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Determination

Infratil Limited and Vodafone New Zealand Limited [2019] NZCC 9

The Commission:	Anna Rawlings Dr Stephen Gale Elisabeth Welson
Summary of application:	An application from Infratil Limited seeking clearance to acquire shares in a special purpose vehicle, such shareholding not to exceed 50%, which will acquire up to 100% of the shares in Vodafone New Zealand Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the Proposed Acquisition
Date of determination:	10 July 2019

Confidential material in this report has been removed. Its location in the document is denoted by [ ].

The proposed acquisition

1. On 17 May 2019, the Commerce Commission (the Commission) registered an Application (the Application) under section 66(1) of the Commerce Act 1986 (the Act) from Infratil Limited (Infratil) seeking clearance to acquire shares in a special purpose vehicle (SPV), such shareholding not to exceed 50%, which will acquire up to 100% of the shares in Vodafone New Zealand Limited (Vodafone) (the Proposed Acquisition).

2. The other part of the SPV will be acquired by Brookfield Asset Management Inc (Brookfield), a global infrastructure investor. Brookfield recently entered into an agreement to purchase 62% of Oaktree Capital Group LLC, which owns MediaWorks. Brookfield does not have any interests in New Zealand telecommunications or related markets.

Our decision

3. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the Proposed Acquisition.

Our framework

4. Our approach to analysing the competition effects of the acquisition is based on the principles set out in our Mergers and Acquisitions Guidelines (our guidelines).[1]

The substantial lessening of competition test

5. As required by the Act, we assess mergers and acquisitions using the substantial lessening of competition test.

6. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[2]

7. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise price above the price that would exist in a competitive market (the 'competitive price'),[3] or reduce non-price factors such as quality or service below competitive levels.

When a lessening of competition is substantial

8. Only a lessening of competition that is substantial is prohibited. A lessening of competition will be substantial if it is real, of substance, or more than nominal.[4]

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[1] Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019) (our guidelines).
[2] *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
[3] Or below competitive levels in a merger between buyers.
[4] *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [127].

Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.[5]

9. As set out in our guidelines, there is no bright line that separates a lessening of competition that is substantial from one which is not. What is substantial is a matter of judgement and depends on the facts of each case.[6]

10. A lessening of competition or an increase in market power may manifest itself in a number of ways, including higher prices or reduced services.[7]

11. While we commonly assess competition effects over the short term (up to two years), the relevant timeframe for assessment depends on the circumstances. A longer timeframe will be appropriate if, on the evidence, competition effects are likely to arise in later years.[8]

When a substantial lessening of competition is likely

12. A substantial lessening of competition is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur. This requires that a substantial lessening of competition is more than a possibility but does not mean that the effect needs to be more likely than not to occur.[9]

The clearance test

13. We must clear a merger if we are satisfied that the merger would not be likely to substantially lessen competition in any market.[10] If we are not satisfied – including if we are left in doubt – we must decline to clear the merger.

The parties

The applicant

14. Infratil is a publicly listed infrastructure investment company focusing on long term assets such as energy, transport, data and social infrastructure. Its interests include a 51% share of Trustpower Limited (Trustpower).[11]

The target

15. Vodafone is a telecommunications service provider (TSP) offering fixed broadband, mobile, and content/TV services to residential and business customers.[12]

16. Vodafone owns and operates its own nationwide mobile network.[13] As well as retailing mobile services, Vodafone wholesales access to its network. In 2018

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5 Ibid at [129].
6 *Mergers and Acquisitions Guidelines* above n1 at [2.23].
7 Ibid at [2.21].
8 *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [131].
9 Ibid at [111].
10 Section 66(3)(a).
11 The Application at [10].
12 The Application at [20].
13 TSPs that own mobile networks are called mobile network operators, or MNOs.

Vodafone signed a wholesale agreement with Kogan.com (Kogan) to launch a mobile virtual network operator (MVNO) offering in New Zealand, which could see Kogan retail mobile services provided over Vodafone's network.

17. Vodafone owns and operates a network to transport internet and voice traffic through New Zealand (known as backhaul).[14] Vodafone self-supplies backhaul for its own retail broadband and voice operations and wholesales backhaul capacity to other TSPs.[15]

Trustpower

18. Trustpower is a power company that also offers phone and internet services mainly to residential customers.[16] It operates as a multi-utility retailer, selling fixed broadband and voice services in bundles with its electricity and gas products.

19. Trustpower began retailing internet and phone services in 2007 as a bundled offering with electricity. It has grown swiftly since it entered the market, introducing price-leading offers for its broadband when bundled with power and offering free household appliances for new contract customers.[17]

20. Trustpower has recently secured an agreement with Spark New Zealand Limited (Spark) to access its mobile network, with the intention of launching MVNO and fixed-wireless broadband services.[18]

Other parties

21. Other, larger TSPs we refer to in this Determination are described below.

    21.1 Spark retails fixed-line and fixed wireless broadband and mobile services to residential and business customers. It also operates a national mobile network and wholesales access to MVNOs. It currently has MVNO agreements with Vocus Group NZ Limited (Vocus) and Trustpower. Spark also owns a backhaul network and wholesales some of its capacity to other TSPs.

