

22 December 2021

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Tēnā koe Tom

### **Application of Part 7 of the Telecommunications Act 2001 to local fibre companies**

1. Thank you for your letter dated 3 December 2021 to Ben Oakley in relation to Part 7 of the Telecommunications Act 2001 (**Act**). Your letter helpfully sets out Vodafone's view on the application of Part 7 to wholesale local fibre companies (**LFCs**), and the basis for its view.
2. Our recent document, *Marketing of alternative telecommunications services during the transition away from copper - response to submissions on our open letter<sup>1</sup>*, provided a brief summary of the Commission's view on that issue. This letter explains the basis for our view, and responds to the points raised in your letter.
3. If there remains a strong difference of opinion between us on this issue once you have had an opportunity to assess the basis for our view and our response to your points, then we would be open to discussing a mechanism for resolution, as explained below.

### **Background**

4. On 8 November 2021, we published guidelines on marketing alternative telecommunications services during the transition away from copper under s 234 of the Act (**s 234 guidelines**).<sup>2</sup> On 1 December 2021, we published our response to submissions on our open letter in respect of the s 234 guidelines, referenced above.

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<sup>1</sup> Available here: [https://comcom.govt.nz/\\_data/assets/pdf\\_file/0023/272066/Marketing-alternative-telecommunications-services-during-the-transition-away-from-copper-Response-to-submissions-on-open-letter-1-December-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0023/272066/Marketing-alternative-telecommunications-services-during-the-transition-away-from-copper-Response-to-submissions-on-open-letter-1-December-2021.pdf). See paragraph 51.

<sup>2</sup> Marketing alternative telecommunications services during the transition away from copper. Guidelines to the telecommunications industry under s 234 of the Telecommunications Act 2001. Available here:

5. In the s 234 guidelines and our response to submissions document, we said:
- 5.1 we considered the outcomes and principles in the s 234 guidelines to be applicable to, and to be capable of adoption by, any party marketing alternative telecommunications services to consumers, including wholesale providers who may not sell telecommunications services directly to consumers;<sup>3</sup>
  - 5.2 we agreed that all marketing of alternative telecommunications services should take place on a level playing field and should be consistent with the guidelines as far as possible. We said we did not see any reason why, in principle, the New Zealand Telecommunications Forum Incorporated (**TCF**) could not create a code that applies to all telecommunications providers;<sup>4</sup>
  - 5.3 we encouraged the TCF to move in the direction of an industry-wide code, given the value of a uniform set of rules applying to marketing conduct. We said if this is not possible, we would consider the use of other tools to address any issues relating to LFC conduct;<sup>5</sup> and
  - 5.4 we expected that marketing by LFCs would be consistent with the guidelines and, if they are not party to the industry code, we expected their commitment to the guidelines to be confirmed in another way.<sup>6</sup>

***The basis for our view***

- 6. Your letter expresses Vodafone's dissatisfaction with the s 234 guidelines, on the basis of the view that the principles and outcomes in the guidelines have not been applied equally to retail service providers (**RSPs**) and LFCs. The letter also explains Vodafone's view that the provisions of Part 7, including Commission retail service quality (**RSQ**) codes, should apply to both RSPs and LFCs.
- 7. We agree that the quality of wholesale inputs, and also the behaviour of wholesale providers, will be relevant to RSQ. In some cases (such as installation), aspects of RSQ are controlled or affected by the quality of the wholesale service.<sup>7</sup> We also

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[https://comcom.govt.nz/\\_data/assets/pdf\\_file/0032/269663/Marketing-alternative-telecommunications-services-during-the-transition-away-from-copper-guidelines-8-November-2021.pdf](https://comcom.govt.nz/_data/assets/pdf_file/0032/269663/Marketing-alternative-telecommunications-services-during-the-transition-away-from-copper-guidelines-8-November-2021.pdf)

<sup>3</sup> Footnote 2, paragraph 24.

<sup>4</sup> Footnote 1, paragraph 52.

<sup>5</sup> Footnote 1, paragraph 54.

<sup>6</sup> Footnote 1, paragraph 55.

