecommunications links to end-users, except between the end-user's building and the Chorus local aggregation point.
6. Together, these LOB restrictions support the structural separation of Telecom by preventing Chorus from re-establishing itself as a vertically integrated entity.³

Enforcement Decisions

RGW ONT – No breach, no further action

7. Vodafone is concerned that Chorus' supply of the RGW ONT contravenes the LOB Restrictions. We have assessed the conduct and concluded that it does not contravene the restrictions in sections 69O and 69R of the Act. Therefore, the Commission will take no further action in response to Vodafone's concerns about the RGW ONT.
8. The Chorus RGW ONT is a new generation ONT. It functions as a standard ONT (a layer 1 or 2 service) with additional capabilities that allow it to function as a router (a layer 3 or above service).

Application of section 69O

9. Section 69O prohibits Chorus from participating in the supply of a telecommunications service to a person if 25% or more of the services are for that person's own use or consumption.
10. Although the RGW ONT installed by Chorus meets the definition of a "telecommunications service" it is not captured by the section 69O LOB restriction

³ In promotion of the purpose of Subpart 2A of the Act: section 69A.

because Chorus does not provide this service directly to end-users. Instead, Chorus activates the RGW function for the Retail Service Provider (**RSP**) who supplies that service to the end-user. This is acknowledged in the text of Vodafone’s letter, which recognises that the RSP must request activation of the RGW function:⁴

“For a particular end-user, the enhanced functionality would be activated at the RSP’s request and implemented through the operation of a TR-069 protocol (a layer 7 service).”

11. Further, there is no evidence to suggest that RSPs are consuming 25% or more of the service for their own use. Therefore, we consider Chorus’ conduct does not contravene section 69O because it is not providing this service directly to end-users.

Application of section 69R

12. Section 69R requires the Fibre Deed to prohibit Chorus from participating in services above layer 2 services.⁵ Clause 7.5 of the Fibre Deed provides:

7.5 Without limiting clause 7.4, Chorus will not supply any Access Seeker with a Downstream service except where Chorus is expressly permitted or required to supply a Downstream Service by any law or regulation.

13. “Downstream Service” is defined in the Fibre Deed as:

Downstream Service means any Service that is a layer 3 or above service by reference to the OSI Model. For the avoidance of doubt, a Service is not a “layer 3 or above service” where it has layer 3 or above capabilities for the purpose of supporting or interfacing with Access Seeker networks or services.

14. When applied together, the Act and the Fibre Deed restrict Chorus from supplying Telecommunications Services at layer 3 or above but do not restrict Chorus from supplying services that are substantively layer 1 or 2 services merely because they have layer 3 or above capabilities for the purpose of supporting or interfacing with Access Seeker networks or services.
15. By default, when Chorus supplies the RGW ONT, the layer 3 or above capabilities are not activated. The RGW ONT will function as a standard ONT, which RSPs can connect to routers they provide to end-users, allowing RSPs to continue to differentiate their retail offerings by branding routers used inside the end-user’s home.
16. Instead of providing a separate router, an RSP has the option to activate the layer 3 or above capabilities of the RGW ONT. These capabilities are activated through a portal provided by Chorus. Once activated, the layer 3 or above functions of the RGW ONT are controlled by the RSP using its ‘Broadband Network Gateway’ (**BNG**), which cannot be independently controlled by Chorus.

⁴ Letter to Commission on Line of Business restrictions, Vodafone, dated 9 November 2020.

⁵ By reference to the OSI Model.

17. We consider the RGW ONT is not substantively a service at layer 3 or above. Rather, it is a layer 1 or 2 service that has layer 3 or above capabilities for the purpose of supporting or interfacing with Access Seeker networks or services. Therefore, it does not fall within the definition of Downstream Services and is not restricted by the LOB Restrictions. Because the RGW ONT is not captured by the LOB Restrictions, it is not necessary to consider whether an exemption ought to be granted under section 69SA.

