Submission by Blue Reach to MBIE on Telecommunications Act options paper

3 September 2016

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1. Introduction and Summary

Introduction

1.1 Our submission deals with roaming and Schedule 3 issues, with some broader implications beyond roaming. Proposals are in the table at the end of this summary.

1.2 Blue Reach is establishing a national network for fixed wireless and mobile services. It would be the 4th MNO. It needs a reasonable roaming agreement to do that, but the 2degrees experience shows the market structure is such that current regulatory settings do not facilitate this.

1.3 There is good evidence that mobile retail prices can be expected to drop by around 19% if there is a 4th viable MNO.

1.4 Further, New Zealand has nearly the worst mobile retail prices in the OECD for higher volume mobile data services: we are 33rd out of 34 countries in the OECD for 6 Gb packages, and double the OECD average retail price. Those are the mobile services that really matter in the short to medium term, as the focus moves to data intensive uses including in triple and quad plays.

1.5 The EU regulator has been clear in multiple decisions that having only 3 MNOs leads to higher prices, lower quality services, less choice, and coordinated competitive behaviour (which includes tacit collusion) as between MNOs. Those are the problems New Zealand has.

1.6 Those problems become more acute as, over the short to medium term, data intensive mobile use such as for TV and OTT content is integrated into triple and quad plays. The hard fought wins of open access and separation are taken away as bundles that include fixed and mobile (triple and quad plays) become dominated by the bottleneck control via mobile, where there is market failure. Control moves from fixed line (such as local access) to mobile. Competitors outside the 3 MNOs cannot compete adequately in the triple and quad play space.

1.7 Having a 4th MNO will largely remove mobile market failure and produce considerable benefits for New Zealand consumers. Fixed location providers need to be able to provide mobile services in a bundle as otherwise they cannot effectively compete, particular as mobile data needs continue to grow exponentially.

1.8 Evidence such as potential 19% price drops for NZ consumers if there is a 4th MNO is compelling.

Vodafone's view supports providing wholesale roaming.

1.9 It is encouraging that Vodafone shares our views on infrastructure sharing such as roaming, and they also note they have a *"social duty to pursue network sharing".* For example, Vodafone said in its report, *Network sharing in Vodafone*:[1]

> "Vodafone is actively seeking opportunities to share in all markets where we operate….. As one of the world's largest mobile operators Vodafone believes we have a social duty to pursue network sharing as it allows us to reduce the visual impact of networks on the horizon, reduces the power consumption and therefore directly reduces our CO2

[1] Vodafone, Network Sharing in Vodafone, 1 June 2009, page 2.

emissions. …Vodafone see network sharing as an opportunity to extend coverage and improved service to an even wider audience in an economic way.”

Blue Reach and Malcolm Dick

1.10 Malcolm Dick owns Blue Reach. Malcolm has started a number of telco businesses in Australia and New Zealand (e.g. as co-founder and owner of CallPlus, now merged into Vocus). He has 45% of the investment in the forthcoming Hawaiki submarine cable between Australasia and the US: the cable has synergies with the Blue Reach network.

1.11 Blue Reach is a serious player. Malcolm, with his track record of driving competition and consumer benefits – for example, CallPlus led prices down and also built NZ’s largest LLU network – can bring substantial competition and benefits to New Zealanders.

But….

1.12 Blue Reach needs national roaming.

1.13 Our focus is to seek a regulatory framework that in practice enables roaming to be available on reasonable terms and more expeditiously.

Mobile competition has failed

1.14 With one exception - roaming - the options paper is based on the conclusion that *“The mobile market appears to be performing well, driven by three mobile network operators competing for subscribers.”*[2]

1.15 That conclusion is inconsistent with the evidence, some of which we have outlined above and set out in more detail below. It seems to us the options paper focusses on better retail pricing for voice and SMS. But the future is dominated by data. In any event, voice and data has lower prices as OTT players such WhatsApp, FB Messenger, Facetime, Snapchat and Skype have provided vibrant competition in this marketplace. This has forced the incumbents to add more minutes and SMSs to existing bundles and has restrained them from increasing prices.

1.16 Mobile data does not have the same competitive external constraints.

1.17 In addition:

(a) The inability of 2degrees to get a reasonable roaming agreement is, of itself, evidence that the mobile market is performing badly including retail markets. Indeed, the roaming problem identified in the options paper is inconsistent with a conclusion the market is performing well.

(b) The mere fact of 2degrees entered a new roaming agreement is not evidence that the market is working. 2degrees has no other choice but to take whatever terms it can get, and those terms appear to be poor. In the current framework, it has little commercial or regulatory leverage.

