

# Options for establishing a consumer data right in New Zealand

Submitted to: Ministry of Business, Innovation and  
Employment

19 October 2020



# Commerce Commission submission on Options for establishing a consumer data right in New Zealand

## Introduction

1. The Commerce Commission (Commission) appreciates the opportunity to submit on the Ministry of Business, Innovation and Employment's (MBIE) proposal to establish a consumer data right (CDR) in New Zealand – as outlined in the Discussion Document published 5 August 2020.
2. This submission comprises three sections:
  - 2.1 first, we describe why the Commission considers the successful establishment of a CDR should involve consideration of general data rights;
  - 2.2 second, we outline the Commission's perspectives on how a CDR may benefit consumers and competition in New Zealand, aligning with the objectives of the Commission's competition, consumer and regulation work; and
  - 2.3 third, we make submissions in response to the questions MBIE has posed in the Discussion Document, primarily regarding the institutional arrangements necessary to establish a CDR in New Zealand.
3. The Commission would welcome continued engagement with MBIE on these issues.

## Executive summary

4. The Commission supports the policy underlying a CDR that enables consumers to securely share their data with service providers, including with third parties. It is increasingly clear that maintaining competition and innovation in New Zealand's markets requires the promotion of consumer data portability.
5. The Commission supports a sectoral designation approach to CDR. However, the Commission considers that to successfully establish a CDR in New Zealand:
  - 5.1 further consideration should be given to the benefits of establishing a framework for general data rights, as detailed below; and
  - 5.2 the lead agency charged with building a CDR platform will require considerable IT, data / API specification, cyber security and registry expertise.
6. We note that the Commission does not currently have the expertise necessary to build a CDR platform, and we have not identified economies of scale or scope which would mean the Commission is well placed to build this expertise.
7. The Commission has competition, consumer and telecommunications expertise that it can contribute to the establishment of any CDR in New Zealand in order to support development of the function.

### **Importance of general data rights**

8. The Commission is of the view that to successfully establish a CDR in New Zealand, proper consideration should be given to the establishment of a framework for general data rights.
9. General data rights could:
  - 9.1 prescribe standardised rules about how personal data is collected and handled, how consent is obtained, and the portability of data; and
  - 9.2 be rolled out in a way that would reduce the cost to small business in New Zealand, by specifying through secondary legislation the businesses, sectors or industries which are required to comply.
10. The Commission considers that, without the foundations of general data rights, it is likely to be much harder to implement the mechanics of a CDR framework for designated sectors.
11. General data rights also have the potential to strengthen consumer rights and enhance opportunities for industry led data-based market innovations (such as cross-market models or new industries).
12. More detailed submissions on this point are included in the Commission's response to Question 1 of the Discussion Document, below.

### **CDR supports competition and benefits consumers**

13. The Commission is of the view that a CDR will, over the long term, enhance competition and benefit consumers in New Zealand. The policy supporting a CDR aligns with the Commission's objectives of markets working well and consumers and businesses being confident market participants.
14. A CDR will allow consumers to safely share data with third parties and support the development of innovative products and services. As such, the Commission supports the policy basis for the introduction of a CDR in New Zealand.
15. Depending on the industries that any CDR is developed for (such as financial services, insurance, telecommunications, and/or electricity), a CDR has the potential to:
  - 15.1 encourage innovation and competition between service providers; and
  - 15.2 enable more effective regulation of markets.
16. We detail below the Commission's perspective on the various ways a CDR could benefit competition and consumers in New Zealand.<sup>1</sup>

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<sup>1</sup> Note, we focus on financial services, electricity and telecommunications as the first two are noted in the Discussion Document, and (as set out below) the Commission has recently engaged with industry in relation to a CDR in the telecommunications space.

17. We note that different approaches to designing a CDR are likely to have different competitive effects in markets, in the long and short term. The Commission is happy to share its competition, consumer and industry-specific expertise with MBIE and others to ensure any regulatory intervention implemented in New Zealand enhances competition in markets in New Zealand.

