Enhancing telecommunications regulatory and funding frameworks

2degrees' Submission in response to MBIE Discussion Document

June 2024

PUBLIC

Introduction

2degrees welcomes the opportunity to comment on the Ministry of Business, Innovation and Employment (MBIE) Discussion document: *Enhancing telecommunications regulatory and funding frameworks,* dated May 2024 (the **Discussion Document**).

As a competition and consumer champion, 2degrees supports ensuring the regulatory and funding frameworks remain fit for purpose, proportionate and supportive of a level playing field that provides great services to telecommunications consumers. We agree that a review is timely given market developments.

As set out in detail in this response:

- 2degrees support making membership of a telecommunications dispute resolution scheme a mandatory requirement for telecommunications service providers, so that all consumers of telecommunications services have access to an independent dispute resolution scheme with telecommunications-specific knowledge and experience.
- 2degrees support the short-term roll-over of existing statutory rights for fibre installation that are due to expire on 1 January 2025, while longer term matters (including the impact on competition and property rights) are considered, noting:
  - There may be limited cases where installations currently designated as 'high impact' could be reclassified, and while we would like to understand specific proposals, we support consideration of the appropriate definition of a 'high impact' installation.
  - We do not support rights of installation for particular technologies where there is no retail connection order.
- 2degrees support satellite providers being captured by the telecommunications development levy (TDL), in keeping with supporting a more level playing field.
- We do not support proposed changes to the TDL mechanism allowing the TDL to be set in regulation:
  - While they do not happen often, changes to the TDL can have very significant consumer and cost implications appropriately considered by Parliament. This change would increase regulatory uncertainty and we consider the costs outweigh the benefits.
  - The proposed change to the TDL mechanism fails to address known issues with the mechanism. In line with the Government's goals of reducing red tape, any review of the TDL mechanism must seek to address the inefficient and unnecessary cost and regulatory burden of the current mechanism on the Commerce Commission, industry and ultimately consumers. While MBIE isn't currently proposing to prioritise this, we expect the time taken to consider this would be significantly less than the time industry stakeholders are required to spend in administering the current regime.

- 2degrees support a simple but mandatory registration requirement for all telecommunications market participants, provided this is proportionate and does not impose additional costs on market participants.
- 2degrees support maintaining the current ELIS arrangements with operators, which we understand are working well. We fully support the importance of the ELIS service. Given significant implications for all of Government, industry and consumers, and feasibility and practical implementation concerns, any regulation that is progressed must not extend to obligations beyond existing requirements.
- 2degrees only support limited amendments to LFC constitutions:
  - Maintaining a strict separation of retail and wholesale in LFC constitutions is a fundamental principle of the establishment of these companies and we do not support any changes to this restriction.
  - Changes in governance settings for 'other' LFC constitutions to align with Chorus requirements are only appropriate provided all the relevant restrictions of Chorus also apply – i.e. LFCs must not be less restricted in any area than Chorus as a result. This includes supporting alignment of the layer 3 and 4 consenting process with that of Chorus.
- In addition to the matters raised by MBIE in the Discussion Document, this review is an important opportunity for Government to address ongoing issues regarding the applicability of Part 7 of the Telecommunications Act to all operators that are engaging directly with retail consumers. In particular, Government should clarify in legislation that Part 7 applies where appropriate, regardless of whether an operator is a retail or a wholesale operator. We encourage engagement with the Commerce Commission on this matter.

We comment on each of the issues for discussion in turn.

Section 1: Consumer access to dispute resolution

Do you consider that the lack of a mandatory requirement for telecommunications service providers to belong to an industry dispute resolution scheme is a problem that needs to be addressed?

2degrees supports a mandatory requirement for telecommunications service providers to belong to an industry dispute resolution scheme in accordance with the Telecommunications Act (Option 2).

We consider all consumers of telecommunications services should be able to access a telecommunications-specific dispute resolution scheme, rather than rely on general dispute resolution processes, such as the Disputes Tribunal.

This includes consumers of services from new entrants to telecommunications markets, such as satellite operators and operators from other sectors such as the energy.

While the number of industry complaints that reaches external dispute resolution – in the context of the millions of consumers and customer interactions that take place each day– is low[1], we do consider use of a telecommunications-specific resolution scheme provides access to useful telecommunications specialist knowledge and experience, and likely a fairer and more consistent approach to dispute resolution (for both consumers and operators) in those limited instances when the need for dispute resolution does arise.