(c) That there are only 20,000 MVNO retail customers, which makes this a largely immaterial competitive pressure, also shows that 3 MNOs are insufficient as the MNOs have insufficient incentives to encourage MVNOs

[2] Options paper at Para 9.1).

(and 2degrees has limited ability to provide MVNOs due to its reliance on roaming).

Fixed line/fixed location – the benefits of FWA

1.18 Blue Reach can bring wins too for consumers over fixed line, particularly outside the UFB footprint, (Within the UFB footprint, UFB will out-perform FWA by a substantial margin, but FWA is competitive against DSL).

1.19 As the Commission's latest Annual Telecommunications Monitoring Report confirms:[3]

> "Fixed wireless technology starts to offer real substitute for copper".

Market failure in fixed line copper services

1.20 Structural separation of itself does not solve fixed line market problems. When the price RSPs pay for copper inputs to Chorus goes down $4 per month, but the retail price does not drop at all, that is a sure sign of lack of competition. As the Commission said in the same report:[4]

> Looking at the bigger picture, wholesale broadband prices are $4 lower than 18 months ago, but the most popular voice and broadband retail bundles are generally a little more expensive, albeit with higher data caps.

1.21 In other words, the competitive landscape is such that retail prices have gone up, despite the drop in wholesale input prices of $4 per month. In a competitive market, a drop in wholesale input prices should be largely passed through in reduced retail prices. That has not happened, implying that the market is too concentrated. The diagram at Appendix A shows why. The market players have shrunk over time by acquisitions, etc, from around 60 to 3 major players in fixed line (Spark/Vodafone/Vocus) controlling around 95% of the market. Open access, separation and even multiple listed RSPs (mostly minnows) do not solve this.

1.22 Over fixed line, the same Commission report also notes high fixed line retail data costs as at March 2016. It noted that:[5]

> There is also a familiar pattern: the more data included in the basket, the more the New Zealand price is above the international average.

1.23 Again, as data consumption increases rapidly, this retail pricing issue becomes more acute.

How Blue Reach can help bring better retail prices and services to NZ consumers

1.24 As a standalone FWA provider, Blue Reach can compete without paying fixed line input costs. An RSP like Spark however, with FWA offerings such as Skinny, provides more muted competition as it will not cannibalise and lower prices where that impacts revenues from copper services.

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[3] At Page 10
[4] At Page 25
[5] At Page 24

Blue Reach can reduce retail prices over both copper and mobile

1.25 The combined play by Blue Reach can bring benefits in both fixed and mobile, but this depends on getting reasonable roaming terms relatively expeditiously.

Blue Reach is a significant disruptor

1.26 The Ofcom report referred to below outlines, and treats empirically, the powerful impact on markets of firms who take a “disruptive” approach.

1.27 Blue Reach is a substantially more significant potential disruptor than 2degrees for a number of reasons, including:

(a) Malcolm Dick has a strong track history in Australia and New Zealand of disruption in the telco sector;

(b) Blue Reach is a wholesale only network. It is also open access. By necessity, it must have multiple RSPs on its network, essentially forcing the equivalent of growing the MVNO market. That magnifies the competition;

(c) 2degrees has had, and continues to have, substantial constraints in getting wider traction in the market;

(d) Blue Reach takes the competition from 3 MNOs to 4 MNOs, with the implications reported by Ofcom of 4 competing instead of 3.

(e) Blue Reach targets not only mobile: it also targets fixed location access, where it can be a major disrupter as well.

Proposals for changes to the Act

1.28 We propose:

Question	Proposal
59, 65, 70, 71 and 76	• Merits review for all decisions, including on non-fixed line determinations. • Merits review on Schedule 3 decisions
66	The Commission does not have sufficient tools to deal market behaviour such as pocket pricing, inefficient end-user switching etc. In particular, the current Act focusses on the wholesale, but, for example, pocket pricing arises in the retail layer where the Commission has only limited powers. The Act should be extended to enable the Commission to deal with these issues at retail level.
65,69 and 72	We agree with the proposed changes, other than legislation providing for 1 or 2 step pricing.
70 and 71	• Remove step by which Minister approves changes, so that the service is added, deleted or changed directly following the Commission’s decision.

	• Move national roaming, by amendment to the Act, from specified to designated.
	
	• Add a hard stop for decision whether to investigate: 30 working days from a party's request to investigate.
	
	• Clarify that a Sch 3A undertaking process:
	
	  o cannot affect the 120 working day hard stop for the Sch 3 investigation; and
	
	  o is for the Commission, solely, to decide.

Structure of this submission

1.29 We have set out our submissions in the following order:

(a) Overview of Blue Reach and its owners;

(b) Overview of the mobile market;

(c) Excessive mobile retail pricing and implications;

(d) Fixed line issues;

(e) Mobile market problems negatively affect other telecommunication markets;

(f) Proposed changes to the Act.

