



MINISTRY OF BUSINESS,  
INNOVATION & EMPLOYMENT  
HIKINA WHAKATUTUKI



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# 700 MHz Management Rights Agreement

[FINAL DETAILS TO BE CONFIRMED  
FOLLOWING COMPLETION OF AUCTION]

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Green shading indicates text to be edited or edited out of the final execution copy

[27 September 2013]

*\*Note: Details of the payment plan will be included in this Agreement when an option for the payment plan has been selected. Other provisions may also need to be reviewed in light of the chosen payment option.\**

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## **PREAMBLE**

As a result of the television digital switchover a substantial quantity of spectrum in the 700 MHz band has been freed up. Spectrum is a key resource in the provision of mobile communications and the 700 MHz band is ideally suited for the next generation (4G) of mobile broadband services. The use of the 700 MHz band for mobile communications is expected to generate significant economic benefits for New Zealand in future years.

The Crown acknowledges that the quantity of spectrum available to a mobile service provider is linked to the quality and capacity of service able to be offered on their network. Consequently, the spectrum allocation process has the potential to determine the future shape of the mobile communications market which has implications in terms of the Commerce Act 1986.

Acquisition limits have been put in place to manage competition issues between potential service providers. These are reinforced through caveats over the Management Rights. Implementation requirements provide for the rapid and widespread use of the spectrum to provide services to consumers. The implementation requirements ensure the effective and efficient use of the spectrum, and are a part of ensuring that most New Zealanders have 4G mobile coverage within five years.

The Crown has undertaken to review the acquisition limits in three years in order to ensure that any limit remains relevant over time.



Signed for and on behalf of [**Purchaser**]

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Signature

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Signature

\_\_\_\_\_  
Date

**SCHEDULE 1 - DETAILS**

**Note:** This schedule lists all Management Rights for information purposes. When prepared for execution, only the Management Rights which are relevant to the specific signatories will be included in the Agreement.

Each lot comprises four Management Rights. The first two Management Rights listed for each lot are the Early Management Rights and the second two Management Rights listed for each lot are the Conditional Management Rights.

Each lot is generally described as follows:

Lot No.	Management Right		Commencement Date <sup>1</sup>	Expiry Date
	Lower Boundary	Upper Boundary		
1	703.0 MHz	708.0 MHz	12 March 2010	11 March 2020
	758.0 MHz	763.0 MHz	12 March 2010	11 March 2020
	703.0 MHz	708.0 MHz	12 March 2020	28 November 2031
	758.0 MHz	763.0 MHz	12 March 2020	28 November 2031
2	708.0 MHz	713.0 MHz	12 March 2010	11 March 2020
	763.0 MHz	768.0 MHz	12 March 2010	11 March 2020
	708.0 MHz	713.0 MHz	12 March 2020	28 November 2031
	763.0 MHz	768.0 MHz	12 March 2020	28 November 2031
3	713.0 MHz	718.0 MHz	12 March 2010	11 March 2020
	768.0 MHz	773.0 MHz	12 March 2010	11 March 2020
	713.0 MHz	718.0 MHz	12 March 2020	28 November 2031
	768.0 MHz	773.0 MHz	12 March 2020	28 November 2031
4	718.0 MHz	723.0 MHz	12 March 2010	11 March 2020
	773.0 MHz	778.0 MHz	12 March 2010	11 March 2020
	718.0 MHz	723.0 MHz	12 March 2020	28 November 2031
	773.0 MHz	778.0 MHz	12 March 2020	28 November 2031
5	723.0 MHz	728.0 MHz	12 March 2010	11 March 2020
	778.0 MHz	783.0 MHz	12 March 2010	11 March 2020
	723.0 MHz	728.0 MHz	12 March 2020	28 November 2031
	778.0 MHz	783.0 MHz	12 March 2020	28 November 2031
6	728.0 MHz	733.0 MHz	12 March 2010	11 March 2020
	783.0 MHz	788.0 MHz	12 March 2010	11 March 2020
	728.0 MHz	733.0 MHz	12 March 2020	28 November 2031
	783.0 MHz	788.0 MHz	12 March 2020	28 November 2031
7	733.0 MHz	738.0 MHz	12 March 2010	11 March 2020
	788.0 MHz	793.0 MHz	12 March 2010	11 March 2020
	733.0 MHz	738.0 MHz	12 March 2020	28 November 2031
	788.0 MHz	793.0 MHz	12 March 2020	28 November 2031

<sup>1</sup> The commencement date on the Early Management Rights is 12 March 2010, and there are a number of licences registered in the bands for television services and in use until December 2013. The Rights will be available for use from the date of transfer.

