



**Submission to the Commerce
Commission on the NGN Discussion
Paper**
February 2009

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on the NGN Discussion Paper
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Executive Summary

1. Thank you for the opportunity to submit in relation to the Commission’s NGN Study.
2. Large scale IPTV is already a reality and it will grow quickly. For example:
 - (a) There’s BBC’s iPlayer service, which enables UK viewers to “catch up” and watch programmes online. The online catch up is available for 7 days after a programme was broadcast. In the 12 months since the service launched, iPlayer has reached 41 Million programme downloads per month, as at December 2008. And this is only one of numerous initiatives in the UK. iPlayer has been taking over 6% of all UK based Internet traffic.

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- (b) During the 2008 Olympics, we provided more content online than we broadcast by traditional means (we were able to cover multiple events in greater depth online). Viewers took 4.3 Million downloads of Olympic action, live or delayed (the choice was the viewers). We were still at trial stage, yet we substantially exceeded our expectations.
 - (c) We're expecting to provide, via our TVNZ On Demand service, 95% of our broadcast local and international content online by the middle of 2009. This is a free, ad-funded service. Viewers can watch everything from Grey's Anatomy and Desperate Housewives, to Shortland Street and ONE News, without owning a TV set. Just as importantly we can offer many value added services. This is not just about mirroring broadcast content on a different platform. Our more extensive coverage online of the Olympics – compared to broadcast – is just one example of this.
 - (d) TVNZ is not alone. Others are going online. Online platforms enable new entrants to provide services as well, and reduce barriers to market entry. The UK Competition Commission concluded this month that technology barriers to new entry in the online video on demand market are not significant.¹
3. A major challenge however is getting appropriate quality of service, quality of experience,² speeds, capacity, and the right commercial and policy settings. This is why we support initiatives such as the fibre to the premises (FTTP) \$1.5Bn funding that Government is currently considering.
 4. The debate on investing in and using networks such as FTTP has been dominated so far by supply-side considerations. A *"build it and they will come"* approach.
 5. However, as the UK Government correctly identified in its January 2009 Digital Britain interim report, demand and content are the key drivers:

[Broadband] ultimately is about demand. It is about what it can do for you, not what it is. Lower prices, easier access, user friendly devices, skills and confidence all play a part in helping people to take up and make the most of broadband.

What really matters is great content and services.
 6. We suggest that the Commission should highlight in its report the need to analyse and advance the demand-side considerations. However, we are confident that IPTV, with the great benefits it can bring to consumers, will be pivotal if the settings are right.
 7. Based on our submissions, we identify two key issues for the Study:
 - (a) The question is not whether IPTV will happen. Instead, it is: "How much can happen, based on consumer demand and the commercial and policy settings?"
 - (b) What can be done to help foster high-speed broadband?

¹ UK Competition Commission's final report on the JV between BBCW, C4 and ITV; Para 42 (4 February 2009).

² We agree with the discussion paper that customer-focused quality of experience is a key objective to supplement traditional quality of service metrics.

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8. We suggest that the Study's report identifies these key issues and deals with them as far as possible. For example, the report can:
 - (a) encourage more focus on demand-side considerations for NGANs (for example by recommending analysis and development of likely demand drivers for FTTP);
 - (b) recognise the substantial impact that IPTV will have on broadband uptake;
 - (c) support an FTTP initiative with public sector funding, and note the demand side role that IPTV has in relation to that initiative;
 - (d) recognise the role that TVNZ and other broadcasters can play in relation to broadband uptake;
 - (e) identify areas that might be considered for regulatory/competition review (e.g. online and mobile anti-competitive bundling of premium content)); and
 - (f) send other regulatory signals to help market participants resolve issues so that regulatory action is not required.
 9. Convergence, and the supply of online content, can and should be pro-competitive. For example, NGAN can provide a means to transmit content so that there is more likelihood of a level playing field, to the benefit of consumers. This is relevant in New Zealand, given the strong position held by the Pay TV incumbent (with its unusual ownership of a free to air (FTA) broadcaster). That dominance internationally is rare. Generally, there are market constraints such as regulation, and competition from cable TV services.
 10. However, running against the pro-competition benefits of convergence and NGNs is a major issue: the creation of bottlenecks by agreements between providers, bundling, and other strategies. Strategies such as bundling can be pro-competitive. But often they in fact limit competition. We identify the issues and some examples below, and suggest that the Commission's report provides signals as to what might happen if concerns are not resolved. We see this is one of the biggest challenges to competition and investment in relation to NGN. The issues are complex, but that should not be a reason to avoid dealing with them.
 11. Convergence of broadcasting and telecommunications raises issues beyond the Telecommunications Act. The scope of the Study can and should include wider matters, including issues outside economics, to the extent they relate to telecommunications.
 12. We suggest a change to the four scenarios – which we support as a means of helping analyse demand side considerations – to better reflect IPTV demand issues.
 13. The Commission's NGN report will, as the discussion paper notes, be informed by the outputs from the IP Interconnection working party, and we refer the Commission to our submission into that process.
 14. All of our submission focuses on Questions 10 to 13. We identify where we deal with other questions in the discussion paper. We do this in the following order:

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- (a) Overview of the issues for TVNZ, the relevant industry sectors, and consumers, referring also to overseas experience and the proposed FTTP roll-out.
 - (b) We raise two key issues: What can be done to help foster high-speed broadband; and what can be done to provide more and better content online that viewers want?
 - (c) We suggest an approach for the Commission in its NGN Report.
 - (d) Demand-side considerations, and the role of IPTV.
 - (e) Bundling, exclusive dealings and other ways in which the pro-competitive benefits of convergence can be distorted.
 - (f) How NGAN developments can enable further competition and new entrants for both broadcast and telecommunications services.
 - (g) We suggest a change to the Commission's four scenarios.
 - (h) Finally, we outline why the scope of this Study can and should extend beyond the Telecommunications Act, and beyond economic issues (so long as scope relates to the telecommunications sector).

“Inspiring New Zealanders on every screen”

- 15. In this section of our submission, we background some of the issues faced by us, by the broadcast and telecommunications sectors and by consumers. This provides background to the online considerations.
- 16. *“Inspiring New Zealanders on every screen”* sets TVNZ's path under our 5 year strategic plan from 2006.³ We are no longer just a traditional free-to-air (FTA) public broadcaster, broadcasting content only on a “linear” basis (linear in the sense that viewers are required to watch according to our schedules, not theirs). Increasingly, we provide content on a non-linear basis so that viewers can watch programmes when they want.
- 17. Non-linear supply of content (such as online Video on Demand (VOD)) is now a reality for us and other traditional broadcasters in New Zealand and internationally. For example, our TVNZ On Demand service enables New Zealanders to “catch-up”, by watching online the *Desperate Housewives*, *Shortland Street* or *ONE News* programme which they have missed.
- 18. Convergence and new equipment will increasingly mean that the online experience won't be limited to viewing on a computer monitor. The online “near view” computer screen experience will rapidly become a “sit back” experience, watched on a TV screen. PCs, Set Top Boxes (STBs), other devices and software will readily enable this. So online viewing will be mainstream and not just the domain of the tech-savvy.

Industry transition to digital

- 19. A key aspect of our business (and for broadcasters generally) is the move to digital, away from analogue to:

³ For more detail, see the TVNZ Statement of Intent for the 3 years ending 30 June 2011.

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- (a) digital workflows, all the way from pre-production through to transmission (in place of analogue tape based workflows);
 - (b) digital transmission (e.g. utilising the Freeview platform, and our new ad-free digital channels, TVNZ 6 and TVNZ 7);
 - (c) High Definition away from Standard Definition including a dolby digital surround sound experience;
 - (d) online supply of content, and content provision on mobile phone screens; and
 - (e) digital non-linear platforms from traditional linear broadcast.

Revenue Pressure

- 20. Unlike many of our overseas counterparts, we fund most of our operations from commercial revenues. TVNZ is a Crown-owned company that gets less than 10% of its funding from the public sector. So it is heavily reliant on commercial revenue, particularly from TV ads. Most of the public sector funding is already contestable funding that is provided via New Zealand On Air and Te Mangai Paho. From 1 July 2009 all our public funding becomes fully contestable. Additionally, the proliferation of platforms puts increased pressure on those agencies to spread the funding more widely.⁴
- 21. In New Zealand and around the world, FTA broadcasters, reliant on ad revenues, face considerable pressure on their operations. The rise of multiple platforms, such as the Internet, means that the impact of an advertisement is reduced (this reduces what advertisers would pay). It also means that advertising is spread around more platforms.

