

## Determination

### Telecom New Zealand Limited and The Crown [2014] NZCC 13

- The Commission:** Dr Mark Berry  
Sue Begg  
Elisabeth Welson  
Pat Duignan
- Summary of application:** Telecom New Zealand Limited seeks clearance to acquire from the Crown the New Zealand wide management rights for 18 years from 1 January 2014 for 2 x 20 MHz of radio spectrum in the 700 MHz range.
- Determination:** Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to the proposed acquisition.
- Date of determination:** 30 May 2014

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

## CONTENTS

<b>THE PROPOSAL .....</b>	<b>4</b>
<b>THE DECISION .....</b>	<b>4</b>
<b>OUR FRAMEWORK.....</b>	<b>4</b>
A LIKELY SUBSTANTIAL LESSENING OF COMPETITION.....	4
WHEN A LESSENING OF COMPETITION IS SUBSTANTIAL.....	5
THE CLEARANCE TEST.....	5
<b>PARTIES.....</b>	<b>6</b>
TELECOM NEW ZEALAND LIMITED (TELECOM).....	6
THE CROWN .....	6
VODAFONE NEW ZEALAND LIMITED (VODAFONE).....	6
TWO DEGREES MOBILE LIMITED (2DEGREES).....	6
<b>THE 700 MHZ AUCTION .....</b>	<b>6</b>
<b>KEY ISSUES RAISED BY THE APPLICATION .....</b>	<b>8</b>
<b>WITH AND WITHOUT SCENARIOS .....</b>	<b>9</b>
WITH THE ACQUISITION .....	9
WITHOUT THE ACQUISITION.....	9
DIFFERENCE IN COMPETITION BETWEEN THE SCENARIOS.....	14
<b>DETERMINATION ON NOTICE OF CLEARANCE.....</b>	<b>16</b>

## The proposal

1. On 4 October 2013, Telecom New Zealand Limited (Telecom) applied for clearance to acquire from the Crown the New Zealand wide management rights for 18 years from 1 January 2014 for 2 x 20 MHz of radio spectrum in the 700 MHz range.<sup>1</sup> This 2 x 20 MHz includes the 2 x 15 MHz that Telecom successfully bid for in the first phase of the 700 MHz auction conducted by the Crown.
2. By agreement with Telecom, a decision on the application was required by 30 May 2014.

## The decision

3. The Commission gives clearance to the proposed acquisition as it is 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.

## Our framework

4. Our approach to analysing the competition effects of the proposed acquisition is based on the principles set out in our *Mergers and Acquisitions Guidelines*.<sup>2</sup>

### A likely substantial lessening of competition

5. As required by the Commerce Act 1986, we assess whether an acquisition is likely to result in a substantial lessening of competition (SLC).
6. The courts require us to undertake this assessment<sup>3</sup> by comparing the likely state of competition if the acquisition proceeds (the scenario with the acquisition), with the likely state of competition if the acquisition does not proceed (the scenario without the acquisition, sometimes shortened to the without scenario).
7. In this case, we assess the state of competition if Telecom acquires a fourth 2 x 5 MHz block of radio spectrum and compare this with the state of competition that would exist if Telecom did not acquire this fourth block. This requires us to consider all likely scenarios for the spectrum allocation of that 2 x 5 MHz block in the event that the acquisition does not proceed.
8. Something is ‘likely’ if there is a real and substantial risk, or a real chance, that it will occur, and New Zealand’s courts have stated that likely means something less than “more likely than not”:<sup>4</sup>

The accepted test of “likely” is whether there is a “real and substantial risk” that the effect will happen. It is concerned with “probabilities and not possibilities”. It involves more than a

---

<sup>1</sup> Telecom seeks clearance to acquire 2 x 20 MHz of 700 MHz spectrum. It does not seek clearance to acquire 2 x 20 MHz of 700 MHz spectrum at a specific frequency range. The position of Telecom’s 2 x 20 MHz 700 MHz spectrum within the range does not affect our conclusions.

