

## **Review of National Roaming**

### **Final decision on consideration of deregulation of national roaming**

**Decision No. [2018] NZCC 14**

Determination under section 1(3) of Schedule 3 of the Telecommunications Act 2001

**The Commission:** Dr Stephen Gale  
Dr Jill Walker  
Elisabeth Welson

**Date of determination:** 4 September 2018

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**Acronyms and abbreviations**

5G	Fifth Generation of cellular networks
Act	Telecommunications Act 2001
IoT	Internet of Things
NR	National Roaming
NESTF	National Environment Standard for Telecommunications Facilities
RSM	Radio Spectrum Management

## Executive summary

1. The Commerce Commission (Commission) is required to consider, at intervals of no more than five 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).<sup>1</sup>
2. The Commission released its draft decision on 9 July 2018 seeking submissions on its preliminary view that there are not reasonable grounds to commence a Schedule 3 investigation into whether to omit the National Roaming (NR) service from Schedule 1 of the Act.
3. Having considered the submissions received on the Commission's preliminary view, the Commission's final view is that, on balance, 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.

## Legislative framework

4. Part 3 of Schedule 1 of the Act describes NR as:<sup>2</sup>

A service (and its associated functions) that enables transmission of cellular mobile traffic by means of the access provider's cellular mobile telephone network between (but not including) the cellular mobile device of the access seeker's end-user and the access seeker's handover point (or equivalent facility) and that enables an end-user who subscribes to an access seeker's cellular mobile service to use services (except value-added services) within the area where the access provider has a cellular mobile telephone network, but which is outside the coverage area of the access seeker's cellular mobile telephone network.
5. Clause 1(3) of Schedule 3 of the Act requires that the Commission consider, at intervals of not more than five 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.
6. The Commission may not consider under clause 1(3) of Schedule 3 of the Act whether or not there are reasonable grounds to commence an investigation into omitting a designated service or specified service earlier than 12 months before the end of the five year interval.<sup>3</sup>

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<sup>1</sup> Clause 1(3) of Part 1 of Schedule 3 of the Telecommunications Act

<sup>2</sup> Part 3 of Schedule 1 includes other features of the NR service such as conditions. This quote only relates to the "description of service" component of the NR service.

<sup>3</sup> Schedule 3, clause 1(4). The Commission may, however, commence a separate investigation on its own initiative at any time in order to propose any amendment to the NR service.

7. 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 NR service was amended on 20 September 2013. Therefore, the current five year interval for the NR service will end on 20 September 2018.
8. 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.
9. 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.<sup>4</sup>
10. In reaching its view, the Commission must make the decision that will best give, or is likely to best give, effect to the purpose set out in section 18 of the Act.<sup>5</sup>
11. 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 unlikely to best promote competition in telecommunications markets for the long-term benefit of end-users.

### **Outline of our preliminary view**

12. The Commission released its preliminary decision on 9 July 2018 and invited submissions until 30 July. Two parties requested very short extensions to make their submissions and as these were only for three and four days, the requests were granted.
13. The Commission's preliminary view was that there were not reasonable grounds to commence a Schedule 3 investigation into the removal of the NR service from Schedule 1 of the Act. We expressed the reasons as follows:
  - 13.1 Roaming is not yet fully competitive. NR regulation is an important backstop, in case commercial negotiations break down in future;
  - 13.2 the regulated service is specified (non-price) only;
  - 13.3 a new mobile provider might require a NR arrangement while it rolled out its 5G network; and
  - 13.4 co-location does not provide a full substitute service to national roaming.
14. This document discusses the submissions received on the Commission's draft view and presents the reasons for confirming our preliminary view in our final decision.

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<sup>4</sup> Schedule 3, clause 1(5).

<sup>5</sup> Section 19 of the Act.

## Submissions on the Commission's preliminary view and our response

### Competition in roaming

15. Spark submitted that it is not possible to state whether or not national roaming acts as a suitable backstop to commercial negotiations but assert that it is likely that the existence of three networks means the market is competitive. Similarly, Vodafone question the need for a regulated backstop but ultimately see no harm in retaining the service.
16. 2degrees submitted that national roaming has aided mobile infrastructure competition and that they have benefited from the regulated service being available.
17. Chorus submitted that it would be premature to reach any conclusion on national roaming whilst we conduct our Mobile Market Study. Furthermore, they noted that RSM are currently consulting on the policy for the forthcoming allocation of spectrum for 5G.
18. Vocus submitted that national roaming is required to encourage investment from incumbent operators and to create the right conditions for new entry, while Trustpower fully supported the Commission's preliminary view, as did Northland Regional Council and the New Zealand Nurses Organisation.
19. Blue Reach submitted that there is market failure in mobile services and that the paucity of MVNOs in New Zealand is illustrative of this fact. They added that the three existing MNOs have conflicting incentives but that the incentives to keep a fourth entrant out of the market are greater than the incentives to gain wholesale customers.
20. Before investing, a potential new entrant may have a choice of roaming partners, with each of the MNOs now using the same technology. While the entrant may incur some sunk costs that are specific to a particular partner and which would not be recovered in the event that they subsequently switched, this could be solved by a suitable long-term contract.
21. However, given the conflicting incentives of the existing MNOs around offering roaming services to a new entrant MNO, we cannot be sure that such contracts would be competitively available without the presence of a NR specified service in the 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.
22. We remain of the view that NR will act as an important regulatory backstop in the event of commercial negotiations breaking down.