Other Offers – No breach, no further action

18. Vodafone’s letter raised issue with Other Offers made or proposed by Chorus, including:
- 18.1. bonus credits of \$350 paid to RSPs for moving customers to Chorus’ network;
 - 18.2. pre-paid payment cards issued to customers not previously connected to Chorus’ network; and
 - 18.3. a proposed offer of six months of free fibre broadband offered to customers not previously connected to Chorus’ network. Chorus ultimately did not make this offer and it is, therefore, not included in the below compliance assessment.
19. We have assessed that Chorus’ conduct does not contravene the restrictions in section 69O of the Act. Therefore, the Commission will take no further action in response to Vodafone’s concerns in relation to the Other Offers.
20. By making these Other Offers, we do not consider that Chorus participates in the supply of a “telecommunications service” as defined by the Act. This is because such offers are not telecommunications services. If an end-user chooses to accept the offer, any associated retail telecommunications service would be provided by the RSP. Accordingly, this conduct does not amount to the vertical reintegration of Chorus that the LOB Restrictions aim to prevent. Rather, Chorus’ Other Offers are a permissible response to the effects of competition in the wholesale market.
21. We consider the Other Offers are consistent with Chorus’ non-discrimination obligations under the Fibre Deed. Further, any prohibition on Chorus making such offers may be inconsistent with the purpose of Part 2A of the Act, which is to “facilitate the promotion of competition in telecommunications markets for the long-term benefit of end-users of telecommunications services in New Zealand.”⁶
22. We also note the recent development of the Telecommunications Forum (TCF) finalising the Broadband Marketing code and the Copper and Public Switched Telecommunications Network (PSTN) transition code. While not bound by the TCF codes, the local fibre companies, including Chorus, have issued a separate

⁶ Telecommunications Act 2001, section 69SA.

commitment to the Commission to apply the relevant provisions to the extent relevant in their advertising.⁷

Promotion of competition for the long-term benefit of consumers

23. As we have set out above, the Commission considers that the conduct at issue does not contravene the LOB Restrictions. Rather, the RGW ONT is a good example of local fibre companies innovating and may promote efficient investment and competition in telecommunications markets for the long-term benefit of consumers in the following ways:⁸
- 23.1. promoting efficient investment in telecommunications infrastructure by eliminating the need for consumers or RSPs to purchase a separate router. This may reduce costs for smaller or new entrant RSPs, promoting wholesale market development and giving rise to efficiency gains for consumers;
 - 23.2. promoting digital inclusion and improving the customer experience by reducing the connection delay and hardware cost to consumers associated with a separate router; and
 - 23.3. giving rise to opportunities for RSPs to innovate or improve their product offerings by using the RGW ONT provided by the wholesaler.

Section 690 guidance

24. Vodafone has requested that the Commission provides guidance on how to interpret section 690. The Commission does not intend to issue guidance at this time. However, the analysis set out in this letter should provide industry stakeholders with an indication of our approach on the relevant issues.
25. Although every compliance matter will be assessed according to its particular circumstances, consideration of this issue may provide relevant insight into the Commission's perspective on similar conduct for industry stakeholders, including other LFCs who are subject to LOB Restrictions according to their Deeds. More general guidance on the Commission's enforcement approach can be taken from our enforcement criteria, which are available on our website.⁹

Next steps

26. The Commission appreciates Vodafone engaging with us on these matters and recognises the importance to the wider industry of providing more clarity on the LOB issues. Therefore, we intend to publish this letter on the Commission's website, to provide greater transparency about the Commission's approach.

⁸ Telecommunications Act 2001, section 69A.

⁹ <https://comcom.govt.nz/about-us/our-policies-and-guidelines/investigations-and-enforcement/enforcement-criteria>.

27. Please contact Sam Norman, at Sam.Norman@comcom.govt.nz, if you have any questions in relation to this letter.

Nāku iti noa, nā

A handwritten signature in black ink, appearing to read 'R. Coyle'.

Rachael Coyle
Head of Telecommunications