Lot No.	Management Right		Commencement Date <sup>1</sup>	Expiry Date
	Lower Boundary	Upper Boundary		
8	738.0 MHz	743.0 MHz	12 March 2010	11 March 2020
	793.0 MHz	798.0 MHz	12 March 2010	11 March 2020
	738.0 MHz	743.0 MHz	12 March 2020	28 November 2031
	793.0 MHz	798.0 MHz	12 March 2020	28 November 2031
9	743.0 MHz	748.0 MHz	12 March 2010	11 March 2020
	798.0 MHz	803.0 MHz	12 March 2010	11 March 2020
	743.0 MHz	748.0 MHz	12 March 2020	28 November 2031
	798.0 MHz	803.0 MHz	12 March 2020	28 November 2031

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## 1. DEFINITIONS AND INTERPRETATION

### 1.1 Definitions

In this Agreement, unless the context otherwise requires:

**“Acquisition Limit”** means the holding of, or having a Controlling Interest in, management rights of not more than 30 MHz (i.e. 3 lots, or 2x15 MHz) in the 700 MHz band.

**Note:** Depending upon decisions to be taken during the Auction the limit in executed copies of this Agreement may be changed to 40 MHz (i.e. 4 lots or 2 x 20 MHz).

**“Act”** means the Radiocommunications Act 1989;

**“Agreement”** for the purposes of clauses 1.2 and 1.3 includes an agreement, arrangement or understanding whether:

- (a) formal or informal or partly formal and partly informal; or
- (b) written or oral or partly written and partly oral; or
- (c) having legal or equitable force or not, and whether or not based on legal or equitable rights;

**“Associate”** has the meaning in clause 1.2;

**“Auction”** means the 700 MHz band auction conducted on behalf of the Crown in the 2013/14 year, and in which the Purchaser was the provisionally successful bidder for the Management Rights, and “terms and conditions of the Auction” means the terms and conditions of the Auction as contained in the Auction Catalogue (as amended from time to time in accordance with that catalogue and auction terms and conditions);

**“Business”** means a business that relates to or includes (in whole or in part) the holding of radio frequency spectrum licences or management rights or the provision of telecommunications services;

**“Chief Executive”** means the Chief Executive of the Ministry of Business, Innovation and Employment from time to time and his or her delegate;

**“Conditional Management Right”** means the Conditional Management Rights described in Schedule 1 and with a commencement date of 12 March 2020;

**“Controlling Interest”** means, in relation to any management right, an interest which results in the direct or indirect control of any radio frequency spectrum the subject of that management right, including (to avoid doubt) the non-exclusive right for any

person to use that spectrum on arms-length commercial terms where that frequency is controlled directly or indirectly by another person;

- “Declaration Date”** means 30 June 2019 or such later date as agreed between the Ministry and the Purchaser;
- “Early Management Right”** means the Early Management Rights described in Schedule 1 and with a commencement date on or before 1 January 2014;
- “Force Majeure Event”** means an event, occurrence or failure caused directly or indirectly by anything beyond the reasonable control of a party including forces of nature, acts of war or acts of public enemies;
- “Implementation Requirement”** means the implementation requirement set out in clauses 8.3, 8.4, 8.5 and 8.6;
- “Management Rights”** means the management rights referred to in Schedule 1;
- “Material Breach”** means any breach of this Agreement and includes:
- a. any breach that adversely impacts on the benefits the Crown may expect under this agreement including the Implementation Requirement and Service Requirements; or
  - b. any default on payment that cannot be remedied within the specified time; or
  - c. a series of breaches of the agreement that together constitute a Material Breach;
- “Registered”** means recorded on the Register of Radio Frequencies established under section 5 of the Act;
- “Related Body Corporate”** a body corporate is related to another body corporate if:
- a. the other body corporate is its holding company or subsidiary within the meaning of sections 5 and 6 of the Companies Act 1993; or
  - b. at least 20% of its issued shares, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by the other body corporate and bodies corporate related to that other body corporate (whether directly or indirectly, but other than in a fiduciary capacity); or
  - c. at least 20% of the issued shares of each of them, other than shares that carry no right to participate beyond a specified amount in a distribution of either profits or capital, is held by shareholders or

members of the other (whether directly or indirectly, but other than solely in a fiduciary capacity); or

- d. the businesses of the bodies corporate have been so carried on that the separate business of each body corporate, or a substantial part of it, is not readily identifiable; or
- e. there is another body corporate to which both bodies corporate are related;

**“Roaming Agreement”**

means an agreement between two or more companies that provides the ability for a customer to automatically make and receive voice calls, send and receive data, or access other services, including home data services, when travelling outside the geographical coverage area of the home network, by means of using a visited network;

**“Rural Area”**

means the area as determined by the Chief Executive and shown in Schedule 3. The Ministry of Business, Innovation and Employment will provide shapefiles of the Rural Area coverage to the Purchaser;

**[Note: A list of the relevant cell sites agreed as being in the Rural Area may be included as a schedule to this document]**

**“Service Requirement”**

means the continuous and on-going service requirement set out in clause 8.2;

**“Working Day”**

means a day between the hours of 8.30am to 5.00pm on any day that is not a Saturday or a Sunday or a day that is a public holiday within the meaning of section 44 of the Holidays Act 2003;

**“700 MHz band”**

means the band of radio spectrum within the frequency ranges 703 to 748 MHz and 758 to 803 MHz;

**“850 MHz band”**

means the band of radio spectrum within the frequency ranges 825 to 840 MHz and 870 to 885 MHz;

**“900 MHz band”**

means the band of radio spectrum within the frequency ranges 890 to 915 MHz and 935 to 960 MHz.