Content Creation

- 22. A high proportion of our programming is local content, produced in-house by TVNZ or commissioned from New Zealand production houses. Reduced revenues have economic implications for New Zealand wider than the direct effect on TVNZ. For example, in addition to our in-house production of content, and content produced with public funding, we provide around \$100M each year, paid for out of our commercial revenues, to external production houses that produce local content. Support of local production by us and other New Zealand broadcasters in turn fosters the wider audio-visual production industry in New Zealand, including the film sector. This in turn leads to overall substantial export revenues. This is just an example of the wider economic benefits from our services, and those of our broadcast and content colleagues.
- 23. The challenges faced in funding content creation are outlined in a January 2009 report from the UK Government:⁵

... the challenge that digital economics pose to a number of business models that have traditionally supported content creation and aggregation. The huge growth of advertising inventory [i.e. available opportunities for advertising] has produced a parallel reduction in the value of advertising impacts and their ability to fund professional long-form content. Pricing and consumer expectations whether for adverts or

⁴ Amended legislation means that these funding agencies can now fund platforms beyond linear broadcasters.

⁵ Digital Britain: The Interim Report by the UK Government; page 45 (January 2009).

subscription to the content itself are a fraction of their analogue value.
The profits that funded high levels of original...content are diminishing.

Wider issues beyond economic considerations

24. We have a significant role in contributing to New Zealand's culture, citizenship and national identity. A substantial proportion of our content is locally produced for this reason (it would generate significantly more net revenues for the company to just bring in overseas programmes).
25. Multiple media voices also provide plurality, which is a fundamental and important outcome, particularly for freedom of speech (which is generally regulated for in other OECD countries, but is not regulated here).
26. At the end of these submissions, we note that Section 9A, under which this Study is being undertaken, expects wider review than just economic considerations, to the extent issues are related to telecommunications.
27. The Commission has an opportunity to take a wide ranging and proactive approach in this study, beyond pure economic analysis. That is valuable in enabling the Commission to recommend great outcomes.
28. The cross-play between broadcast and telecommunications impacts on issues such as plurality, and wider national identity and culture issues.
29. The Commission is able, in its Study, to identify the issues, and recommend consideration by appropriate bodies.

Increased cost and availability of content, due to the unusual industry structure

30. TVNZ (and other FTA providers other than Prime) face additional challenges in delivering services to viewers, from the growing dominance of the sole Pay TV broadcaster and its FTA arm, Prime.
31. Aggregated Pay TV and FTA operations internationally are unusual (and generally not permitted in other countries).⁶ Pay TV with limited commercial constraints (e.g. New Zealand has only limited cable TV competition) is rare. Pay TV with limited regulatory restraints is also rare. Of course, Pay TV must be able to function and compete, and reasonably benefit from its investments over the years. But that does not mean its activities should be largely unrestrained.
32. This brings major challenges to the marketplace (and, ultimately, reduced consumer welfare). We have outlined this in our submissions on the MCH/MED Digital Broadcasting review.
33. Among other things, this leads to the outcome that, while advertising revenue declines, the cost of sourcing programming has increased, as illustrated by the SKY/Prime acquisition of the 2012 London and Vancouver Olympic broadcasting rights. Control of premium sports rights is key, including online. It has widespread market implications, including for broadband and NGANs. We return to that topic below.
34. A key reason why some content has a high price for FTA providers (other than Prime) is that the Pay TV/FTA combination of Sky and Prime is uniquely placed

⁶ A recent illustration is BSkyB's attempt to acquire 17.9% of the shares in ITV in the UK.

to buy multiple “windows”. Transmission rights are closely controlled by distributors and sold as transmission windows limited by time (e.g. live, delayed play, transmission within a limited number of days, etc); by platform (Pay TV, FTA, online, etc), and so on. Only Sky can buy all Pay TV, FTA, mobile and online rights. Sky can generally bid for programmes beyond what FTA channels can afford in view of its unique Pay TV/FTA position.

35. What has been a broadcast problem (the buying power of the Pay TV/FTA aggregation) is now an online problem too (as the Pay TV provider leverages that dominant position to acquire online and mobile rights as well).

But isn't this just good competition between providers for the benefit of consumers?