We also consider access to such a scheme supports consumer confidence: while we aim not to use it, all our customers have access to an independent dispute resolution service if needed. We support customers of all telecommunications operators in New Zealand having this assurance.

2degrees is a member of the industry dispute resolution scheme specified under the Telecommunications Act, the Telecommunications Dispute Resolution scheme (TDRS)[2]. The TDRS is mandatory for TCF members and has recently had substantial updates, including a significant change to the governance structure and implementation of a number of Commerce Commission recommendations, requiring substantial resource. While there are some necessary adjustments as stakeholders adjust to the updated TDRS scheme – overall we consider the TDRS is working well, and that it has been further enhanced by the recent changes.

We note that currently most, but not all, telecommunications service providers are members of the TDRS. While all members of the TCF must belong to the TDRS, non-TCF members are also able to sign up to the TDRS voluntarily. While there may be various reasons for not doing so, in line with the TCF's TDRS Review submission[3] 2degrees considers this as an area to improve on: as a TCF we have encouraged the Commerce Commission to support increasing membership of the TDRS. Mandatory membership of an industry dispute resolution scheme in New Zealand, as proposed in the Discussion Document, would further support this.

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[1] We note the Discussion Document comments "In its review of the TDR the Commerce Commission highlighted the high level of complaints within the telecommunications sector. This has been a persistent problem for over a decade, with complaint volumes doubling in the preceding five years to the review. Against this backdrop of high complaints, the Commission noted that 13 per cent of fixed line customers did not have access to the TDR." While the number of complaints has increased - expected in line with awareness initiatives of the scheme, including marketing - we note the 2023 TDR Annual Report indicates the TDR only received 3725 complaints/enquiries for the year ending 30 June 2023, of which only 10 were upheld and 8 partially upheld. While we don't like any consumer to have an issue or complaint, it is also important that MBIE policy ensures it considers and represents the number of complaints/alleged issues in context, which includes acknowledging the small number of upheld complaints/enquiries.

[2] 2degrees is also a member of the Utilities Dispute Resolution Scheme (UDL) in relation to energy services.

[3] TCF Submission to Commerce Commission, *2024 Review of the Telecommunications Disputes Resolution Scheme*, 23 May 2024.

We note that the Telecommunications Act does allow for alternative industry dispute resolution schemes. An alternative dispute resolution scheme under the Act may support choice and incentivise appropriate efficiencies for dispute resolution services, including their efficient administration, over time. We are aware, for example, that some operators regard TDRS as a high-cost model.[4]

2degrees shares MBIE's concerns regarding a fragmented approach to telecommunications dispute resolution scheme membership. We note:

- Given the significant amount work undertaken by the TCF and Commerce Commission on the TDRS , and as a member of both the TCF and TDRS, 2degrees supports this scheme as the disputes resolution scheme for the telecommunications industry. We also support further work done by the TDRL and the Commerce Commission to increase membership of the TDRS.
- If there are alternative industry dispute schemes, we consider it important there is a level of consistency in the consumer principles/consumer expectations applied.

Section 2: Accessing shared property for fibre installations

Issue 1: Expiry of statutory rights for fibre installations

2degrees supports reinstating the rights for access to shared property for new fibre installs, but only for a temporary, specified timeframe, noting market developments over time and that there was intentionally an 'end date' applied to this right, and competition and property right considerations.

We consider reinstatement of the rights while these matters are considered is appropriate[5]. We understand the matter of this pending expiry was raised some time ago and are concerned that this is 'expiring' on 1 January 2025 without proper consideration. Expiry will also have an impact on operator processes.

Issue 2: Invoking statutory rights for high impact installations

If reinstated, 2degrees supports consideration of the definition of what a 'high impact' installation is.

There may be limited cases where installations currently designated as 'high impact' could be reclassified, for instance minor changes to existing 'medium impact' installations. We would like to understand the specific proposals being put forward before commenting further.

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[4] Devoli, Letter to Commerce Commission, *2024 review of the Telecommunications Dispute Resolution Scheme*, 23 May 2024.

[5] Any further extensions to an expiry date must be subject to review.

We note that these proposals will need to be considered in the context of property rights and competition. Alternative technologies such as fixed wireless access will be appropriate in some cases, and avoid the need for 'high impact' fibre installations that negatively impact other parties (e.g. neighbours) on shared driveways.

We are not clear on the appropriate mechanism should this change be implemented– for example allowing some 'high impact' installations (as proposed in the Discussion Document) versus reclassifying some installations as low or medium impact.

