Regulating communications for the future:
Review of the Telecommunications Act 2001

Two Degrees Mobile Limited

Submission to the Ministry of Business, Innovation & Employment

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Confidential and market sensitive information

Confidential and market sensitive information that Two Degrees Mobile Limited (2degrees) has included in this submission, based on the view that it can be withheld under the Official Information Act 1982, is marked in bold square brackets [C-I-C]. We ask that we be consulted on any request received for the release of such information.
1 Executive Summary

Few sectors have changed consumers’ daily lives as rapidly as telecommunications. In less than a decade New Zealanders have progressed from entry level broadband and high cost mobile services to a life of always-on connectivity that underpins the way we work, buy products and services, access entertainment and socialise.

This fundamental change has resulted from investment and innovation, made possible by government policy and investor confidence. The changes made to the Telecommunications Act in 2006 and 2011 have stimulated the most critical input in the telecommunications market: competition.

As fibre network deployment approaches critical mass, content moves to new platforms and mobile networks face the next level of investment it is the ideal time to review our policy settings for 2020 and beyond.

2degrees welcomes the opportunity to comment on the MBIE discussion document ‘A Review of the Telecommunications Act’ (the Discussion Document). As a full service telecommunications provider, 2degrees has an interest in all aspects of the sector. Our submission provides comments on proposed changes to both fixed and mobile policy settings, delving most deeply into the market MBIE correctly identifies as vulnerable: mobile.

A vibrant communications environment

The government’s vision of a vibrant communications environment providing high quality, affordable services for all New Zealanders and 2025 broadband speeds of at least 50Mbps for 99% of New Zealanders and 10Mbps for the remaining 1%, is bold, but achievable.

To realise this, New Zealand needs a healthy telecommunications sector, with competitive players investing in new technologies and innovative services, including 5G and beyond.

It also requires a government vision beyond a sector that continues to be dominated by two retail incumbents, which together still control more than 80% of New Zealand’s retail telecommunications revenues (and each many times the size of the next largest competitor).

New Zealand’s telecommunications sector has developed in leaps and bounds since the introduction of competition. Competition has driven investment in infrastructure, innovation and an affordable choice of services by global standards. New Zealand needs to ensure that as data-hungry applications drive exponential growth in UFB, LTE take-up and network capacity demand, the benefits of competition and choice continue and are extended to the business and rural markets so important to New Zealand’s economic growth.

In 2degrees’ view, this requires sound competition-centric policy, enforced by an empowered independent regulator that is fully accountable, but able to move quickly. In this way, government minimises the need for, and risks associated with, a long term government role in industry.

A stable regulatory environment for the long term

A stable, predictable regulatory environment is vital to support ongoing investment. 2degrees’ investors have invested heavily in New Zealand infrastructure on the basis of pro-competitive regulatory settings. These are long term investments. It is critical that pro-competitive regulatory settings are not changed mid-way through such significant investments.

2degrees supports a communications regulatory framework that:

- Minimises political risk to long term investments, by empowering a stable, independent regulator.
- Enables competition to develop, without establishing competitive advantage or bottlenecks.
- Supports wholesale access via industry solutions, with an effective regulatory backstop that can quickly address issues should these not succeed.
- Appreciates different settings are required for natural monopoly access networks versus markets where network based competition is in place.
- Speeds up the regulatory process, while ensuring sufficient consultation and robust decisions.
Price certainty for fixed line access services

New UFB networks will underpin the majority of fixed line access connections beyond 2020. With UFB contracts coming to an end, and the extensive Schedule 3 process of the current Act, the current regulatory settings risk significant price shocks for consumers and service providers. This could substantially inhibit downstream competition and investment incentives. Certainty of access pricing is needed as soon as possible.

2degrees appreciates the proposed move to a RAB approach is aimed at addressing these concerns; however the change may in itself create regulatory uncertainty and a complex regulatory process.

2degrees supports the industry being given the opportunity to develop a solution, potentially including a price path to transition from UFB contracts, with a robust regulatory backstop in the Act should such a solution fail to materialise in the near term.

Securing mobile competition

2degrees’ investment in New Zealand’s third mobile network operator, and the competition that has arisen as a result, has driven investment and innovation and delivered substantial benefits to New Zealand mobile users. This would not have been possible without pro-competition policy and regulatory settings.

In just over six years 2degrees has deployed a national mobile network of cell sites extending beyond 90% population coverage, and has made considerable inroads in the prepaid and low end postpay markets. However, the gains have not reached all markets, with business and M2M/IoT markets facing a limited choice, and, as the government has correctly identified, this competition remains vulnerable.

Decisions now around spectrum allocation, government funding of rural infrastructure and the market behaviour of incumbents will directly impact the telecommunications experience for consumers in 2020 and beyond.

Attention is needed regarding:

- **Spectrum allocation and pricing decisions:**
  Relative spectrum holdings between mobile network operators shape long term industry structure and the nature of competition due to their impact on underlying costs of capacity. The current regulatory framework has no legislative framework, no requirement to consider competition impacts, and no requirement for an independent analysis of the competition safeguards that should be put in place to prevent long term bottlenecks and protect consumer interests over the long term. The result: the regulatory framework has allowed significant spectrum concentration, with a worsening imbalance in holdings between the two largest operators and 2degrees. If these spectrum disparities are not addressed, as demand for data increases there will be a significant impact on 2degrees’ ability to compete and innovate.

  2degrees supports the responsibility for spectrum allocation being placed with an independent regulator, as is commonplace internationally. However, at a minimum, this review should address the lack of transparency, accountability and investment uncertainty from the current ad hoc arrangements by establishing a clear framework for spectrum allocation decisions. This includes a clear requirement to take competition issues into account, and requiring the Commission, as an independent expert separated from the seller of the spectrum, to conduct an assessment of competition issues and identify appropriate safeguards (prior to any spectrum assignment process).

- **A streamlined process for price regulation of national roaming services:**
  Similar national coverage is critical to effectively compete in national mobile markets. As the late entrant 2degrees relies on the purchase of national roaming services to ensure its customers
have access to mobile services in less densely populated areas, including key transport corridors, where it does not have its own network footprint. The vast majority of our customers use these national roaming services at some point.

This service is not contestable for reasons of technical compatibility [ ]. It is essential the national roaming service remains regulated under the Act to incentivise industry solutions, and that the regulatory regime can react quickly to any breakdown of national roaming arrangements, including determination of cost-oriented pricing should that be required. We agree with the view set out in the Discussion Document that the national roaming service would benefit from streamlining of the Schedule 3 process.

- **Government initiatives to improve coverage:**
  The tower co-location model adopted for RBI1 has resulted in inefficient duplication of infrastructure in areas of low capacity demand and competitively disadvantaged the late mobile entrant. As the government RBI2 and Mobile Black Spot Fund initiatives roll out to increasingly remote areas, government has an important opportunity to support increased rural coverage, increased competition and choice and more efficient deployment of national infrastructure using government funding. We support and encourage the government’s recognition and consideration of these issues.

There is no case for an investigation of MVNO access regulation at this time. [ ]. However, improvements to the Schedule 3 process would equally be available to Access Seekers of MVNO services.

**The regulatory toolkit**

The discussion document proposes a number of changes to the regulatory toolkit, including adoption of the purpose statement to adjust for issues related to specific fixed line access services. Although 2degrees understands the desire to address the issues identified, blanket changes in the purpose statement of legislation will have unintended consequences. Any utility style regulatory framework that is introduced should have a separate purpose statement to reflect the different nature of that regime and avoid causing additional uncertainty and delays to regulatory issues concerning other services under the Act.

A key focus of this review should be streamlining the regulatory process when commercial negotiations fail – we cannot afford a repeat of the eight year process to regulate mobile termination rates, or the cumbersome UCLL and UBA pricing determinations. A range of options should be considered, including whether the Schedule 3 and STD processes can be combined into a single Commission process, whether the Commission can be empowered to make decisions on whether regulation is required and whether it is appropriate to provide the Commission with additional flexibility to choose the methodology when determining the pricing principle.

Other issues a strategic review of the Act should be considering include:

- The inability for the Commission to effectively address competition issues at the retail level and whether tools such as the Australian Telecommunications Notice Regime are appropriate.

- Potential changes to the TSO and TDL liability allocation processes.

The remainder of this submission responds to the specific questions set out in the Discussion Document. These are necessarily high level initial comments given the short timeframe provided to respond on a wide range of complex issues and the high level discussion of the Discussion Document. We welcome the opportunity to discuss these issues further in due course.
2 Goals for this Review

1a. Do you have any comments on the Government’s long-term vision for communications markets?

2degrees supports the Government’s long-term vision for “a vibrant communications environment that provides high quality and affordable services for all New Zealanders, and enables our economy to grow, innovate and compete in a dynamic global environment”. We also support the ambitious, but achievable, goal of access to peak broadband speeds of at least 50Mbps for 99% of New Zealanders and 10Mbps for the remaining 1% by 2025.

With the exponential growth in data demand as uptake of new data-hungry services increases and the development new applications and services including exciting opportunities in M2M/ the Internet of Things, the opportunity for communications infrastructure to enable increase New Zealand’s productivity and standard of living is enormous.

