

Review of National Roaming

**Final decision on whether to commence an investigation under clause 1(3) of
Schedule 3 of the Telecommunications Act 2001**

Decision No. [2023] NZCC 24

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Acronyms and abbreviations

Term	
Act	Telecommunications Act 2001
Commission	Commerce Commission
MNO	Mobile Network Operator
MoRAN	Multi-operator Radio Access Network
MVNO	Mobile Virtual Network Operator
Provider	A telecommunications service provider
Subscribers	Customers of mobile network operators

Executive summary

1. The Commerce Commission (**Commission**) is required to consider, at intervals of no more than 5 years after the date on which a specified service came into force, whether there are reasonable grounds to commence an investigation into whether the service should be omitted from the list of specified services in Schedule 1 of the Telecommunications Act (**the Act**).¹
2. The Commission released its draft decision on 12 June 2023, where it set out its preliminary view that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming service from Schedule 1 of the Act.² The Commission invited submissions on its preliminary view by 10 July 2023, and received submissions from Spark, One NZ, 2degrees, and TUANZ.
3. Having considered the submissions received on the Commission's preliminary view, the Commission's final view is that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming specified service from Schedule 1 of the Act.
4. This document responds to submissions on our preliminary view and summarises the reasons for our final decision.

¹ Clause 1(3) of Part 1 of Schedule 3 of the Telecommunications Act

² <https://comcom.govt.nz/regulated-industries/telecommunications/projects/2023-review-of-national-roaming?target=documents&root=318064>

Chapter 1: Introduction

Purpose

5. This paper sets out our final decision on whether there are reasonable grounds for commencing an investigation into whether National Roaming should be omitted from Schedule 1 of the Act.

Structure of this review

6. Following this introduction, which summarises relevant background information, the remainder of the decision paper has the following structure:
 - 6.1 **Chapter 2: Our legislative framework** discusses the relevant legal framework for this review.
 - 6.2 **Chapter 3: Outline of our preliminary view** summarises the key factors that were considered in forming our preliminary view.
 - 6.3 **Chapter 4: Our final decision** presents our final decision and addresses submissions we received on our preliminary view. It provides the reasons for our final decision that there are currently not reasonable grounds for commencing an investigation into whether National Roaming should be omitted from Schedule 1 of the Act.

Background and context for this review

What is a Schedule 1 service?

7. Schedule 1 of the Act contains the regulated wholesale services, which are designated access services and designated multinet network services (known together as designated services), and specified services. For designated services, we are able to determine price and non-price terms of access, but we are limited to determining only non-price terms of access for specified services.
8. Schedule 1 describes each regulated service and the general conditions of access, and so can form the basis for access seekers and access providers to negotiate agreement.
9. Schedule 1 currently contains 11 regulated services, including nine designated services and two specified services. The National Roaming service which is the subject of this review is a specified service.

Why we have conducted this review of the National Roaming service

10. As markets evolve at both the retail and wholesale level, access providers of Schedule 1 services such as National Roaming can face increased competition. These market developments can indicate that it may no longer be necessary to mandate access to a Schedule 1 service.
11. To ensure that the scope of regulated access in Schedule 1 of the Act remains appropriate, the Commission is required to periodically consider whether regulation

is still justified. These reviews are concerned with whether regulation may no longer be needed to promote competition for the long-term benefit of end-users in terms of the purpose statement in section 18 of the Act.

12. Therefore, the question we are considering for this review is whether, in light of the section 18 purpose of the Act, there are reasonable grounds for commencing an investigation into whether National Roaming should be omitted from Schedule 1 of the Act.

What is National Roaming, and why is it a specified service?

13. Coverage is an important feature of being able to offer competitive mobile services at the retail level. A new mobile network operator (MNO) can increase the coverage of retail mobile services it offers to subscribers in a number of ways:
 - 13.1 by building its own network infrastructure (including passive infrastructure such as towers);
 - 13.2 by co-locating its active equipment on the existing tower infrastructure of another operator; or
 - 13.3 by gaining wholesale roaming access to another network.
14. Experience suggests that a new MNO entering the market is likely to require a roaming arrangement while it deploys its own infrastructure. The existing regulatory framework provides a regulatory backstop for commercial negotiation of roaming arrangements.
15. Roaming provides access to different generations of mobile technology and allows extended geographic reach, such as nationwide 4G access for an MNO offering 5G services in selected geographic areas.