2. Blue Reach and its owners – an overview

2.1 We provide this overview to show that Blue Reach can bring substantial benefits to NZ consumers, including as a proven disruptive operator.

2.2 Blue Reach is establishing a national network for fixed wireless and mobile services. The network is operating but it is at early stages. As a fixed wireless provider, it supplies services to fixed locations, as do copper, fibre and cable/HFC based services, and other Fixed wireless (FWA) services such as Spark's and Vodafone's.

Blue Reach's owner and track history

2.3 The company is owned by Malcolm Dick. Malcolm has started a number of very successful telco businesses in Australia and New Zealand, as a serial entrepreneur. Following telecommunications deregulation in 1993, he and Annette Presley set up Call Australia and other RSPs: the business went from zero to over $100M annual revenue in 3 years.

2.4 Having sold that business and returned to New Zealand, they set up the CallPlus, i4free, Slingshot, 2Talk and Flip businesses from 1997 onward, growing revenues to over $250M per annum and making it the 3rd largest fixed line telco. The business was sold to Australian telco, M2, and then last year by M2 to Vocus. Malcolm retained the spectrum referred to below and that was excluded from the sale.

2.5 CallPlus and the related brands and businesses had a disruptive approach to the market, for example, as price leader to lower prices, and also as the largest unbundler in New Zealand, which was a substantial investment and competitive influence.

2.6 Malcolm is also a 45% investor in the Hawaiki submarine cable linking Australasia and the States, and there are synergies between that cable and Blue Reach, as the Blue Reach network can integrate with Hawaiki services

Blue Reach

2.7 Blue Reach is a pure wholesale business and is encouraging regional and other businesses to enter the fixed line replacement/mobile MVNO business on an open access basis, with pass-through pricing for the core incumbent-provided services such as fixed/mobile/0800 interconnect, number ranges, porting, roaming, regulatory obligations, and connectivity to LFCs. The reason we are doing this is because it is difficult, costly and time consuming for regional players and smaller national players to do this individually.

2.8 Blue Reach's commercial proposition will be to provide one-stop white label billing and operational support systems to enable retail businesses to concentrate on collecting customers, providing them with high quality local support and adding value by incorporating other services into their offering.

2.9 Blue Reach is also providing fixed line replacement services to a number of 2nd Tier Telcos.

2.10 Blue Reach will move to new 5G technologies which provide even greater FWA and mobile speeds than current technology, 4G, and greater throughput as well, so that contention is less of an issue.

2.11 Blue Reach's model is to have voice and SMS carried over data rather than the current voice/SMS technologies used by existing data providers. That is further reason why mobile data pricing at wholesale is important for new mobile entrants. We expand on that below.

2.12 The spectrum we have is primarily 30 MHz of LTE spectrum in the 2.5GHz band.

2.13 We also have 20 MHz of 1800 spectrum (the old guard band which is now usable), 5MHz of 2.0MHz and 14 MHz of 3.5MHz LTE spectrum. In addition, we are actively seeking additional spectrum as we do not have enough in the long term.

Blue Reach is a serious player

2.14 The network is to be a national network and that means that access to national roaming is required while the network is being built out.

3. Mobile wholesale market - overview

3.1 While there are 3 mobile network operators (MNOs), 2degrees has more limited national coverage over its own network (and its 4G coverage is only around 70% of the population, compared to Spark and Vodafone each at 90%).[6]

[6] Commission's 2015 Annual Telecommunications Report at Page 28

3.2 2degrees relies on a commercially negotiated roaming agreement with Vodafone, which is understood to contain relatively poor price and non-price terms, such as providing only 3G coverage even though 4G is available from Vodafone over the same footprint.

3.3 The commercial negotiations between Vodafone and 2degrees have occurred in an environment of minimal regulatory backstop pressure.

3.4 There is little incentive on MNOs to compete down the roaming terms: the opposite is the position. That is because (a) they are in duopoly conditions and (b) discouraging more effective competition outweighs revenues from the roaming agreement.