To realise this vision, New Zealand will need a healthy telecommunications sector, with the ability for multiple players to invest in future technology services and beyond. It requires an aspiration beyond two dominant retail giants and a number of healthy dwarves.

Despite improvements to date, both fixed and mobile markets remain highly concentrated. Figure 1 illustrates that Spark and Vodafone together account for well over 80% of the telecommunications market and each many times the size of the next largest competitor.

Figure 1 Estimated Telecommunications Market Shares (March 2015)


In 2degrees’ view, achieving a vibrant telecommunications sector with minimum ongoing government intervention requires sound competition-centric policy, with an appreciation for the different regulatory settings required for natural monopoly fixed access networks versus the network-based competition in mobile.

It also requires an empowered independent regulator that is fully accountable, but able to move quickly, and a transparent and accountable regime that respects investors’ reasonable expectation of a reasonable return on efficient investment.

1b. Do you have any comments on the Government’s regulatory principles?

The regulatory principles of the telecommunications regulatory framework should also include:

- Regulatory independence.
- The promotion of competition.
- Reasonable returns on efficient investment.
A key principle that underpins any best practice regulatory regime and that stands out as missing from the initial proposed list of principles is *regulatory independence*.

A capable independent regulator is fundamental to a stable and predictable regulatory environment that provides the certainty required to make long term infrastructure investment decisions. This requires that the independent regulator (in this case the Commerce Commission) is delegated appropriate authority to make relevant independent decisions and free to carry out its responsibilities without undue political interference.

A capable, independent regulator must form part of any regulatory principles underpinning the New Zealand telecommunications regulatory regime.

2degrees generally supports the regulatory principles identified in the Discussion Document (predictability, proportionality, transparency and accountability, flexibility, including technology neutrality). Specific comments on each of these principles are set out in Figure 2 below.

**Figure 2 Regulatory Principles**

<table>
<thead>
<tr>
<th>Principle</th>
<th>2degrees comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear necessity</td>
<td>• While we agree that there should be a clear case for regulation, we do not consider that this is a separate regulatory principle, rather it is a clear outcome of the “proportionality” principle: if regulation is not justified on the basis of a cost benefit analysis then it would not meet the proportionality criteria.</td>
</tr>
<tr>
<td></td>
<td>• 2degrees does not support regulation where there is no case for it. There should be clear evidence of an issue and the benefits and costs of regulation (or continued regulation) should be analysed against the benefits and costs of no regulation.</td>
</tr>
<tr>
<td></td>
<td>• This does not mean that all regulations not being directly used should be removed:</td>
</tr>
<tr>
<td></td>
<td>- The role of the regulatory backstop in supporting commercial outcomes and ensuring against more intrusive regulation should not be underestimated in the cost/benefit analysis.</td>
</tr>
<tr>
<td></td>
<td>- The costs and risks of deregulation may significantly outweigh the benefits in some cases. This is particularly the case given the inability of the regulatory process to address issues should they arise in a timely manner. It is important to ensure the regulatory regime is not weakened to favour dominant operators.</td>
</tr>
<tr>
<td>Predictability</td>
<td>• Predictability of the regulatory regime is key to enabling investment certainty and ongoing investment.</td>
</tr>
<tr>
<td></td>
<td>• This requires regulatory stability, clear decision making criteria and certainty of process.</td>
</tr>
<tr>
<td></td>
<td>• The Discussion Document identifies two sources of major uncertainty under the current regime – UFB pricing and copper pricing. We note that a major source of uncertainty for 2degrees is spectrum allocation and renewal decisions.</td>
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<tr>
<td></td>
<td>• Changes to the purpose statement are also likely to introduce significant uncertainty.</td>
</tr>
<tr>
<td></td>
<td>• Any shift away from the current pro-competitive stance of the Telecommunications Act would introduce significant uncertainty. The promotion of competition has been the core of the telecommunications regime since it was enacted in 2001 and is recognised internationally as an appropriate means to ensure long term market efficiencies, spur investment, and secure sustained consumer benefits, including pricing, quality and innovation. 2degrees invested on the basis of a cost benefit analysis then it would not meet the proportionality criteria.</td>
</tr>
<tr>
<td>Proportionality</td>
<td>• The burden of the rules should be proportionate to the expected benefits.</td>
</tr>
<tr>
<td></td>
<td>• Regulation should only be imposed where the benefits outweigh the costs of doing so.</td>
</tr>
<tr>
<td></td>
<td>• “Clear necessity” should be merged into this principle.</td>
</tr>
<tr>
<td></td>
<td>• The form of regulation/level of regulatory intervention should reflect the relative costs and benefits.</td>
</tr>
<tr>
<td></td>
<td>• Regulatory backstops are likely to remain appropriate in wholesale markets with market power as both an incentive to commercial solutions and means to address issues in a timely manner if required.</td>
</tr>
<tr>
<td>Transparency &amp; accountability</td>
<td>• This requires transparent development of regulatory policy and rules, clear regulatory frameworks and clear justification and transparency of decisions, including publishing of reasons supporting those decisions.</td>
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<tr>
<td></td>
<td>• The current spectrum allocation and renewal framework is a clear example where transparency and accountability principles are not currently met.</td>
</tr>
<tr>
<td>Flexibility, including technological neutrality</td>
<td>• This review is a long term assessment of the regulatory framework and is required to consider a range of telecommunications technologies, as specified in the Act. The regulatory regime should be flexible and durable to as yet unknown technology developments over an extended period and should not “pick winners” through legislative means.</td>
</tr>
<tr>
<td></td>
<td>• A flexible, durable approach requires a principles-based regime rather than being overly prescriptive.</td>
</tr>
</tbody>
</table>
3 Is the regulatory framework fit for purpose?

2. What is your view on creating an overarching ‘Communications Act’ to consolidate economic regulation across the communications sector?

In principle, we agree that consolidating economic regulatory functions for communications is desirable.

We support the inclusion of a regulatory framework for spectrum allocation and renewals and the Commerce Commission playing a greater role in spectrum decisions. We discuss this in further detail in section 5.

We consider more analysis is required of the competition issues in the broadcasting sector, and the benefits and costs of amending the exception for broadcasting infrastructure before amendments are carried out.

3. Have we identified the main challenges facing communications regulation as we move beyond 2020?

The Discussion Document identifies a number of key issues for the communications sector going forward. We agree addressing pricing issues with fixed line access services and supporting sustainable competition in mobile markets are critical aspects of the regime.

We also consider the following issues merit further consideration as part of this review:

1. Ability for Commission to address competition concerns at the retail level:

As we have previously noted, the Telecommunications Commissioner has only limited powers to address anticompetitive conduct, including competition concerns arising at the retail level. This review should ensure the Commission has the relevant tools to address behavioural issues in a timely, effective manner.

Such powers could allow the Commission to more effectively address switching barriers such as SIM locking, transparency of early termination charges and bundling.

2degrees has on-going concerns given two players control in excess of 80% of the market. There is very limited discussion of the potential for competition issues in future content markets in the Discussion Document. However, bundling of content is likely to be a key differentiator between retail services in the future. This is an aspect of the regulatory regime that has received significant attention overseas, for example regarding bundling of premium content and the ability for one player to purchase premium content across multiple platforms (traditional terrestrial, satellite and IP). While we agree that convergence may have reduced the market power of traditional players in the broadcasting market, it is not clear that future competition issues have been sufficiently considered for a future regulatory framework for converged telecommunications markets.

A review of the regulatory toolkit to ensure such issues can be addressed in a timely, effective manner will be critical going forward.

As recognised by the Commission and Productivity Commission, the Commerce Act has significant shortcomings in its ability to promptly address anticompetitive behaviour. This is particularly the case in fast-moving technology markets such as telecommunications, where cases have extended over 10 years.\(^1\) This does not provide confidence to investors in competitive services that anticompetitive conduct will be efficiently and effectively dealt with.

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\(^1\) For example, in 2012 Telecom was finally convicted for offences over the period 2001 to 2004 in relation to its data tail pricing. The 0867 case, also regarding Telecom anticompetitive behaviour under section 36, likewise extended for over 10 years.
In Australia, the regulator has additional powers to address anticompetitive conduct under its Telecommunications Competition Notice regime. This recognises that anti-competitive behaviour can cause rapid damage to competition that has already developed in telecommunications markets and severely hamper new entry.

Under this regime, the ACCC can issue a competition notice in respect of conduct which it believes has the effect of substantially lessening competition. Substantial fines can apply until the party against whom the competition notice has been issued ceases the anti-competitive conduct.

2. TSO and TDL liability allocation process:

The current government review of the TSO and TDL liability allocation process should form part of this broader review of the telecommunications regulatory environment.

As set out in the TCF’s response to the Minister’s request for comments on the TDL liability allocation process, the industry supports a more fundamental review of the TDL process, with a view to simplifying the current levy collection and Commission determination processes. This would have legislative implications and we consider is appropriate to address within this review.