    21.2 Vocus retails fixed broadband and voice services through several brands: Slingshot, Orcon, Flip, Vocus, and 2talk. Vocus operates a backhaul network and wholesales some of its capacity to other TSPs. Vocus offers mobile through its MVNO agreement with Spark. In 2016, Vocus purchased electricity retailer Switch Utilities Limited and began bundling broadband, power and mobile via Slingshot.

    21.3 2degrees Mobile Limited (2degrees) is a mobile network operator (MNO). It began retailing fixed broadband services in 2015 after buying Snap Limited.

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14 For more information about backhaul, see Commerce Commission "Section 9A Backhaul services study" (11 June 2019).

15 Commerce Commission "Section 9A Backhaul services study" (11 June 2019) at [1.25].

16 The Application at [52-54].

17 Trustpower 2019 Annual Report at 35. Trustpower had approximately 38 000 telecommunications connections in 2015 and now has approximately 96 000.

18 The Application at [54].

22. In addition to these more prominent TSPs, we refer to a range of others, including:

    22.1 mid-sized broadband retailers such as MyRepublic Limited (MyRepublic) and Stuff Limited (Stuff); and

    22.2 power companies that have recently started bundling broadband with electricity and/or gas, including: Contact Energy Limited (Contact Energy) in 2017; and Nova Energy Limited (Nova) in 2018.

23. Chorus Limited (Chorus) is a provider of telecommunications infrastructure throughout New Zealand. Chorus is a major wholesaler of backhaul and fixed access services. Chorus operates the bulk of intra-regional (local) backhaul across New Zealand, and is the only provider of those services in many locations (some of which are regulated).[19]

Industry background

24. The main areas of interest in this merger are the supply of broadband and mobile services. We set out some background to these services below.

Broadband

25. Broadband is a term for a data service that gives high-speed access to the internet. To provide broadband to users, suppliers need to connect users to content providers. The parts of the supply chain of relevance to this case are:

    25.1 connections that transport content from the content providers through to local exchanges throughout New Zealand (called backhaul, as described below)[20]; and

    25.2 access connections that transport content from local exchanges to homes or businesses.

26. Backhaul is a term that describes a range of connections that transport internet and voice traffic between different points in a network. Generally, backhaul is provided over fibre but can also be provided using wireless technology, for example in remote areas. On a geographic basis backhaul services can be broadly categorised as follows:

    26.1 inter-regional backhaul services (providing transport between main centres such as Auckland and Wellington);

    26.2 intra-regional backhaul services (providing transport between smaller centres such as Whangarei and Kaitaia); and

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[19] Commerce Commission "Section 9A Backhaul services study" (11 June 2019) at [1.19.1], [1.24], [1.32].

[20] This is a simplified definition of backhaul. The extent of backhaul required to get to an end user depends on the location of the end user and how they are connected to the internet. See Commerce Commission "Section 9A Backhaul services study" (11 June 2019) for a more detailed explanation.

26.3 local backhaul services (providing transport services between local exchanges within a central business district or a town).

27. Many players operate backhaul networks which they use to support their own requirements or to wholesale to other TSPs.

27.1 Suppliers of inter-regional backhaul include Chorus, Spark, Vodafone, Vector, Vital, Vocus and Kordia. Most volume occurs between major centres and then falls away for lower volume links in the regions.[21] As such, the inter-regional level is where most competition occurs for backhaul.

27.2 Local Fibre Companies (LFCs) supply intra-regional backhaul. There is often only one LFC active in a given region. Chorus owns most of this infrastructure, providing the bulk of intra-regional backhaul. The other LFCs – Northpower, Ultrafast Fibre, and Enable – also provide intra-regional backhaul across their networks.

27.3 Several operators offer local backhaul services. For example, Vector Communications operates a local fibre network in the Auckland CBD.

28. The main ways that broadband can be delivered over access connections from the local exchange to the home or business are as follows.[22]

28.1 Copper - broadband was first delivered using copper phone lines and until recently was the most common means by which New Zealanders access broadband. ADSL (asymmetric digital subscriber line) and VDSL (very high-speed digital subscriber line) are broadband services that are provided over copper.

28.2 Fibre - over the past decade the Ultra-fast Broadband (UFB) Initiative has led to the rollout of fibreoptic cables to replace copper.[23] Fibre allows much faster download speeds than copper. According to the most recent update, 75% of New Zealand homes and businesses can now access UFB.[24] Around half of these homes and businesses have taken it up.

28.3 Hybrid fibre co-axial (HFC) - Vodafone's HFC network covers much of Wellington and Christchurch, and provides cable television, broadband, and voice services.

28.4 Fixed wireless - fixed wireless uses a mobile network rather than a fixed line network to deliver broadband to the user. Fixed wireless services is not generally as fast as fibre, and can be more prone to congestion due to the shared nature of fixed wireless services.[25] However, it may be suitable for

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21 Commerce Commission "Section 9A Backhaul services study" (11 June 2019) at [1.23].