Timing and scope of this review

16. We are required to review each Schedule 1 service at least every 5 years, starting from the time the service came into force. The National Roaming service was last reviewed in September 2018, meaning the current review must be completed by September 2023.
17. This review is limited to considering whether there are reasonable grounds for commencing an investigation into whether the National Roaming service should be omitted from Schedule 1 of the Act.
18. Although we are required to consider each Schedule 1 service at least every 5 years, we are not limited to a 5-year cycle. The telecommunications industry is characterised by a high rate of technological change, where services and competitive constraints can develop quickly. Clause 1(1) of Schedule 3 of the Act empowers us to commence an investigation on our own initiative into whether any Schedule 1 service should be added, omitted or amended, provided we are satisfied there are reasonable grounds for such an investigation. We are therefore able to revisit the

scope of regulation before the conclusion of the next 5-year interval to reflect commercial or technological developments, where reasonable grounds exist.

Our process

19. Table 1 below sets out the process we have undertaken for this review.

Table 1: Our process

Milestone	Indicative date
Preliminary View published	12 June 2023
Submissions on draft decision due	10 July 2023
Final decision published	30 August 2023

Chapter 2: Legislative framework

21. Clause 1(3) of Schedule 3 of the Act requires that the Commission consider, at intervals of not more than 5 years after the date on which a designated service or specified service comes into force, whether there are reasonable grounds for commencing an investigation into whether the service should be omitted from Schedule 1 of the Act.
22. Where a designated service or specified service is amended or altered, the effective date of that service coming into effect is the date the altered or amended service came into effect. The National Roaming service was amended on 11 September 2008. Therefore, the current 5-year interval for the National Roaming service ends on 11 September 2023.³
23. A review by the Commission under clause 1(3) of Schedule 3 of the Act is limited to considering whether there are reasonable grounds for commencing an investigation into whether the service should be removed from Schedule 1. It does not extend to considering introducing a new service or amending an existing service.
24. If the Commission decides that there are reasonable grounds for commencing an investigation into whether a designated service or specified service should be omitted from Schedule 1 under section 66(b), the Commission must commence the investigation not later than 15 working days after making that decision.⁴
25. The Commission may, on its own initiative commence an investigation into whether or not Schedule 1 should be altered if the Commission is satisfied that there are reasonable grounds for an investigation into the matter. The investigation can happen at any time and would follow the same process as required under Schedule 3 for an investigation resulting from a 5-year review.

What are considered reasonable grounds to investigate?

26. In reaching a view on whether there are reasonable grounds for commencing an investigation, section 19 of the Act requires us to make the decision that will give, or likely best give, effect to the purpose set out in section 18 of the Act. The section 18 purpose is:

"...to promote competition in telecommunications markets for the long-term benefit of end-users of telecommunications services within New Zealand by regulating, and providing for the regulation of, the supply of certain telecommunications services between service providers."

³ The Gazette notice was published on the 14th August 2008, available at www.legislation.govt.nz/regulation/public/2008/0251/latest/DLM1450501.html - Telecommunications (National Roaming) Order 2008 (SR 2008/2511). The effective date of this Order is 28 days following the publication in the Gazette, therefore the date from which to determine the 5-year period is 11 September 2008.

⁴ Schedule 3, clause 1(5).

27. The Commission considers that reasonable grounds to investigate whether a service should be omitted from Schedule 1 exist where it appears that competition may have developed to such an extent that continued regulation is no longer necessary to best promote competition in telecommunications markets for the long-term benefit of end-users.⁵
28. In forming our view, we have considered the current state of competition and the changes that have occurred within the New Zealand telecommunications market since the last review, as well as changes since the service was first regulated. In applying the test in paragraph 27 we have also taken into account the likely costs and benefits associated with retaining the specified service backstop.

⁵ This is consistent with previous reviews of Schedule 1 services the Commission has conducted.

Chapter 3: Outline of our preliminary view

29. The Commission released its preliminary decision on 12 June 2023 and invited submissions by 10 July.
30. The Commission's preliminary view was that there were not reasonable grounds to commence a Schedule 3 investigation into the removal of the National Roaming service from Schedule 1 of the Act. We expressed the reasons for this as follows:
 - 30.1 regulation operates at the lower "specified service" level, meaning roaming providers are free to set prices on commercial terms;
 - 30.2 any costs associated with retaining the specified service backstop do not appear to be material, and are likely to be outweighed by the benefits of retention;
 - 30.3 regulation has not constrained the ongoing development of the New Zealand mobile market;
 - 30.4 the impact of emerging technologies, such as low earth orbit (LEO) satellites, and the effect these may have on the need for roaming arrangements in the future, remains uncertain at this point; and
 - 30.5 it is not yet clear whether the market is sufficiently competitive to make roaming regulation unnecessary.
31. The Commission also noted that recent 5G spectrum allocations and the potential for 5G to be used on a standalone basis leave open the possibility of future entry in the New Zealand mobile market.
32. In the following chapter, we discuss the submissions received on the Commission's draft view, and we set out the reasons for confirming our preliminary view in our final decision.