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4 Pricing for fixed line access services

Summary:

- 2degrees’ key concern in relation to fixed line access services is pricing certainty for services beyond December 2019, whether fibre or copper, and a smooth transition to any new regulatory environment for our customers (no price shocks).
- We support:
  - The opportunity for industry to develop a commercial solution for fibre pricing that avoids costly and lengthy regulatory intervention;
  - A regulatory backstop that provides for regulation of pricing of UFB services beyond December 2019, should the industry solution be unsuccessful.
- The regulatory backstop should be included in the Telecommunications Act (or Communications Act) and not the Commerce Act. There are key differences between the telecommunications sector and utilities such as electricity and gas, which make inclusion in Part 4 of the Commerce Act impractical and inappropriate.
- The Regulated Asset Base (RAB) approach has the potential to work for pricing of UFB services, however it will be critical to work closely with the industry in the development of this approach to ensure practical implementation and reduce uncertainty.
- Whichever model is chosen, the government must adopt a consistent approach in its treatment of Chorus and LFCs.
- Fibre unbundling should be supported.
- There are other fixed line services that remain relevant to the access regime of the Telecommunications Act but are not discussed in either the fixed or mobile sections, for example national and regional backhaul services. Schedule 3 should remain available as a regulatory backstop to address issues in such fixed line markets should they arise in future.

4. Do you agree with our policy objectives for the price regulation of fixed line infrastructure?

2degrees agrees that a regulatory access and pricing regime will continue to be required for fixed line communications, which provides investment certainty and limits the ability of network owners to extract excessive profits.

A successful communications sector requires not just incentives for the fixed network access providers to innovate and invest, but also incentives for other players to innovate and invest.

Geographic Averaging

Having geographically averaged wholesale prices and access terms across the country is desirable from a retail service provider perspective although we note that this could be challenging under a RAB approach, which uses actual cost rather than hypothetical efficient operator costs. This is particularly so when applied to different fibre companies with different rollout models and geographies to contend with. The extent to which geographic averaging is possible and consistent with key regulatory principles will also be impacted by the extent to which different costs are controllable by the network owner and the size of the network (larger networks may find it easier to average out different costs across the country compared to regional operators).

Fibre unbundling

We support the continued ability to unbundle fibre post 2020. While an effective commercial offer from Chorus/LFCs would reduce the demand for such unbundling, the ability to unbundle will provide an important competitive tension and regulatory backstop should there be issues with the pricing and/or level of innovation of the service offerings.
Pricing frameworks for UFB and copper access services

We agree that UFB will eventually replace the copper network in UFB areas and that regulatory settings should not encourage inefficient investment in older networks. UFB take-up will be driven by superior network performance, data-hungry applications and competitive UFB offerings. This is reflected in 2degrees’ market offering, which offers entry level fibre at the same price as copper services.

Applying an inconsistent approach between Chorus and LFC areas could encourage inefficient investment in the Chorus copper network within UFB areas. The government must take a consistent approach in all fibre regions – either there is value for consumers in continuing competing copper services and Chorus operates parallel networks with open access, or there is not. This should not change dependent on the UFB network owner.

5. Is it feasible to move to technology neutral service descriptions? How would this work in practice?

Customers are likely to be agnostic as to the fixed technology they receive as long as they receive the quality of service they require. This is already reflected in 2degrees’ fixed broadband offering which offers the best type of connection available – copper or fibre for the same price.

From a business perspective, where there is fibre, we consider our customers are best served by using the fibre network.

However, we expect consumers demand for higher speed/innovative fibre services will continue to increase and that technology neutral service descriptions may be difficult to implement in practice:

- Copper access terms (and services) are different to UFB access terms (and services);
- The underlying costs of Chorus’ copper network, Chorus’ fibre network, and LFC fibre networks are not the same. This is especially an issue under a RAB approach and as the balance of demand between networks changes.
- The service description would need to be regularly updated to reflect market developments and consumer demand.

6. Do you consider utility-style regulation may now be more appropriate for fixed line communications services? If so, what elements would be most effective?

The industry would like the opportunity to develop a commercial fibre pricing solution that avoids costly and lengthy regulatory intervention, provides certainty, and ensures a price path that avoids price shocks. The TCF intends to provide an update of progress on this to government in early 2016. However, a regulatory backstop in the Act is still required to address fibre access should it not be possible to reach an industry solution.

The Discussion Document provides a useful high level overview of the potential for the RAB/utility-style regulatory approach. We consider there may be some merit in this approach as the regulatory backstop, however significantly more detail is required.

We note that:

- In general, utility-style regulation is considered better suited to more mature, less dynamic industries, whereas fibre is only now being rolled out in New Zealand.
- Introducing a whole new regime for fixed UFB services will result in uncertainty. We expect it will be more complex to apply this approach to communications services versus sectors such as electricity and gas, which have quite different characteristics, market structure and dynamics. We expect considerable debate on how RAB is applied to telecommunications services.
- Many of the same issues from a LRIC-based approach will still apply to the RAB approach and a LRIC based approach has strong international precedent for telecommunications markets as well as in New Zealand. Many of the issues related to the copper pricing debate appear to relate not to
the choice of LRIC cost methodology but the processes of the Act and practical implementation issues. These issues would also need to be addressed if a new regime is to be successful.

- Under utility style regulation annual reviews are still required that compare actual versus efficient costs. These can result in price shocks for consumers and businesses.

- Utility style regulation is not appropriate for all communications services including both other fixed services and mobile services. If a separate regime is introduced for particular fixed line services the implications on other services need to be carefully thought through. As we discuss in section 6, changes should not introduce further uncertainty to other services, e.g. through changes to the purpose statement for all services rather than introducing a tailored purpose statement for the new regime.

- Given the complexity of this issue, to increase the likelihood of success, Government and officials will need to work closely with industry in developing the proposed regulatory approach.

### 7. Would maintaining the status quo for UFB services be effective post-2020?

We recognise that some changes to the regulatory backstop are likely to be required to provide certainty as to UFB pricing once the UFB contracts expire. The natural monopoly characteristics of UFB and industry-wide acknowledgement of the merits of a regulatory backstop may present an opportunity to fast-track any future regulatory pricing determination process.

Industry would like to work with officials on the development of this regulatory backstop.

As we discuss further in section 6, the current Schedule 3 process is costly and extensive. We consider this review should consider potential opportunities to streamline this process for all potential access services under the Act.

### 8. If the Government was to specify the pricing methodology that would eventually apply to UFB services, what methodology would be preferable?

There may be some merit in a RAB approach as the regulatory backstop, however significantly more detail is required. Key issues under the RAB approach will be the setting of the initial prices and the timeframe for recovery of investments.

### 9. What is your view on UFB access services being regulated immediately from 1 January 2020, compared to a backstop regime whose application would be triggered by a Commerce Commission recommendation?

If an industry commercial solution is not reached, the Commission should be required to be in a position to set prices for regulated products from the expiry of the contracted prices in 2020.

There needs to be certainty on UFB prices immediately following the expiry of the contracted prices, whether this is achieved via regulatory or non-regulatory means.

### 10. If the Government were to legislate for the price regulation of UFB services from 1 January 2020, do you have any initial thoughts on the scope of such regulation? Should a different approach be taken in LFC areas?

The approach should be consistent for Chorus and LFCs. The Discussion Document appears to suggest that there may be scope to regulate copper differently between areas depending on whether Chorus or a LFC owns the fibre network.

The government must take a consistent approach as to whether it considers copper to be a replacement or competing network in areas where fibre is rolled out. This position should not change depending on whether Chorus is the network owner. Clearly this approach lacks consistency and is at odds with ensuring a level playing field:
- It is not clear why competition using the copper network would be considered valuable for consumers in LFC regions but not Chorus areas.
- It is not clear why having a parallel copper network is inefficient duplication in some UFB areas but not others (including why Chorus investing in faster copper technologies in LFC areas is not considered to be inefficient duplication).
- The utility-style regulation approach is justified on the basis of natural monopoly characteristics, however continued competition from copper services in LFC areas would undermine the use of this approach.

11. If the Government were to introduce a backstop regime for UFB services, do you have any initial thoughts on:
   a. tailoring the traditional Schedule 3 investigation into whether UFB services should be regulated?
   b. the need for transitional measures that might apply prior to the possible price regulation of UFB services?

Industry would like to work with officials on the development of a more effective backstop than the current Schedule 3 process.

As we set out in section 6, there is a wider question as to whether Schedule 3 could be better streamlined as it applies to all services under the Act.

It is in the interests of both consumers and industry to avoid a price shock as the industry transitions off existing UFB contracts. Implementation of price paths have the potential to mitigate this risk.

12. Is there a case for change to the regulated copper access services pricing methodology? If so, what pricing methodology should apply post-2020?

13. If a BBM pricing methodology were put in place for UFB services, how would that impact the choice of a copper pricing regime? Should consistency be an important consideration?

Copper access services will remain important beyond 2020 for those areas outside the UFB footprint. The decisions on the UFB pricing model are likely to impact copper pricing considerations and will need to be carefully considered in future phases of this review.

14. If BBM were introduced for UFB and/or copper services, should this be done under Part 4 of the Commerce Act or through a similar model under the Telecommunications Act? What would be the costs and benefits of each option?