Issue 3: Invoking the statutory rights without a retail connection order from an internet service provider

If reinstated, 2degrees support Option 1 (the status quo). We do not support installation of fibre where no retail connection order has been placed.

Section 3: Telecommunications Levy settings

Issue 1: Identifying liable persons

2degrees supports Option 2 – amending liability provisions to capture all satellite providers.

We consider this is an important step in promoting a more level playing field – we agree it is important to ensure that all those who are benefiting from operating in the New Zealand telecommunications market are contributing to the same regulatory costs as other providers in that market.[6]

Issue 2: Regulatory process to set the total TDL amount

2degrees support Option 1 – the Telecommunications Development Levy amount should remain set under Schedule B of the Act.

We do not consider a change to the current process has been justified:

- It would increase industry uncertainty and indicate government willingness to pass on potential cost increases to industry and consumers, which we do not consider appropriate at this time.
- The current TDL is already subject to inflation adjustments.
- There is no specific 'need' to change the levy - which in any case should be consulted on prior to funding decisions and legislative change (as we understand has previously been the case).

[6] We note that the current approach/definition of liable person (which relates to use of a PTN) does not capture all service providers that benefit from operating in New Zealand.

- Changes to the levy can have very significant consumer and industry cost implications and are appropriately subject to Parliamentary scrutiny.
- The costs to industry stakeholders of this change significantly outweigh any benefits of administrative ease:
  - Given changes to the TDL do not happen often, it is not unreasonable or overly burdensome to go through a legislative process, where a change is justified.
  - Operators require time to adjust to any changes in levy amounts, which can have significant budgeting implications. Any comments that regulation 'would reduce the timeframes to increase the Telecommunications Development Levy' are concerning and increase regulatory uncertainty.
  - While concerned about government administrative issues, we note the Discussion Document excludes consideration of the significant administrative burden the current TDL mechanism places on the industry and Commerce Commission.

In our view, if MBIE is considering changing the TDL mechanism in legislation, it needs to also consider at the same time other aspects of the levy mechanism that need legislative attention, including those that MBIE has indicated 'out of scope'.

As noted above and acknowledged in the Discussion Document, the current TDL process is complex and is administratively burdensome for both liable persons (who must disclose a large amount of information and fulfil audit requirements) and the Commerce Commission (who must process this information and then issue draft and final allocation determinations):

- Set up for another purpose a long time ago, we understand the process does not comply with the government's own guidance for design and implementation of cost-recovery levies.
- Ultimately this is an unnecessary cost to consumers both in terms of industry and commission resourcing.

This is an important and timely opportunity for government to address these issues and Government should require this to be a higher priority for MBIE as it considers changes to the Telecommunications Act:

- We expect the time taken to consider this from a policy perspective to be significantly less than the time industry stakeholders are required to spend in administering the current regime.
- Reducing this inefficient administrative burden and red tape is in line with the Government's goals. It is not clear why the Government/MBIE would not consider this at the same time as reviewing other aspects of the TDL mechanism, and if it doesn't, when it is instead proposing to do so.

Section 4: Identifying participants in the market

Do you consider there is a need for a registration requirement for telecommunications provider operating in New Zealand (when entering the market, as well as updating contact and other business details over time? Why or why not?

2degrees support Option 2, a mandatory registration requirement for telecommunications market participants, provided that this is limited to a simple administrative registration process that does not impose additional costs on market participants.

We agree the regulator should be able to list telecommunications service providers in New Zealand for monitoring and compliance services.

Registration should be a very straightforward process (for example, company details and contact information). It does not require additional resources or funding, nor should it be confused with a revenue seeking mechanism or extensive information gathering/ 'monitoring' exercise.

We note the existing process to register as a Network Operator, which includes a simple two-page application form relevant to Network Operator Status, may be a useful reference when considering a registration process.[7]

Any registration requirement should apply equally to all operators with consumers in New Zealand, including satellite providers.

Section 5: Enhancing information flow to the Emergency Location Information System

Do you agree with the potential risks relating to the provision of information into the Emergency Location Information System that we have identified? Why or why not?

2degrees supports the ELIS service and has contracts with the Crown to supply these services.