22 Commerce Commission "Annual telecommunications Monitoring report 2018", Figure 1.

23 See for example www.ufb.org.nz

24 MBIE "Quarterly Connectivity Update" (19 March 2019) at 5.

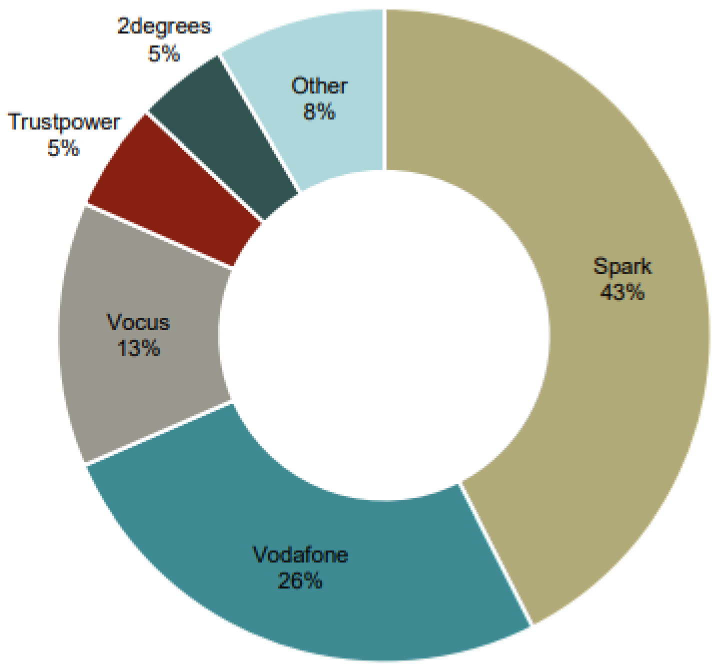
25 SamKnows (on behalf of the Commerce Commission) "Measuring Broadband New Zealand" (June 2019).

users who do not demand high speed or who cannot easily get fibre (for example in rural areas).

29. Chorus owns the copper lines that link homes and businesses to local exchanges. Fibre networks have been deployed by LFCs under contracts with the Crown. In both cases TSPs can get access to these lines under regulated or contracted[26] prices. Fixed wireless services are supplied by Spark in urban areas using its own mobile network. Vodafone also offers fixed wireless services in some rural areas under contract with the Crown (as part of the Rural Broadband Initiative, the RBI)[27], as well as in non-RBI areas.

30. According to the Commerce Commission's Annual Telecommunications Monitoring Report 2018, the leading supplier of retail fixed broadband services in 2018 was Spark, followed by Vodafone and Vocus (see chart 1).

Chart 1: Estimated fixed broadband retailer market share by connections (2018)



Source: Commerce Commission "Annual Telecommunications Monitoring Report 2018 (18 December 2018), Figure 9.

[26] Fibre services are provided at contracted prices agreed between the LFCs and the Crown.

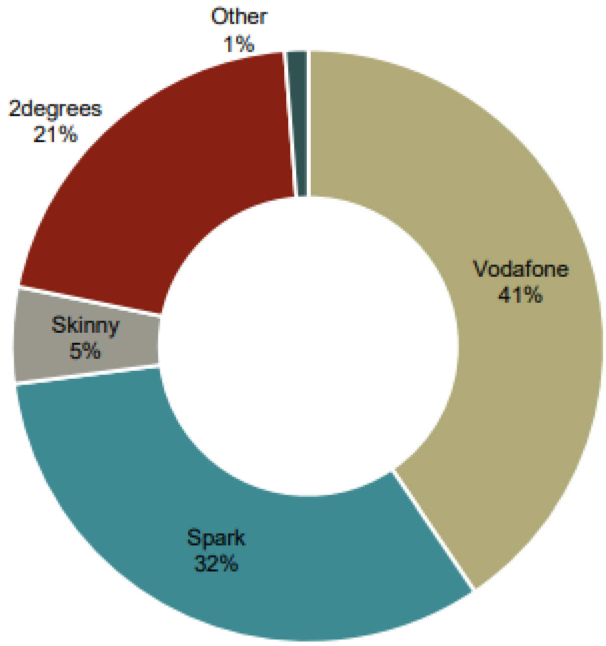
[27] The RBI is a government initiative to improve broadband in rural areas. This includes funding for investment in fibre and fixed wireless infrastructure in some locations where fibre was not possible. See for example MBIE "Rural Broadband Initiative phase one complete" (August 2016).

Mobile

31. A mobile network (or cellular network) is a communications network where the device (such as a mobile phone) is linked to a cell site by a wireless connection.[28] There are three MNOs in New Zealand: Spark, Vodafone and 2degrees. The MNOs own infrastructure throughout New Zealand and have the rights to spectrum. These firms also sell capacity to MVNOs.

32. According to the Commerce Commission's Annual Telecommunications Monitoring Report 2018, the leading supplier of mobile services was Vodafone, followed by Spark (including Skinny) and then 2degrees (see chart 2). MVNOs accounted for only 1% share.