36. Convergence, proliferation of platforms, etc, can and should be pro-competitive. Opportunities are opened up for new entrants, and existing providers can offer exciting new services. The consumer benefits as a result.
37. However, the pro-competition benefits are being lost by market distortions, and bottlenecks are being created (for example, in the way that premium content is used). We return to this below in the online context of this NGN Study.

Key issues “What can be done to help foster high-speed broadband and provide more and better content online that viewers want”

38. There are two key related issues.

First issue

39. Online supply of content is now reality. A key issue is whether the commercial and policy settings will allow us, other providers, and new entrants, to provide IPTV in a way and to the extent that viewers want.
40. So, the issue is not whether IPTV will happen. Instead, it is: “How much can happen, based on consumer demand and the commercial and policy settings?”

Second issue

41. What can be done to help foster high-speed broadband?
42. So far, the NGAN discussion has been marked by supply-side considerations, with only limited focus on demand.
43. The “*build it and they will come*” approach.
44. While there will always be an element of demand following availability of NGANs, we consider that demand for fast broadband should be carefully analysed. That analysis can assist in achieving the optimal outcomes in terms of broadband and network uptake, with optimal competition and investment outcomes. Such analysis can also consider two-sided market considerations.
45. However, we are already confident that, with the right settings, IPTV will not only be a major service provided over NGANs. It will also be a key consideration for investment decisions, whether by the commercial or the public sectors. For

example, IPTV, and the benefits it delivers, can be a major consideration as Government decides whether and how to invest in NGAN.

46. If the right commercial and policy settings exist for encouraging supply of the online content that viewers want, strong broadband uptake, and NGAN roll-out, becomes more likely.
47. For example, we consider that IPTV is a fundamental demand driver for a Fibre to the Premises (FTTP) roll-out, which is currently under review for \$1.5Bn funding by Government.

BBC's iPlayer shows the way

48. The scale of this IPTV demand for FTTP (which we return to below) is demonstrated by recent UK experience. BBC's online iPlayer service provides BBC content online, geofenced to UK viewers. The available content is replays of programmes broadcast within the preceding 7 days (so called "catch up" content).
49. Within the UK, iPlayer requests to download BBC catch up content went from nothing in December 2007 (when the service started) to 41 Million programme requests per month, by December 2008.⁷
50. iPlayer traffic on the Internet has been occupying up to 6% of all UK Internet traffic. This is happening even before BT rolls out its NGAN.

TVNZ's role

51. TVNZ has a valuable role to play in encouraging demand for high speed broadband. Internationally, public broadcasters have led many new developments. Other providers have followed their initiatives, thereby encouraging new entrants, a wider array of service options for viewers, etc.
52. This is illustrated by the major January 2009 UK Government interim report, Digital Britain. For example, in concluding there should be universal connectivity (USO) for broadband (using not only fixed line but also mobile and other wireless solutions), the report notes the importance of a focus on demand and the role the wider public sector including the public broadcaster can play:

Universal connectivity ultimately is about demand. It is about what it can do for you, not what it is. Lower prices, easier access, user friendly devices, skills and confidence all play a part in helping people to take up and make the most of broadband.

What really matters is great content and services. Much of this is for the private sector and innovation.

Government can emulate the lead of some other parts of the public sector in leading people to the digital world. Within the wider public sector, the BBC iPlayer, which allows people of any age or background to understand the empowering freedoms of the new technology, is a good example.

53. Below we introduce how we are moving strongly into the online world, assuming commercial and policy settings are appropriate.

⁷ Source: Digital Britain: The Interim Report by the UK Government; page 20 (January 2009).

Approach in the Study's report

54. We suggest that the Study's report identifies these key issues and deals with them as far as possible. For example, the report can:
- (a) encourage more focus on demand-side considerations for NGANs (for example by recommending analysis and development of likely demand drivers for FTTP);
 - (b) recognise the substantial impact that IPTV will have on broadband uptake;
 - (c) support an FTTP initiative with public sector funding, and note the demand side role that IPTV has in relation to that initiative;
 - (d) recognise the role that TVNZ and other broadcasters can play in relation to broadband uptake;
 - (e) identify areas that might be considered for regulatory/competition review (e.g. online and mobile anti-competitive bundling of premium content); and
 - (f) send other regulatory signals to help market participants resolve issues so that regulatory action is not required.