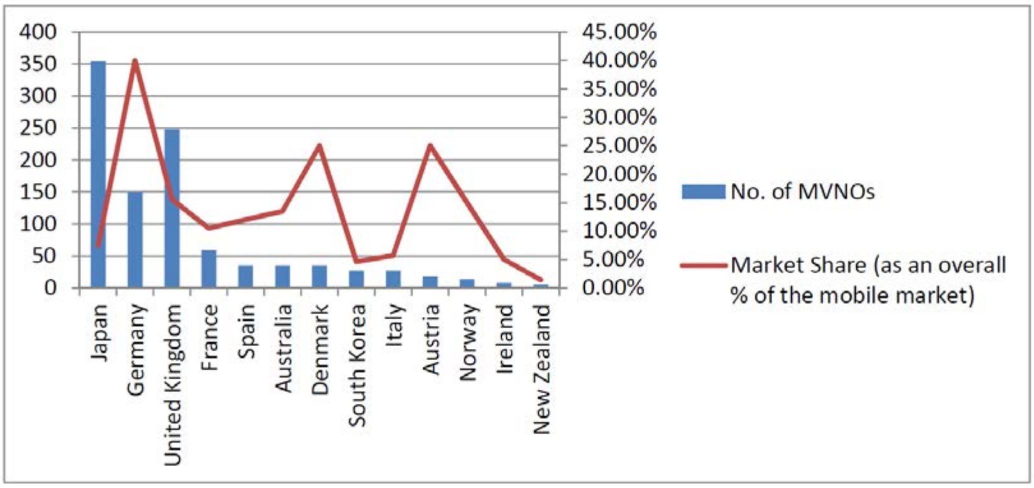
MVNOs – the current position

3.5 For similar reasons, the MNOs have low incentives to compete the price and non-price terms on MVNO services downwards. To the contrary, they have greater incentives to keep MVNOs out of the market, and to minimise the prospect of MVNOs taking away their retail customer base and competing down retail prices.

3.6 Therefore, as the Commission's latest Annual Telecommunications Report confirms,[7] there is only a "handful" of MVNOs (around 6), with MVNO subscribers being under 20,000 as at June 2015 (an immaterial number compared to total MNO subscribers).

3.7 This is also shown in the following figure: other comparator countries have dozens and sometimes hundreds of MVNOs, accounting for anywhere between 10% to 40% of retail market share, compared to our 2%.

Figure: Number of MVNOs tracked against market share[8]



3.8 That lack of market impact follows from the too restrictive terms on which MVNOs are offered – both price and non-price. This is marked for example, by

[7] The 2015 report at Page 28

[8] Sourced from Trustpower's October 2015 submission on this review, where it is stated: "Data drawn from a variety of sources, primarily OECD, 2014, "Wireless Market Structure and Network Sharing", OECD Digital Economy Papers, No. 243, OECD Publishing; and McKinsey & Company, Virtually mobile: what drives MVNO success, June 2014, p3; Pyramid Research, Market Opportunities and the Evolution of MVNO Business Models in Western Europe, 2014. For a more comprehensive list of sources please refer to Attachment B" of that Trustpower submission.

offerings such as MVNO services based on retail minus and the MNO's own retail constructs, etc (so called "thin" MVNOs). It also shows that Telcos of sufficient scale to build subscriber numbers have not been able to do so. That there are only 20,000 customers demonstrates this.

3.9 That nearly non-existent MVNO market is an international outlier by a substantial margin.

3.10 This is not a factor of the small size of the New Zealand market, as other small countries have a significantly larger and more effective MVNO sector, and they have a substantial portion of mobile retail revenues over MVNO on top of MVNO.

3.11 This is shown by the above figure. As Trustpower has submitted on this review:[9]

> "The presence of a vigorous MVNO sector is not necessarily a function of a mobile market being larger than that found in New Zealand. As [the Figure above] shows, countries which face similar challenges of scale and which have 3 or fewer MNOs, such as Norway, Australia, Ireland and Austria, have many more MVNOs, accounting for 6 to 20 times more market share than the current pool of New Zealand MVNOs."

4. Mobile data retail pricing

4.1 There is a clear trend of expanding mobile data usage, as more and more content is sent wirelessly, and with the move toward integrated mobile and content bundles, including quad plays with fixed line broadband. Thus, mobile data is a key service for new entrant mobile operators, whether MNO or MVNO.

4.2 That is the more so for Blue Reach, as its voice and SMS services will be provided by way of data streams. For its roaming agreements, it wishes to acquire airtime or similar (essentially a bucket of airtime/data).

High mobile retail data pricing

4.3 The data used by the Commission, and summarised in this section, is from February 2016.[10] This table is from that report:

Table 4: Results of mobile broadband benchmarking

		Dec 2015 price (NZD PPP)			NZ % price var. from	
Mobile phone services basket	NZ rank	NZ	Australia	Average	Australia	Average
1.5GB GST included	28/34	30	10	20	191%	46%
6GB GST included	33/34	70	40	36	74%	95%

Source: Teligen

4.4 Given the trend toward much larger mobile data use, of particular concern is that mobile data retail pricing is higher than nearly all other OECD countries.[11] The 1.5 Gb and 6 Gb data services referred to in the Commission's report, and outlined in the above table, are around 50% and 100% higher than the OECD averages respectively. New Zealand ranks 28th and 33rd out of 34 countries, for the 1.5GB and 6Gb packages respectively.