Chart 2: Estimated mobile market shares by subscribers (2018)



Source: Commerce Commission "Annual Telecommunications Monitoring Report 2018" (18 December 2018), Figure 10.

With and without scenarios

33. To assess whether a merger is likely to substantially lessen competition in a market, we compare the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[29]

[28] See for example Commerce Commission "Mobile Market Study" (16 May 2019) at 23-28 for a more detailed explanation of mobile services.

[29] The guidelines at [2.29].

With the acquisition

34. The Commerce Act prevents a person from acquiring the assets or shares of a business if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market. A person can include two or more persons that are interconnected or associated.

35. We considered the extent to which Infratil and Trustpower are interconnected or associated, whether Infratil's acquisition of shares in Vodafone will give Infratil a substantial degree of influence over Vodafone, and whether the Proposed Acquisition could therefore have the effect of substantially lessening competition as a consequence of Infratil's ability to influence both Trustpower and Vodafone.

36. Infratil submitted that, should the Proposed Acquisition proceed:[30]

    36.1 Trustpower and Vodafone would continue to operate as separate independent entities and would not be interconnected bodies corporate;

    36.2 any agreement or arrangement between Trustpower and Vodafone would be subject to the Commerce Act; and

    36.3 company law and corporate governance requirements would limit Infratil's ability to influence Trustpower and Vodafone.

37. Infratil also submitted that despite the legal and practical restrictions outlined above, the analysis in its application for clearance is based on the conservative assumption that the businesses of Trustpower and Vodafone could be combined.[31]

38. Infratil is currently interconnected with Trustpower.

39. We accept Infratil's submission that the Proposed Acquisition will not cause Infratil and Vodafone to become interconnected. We do, however, find that the Proposed Acquisition is likely to cause Infratil to acquire a substantial degree of influence over Vodafone. In reaching this view we considered whether, post-transaction, Infratil is likely to have the ability to bring real pressure to bear on Vodafone's decision-making process, taking into consideration the types of factual matters specified in paragraph 8 of the Guidelines.[32]

40. Infratil's current relationship with Trustpower, and proposed relationship with Vodafone, mean it will become a common shareholder in both Trustpower and Vodafone. As such, we have conducted our competition assessment of the transaction based on the conservative assumption that the businesses of Trustpower

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[30] The Application at [36]-[42].

[31] The Application at [43]. Infratil also submitted at [38] that "any proposal to integrate Trustpower and Vodafone (which, to avoid doubt, is not intended) would also be subject to section 47 (if Infratil increases its shareholding) or section 27 of the Commerce Act (if section 47 did not apply).

[32] Attachment C of the guidelines, *Commerce Commission v New Zealand Bus Ltd* (2006) 11 TCLR 679 (HC) at [209]-[214].

and Vodafone could be combined. For the purposes of these written reasons, we reflect this assumption by referring to 'the merged entity' throughout.

41. The Commission remains interested in any future material changes to the relationship between Infratil and Trustpower, and Infratil and Vodafone, post-transaction (including, for example, changes to the percentage shareholding, and / or corporate relationships between the entities).

Without the acquisition

42. Without the acquisition we consider the likely scenario would be the status quo or something similar; that is, Trustpower and Vodafone operating as separate independent entities.

How the acquisition could substantially lessen competition

43. Vodafone competes to supply telecommunication services (including broadband and mobile) to customers. Vodafone also competes to supply backhaul capacity and wholesales mobile network access to MVNOs. Trustpower competes to supply broadband and is planning to launch a mobile service as an MVNO. We describe below how we think the Proposed Acquisition might affect competition.

Unilateral effects

44. Unilateral effects arise when a firm acquires a current or potential competitor that would otherwise provide a competitive constraint.

45. Both Vodafone and Trustpower compete to sell broadband to residential customers. The Proposed Acquisition could mean that any existing or potential competition between them for residential broadband customers is lost. We have therefore assessed whether the merged entity may be able to increase prices (or reduce service quality) in the market for residential broadband. To test this, we have analysed:

    45.1 whether the two firms impose a strong constraint on one another now (or would do in the future);

    45.2 whether there are other strong competitors in the market that could replace the lost competition; and

    45.3 whether the barriers to entry and expansion are high.

46. Vodafone is a leading provider of retail mobile services in New Zealand. Trustpower is planning to launch an MVNO service. Trustpower is therefore a potential competitor in the mobile services market that, absent the merger, could impose a constraint on Vodafone. We have therefore tested whether the Proposed Acquisition is likely to result in an SLC for the supply of mobile services asking the same questions noted above in relation to residential broadband.

47. Vodafone also supplies broadband and mobile services to business customers. As Trustpower's presence in supplying broadband to business customers is very limited, we do not consider business broadband further in this Determination.[33]

Coordinated effects

48. A merger can substantially lessen competition if it increases the potential for the merged firm and all or some of its remaining competitors to collectively exercise market power to increase prices or reduce service quality.[34] We refer to this conduct as "coordinated effects".