**1.2 Additional definitions relating to associations**

For the purposes of this Agreement, person A is an Associate of person B (and vice versa) if:

- (a) person A is a body corporate, and person B is:
  - (i) a director of that body corporate; or
  - (ii) a Related Body Corporate of that body corporate; or

- (iii) a director of a Related Body Corporate of that body corporate; or
- (b) person A is in the same immediate family as person B (including a spouse, civil union partner, de facto partner, child (including step-child), or parent (including step-parent) or sibling (including step-siblings) of person B); or
- (c) person A is a nominee or trustee for person B; or
- (d) person A is a director of a body corporate, or person A holds any voting power in the body corporate, and person A and person B are parties to an Agreement relating to:
  - (i) the control of that body corporate; or
  - (ii) at least 20% of the voting power in that body corporate; or
- (e) person A holds or controls directly or indirectly at least 20% of the voting power, or at least 20% of the issued shares, in person B; or
- (f) person B (or a director, employee or other Associate of person B) is the trustee of a trust acting in that capacity and person A is a settlor, beneficiary, or trustee, of that trust; or
- (g) person A is a person who, in making a decision or exercising a power materially affecting a Business, is accustomed, or under an obligation, or proposes or is likely (in the Chief Executive's sole opinion), to act in accordance with the directions or instructions or wishes of person B; or
- (h) person A and person B are acting, or propose or are likely to act (in the Chief Executive's sole opinion), jointly or in concert in relation to a Business; or
- (i) person A (being a person other than the Chief Executive) and person B are or were parties to an Agreement that:
  - (i) relates or related directly or indirectly to the bidding strategy adopted by either or both of persons at the Auction; or
  - (ii) entitles one of the persons to a substantial degree of influence, or the right to obtain a substantial degree of influence, over radio frequency spectrum covered by the lots in the Auction and in respect of which the other person is or will be (subject to this Agreement) a manager or rightholder under the Act; or
- (j) person A is an Associate of another person that is an Associate of person B under this Agreement, including an Associate in a chain of Associates.

### 1.3 Exceptions to Associations

For the avoidance of doubt, the following types of agreements are not Associations for the purposes of this Agreement:

- (a) Roaming Agreements;
- (b) Agreements under the Rural Broadband Initiative, including the Rural Broadband Agreements dated 20 April 2011 between Telecom New Zealand Limited and the Crown, and between Vodafone New Zealand Limited and the Crown.

#### 1.4 Construction

In this Agreement:

- (a) a reference to “including” or similar phrases does not imply any limitation;
- (b) a reference to a person includes an individual, body corporate or unincorporated body of persons;
- (c) the singular includes the plural, and vice versa;
- (d) a reference to \$ or dollars is a reference to New Zealand currency;
- (e) the headings and clause and subclause headings in this Agreement are for convenience only and have no legal effect; and
- (f) where any word or phrase has been given a defined meaning, any other part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning.

## 2. TERM OF THIS AGREEMENT

### 2.1 Term expires on transfer of Conditional Management Rights

The term of this Agreement commences from the date of this Agreement and expires on the date the Conditional Management Rights commence, unless terminated earlier in accordance with this Agreement.

### 2.2 Licences and Implementation, Service and Compliance Requirements

Despite clause 2.1, clause 7 relating to licences and clause 8 relating to the Implementation Requirement, Service Requirement and compliance requirements expire on the date the Conditional Management Rights commence, unless extended in accordance with clause 2.5.

### 2.3 Transfers and Creation of Interests and Caveats

Despite clause 2.1, clause 6 relating to Transfers and Creation of Interests and clause 12 relating to caveats expire on the date the Conditional Management Rights commence, unless extended in accordance with clause 2.5.

### 2.4 Acquisition Limit

Despite clause 2.1, clause 4 relating to the Acquisition Limit expires on 31 December 2016, unless extended in accordance with clause 2.5.

### 2.5 Process to extend the Agreement

The Chief Executive may extend the date on which any of the obligations referred to in clause 2.2, 2.3, or 2.4 expire by giving the Purchaser notice in writing no less than 60 Working Days prior to the date on which the relevant provision would otherwise expire.

## 3. PURCHASE AND SETTLEMENT

### 3.1 Settlement amount

The settlement amount is **NZ\$ xx,000,000** plus GST (if any).

Any payment, including payment in full or a part payment under the payment plan must be made in New Zealand dollars.

