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Market Information Services Section
NZX Limited
PO Box 2959
Wellington

Company Announcements Office
ASX Limited
Level 4, 20 Bridge Street
Sydney, NSW
Australia

SKY TV
PO Box 9059
Newmarket
Auckland 1149
New Zealand

10 Panorama Road
Mt Wellington
Auckland 1060
New Zealand

T. +64 9 579 9999

sky.co.nz
skybusiness.co.nz

Amended appeal of Commerce Commission decision declining clearance in relation to proposed merger

SKY Network Television Limited (SKY) and Vodafone have filed an amended notice of appeal in the High Court against the New Zealand Commerce Commission's decision not to clear the two companies' proposed merger of their operating businesses in New Zealand.

As previously notified, SKY and Vodafone each filed their notice of appeal on 22 March 2017 in order to preserve their rights while they waited for the release of the Commerce Commission's reasons for its decision and the opportunity to assess those reasons.

On 13 April 2017, the Commerce Commission released the reasons for its decision. The amended notice of appeal has been filed following SKY's and Vodafone's subsequent assessment of those reasons. A copy of the amended notice of appeal (redacted to remove confidential information) is attached.

For further information please contact:

Jason Hollingworth
Chief Financial Officer
SKY Network Television
(09) 579 9999
021 312 928
jhollingworth@skytv.co.nz

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In the High Court of New Zealand

CIV-2017-485-164

CIV-2017-485-166

Wellington Registry

Under the Commerce Act 1986

In the matter of an appeal against the determination of the Commerce Commission

Between

Vodafone New Zealand Limited

First appellant

And others

and

Commerce Commission

Respondent

(Abbreviated list of parties)

Amended notice of appeal

17 May 2017

BELL GULLY

BARRISTERS AND SOLICITORS

MR AR GALBRAITH QC / DJ COOPER

SENIOR COUNSEL FOR THE FIRST AND SECOND APPELLANTS

SHORTLAND CHAMBERS

LEVEL 9-13, 70 SHORTLAND ST, AUCKLAND

TEL 64 309 1769 EMAIL ARGALBRAITH@SHORTLANDCHAMBERS.CO.NZ /

DCOOPER@SHORTLANDCHAMBERS.CO.NZ

S J P LADD / J Q WILSON

SOLICITORS FOR THE FIRST AND SECOND APPELLANTS

LEVEL 22, VERO CENTRE, 48 SHORTLAND STREET

PO BOX 4199, AUCKLAND 1140, DX CP20509, NEW ZEALAND

TEL 64 9 916 8800 FAX 64 9 916 8801 EMAIL JESSE.WILSON@BELLGULLY.COM /

CHANELLE.CATTIN@BELLGULLY.COM

Full list of parties

Between

Vodafone New Zealand Limited

First appellant

and

Vodafone Europe B.V.

Second appellant

and

Sky Network Television Limited

Third appellant

and

Commerce Commission

Respondent

To the Registrar of the High Court at Wellington
And to the Commerce Commission
And to any other person the Court directs to be served

This document notifies you that –

1. Vodafone New Zealand Limited and Vodafone Europe B.V. (together, **Vodafone**) and Sky Network Television Limited (**Sky**) are appealing to the Court at Wellington against the whole of the determinations of the Commerce Commission dated 22 February 2017 numbered [2017] NZCC 1 and [2017] NZCC 2 pursuant to section 66 of the Commerce Act 1986 declining to grant Vodafone Europe B.V. and Sky's applications for clearance of business acquisitions (together, **Determinations**).
2. The grounds of appeal are that the Commerce Commission erred in fact and at law in finding that it was not satisfied that the acquisition would not have or would not be likely to have the effect of substantially lessening competition in a market (**SLC**), and in particular the Commission erred in the following respects:

Foreclosure of customers from rival TSPs

- (a) Finding that access to Sky's premium sports content is necessary for rival TSPs to compete effectively with the merged entity in the broadband and mobile services markets).
- (b) Finding that it could not exclude a real chance that the merged entity would offer premium sports content on a standalone basis to customers on relatively less attractive terms than purchasing that content in a bundle, including because it:
 - (i) Overestimated the incentives of the merged entity to offer standalone content on less attractive terms than bundled content.
 - (ii) Failed to consider the merged entity's incentives to promote competitive standalone services to its customers.

