

## Government gazumps 2degrees

### Speed read

Mid this year, Telecom was cleared by the Commission to acquire 33% more spectrum in the 700Mhz range, over the opposition of 2degrees. But this was largely inevitable due to key decisions by Government, at least on the approach taken by the Commission. That is particularly due to Government's decision in late May to allocate the additional spectrum in a band that was unsuitable for 2degrees in the medium term. While technically it is a Commerce Act decision to clear or not, the reality is that the Government decisions forced the outcomes.

But that assumes the Commission considered all the right matters. It is not apparent why the Commission does not appear to have considered the potential anti-competitive effects of Telecom getting more spectrum (as opposed to 2degrees not getting the spectrum, which is the focus of the decision).

It is also not clear whether the Commission has considered longer term issues as to spectrum use, but that may be because some material is redacted.

And are there further Commerce Act issues?



November 2014

### The Detail

A key feature of Commerce Act clearance reviews is a comparison of the position with and without the proposed transaction going through. Is there substantial lessening of competition as between the two scenarios: (a) Telecom acquires the extra spectrum and (b) it doesn't acquire it? The assessment is not whether the proposed acquisition is anti-competitive in a general sense.

The decision here was made simple for the Commission by executive Government decisions and indications. First, Government informed the Commission of the real prospect that, if Telecom didn't get the spectrum, it may well be that 2degrees wouldn't get it. Second, and decisively, Government confirmed in late May that the spectrum in question would be located between the spectrum allocated to Vodafone and Telecom. On current technology, and given the importance for 4G in having contiguous spectrum, this largely ruled out 2degrees.

So, in summary, the Commission decided that 2degrees wouldn't get the spectrum in its commercially usable form and therefore there was no substantial lessening of competition.

And if that's all there is to the story, it's all very simple: Government decisions have given the Commission little choice but to go down that path.

### But is it that simple?

It's hard to be sure as some material is not publicly available. But, a couple of questions:

### Long term issues

First, the decision refers to the prospect that non-contiguous spectrum could be used in the future as technologies and spectrum develop in the future. This would not, said the parties, happen in the medium term, Vodafone noting a best estimate of at least 5 years.

Critically, this is a clear 18 year play as that is the term of the new licence. Spectrum allocation now affects the market for at least 18

Government  
gazumps  
2degrees

years. Commission decisions clearly affect the market for 18 years (even though the effects are less predictable further out).

While the Commission's default position is to consider competition effects in the near term (eg 2 years) the decision doesn't address these longer term effects (including whether or not they should be considered). Some of the decision is redacted so it is a little hard to tell why this is so.

With the potential ability to use non-contiguous spectrum as soon as possibly 5 years away, should decisions be made now based only on the current position?

**All relevant issues considered?**

Second, the decision focusses solely on 2degrees not getting usable spectrum, and ignores the market effects, where there are only three players, of one of the two dominant players – Telecom – getting 33% more spectrum.

Telecom said that, by it getting more spectrum, mobile customers would get greater coverage, speeds and service particularly in rural areas.

That's nice, but it does raise a flip side question: does that have anti-competitive effects, against the interests of those customers? That question was not addressed: the sole focus was on 2degrees not getting spectrum.

To highlight this concern, Vodafone and Telecom have strong dominance in rural areas and 800 spectrum is particularly suitable for rural. Ironically that dominance has increased due to an earlier Government decision: the RBI JV between Vodafone and Telecom (although Chorus is now in the mix, many of the market effects continue). These cumulative Government decisions don't stack up well for 2degrees. Importantly, a weakness in one area such as rural can have widespread effects on competition outside that area too. For example, the prospect of vibrant MVNO competition is weakened.

But none of that is discussed in the decision.

**Wider concerns?**

Based on the way the Commission approached this, the Government's decisions forced the Commission's hand. A question to consider is the combination of those decisions, the sale of spectrum to Telecom, and the wider requirements of the Act. The Commerce Act binds the Crown in a number of respects and of course it binds Telecom. Is that combination problematic? Just a question today, to answer another day.

*Disclosure: we act for 2degrees but not on this matter.*

**Wigley+Company**

PO Box 10842  
Level 6/23 Waring Taylor Street, Wellington  
T +64(4) 472 3023 E info@wigleylaw.com

and in Auckland  
T +64(9) 307 5957  
www.wigleylaw.com

---

*We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.*