### 3.2 Settlement

Settlement can be undertaken by either:

- (a) Full payment of the settlement amount; or

- (b) A payment plan comprising 5 equal payments. **[Note: Refer to note on front page of Agreement – this provision will be amended in light of the chosen option in relation to the payment plan.]**

### 3.3 Settlement on invoice

Settlement is due within 40 Working Days of the invoice date. If payment is to be by cheque it must be by Bank Cheque and made payable to the Ministry of Business, Innovation & Employment.

## 4. ACQUISITION LIMIT

The Purchaser must not, at any time, by itself or together with its Associates, hold or have registered or unregistered interests in Management Rights, or Controlling Interests in relation to Management Rights, if holding or having such interests would cause them to exceed the Acquisition Limit.

## 5. PROVISION OF THE EARLY MANAGEMENT RIGHT BY THE CROWN

- (a) The Early Management Rights set out in Schedule 1 will be transferred to the Successful Bidder within 30 Working Days of the Auction Manager receiving full payment of the settlement amount.
- (b) If a purchaser elects to utilise the payment plan the transfer of the Early Management Right and the discharge of security arrangements will be in accordance with the payment plan. **[Note: Refer to note on front page of Agreement – this provision will be amended in light of the chosen option in relation to the payment plan.]**

## 6. TRANSFERS AND CREATION OF INTERESTS BY THE PURCHASER

### 6.1 Transfers and creation of interests prohibited

- (a) The Purchaser must not, except as provided in clause 6.3, transfer, assign, or create, or purport to transfer, or assign or create, any Registered or unregistered interest in, or Controlling Interest in relation to, the Management Rights, in favour of any person other than the Purchaser itself or the Crown.
- (b) To avoid doubt, paragraph (a) does not prohibit the Purchaser from entering into any agreement for a transaction that is conditional upon receiving the consent of the Chief Executive and that will not take effect until the consent of the Chief Executive is received.

### 6.2 Licences are interests

The interests referred to in clause 6.1 include the interests by virtue of the creation or transfer of any licences on frequencies to which the Management Rights relate.

### 6.3 Chief Executive may give consent

- (a) The Purchaser may with the prior written consent of the Chief Executive, transfer, assign or create any Registered or unregistered interest in, or Controlling Interest in relation to, the Management Rights in favour of any person other than the Purchaser itself.
- (b) Consent under paragraph (a) must be applied for no later than 20 Working Days prior to the date of the transaction.

### 6.4 Consent subject to conditions

If the Chief Executive's consent is sought under clause 6.3, the Purchaser must:

- (a) demonstrate to the satisfaction of the Chief Executive that the Purchaser has complied with the terms of this Agreement;

- (b) ensure that in the case of a transfer, assignment or other transaction in relation to a Management Right, the proposed transferee, assignee, or other party to such a transaction executes a Management Rights Agreement with the Crown. For the avoidance of doubt if the proposed transferee already owns Management Rights in the 700 MHz band the Chief Executive will require that the Implementation Requirement, as set out in the "700MHz: Auction Catalogue", applies to the total 700 MHz Management Rights held;
- (c) ensure that the form of the transaction is acceptable to the Crown, and contains covenants to the same effect and with a term equal to the remaining term of this Agreement, including the Acquisition Limit, Implementation Requirement and Service Requirement, the prohibition on transfers and creation of interests as set out in clause 6.1 and the retention of a Caveat on the Management Rights in favour of the Crown as set out in clause 12; and
- (d) undertake to complete all payment obligations (if any) relating to the Management Rights in the 700 MHz Band for which consent under clause 6.3 is being sought.

## **7. REQUIREMENTS RELATING TO LICENCES**

### **7.1 Licence intended to permit use of radiomicrophones**

The Early Management Rights purchased will each contain a licence intended to permit the use of radiomicrophones which expires on 11 March 2015. Notwithstanding the authorities specified for the licence the Purchaser must not cancel, transfer, or modify the licence without the written permission of the Chief Executive.

### **7.2 Licences at locations on Chatham Islands**

- (a) The Chief Executive may require the Purchaser, acting as the Manager of the Early Managements Rights purchased, to grant spectrum licences to the Chief Executive for locations on the Chatham Islands (including, for the avoidance of doubt, Pitt Island); and
- (b) The Purchaser must create such licences with parameters and authorities as specified by the Chief Executive.

### **7.3 Licences at Correctional Institutions**

- (a) The Purchaser must act in accordance with the Telecommunications Carriers' Forum Code for the Control of Unauthorised Use of Mobile Phones, including any revision or replacement of that Code, in regard to granting spectrum licences for the purposes of the Code; and
- (b) The requirement in clause 7.3(a) applies irrespective of whether:
  - (a) the frequency ranges of the Management Rights are included in the Code;
  - (b) the organisation seeking licences is the Department of Corrections or any other organisation having responsibility for operation or management of prisons or other correctional institutions; and
  - (c) the Purchaser is a Party to the Code.