- (c) Finding that it could not exclude a real chance that the merged entity would set wholesale terms for Sky's key content that would not allow rival TSPs to compete against the merged entity's bundles, including because it:
 - (i) Overestimated the incentives of the merged entity to offer standalone content on less attractive terms than bundled content.
 - (ii) Failed to consider the merged entity's incentives to offer wholesale access to rival TSPs on competitive terms.

- (d) Finding that it could not exclude a real chance that a significant proportion of rival TSPs' customers who subscribe to Sky Sport would be likely to switch to the merged entity and would be foreclosed to competition by rival TSPs, including because the roll-out of UFB:
 - (i) Constitutes a unique opportunity for the merged entity to cause customers to switch from rival TSPs.
 - (ii) Once completed, will cause bundled customers to be less likely to switch from the merged entity to rival TSPs even if the merged entity raises prices and/or decreases quality.

Switching in the broadband market

- (e) Finding that it could not exclude a real chance that a significant number of rival TSPs' broadband customers that subscribe to Sky Sport would switch to the merged entity, including because it:
 - (i) Placed no or insufficient weight on evidence that [REDACTED]
[REDACTED]
[REDACTED]
 - (ii) Placed insufficient weight on evidence regarding [REDACTED]
[REDACTED]
 - (iii) Placed no or insufficient weight on the ability and incentive of rival TSPs to respond to the merged entity's offers

competitively including by offering alternatives to customers.

- (iv) Placed no or insufficient weight on evidence from [REDACTED]
[REDACTED]
[REDACTED].
- (v) Placed no or insufficient weight on the appellants' evidence regarding customer switching which was consistent with market disclosures.
- (vi) Placed no or insufficient weight on [REDACTED]
[REDACTED].

Switching in the mobile market

- (f) Finding that it could not exclude a real chance that a significant number of rival TSPs' mobile customers that subscribe to Sky Sport would switch to the merged entity, including because it:
 - (i) Incorrectly evaluated evidence regarding the overall number of Sky Sport subscriptions in the market compared to the overall number of mobile subscriptions.
 - (ii) Placed insufficient weight on New Zealand evidence regarding consumer behaviour which [REDACTED]
[REDACTED].
 - (iii) Placed no or insufficient weight on evidence from [REDACTED]
[REDACTED]
[REDACTED].
 - (iv) Placed no or insufficient weight on evidence of the level of mobile switching that Vodafone has previously been able to achieve.

Competitive effectiveness of rival TSPs in broadband market

- (g) Finding that it could not exclude a real chance that, as a result of broadband customers switching to the merged entity, rival TSPs

in the broadband market would be rendered less effective, including because it:

- (i) Incorrectly assessed the evidence in relation to the value of Sky Sport subscribers as broadband and mobile customers.
- (ii) Wrongly concluded that the evidence was unclear on the importance of scale to the ability and incentive to unbundle UFB.
- (iii) Failed to accept the evidence that the minimum efficient scale to be competitive in the broadband market was small.
- (iv) Placed no or insufficient weight on the historical evidence regarding unbundling of the copper network, which:
 - (A) Was inconsistent with the Commission's findings on unbundling of the fibre network; and
 - (B) Ought to have supported the conclusion that scale is not necessary to invest in unbundling.
- (v) Overestimated the importance to competition of rival TSPs owning backhaul networks in the future, including because it:
 - (A) Failed to consider, or give sufficient weight to, the competitive nature of backhaul markets including the impact of a vertically separated competitor in Chorus.
 - (B) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].
- (vi) Overestimated the impact of customer switching on the broadband market, including because it:
 - (A) Overstated the number of customers expected to switch to the merged entity.