#### *Consumer benefits*

18. Based on the objectives described in the Discussion Document, the Commission anticipates that a CDR will enable third party providers, such as fintechs, to support consumer decision making in markets where the products and/or services are complex to compare.
19. Informed decision-making benefits consumers because they have an enhanced ability to select a product or service that best suits their needs.
20. This is particularly the case in markets well known for “sticky” consumer behaviour such as banking, electricity and telecommunications. Part of this “stickiness” may come down to the difficulty consumers face in comparing alternative products and services.
21. If a CDR enables third parties to securely provide information to consumers that would enhance consumer decision-making, it is likely to encourage a willingness to switch service providers in “sticky” markets.

#### *Competition benefits*

22. Flowing from the consumer benefits outlined above, it is implicit that if consumers are empowered to compare, and switch to, alternative products or service providers, competition between those service providers will become stronger.
23. In addition, a CDR has the potential to lower barriers to entry in data-based markets and expand the range of feasible business models, by enabling consumers to choose to share their data with new entrant providers, therefore enhancing the potential for market entrants to develop new and innovative products.
24. Enhanced competition is likely to encourage innovation, improve quality and reduce prices. The Commission is supportive of implementing regulatory tools that will enhance competition in markets such as electricity, financial services and telecommunications – we further detail the reasons why below.

#### *Financial services*

25. As noted in the Discussion Document, work has been done to encourage an industry-led open banking system, based on the UK model. One rationale for this work is to encourage development and entry of fintech, via wider access to consumer data, to support competition and innovation in financial services.
26. The Commission is interested in this issue from a competition perspective, including how open-access APIs are set in order to ensure current industry participants are not favoured over new entrants.

27. The Commission also recognises that enabling consumers to share their usage and product information with competitors and comparison services, with appropriate security and privacy safeguards, can facilitate the participation of informed consumers in efficient and transparent credit markets. Other regulators in this sector will have views on a financial services CDR and any views are best reached in consultation with the Financial Markets Authority and the Reserve Bank of NZ.

#### *Telecommunications*

28. We note that it may already be possible to establish rules to provide consumers access to their data under Part 7 of the Telecommunications Act 2001. As such, the Commission recently sent an open letter to mobile service providers setting expectations of the industry following the completion of our review into mobile consumer bills and our 2019 mobile market study.<sup>2</sup>
29. The letter (included as Attachment A) states that one of the Commission's three specified expectations involves industry led work on a "consumer data right" to enable consumers to share their usage and product information with competitors and comparison services.
30. More specifically, the Commission suggested that in the telecommunications context, a CDR can be thought of as a "data portability" right, which would enable consumers to share their data with competitors and comparison services if they chose to do so.
31. The primary purpose of this suggestion is to empower consumers to choose a mobile plan that best meets their individual needs, or to enable third parties to assist a consumer to choose the right plan.
32. We consider the establishment of a CDR in New Zealand would enhance the Commission's ability to encourage the telecommunications industry to implement the consumer data rights proposed above.

#### *Electricity*

33. As noted in the Discussion Document, under Part 11 of the Electricity Industry Participation Code a consumer, or an agent acting on behalf of a consumer, is able to access usage information about a consumer's electricity consumption.
34. In addition, as MBIE will be aware, the Electricity Price Review panel made a recommendation in relation to improving the accessibility of electricity usage and

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<sup>2</sup> Commerce Commission Media Release, Mobile operators should improve consumer choice through easier comparisons (17 September 2020) <https://comcom.govt.nz/news-and-media/media-releases/2020/mobile-operators-should-improve-consumer-choice-through-easier-comparisons>

product information for consumers. The Electricity Authority (EA) has taken steps to address this.<sup>3</sup>

35. Given that the Commission regulates wholesale electricity distribution, and the EA is responsible for retail supply, any views reached in relation to an electricity CDR are best reached in consultation with the EA.

### **Responses to particular issues raised by Discussion Document**

36. The Commission has focused its response to the Discussion Document on the importance of ensuring that key building blocks are in place for implementing a successful CDR for designated sectors and on the institutional considerations relevant to the design, build and operation of a CDR in New Zealand.
37. To summarise, the Commission considers:
- 37.1 that based on the ACCC experience, establishing general data rights would enable the more successful implementation of a CDR for designated sectors;
  - 37.2 for the CDR to be successful in New Zealand, institutional design should match the design of the regime and platform;
  - 37.3 it is critical that the lead agency tasked with building the platform has, or is able to rapidly develop, considerable expertise in data / API specification, IT, registry build and cyber security.
38. The Commission does not have the expertise necessary to build a CDR platform in New Zealand, and we have not identified economies of scale or scope which would mean the Commission is well placed to build this expertise. The Commission is able to contribute its competition, consumer and telecommunications expertise to the regime design.