### Regulated service is specified (non-price terms only)

23. Spark submitted that the existing regulation is outmoded and suggested that any unnecessary regulation will, by definition, distort investment incentives and raise the risk associated with 5G deployments, given the uncertainties surrounding the level of 5G network investment.
24. Chorus submitted that the Commission ought to await the outcome of the Mobile Market Study prior to taking a position on the status of the NR service.
25. 2degrees submitted that the specified service has provided them with historical and on-going investment incentives for new products and further network deployment.
26. We acknowledge the potential for distortions to investment incentives from regulation, but the specified nature of the roaming service mitigates this risk. As roaming service are a specified service, roaming providers are able to set prices on commercial terms, which provide them with the flexibility to preserve investment incentives. Furthermore, two of the three potential suppliers of a national roaming service are not opposed to retaining NR as a specified service.
27. We have previously considered whether to amend the specified roaming service to be designated, but concluded that this was not necessary because Vodafone and 2degrees reached a commercial agreement.<sup>6</sup> During 2017, we reviewed the commercial NR agreement between Vodafone and 2degrees. We identified provisions in earlier variations of the agreement that were a concern. Given that those provisions had been removed, we decided not to pursue the matter, but we did indicate that if such anti-competitive clauses were to resurface in future, we would have to reconsider this conclusion and possibly initiate an investigation.<sup>7</sup>
28. We remain of the view that 2degrees' commercial roaming arrangements with Vodafone were only secured against the threat of regulation. We consider that similar difficulties could potentially arise for a new entrant as have affected 2degrees.
29. A new entrant today would face three potential suppliers, all using the same technology and similar spectrum frequencies. Even so, our view is that retaining specification of the service promotes competition for the long term benefit of consumers by guaranteeing to the entrant that roaming will be available, whether by commercial negotiation or under a STD. Roaming established via commercial negotiation provides immediacy of coverage, as an entrant builds out its physical infrastructure.

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<sup>6</sup> Commerce Commission "Schedule 3 Investigation Into Amending The Roaming Service: Final Report 10 March 2008: Report on whether to amend the roaming service or accept the Vodafone undertaking as an alternative to amending the regulations", page iii.

<sup>7</sup> Commerce Commission "Summary of findings of investigation of the national roaming agreement between Vodafone and 2Degrees", October 2017.

30. Retaining the specified service as a regulatory backstop preserves incentives for commercial negotiation. Should further regulation be required, the time and steps to move to a STD—with or without a price—will be less than if the service had been removed from Schedule 1. If NR were to have been deregulated and a potential entrant found itself unable to secure a reasonable offer from any of the three incumbents, the service would first have to be added to schedule 1 again.

**A new entrant might require a NR arrangement for roll out of 5G**

31. Spark submitted that the majority of the roaming arrangements will be on the 4G network and not for 5G. Vodafone maintain that Blue Reach has managed to achieve significant coverage absent roaming arrangements.
32. Vocus and Trustpower on the other hand, submitted that the Commission was correct to assume that 5G will have an influence on the state of mobile competition and consider that more competition will encourage new entry and innovation.
33. Blue Reach submitted that they consider the availability of regulated roaming to be critical and cite the difficulties faced by 2degrees in obtaining a satisfactory roaming arrangement from an existing MNO. Blue Reach considered the current regulation not to be strong enough for a fourth entrant and argued that there are considerable challenges to negotiating and obtaining reasonable roaming terms.
34. We consider that, in future, entry incorporating 5G exclusively seems unlikely. However, the NR service that we are required to consider by clause 1(3) of Schedule 1 is the regulated service, as currently framed. This is a technology neutral service.

**Co-location as an alternative to roaming?**

35. Spark and Vodafone submitted that network expansion is facilitated by co-location. Spark submitted that co-location may indeed be a substitute for mobile roaming in certain circumstances, such as for fixed wireless provision or for an IoT provider.
36. Vodafone submitted that the market for co-location is well established and functioning and that furthermore, the National Environment Standard for Telecommunications Facilities (NESTF) makes for fast, easy and cheap mobile infrastructure development.
37. There are important differences between co-location and roaming, and their respective roles for an entrant's ability to offer coverage. We have previously stated that "[R]oaming provides the entrant with the ability to offer, at launch, mobile services beyond its initial network reach, and this ability to offer national coverage is generally accepted as being an important feature of a mobile service. Co-location relates to the gradual deployment of the entrant's network. As a result, in the short



term, co-location is not likely to be a substitute for roaming, as roaming offers immediate coverage.<sup>8</sup> We maintain this view under the current circumstances.

### **Commission's final decision**

38. On balance, having considered the submissions received on our 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 service from Schedule 1 of the Act at this time. National Roaming remains a relevant service for competition in mobile telecommunications markets.

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<sup>8</sup> Final Decision on whether to investigate omitting national roaming from Part 3 of Schedule 1, 20 September 2013, page 7.