- (B) Placed insufficient weight on evidence regarding consumer preferences [REDACTED]
[REDACTED]
[REDACTED].
- (C) Placed no or insufficient weight on evidence from [REDACTED]
[REDACTED]
[REDACTED].
- (D) Overstated the impact of switching by incorrectly assessing the evidence in relation to the value of Sky Sport subscribers as broadband and mobile customers.

(vii) Overestimated the barriers to entry and expansion in the broadband market.

(viii) Found that it could not exclude a real chance that the merger would cause Vocus and Trustpower to lose a significant proportion of their respective customer bases, thereby reducing their respective ability and incentive to make investments in their networks, including because it:

(A) Placed no or insufficient weight on the fact that Vocus is a substantial Australian business with the ability to invest in unbundling irrespective of its scale in New Zealand.

(B) Failed to discount [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

(C) Failed to discount [REDACTED]
[REDACTED]
[REDACTED].



- (D) Wrongly concluded that it had insufficient evidence to be satisfied that the merger would not significantly weaken the competitive constraints imposed by Vocus and Trustpower.

Competitive effectiveness of rival TSPs in mobile market

- (h) Finding that it could not exclude a real chance that mobile customers switching to the merged entity would render rival TSPs in the mobile market less effective, including because it:
 - (i) Overestimated the likely extent of customer switching from rival TSPs to the merged entity in the mobile market.
 - (ii) Overestimated the impact on 2degrees of the assumed level of customer switching, including in relation to:
 - (A) The competitive constraints imposed by 2degrees; and
 - (B) 2degrees' ability and incentives to compete, invest, and innovate.
 - (iii) Overestimated the barriers to entry and expansion in the mobile market.

Substantial lessening of competition

- (i) Finding that there was a real chance that the merger could result in higher prices and/or lower quality in a market, including because:
 - (i) The broadband and mobile markets are both highly competitive;

- (ii) Competition is driven by all competitors in the market not only the specific rival TSPs identified by the Commission as being important drivers of competition;
- (iii) A loss of share by rival TSPs in either the broadband or mobile markets would not render rival TSPs uncompetitive; and
- (iv) A loss of scale by rival TSPs would neither reduce competitive intensity nor prevent future network investment by rival TSPs, including investment in 5G technology.

Positive effects on competition

- (j) Failing to place sufficient weight on the increased ability of the merged entity to innovate including by developing new products and services and achieve dynamic efficiencies.
- (k) Failing to place sufficient weight on the likelihood that the merged entity's behaviour would encourage competitive responses from rival TSPs.

Failure to critically evaluate the evidence

- (l) Failing to critically evaluate the evidence, including because it:
 - (i) Failed to place sufficient weight on the preponderance of the evidence supporting the applications for clearance.
 - (ii) Failed to place any or sufficient weight on the appellants' evidence regarding the competitive synergies that would be created by the merger.
 - (iii) Wrongly concluded that the existence of conflicts or limitations in the evidence favoured a finding of doubt.
 - (iv) Failed to stand back and consider whether each of the preconditions for the Commission's theory of harm would all be likely to occur – which would have led the Commission

to conclude that the cumulative probability of these preconditions occurring is remote.

- (v) Failed to properly assess the likely medium to long-term effects of the merger in light of its finding that the merger would be pro-competitive in the short-term.

3. By way of relief, the appellants seek a judgment of this Court:

- (a) Reversing the whole of the Determinations;
- (b) Granting clearance for the business acquisitions in terms of Vodafone Europe B.V. and Sky's clearance applications; and
- (c) An order for costs.

4. The appellants are not legally aided.

Dated 17 May 2017

AR Galbraith QC / DJ Cooper / JQ Wilson / CM Cattin
Counsel for Vodafone New Zealand Ltd and Vodafone Europe B.V.

TC Weston QC / LA O'Gorman / DT Broadmore
Counsel for Sky Network Television Ltd