49. Coordinated effects are more likely when a market is characterised by certain features which make it easier to reach, and then to sustain, an agreement or understanding. We have tested whether coordinated effects might arise as result of Trustpower and Vodafone no longer being separate competitors for telecommunications by asking:

    49.1 whether the markets in which the parties compete might be vulnerable to coordination; and,

    49.2 whether the transaction will make coordination significantly more likely (for example, by removing an aggressive competitor).

Vertical and conglomerate effects

50. Vertical effects arise where the merging firms operate at different levels in the supply chain (for example, a wholesaler and a retailer). Vertical mergers can increase a merged entity's ability and incentive to hinder rivals from competing (also known as foreclosing a rival). Vertical effects might occur where the merged entity has market power for a product or service in an upstream market and raises access prices or refuses supply to downstream rivals.[35] Doing so could raise rivals' costs or exclude them entirely from the market, reducing competition.

51. Vodafone is an MNO and, as discussed, is a potential supplier of wholesale MVNO services to firms that wish to offer retail mobile services (such as Kogan). Trustpower is a buyer of MVNO services. We have considered whether the merged entity could harm competition in mobile markets by refusing to supply MVNO services to rivals. To test this, we have assessed whether:

    51.1 the merged entity would have a greater ability to foreclose (by having market power over wholesale MVNO services);

    51.2 the merged entity would have a greater incentive to foreclose; and

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33 [ ].

34 See for example the guidelines at 27-28.

35 The merged entity might also only supply the upstream product at a low quality. We use the term "refusing to supply" to include all types of conduct that might raise the cost of downstream rivals.

51.3 if ability and incentive could be established, the conduct would be harmful enough to cause a substantial lessening of competition.

52. Vodafone owns inter-regional backhaul and competes to wholesale capacity to broadband suppliers. Trustpower is a buyer of backhaul capacity. We have considered whether the merged entity could harm competition by foreclosing downstream rivals from accessing backhaul capacity. We have tested this using the same framework as for MVNO services, described above.

53. A conglomerate merger is a merger between firms that supply products that might be bundled together as a combined offering. Conglomerate effects can harm competition if the merged entity offers a bundled discount that rivals cannot match and which results in a reduction in competition (for example, because a rival is denied access to enough customers to achieve a competitive scale). We have assessed whether the merged entity would have the ability and incentive to exclude rivals due to conglomerate effects by, for example, offering a bundle that includes power, broadband and mobile.

Market definition

54. Market definition is a tool that helps identify and assess the close competitive constraints the merged entity would face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes, as a matter of fact and commercial common sense, to fall within the same market.

55. We define markets in the way that best isolates the key competition issues that arise from a merger.[36] In many cases we may not need to precisely define the boundaries of a market. What matters is that we consider all competitive constraints. For that reason, we also consider products and services which fall outside the market but still impose a competitive constraint on the merged entity.

Applicant's view of the relevant markets

56. In the Application, Infratil adopted market definitions based on past Commission decisions.[37] It submitted that the relevant markets in which to assess the Proposed Acquisition are the national retail markets for:[38]

56.1 residential broadband services (fixed line and wireless);

56.2 residential fixed voice services;

56.3 business fixed data services; and

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[36] The guidelines at [3.10]-[3.12].

[37] Including *Vodafone New Zealand Limited and TelstraClear Limited* [2012] NZCC 33, *Spark New Zealand Trading Limited and Craig Wireless New Zealand Spectrum Operations Limited and Woosh Wireless Holdings Limited* [2016] NZCC 7, and *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1 / *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2.

[38] The Application at [59]-[62].

56.4 mobile phone services.

Our view of the relevant markets

57. The Commission has considered retail telecommunications markets in a merger context several times, most recently in *Vodafone/Sky.*[39] In that decision, the Commission defined the following relevant markets:[40]

    57.1 the national retail market for the provision of fixed-line broadband services (residential and business);

    57.2 the national retail market for the provision of mobile services (for residential and business customers).

58. In this case, we have considered whether it is appropriate to define a single market for broadband services, including all fixed-line and fixed wireless services. Technological advancements and changes in internet use may have affected the degree of substitutability between different broadband technologies.

    58.1 The rise of content streaming and other data-hungry services means that copper ADSL and VDSL broadband connections may no longer be good alternatives to fibre broadband for many customers. Such trends may mean we need to depart from the single market approach in future cases.

    58.2 Spark has recently launched fixed wireless in urban areas. As noted above, current fixed wireless services are slower than fibre, so will not be a good alternative for all customers. In some cases, this may mean that it is appropriate for fixed wireless and fibre to be in different markets.

59. In the present case, however, we have not found it necessary to depart from a single broadband product market. We do not consider that our competition analysis would be materially altered if we were to adopt separate markets.

60. We have also assessed whether there are regional differences in the strength and offerings of different TSPs such that the markets should be defined regionally. For example, Trustpower has a higher share of broadband connections in the Bay of Plenty area than elsewhere in New Zealand. Our market inquiries indicated that the larger TSPs (the ones discussed in this report) tend to operate on a national basis despite any regional differences in strength. Accordingly, we have adopted national retail markets for the purpose of our analysis. However, we have considered regional differences in competition within this framework.