<sup>2</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, July 2013.

<sup>3</sup> See *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63] and *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [110].

<sup>4</sup> *Woolworths & Ors v Commerce Commission* (HC) above n3 at [111].

possibility but the effect does not need to be “more likely than not”. Another way of putting it is that there must be a “real chance” that the effect will happen.

9. This means we are required to consider all scenarios that are more than possibilities, even if they have less than a 50% probability of occurring.<sup>5</sup>
10. 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’),<sup>6</sup> or reduce non-price factors such as quality or service below competitive levels.
11. Determining the scope of the relevant market or markets can be an important tool in determining whether a substantial lessening of competition is likely.
12. We define markets in the way that we consider best isolates the key competition issues that arise from the acquisition. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Act, as a matter of fact and commercial common sense.<sup>7</sup>

#### **When a lessening of competition is substantial**

13. 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.<sup>8</sup> Some courts have used the word ‘material’ to describe a lessening of competition that is substantial.<sup>9</sup>
14. Consequently, there is no bright line that separates a lessening of competition that is substantial from one that is not. What is substantial is a matter of judgement and depends on the facts of each case. Ultimately, we assess whether competition will be substantially lessened by asking whether consumers in the relevant market(s) are likely to be adversely affected in a material way.

#### **The clearance test**

15. We must clear an acquisition if we are satisfied that the acquisition would not be likely to substantially lessen competition in any market.<sup>10</sup> If we are not satisfied – including if we are left in doubt – we must decline to clear the acquisition.<sup>11</sup>

---

<sup>5</sup> Ibid.

<sup>6</sup> Or below competitive levels in a merger between buyers.

<sup>7</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>8</sup> *Woolworths & Ors v Commerce Commission* (HC) above n3 at [127].

<sup>9</sup> Ibid at [129].

<sup>10</sup> Commerce Act 1986, s 66(1) of the Commerce Act 1986.

<sup>11</sup> In *Commerce Commission v Woolworths Limited* (CA), above n3 at [98], the Court held that “the existence of a ‘doubt’ corresponds to a failure to exclude a real chance of a substantial lessening of competition”.

## Parties

### Telecom New Zealand Limited (Telecom)

16. Telecom is a subsidiary of Telecom Corporation of New Zealand Limited. It provides a full range of telecommunications products and services throughout New Zealand to both residential and business customers. Its range of services includes both fixed-line and mobile telecommunications services. While the focus of Telecom's business is on providing retail services, it also provides wholesale services to telecommunications service providers.

### The Crown

17. The Crown is the vendor in terms of this acquisition.<sup>12</sup>
18. The Ministry of Business, Innovation and Employment (MBIE) is responsible for providing policy advice to Government on the allocation of New Zealand's radio spectrum, and administering the Radiocommunications Act 1989 and related Radiocommunications Regulations 2001. MBIE's responsibilities include administering the disposal (including by sale or auction) of Crown management rights and spectrum licences in accordance with Government decisions.

### Vodafone New Zealand Limited (Vodafone)

19. Vodafone New Zealand limited (Vodafone) is owned by Vodafone Group Plc. Since its acquisition of TelstraClear Limited in 2012, Vodafone has provided a full range of telecommunications products and services throughout New Zealand to both retail (residential and business) and wholesale customers, including both fixed-line and mobile telecommunications services.

### Two Degrees Mobile Limited (2degrees)

20. Two Degrees Mobile Limited (2degrees) commenced operations as New Zealand's third mobile network operator (MNO) in 2009. Its range of products and services is currently limited to mobile telecommunications services. It offers both pre- and post-pay mobile services to retail (residential and business) customers.

### The 700 MHz auction

21. Relevant to the proposed acquisition, MBIE has auctioned the 18 year management rights to radio spectrum in the 700 MHz range.<sup>13</sup> Spectrum in the 700 MHz range, in conjunction with 1800 MHz spectrum, is expected to be used in the provision of fourth generation (4G) mobile services.
22. MBIE structured the auction into three distinct phases.