<sup>7</sup> We will consider the question of how RSQ codes can and should address dimensions of quality that are affected by the quality of the wholesale service as we progress our RSQ work programme in 2022 and as issues become relevant.

understand that, under the TCF Code Compliance Framework,<sup>8</sup> wholesale providers can be, and are, subject to industry-made RSQ codes.<sup>9</sup>

8. Notwithstanding this, for the reasons we explain below, we do not consider the Commission can impose binding obligations on LFCs under Commission RSQ codes. In the immediate context, this would include issuing an RSQ code that purports to control how both RSPs and LFCs market alternative telecommunications services to consumers.
9. As we explain below, we consider we have taken the right approach to addressing the telecommunications industry, including the LFCs, in the s 234 guidelines.

### *Section 234 guidelines*

10. We see our role under Part 7 as being concerned with:
  - 10.1 issuing guidelines on “matters relating to retail service quality codes” (s 234);
  - 10.2 reviewing industry RSQ codes, including seeking information from service providers to whom the RSQ code applies (s 235); and
  - 10.3 making Commission RSQ codes where appropriate (ss 236-237).
11. These sections of Part 7 focus on the provision of retail services, not the provision of wholesale services, which are governed by different regimes.<sup>10</sup> For example, clause 1 of Schedule 2A provides for a copper withdrawal code to set out “minimum consumer protection requirements for end-users.” If necessary, this would be an appropriate mechanism to address Chorus’ copper withdrawal marketing.
12. Your letter advances the view that the s 233 purpose does not limit the parties to whom an RSQ code applies.<sup>11</sup> It then goes on to state that guidelines issued under s 234 can be issued to the industry as a whole as the section specifies the Commission may issue guidelines to the “telecommunications industry.”
13. Given that guidelines under s 234 do not create binding obligations, we considered it appropriate to express our view that wholesale providers should adopt the principles and outcomes, and that we will be looking for commitments from wholesale providers to confirm this. However, we have not included recommendations to bind LFCs under RSQ codes in the s 234 guidelines, in light of our view that the

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<sup>8</sup> <https://www.tcf.org.nz/industry/standards-compliance/about/code-compliance/>

<sup>9</sup> Section 235 provides for the Commission to review industry RSQ codes and to make recommendations. Section 234 provides that the Commission may issue guidelines to the telecommunications industry on matters relating to RSQ codes, which includes industry RSQ codes.

<sup>10</sup> The quality of wholesale services provided to an access seeker is regulated principally by the standard terms determinations under Part 2 of the Act, in relation to copper services, and the Part 6 fibre regulation regime, in relation to fibre fixed line access services.

<sup>11</sup> Section 233 provides the purpose of a retail service quality code is to improve retail service quality to reflect the demands of end-users of telecommunications services.

Commission cannot impose binding obligations on LFCs under Commission RSQ codes.

*Commission RSQ codes*

14. While we agree with Vodafone that guidelines issued under s 234 can be addressed to the telecommunications industry as a whole, in our view, it does not follow that the Commission has the power to impose binding RSQ codes on LFCs.
15. Section 237 sets out the requirements for Commission RSQ codes, including matters Commission RSQ codes must address.
  - 15.1 Section 237(1) requires that we specify the services and providers to which the Commission RSQ code applies.
  - 15.2 Section 237(2)(a) provides that a code “may...impose binding obligations on telecommunications service providers that provide retail telecommunications services covered by the code”.
16. In our view, these sections indicate that Parliament only contemplated that RSPs could be subject to a Commission RSQ code. The purpose of s 237(2)(a) is to make it clear that the Commission has the power to impose binding obligations on providers but also, importantly, that the only providers Parliament contemplated would be subject to such binding obligations were the providers of retail services (not wholesalers). This reflects the general policy that Commission RSQ codes are designed to regulate the provision of retail services, not upstream wholesale services, as explained in paragraph 11.
17. In your letter, it is suggested that s 237(2)(b) enables the Commission to also impose binding obligations on wholesale providers under s 237(2)(a).<sup>12</sup> We do not consider that this interpretation can be reconciled with the language and context of the legislation. It would involve reading into s 237(1)(a) the words “or providers of wholesale services” and thus materially altering the meaning of the section. Neither do we think the policy objective of Part 7 supports such a departure from the express language of the statute. Therefore, we do not consider our RSQ code-making powers to include “any other provisions that are necessary or desirable”, can be used to extend the Commission’s powers beyond which Parliament conferred.
18. Your letter also cites a Departmental Report<sup>13</sup> to support the view that Parliament intended that RSPs and LFCs would be subject to Commission RSQ codes. In our view, a proper reading of the Departmental Report contradicts, rather than supports, this

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<sup>12</sup> Section 237(2)(b) provides a Commission retail service quality code may contain any other provisions that are necessary and desirable.