The telecommunications industry has quite different characteristics to industries regulated under Part 4 of the Commerce Act. Any regulatory regime for UFB and/or copper services should be contained in the Telecommunications (or future Communications Act) and not Part 4 of the Commerce Act:

- Containing all telecommunications access regulation in the same legislation provides for a more holistic approach to the sector.
- All telecommunications access regulation should be considered by the specialist Telecommunications Division of the Commerce Commission.
- Services under Part 4 of the Commerce Act appear to have less potential for innovative competition downstream, with a focus on wholesale price-quality setting and ensuring incentives on the regulated entity to invest rather than the market.
- The toolkit of Part 4 of the Commerce Act differs substantially with information disclosure, price-quality regulation, and a negotiate/arbitrate function. It does not address other non-price access issues that form part of the Telecommunications Act processes.
Part 4 of the Commerce Act is unlikely to provide sufficient certainty regarding the application of a RAB cost methodology to telecommunications. It does not specify details of the cost methodology to be applied. We expect application of a RAB to telecommunications is likely to be more complicated than for other network industries and there could be merit in providing for additional detail in the Telecommunications Act. In the telecommunications sector pricing may be required for specific products rather than an overall revenue cap.

If a specific regime is introduced for certain fixed line access services a separate section of the Telecommunications Act is likely to be the most appropriate means of implementing this. This could include a separate purpose statement reflecting the natural monopoly characteristics of those particular services.

15. What is the right balance between providing predictability through legislated pricing requirements and ensuring the Commission has flexibility to respond to a changing environment? How might this be achieved?

16. Please comment on the implementation issues we have identified for moving to BBM for UFB and/or copper access services, including identifying any other material issues that you think would need to be addressed.

It is important to ensure the Commission has flexibility to respond to the changing telecommunications environment. A principled rather than overly prescriptive approach preserves such flexibility whilst signalling to industry stakeholders the policy intention.

It is not clear what input the Commission has through this consultation process. However we consider it important that the independent regulator, with expertise in these matters and who is likely to be implementing key aspects of the regime, has an opportunity to input into this Act review and comment on such implementation issues.

Regulatory framework for other fixed line services

The Discussion Document acknowledges that the current regulatory pricing framework will continue to be relevant for MTAS and other mobile/wireless services.

The Telecommunications Act’s access regime also remains relevant to fixed line services other than UFB and copper access services, for example backhaul and transit services should access issues arise with such services in future.

It important that the Schedule 3 process remains available to address future issues in these markets should they arise.

A further aspect that does not appear to have been considered is the importance of access to capacity on international cables for a thriving domestic market. The government should also consider whether the current regulatory framework has the ability to address access issues related to international capacity bottlenecks/vertical integration issues.
5 Mobile competition and radio spectrum

Summary:
- Despite significant improvements, competition in mobile remains vulnerable with the late entrant still building out network coverage.
- The Discussion Document has correctly identified national roaming, infrastructure sharing in rural areas and spectrum allocation issues as key outstanding issues in mobile.
- To support dynamic, sustainable competition in mobile that does not require deeper regulatory intervention later, the future regulatory framework must:
  - **Address long term spectrum disparities between mobile network operators:**
    - Relative spectrum holdings will determine the long term industry structure and nature of competition because of the impact on underlying capacity cost. The current spectrum allocation framework has no legislative framework or requirement to consider input from the independent competition expert. The result: a significant long term concentration of spectrum holdings.
    - 2degrees supports allocation of spectrum by an independent regulatory authority.
    - However, at a minimum, the spectrum regulatory framework must:
      - Provide that future allocation and renewal decisions explicitly consider the long term impact on competition.
      - Ensure that the Commission, as an independent regulator with competition and industry expertise, has responsibility for upfront competition assessments in relation to radio spectrum (including how to minimise competition distortions);
  - **Ensure certainty of supply of national roaming service, at reasonable prices.**
    - 2degrees agrees with the Discussion Document’s view that national roaming remains a critical regulated service under the Act. Like-for-like coverage is vital to effectively compete in national mobile markets. It is essential the regulatory backstop remains in place to incentivise ongoing national roaming negotiations and to provide a credible alternative should commercial negotiations fail. The regulatory regime must be able to react quickly to any breakdown of national roaming arrangements, including determination of cost-oriented pricing should that be required. We agree that the national roaming service would benefit from a streamlined Schedule 3 process.
  - **Support efficient pro-competitive rollout of infrastructure in rural areas:**
    - We agree with the Discussion Document that there is a point in rural New Zealand where continuing to promote triplication of mobile infrastructure is inefficient, and where better outcomes, including competition and choice, can be achieved through deeper sharing of mobile infrastructure.
    - Government coverage programmes should ensure that they promote both efficient rollout to rural areas and competition and choice, rather than further disadvantage late entrants. 2degrees supports the government’s adoption of a roaming solution for the RBI2 and MBSF initiatives which is more efficient and provides for connectivity across all mobile networks (and all New Zealand mobile subscribers) from launch. This provides both high speed LTE broadband for rural areas and better value for money through reducing per tower capital and ongoing operating costs.
    - 2degrees agrees that Schedule 3 is appropriate to address any future issues around MVNO access should they arise. There are not reasonable grounds for the Commission to open such an investigation at present. 2degrees is a willing seller of MVNO services, contesting for MVNO business where opportunities arise.
As the discussion document has identified, competition has improved in the mobile sector but remains vulnerable.

2degrees has brought undeniable benefits to market in the form of much more competitive pricing, substantial market innovation and spurred faster rollout of world class mobile services. However, and bring durable competition and innovation into the mobile sector. This includes the mobile business and machine to machine (M2M) markets which remain highly concentrated.

As a late third entrant to the market, 2degrees has invested heavily in building out its national mobile network infrastructure over a very condensed timeframe. While 2degrees’ network now extends to over 90% population coverage, to compete in national mobile markets requires like-for-like coverage with the larger incumbents and 2degrees is still building out its national network infrastructure. This substantial investment is required at the same time as it deploys a high-speed LTE network, funds the purchase of important long term spectrum, enters the UFB/fixed market and continues to invest in innovative retail and wholesale services.

While government intervention on sub-1GHz spectrum and pro-competitive regulatory settings was instrumental in enabling 2degrees’ entry and investment, and the associated benefits of that investment, the current regulatory framework has not addressed key concerns regarding spectrum costs and national roaming, and in some cases has exacerbated an uneven playing field:

- The current regulatory framework has allowed long term concentration of mobile spectrum holdings due to short term capital constraints, providing long term cost and speed advantages to incumbents with limited competition safeguards;
- There is no certainty over the framework for future spectrum allocations or renewals, and the pricing or payment terms of such allocations.
- The Schedule 3 process is extensive and uncertain for access seekers.
- The RBI1 programme, which was aimed at fixed wireless coverage, has provided the largest mobile operators with significant first mover and coverage advantages over the late entrant.

In addition, as we noted in section 3, the Commerce Act is ineffective in addressing retail anticompetitive issues and the Telecommunications Commissioner has had only limited ability to address issues such as switching barriers which affect competition in mobile markets.

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3 For example, 2degrees halved standard prepay voice and text rates at launch; introduced Aussie Talk and Text, introduced the prepay combo pack to the market, Carryover Minutes and Carryover Data, Shared Data and Mobile Repayment Options.

4 While 2degrees has achieved over 90% population coverage, this does not equate to 90% of towers built, with significantly more sites required to achieve like-for-like coverage.

5 Pro-competitive regulatory settings included regulated pricing of MTAS, national roaming access and mobile number portability. That said, there were significant delays in achieving those regulatory settings that meant the entry of New Zealand’s third mobile network operator was significantly later than in many overseas jurisdictions.
17b. Will it continue to support both coverage and competition objectives in the future?

To support coverage and competition objectives will require the above issues to be addressed. Where possible we consider promoting healthy infrastructure competition will support both retail and wholesale competition objectives.

Importantly, achieving the government’s coverage and competition objectives should be seen as complementary objectives rather than a trade-off.

The government has recently announced its vision of peak speeds of at least 50Mbps for 99% of the population and 10Mbps for the remaining 1%, by 2025. The 700MHz spectrum band (and any future sub-1GHz spectrum bands released to mobile) provide the means to achieve this vision.

As the government strives towards this vision, it should seek to achieve both coverage and competition objectives together by supporting deeper mobile infrastructure sharing as sites become increasingly more remote. This has the potential to offer all rural users very high speeds by the most efficient means and will minimise competition effects. As the Hon Amy Adams has recently noted: 

...increasingly, mobile coverage is expected to be almost universally available.

The Discussion Document (and the RBI) already recognise there is a point where coverage is uneconomic to be privately provided given population density and capacity demand. The usage reported on RBI1 sites demonstrates the importance of coverage to all mobile users (with Vodafone reporting nearly 1.8 million unique Vodafone mobile customers as active on the RBI1 towers in the March quarter). This is only expected to increase as consumer expectations and demand for data increase.

As the RBI reaches towards the 99 and 100 percentiles a roaming/sharing model, more akin to the UFB single network mode, would better serve rural users and achieve more efficient network coverage. This is because it reduces triplication of costs in areas of low capacity demand and serves all New Zealand mobile consumers, no matter which mobile network they choose.

We acknowledge and support government’s consideration of this issue as part of the RBI2 and MBSF programmes and include further details of our proposal summarised in our response to question 18.