---

<sup>12</sup> The Public Finance Act 1989 defines the Crown to include all Ministers of the Crown and all Government departments. The Auction Catalogue for the 700 MHz auction makes it clear that the Crown also includes MBIE officials.

<sup>13</sup> Spectrum in the 700 MHz range was freed up by the switchover to digital television. Information on MBIE's auction of 700 MHz spectrum is available at <http://www.rsm.govt.nz/cms/policy-and-planning/consultation/digital-dividend-auction/digital-dividend-auction>.

- 22.1 In the first phase of the auction (the clock allocation phase), registered bidders were each able to bid for up to three blocks (a total of 2 x 15 MHz) of 700 MHz spectrum. This phase of the auction occurred on 29 October 2013.
- 22.2 The auction rules provided that if there were unsold blocks at the end of the first phase of the auction, then the Crown could decide to increase the acquisition limit to 2 x 20 MHz and auction any unsold blocks to bidders in a second phase of the auction (the supplementary allocation phase). The auction of this remaining block started on 26 November 2013 and concluded on 22 January 2014.
- 22.3 The final phase of the auction (the combinatorial assignment phase), set to occur after the Commission has made its decision on Telecom's application, will determine where each MNO's holdings are placed within the 700 MHz range and their relativity to other MNOs.
23. The 700 MHz auction comprised nine blocks of 5 MHz paired spectrum in the 700 MHz range.<sup>14</sup> Telecom, Vodafone and 2degrees all bid for spectrum in the auction.
24. Table 1 sets out the provisional auction results.

**Table 1: Provisional 700 MHz auction results**

Phase	Telecom	Vodafone	2degrees
1	2 x 15 MHz	2 x 15 MHz	2 x 10 MHz
2	2 x 5 MHz		
<b>Total</b>	<b>2 x 20 MHz</b>	<b>2 x 15 MHz</b>	<b>2 x 10 MHz</b>

Source: MBIE

25. As set out in Table 1, in the first phase of the auction Telecom and Vodafone each successfully bid for 2 x 15 MHz, while 2degrees successfully bid for 2 x 10 MHz. One block of 2 x 5 MHz remained unsold at the end of this phase of the auction. Both Telecom and Vodafone bid in the second phase of the auction for the remaining block of 2 x 5 MHz, with Telecom being declared the successful bidder on 22 January 2014. Telecom's bid is conditional on obtaining clearance from the Commission.<sup>15</sup>

<sup>14</sup> Each block of 5 MHz paired spectrum comprises a 5 MHz block at the lower end of the 700 MHz range and an associated 5 MHz block at the upper end of that range. A block of 5 MHz paired spectrum is typically referred to as 2 x 5 MHz.

<sup>15</sup> Any acquisition of management rights to radio spectrum is subject to section 47 of the Act. However, none of the bids that Telecom, Vodafone or 2degrees made in the first phase of the 700 MHz auction were bids conditional on clearance. 2degrees submitted that the acquisitions of 2 x 15 MHz by Telecom and Vodafone were not necessarily competitively neutral and should be examined by the Commission. The Commission considers that the acquisition of 2 x 15 MHz by each of Telecom and Vodafone will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand. Absent those acquisitions, a significant amount of 700 MHz spectrum would remain unused in New Zealand, thereby depriving the market of the competitive benefits of that spectrum being deployed.

26. The auction rules specify that MBIE would, before the commencement of the combinatorial assignment phase of the auction, advise each successful bidder of the options available for the contiguous lots they are able to bid on in this phase of the auction. In this final phase of the auction, the MNOs will submit bids for their preferred position within the 700 MHz range. MBIE will determine the outcome of this phase of the auction based on the bid combination that maximises revenue to the Crown.

