

8 May 2014

Regulatory Institutions and Practices Inquiry
New Zealand Productivity Commission
PO Box 8036
The Terrace
WELLINGTON 6143



Dear Sir/Madam

REGULATORY INSTITUTIONS AND PRACTICES: DRAFT REPORT

2degrees welcomes the opportunity to comment on the Productivity Commission's Draft Report on Regulatory Institutions and Practices.

As a significant investor in the telecommunications sector, having invested over \$500m to date and with substantial further investments planned, 2degrees is keenly aware of the importance of effective regulatory institutions and frameworks, and conversely the harm to investment in the absence of an effective regulatory framework. 2degrees' own entry into the mobile sector was only possible following significant reform of the telecommunications regulatory framework, to bring it more into line with the best practice pro-competitive regulatory settings of overseas.

Despite this, there remain significant areas of concern regarding the regulatory set-up in New Zealand. This letter identifies three key issues relevant to the Productivity Commission's review:

- The independence of regulatory decisions from political interference;
- Adequate resourcing of regulators to carry out their statutory duties and monitor best practice developments overseas; and
- Avoiding a merits review process, or any other imposition, that enables incumbents to further delay or circumvent regulation that improves New Zealand productivity and consumer outcomes.

The importance of an independent regulator

A credible independent regulator and best practice regulatory framework is fundamental to ensuring a stable and predictable regulatory environment that provides the certainty required to make long term investment decisions. All investors should have confidence of a reasonable return on investment that reflects the risks assumed.

This requires that the regulator is both delegated appropriate authority to make relevant independent decisions and that it is free to carry out its responsibilities without political interference.

The New Zealand telecommunications regulatory regime still retains a significant amount of political decision making. For example:

- In addition to general telecommunications policy decisions, under the Telecommunications Act the final decision as to whether or not to regulate services is retained by the Minister. While the Commerce Commission is required to carry out extensive consideration and consultation under Schedule 3 of the Act, it then makes a recommendation to the Minister, who can in turn accept,

reject or request that the Commission reconsider its recommendation. This two-step procedure extends the process significantly, and opens it up to further gaming opportunities and delays in realising consumer benefits, for example as it did with the decision on the regulation of mobile termination, which delayed benefits to consumers by over 5 years.¹ In addition, Government policy of the day (for example investment in a particular supplier or rural broadband policy) may be in conflict with the competition concerns the statutory decisions under the Act address.

- Unlike in other jurisdictions such as in the UK, decisions regarding spectrum management/allocation continue to be made by the Minister rather than the independent regulator. This risks complex issues such as the consideration of competition issues under the Commerce Act not being given due consideration prior to decisions on allocation. In addition, in the case of a spectrum auction, there exists an inherent conflict in that the Crown is also the vendor of the spectrum under the Commerce Act. Such issues are relevant to the current 700MHz spectrum auction, where the Government decided to auction a 20MHz block of spectrum conditional on Commerce Commission clearance but against advice received from the Telecommunications Commissioner that a 15MHz cap should apply for the duration of the 18 year management right. Delegating such spectrum allocation decisions to the independent regulator would avoid such issues and any conflicts of interest.

As noted to the Productivity Commission in other parties' earlier submissions, there have also been instances of apparent willingness of Government to intervene on regulatory processes, notably the recent (2013) Government response to Commerce Commission draft determinations on Chorus wholesale service pricing, which brought forward a wide-ranging statutory sector review to address a specific regulatory issue of concern to its own supplier of UFB services. Ad hoc intervention sets a dangerous precedent across industries - it serves to undermine the credibility of the regulator, the regulatory process and framework, and represents a deviation from international regulatory best practice principles. Circumstances where Government intervention of regulatory processes is warranted should be clearly articulated to provide greater certainty to investors regarding future decisions.

Adequate resourcing of regulators to carry out their statutory duties and monitor and inform of best practice developments overseas

Effective regulators need to be provided adequate resources to carry out their statutory responsibilities. 2degrees considers that the Commerce Commission lacks sufficient capacity to carry out its telecommunications functions effectively. For example, the Commerce Commission was provided with new powers under section 9A of the Telecommunications Act in relation to sector monitoring and information dissemination (including the power to conduct *"inquiries, reviews, and studies (including international benchmarking) into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within New Zealand"*).

¹ 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 rates (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. This is a demonstration of how the political step of the process facilitates gaming and can lead to substantial delays to the detriment of competition and end users.

While 2degrees strongly supports these additional functions it notes that resource constraints within the Commission mean that the timeliness of such monitoring is lacking. Annual market monitoring reports are published with data nearly a year old. In addition, important areas of study (including monitoring of international developments) are, in our view, not being given the appropriate priority. For example a proposed study of infrastructure sharing, which would consider the potential for various forms of infrastructure sharing in rural areas prior to the rollout of triplicate LTE networks by New Zealand mobile network operators, has not yet commenced.

2degrees also notes that, given the specific technical expertise of the Commerce Commission, it should be encouraged to play a more active and transparent role in informing relevant Government policy decisions.

Avoiding a merits review process that facilitates further competitive delays

2degrees notes there is a high risk that a merits review process could be used by incumbent operators to further delay or circumvent competitive regulation. Delay and gaming hurts challengers, creates further uncertainty, and requires significant resource commitments that are better spent on serving consumers and making competitive investments. In addition, incumbent operators tend to be better resourced and able to fund such appeal processes.

Regulation under the Telecommunications Act is already subject to an extensive process of consultation. Further, for pricing matters, if a party is unhappy with an Initial Pricing Principle determination it is able to apply for consideration of a Final Pricing Principle determination. 2degrees considers current judicial review procedures are sufficient.

Please let us know if you have any queries.

Yours sincerely



Sara Lipanovic
Regulatory Policy Manager