18. If changes are needed to regulation of mobile services, what should we consider? For example, is it worth actively promoting infrastructure sharing?

There are three key areas where we consider the telecommunications regulatory framework for mobile services requires significant improvement:

- The spectrum allocation and renewal framework;
- Streamlining and reducing uncertainties related to the Schedule 3 national roaming process; and
- Promoting rural infrastructure sharing (including roaming).

As set out in section 3, we also consider the review should consider the ability for the Commission to address competition concerns at the retail level.

Spectrum allocation and renewal framework

Given the importance of the relative spectrum holdings on long term cost and speed between mobile network operators, it is essential that the independent and expert competition regulator is able to oversee mobile spectrum allocation decisions.

The current framework does not provide that future allocation and renewal decisions consider the long term impact on competition or require any independent consideration of competition issues, despite the long term impact of these decisions. Post-allocation clearance requirements, which potentially could overrule the allocation, create considerable uncertainty for all parties and the tests are not well suited to spectrum decisions which relate to future markets.
The legislative framework should provide that future allocation and renewal decisions consider the long term impact on competition and that competition assessment by the independent regulator, and conditions, should be incorporated upfront so that government does not proceed through the allocation process without the independent regulator view.

We also consider more tools should be provided for to provide greater flexibility in mitigating competition issues. For example, unlike in overseas jurisdictions, the Commission is not able to accept behavioural undertakings as part of an acquisition process (only divestiture of assets).

Spectrum issues are further discussed in our response to question 19.

**Streamlining and reducing uncertainties related to the Schedule 3 national roaming process**

National roaming is a critical service for a late mobile entrant to enable it to compete in downstream retail mobile markets. Consumers consider comparable national coverage a prerequisite when choosing whether to switch mobile service provider.

It is essential that the regulatory regime support certainty of supply of national roaming services, and at reasonable prices.

Unlike in overseas jurisdictions, there is no effective competition in the supply of wholesale national roaming services in New Zealand due to handset incompatibility issues related to use of different 3G spectrum bands of Vodafone and Spark [7].

While 2degrees currently has a national roaming agreement, this was only secured against the threat of regulation, including the threat of price regulation and extended Commission regulatory inquiries. 8 The prices 2degrees and Vodafone agreed were substantially higher than that which would be expected in a competitive market, but accepted given the significant delays and uncertainty of the regulatory process and need to offer a national service to customers immediately.

A regulatory backstop provides both an incentive for incumbent operators to engage on reasonable commercial terms and a credible regulatory alternative should commercial negotiations fail.

National roaming is currently a specified service under the Act, meaning that it would need to go through a costly and lengthy schedule 3 process (including Commission process, Ministerial process and then Commission STD process) before being able to access regulated national roaming prices should commercial negotiations fail [7].

We agree with the government’s view that “Given the importance offering national mobile coverage, New Zealand’s vulnerable state of mobile competition could be quite rapidly affected by a failure of

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7 In addition, Spark does not have a 2G network.
8 For example:
- The original roaming agreement was only concluded in 2007 following the Commission’s review of entry issues in the cellular mobile market and subsequent launch of a Schedule 3 investigation into national roaming (and colocation) services under the Act. Prior to this TelestraClear had spent years unsuccessfully negotiating such an agreement;
- Subsequent negotiations occurred in parallel to considerations by the Commission (including as requested by the Minister of Communications) as to whether national roaming should be a designated service. This included consideration of relevant mobile termination rate (MTR) benchmarks and charging structures for national roaming. The Commission’s conclusion that MTRs are a reasonable proxy for national roaming costs is likely to have contributed to the sharp drop in Vodafone’s voice call prices between the January 2007 Undertaking it provided to the Commission and the final commercial agreement.
- [ ]
commercially negotiated roaming agreements” and that this “may be another market where a more streamlined process for regulatory intervention […] would be beneficial”.

It is critical that the regulatory regime can react quickly to any breakdown of national roaming agreement, including determination of cost-oriented prices [ ].

We discuss specific options for streamlining Schedule 3 in section 5. This includes options of combining the Schedule 3 and STD processes and empowering the Commission to make the final Schedule 3 decisions on regulation. Streamlining would increase the incentives to reach non-regulatory solutions.

Promoting rural infrastructure sharing (including RBI roaming)

Despite large areas of New Zealand having very low population density and low capacity demand there is limited infrastructure sharing between mobile network operators compared to overseas. The result is inefficient triplcation of network infrastructure and diversion of industry resource and funding. Competition suffers when the benefits of sharing don’t eventuate.

Since the inception of RBI1 there has been an international shift towards greater, deeper sharing in rural areas in recognition of the economics of serving regional areas and the efficiencies of such sharing models. As the RBI2 ventures into even less densely populated areas, the economics become even tougher.

By driving greater infrastructure sharing and access by all three operators through its RBI2 initiative, the government has the opportunity to better achieve coverage and competition objectives, providing substantially greater social and economic benefits to New Zealand telecommunications users.

As part of the RBI2 ROI process, 2degrees has proposed a model that replaces a costly, ineffective and underutilised colocation approach with a roaming service that will see smaller towers built, ensuring limited funding goes further. Even the most remote user would have a choice of provider and all of the price and service benefits that brings with it.

The benefits of the government adopting such an approach in New Zealand are especially clear given NZ’s smaller population and rural characteristics.

The government should support the development of an active sharing model for RBI2 and the MBSF initiatives. This would:

- Improve mobile connectivity for all New Zealand mobile subscribers, whether businesses or consumers, at work or on holiday.
- Support and accelerate the development of exciting new mobile applications to enhance New Zealand business productivity, for example by encouraging the development of a competitive machine to machine (‘M2M’) market that supports rural businesses.
- Use the limited funding more efficiently and deliver more towers per buck through reduced duplication of equipment and reduced infrastructure requirements.
- Ensure the cost of accessing these towers is lower for all operators – including lower capex and opex costs.
- Provide the latest fixed and wireless LTE technology solutions to rural areas.
- Promote increased competition and investment from all players in the market, from day one, and drive ongoing improvements in products and services.

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9 Active sharing arrangements (both roaming and RAN share models) have now been adopted in a very wide range of countries to achieve significant cost savings in lower capacity areas. This includes by large incumbent operators in countries with significantly higher populations. Examples include: the UK, Spain, the Netherlands, France, Brazil, Turkey, Canada, Denmark, Sweden, Poland, Austria, Iceland, Indonesia, Russia, Hong Kong, Thailand and Malaysia.
• Allow multiple providers to develop and sell their own RBI products based on input wholesale roaming prices and/or wholesale fixed wireless services.

• Create a flexible build approach that can adapt to the local requirements. For example this could be a traditional tower in rural townships, or utilise small cell technology, for example along state highways, small communities and tourist spots.

2degrees’ proposal is underpinned by the following principles:

• Benefits to the widest group of consumers as fast as possible.

• Built as efficiently as possible (minimise duplication).

• Should not provide a competitive advantage to any operator.

• All operators have access to services available on government funded RBI towers on a non-discriminatory wholesale basis.

• RBI colocation is increasingly uneconomic as rural coverage spreads to more remote communities, with even lower population density per cell site.

We recognise and welcome government’s consideration of this opportunity to bring both coverage and competition and choice to rural New Zealand.

Mobile Virtual Network Operators

The Discussion Document also considers whether there might be a case for regulation of MVNOs, reaching the preliminary view that to the extent there is any issue with the MVNO market, the Commission’s Schedule 3 process is available.

We agree with this conclusion:

• Government should only intervene if there is clear evidence of a problem.

  – Unlike the monopoly access environment of the fixed market, there are three potential suppliers of MVNO services. 2degrees has an active wholesale business and actively supports new innovation in the MVNO market, competing vigorously for new MVNO opportunities. It is notable that some of the industry participants that have been vocal in recent regulatory forums on this issue have not progressed commercial solutions with 2degrees.

  – Further, access seekers appear to be able to price below mobile network operators with current commercial agreements.

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19. What are your views on the options for reform in spectrum allocation?

19 a. How could the overlap between spectrum assignment by government and consideration under the Commerce Act be managed?

19 b. Should there be any requirements on government to consult or establish objectives for spectrum assignments in legislation?

Spectrum is an essential input to the provision of national mobile services.

The current regulatory framework has failed to recognise the key role relative spectrum holdings play in determining future market structure and the state of competition. The amount and type of spectrum an operator holds directly relates to long term cost structures and the ability to compete in downstream markets (impacting both capacity and speed).

However, the current framework has allowed significant long term concentration of spectrum holdings in the mobile market, and for existing spectrum disparities to be exacerbated. Spark and Vodafone both now have in excess of 70MHz more mobile spectrum than 2degrees, including c.30MHz and 20MHz more of critical sub-1GHz spectrum required for indoor data and rural coverage. The competitive value of additional spectrum has recently been demonstrated in the final 700MHz round, which indicated Vodafone and Spark were prepared to pay over $80 million for the last 2x5MHz of 700MHz spectrum, for a total of 2x20MHz of 700MHz spectrum.10

To secure a vibrant mobile sector in future requires rebalancing of these substantial spectrum disparities. However, the current framework, which has no legislative basis and relies on the government of the day, provides no certainty that these issues will be addressed or even considered in future spectrum allocation and renewal rounds. 2degrees’ responses to the Radiocommunications Act Review sets out its detailed position on the current spectrum allocation framework and should be read in conjunction with this submission. It identifies the following key issues:

- Investment uncertainty.
- Lack of transparency and accountability.
- Lack of independence.
- Lack of competition or sector expertise, including no requirement to consider Commerce Commission advice on allocation decisions.
- Continued inadequacies with the Commerce Act and lack of credibility of the spectrum trading regime.