[9] In their October 2015 submission
[10] 2015 Annual Telecommunications Monitoring Report at Page 38.
[11] 2015 Annual Telecommunications Monitoring Report at Page 40

4.5 This demonstrates that consumers are paying too much – and often considerably too much – for their mobile data services. It also demonstrates, as does the weak and almost non-existent MVNO market, that the combination of 3 MNOs – one of which has a limited footprint, with only 70% at 4G speeds – is leading to substantial market failure.

5. The European experience

5.1 In the EU there has been a number of attempts to get clearances to mergers between 2 MNOs, thereby reducing 4 MNOs down to 3. The Commission has concluded that the remaining 3 MNOs after the merger would not facilitate sufficient competition between the networks. Therefore, the Commission has generally not permitted the merger until the merging networks have entered into a contract with a third party MVNO, to supply MVNO inputs on reasonable price and non-price terms. In other cases, the Commission has refused the clearance.

5.2 The MVNO terms required by the regulator are at the so-called “thick” end of the spectrum, that is, the MVNO obtains airtime and data, and itself undertakes most of the other services as part of its retail offering. New Zealand’s current MVNOs are “thin” MVNOs (that is, they are close to replicating the retail constructs of the wholesaling MVNO and that restricts pricing and product differentiation options).

5.3 By means of the mandated thick MVNO, the European Commission has retained competition between 4 networks, with the MVNO being comparable in competitive effect to a full MNO.

5.4 In relation to a 2016 clearance application – to enable Hutchison and O2 to merge in the UK, reducing 4 MNOs to 3 - the European Commission in 2016 refused to clear the merger because the proffered MVNO terms were not acceptable. Other 4 to 3 MNO mergers were cleared, such as the 2016 clearance of the merger in Belgium of MNOs, BASE and Liberty Global, on the basis that thick MVNOs were established so there is an effective 4th operator.

5.5 On 1 September 2016, the EU has confirmed that position again, by allowing 2 out of 4 MNOs in Italy to merge, only if the 2 merging MNOs gave network assets to another player so it could become the 4th MNO.

5.6 The regulator identified that having only 3MNOs, consumers would result in:[12]

> “less choice and a decrease in quality of services for consumers, as well as higher retail mobile prices charged by all operators.”

5.7 Having only 3 MNOs would, said the EU regulator, have made it easier and more likely that the MNOs would coordinate their competitive behaviour (such behaviour includes tacit collusion), and that would: [13]

> “likely have led to a further increase in retail mobile prices”

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[12] EU, *Commission approves Hutchison/VimpelCom Joint Venture in Italy subject to conditions.* 1 September 2016. http://europa.eu/rapid/press-release_IP-16-2932_en.htm The formal reasons have not yet been released.
[13] EU, *Commission approves Hutchison/VimpelCom Joint Venture in Italy subject to conditions.* 1 September 2016. http://europa.eu/rapid/press-release_IP-16-2932_en.htm The formal reasons have not yet been released.

5.8 Having only 3 MNOs would also negatively impact the availability of viable MVNO terms, as new entrants: [14]

> "Would have had less choice of host networks and hence a weaker negotiating position to obtain favourable wholesale access terms"

Relevance to New Zealand

5.9 This supports the conclusion that 3 MNOs do not provide for sufficient competition. This is reflected in NZ by facts such as mobile data retail pricing which is almost the highest in the OECD, the lack of effective MVNOs, and the poor roaming terms available to 2degrees.

6. Another NZ MNO potentially drops prices by around 19% - Ofcom

6.1 A March 2016 Ofcom *report, A cross-country econometric analysis of the effect of disruptive firms on mobile pricing,*[15] analyses the position in 25 developed countries including New Zealand, It concludes that retail prices for mobile services:[16]

> "are between 17.2% and 20.5% lower on average in countries where there is one additional mobile operator [above 3 operators] AND a disruptive firm is in the market".

6.2 As we explain below, Blue Reach is such a "disruptive firm".

6.3 Ofcom's conclusion is based on the difference between 3 and 4 mobile operators in the market as the report was prepared in the context of the European Commission's review of the abovementioned proposed merger in the UK between MNOs, H3G and O2, which would take the number of operators from 4 to 3.

6.4 Ofcom concluded:

> "Combining the two sets of confidence intervals indicates that prices could be between 17.2% and 20.5% lower on average in countries where there are four or more mobile operators AND a disruptive firm is in the market. By implication, this may suggest that removing a disruptive player from a four player market (as is proposed in the H3G/O2 merger in the UK) could increase prices by between 17.2% and 20.5% on average, all else being equal."