Broadband and demand for IPTV

55. In this section of our submission, we expand on the significance of IPTV for broadband.
56. First it helps to be clear about the various IPTV models as there are a number of ways that TV content can be delivered online. There is a useful description of these issues in the UK Competition Commission's February 2009 decision on Project Kangaroo.⁸
57. Content distributors commercialise their offerings by providing rights to transmit within time-limited and platform-limited windows. These are controlled by limiting intellectual property rights, sometimes backed up by digital rights management (DRM) requirements such as encryption.
58. Typically, online content is available as follows:
- (a) Delivery of content on a "linear" basis, that is, in the same way that broadcasters deliver content. Viewers watch according to the providers' schedule. This is described as "streaming". Viewers do not store content on their Set Top Box (STB) or PC. It's like watching a broadcast programme. An example is TVNZ's live streaming of the Olympics, Sir Edmund Hillary's funeral, and the Louis Vuitton Cup. As happened with the Olympics, we made available multiple channels at the same time online, beyond our more limited live broadcast coverage. Therefore, even this mirror of our traditional broadcast services enables us to provide. The FTTP network would support high volume, high bandwidth, and High Definition programming, such as this.

⁸ UK Competition Commission's final report on the JV between BBCW, C4 and ITV (4 February 2009).

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- (b) Delivery of the same content but also on a delayed availability basis: the viewer can stream the content when requested. Some IP rights will limit when this can be done.
 - (c) Ultimately, delivery of content on a linear basis could comprise all of a provider's channels, provided network speeds, capacity, QoS and price are appropriately set. (A likely option is delivery of content also on a non-linear basis too). For example, a new entrant can start up a content provision service as extensive as ours, MediaWorks', or Sky's, using only FTTP-based online transmission (coupled with other forms of online transmission outside the FTTP footprint). The UK Competition Commission concluded this month that technology barriers to new entry in the online video on demand market are not significant.⁹
 - (d) "Catch-up" online TV. This is a "pull" type of video-on-demand (VOD) service. On our catch up service (TV On Demand), a viewer can watch a recent programme (typically within 7 days). Our DRM obligations mean that the online feed to the viewer is encrypted so that the content cannot be downloaded by the viewer: it can only be streamed. Other catch up services will be governed by different rights. For example, iPlayer content can be streamed, or stored by the viewer on a time-limited basis.
 - (e) Push VOD is another type of service. A typical example has the service provider selecting material to send overnight to the viewer's Personal Video Recorder (PVR). (Although not used in this way, MySky is an example of a PVR).
 - (f) An online subscription service. This could be an online equivalent of a PayTV's broadcast offering.
 - (g) Archived content. For example, TVNZ has some of this content on its TVNZ On Demand service. However, for many programmes, rights, beyond short term "catch-up", can be commercialised in other ways, including online. There is a complex inter-relationship between the various categories of rights.
 - (h) Further variations include a combination of broadcasting and online delivery of content.
59. Commercial models are evolving for online IPTV. The three main models so far are (a) subscription (b) pay per view (e.g. paying to download a programme) and (c) free content, funded by ad revenue. TVNZ's services are free with ads. These models may change other time and may have aspects that merge as well. Broadly, Pay broadcasters are providing content online on a subscription model ("Closed VOD") and FTA broadcasters are using a free, ad-funded model ("Open VOD").

The UK experience

60. Above, we introduced the success of iPlayer as a strong sign of the increasing importance of IPTV, and what can happen elsewhere including New Zealand.
61. Although, in the UK, Virgin Media has recently revitalised its cable business, the UK has parallels with New Zealand in that it did not have a strong cable business to compete with Pay TV broadcasters. This is illustrated by the fact

⁹ UK Competition Commission's final report on the JV between BBCW, C4 and ITV; Para 42 (4 February 2009).

that a key driver for operational separation in the UK was the lack of cable competition to the local loop operator; the same driver also underpins the operational separation decision here: our lack of cable competition to Telecom was a key factor. The discussion paper raises the question of whether the lack of cable competition here means that IPTV will not be a significant broadband driver. The UK is one example where IPTV surged ahead even though cable competition was limited.