Chapter 4: Our final decision

33. This chapter outlines the reasons for our final decision. We first provide a summary of the submissions we received on our preliminary view. We then respond to these submissions and set out our final decision that there are currently not reasonable grounds for commencing an investigation into whether National Roaming should be omitted from Schedule 1 of the Act.

Competition in roaming

34. Spark submitted that there have been significant changes in the market since the Commission's first investigation into amending the National Roaming service in 2008. 2degrees is now an established third mobile operator and no longer relies on roaming. According to Spark, the market is delivering outcomes for consumers consistent with those expected from a competitive market. As examples of this, Spark noted that consumer prices benchmark well against prices in other OECD countries; that the Commission's market monitoring had highlighted that consumers are paying less for mobile services and consuming more; that operators continue to make significant investment in capacity and in new capability; and that there are significant levels of customer engagement with respect to switching plans and providers.
35. One NZ submitted that there is unlikely to be a fourth traditional entrant into the New Zealand mobile market. Any further entry into the market would likely occur in an alternative way, such as a major digital service provider utilising an e-sim offering via network access arrangements with existing network operators. Such a provider is likely to have sufficient market power to leverage entry without the need for National Roaming regulations.
36. One NZ submitted that there are reasonable grounds to argue that market competition has developed to an extent that regulation may now be redundant. It considers it would be prudent for the Commission to review whether the status quo should remain.
37. TUANZ submitted that it has been consistently supportive of the regulation of National Roaming to ensure fair competition in the mobile services market especially as a backstop to failed negotiations for market entrants.
38. 2degrees submitted that the National Roaming service has been an important backstop to its commercial negotiations as it has continued to invest heavily in its nationwide deployment of its mobile network. Based on its own experience entering the market, 2degrees supports the retention of National Roaming as a regulatory backstop.
39. The Commission agrees that competition in the retail mobile market has become more established with three independent, national network-based competitors. This has resulted in mobile consumers benefitting from an increasingly competitive market environment.

40. However, we do not consider that competition may have developed to such an extent that continued regulation is no longer necessary to promote competition in telecommunications markets for the long-term benefit of end-users.
41. A key factor in determining whether or not amending regulation best gives effect to the promotion of competition is the assessment of both current and forward-looking factors that affect competition and market development. These include existing competition and potential competition.
42. Potential competition includes the potential for entry and the significance of any barriers to entry and expansion that may exist. Barriers to entry can take a variety of forms, including structural, regulatory and strategic conditions. In the mobile market, national coverage is considered one of the main conditions of entry. This is particularly significant where a new entrant would be competing against established national mobile operators.
43. Recent 5G spectrum allocations and the potential for 5G to be used on a standalone basis leave open the possibility of future entry in the New Zealand mobile market. We consider that retaining roaming as a specified service remains important for promoting competition, while still giving roaming providers flexibility around commercial pricing of roaming services.
44. We remain of the view that National Roaming will act as an important regulatory backstop in the event of commercial negotiations breaking down.

National Roaming and shifting market dynamics

45. Spark submitted that the transition to 5G networks has materially changed the nature of the market. Spark consider that 5G network market “will be significantly more diverse than the past as private and localised networks are deployed and there is increasing demand for services that do not require a national footprint”. Accordingly, in Spark’s view contiguous 5G coverage is very unlikely to be required by any entrant in the foreseeable future.
46. One NZ submitted that MNOs are currently facing challenging industry economics in the form of increasing investment demands and declining retail prices. One NZ submitted that MNOs are therefore highly incentivised to pursue alternative revenue opportunities, including wholesale roaming under commercial agreements. As an example of this, it cites an arrangement in place since 2020 under which 2degrees provides services using Multi-operator Radio Access Network (MoRAN) equipment installed on One NZ towers.
47. 2degrees submitted that National Roaming as a specified service is an important alternative to its active sharing arrangements.
48. We agree with Spark that coverage will be less of an issue for some 5G-based services such as a fixed wireless home broadband service. However, for mobile services, coverage will continue to be an important feature, and the availability of roaming is likely to remain important for a new entrant to achieve coverage.

49. As referenced above, the Government has recently announced new spectrum allocations to support the rollout of 5G services. The spectrum was directly allocated to each of the three MNOs (each getting 80MHz), and also to the Interim Māori Spectrum Commission (100MHz). The allocations raise the prospect of further new entry (depending on how the 100MHz block ends up being used), for which National Roaming might be important.
50. We agree that in markets where there is sufficient competition between existing infrastructure owners, existing market players have incentives to provide national roaming on purely commercial terms. However, those same existing players may also have incentives to prevent or delay any further new entry, in which case it may be inappropriate to assume negotiations will be quick and effective.
51. In this context, our view remains that regulated National Roaming is a valuable regulatory backstop against which these commercial negotiations take place, providing both an incentive for the incumbent operators to engage on reasonable commercial terms and against a backdrop of a credible regulatory alternative should commercial negotiations fail.