MBIE is proposing to regulate the provision of ELIS information under the Telecommunications Act. While we consider ELIS a very important service, we are not clear that regulating the provision of emergency location information is necessary or

[7] Register as a network operator | Ministry of Business, Innovation & Employment (mbie.govt.nz).

appropriate given the costs and benefits, and we support Option 1 (the status quo – a continuation of contractual arrangements):

- As noted in the Discussion Document, contractual arrangements with mobile network operators and other telecommunications agencies already exist and are working well.[8]
- We are not aware of issues with our contracts – but we would be happy to discuss this further with relevant parties if necessary.
- It is not clear how the current successful contractual process would carry across to a legislated requirement.
- We do not consider the potential scenario related to uncertainty of the continued provision of our ELIS information at all likely. Relatedly, we understand other operators also engage constructively with MBIE and relevant agencies, in line with international standards.
- If this is regulated, we consider obligations must be strictly limited to the existing scope requirements of ELIS (including ELIS data supplied, systems/processes and purposes).
- While 2degrees is very supportive of the ELIS service and its intentions, we do not support legislation that would allow the imposition of scope expansions: Given changes in scope could have significant implications for all of Government, industry and consumers, and may not be feasible or practical, it is critical that any changes in scope to the ELIS are discussed and agreed with relevant operators.

Section 6: Governance settings in 'other' local fibre company constitutions

Issue 1 : Governance of permitted business activities

The separation of retail and wholesale LFC providers is a fundamental principle of the regulatory framework. It underpinned the establishment of the LFCs and their regional monopoly roles in deploying UFB. We strongly agree with MBIE that this separation must not change, and we do not support any proposed changes to LFC constitutions that would allow LFC provision of retail or direct-to-end-user services. For example, we do not support any LFC "being able to supply end users or retail services (for example, supplying consumers with connectivity solutions, selling connectivity equipment or services like networking".

[8] In addition, MBIE will also be aware Android and Apple provide a parallel back up to ECLI by way of handset-based positioning. This is alongside our existing ECLI arrangements.

As MBIE is aware, there are also significant concerns with LFCs providing Layer 3 and Layer 4 services. This is why provision of such services by LFCs is limited under the regulatory framework. That said, in principle 2degrees understands LFCs seeking changes that align with Chorus in the Telecommunications Act. However, we consider that both:

- Any changes would need to be the minimum required to be equivalent; and
- Very importantly, must also ensure all the restrictions of Chorus apply to the LFCs (including if these are "new obligations", which MBIE has currently listed as out of scope). LFCs must not be less restricted than Chorus as a result of these changes[9].
- Important relevant regulatory principles are those of equivalence and non-discrimination.

Issue 2: Process to seek agreement to operate at layer 3 and layer 4

In principle 2degrees could support Option 2, shifting the mechanism for other LFCs to seek consent to operate at layer 3 and layer 4 into the Act to align with Chorus' process (rather than the current mechanism that sits within the 'other LFC' constitutions and lacks clear criteria/ a clear process).

As noted above, there are concerns with all LFCs operating at layer 3 and layer 4.

Section 7: Other matters

Issue 1: Considering non-regulated fibre networks in specified fibre areas

2degrees would support further consideration of Option 2 – considering non-regulated fibre networks in 'Specified Fibre Areas'. The Commission in its consideration would need to be clear that any fibre taken into account was accessible to retail consumers. We understand and agree that this is not seeking feedback about other technologies and do not provide further comment on this here.

Other minor changes and clarifications.

In principle, we support the opportunity to address "other minor non-policy issues in the bill at the same time" should a bill be progressed, however we reserve specific comment on these aspects until the detail of any proposed changes is available. It makes sense to address these if a bill on the Telecommunications Act is being considered, given this does not happen often. For the same reason, and as detailed in Section 3, we support further consideration of the TDL mechanism at the same time.

[9] We note this may not be the same as Option 2.

Additional matters – Part 7 (Consumer matters)

In addition, we consider that the Government should take this opportunity to clarify the applicability of Part 7 of the Telecommunications Act to wholesale operators.

The Commerce Commission has, and continues to, conduct significant work under Part 7 (Consumer matters) in the interests of end-users.

As MBIE is aware, there are currently differing interpretations of the applicability of Part 7 of the Act, and the Commerce Commission's ability to intervene, in relation to interactions direct with end users / retail consumers of telecommunications services by wholesale providers.

This has caused issues and delays with the implementation of industry and Commerce Commission 'RSQ' work.

It is our view that the Commerce Commission has a Part 7 role regarding engagement with retail consumers, and that this should be regardless of what operator is carrying out that engagement: in principle, the same actions should be subject to the same rules, for example regarding marketing direct to end-users.

The Government and MBIE should clarify this issue to support RSQ work. We encourage officials to engage with the Commerce Commission on this matter.