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# Settlement Deed

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Telecom New Zealand Limited (Telecom)

Commerce Commission (the Commission)

*Date:* 2010

## PARTIES

**Telecom New Zealand Limited** at Wellington (*Telecom*)

**Commerce Commission** (*the Commission*) a statutory body established under section 8 of the Commerce Act 1986

## INTERPRETATION

1 In this Deed:

- 1.1 *Telecom Undertakings* means the Telecom Separation Undertakings as provided to the Minister of Communications on 25 March 2008 in accordance with section 69K(2)(c) of the Telecommunications Act 2001, as varied on or prior to 10 June 2009; and
- 1.2 a reference to *parties* means the parties to this Deed.

## BACKGROUND

- 2 Telecom, through its Wholesale division, made three broadband and PSTN access offers to its customers, the "Loyalty Discount - Auckland Residential Market" offer on or about December 2008, the "All of New Zealand Loyalty Offer" on or about March 2009 and the "Regions Offer" on or about July 2009 (each a *Loyalty Offer* and together *the Loyalty Offers*).
- 3 In response to complaints from Vodafone New Zealand Limited (*Vodafone*) and Kordia Group Limited, the Independent Oversight Group (*the IOG*) investigated the Loyalty Offers.
- 4 At or about this time the Commission also initiated an investigation into the Loyalty Offers (*Investigation*).
- 5 In August 2009, reversing its preliminary determination in June 2009, the IOG concluded that the "All of New Zealand" Loyalty Offer breached the clause 56 non-discrimination obligation in the Telecom Undertakings.
- 6 Following the IOG decision, Telecom terminated all of the Loyalty Offer contracts with effect from the end of September 2009.
- 7 In November 2009 the Commission following an investigation concluded that the Loyalty Offers breached the Undertakings and announced that it intended to file proceedings alleging that Telecom's Loyalty Offers breached the clause 56 non-discrimination obligation in the Telecom Undertakings (*the Proceedings*).

8 Telecom and the Commission have reached an agreed settlement to resolve the Investigation without initiating the Proceedings.

9 This Deed records:

- 9.1 the background to the Commission's Investigation (as defined in clause 4);
- 9.2 the means by which the Investigation is resolved;
- 9.3 Telecom's acknowledgements regarding the "All of New Zealand" Loyalty Offer;
- 9.4 that Telecom will pay an amount for the benefit of the industry (as detailed in clauses 13 to 16); and
- 9.5 that this Deed is in full and final settlement of any and all claims, proceedings or actions that the Commission has or may have relating to the Loyalty Offers.

### **ACKNOWLEDGEMENTS BY TELECOM**

10 For the purposes of this settlement with the Commission, Telecom acknowledges to the Commission that it:

- 10.1 accepts that the "All of New Zealand" Loyalty Offer:
  - (a) caused concern in the Wholesale market; and
  - (b) risked breaching the Telecom Undertakings (specifically, the non-discrimination obligation) and was likely to have affected competition in the Wholesale market;
- 10.2 regrets any loss of confidence or impact on investment in the Wholesale market that may have resulted from the "All of New Zealand" Loyalty Offer; and
- 10.3 is revising its internal processes to take account of the concerns and learnings from the Commission's Investigation of the "All of New Zealand" Loyalty Offer.

### **FUTURE CONDUCT BY TELECOM**

11 Telecom will enhance its compliance and awareness by:

- 11.1 training Telecom Wholesale staff on the non-discrimination obligation within two months of the date of this Deed;

- 11.2 preparing additional internal guidelines reflecting Telecom's learnings.
- 12 Telecom will, on request from the Commission, provide confirmation of Telecom's performance of these activities.

#### **PAYMENT FOR THE BENEFIT OF THE INDUSTRY**

- 13 Telecom will pay a total of \$1.6 million (*Settlement Amount*) being a payment for the benefit of the industry, acknowledging the matters raised in clause 10.
- 14 In accordance with the Commission's direction, Telecom will pay the Settlement Amount to Vodafone and Orcon Internet Limited (*Orcon*) in equal shares (each share a *Directed Payment*).
- 15 Telecom will pay the Directed Payments within 30 days of the date of this Deed.
- 16 The parties acknowledge that:
- 16.1 Subject to clauses 16.2 and 16.3, nothing in this Deed shall affect, compromise or exclude any legal claim that any other person might have in respect of the Loyalty Offers (including any claim by Vodafone or Orcon);
- 16.2 the Directed Payments may be taken into account in any assessment of any claims for losses or damages by Vodafone and Orcon;
- 16.3 Telecom will rely on its payments to Vodafone and Orcon as setting off any liability it may have on such claims up to the amount of the payments.

#### **COSTS**

- 17 Telecom will, within 30 days of the date of this Deed, pay \$100,000 to the Commission on account of its costs in relation to the Investigation and preparing the Proceedings.

#### **COMMISSION WARNING**

- 18 The Commission will issue and may publish a warning to Telecom regarding the "All of New Zealand" Loyalty Offer.
- 19 Telecom acknowledges that, in any subsequent proceeding against Telecom for pecuniary penalty under sections 156L or 156P of the Telecommunications Act 2001 in relation to a breach of the non-discrimination provision of the

Telecom Undertakings, the Commission may refer to the warning under clause 18 in any assessment of a pecuniary penalty in such proceeding.

### **NO FURTHER ACTION BY THE COMMISSION**

- 20 The Commission will immediately close the Investigation and undertakes, subject to clauses 18 and 19, to take no further action in connection with the Loyalty Offers.
- 21 Except in enforcement of its provisions, this Deed fully and finally settles, and may be relied upon as a complete bar to and/or defence against, any and all claims, proceedings or actions (including, without limitation, under the Commerce Act 1986 and/or the Telecommunications Act 2001) that the Commission has or may now or in the future have against Telecom (whether or not known to, or capable of being known by, the Commission) relating to the Loyalty Offers.

### **GENERAL**

- 22 Each party will exchange their draft media release relating to the execution of this Deed no later than 24 hours before issuing the media release to the media. Each party will consider any comments from the other party on their draft media release. However except for:
  - 22.1 Telecom's agreement to include in its media release the statements in clause 10;
  - 22.2 the Commission's agreement not to seek to use its media release to raise issues about any matters other than the Loyalty Offers; and
  - 22.3 each party's agreement to acknowledge in their media release the spirit of the settlement and that the other party has taken a constructive approach to resolution without resort to litigation;

there is no obligation on either party to amend their draft media release.

- 23 The parties will keep the fact and contents of the Deed confidential until the Commission's media release is released to the media in accordance with clause 22.
- 24 The parties will take all steps as are necessary and desirable to give effect to the terms of this Deed.

- 25 This Deed may be signed in counterparts (including counterparts signed, scanned and transmitted by email), which when taken together will constitute one Deed.

**EXECUTED AS A DEED**

Executed by **Telecom New Zealand**  
**Limited** by:

\_\_\_\_\_  
Director

\_\_\_\_\_  
Director

Executed by the **Commerce Commission**  
by:

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