The costs of regulation

52. The Preliminary View paper noted that understanding the cost of maintaining regulation is an important dimension to our decision-making. We requested any views and relevant evidence that parties may have with regard to this.
53. Spark submitted that it is difficult to identify the specific costs as there are few observable administrative costs to regulation and the key implications relate to additional uncertainty faced by operators and investors. However, Spark considered that “the costs are likely to be higher when the removal of regulation is a key component of the wider framework (having important signalling benefits) and in dynamic markets where it potentially distorts investment”.
54. Spark noted there are large risks to 5G network investors if they build 5G networks and that utilisation does not eventuate. In this context, Spark submitted that “continued unnecessary regulation - of any kind - will have a cost and will distort investment incentives”.
55. 2degrees submitted that it considers the current costs of maintaining the existing, specified-only, service are limited. This recognises that changes to the existing service are beyond the scope of this review and 2degrees are not seeking amendments to this service at this time.
56. In the context of National Roaming, we currently consider that the benefits it can deliver to end-users exceed the costs of regulation. We acknowledge the potential for distortions to investment incentives from regulation, but the specified nature of the roaming service mitigates this risk. As National Roaming is a specified service, roaming providers are able to set prices on commercial terms, which provides them with the flexibility to preserve investment incentives.

57. Since the introduction of National Roaming as a specified service we have seen ongoing investment in the mobile networks of all three MNOs, investing in new generations of technology. The specified National Roaming service does not appear to have constrained the ongoing development of the New Zealand mobile market – as seen most recently in the Vocus/2degrees merger, a growing number of mobile virtual network operators (MVNO)s, and the creation of independent tower companies. As Spark noted in its submission, operators have continued to make significant investments in the capacity and capability of their mobile networks, investing around \$830 million in mobile access networks and core and backhaul networks in 2022.

Commission’s approach to regulatory assessment

58. One NZ submitted that the Commission has a responsibility to manage the stock of regulations and it is good regulatory practice to give proper consideration to whether regulations continue to serve a purpose. Given the changes in the market since the national roaming regulations were put in place, it could be argued that they are no longer fit-for-purpose.
59. Spark considers that the Commission’s approach in assessing whether there are reasonable grounds to investigate is biased towards the regulatory status-quo. This is a result of the Commission’s key consideration of whether anything has sufficiently changed in the market since our last review that negates the need for the National Roaming service to remain as a specified service.
60. Spark submitted that an incremental approach that uses the next most recent review as the decision baseline is unlikely to fully expose changes in the conditions that led to the original competition concerns and avoids considering whether the concerns that led to regulation continue to be valid.
61. At our last review, we concluded that the regulated National Roaming service should remain in Schedule 1. We are now required to consider whether there are reasonable grounds to consider deregulation of the National Roaming service. We must assess whether competition has developed to the point where continued regulation may no longer be necessary to achieve the purpose set out in section 18 of the Act.
62. We do not consider that our approach creates a bias towards the status quo making it more difficult for the regulatory threshold to be met. While consideration of developments in the period since competition was last not found to be sufficient is an important part of our review, the focus is always on the totality of competition at the relevant point in time. If competition has developed such that regulation may no longer be required, our view is that there are likely to be reasonable grounds to commence an investigation into whether the service should be deregulated.
63. Spark also notes that the market is dynamic and submits that regulation should therefore be removed. However, as we said in our preliminary view, there remains some uncertainty regarding the potential implications of emerging technologies

(such as low earth orbit satellites) on the need for roaming. As discussed above, we can initiate an investigation into potential deregulation at any point, should we see reason for doing so. It is more prudent to wait for emerging technologies to demonstrate the case for deregulation, rather than assume this will happen.

64. Good regulatory stewardship requires reviewing the system at appropriate intervals to determine whether it is still fit-for-purpose, and likely to remain so in the medium to longer-term. We agree that any review should seek to expose whether concerns that led to the original regulation continue to be valid. In reaching our preliminary view we assessed changes since the prior review, as well as assessment of the current state of competition, which by its nature is a product of all changes since regulation was first introduced.

Commission's final decision

65. Having considered all the available information we do not consider that competition has developed to such an extent that regulation may no longer be required. Accordingly, the Commission's final view is that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming service from Schedule 1 of the Act at this time. National Roaming remains a relevant service for promoting competition in mobile telecommunications markets.