<sup>13</sup> Telecommunications (New Regulatory Framework) Amendment Bill - Departmental Report to the Economic Development, Science and Innovation Committee, 10 April 2018, Appendix 2, officials’ comment at item 147, page 29-30. Available at: [https://www.parliament.nz/resource/en-NZ/52SCED\\_ADV\\_74818\\_1100/2f1c30fe9b7b58623655407f67679fd080c43220](https://www.parliament.nz/resource/en-NZ/52SCED_ADV_74818_1100/2f1c30fe9b7b58623655407f67679fd080c43220)

argument. In submissions to the Select Committee, Vodafone, 2degrees and Spark argued that s 237 (then s 232 in the Telecommunications (New Regulatory Framework) Amendment Bill (**Bill**)) needed to be amended to capture wholesalers' activities. Although not referring specifically to marketing, the RSPs made the following arguments<sup>14</sup>:

**Vodafone:** To be both effective and fair, the codes must apply equally to all providers (wholesalers and retailers). Section 232(1)(b) allows the Commission to specify which providers it applies to. This must be removed, and an explicit prohibition included to disallow exemptions. All providers of a particular service must be held to the same standard if we are to actually lift the standard of service delivery for end users.

**2degrees:** Suggests s 232(1)(b) should be deleted. Is concerned if only certain competing telecommunications service providers were subject to RSQ codes. These should be equally applied by service (as per 232(1)(a)).

**Spark:** For the service quality framework to have any chance of succeeding in improving retail service standards, it will need to be broad enough to cover wholesale providers (i.e. LFCs that install fibre connections). The current Bill does not extend to those providers, meaning there is a disconnect between what drives service quality and the tools available to the Commission. Amend 232(2)(a) to add 'or providers of wholesale services that enable these retail telecommunications services' to include wholesale providers. Amend 232(2)(b) to make it clear that it is things 'necessary or desirable' to meet solve the problem identified by the Commission in Section 229

19. These submissions reflected an acceptance by the RSPs that, as drafted at that time, Part 7 in the Bill did not permit the Commission to impose a code on providers of telecommunications services that did not supply retail services. This proposition is explicitly advanced by Spark, and implicit in Vodafone's submission. The officials' response was "**Disagree** – The policy intent of this part is to allow for creation of RSQ codes, not wholesale codes."<sup>15</sup>
20. Therefore, we do not consider that the observation cited by Vodafone earlier in the report supports its interpretation. This observation was made in the context of enforcement (s 156MB) where the TCF expressed concerns about RSPs being held liable for breaches of quality requirements that are attributable to LFC conduct. Those enforcement provisions apply generally to all codes (including the Commission 111 contact code and the copper withdrawal code), so the reference to Chorus being subject to "the code" is ambiguous. In our view, the focus of the officials' comment was on the courts' ability to take into account relative contribution, rather than the Commission's power to impose binding obligations on wholesalers.

### **Next steps**

21. We appreciate you engaging with us on this issue, and recognise its importance to Vodafone. I hope that the explanation set out above of the basis for our view assists Vodafone to understand the Commission's position on the application of Part 7 to the LFCs. Given that the issue is of potential relevance to a broader set of

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<sup>14</sup> Footnote 13, items 178-180 at page 39 of Appendix 2.

<sup>15</sup> Footnote 13, item 178 at page 39 of Appendix 2.

stakeholders, we intend to publish this exchange of correspondence on the Commission's website, to provide greater transparency about the Commission's view.

22. Once you have had an opportunity to consider the points made in this letter, if there continues to be a strong difference of opinion between us on this issue then we would be amenable to discussing with you a mechanism for resolving this difference. For example, the Commission could seek an opinion on this issue from independent senior counsel. Please contact me if you consider that such a step might be necessary, or if you wish to discuss further any of the contents of this letter.

Nāku iti noa, nā

A handwritten signature in black ink that reads "Andrew Riseley". The signature is written in a cursive, slightly stylized font.

**Andrew Riseley**  
General Counsel