*Q 1 Are there any additional problems that are preventing greater data portability in New Zealand that have not been identified in this discussion document?*

39. The Commission has undertaken some preliminary thinking on the design of a successful CDR platform in New Zealand. Our view is that further thought should be given to establishing general data rights which could enhance the success of either a CDR regime for designated sectors or industry led CDR.
40. Any general data rights established in New Zealand could be set across certain sectors and operate as a baseline for any CDR established in New Zealand.
41. A general data right could be rolled out in a way that would reduce the cost to small business in New Zealand (for example, by excluding them from general data right obligations or by using a minimum number of employees) or by specifying through secondary legislation particular businesses, sectors or industries that are required to

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<sup>3</sup> ACCES decision paper (14 January 2020) <https://www.ea.govt.nz/development/work-programme/evolving-tech-business/aces/development/additional-consumer-choice-of-electricity-services-aces-decision-paper/>

comply. If this approach is taken, it would be important to ensure the designation process is designed to be competitively neutral.

42. The rights could reflect the core elements of analogous data rights established in other jurisdictions. Elements of these analogous rights which could be reflected in any New Zealand general data rights could include: <sup>4</sup>
  - 42.1 how informed consent should be obtained;
  - 42.2 the right to receive a copy of your personal data in a structured, commonly used and machine-readable format;
  - 42.3 how data is held and processed;
  - 42.4 the right to transfer this data to a trusted third party;
  - 42.5 the right to require the data be corrected or erased, as required; and
  - 42.6 the right be informed about the extent of data collection and use.
43. Establishing such rights as part of a baseline may facilitate enhanced data portability and the speed in which CDR for specific sectors can be implemented for the following reasons:
  - 43.1 a general data right would establish a consistent framework for the storage and transfer of personal data that any sector specific CDR regime can build on (enhancing cross sector innovation);
  - 43.2 a general data right would provide confidence to consumers that they can securely share their data within a CDR regime;
  - 43.3 a general data right which is independent from a CDR will remove the need for any CDR to establish privacy rights and/or obligations, the presence of which can distort third party incentives to participate in a CDR, because it involves a more onerous framework for data storage and management;
  - 43.4 a general data right may pre-empt, and provide a platform for, industry-led CDR based innovations, and at the same time encourage a consumer centric approach to such innovation.
44. A general data right may also make it easier to implement the basic mechanics of a CDR framework for designated sectors, while also encouraging industry-led CDR innovations. Importantly, the elements of the general data right go beyond the rights of access of New Zealand's existing privacy laws to provide for data portability (i.e. to support the ease of transfer of that data).

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<sup>4</sup> We propose this package of basic elements, based on the package of rights included in the GDPR, which is much more extensive, see <https://gdpr.eu/tag/chapter-3/>

45. We understand that the efficacy of the CDR regime in Australia may be impacted by the fact that Australians do not benefit from a general data right. General data rights have had to be built into the Australian CDR and these rights do not apply to data sourced through other means (such as screen-scraping). We understand that the additional privacy obligations imposed by these rights place the CDR regime at a disadvantage against other forms of data sharing. We understand that, following the Digital Platforms Inquiry recommendations, Australia may seek to address this issue in a review of its privacy law over 2021.<sup>5</sup>

*Q 10 Do you have any comments on the discussion of Option two: A sectoral-designation process?*

46. The Commission considers that the success of a sectorial designation approach to CDR will depend on ensuring the agencies involved have the appropriate expertise, and clear role delineation between the agencies involved.
47. Depending on the sectors the CDR is designated to apply to, the Commission can contribute its competition, consumer and telecommunications expertise to the regime / platform design process. As described above, other agencies should also be involved for any financial services or electricity CDR designation.
48. In our view, for a CDR to be successful the lead agency will need considerable IT, data / API specification, cyber security and registry expertise. We have not identified economies of scale or scope which would mean the Commission is well placed to build this expertise.