## 8. IMPLEMENTATION, SERVICE AND COMPLIANCE REQUIREMENTS

### 8.1 Compliance with this Agreement

- (a) Before the Conditional Management Right is transferred to the Purchaser, the Implementation Requirement and Service Requirement must be met by 1 January 2019; and
- (b) the Purchaser must demonstrate compliance with the terms of this Agreement to the reasonable satisfaction of the Chief Executive.

### 8.2 Continuous On-going Service Requirement

The Purchaser must have implemented a continuous and on-going telecommunications service using the Purchaser's Early Management Right that:

- (a) meets the requirement of clause 8.3 and 8.4 or 8.5 and, if appropriate, clause 8.6;
- (b) operates 24 hours per day, 7 days per week (excluding reasonable outages including those for maintenance and construction); and
- (c) will, in the opinion of the Chief Executive, continue to meet the requirements in these clauses up to and on 11 March 2020.

### 8.3 Implementation Requirement using Early Management Right

The Purchaser, as a minimum, must have implemented by 1 January 2019 a continuous and on-going telecommunications service that:

- (a) is provided using substantially the Early Management Rights purchased; and
- (b) uses, as a minimum equipment standard, an OFDM-based system such as:
  - (a) LTE (Long Term Evolution) as specified by the 3<sup>rd</sup> Generation Partnership Project (3GPP) in its Release 8 or later document series; or
  - (b) WiMax (Worldwide Interoperability for Microwave Access) as specified in the Institute of Electrical and Electronics Engineers (IEEE) standard IEEE 802.16-2004, as amended by IEEE 802.16e-2005.

### 8.4 Implementation Requirement if not an Existing Cellular Operator

If the Purchaser or any Associate of the Purchaser does not operate a cellular network in New Zealand using any radio spectrum at the date of this Agreement, the service required in clause 8.3 must be:

- (a) available for use by, and being offered for use on a commercial basis to (and may be a part of a network covering), at least 50% (for purchase of 1, 2, or 3 lots) or 75% (for four lots) of New Zealand's resident population, on a national basis, without relying on infrastructure (including networks) provided by persons other than the Purchaser; and
- (b) available for use by, and being offered for use on a commercial basis to (and may be a part of a network covering), at least 30% (for purchases of 2 or 3 lots) or 50% for 4 lots of New Zealand's resident population, in each Region, without relying on infrastructure (including networks) provided by persons other than the Purchaser.

#### In this clause:

- (a) "Region" has the same meaning as defined in section 5 of the Local Government Act 2002;



- (b) The resident population for each Region is determined using the Statistics New Zealand's National Population Estimates for the most recently published quarter prior to the Chief Executive's determination; and
- (c) the populations of the Tasman and Nelson Regions are to be combined and considered as one Region.

### **8.5 Implementation Requirement if an Existing Cellular Operator**

If the Purchaser operates a cellular network in New Zealand using any radio spectrum at the date of this Agreement, the service required in clause 8.3 must, in addition to any contractual undertaking to the Crown outside of this Agreement, be available through ~~XXX~~ of pre-existing cell sites in Rural Areas (being the lesser of 75% of pre-existing cell sites or 300 pre-existing cell sites that use frequencies in the 850 MHz band and/or the 900 MHz band in Rural Areas where the Purchaser already offers cellular service through its own facilities, as agreed with the Chief Executive);

**[Note: When prepared for execution, the Agreement will be edited for each signatory to include either clause 8.4 or 8.5, and if appropriate clause 8.6, with the appropriate requirements edited depending upon the number of lots purchased.]**

**[Note: That when finalising executable copies of this agreement the agreements for any parties who are Associates will be constructed so that each agreement will reflect an Implementation Requirement in clause 8.3, 8.4, 8.5 and 8.6 for the aggregate number of Lots acquired by all the Associates.]**

### **8.6 Implementation Requirement to provide new sites**

- (a) The Purchaser, as a minimum, must provide service from [five (5) new transmission sites (if the Purchaser purchases three lots)] or ten [(10) new transmission sites (if the Purchaser purchases four lots)] per year during the five year period from 1 January 2014 to 1 January 2019, with the specific sites being proposed to, and agreed by, the Chief Executive in writing each year prior to implementation;
- (b) These can be co-located sites, provided that they provide genuinely new coverage for the Purchaser and do not provide coverage that the Purchaser is required to provide through a contractual undertaking to the Crown outside of this Agreement (e.g. through the Rural Broadband Initiative);
- (c) If a new site agreed by the Chief Executive above provides service in the 700 MHz bands the number of pre-existing cell sites required to be upgraded under clause 8.5 will be reduced accordingly;
- (d) If the Purchaser is unable, through circumstances that the Chief Executive agrees are outside of the control of the Purchaser, to provide service from the sites proposed and agreed for a given year, the Chief Executive may agree in writing to an alternative completion date, and if proposed, an alternative site;
- (e) If the site, or an agreed alternative site, remains uncompleted by the end of the relevant year, or by any alternative completion date agreed in writing between the Crown and the Purchaser, the Purchaser is liable to pay the Crown a sum of \$50,000 (plus GST) in respect of that breach of contract for each year or portion of a year that the breach continues in respect of that site.