### **Key issues raised by the application**

27. To grant Telecom clearance we must be satisfied that Telecom's acquisition of the management rights for 2 x 20 MHz of 700 MHz spectrum would not be likely to substantially lessen competition. As explained above, that requires us to compare the likely state of competition if Telecom were to have those management rights, with the likely state of competition if it did not, and determine whether competition is substantially lessened comparing those scenarios.<sup>16</sup>
28. We have been told by all parties that greater contiguous 700 MHz spectrum holdings allow MNOs to provide services with higher peak speeds. This being the case, the potential for a substantial lessening of competition arises because Telecom's acquisition of the ninth block of 2 x 5 MHz of 700 MHz spectrum would necessarily prevent 2degrees from acquiring that spectrum. We therefore need to consider whether, by preventing 2degrees from acquiring that 2 x 5 MHz block of spectrum, Telecom's acquisition could be said to reduce 2degrees' competitive effectiveness in a way that substantially lessens competition compared to the scenario without the acquisition.<sup>17</sup>
29. Whether such a substantial lessening of competition is 'likely' depends on a key threshold question: if Telecom's acquisition did not proceed, is it likely that the Crown and 2degrees would enter into an agreement whereby 2degrees would acquire the management rights to the 2 x 5 MHz block of spectrum from the Crown?
- 29.1 If the answer to that question is no – that is, such a transaction is not likely – then a substantial lessening of competition will necessarily be unlikely and the Commission would be bound to grant clearance.
- 29.2 However, if the answer is yes, a subsequent question follows, namely: would competition be substantially less in the scenario where Telecom has the rights to that spectrum compared to the scenario where 2degrees has the rights to that spectrum?
30. We address those questions below.

---

<sup>16</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

<sup>17</sup> The question is framed this way because we do not consider it likely that Vodafone would acquire the remaining 2 x 5 MHz block absent its sale to Telecom for the reasons set out at [36-37].



## With and without scenarios

### With the acquisition

31. With the acquisition, Telecom would acquire the management rights to a fourth 2 x 5 MHz block of 700 MHz spectrum bringing its total holdings of 700 MHz spectrum to 2 x 20 MHz. Vodafone and 2degrees would hold management rights to 2 x 15 MHz and 2 x 10 MHz of 700 MHz spectrum, respectively.

### Without the acquisition

32. Without the acquisition, the Commission expects that Telecom would proceed to acquire the management rights to 2 x 15 MHz of 700 MHz spectrum.<sup>18</sup> Similarly, for the reasons set out below, we expect that Vodafone would proceed to acquire 2 x 15 MHz of 700 MHz spectrum.
33. Likewise, we have no reason to expect that 2degrees would not proceed to acquire the 2 x 10 MHz of 700 MHz spectrum it bid for in the first round of the auction.
34. 2degrees has publicly stated its interest in acquiring the remaining block of 2 x 5 MHz absent its sale to Telecom. In October 2013, 2degrees wrote to the Minister for Communications and Information Technology suggesting that the Crown hold on to the remaining block of 2 x 5 MHz as doing so “might allow 2degrees to acquire the extra spectrum” at a later date.<sup>19</sup>
35. As highlighted above, the key threshold question is whether it is likely that the Crown and 2degrees would enter into an agreement whereby 2degrees would acquire the rights to the 2 x 5 MHz block spectrum from the Crown. For reasons we explain, we consider that unlikely.

### *Vodafone unlikely to acquire remaining 2 x 5 MHz block*

36. We do not consider that Vodafone acquiring 2 x 20 MHz is a likely scenario without the acquisition, given that it would require clearance.<sup>20</sup>
37. Vodafone had sought clearance from the Commission to acquire a fourth 2 x 5 MHz block, but withdrew its application on 27 January 2014 after Telecom won the auction for the last block. While an application from Vodafone is no longer before the Commission (and any such application would need to be considered on its own merits), any application from Vodafone would appear to raise similar competition issues to Telecom’s clearance application. We note that at the time it withdrew its application, Vodafone also apprehended that if Telecom had an impediment to clearance, so did Vodafone.<sup>21</sup>

<sup>18</sup> In its application, Telecom submitted that if it did not acquire 2 x 20 MHz of 700 MHz spectrum then from a commercial perspective it would at least acquire 2 x 15 MHz. Clearance application from Telecom New Zealand Limited (4 October 2013) at [15.1].