*Q 22 To what extent should we be considering compatibility with overseas jurisdictions at this stage in the development of a consumer data right in New Zealand?*

49. The Commission considers that the international compatibility of any CDR regime is important, particularly in respect of Australia. Many of the service providers that will be impacted by a CDR regime operate, and therefore collect data, in jurisdictions beyond New Zealand (e.g. most New Zealand banks are Australian banks).
50. From the Commission's perspective, international compatibility is important to ensure:
- 50.1 enforcement agencies can operate collaboratively in relation to multi-jurisdictional conduct; and
  - 50.2 industry is able to easily translate regulatory compliance from one jurisdiction to another.
51. Regulatory compatibility need not mean identical institutional design. Although the ACCC is both the lead regulator and strategic enforcement agency of the Australian

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<sup>5</sup> OAIC international strategy 2020–2021 (10 March 2020) <https://www.oaic.gov.au/about-us/our-corporate-information/oaic-international-strategy-2020-2021/>  
See also The Digital Platforms Inquiry Final Report (June 2019), Chapter 7 and Recommendations 16 – 21 <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf>.



CDR, the Commission need not perform these roles in order for the two regimes to be compatible.

*Q 24 Do you have any comments on the arrangements for establishing any new bodies to oversee parts of a consumer data right?*

52. The Commission considers that, based on our understanding of the ACCC experience, the design and build of a sectoral designation approach to CDR will require extensive expertise and resource – it is a high fixed cost endeavour.
53. For a CDR to be successful the lead agency will need considerable IT, data / API specification, cyber security and registry expertise. We have not identified economies of scale or scope which would mean the Commission is well placed to build this expertise.
54. As stated above, the Commission is able to contribute its competition, consumer and telecommunications expertise to the regime / platform design.

*Q 25 What are the pros or cons of having multiple regulators, or a single regulator, involved in a consumer data right?*

55. The Commission's view is that while it may be useful to involve multiple regulators in any New Zealand CDR – from an expertise perspective – the role designation needs to be clear and carefully decided, to reduce the inefficiencies which can arise due to:
  - 55.1 duplicative consultation;
  - 55.2 unclear responsibility; and
  - 55.3 inadequate expertise.
56. If MBIE proceeds with multi-regulator approach to a CDR, the Commission could contribute its competition, consumer and telecommunications expertise.

## Attachment A – Open Letter 17 September 2020

17 September 2020

Geoff Thorn  
CEO TCF

Jason Paris  
CEO Vodafone NZ

Jolie Hodson  
CEO Spark

Mark Aue  
CEO 2degrees

By email

Ngā mihi mahana kia koutou katoa

### Addressing transparency and inertia issues in the mobile market

#### *Summary*

1. We have sought to improve our understanding of the mobile telecommunications market through our 2019 mobile market study and our 2020 review of mobile consumer bills.
2. This work has highlighted issues relating to transparency and consumer inertia in the residential mobile market. These issues appear to have resulted in significant overspending by some consumers and suggest that action is required to improve consumer outcomes.
3. We are therefore writing to seek feedback from the three mobile network operators – Spark, 2degrees and Vodafone (**operators**) – on our mobile bill report and to ask those operators to confirm their plans for addressing transparency and consumer inertia issues.
4. We set out below our expectation that operators should take steps to improve consumer outcomes by:
  - 4.1 **increasing the usage information made available to consumers** – to address transparency issues and empower customers to make meaningful choices;
  - 4.2 **implementing measures to help ensure customers are on plans that best reflect their actual requirements** – to address inertia issues and protect customers from overspending; and
  - 4.3 **initiating work on a “consumer data right” for the industry** – to enable consumers to share their usage and product information with competitors and comparison services if they choose to do so.

5. We will review operator responses to this letter, and assess whether further action is required, in the Retail Service Quality work programme that will shortly be launched under Part 7 of the Telecommunications Act 2001 (the **Act**).