6.5 As to be expected, the Ofcom report concludes as well that less than 4 MNOs, and without a disruptive operator, can take the form of product quality being kept low, as well as higher prices:[17]

> Consumer harm in concentrated markets can arise even without a single dominant company or companies engaging in overt collusion.

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[14] EU, *Commission approves Hutchison/VimpelCom Joint Venture in Italy subject to conditions.* 1 September 2016. http://europa.eu/rapid/press-release_IP-16-2932_en.htm The formal reasons have not yet been released.
[15] http://stakeholders.ofcom.org.uk/binaries/research/cross-media/disruptive-firms-econometrics/research_document.pdf
[16] At page 17
[17] At

It may take the form of prices being substantially above costs or product quality being low.

Implications for New Zealand

6.6 Of course, New Zealand already has only 3 MNOs, and therefore the econometric analysis across 25 countries including New Zealand firmly supports the conclusion that consumers may well be paying too much and/or receiving lower quality services.

6.7 Blue Reach is able to be the 4th MNO, as well as being a FWA provider, competing against fixed line and other FWA providers. Blue Reach is also a disruptive provider as we note below.

Ofcom explains why disruption AND another operator are important

6.8 The Ofcom report explains why market disruption is important in this context:[18]

> "Generally, disruptive players (that do not follow the crowd and actively disturb existing market dynamics) have been seen by regulatory authorities as having a positive effect on markets for their ability to increase competition, with policies to encourage disruptive entry commonly explored. In addition, competition authorities have sometimes paid particular attention to disruptive players or "maverick" competitors in their decisions, for example, on mergers."
>
> "We are interested in market disruption because of the effect it can have on competitive intensity in a market. Under certain conditions, markets may reach undesirable outcomes where prices are substantially above costs and/or product quality is low, even without a single dominant firm or players engaging in overtly collusive behaviour. This may be the case in markets with relatively few large competing firms, a market structure that is prevalent in the communications sector. Disruption, or even the threat of disruption, can disturb these market dynamics and promote competitive rivalry amongst players, ultimately to the benefit of consumers."
>
> "We consider that market disruption can arise for a number of reasons….. National regulatory authorities can create the right conditions for it to emerge or continue through merger control, removing entry barriers, preventing strategic responses from incumbents etc. but these are all things we would do anyway to promote competition more generally."

Who are disruptive operators?

6.9 Ofcom explain this as follows:[19]

> Disruption is a strategic choice made by firms and is something that happens exogenously. However, once it emerges, we are keen to protect disruption to retain the consumer benefits associated with it.

[18] At page 2 and 3
[19] At page 3

> These benefits may take the form of lower retail prices or improved product offerings. ….
>
> Ultimately, our view is that a level of disruption which encourages firms to invest and remain competitive in the market is likely to maximise the benefits to consumers in the long term.

Blue Reach is a stronger disruptive operator than 2degrees

6.10 As noted above, Ofcom concludes that 2degrees is a disruptor (and therefore the entry of a 4th MNO such as Blue Reach will have incremental impact as the market moves beyond 3 MNOs).

6.11 However, Blue Reach is a substantially more significant disruptor than 2degrees for a number of reasons, including:

(a) Malcolm Dick has a strong track history in Australia and New Zealand of disruption in the telco sector;

(b) Blue Reach is a wholesale only network. It is also open access. By necessity, it must have multiple RSPs on its network, essentially forcing the equivalent of growing the MVNO market. That magnifies the competition;

(c) 2degrees has had, and continues to have, substantial constraints in getting wider traction in the market, particularly:

(i) beyond pre-pay customers (which means that its revenues are considerably lower on average per customer than Vodafone and Spark);[20]

(ii) it has had little traction in the business retail market;

(iii) it is held back by unfavourable roaming terms with Vodafone; and

(iv) it is suffering from issues relating to being a later entrant against two strongly established incumbents, when the cost of rolling out networks was much higher than it is now.

(d) Blue Reach takes the competition from 3 MNOs to 4 MNOs, with the implications reported by Ofcom of 4 competing instead of 3.

(e) Blue Reach targets not only mobile: it also targets fixed location access, where it can be a major disrupter as well. We turn to that now.

7. Fixed Wireless/fixed line/fixed location markets

7.1 Blue Reach's service, in addition to mobile, is an FWA service, providing competition in the fixed location, fixed line space. Given FWA cannot provide the quality of service available over fibre, the primary focus of Blue Reach's service is outside the FWA footprint.

[20] See Commission's 2015 Annual Telecommunications Monitoring Report

New Zealand has high fixed line data prices

7.2 Fixed line data usage is increasing exponentially. For example, the Commission's latest monitoring report shows[21] that each fixed line subscriber on average "hit 48 Gb per month in 2015, well up from the 32Gb recorded for 2014". That is just the start, given the trends with Pay TV, OTT, etc.