61. As discussed, the overlap between Trustpower and Vodafone in retail broadband services occurs principally in residential connections. Because of this, we have adopted a residential-only market in our analysis of retail broadband services. If the

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39 *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1 / *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2.

40 *Vodafone Europe B.V. and Sky Network Television Limited* [2017] NZCC 1 / *Sky Network Television Limited and Vodafone New Zealand Limited* [2017] NZCC 2 at [269].

Proposed Acquisition does not raise competition concerns in a market defined in this way, then it is unlikely to do so in a wider market comprising both residential and business connections.

Conclusion on market definition

62. For the purposes of our analysis of the Proposed Acquisition, we have considered the impact on competition in the national markets for:

    62.1 the retail supply of broadband services to residential customers; and,

    62.2 the retail supply of mobile services.

Competition Assessment - Unilateral effects

Summary

63. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition in the residential broadband and mobile markets due to unilateral effects. The main reasons for this are:

    63.1 for residential broadband, Trustpower and Vodafone do not appear to be each other's closest competitors, and they will continue to face competition from several aggressive players; and,

    63.2 for mobile, the market already appears competitive and MVNOs to date do not appear to have had a major impact on the market.

Residential broadband

64. According to estimates in the Commerce Commission's 2018 Annual Telecommunications Monitoring report, combining Trustpower and Vodafone would result in the top two market participants becoming more comparable in market share.[41] Spark would be the largest player with 43% followed by the merged entity with 31%. Vocus would be third with 13%. Other medium and small broadband providers – such as 2degrees, MyRepublic – account for around 15%. When compared with the market shares from our monitoring reports in previous years the trend is that smaller market participants (that is, 2degrees and those represented by the "Other" category) are growing their share at the expense of larger market participants.[42]

65. While Vodafone and Trustpower compete in retailing broadband to residential customers, they do not appear to be each other's closest competitors.

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[41] Commerce Commission "Annual Telecommunications Monitoring Report 2018 (18 December 2018), Figure 9. We also collected updated data for the purpose of this investigation. Those figures were consistent with the data from the telecommunications monitoring report.

[42] See for example Commerce Commission "Annual Telecommunications Monitoring Report 2017" (20 December 2017), Figure 9.

65.1 Trustpower's main offering is its energy and telecommunications bundle, which likely competes more directly with other providers offering similar bundles such as Contact Energy, Nova Energy and Vocus (via Slingshot).[43]

65.2 Vodafone's broadband offerings are more focused on content and entertainment, with various bundles that include Sky TV and Vodafone TV.[44] Vodafone is likely to compete more directly with Spark.

65.3 [ ][45]

66. Our enquiries have not indicated that the Proposed Acquisition would remove a uniquely aggressive competitor from the residential broadband market. In the past, Trustpower has adopted an aggressive, price-leading strategy aimed at winning new customers for its bundled offers. It continues to gain market share, with some market participants still seeing it as a strong competitor.[46]
[ ][47]
[ ][48]

67. Aside from Trustpower, our market enquiries suggest there are several other aggressive players in the broadband market. These include 2degrees, Stuff and Contact Energy.[49]

68. We did not identify significant barriers to entry in the retail broadband market. There are some types of offer for which scale is likely to be important. For example, having

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43 For example, Nova Energy entered the broadband market in 2018 and currently has a variety of bundled broadband, phone and power offers including a free Smart TV or $500-$650 credit depending on which plan a customer chooses. See Nova Energy "Nova Broadband & Phone" <www.novaenergy.co.nz>

44 Vodafone customers can access Vodafone TV using an internet-connected box that connects to a television. The box allows users to view online TV content such as TVNZ OnDemand, ThreeNow, Netflix and YouTube. See https://www.vodafone.co.nz/tv/vodafone-tv/.

45 [ ].

46 Commerce Commission interview with [ ]; Commerce Commission interview with [ ].

47 [ ]

48 [ ].

49 [ ] identified Contact Energy as a potential threat; [ ] identified 2degrees as gaining the most market share; [ ] viewed Stuff as being a consistent competitor (due to its ability to place advertisements in its publications) and Vocus as being the most aggressive on price. [ ]; Commerce Commission interview with [ ]; Commerce Commission interview with [ ].

a large customer base makes it easier to compete to acquire rights to premium sports content for supply over broadband as the fixed cost of that content is spread over more customers. However, smaller providers have entered the market and found different ways to appeal to, and compete for, customers.

68.1 Contact Energy entered by offering broadband to its energy customers. [ ][50]

68.2 [ ] considered that entry into the New Zealand broadband market is easy because Chorus and other LFCs must provide access on equal terms regardless of volumes.[51]

Possible regional differences

69. Attachment A sets out estimated market shares for residential broadband on a regional basis. As noted above, Trustpower has a larger share of connections in the Bay of Plenty than it does nationally.