*Why did we undertake the mobile bill review?*

6. Our mobile market study noted that residential mobile consumers do not compare mobile offers, switch plans or change providers very often. Specifically:
  - 6.1 68% of consumers never or only rarely consider their mobile options; and
  - 6.2 54% of consumers have not switched between service providers in the last five years.<sup>6</sup>
7. The market study concluded that there may be a degree of consumer inertia and that consumers may be unaware of other retail offers available that might better meet their needs.
8. We therefore commenced a review of consumer bills for the three mobile network operators, under section 9A of the Act, to understand:
  - 8.1 the usage and expenditure patterns of residential consumers in the mobile market; and
  - 8.2 the extent to which these consumers could save money by changing their purchasing behaviour.
9. We are grateful to operators for providing anonymised consumer bills for the purposes of this review.
10. The results of this review are set out in the report by Schiff Consulting, the independent economic consultant engaged to undertake the study, entitled *“Analysis of Mobile Bills – Report for the New Zealand Commerce Commission”*. The report is being published today alongside this letter.
11. We welcome feedback on the report by email to [regulation.branch@comcom.govt.nz](mailto:regulation.branch@comcom.govt.nz). Please ensure that any comments are provided by 30 September 2020. We will take account of comments when reviewing operator responses on the issues covered in this letter and when considering next steps in the Part 7 work programme.

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<sup>6</sup> Commerce Commission “Mobile Market Study – Findings” (26 September 2019) Figure 15, Figure 17. These figures are sourced from Consumer NZ’s 2018 survey of mobile consumers.

### *What we have found*

12. Based on the mobile bill review and the mobile market study, we consider that there are transparency and inertia issues that may result in significant value being lost by some consumers.<sup>7</sup>
13. Notably, of the nearly 80,000 anonymous consumers in the bill review sample:
  - 13.1 64% of consumers who bought base plans did not switch during the 12 month period;<sup>8</sup>
  - 13.2 just over 25% of postpaid consumers could save an estimated average of \$11.58 a month by moving to a cheaper base plan that would still cover their usage (a saving of 23% of the average postpaid monthly spend); and
  - 13.3 around 7% of residential consumers spend a relatively high amount on mobile services, given their usage. These consumers could potentially save an average of \$48.65 per month.
14. We recognise that some packages include add-ons and extras (such as “endless data”, handset discounts, content streaming and other benefits), which can make it more difficult for consumers to compare plans.
15. Nevertheless, our work has identified a clear need for consumers to have an easily accessible baseline view of their usage and spend information, against which they can determine the value they are willing to attribute to the offered extras.
16. Current app-based usage and spend information varies, with some apps providing trend information and summaries, but over different periods of time and in different formats depending on the operator. These are generally not sufficient for meaningful comparisons on usage and price.
17. Current bill-based information (for postpaid consumers) typically provides even less trend data, and can be difficult to access and assess, particularly offline. It is difficult for consumers to see at a glance trends in usage against quotas, rollover balances or spend on add-ons or casual rates.
18. Overall, there appears to be scope for operators to facilitate greater consumer engagement and sharper comparison of mobile plans, along the lines seen in other sectors such as electricity, where consumers and comparison websites have made good use of the ability to compare electricity pricing and usage parameters.

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<sup>7</sup> The report also noted the large number of products in the market and questioned how readily customers could choose the services that are the best value for them given the number of alternatives and the complexity of such decisions.

<sup>8</sup> This figure is a weighted average; non-switching of base plans is 72% for prepaid and 57% postpaid. These figures exclude consumers who switched base plans between prepaid and postpaid and between providers.

19. Electricity consumers, unlike many telecommunications consumers, generally have at least 12 months of usage information available to them at any one time and can access up to 24 months of data on request.

*Addressing the issues – Transparency*

20. We consider that consumers need to be able to easily see their usage and spend information to help them assess the value they get from their current plan and decide whether to switch to plans that better match their needs, either with their current provider or by moving to a different provider.
21. We would therefore like to see easy access to key information become the norm for all consumers.<sup>9</sup>
22. To this end, our expectation is that operators will take steps to make better data available to their customers and highlight that this information is available. This information should be easy to access and understand at a glance (such as on a table or graph), included in any app or bill, and display:
  - 22.1 at least 12 months of mobile data, voice and SMS usage, including actual usage for each month so the customer can see how their usage varies;
  - 22.2 at least 12 months of carry-over or rollover balances, so the customer can assess how their rollover has changed over time and what might be an appropriate level of allowance for their needs; and
  - 22.3 at least 12 months of consumer spend, clearly showing the amounts spent each month using casual rates, buying add-ons and for base plan purchases.
23. The primary purpose of this information is to provide a clear baseline to enable meaningful comparisons. This will make it easier for consumers to choose a mobile plan that best meets their individual needs, better assess the value of additional benefits (such as Netflix), and enable other parties to assist consumers to choose the right plan. We consider that the operators should initially focus on the information available on their apps, and then address their physical bills to their customers.

