



Supreme Court of New Zealand

17 November 2011

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

Vodafone New Zealand Limited v Telecom New Zealand Limited
SC 4/2010

Commerce Commission v Vodafone New Zealand Limited and Telecom
New Zealand Limited SC 44/2010

Telecom New Zealand Limited v Vodafone New Zealand Limited and
Commerce Commission SC 45/2010

Telecom New Zealand Limited v Vodafone New Zealand Limited and
Commerce Commission SC 46/2010

[2011] NZSC 138

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

The Supreme Court heard appeals by Vodafone New Zealand Ltd, Telecom New Zealand Ltd and the Commerce Commission under Part 3 of the Telecommunications Act 2001. They related to amounts recoverable by Telecom from Vodafone and other service providers to recompense Telecom for the net cost of meeting its telecommunications service obligation (TSO) to deliver residential telephone connections to clusters of commercially non-viable customers. The determinations in question related to the 2003/2004,

2004/2005 and 2005/2006 years. Vodafone was the appellant in the appeal relating to the first of these years. Telecom and the Commission appealed about aspects of the latter two determinations. There are no extant proceedings relating to determinations for any earlier or later years.

After the hearing in the Supreme Court and while judgment was reserved there were two developments. First, the Telecommunications (TSO, Broadband, and Other Matters) Amendment Act 2011 was enacted. It replaced the TSO regime as from 1 July 2011 with a new and different regime. Secondly, Vodafone and Telecom advised the Court that they had entered into a confidential commercial settlement regarding the financial consequences of all TSO matters at issue between them in the appeals and those still awaiting determination by the Commission for years prior to the date from which the amending legislation has effect. They advised that their appeals, which related to about 94% of the net costs in the years in question, were no longer live.

However, as the Commission is not a party to the settlement and as the High Court has ordered the Commission to reconsider the determinations for 2004/2005 and 2005/2006, and the Commission has a statutory obligation to make determinations for years where none has yet been issued, the Commission requested the Court to proceed to issue a judgment on its appeal. It pointed out that there are service providers who are not parties to the proceedings but will be affected by the determinations.

In agreement with the High Court, the Supreme Court has unanimously concluded that the Commission erred in law in assessing the net cost of the provision of the services to commercially non-viable customers in the years to which the Commission's appeal relates. The Court finds that the Commission erred in modelling net cost on the basis of Telecom's existing core PSTN network and in failing to incorporate into its model the use of mobile technology. The Chief Justice and Tipping J hold that in failing to optimise with this new technology the Commission misinterpreted the statutory requirement that net cost should be the unavoidable net incremental costs to

an efficient service provider (ESP) of providing the service. It allowed net cost to be set above that which would be incurred by an ESP. Blanchard, McGrath and Gault JJ are of the view that in choosing its methodology the Commission did not misinterpret the statutory requirement but nevertheless fell into error of law by applying the provisions of Part 3 in a manner that was clearly untenable. They say that it did so, first, by artificially attributing new values to old assets, particularly copper wire, which had been installed years previously and was wholly or partially depreciated and, secondly, by failing to adjust the model when that flaw became apparent, by including mobile technology. The Commission had a mistaken understanding that it would be necessary to compensate Telecom for the adjustment.

The Court has dismissed the Commission's appeal.

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