70. Trustpower's higher share in the Bay of Plenty would result in the merged entity accounting for approximately [ ]% of the market in that region. This higher share appears to result from Trustpower's success selling broadband to its existing large base of energy customers in the region.

71. However, even in regions with higher levels of aggregation there would be several remaining competitors of scale. In the Bay of Plenty, for example, Spark has [ ]%, Vocus has [ ]%, and 2degrees has [ ]% market share.

72. The TSPs we spoke to do not appear to significantly differentiate their offers on a regional basis and often advertise nationwide. As a result, customers in these regions have a similar choice of broadband offers as customers in other regions. Therefore, we do not consider that the Proposed Acquisition is likely to have a materially different effect in certain regions.

Mobile

73. Trustpower is not yet in the mobile market. Therefore, to assess the Proposed Acquisition we have tested the impact if, post-merger, Trustpower were to abandon its MVNO deal with Spark or compete less aggressively with Vodafone. In doing so, we have assessed whether Trustpower's MVNO offering could have a significant impact on the market.

74. We do not consider that removing Trustpower as a future independent MVNO is likely to have a significant impact on competition in the mobile market.

50 Commerce Commission interview with Contact Energy (19 June 2019).

51 Commerce Commission interview with [ ].

75. First, some market participants told us that the retail market is currently competitive.[52] This is consistent with the preliminary findings of the Commission Commission's 2019 study on mobile markets, which found that competition in the retail market for mobile services in New Zealand has become more established with three independent, national MNOs.[53]

76. Second, MVNOs have to date only had a limited impact on the market compared to MNOs. For example:

    76.1 Vocus, which operates as an MVNO through an agreement with Spark, recently submitted to the Commission that MVNOs are "constantly out of the market and in a never ending game of catch-up with MNO's retail services";[54] and

    76.2 [ ] told us that it is challenging for an MVNO to deliver something that isn't already available from an existing MNO, [ ][55]

77. [ ][56] [ ][57]

78. Trustpower does not appear to be unique in its ability or intention to enter the retail mobile market as an MVNO. As the Commission noted in its preliminary findings report on mobile markets, with three national MNOs, competitive conditions have developed at the wholesale level to allow MVNOs to emerge where commercially viable.[58]

    78.1 [ ] advised that it is considering a mobile offering and did not express concern about its ability to secure an MVNO agreement.[59]

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52 Commerce Commission interview with [ ]; Commerce Commission interview with [ ].

53 Commerce Commission "Mobile Market Study – Preliminary Findings" (16 May 2019) at [PF18].

54 Vocus "Study of mobile telecommunications markets in New Zealand. Submission to Commerce Commission" (26 October 2018) at 15; [ ]

55 Commerce Commission interview with [ ].

56 Commerce Commission interview with Trustpower (27 June 2019).

57 [ ] By comparison, Spark, Vodafone and 2degrees had combined mobile subscribers numbering 6,328,121 in 2018. Commerce Commission "Mobile Market Study – Preliminary Findings" (16 May 2019) at Table 2.

58 Commerce Commission "Mobile Market Study – Preliminary Findings" (16 May 2019) at 14.

59 Commerce Commission interview with [ ].

[ ]

78.2 Both MyRepublic and Kogan are possible new entrants as MVNOs.[60] Kogan already has an MVNO agreement with Vodafone.

78.3 [ ][61] indicating that network access is available for prospective MVNOs.

Coordinated effects

79. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to substantially lessen competition in a market due to coordinated effects.

80. We considered whether the loss of Vodafone and Trustpower as separate broadband competitors would increase the likelihood of coordination between the parties and some or all of their remaining competitors.

81. We concluded that the markets in which the parties compete for broadband do not appear to be vulnerable to coordination and the Proposed Acquisition will not increase the likelihood of coordination.

81.1 Coordination is more likely when the product or service is homogenous since it is easier for the parties to identify a price (or other dimension of competition) to moderate their competitive behaviour. In this case, although the base product (broadband) is largely homogenous, firms in the market have adopted different strategies which mean the final offer is differentiated and there are many prices in the market. This is likely to make it difficult to reach an understanding on what price to set. For example:

81.1.1 Vodafone and Spark bundle broadband with content;

81.1.2 Trustpower bundles broadband with power and offers a free appliance; and

81.1.3 suppliers such Orcon and MyRepublic promote internet speed and quality.[62]

81.2 Coordination is more likely when firms have similar cost structures since they are more likely to have similar pricing incentives. In this case, TSPs face the same costs in terms of the wholesale prices paid to Chorus and the other LFCs for access to the copper and fibre broadband networks. However, cost differences are likely to arise as a result of their different scales and

60 Commerce Commission “Mobile Market Study – Preliminary Findings” (16 May 2019) at [4.56].

61 Commerce Commission interview with [ ] Commerce Commission interview with [ ].

62 See for example Orcon <www.orcon.net.nz> and MyRepublic <www.myrepublic.net>

strategies, undermining the ability to engage in coordinated behaviour. For example:

81.2.1 different TSPs may purchase different types of wholesale services (such as unbundled access or bitstream services);

81.2.2 cost differences will arise where a TSP uses its own network infrastructure to supply retail broadband services; and

81.2.3 Spark offers fixed wireless services, which are likely to have a different price structure to fixed-line broadband services.