62. iPlayer is only one part of what is happening in the UK. iPlayer is a public service activity of the BBC. This is separate from the content available from BBC's commercial arm, BBC Worldwide. BBC Worldwide, along with UK's Channel 4 and ITV, additionally wanted to start another service providing, by way of a JV, online content. The JV was to supply catch up and archive content (in addition to what iPlayer would continue to provide). Although the UK Competition Commission refused to allow the JV to proceed for competition reasons, the Commission expected the parties to the JV – and other UK providers – to provide similar online services separately.¹⁰
63. So, there is an IPTV groundswell in the UK, from these FTA broadcasters, Virgin, BSkyB, and the other providers listed in the Competition Commission decision.
64. If only one of the providers (BBC's iPlayer) gets 41 Million programme requests a month only 12 months after it launched, and takes up to 6% of all Internet traffic, IPTV clearly is a major dynamic in broadband. Caution is needed in applying overseas experience but even a significantly smaller percentage of this impact will mean that IPTV will be a major demand for NGANs in New Zealand, including FTTP.

TVNZ's experience and plans

65. To illustrate IPTV uptake, during the 2008 Olympics, when we also had extensive traditional broadcast coverage, there were over 4.3 Million separate downloads of streamed Olympics coverage. This substantially exceeded our expectations for what was largely a trial for us.
66. So, high online demand for IPTV is already a reality.
67. But we are still at the early stages, having got through the trials such as the Olympics.
68. We want to build on that base; to the extent we are able, if the commercial and other settings permit. We are concerned about this, as we outline in our paper to the TCF IP Interconnection working party.
69. Among our plans, we intend to increase, by mid this year, the "catch up" content available via the On Demand service to around 95% of all primetime content that we broadcast. (Currently we provide only a small percentage of that content online).
70. A viewer will be able to watch nearly all our content online, from Grey's Anatomy to Close-Up, without needing to have a traditional television set.
71. This is online substitution for traditional broadcasting, within months.

¹⁰ Competition Commission's final report on the JV between BBCW, C4 and ITV (4 February 2009).

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72. However the viewer experience is affected by the speeds, quality of service, etc, that are available. That is why we support initiatives to roll-out fibre to the premises.
 73. Significantly, online delivery is not just about delivering the same material on a different platform. It is also about providing greater options and opportunities to viewers. We have the opportunity to add value to our linear broadcast services. We can add interactive features, more closely link our TVNZ On Demand site with our broadcast programmes, provide viewers with more information online, and other value added and differentiated services besides.
 74. We are doing this, and we expect other current providers and new entrants will take the opportunities as well, assuming no distortions in the market.
 75. As we outline below, the dominance of the Pay TV incumbent is challenging for FTA broadcasters, and for online content provision. However, if TVNZ can get the price and QoS settings right (whether by negotiation or regulatory intervention), we are confident that IPTV will be a major driver for broadband and NGAN uptake.

Bundling, exclusive dealings and walled gardens

76. Convergence and the NGN have the potential to enhance competition and provide increasing choice for consumers. For example, content can be provided to consumers via multiple channels.
77. In this section of our submission we outline our concern about how providers might erode competition, incentives to invest, and consumer benefit. For example service providers may create bottleneck control in the value chain, which moves bottleneck control from points now regulated (e.g. the local loop) to other points.
78. We have already given a key example above: the ability of the Sky/Prime aggregation to uniquely leverage its position to acquire Pay, FTA, online and mobile rights, when other parties have little prospect of doing so.
79. Triple play bundling (i.e. high-speed internet access, content and voice telephony) and quad play (triple play with mobile added) are having a major, and often negative, impact on competition. While bundling can be pro-competitive, there are increasing signs that there are negative competition implications and therefore poor outcomes for end users.
80. Ability to provide content, particularly premium content such as high profile sports (e.g. rugby internationals) is already a major concern for broadcasters, providing traditional broadcasting services. We have submitted on this in the MCH/MED Review of Digital Broadcasting.
81. As Sky has said, the key driver for uptake of its Pay TV subscriptions is premium sport.¹¹ The same can be expected online.
82. Control of access to premium content can skew the market from a competition perspective, creating barriers to entry. Content platforms that do not have that content find it increasingly difficult to compete.

¹¹ Commerce Commission Decision 573 relating to the acquisition of Prime TV by Sky.