<sup>19</sup> <http://www.stuff.co.nz/business/industries/9341096/2degrees-still-the-rural-underdog>.

<sup>20</sup> Commerce Commission, *Mergers and Acquisitions Guidelines*, above n2 at [2.40].

<sup>21</sup> Letter from Vodafone to the Commerce Commission (27 January 2014).

We do not anticipate that the Commission would reach decisions on the two applications relating to 700MHz spectrum now before it that would not allow Telecom to acquire this block but would allow Vodafone to do so.

*Correspondence from MBIE regarding the Crown's intentions should the sale to Telecom not proceed*

38. In considering the proposed acquisition, the Commission had to seek information from MBIE as to what the Crown (as vendor) would do with the remaining 2 x 5 MHz block of 700 MHz spectrum if the Commission declined to give clearance.
39. In a letter dated 21 November 2013 responding to a request for information we made on 30 October 2013, MBIE advised:<sup>22</sup>

If the Commission declines both clearance applications, and 2degrees does not bid for the spectrum, the results of the supplementary round(s) will be void and the government will retain the unsold lot. No decisions have been made about what the government would do with the unsold lot in that scenario.

40. In a letter dated 5 March 2014 responding to our further request of 25 February 2014 (after the conclusion of the supplementary allocation phase of the auction), MBIE advised:<sup>23</sup>

The government has not made any decisions about what would happen next with regard to the unsold block. Other parties that have expressed interest in 700 MHz spectrum include 2degrees, the Electricity Networks Association, Vector, specialist business telecommunications service provider TeamTalk, emergency services organisations (operating through the Emergency Telecommunications Services Steering Group – ETSSG), and Maori interests including the Maori Spectrum Coalition and Hautaki Ltd. It is possible that fixed wireless broadband operators such as Woosh and Farmside may also be interested, if the spectrum became available for allocation.

An alternative to allocation is that the government may decide to keep the spectrum block under Crown ownership, to protect the government's future option value.

41. In a letter dated 14 April 2014, MBIE advised that, without the acquisition, the Crown would consider allocating the block for alternative uses ahead of the possibility of selling it to 2degrees.<sup>24</sup>

Without allocating the last (ninth) auction lot, the government has already achieved its main objective from the auction, which was allocation of spectrum such that three mobile operators have sufficient spectrum to compete. Given that 2degrees declined the opportunity to purchase this lot at a reasonable price and with five-year payment terms (that is, "mutually beneficial terms" could not be agreed), the government would not reopen discussions with 2degrees. It would instead think very carefully about alternative uses for the spectrum.

Having achieved its main objective for the mobile market, it would now consider options in terms of the marginal benefit to the country that might arise from allocation to other sectors. There are many options to consider including the potential benefits that could arise from smart

<sup>22</sup> Letter from MBIE to the Commerce Commission (21 November 2013).

<sup>23</sup> Letter from MBIE to the Commerce Commission (5 March 2014).

<sup>24</sup> Letter from MBIE to the Commerce Commission (14 April 2014).

electricity networks, use of broadband by emergency services, and Maori economic development. Government would also consider the option value of holding it for some future alternative. In this context, alternative options would now all be considered ahead of any possibility of making another offer to 2degrees.