*Addressing the issues – Consumer inertia*

24. We also consider that consumers should not be paying for more than they reasonably require and that the persistence of inertia-based “overspend” in some areas of the market is contrary to consumer interests.
25. It seems clear that some consumers overestimate their requirements when selecting a plan and, for various reasons, never go back to revisit this decision in light of their actual usage.

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<sup>9</sup> This includes the mobile network operators’ own retail customers as well as their wholesale MVNO customers by making the necessary data available to them.

26. There is currently no mechanism for correcting this inertia factor that can result in significant welfare losses for consumers and corresponding windfall gains for mobile operators.
27. The absence of a mechanism for correcting such “overspend” contrasts with the position where a consumer is “underspending” and various mechanisms, such as out of bundle charges, act to encourage the consumer to spend more.
28. Our expectation is that operators will take steps to address this imbalance by putting in place “right-sizing” or “right-planning” measures to guard against overspending.
29. To this end, we would like to see operators more proactively managing the best interests of their own customers, including by monitoring usage against spend and helping to keep customers on plans that best reflect their actual requirements.

*Bringing the solutions together – consumer data rights*

30. Finally, we note the moves to introduce consumer data rights in various countries around the world, as outlined in the recent discussion document issued by the Ministry of Business, Innovation & Employment on this subject.<sup>10</sup>
31. In the telecommunications context, a consumer data right can be thought of as a “data portability” right, which would enable consumers to share their transaction, usage and product information with competitors and comparison services if they choose to do so.
32. Consumer data rights would be expected to have a similar effect to number portability in terms of “unlocking” customer information and empowering consumer choice. This is a potentially powerful tool for addressing transparency and inertia issues and improving competitive outcomes for consumers.
33. We see an opportunity for the industry to assume a leadership position on this issue and encourage the Telecommunications Forum (TCF) to initiate a programme of work looking at the design and implementation of a consumer data right in New Zealand.
34. At this stage, we believe an industry-led response through the TCF would be the best way forward on this issue, recognising that this will be a longer term project that needs to be informed by ongoing international developments.

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<sup>10</sup> MBIE “Discussion Document - Options for establishing a consumer data right in New Zealand” (05 August 2020). <https://www.mbie.govt.nz/dmsdocument/11625-discussion-document-options-for-establishing-a-consumer-data-right-in-new-zealand>.

*Next steps*

35. We hope that operators will see the issues we have identified as important opportunities for improving consumer outcomes and the suggestions we have made as a useful framework for developing individual commercial responses.
36. We encourage operators to develop solutions having regard to experience in other sectors and markets with a view to these solutions becoming points of competitive differentiation between them going forward.<sup>11</sup>
37. We ask that individual operators share with the Commission their plans for addressing these issues, including the timeframes for implementation, and how they propose to measure success.
38. We also ask the TCF to engage with the Commission on its plans for initiating a longer term programme of work on a consumer data right for New Zealand.
39. We would welcome responses in both cases by the end of November 2020.
40. We will review responses to this letter early in our Part 7 Retail Service Quality work programme, with a view to taking more active measures to address these specific pain points for consumers, if required.
41. We will be launching our Part 7 work programme shortly and look forward to continuing our engagement with stakeholders on these and other important consumer issues.
42. In the meanwhile, if there are any questions on any of the matters set out in this letter, please reach out to your usual contact in the Commission's Telecommunications Team.

Ngā mihi



**Tristan Gilbertson**  
Telecommunications Commissioner

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<sup>11</sup> We also expect operators to support the MVNO providers hosted on their networks by making the necessary data available to them