7.3 However, as to New Zealand fixed line retail pricing, as at March 2016, the Commission observed that pricing is generally above the OECD average. It noted that:[22]

> There is also a familiar pattern: the more data included in the basket, the more the New Zealand price is above the international average.

7.4 As data consumption increases rapidly, this pricing issue becomes more acute.

Despite separation there are coordinated effects over fixed line

7.5 In the same monitoring report, the Commission stated:[23]

> Looking at the bigger picture, wholesale broadband prices are $4 lower than 18 months ago, but the most popular voice and broadband retail bundles are generally a little more expensive, albeit with higher data caps.

7.6 In other words, the competitive landscape is such that retail prices have gone up, despite the drop in wholesale input prices of $4 per month. In a competitive market, a drop in wholesale input prices should be largely passed through in reduced retail prices.

7.7 But that has not happened, indicating the value of additional competition as to fixed line/FWA services. This implies that current market structures, where there are three RSPs much larger than the rest, do not produce conditions by which price drops in wholesale inputs are competed away.

7.8 Additionally, the parties offering FWA (Spark and Vodafone in particular) are also major fixed line providers over copper and fibre. Thus, they are largely not a competitive constraint on fixed line providers generally, for they do not have incentives to use FWA to compete down their pricing including over fibre and copper.

7.9 Blue Reach however is solely a wireless FWA provider in relation to services to fixed location customers. It also does not have to pay Chorus and LFC input costs for local access via copper or fibre. It, and its wholesale customer RSPs, are well placed to compete and bring benefits to consumers.

8. Mobile market failure erodes other telecommunications markets

8.1 The problems become more acute as, over the short to medium term, data intensive mobile use such as for TV and OTT content is integrated into triple and quad plays. Just as Pay TV content can be a bottleneck, so too can mobile access where there are only 3 MNOs, leading to market failure. A bundle which includes fixed line (over the open access platform, designed to stop abuse of

[21] At Page 22
[22] At Page 24
[23] At Page 25

bottleneck inputs) and mobile can have the anti-competitive outcomes from the bundle, due to bottlenecks now in the mobile part of the bundle instead of fixed line.

8.2 Further, competitors outside the 3 MNOs cannot compete adequately in the triple and quad play space.

9. Proposed changes to the Act

9.1 We have summarised these in the table in the introduction and summary above.

9.2 Critically, all of our submissions above are integral to the conclusions, summarised here.

Expediting the Schedule 3 process

9.3 We agree with having:

(a) a 120 working days' hard deadline for the Commission to make the Sch 3 decision (60 working days for moving a service from specified to designated, with no conference);

(b) a one shot Sch 3A undertaking process, on the basis that the 120 working days noted above is not affected by the undertaking process.

9.4 With planning by the Commission, around 6 months to recommendation is manageable, and the benefits substantially outweigh the problems of downside of hard stops. This can be managed.

Eliminate the Ministerial step in Schedule 3

9.5 The Commission's role under Schedule is only to recommend regulation (or not) to the Minister. The actual decision is made via Order in Council on the recommendation of the Minister (the only restriction is that the Commission must have recommended the change).

9.6 From a policy perspective, that takes away the role of the Commission, as a regulator independent of Government. The regulator cannot perform that independent function.

9.7 It is also not consistent with New Zealand's legal commitment – and therefore unlawful - to have an independent regulator deciding regulation, pursuant to the Telecommunications Annex and Reference Paper, under GATS. Nor is it consistent with New Zealand's APEC commitments. This is the opportunity to remedy the position.

9.8 In practice, much of the delay in introducing a change to Sch 3 has occurred during the time the Minister was dealing with the recommendation, including considering further proffered undertakings. That is the period after the proposed 120 working days' hard stop.

9.9 Therefore, Sch 3 should be amended, along with s 66, to have the final decision on adding, changing or deleting services made by the Commission.

Merits review for determinations and Sch 3 decisions

9.10 We agree there should be merits review for fixed line determinations as proposed at Para 7.8 of the options paper.

9.11 For similar reasons given there, merits review should extend to both Sch 3 decisions and also non-fixed line determinations. Para 7.8.2 justifies merits review on the basis of long term implications. Sch 3 decisions and other determinations also have substantial and long term implications. Having no appeal rights on Schedule 3 means that access seekers and providers are deprived of review rights on critical issues (other than limited judicial review as to process issues). For example, as to Blue Reach, an adverse decision on roaming at the Sch 3 stage can mean the business does not survive, and that consumers do not get the benefits, outlined above, of a 4th MNO. That implies consumers paying 19% more for example, which has "substantial and long term implications". Appeals as to questions of law are too limited for what is at stake in relation to non-fixed line determinations.