42. In a subsequent meeting MBIE officials advised that any decisions about the use of the remaining block of 2 x 5 MHz would not be made until after this year's general election. MBIE further advised that it could not anticipate or rule out decisions a future Government might make.<sup>25</sup>
43. While no decision has been made as to how the remaining 2 x 5 MHz block will be allocated if the sale to Telecom does not proceed, in a letter dated 9 May 2014, MBIE communicated to the Commission the Crown's decision as to the possible different options for where in the 700 MHz frequency range the successful bidders' holdings might be located, including the remaining 2 x 5 MHz block of spectrum if Telecom was or was not granted clearance.<sup>26</sup> On 23 May 2014, the Minister for Communications and Information Technology publicly announced this decision.<sup>27</sup>
44. In terms of the placement options the MNOs may bid for were we to decline to give clearance, the MBIE information released by the Minister on 23 May 2014 stated:<sup>28 29</sup>

TABLE 2. POSSIBLE ASSIGNMENT ROUND OUTCOMES IF CLEARANCE IS NOT GRANTED

Lower MHz	703-708	708-713	713-718	718-723	723-728	728-733	733-738	738-743	743-748
Upper MHz	758-763	763-768	768-773	773-778	778-783	783-788	788-793	793-798	798-803
Option A1	2x15 MHz (TC)			2x5 MHz (Crown)	2x15 MHz (VF)			2x10 MHz (2D)	
Option C1	2x10 MHz (2D)		2x15 MHz (TC)			2x5 MHz (Crown)	2x15 MHz (VF)		
Option D1	2x15 MHz (VF)			2x5 MHz (Crown)	2x15 MHz (TC)			2x10 MHz (2D)	
Option E1	2x10 MHz (2D)		2x15 MHz (VF)			2x5 MHz (Crown)	2x15 MHz (TC)		

The practical effect of this is that the unsold lot will be placed between Telecom and Vodafone. This means the government can fulfil its commitments under the auction rules by ensuring that it will be able to provide 2x20 MHz of contiguous spectrum to Telecom or Vodafone, should either bidder ultimately be successful in its clearance application. Telecom is able to appeal the

<sup>25</sup> Meeting between MBIE and the Commerce Commission (29 April 2014).

<sup>26</sup> Letter from MBIE to the Commerce Commission (9 May 2014).

<sup>27</sup> Cabinet-level decisions were made by a delegated subcommittee of Ministers comprising the Minister for Communications and Information Technology, the Minister of Finance and the Minister for Economic Development.

<sup>28</sup> Media Statement from the Minister for Communications and Information Technology, *Allocation options for 700 MHz radio spectrum* (23 May 2014). MBIE, *700 MHz Auction: Combinatorial Assignment Round Options/Outcomes* (22 May 2014).

<sup>29</sup> Note that in MBIE's Table 2 Telecom's possible placements (TC) are shown in blue, Vodafone's (VF) in red, and 2degrees' (2D) in green. The unsold lot is shown in yellow. MBIE advised the Commission that this lot "would remain in Crown ownership at least until the clearance issues are resolved". Letter from MBIE to the Commerce Commission above n26.

Commission's decision, which could take considerable time. If Telecom's makes an unsuccessful appeal, Vodafone as the next highest bidder is entitled to seek clearance to acquire this lot (pursuant to clause 8.16.1 of the Addendum No. 1 to 700 MHz Auction Catalogue), provided it meets the requirements of the Commerce Act.

45. In its 9 May letter to the Commission, MBIE also stated:<sup>30</sup>

Of the options available these options are also the most consistent with the other possibilities that the Government might consider if neither Telecom nor Vodafone get clearance. (My letter to you of 14 April described some of those possibilities). These included, for example, the use of the spectrum for emergency services. The placement of the spectrum between the two larger networks would best suit such a spectrum use.

46. In relation to the Minister's announcement, 2degrees submitted that [ ]<sup>31</sup>  
However, we are satisfied that the Crown's decision represents what the Crown is likely to do without the acquisition.