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83. Control and use of content in this way is an online problem too. An ISP (and a mobile operator) that can't get access to content will struggle to compete with one that does. Conversely, an ISP or mobile operator that gets the right to provide premium content can achieve online bottleneck control.
 84. This can occur by agreements between content providers and ISPs (and mobile providers).
 85. The opportunities, and threats, on the Internet, are driving broadcasters, content providers, and telecommunications providers to enter agreements that include content in bundles such as quad/triple play. Particularly where premium content is included, this can be negative for competition.

86. As the OECD note:

Multiple play service providers know that they need good access to video content in order to attract users. In many ways, access to video content could determine the success of television over IP in a given market.¹²

[I]ncumbents can also create "walled gardens" where outside content is actually blocked. Telecommunication and cable operators are investing heavily in multiple-play infrastructure with the expectation that many of their subscribers will choose the incumbent's services over those offered by independent service providers. However, some customers will still want to use the bandwidth they pay for from the operators to subscribe to independent services such as Skype for phone calls or emerging providers for video-on-demand. There has been some concern of late that consumers subscribing to certain broadband providers could find themselves in a walled-garden of services. Some reports have suggested that telecommunication operators could block competitive services on their networks as a way to enhance security and quality. At the same time, these traffic structuring technologies could limit subscriber access to outside content and services such as on-demand movies or independently provided VoIP phone calls.¹³

87. The Commission also notes that this may be an issue in relation to deployment of NGNs.¹⁴
88. It helps to be clear about what is meant by convergence. Ofcom has usefully defined convergence as:

The ability of consumers to obtain multiple services on a single platform or device - or obtain any given service on multiple platforms or devices.¹⁵

89. While convergence should be pro-competitive in view of the multiple services and platforms, it is important to ensure that the benefits are gained, and competition is not impeded. As the Chair of the Australian regulator, ACCC, said, in dealing with the pro-competition benefits of convergence:

¹² Multiple Play: Pricing and Policy Trends; OECD (7 April 2006) (Page 30).

¹³ Multiple Play: Pricing and Policy Trends; OECD (7 April 2006) (Page 29).

¹⁴ Commerce Commission discussion paper, Page 3.

¹⁵ What is Convergence? A submission to the Convergence Think Tank, (December 2007). See also Page 4 of the Commission's NGN Discussion Paper.

The ACCC's challenge during this evolution of the media market will be to promote competition and not allow incumbents to impede the development of competitive choices for consumers... [We'll] be trying to keep the pipes clear of blockages.

The ACCC is...focusing on control of content and content producers. With an increasing diversity in distribution channels, it is essential that content and content production is not concentrated in a manner that inhibits competitive choices for consumers.¹⁶

90. The OECD makes the same point:

Regulators and competition agencies will still need to be vigilant against anti-competitive behaviour from firms with significant market power, particularly in cases where there is no competitive infrastructure available to consumers and where unfair pricing could occur through service bundling.¹⁷

91. The OECD's concern is illustrated by the arrangements between Sky and Vodafone. Sky supplies Vodafone with 8 content channels, accessible on 3G phones for a subscription paid by the Vodafone customer. TVNZ (and, we assume, other broadcasters) are not permitted to supply content on Vodafone phones, on a basis that enables revenue to be earned. Effectively, Sky and Vodafone have an exclusive arrangement for supply of their content only.
92. While mobile data is part of what is encompassed within "NGN", as NGN includes wireless as well as fixed services, and so this is an issue for this Study, this situation illustrates the prospect of bottlenecks online.
93. Both Sky and Vodafone have significant market power in this situation.
94. In the case of Vodafone the relevant market power is not its share of the mobile market (as between it and Telecom). Rather it is the market for terminating content with its customers. The position is the same as termination of voice calls with Vodafone customers, in respect of traffic originated by a fixed line carrier (i.e. it is the same as Fixed to Mobile termination). Thus, Vodafone has a monopoly in this content termination market, just as Vodafone and Telecom each have a monopoly for terminating calls with their own customers. The fact that there are increased channels to market, via convergence, does not change the fact that there is this termination monopoly. The position is the same online in comparable circumstances.
- [M]any barriers to competition still exist. Full competition between providers of transmission services is not necessarily enough to provide full competition between content providers.¹⁸
95. Take Sky's premium sport content supplied to Vodafone as an example. That content is what primarily drives broadcast subscriptions for Sky, and the same effect can be expected online and on mobiles. Control of access to premium sport can distort the market from a competition perspective, creating barriers to entry for new and existing providers.