Period between request to commence Sch 3 investigation and decision to investigate

9.12 We propose that that be limited to 30 working days, as this also can be a source of delay, and a hard stop will assist in expediting the position.

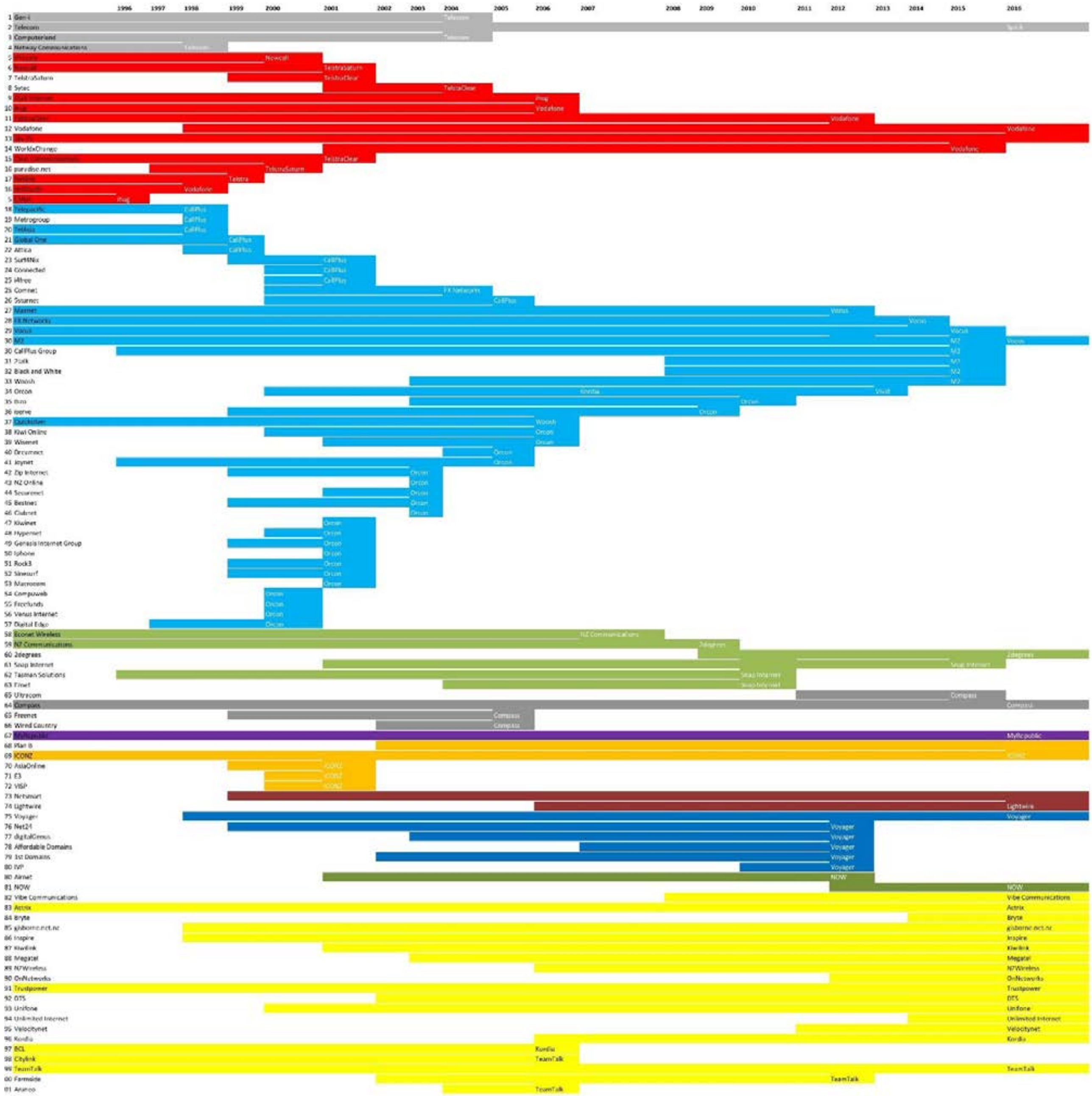
Move national roaming from specified to designated

9.13 Regulation of services as to non-price terms only is unworkable and of itself makes no difference. There is little point in having only a non-price terms determination. In any event, the problems as to roaming are sufficiently established for Government to legislate to move national roaming from specified (non-price terms only) to designated (price and non-price terms). That valuably bypasses the Sch 3 process, as Government has done on a number of occasions, such as for LLU, UBA and UCLFS.

One and two step pricing models

9.14 The Commission has wide enough power already to recommend any pricing model, and this does not need to be specified. The level of prescription in the Act has been problematic due to changing circumstances, and this should be kept to a minimum.

Appendix A.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