### 8.7 Creation of licences

The purchaser must ensure that any licences created and recorded on the Register of Radio Frequencies under section 48 of the Radiocommunications Act specify that the licences can only be cancelled by the manager acting alone, unless otherwise specified under clause 7.2(b).

### 8.8 Chief Executive determination

Whether or not the Implementation Requirement and Service Requirement have been met is a matter to be determined by the Chief Executive in his or her sole discretion based solely on information relating to whether the requirements in clauses 8.2, 8.3, 8.4, 8.5 and 8.6 have been satisfied.

### 8.9 Purchaser must submit a statutory declaration

To assist the Chief Executive with his or her determination under clause 8.8, and his or her assessment of compliance under clause 8.1(b), the Purchaser must submit to the Chief Executive no later than the Declaration Date (time being of the essence), a statutory declaration:

- (a) stating that the Implementation Requirement and Service Requirements are met; and
- (b) attaching sufficient evidence to satisfy the Chief Executive that the Implementation Requirement and Service Requirement is met; and
- (c) undertaking that the Implementation Requirement and Service Requirement will continue to be met up to and on 11 March 2020; and
- (d) stating that the Purchaser has complied with and will continue to comply with the Agreement up to the date the Conditional Management Right comes into force.

### 8.10 Chief Executive may require Further Information

- (a) The Chief Executive may request further information ("Further Information") from the Purchaser that is reasonably required to assess implementation under clause 8.9(b), make his or her determination under clause 8.8 and assess compliance with the Agreement under clause 8.1(b).
- (b) The Purchaser must respond promptly to such a request and in any event, must provide the Further Information within 10 working days of receiving the request.
- (c) The Ministry agrees to keep any Further Information strictly confidential unless disclosure is required by law, Ministers, or parliamentary convention. The Ministry acknowledges that for the purposes of the Official Information Act 1982, the withholding of the information may be necessary to avoid unreasonable commercial prejudice to the Purchaser in terms of section 9(2)(b)(ii) of the Official Information Act. The Ministry must consult with the Purchaser on any request made under the Official Information Act for any information provided by the Purchaser.
- (d) If:
  - (a) for any reason, it is not practicable for the Purchaser to provide the Further Information within the specified timeframe, the Purchaser must give notice to the Ministry of the reason for any delay and the Ministry may, taking into account the circumstances, determine a reasonable extension; or

- (b) the Further Information does not exist or cannot be compiled or found after due inquiry, the Purchaser may refuse the Chief Executive's request after giving notice within 10 working days of receiving the request to the Ministry of the reason for the refusal. The absence of the Further Information may be taken into account by the Chief Executive when determining whether the Implementation Requirement and service requirement in clauses 8.2 and 8.3 have been met and whether the Purchaser has complied with the terms of the Agreement.

#### **8.11 Chief Executive must notify if implemented**

- (a) Within 30 working days of receiving the statutory declaration submitted under clause 8.9, or the Further Information requested under clause 8.10, the Chief Executive must provide written notice to the Purchaser as to whether or not he or she is satisfied, in accordance with clause 8.8, that the Service Requirement and Implementation Requirement as set out in clauses 8.2, 8.3, 8.4, 8.5 and 8.6 have been met. Written notice from the Chief Executive that the Service Requirement and Implementation Requirement has not been met is conclusive in the absence of manifest error.
- (b) Until the earlier of transfer of the Conditional Management Right in accordance with clause 9, expiry of Early Management Rights or termination under clauses 8.12 or 10.1, the Purchaser will continue to exercise the Early Management Right in accordance with the terms of this Agreement.

#### **8.12 Effect of failure to meet requirements**

Subject to the Purchaser's right to remedy any breach of this Agreement in accordance with clause 10.1 or 13.1 or the extension of the date of the Implementation Requirement in accordance with clause 8.15, if an event in clause 8.13 occurs and is not remedied, then:

- (a) the Implementation Requirement is deemed to have not been met; and
- (b) to avoid doubt:
  - (a) the Conditional Management Right will not be transferred to the Purchaser under clause 9; and
  - (b) the Purchaser is not entitled to any refund (partial or otherwise) of the settlement amount paid by the Purchaser for the Management Rights; and
- (c) this Agreement will automatically terminate, and clauses 10.2 and 11 will apply.

#### **8.13 Events leading to failure to implement**

The events are:

- (a) the Purchaser does not submit the statutory declaration under clause 8.9 (including not submitting it by the Declaration Date or not submitting it because the Purchaser cannot declare that it has met the Implementation Requirement or complied with this Agreement); or
- (b) the Chief Executive provides notice under clause 8.11 that the Implementation Requirement and Service Requirement has not been met; or
- (c) the statutory declaration provided under clause 8.9 or any Further Information provided by the Purchaser under clause 8.10, is false, misleading or incomplete in any material respect.

