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BY EMAIL ONLY

Application of Part 7 of the Telecommunications Act 2001

Kia ora Ben,

We've now had an opportunity to review the Commission's response to submissions on its open letter regarding marketing of alternative telecommunications services during the transition away from copper.

As this response notes, Vodafone has a strongly held view that the outcomes and principles set out in the open letter, as now expressed in guidelines to the telecommunications industry under section 234 of the Telecommunications Act 2001 ('the Act'), should apply equally to retailers *and* LFCs.

The response is the first indication we have had of the Commission's reasons for not specifically addressing guidelines to both retailers and LFCs. While we are encouraged by the Commission's expectation that marketing by LFCs should be consistent with its guidelines, this does not alter the reality that LFCs can ignore this request and are likely to do so where they do not consider themselves in any way bound by them. We understand LFCs' position to be that they will only commit to *considering* which parts *might be* relevant to them to implement through an unspecified process *outside any industry code*.

The position of LFCs is reflected in the immediate response to publication of the guidelines. Whereas retailers have taken immediate steps to adjust advertised speeds and other elements of service descriptions as requested by the Commission, LFCs continue to use 'up to' speed claims that are inconsistent with the guidelines and create an inconsistency across industry advertising.¹

We also remain concerned about the extent to which LFCs continue to 'oversell' enhanced fibre products by implying to consumers that higher speeds are essential for the performance of many activities that, in fact, do not require such premium priced wholesale inputs. This practice is enabled by LFCs ability and choice to sidestep the guidelines and any industry code.

¹ See, for example, [Get the best home broadband: compare your options | Chorus NZ](#)
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We note the Commission's view in paragraph 51 of the response that: "*[s]trictly speaking, Part 7 of the Act, under which the guidelines have been issued, is a retail specific framework. It was created because of ongoing problems at the retail level of the market and contains powers directed at addressing these retail level issues. LFCs are regulated separately under Part 6 of the Act, including as to issues of service quality.*" We do not agree with this reading of Part 7. In particular, the suggestion that regulation of LFCs under Part 6 excludes the operation of Part 7 is incorrect – and also inconsistent with the Commission's endorsement of coexisting regulatory regimes (i.e. Part 7 and the Fair Trading Act 1986) in paragraphs 65-68 of the response.

Our view remains that the purpose of Part 7 intervention is to address demands of end users of telecommunications services regardless of whether these services are provided by a retailer or an LFC. The RSQ provisions in Part 7 capture LFCs because:

- a) The prescribed purpose of an RSQ Code is to improve retail service quality to reflect the demands of end-users of *telecommunications services* (section 233 of the Act). Clearly, LFCs provide wholesale services that directly affect the end-user's experience. Improving those services is consistent with section 233.
- b) The Commission is empowered under section 234 to issue guidelines to "*the telecommunications industry*" as a whole. Further, section 235 provides that the Commission may review an "*industry RSQ Code*." These provisions suggest that the RSQ Code framework applies at an industry level. While the Commission can impose an RSQ Code on certain providers or groups of providers (section 237), that is only possible where the industry as a whole (including LFCs) has failed to adopt a suitable industry RSQ Code.
- c) There are no express exemptions for LFCs in Part 7. More broadly, the Commission has discretion to include in an RSQ code "*any other provisions that are necessary or desirable*." This weighs against a technical reading down of the Commission's powers. Our conclusion is also consistent with the legislative history.

Section 233 sets out the purpose of RSQ Codes: "*[t]he purpose of a retail service quality code is to improve retail service quality to reflect the demands of end-users of telecommunications services.*" This purpose does not limit the parties to whom a RSQ Code applies. The focus is on meeting the demands of end-users of telecommunication services. "End-user" is defined as "*in relation to a telecommunications service, means a person who is the ultimate recipient of that service or of another service whose provision is dependent on that service.*" The section 233 purpose is engaged by improving *any telecommunication services* that directly affect the end-user's experience. LFCs are providers of telecommunications services and play an important role in meeting the demands of end-users.

Section 234 of the Act provides: "*[t]he Commission may issue guidelines to the telecommunications industry on any matters relating to retail service quality codes, including advice on what matters are appropriately dealt with by retail service quality codes.*" The guidelines are to be issued "*to the*

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telecommunications industry.” That term is not defined, but on its ordinary meaning however it would capture all telecommunications industry participants, including LFCs. That is because “Telecommunications services” are also defined broadly as “*any goods, services, equipment, and facilities that enable or facilitate telecommunication.*”² This would encompass services provided by LFCs, i.e. wholesale fibre services.

Part 7 of the Act does not expressly exempt network operators³ or entities that are regulated under Part 6. More broadly, the Commission has discretion to include in an RSQ code “*any other provisions that are necessary or desirable.*” This weighs against a technical reading down of the Commission’s powers. It follows from the above that, in our view:

- a) The guidelines do (and must) apply to the industry as a whole (and therefore the reference to LFCs in paragraph 24 of the guidelines is correct and consistent with the Act).
- b) An industry RSQ Code should apply to the industry as a whole (including LFCs).
- c) A Commission RSQ Code must apply to providers of subject telecommunications services equally.

For completeness, we have tested our conclusions against the background to the legislative history of Part 7. In 2018, the officials’ report on the Telecommunications (New Regulatory Framework) Amendment Bill noted that: “*Chorus and wholesale providers will be parties subject to the code.*”⁴ Ultimately, the legislative history does not clarify the intent of the provisions one way or the other. But, absent consistent contrary indications in the background materials, and in view of the ordinary meaning of the provisions as outlined above, we consider the better view is that LFCs are subject to Part 7.

While Vodafone shares the Commission’s hope that this issue should not become a distraction that undermines industry’s implementation of the guidelines, we remain concerned that if LFCs are enabled to remain outside Part 7 this will:

- a) Undermine scope for industry agreement and execution on some matters, ultimately to the detriment of end users;
- b) Embed an inconsistent approach across retailer vs. LFC advertising to the same end users;
- c) Result in a asymmetric regulatory requirements in respect of behaviour that affects end users in the same way, which Vodafone and other retailers are unlikely to accept.

² “Telecommunication” is defined very broadly as “the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not.”

³ Further, part 4AA of the Telecommunications Act refers to wholesalers as “providers of wholesale telecommunications services that are provided using a fibre optic communications network”, so clearly contemplates that they are capable of providing telecommunications services.

⁴ Telecommunications (New Regulatory Framework) Amendment Bill [Departmental Report](#) to the Economic Development, Science and Innovation Committee 10 April 2018 at pages 29-30.



We would like to discuss this issue further at our next meeting with you on 14 December.

Naku nā,

A handwritten signature in blue ink, appearing to read 'T. Thursby', is located below the text 'Naku nā,'.

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