*Implications of the Crown's decisions for our analysis*

47. MBIE's 14 April 2014 letter does not rule out the possibility that the Crown would sell the remaining block of 2 x 5 MHz to 2degrees absent its sale to Telecom.
48. However, the decision released by the Minister on 23 May 2014 means that if the 2 x 5 MHz block is not sold to Telecom, the 2 x 5 MHz block will not be contiguous with the 2 x 10 MHz that 2degrees has already provisionally acquired through MBIE's 700 MHz auction. The Crown's decision communicated to us on 9 May 2014 meant that it was appropriate for us from that point on to only assess the without scenario only on that basis.
49. Given that the remaining block of 2 x 5 MHz would not be contiguous with 2degrees 2 x 10 MHz, on 14 May 2014 we invited comment from all three MNOs on the implications of holding non-contiguous blocks of spectrum and then on 23 May 2014 we invited any further comments on the implications of the Crown's decision (as announced by the Minister that same day).
50. All three MNOs submitted that current technology requires an MNO's spectrum holdings within a specific frequency range to be contiguous for it to be able to offer the speed and quality of services associated with holding 2 x 15 MHz. They also submitted that, for this to change, international standards would need to be agreed on the aggregation of non-contiguous spectrum within the 700 MHz band, and then standard-compliant devices (eg, mobile phones) would need to be developed and

<sup>30</sup> Letter from MBIE to the Commerce Commission above n26.

<sup>31</sup> Letter from Matthews Law (on behalf of 2degrees) to the Commerce Commission (27 May 2014).

made available to consumers. Furthermore they submitted that these technological developments would have to be demanded by MNOs internationally.<sup>32</sup>

51. In terms of the potential timing of any such developments, Telecom, Vodafone and 2degrees submitted that such technological developments are unlikely to arise even in the medium term. Telecom submitted that while technological developments could occur in the future, it was not sure when that would happen.<sup>33</sup> Vodafone submitted that its best estimate was that such technological developments, including the development of intra-band carrier aggregation standards, would “take a minimum of five years”.<sup>34</sup> 2degrees submitted:<sup>35</sup>

[

]

52. The Crown’s decision would appear to significantly reduce the value of the remaining 2 x 5 MHz block to 2degrees, reducing the prospect that the Crown and 2degrees would be able to agree mutually acceptable terms for 2degrees to acquire the managements rights for the remaining block of 2 x 5 MHz.

*Conclusion on the without scenario*

53. Based on the available evidence, the Commission considers it unlikely that 2degrees would acquire the rights to the remaining 2 x 5 MHz block of spectrum in the without scenario. This is because:
- 53.1 the Crown has signalled its intention to consider other options ahead of sale to 2degrees; and
- 53.2 the Crown’s decision to allocate the unsold 2 x 5 MHz block of spectrum in a position that is non-contiguous with 2degrees reduces the likelihood that 2degrees and the Crown would be able to agree mutually acceptable terms for 2degrees to acquire the management rights for the remaining block of 2 x 5 MHz.
54. The uncertainty presented by these two contingencies means that such a transaction is no more than a possible outcome. It does not meet the threshold of likely.

<sup>32</sup> International standards already exist allowing MNOs to aggregate spectrum in different frequency ranges (eg, 700 MHz and 1800 MHz) and standard-compliant devices are expected to be available shortly.

[http://www.telecom-media.co.nz/releases\\_detail.asp?id=3933&page=index](http://www.telecom-media.co.nz/releases_detail.asp?id=3933&page=index)

<sup>33</sup> Letter from Telecom to the Commerce Commission (16 May 2014).

<sup>34</sup> E-mail from Vodafone to the Commerce Commission (16 May 2014).

<sup>35</sup> Letter from Matthews Law (on behalf of 2degrees) to the Commerce Commission (19 May 2014).

55. Rather, the Commission considers that 2degrees would hold 2 x 10 MHz of 700 MHz spectrum, both with and without the acquisition. This is the without scenario on which we conduct our principal competition analysis below.
56. However, we have also analysed the competition effects in the event that we are wrong and 2degrees did acquire 2 x 10 MHz and 2 x 5 MHz of non-contiguous 700 MHz spectrum.