**8.14 No further obligation if implemented**

- (a) To avoid doubt, if the Chief Executive gives notice under clause 8.11 that the Implementation Requirement and Service Requirement has been met, the Purchaser is under no other obligation in respect of these requirements on or after 12 March 2020.
- (b) Clause 8.14(a) only applies if the statutory declaration under clause 8.9 and any Further Information under clause 8.10 provided by the Purchaser are not incorrect, misleading or incomplete in any material respect in relation to the Implementation Requirement.

**8.15 Extension of Implementation Requirement**

Notwithstanding any other provision in this Agreement, the Purchaser must use all reasonable endeavours to meet the Implementation Requirement by 1 January 2019. However, this date may be extended at any time:

- (a) for any reason with the prior written consent of the Chief Executive; or
- (b) in accordance with clause 8.16(c).

**8.16 Force majeure**

If the Purchaser is affected, or likely to be affected, by a force majeure event:

- (a) the Purchaser must immediately give to the Ministry prompt notice of that fact, including:
  - (i) full particulars of the force majeure event;
  - (ii) an estimate of the likely duration of the force majeure event;
  - (iii) the obligations affected by the force majeure event and the extent of its effect on those obligations; and
  - (iv) the steps taken by the Purchaser to rectify it;
- (b) the Purchaser's obligations under this Agreement are suspended to the extent to which they are affected by the relevant force majeure event and for as long as that force majeure event prevents the Purchaser from fulfilling its obligations; and
- (c) The date of the Implementation Requirement will be extended by such time as the Ministry and the Purchaser consider to be reasonable in the circumstances, such time to be no less than the duration of the period during which the Purchaser is prevented from fulfilling its obligations by the force majeure event.

**9. TRANSFER OF CONDITIONAL MANAGEMENT RIGHT****9.1 Requirements met**

- (a) Subject to clause 9.2, if the Chief Executive gives notice under clause 8.11 that the Implementation Requirement and Service Requirement is met, and if the Chief Executive is satisfied under clause 8.1(b) that the Purchaser has complied with this Agreement, then the Crown must consent to transfer the Conditional Management Right to the Purchaser under section 42 of the Act on the terms and conditions as substantially set out in this Agreement not later than 20 Working Days prior to the commencement of the Conditional Management Right.

## 9.2 No false, misleading or incorrect information

- (a) Clause 9.1 only applies if the statutory declaration provided by the Purchaser under clause 8.9 and any Further Information under clause 8.10 are not false, misleading or incorrect in any material respect.
- (b) If the Conditional Management Right is transferred before the statutory declaration under clause 8.9 or any Further Information under clause 8.10 are found to be false, misleading or incorrect in any material respect, the Purchaser agrees to transfer the Conditional Management Right to the Crown under section 42 of the Act within 20 working days of the Chief Executive providing notice of the finding.

## 10. TERMINATION OF AGREEMENT

### 10.1 Termination for cause

The Ministry may terminate this Agreement at any time by giving 10 Working Days notice to the Purchaser, if the Purchaser:

- (a) commits a Material Breach of any of its obligations under this Agreement and that breach is not capable of being remedied; or
- (b) fails to remedy any Material Breach of its obligations:
  - (i) under clause 6 within the timeframes for remedy set out in clause 15.1(c) of this Agreement; and
  - (ii) under clauses 8.9 or 8.10 of this Agreement within 10 working days of becoming aware of the breach or receiving notice of the breach from the Ministry.

### 10.2 Rights and obligations on termination

Termination of this Agreement is without prejudice to the rights and obligations of the Parties accrued up to and including the date of termination. To avoid doubt, where this Agreement is terminated in accordance with clauses 8.12 or 10.1 before the Conditional Management Right has been transferred:

- (a) the Conditional Management Right will not be transferred to the Purchaser under clause 9; and
- (b) the Purchaser is not entitled to any payment or compensation of any kind from the Ministry for the Management Rights.

## 11. TRANSFER OBLIGATION AND POWER OF ATTORNEY

The Purchaser must execute a power of attorney irrevocably appointing the Chief Executive (or the Chief Executive's duly authorised delegate) as its attorney for the purpose of transferring the following Management Rights to the Crown under section 42 of the Act:

- (a) The Early Management Right, if this Agreement is terminated under clause 8.12 or if the Ministry terminates this Agreement under clause 10.1:
- (b) The Conditional Management Right, if the statutory declaration provided by the Purchaser under clause 8.9 or any Further Information under clause 8.10 are found to be false, misleading or incorrect in any material respect.

## 12. CROWN'S CAVEATABLE INTEREST

### 12.1 Caveat lodged by Crown

Pursuant to section 89 of the Act, the Crown will lodge with the Registrar of Radio Frequencies a caveat over the Early Management Rights.

### 12.2 Effect of caveat

The caveat will have the effect of prohibiting the Registrar from making any entry on the register charging or transferring the Management Rights or creating or modifying any licence under the Management Rights, other than with the consent of the Crown.