As such, 2degrees welcomes the recognition in this review that there are issues with the current spectrum allocation framework, including a lack of transparency and accountability, uncertainty for participants and lack of competition expertise.

However, the key issue is ensuring a transparent legislative framework that requires competition issues to be taken into account and assessment of competition matters by an independent competition expert.

2degrees considers significant changes are required if the government is to achieve its competition objectives as well as its coverage objectives and improve transparency and accountability to industry.

As set out in our response to the Radiocommunications Act Review, the spectrum regulatory framework in New Zealand is unusual. We consider a fundamental revisit of the role of MBIE in spectrum allocation and meaningful consideration of the case for an independent regulator for spectrum (e.g. the Commerce Commission), along the lines of international precedent including Australia, the UK and the US is justified.

10 [ ]
However at a minimum:

- The Act should establish a **clear competition framework** to increase certainty, transparency and accountability of spectrum decisions related to competition matters.  
  This could take the form of a purpose statement consistent with the Commerce Act and current Telecommunications Act, i.e. "to promote competition in New Zealand for the long term benefit of consumers".
  If government also has other **social objectives** related to spectrum could also be incorporated.

- The Act should require an **independent assessment of competition-related matters**, including appropriate competition safeguards, to address the inherent conflict of interest between the Crown as vendor and rule setter/decision maker on competition issues. 
  This process should be transparent and undertaken prior to any allocation being undertaken to enable competition issues to be mitigated and reduce uncertainty. A key aspect of the uncertainty of the current process is related to independent consideration of the competition aspect taking place after the allocation. 
  This was particularly the case in the case of the 700MHz auction for a 20MHz acquisition, where the telecommunications competition regulator had already indicated it supported a 15MHz cap and with the associated uncertainty regarding potential divestiture of spectrum.

- Decisions on spectrum assignment should be made on the basis of the legislative framework/purpose statement and take into account the independent assessment of competition matters. Consistent with the principles of transparency and accountability, reasons for decisions should be published.

Additional tools to provide greater flexibility in mitigating competition issues should be provided for. For example, overseas jurisdictions have the ability to apply behavioural or service undertakings.

We support a range of tools being used to support competition, including spectrum pricing and payment terms, acquisition caps (sub-1GHz and total), use-it-or-lose-it provisions.

The discussion document sets out three potential options for addressing issues with the current spectrum framework. While we do not consider that any of these options fully the address the issues identified, a combination of MBIE’s Option 1 and Option 2a (Commission input on competition settings of the assignment process and overarching objectives) could significantly improve outcomes.

We strongly object to any option that removes the role of the independent regulator and competition expert in considering competition issues and applying competition safeguards.

Given known issues with the Commerce Act in its ability to address spectrum acquisition issues as well as the impracticalities and disruptions of unwinding spectrum acquisitions ex post, any option that relies solely on the existing Commerce Act provisions lacks credibility.

### 19 a. How could the overlap between spectrum assignment by government and consideration under the Commerce Act be managed?

The Commerce Commission should carry out a competition assessment (including application of relevant competition safeguards) prior to decisions on allocation.

Importantly, the current consideration by government of competition issues and consideration by the Commerce Commission are not duplications of one another:

- MBIE considers only high level competition-related issues in developing policy, and does not carry out competition analysis nor publish decisions on competition matters.

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11 As set out in responses to the Radiocommunications Act Review, this is also supported by consumer representative organisations such as TUANZ and InternetNZ.
12 As set out in responses to the Radiocommunications Act Review, consideration of competition issues by the independent regulator is widely supported.
13 However, the Commerce Act “SLC” test did not prevent this acquisition from proceeding.
14 For example, we note national roaming has been made mandatory as part of spectrum auction processes internationally, including in Austria, Spain, Italy, Canada and France. Such an obligation could, for example, allow a larger spectrum allocation to an incumbent, by continuing to ensure promotion of competition at a national level. The current disconnect between the Radiocommunications Act and the Telecommunications Act does not allow such solutions. Even under our Commerce Act the Commission is only able to accept divestiture of assets as a remedy. Behavioural undertakings are likely to be more practical given band planning and transitioning issues. This may allow incumbents to participate in spectrum allocations without which competition issues are likely to arise.
The Commerce Commission is an independent competition expert, whereas MBIE RSM is not independent and is not an expert in competition matters (nor was it intended to be).

20. Is an undertakings regime needed to set and enforce spectrum assignment terms and conditions? Where would this sit within the existing legislative framework?

21. Should the Ministry of Business, Innovation and Employment or an independent agency monitor and enforce assignment conditions?

Whilst we support enforcement of breaches in competition safeguards it is not clear that an undertakings regime, which also applies to social objectives, is the most appropriate means of doing so.

In general, we support all spectrum allocation decisions being administered by an independent agency as is the case internationally (for example in the UK, Australia, Canada and the US).
6 The regulatory toolkit

Summary:
- Changes to the purpose statement of legislation should be undertaken with caution. We do not support changing the current purpose statement that applies to a wide range of services under the Act to address specific fixed line access services issues. This would create extensive uncertainty and unpredictability across the regime and extend the time of Schedule 3 processes.

- The promotion of competition for the long-term benefit of end-users remains an appropriate purpose for economic regulation under Schedule 3. This requires investment and innovation to be taken into account.

- We recognise the issue the government is seeking to address in proposing a new purpose statement for natural monopoly fixed line access services. If a new purpose statement is required to address a shift to a utility-based access regime to reduce uncertainty across the regime this should only apply to services where utility-based regulation applies and be set out in a separate section of the Act that relates to that regime.

- Net neutrality is not an issue in New Zealand and does not require regulatory intervention. The best protection against such issues is competition.

- The current Commerce Commission deregulatory review process is an efficient means of ensuring regulation remains justified on a regular basis whilst not requiring costly and resource intensive regulatory processes. This process requires the Commission to conduct a full investigation where there are reasonable grounds to do so. The introduction of sunset clauses would introduce significant uncertainty for access seekers making substantial long term investments.

- The current Schedule 3 process is extensive, costly and resource intensive. A key aspect of this review should be how to streamline this process whilst ensuring a robust process led by the independent regulator. A range of options should be considered, for example combining the Schedule 3 and STD processes, empowering the Commission to make the final Schedule 3 decision, providing additional flexibility to the Commission to determine the appropriate pricing principle and tightening up the Schedule 3A undertakings process.

- We value the role of a separate Telecommunications (or Communications) Commissioner.

- Merits review processes are often lengthy, costly and uncertain, and have the potential to result in very significant delays in realising competitive benefits to consumers.

22. Is there a need to update the current purpose statement in the Telecommunications Act for the communications access regime? What are your views on the suggested changes?

No. We do not consider the current purpose statement in the Telecommunications Act requires amendment. This will result in further uncertainty and extensive industry debate, and is likely to further lengthen any future Schedule 3 processes.

The purpose statement provides critical guidance to the overall access regime and reflects the economic regulation nature of the regime, which is fundamentally to address competition issues.

Changing the purpose statement is not just an issue about fibre or structural separation in certain fixed line services. It impacts the whole sector, including other fixed services and wireless services.

The promotion of competition for the long-term benefits of end-users remains appropriate for a regulatory access regime. Importantly, the requirement is to not just ‘promote competition’, but ‘to promote competition for the long-term benefit of end-users of telecommunications services’. This requires the independent regulator to consider the impact on competition, innovation and investment.
and consider whether this is in the interests of end users over the long term, having regard to allocative, productive and dynamic efficiencies. This purpose statement, and that of the related Commerce Act, have been well tested over time, including consideration by the Courts, and we caution against amending these too readily.

**Amendment: ‘outcomes consistent with outcomes in competitive markets’**

We recognize the issue that government is seeking to address in relation to fixed line access services, the natural monopoly characteristics of the UFB network as a replacement network, and the appropriateness of the current purpose statement to any future utility-style regulatory regime. While we expect competition in downstream retail markets will remain important in any fixed line access regime, government may consider the wording of a purpose statement that applies to a utility-style regulatory regime needs to reflect the absence of platform competition.

If this is the case, our strong preference would be the insertion of a separate purpose statement in the Act that applied to services subject to the utility style regulation. This approach is consistent with that in the Commerce Act, which has an overarching purpose statement (section 1A) and a specific purpose statement for Part 4 (section 52A). This would avoid increasing uncertainty for other services under the Act.