### **Difference in competition between the scenarios**

#### *2degrees does not acquire 2 x 5MHz of non-contiguous spectrum in the counterfactual*

57. With the acquisition, Telecom would hold the management rights to 2 x 20 MHz of 700 MHz spectrum compared to 2 x 15 MHz without the acquisition. Put another way, Telecom would have a fourth block of 2 x 5 MHz, or 33% more 700 MHz spectrum, with the acquisition than without the acquisition.
58. In the without scenario, the fourth block is unlikely to be used by any MNO to provide retail mobile services, thereby denying consumers the benefits of any enhanced services that Telecom might be able to offer using 2 x 20 MHz.<sup>36</sup>
59. In this regard, Telecom submitted that significant efficiencies would arise from its acquisition of a fourth 2 x 5 MHz block (to give it a total of 2 x 20 MHz) of 700 MHz spectrum.<sup>37</sup> It further submitted that there would be significant benefits to mobile customers given the greater coverage, greater peak speeds and better service that it would be able to offer (particularly in rural areas).<sup>38</sup>
60. In terms of how Telecom's acquisition would affect competition, Telecom submitted that the market would remain highly competitive and it would continue to be "constrained in its actions by Vodafone, the largest mobile operator in New Zealand, and 2Degrees".<sup>39</sup>
61. Vodafone and 2degrees would both hold the same quantity of 700 MHz spectrum with the acquisition as they would without the acquisition (specifically, 2 x 15 MHz in the case of Vodafone and 2 x 10 MHz in the case of 2degrees). In both scenarios, Vodafone and 2degrees would use the same spectrum holdings to provide mobile services in competition with Telecom. As such, there would be no observable difference in the competitive constraint that Vodafone and 2degrees would provide on Telecom between the two scenarios.
62. Accordingly, the Commission concludes 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.

---

<sup>36</sup> We note that in deciding what it would do with the 700 MHz radio spectrum freed up by the switchover to digital television, MBIE (then the Ministry of Economic Development) considered that using the spectrum for mobile services would provide the highest economic benefit to New Zealand. Ministry of Economic Development, *Digital Dividend Opportunities for New Zealand* (August 2011) at 8.

<sup>37</sup> Telecom application above n18 at [27.1].

<sup>38</sup> Ibid at [1.4-1.5] and [5.7].

<sup>39</sup> Telecom application above n18 at [18.1].

*2degrees acquires 2 x 5MHz of non-contiguous spectrum in the counterfactual*

63. We have considered the impact of the acquisition assuming we were wrong in our conclusion that the Crown and 2degrees are unlikely to enter into a mutually acceptable transaction under which 2degrees obtains the management rights for the 2 x 5 MHz block of 700 MHz spectrum. In this scenario, 2degrees would hold separate blocks of 2 x 10 MHz and 2 x 5 MHz.

64. In terms of this scenario, 2degrees submitted:<sup>40</sup>

[

]

65. 2degrees further submitted that [

].<sup>41</sup>

66. Based on the above evidence, while a separate 2 x 5 MHz block would provide 2degrees with additional capacity, the quality of service that 2degrees would be able to offer consumers in this scenario is unlikely to be different to what it would be able to offer if it only held 2 x 10 MHz, unless it is able to improve the quality of its services by aggregating the separate 2 x 5 MHz block with spectrum in another frequency range.

67. This is because 2degrees' competitive offering, in both the with and without scenarios, would be effectively limited by what it could do with 2 x 10 MHz of 700 MHz spectrum. 2degrees having the ability to provide materially lower quality 4G mobile services to additional customers using an extra 2 x 5 MHz block is unlikely to significantly alter its ability to compete in the future given that providing high quality 4G services is expected to be an increasingly important part of the provision of mobile services.

68. For that reason, we see the competitive outcome in this scenario as not being materially different to the outcome where 2degrees did not acquire the 2 x 5 MHz block of non-contiguous spectrum.

---

<sup>40</sup> Letter from 2degrees above n35.

<sup>41</sup> Ibid.

**Determination on notice of clearance**

69. Pursuant to section 66(3)(a) of the Commerce Act 1986, the Commission determines to give clearance to the proposed acquisition.

Dated this 30<sup>th</sup> day of May 2014

Dr Mark Berry  
Chairman