81.3 Trustpower has been an aggressive player in the past. In some cases, the loss of a disruptive player might make coordination more likely, as the remaining parties can find it easier to settle on a price. However, as discussed earlier, in this case there appear to be several other aggressive players in the market using different strategies to win customers, including 2degrees, MyRepublic, and Contact Energy.

Vertical and conglomerate effects

82. For the reasons set out below we consider that the Proposed Acquisition is unlikely to substantially lessen competition in any market due to vertical and/or conglomerate effects.

83. We tested whether the merged entity would have the ability and incentive to foreclose broadband rivals by refusing to supply backhaul capacity to them. Vodafone currently has both wholesale and retail operations and yet offers wholesale services to its retail rivals. Given the merged entity would have a larger retail footprint, it may gain a greater incentive to foreclose retail rivals. However, the evidence did not support a view that Vodafone would have the ability to engage in such conduct. Although Vodafone owns inter-regional backhaul capacity, there are other suppliers of this type of backhaul including Chorus, Spark, Vocus and others who could supply its customers.[63]

84. We tested whether the merged entity would be able to foreclose mobile rivals by refusing to supply MVNOs with access to its mobile network. This could occur, for example, by the merged entity shifting Trustpower's planned MVNO offering to Vodafone's network and then seeking to foreclose rival MVNOs by refusing them MVNO access. However, the evidence did not support a view that the merged entity would have the ability to engage in this conduct. Although Vodafone does supply MVNO services, Spark and 2degrees appear to be potential options for MVNO agreements and so any MVNO refused access by Vodafone has other potential mobile network options.[64]

63 See for example Commerce Commission interview with [ ] and Commerce Commission "Section 9A Backhaul services study" (11 June 2019).

64 For example, [ ] stated that Vodafone has not been active in the market and says that the competition is between Spark and 2degrees. Commerce Commission interview with [ ].

85. We tested whether the merged entity would be able to foreclose rivals in any market through bundling energy, broadband and mobile. However, the evidence did not support a view that the merged entity would have the ability to engage in such conduct.

85.1 The merged entity would not supply a unique or essential part of a bundle as there are other suppliers of energy, broadband and mobile.

85.2 The merged entity is unlikely to have significant market power for either broadband or mobile. As discussed earlier in this Determination, the merged entity would face material constraint from competitors in the national retail markets for both these services. Nor is the merged entity likely to have significant market power in the national retail energy market. Trustpower only has around 13% of energy connections[65] and the merged entity would face material competition from several rivals, including the two largest energy retailers, Genesis and Contact.

85.3 As discussed, there appear to be few barriers to offering a bundle that includes a mix of power and broadband. There are several firms that already do so, such as Contact, Nova and Vocus.

85.4 Offering a bundle with power, broadband and mobile is less common (though Vocus does this). If the merged entity created such a bundle and it became popular, there appear to be few barriers to others creating a similar bundle given there are other wholesale suppliers of mobile services aside from Vodafone. For example, Contact Energy or Nova could reach an MVNO agreement with Spark or 2degrees.

[ ]. Commerce Commission interview with [ ].
[ ]

65 Electricity Authority “Market share trends” <www.emi.ea.govt.nz>. Trustpower has a higher market share for energy in the Bay of Plenty, particularly in Tauranga where it is based. However, even if the merged entity was able to leverage its position in the Bay of Plenty area for energy into telecommunication markets, it is unlikely that such a strategy would materially affect the scale economics of other telecommunication rivals. Telecommunication rivals operate on a national basis. Even if they could not win many customers in the Bay of Plenty, it would only affect a small proportion of their total customer base.

Determination on notice of clearance

86. We are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

87. Pursuant to section 66(3)(a) of the Act, the Commerce Commission determines to give clearance to Infratil Limited to acquire shares in a special purpose vehicle, such shareholding not to exceed 50%, which will acquire up to 100% of the shares in Vodafone New Zealand Limited.

Dated this 10th day of July 2019

Anna Rawlings
Chair

Attachment A – regional market shares for residential broadband

Region	Trustpower	Vodafone	Combined	Spark	Vocus	2degrees	MyRepublic	Total
Northland	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Auckland	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Waikato	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Bay of Plenty	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Gisborne	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Hawkes Bay	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Taranaki	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Manawatu-Wanganui	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Wellington	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Tasman	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Nelson	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Marlborough	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
West Coast	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Canterbury	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Otago	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Southland	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
Unknown	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0
National	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	[ ]	100.0

Source: TSPs responses to the Commission's information requests. Notes: (i) Trustpower, Vocus, 2degrees and MyRepublic provided data as at 30 June 2018. Vodafone and Spark provided data as at 31 March 2019. (ii) The totals only included the parties listed in the table. So the figures overestimate actual market share.