In any case, we note that the current proposed drafting does not accurately reflect the policy justification and would lead to significant unintended consequences. In particular, the amendment wording could be applied to markets where competition is possible, which is clearly inappropriate and not the policy intent. Drafting would need to reflect that ‘outcomes consistent with outcomes in competitive markets’ only applies for markets where there is little or no prospect of competition emerging, to ensure that the new wording does not introduce further uncertainty to markets which do not have the natural monopoly characteristics, nor enable market power in potentially competitive markets to be traded off with short term investments.

**Proposal to amend section 18 to include additional policy objectives**

As for the above amendment, while this is intended to address the issue that in natural monopoly markets investment and innovation is not expected to flow from competition, the actual proposal impacts all services under the Act and would significantly increase uncertainty for those services. It would open the purpose statement to considerable debate and require the Commission to weight multiple objectives. This would be a major change that has not been justified in the paper and one we could not support.

We do not consider this amendment is required or appropriate for wider economic regulation under the Act put in place to address market power issues. While there is no debate that growth, innovation and efficient investment are likely to lead to long term benefits of end users it is internationally recognised that the promotion of competition for the long term benefit of end users is the most efficient means of promoting these factors and ensuring consumer outcomes, including ongoing investment in new innovations and infrastructure over the long term. As also recognised in the Commerce Act, competition is the key driver for private investment and can be thought of as a sort of self-regulating mechanism. It should remain the primary objective for most services.

Importantly, while competition and innovation and investment is often presented as a trade-off by incumbents, in practice efficient competition spurs investment in new technologies and services by competing operators. The key danger is that too much of a focus on short term investment can sacrifice long term investment in competitive, innovative and affordable services.

In reality including multiple objectives with no clear priority is likely to result in extensive litigation of what the new purpose statement means and promote neither certainty nor timely regulatory proceedings. It will necessarily require judgement calls (which can often be political decisions) and which the government of the day won’t always agree with. We are concerned the government could underestimate the extent of potential debate over the purpose statement that changes could result in.

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15 For example, it is not in the long term interests of end users to stifle ongoing investment in the industry for short term price gains. This is also the case for the Commerce Act purpose statement.

16 We acknowledge that the government may have expected a different interpretation of section 18(2A) in relation to the copper pricing debate, in particular to prioritise the Government’s UFB rollout. However, the Commission must make an independent decision based on the arguments presented to it and what it considers to be in the best interests of consumers.
Any such amendment should need to be confined to those aspects where the government decides utility-style regulation is appropriate. If the government considers this necessary as a result of the introduction of a utility-style regime, then this should be inserted in a separate section of the Act, consistent with the Part 4 approach, which sets out sub-objectives which focus on Access Providers (not Access Seekers). This would address the policy problem identified.

23. Are there any other barriers to withdrawal or switch-off of copper services which are not addressed here? For example, are there any services based on the legacy copper network for which a replacement product is required, and is not available in New Zealand?

24. In your view, should Chorus have to meet any requirements to protect consumers prior to withdrawing copper services or switching off the copper network within the UFB footprint?

   a. What requirements should be met?
   b. How should these requirements be given legal effect?
   c. What requirements should be met?
   d. How should these requirements be given legal effect?

Adequate notice of withdrawal of copper services will need to be provided to both industry and consumers. Copper switch-off will require replacement of many consumers’ terminal equipment and require management by RSPs.

It will also be important to understand the impact on other devices such as alarms prior to switch off.

The TSO currently imposes obligations on Spark and Chorus which may impede the migration from copper to UFB. We understand Chorus and Spark will prepare a proposal for industry to provide comment on that takes into account TSO obligations. We have previously set out our views on the TSO in response to the TSO Review. We note that the TSO is not consistent with the principle of technological neutrality.

25. Is there a need for a mandatory codes system for providers of telecommunications services in New Zealand? How would this work in practice?

It is in consumers’ interests for all telecommunications service providers to be bound by minimum standards.

The TCF already has a mandatory code system for its members. Non-members can also adopt these codes but have not chosen to do so to date. We would support mandatory compliance with these key codes, which include, for example, the Emergency Services Voice Calling Code and Customer Complaints Code.
26. Do you think there are current net neutrality issues in New Zealand?

27. Do you think the regulatory regime is capable of addressing net neutrality issues if they arise in New Zealand? If not, what approach should we consider?

a. Are there elements of the rules and expectations introduced in the European Union and United States that would be useful to have in the New Zealand regime?

28. What do you consider is acceptable traffic management and what is not acceptable? Please provide specific and realistic examples. For example, should telecommunications providers:

a. be able to block or deprioritise lawful content, applications, or services?

b. be able to enter into commercial agreements with content providers to prioritise certain traffic?

c. be able to prioritise certain types of traffic when their network is congested (such as voice traffic or emergency services calls)?

29. Are there other net neutrality matters you consider should be considered in a regulatory context (for example, peering or certain content distribution practices)?

We do not consider net neutrality is an issue in New Zealand and therefore consider any direct regulation of net neutrality would be disproportionate.

While 2degrees does not currently prioritise data traffic there are legitimate reasons for doing so and the regulatory framework should not prevent this. Such applications could include prioritising internet voice services, filtering, emergency services, security and health monitoring, and addressing network congestion issues. There may also be a case for offering consumers a choice of service which depends on performance. For example, tailoring packages and traffic management to niche sets of consumers. This should not be a problem if the retail market is competitive and the consumer can choose an alternative service.

The key issue is that such traffic management does not give rise to competition concerns, for example if an RSP is deprioritising certain traffic to disadvantage competitors or to extract revenue from a position of market power, in which case the Commerce Commission should be equipped to address such concerns.

Ultimately, the best protection against such issues is competition.

30. Do you have any suggestions for encouraging deregulation as part of the regulatory process?

The Commission is already required to regularly review existing regulation under the Act, and recommend, where appropriate, the removal of regulation where competitive bottlenecks have been removed.

The current process has worked well and is an efficient and proportionate means of ensuring regulation remains justified on a regular basis whilst not requiring costly and resource intensive regulatory processes where there is clearly no case for change.

2degrees cautions against calls for deregulation in mobile services when more than 80% of retail telecommunications market revenues are still controlled by two players.

In considering whether there is a case for deregulation the Commission carries out a transparent process. This includes issuing of a consultation document setting out potential issues and an opportunity for both access providers and access seekers to make their case to the Commission. If Access Seekers make a case that there are reasonable grounds for commencing an investigation into the deregulation of a service, then the Commission will commence such an investigation, as in fact they did for ten services in 2006 and four services in 2009/10.

It is very unclear why the government would want a full investigation to be carried out every five years even when such a low threshold is not able to be met. This would significantly increase Commission and industry regulatory costs, for what seems little benefit.
While it may be the case that some fixed services are no longer required to be regulated under the Act, we note that the Commission is due to commence its deregulatory review of such services shortly. This must be complete by September 2016. We do not see any merit in this review circumventing that process of the independent regulator.

Re-introduction of the previous sunset clause would create significant additional regulatory uncertainty for access seekers investing in new networks, and would undermine the effectiveness of the regulatory backstop in commercial negotiations. We note that in our experience for certain services, five years is not long enough a period to encourage investment certainty, particularly in relation to national roaming. There may be some merit in providing the Commission flexibility to conduct reviews over more extended periods.

Sunset clauses are also likely to favour access providers. Experience demonstrates that incumbents will argue for deregulation even when there are clear cases for continued regulation. For example Spark and Vodafone have argued for deregulation of national roaming, however it is critical to 2degrees’ ability to compete.

It is important to note that the costs/risks of early removal are likely to outweigh the benefits in many cases. This is particularly the case given the extensive Schedule 3 process and important role of timely regulation as a backstop to commercial negotiations.

**Streamlining & reducing uncertainties related to the Schedule 3 process**

As set out in section 5, the length and uncertainties of the Schedule 3 process has been a major concern for our business. It took eight years for mobile termination to be regulated in New Zealand. The UCLL and UBA pricing determinations also clear that the STD process can be unduly costly and extensive.

The current regulatory framework involves an extensive (minimum) three-step process to go from regulation of a service to implementation of that service:

- A Commerce Commission Schedule 3 investigation, requiring extensive consultation including publishing of a draft report, a conference and a final report. This would make a recommendation to the Minister as to whether the Commission should be able to regulate prices.

- The Minister of Communications must then consider the Commission’s recommendations. This typically involves a further public consultation process.

- If the Minister accepts a recommendation that the Commission should be able to regulate pricing, then an Order in Council is passed.

- The Commission then needs to carry out a Standard Terms Determination for that service and implement that decision.

- In addition, the Act also provides for additional potential steps including consideration of an undertaking and a reconsideration process.

The result is an extensive, costly and resource intensive Schedule 3 process for both the telecommunications industry, the Commission and MBIE.

A key aspect of this review should be consideration of how to better streamline this process whilst ensuring a robust process led by the independent regulator.