### 12.3 Duration of Caveat

Any caveat lodged under clause 12.1 will remain in force for the duration of the Early Management Rights.

### 12.4 Crown consents to certain dealing

The Crown will consent as caveator to any dealing:

- (a) giving effect to a transaction that the Chief Executive has consented to under clause 6.3; or
- (b) for which the Chief Executive's consent under clause 6.3 is not required; and
- (c) to create or modify any spectrum licence under the Management Rights

## 13. DISPUTE RESOLUTION

### 13.1 Good faith

The parties must attempt to resolve any dispute or difference that may arise under or in connection with this Agreement amicably and in good faith, referring the dispute to the parties' senior managers if necessary.

### 13.2 Inability to resolve

If the parties' senior managers are unable to resolve within 10 Working Days of it being referred to them, the parties must refer the dispute to mediation or another form of alternative dispute resolution agreed between the parties.

### 13.3 Mediation

If a dispute is referred to mediation, the mediation must be conducted by a single mediator appointed by the parties (or, if they cannot agree, appointed by the Chair of LEADR New Zealand Inc.) and on the terms of the LEADR New Zealand Inc. standard mediation agreement (unless the parties agree otherwise). The parties must pay their own costs relating to any mediation or other form of alternative dispute resolution (unless they agree otherwise).

### 13.4 Contractual obligations

The parties must continue to perform their obligations under this Agreement as far as possible as if no dispute had arisen pending final resolution of the dispute.

### 13.5 Urgent relief

Nothing in the clause 13 precludes either party from taking immediate steps to seek urgent relief before a New Zealand Court.

## 14. APPLICATION OF THE COMMERCE ACT 1986

### 14.1 No warranty

The Crown makes no warranty that a holding of Management Rights within the Acquisition Limit complies with section 47 of the Commerce Act 1986.

### 14.2 Ministry indemnified

The Purchaser indemnifies the Crown against any claim, liability, loss or expense (including legal fees on a solicitor own client basis) brought or threatened against, or

incurred by the Crown in the event that the holding of Management Rights by the Purchaser breaches or is alleged to breach the Commerce Act 1986.

## 15. GENERAL

### 15.1 Purchaser's liability and indemnity

- (a) Other than in respect of any breach by the Purchaser of clauses 4, 6, 7 or 8, neither party will have any liability to any other party (in contract, tort (including negligence) or breach of statutory duty or otherwise), for any indirect or consequential losses (including loss of profits, revenue, business or anticipated savings) arising out of or in connection with this Agreement.
- (b) The parties agree that in respect of any breach by the Purchaser of clauses 3, 4 and 5, damages alone are likely to be an inadequate remedy, and discretionary relief by way of injunction or order for specific performance is likely to provide a more adequate remedy for the Crown.
- (c) The Purchaser agrees to remedy any breach of clause 6.1 as soon as reasonably practicable and in any event within 3 months of becoming aware of such a breach. The measures necessary to remedy such a breach may include divestment of any registered interests in Management Rights, or Controlling Interests in relation to Management Rights which have been transferred, assigned or created without consent under clause 6.3.

### 15.2 No amendment

No variation to this Agreement is effective unless it is in writing and signed by the parties.

### 15.3 No waiver

No party is deemed to have waived any rights under this Agreement unless the waiver is in writing and signed by that party. A failure to exercise or a delay in exercising any right under this Agreement will not operate as a waiver of that right. Any such waiver will not constitute a waiver of any subsequent or continuing right or of any other provision in this Agreement.

### 15.4 Severability

Any unlawful or voidable provision in this Agreement will be read down so as to be valid and enforceable or, if it cannot be read down, will be severed from this Agreement without affecting the validity, legality, or enforceability of the remaining provisions, provided the reading down or severing does not materially affect the purpose of or frustrate this Agreement.

### 15.5 New Zealand law to apply

This Agreement will be governed by and construed in accordance with New Zealand law.

### 15.6 Communications and notices

- (a) Any notice to be given under this Agreement must be in writing and must be delivered or sent by registered post to the parties' respective addresses as set out in clause 15.6(c) and clause 15.6(d), or if a written notice of change of address is given in accordance with this clause 15.6, then to the new address.
- (b) Any notice will be deemed to be served on the date of delivery or the Business Day next following the date of posting as the case may be. In proving the giving of a notice it is sufficient to prove that the envelope containing such notice was properly addressed and posted.
- (c) The address for the service of notices on the Crown is:

Ministry of Business, Innovation and Employment  
PO Box 1473  
WELLINGTON

Attention: Manager, Radio Spectrum Policy and Planning

- (d) The address for the service of notices on the Purchaser is:

[Insert name]

[Insert postal address]

Attention: [Insert position]



**SCHEDULE 3 – RURAL AREA**

**[Note: the definition of rural area applies only to existing mobile network operators who are successful in the 700 MHz auction, and will be provided to them following discussions.]**