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17 TUANZ wrote to the Commission in July 2003 to request an investigation, which the Commission formally commenced in 2004. In June 2005 the Commission, following a year-long investigation process, including multiple submissions and hearings, recommended to the Minister that mobile termination rates should be regulated. Telecom and Vodafone then provided separate commercial offers to the Minister, and it was sent back to the Commission for a further reconsideration process. A final report recommending regulation was provided to the Minister in April 2006, however the Minister rejected this decision following further consultation. In November 2008 the Commission commenced a new investigation into mobile termination access services (including mobile termination rates) due to ongoing concerns at above-cost mobile termination rates and concerns that, combined with on-net discounting practices in the market, this represented a significant barrier to competition in the mobile market. Following additional consultation processes by both the Commission and the Minister, on 4 August 2010 the Minister accepted a Commission recommendation to regulate mobile termination access services. The services became regulated on 24 September 2010, far later than internationally, after which the Commission could then commence its standard terms determination (STD) for this regulated service. The STD was finally published on 5 May 2011.
For example this could consider whether one or a combination of the following options could address issues:

- **Combining the Schedule 3 and STD processes into a single Commission process:**

  There is significant duplication of the issues that are considered by the Commission within the Schedule 3 and STD processes (including pricing when considering whether designation is appropriate). To avoid this inefficient duplication and speed up the regulatory process the Schedule 3 and STD processes could be combined into a single process.

- **Empowering the Commission to make the final Schedule 3 decision:**

  New Zealand is unusual in requiring that the independent regulator get Ministerial sign-off before it can regulate services.

  The additional ministerial step can add significant time and political uncertainty to the process. It also exposes Ministers to significant lobbying. This was the experience with the MTR decision, which was significantly delayed. Eventually the government rejected the Commission’s recommendation of regulation only to have to reopen the investigation shortly afterwards.

  Removing the Ministerial step of considering the Commission’s expert recommendation could significantly reduce the time of the Schedule 3 process. It is also better suited to an independent regulatory process.

  The Government could maintain the ability to issue Government Policy Statements to the Commission, and the ability to require the Commission to investigate whether regulation is appropriate.

- **Provide additional flexibility to determine the pricing principle:**

  New Zealand is unusual in having a two-stage IPP and FPP process.

  As the Discussion Document acknowledges, the original intent of the two-stage process with international benchmarking as the IPP was to have a quick and low-cost way of setting prices. However, it is clear from the recent copper pricing IPP that this has not always borne out in practice.

  There may be merit in providing the Commission with additional flexibility in its choice of pricing methodology, rather than specifying in the legislation the pricing methodology that must be applied, which obliges the Commission to carry out with that methodology even where it is found this is not the most appropriate (e.g. due to lack of relevant comparators).

  A potential way of achieving this would be to specify pricing principles rather than methodologies, an approach which has been taken in Europe (for example, cost-oriented pricing).

- **Tightening up the Schedule 3A undertakings process:**

  The undertakings process was inserted into the Act to address regulatory gaming issues. The intention was to allow an access provider a (single) opportunity upfront in the regulatory process to avoid regulation, that is, to “put its best foot forward”. In practice the Commission consults on the undertakings and there has been the opportunity to amend the undertakings. This is understandable, however it means that there is little incentive for an Access Provider to put its best foot forward, undermining the intention. Consideration could be given as to how this could be strengthened to incentivise Access Providers to put a reasonable offer forward early in the process.

- **Removing the distinction between specified and designated services.**

  Under this option the Commission could determine during the course of its investigation the terms that it needs to determine (price and or non-price). This would remove the requirement for an additional Schedule 3 process for specified services to become designated.
• **Direct regulation of certain access services:**

  The Discussion Document suggests that the government could pass legislation deeming certain [fixed line access] services to be designated from 1 January 2020 (as occurred for UCLL and UBA in 2006).

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<th><strong>31a. Do you support the Commerce Commission having the flexibility to implement price-only regulation?</strong></th>
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<td>It is unclear how price-only regulation would work in practice – non-price terms are a key determinant of the cost of service provision. We do not consider this would add to the current ‘designated’ service under the act, where the Commission has the ability to consider both price and non-price terms. Indeed, this could add to further delays if during the process the Commission it found it was unable to determine the price without non-price terms, and thus another extended Schedule 3 process was required to have the service designated. There may be more of a case to increase the Commission’s flexibility to determine both price and non-price terms during an investigation based on the merits of the arguments heard, rather than decrease its flexibility by introducing a further category, which limits its consideration solely to price.</td>
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<th><strong>31b. Do you support the Commerce Commission having the flexibility to adopt either a one- or two-stage pricing process?</strong></th>
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<td>We consider there may be merit in providing the Commission with additional flexibility in its choice of pricing methodology, rather than specifying in the legislation the pricing methodology that must be applied, which obliges the Commission to carry out with that methodology even where it is found this is not the most appropriate (e.g. due to lack of relevant comparators). A potential way of achieving this would be to specify pricing principles rather than methodologies, an approach which has been taken in Europe (for example, cost-oriented pricing).</td>
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<th><strong>Information Disclosure Requirements</strong></th>
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<td>It is important that the Commission, as the independent oversight body for the industry, has the ability to require information disclosure related to businesses with market power and regulated access services if required. There is no analysis as to the reasons the current Part 2B provisions have never been used, the costs and benefits of removing these provisions and alternative options that would better achieve the policy objectives. This could include information disclosure requirements as part of a determination process or strengthening the Commission’s monitoring functions. Further consideration needs to be given to these issues.</td>
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<th><strong>32. Do you have any comments on the current arrangements for consumer representation?</strong></th>
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<td>2degrees considers TUANZ, Consumer NZ and Internet NZ play an important role in representing consumers on communications industry issues. It is not clear that a consumer advocate with a formal statutory role is warranted.</td>
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<th><strong>33. In your view, is there justification for the Government to make it clear in legislation whether or not backdating will occur?</strong></th>
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<td>We recognise that the issue of backdating has given rise to significant uncertainty and debate in the industry. There are both pros and cons of backdating which are likely to depend on the particular circumstance.</td>
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34. In your view, is there still a need for a separate Telecommunications Commissioner (rather than using the general Commissioners)?

Yes. We support the role of a separate Telecommunications Commissioner within the Commerce Commission. We consider there is value in the continuity this provides for both the industry and Commission considerations. Telecommunications sector issues are particularly complex and it is appropriate that a specialist Commissioner that is aware of the wider industry context is involved in all telecommunications determinations. We also consider this supports greater accountability and value having this key point of contact in the Commission. In addition, we consider a dedicated Telecommunications Commissioner has facilitated faster grasp of the issues.

Not having a continuous Telecommunications Commissioner could slow the Commerce Commission’s ability to progress and react to telecommunications issues.

That said, there is value in having other Commissioners alongside the Telecommunications Commissioner. The Discussion Document does not provide context to proposals to amend the number of Commissioners required by section 10 of the Act, however there could be merit in providing greater flexibility to the Commission on this matter.

Renaming the role of Telecommunications Commissioner to Communications Commissioner is consistent with the Ministry’s proposed changes to reflect the increasingly converged nature of the sector.

35. Would the increased accountability created by a merits review process outweigh the risk of increased uncertainty and length added into regulatory processes?

This issue has already been subject to considerable debate. As acknowledged in the Discussion Document, merits review processes are often lengthy, costly and uncertain, and can suffer from a lack of specialist/technical skills of the Court. Merits review also tends to favour well-resourced incumbents. We would be concerned if a merits review process was introduced that could be used to introduce further delays and uncertainties to regulatory processes and determinations that benefit end-users.

The Commission already carries out a robust and transparent process according to the legislation that it is required to implement. It is not clear that there is an issue with the level of the Commission’s accountability to date (as opposed to lack of flexibility and clarity in the legislative intent).

The Discussion Document notes that there may be a case for introducing merits review of input methodologies if the government does decide to adopt a RAB approach for certain fixed line access services (similar to Part 4). This could be appropriate for this specific purpose. However we understand that the merits review process applied to the electricity has taken three years without going all the way to the Supreme Court. Much more consideration needs to be given to the costs and benefits of this approach given the significant period of uncertainty this requires before a decision to introduce merits review is taken. This should consider what limitations on merits appeal are appropriate and incorporating a clawback mechanism (as in Part 4 of the Commerce Act).

Introducing a merits review process beyond any utility-style regulatory regime would increase regulatory uncertainty, divert industry resource, open the process up to gaming, and is likely to result in very significant delays in realising competitive benefits to consumers. The process for regulation is already extended compared to overseas jurisdictions with the independent regulator only able to make recommendations to the Minister and requiring Ministerial approval. There is no justification for both Ministerial oversight and a separate merits review process.

36. Do you have any suggestions for the most effective way to transition to a new regulatory framework, and to ensure any updated framework remains fit for purpose over time?

The industry is proposing to come up with a commercial solution to manage the transition off current UFB pricing contracts.
37. Do you have any comments on the potential removal of the ‘broadcasting exclusion’ in the Telecommunications Act?

There may be merit in removing this exclusion in keeping with the principle of technological neutrality.

We consider more analysis is required of the competition issues in the broadcasting sector, and the benefits and costs of amending the exception for broadcasting infrastructure before amendments are carried out.

38. Are you aware of any barriers to trans-Tasman trade in communications markets that the Government should address, or areas where closer harmonisation with Australia would be beneficial?

Issues for consideration include co-ordination on international spectrum band allocations, the ability to address international cable access issues, greater harmonisation of the spectrum regime (the role of an independent regulator) and competition law (for example the Telecommunications Competition Notice regime).