¹⁶ Regulating media and broadcasting in a changing environment, Graeme Samuel, Chairman ACCC (5 March 2007).

¹⁷ Multiple Play: Pricing and Policy Trends; OECD (7 April 2006).

¹⁸ OECD, Policy Considerations for Audio-Visual Content Distribution in a Multiplatform Environment (January 2007). See also the conclusion in WIK-Consult's report to the EU on The Future of IP Interconnection (January 2008) which concludes that NGN does not eliminate the termination monopoly.

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96. Arrangements such as the Vodafone and Sky deal, other variations of quad and triple play bundles, etc, are increasingly a major dynamic in telecommunications. They can readily cut out new entrants and even existing providers from the market. A challenge is to distinguish pro-competitive bundles and other offerings from those that harm competition. As the OECD note, when dealing with multiple play packages:¹⁹

The bundling of services is not, in itself, anti-competitive. Bundled services can indeed be a signal that a vibrant market is responding to consumer demand. However, competition law could be applied in circumstances where a dominant operator takes advantage of a dominant position in a market to tie or bundle additional services that consumers may not want but are required to purchase as part of a package. **Tying and bundling could also be deemed anti-competitive if a dominant operator offers service bundles that competitors have no means of matching.** [emphasis added]

97. It may be that situations such as the Vodafone/Sky arrangement noted above can be pursued by the competition branch of the Commission, under Sections 27 and 36 of the Commerce Act. Instead or as well, the Study report can provide appropriate signals. Both options are within scope for this Study, as we outline at the end of this submission. We submit that the Study should outline the issues, and the risk of distorting the pro-competitive benefits of convergence and NGN developments.
98. As the Commission is well aware, the Court's interpretation of Section 36, in particular, is controversial. Many commentators regard the interpretation as unduly restricted, such that the provision is largely ineffective. The Commission is of course appealing the 0867 High Court decision, which is based on the two controversial Privy Council decisions (*Telecom v Clear* and *Carter Holt*).
99. The Study is able to deal with the implications of the way in which the Section is currently interpreted. It is appropriate to regulate where general competition law does not adequately deal with a market failure. If the Commission considers that it cannot take action under the Commerce Act, and there is a market problem, that is a reason to regulate.
100. These bundling and exclusive dealing issues are so significant in the telecommunications market that the Study should outline the concerns, issues, and regulatory signals. Some of the issues are complex, but too much is at stake to shy away from dealing with them.

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101. The 2008 Francesco Caio report for BERR makes the point that it is essential to look at the specific characteristics in each country, before considering and adopting experience in other countries.
102. There are three key factors that differentiate New Zealand from nearly every other country in the OECD and which provide challenges for competition:²⁰

¹⁹ Multiple Play: Pricing and Policy Trends; OECD; Page 26 (7 April 2006)

²⁰ Refer, Page 21 of the Commission's discussion paper.

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- (a) there is only a small cable network (Telstra-Clear's network in limited locations);
 - (b) there is therefore no competition, to speak of, for subscription services, in relation to the sole Pay TV broadcaster. This gives that broadcaster abnormally high market power, augmented by the rare position that the Pay TV broadcaster operates an FTA channel as well (Prime). As we have outlined in our submission to the MCH/MED broadcasting review, FTA broadcasters, such as TVNZ, MediaWorks, etc, provide only limited constraint on this high market power. There is increasingly less constraint as media platforms proliferate, reducing FTA advertising revenues; and
 - (c) Cable networks overseas provide strong competition for incumbent telecommunication providers. Telecom does not have that competition in New Zealand.
103. FTTP networks can provide unbundled access or open access on appropriate price and QoS terms. They provide the opportunity for real competition not only for the telecommunications incumbent (whether facilities or services-based competition), but also for the subscription TV incumbent as well. Such networks will facilitate another platform to provide TV content in various forms (streamed, video on demand, etc).
104. As we note above, we support an FTTP initiative, and this is further reason.

The Commission's four scenarios

105. In relation to Question 14, our description of the types of IPTV services indicates that the commercial service scenarios in Diagram 7 should use different descriptors than VOD for Scenario 3 and IPTV multicast for Scenario 2. Scenario 3 appears to include all potential types of IPTV services. Scenario 2 has reduced support for IPTV services. Scenario 3 appears to reflect the position where FTTP is available to a large percentage of New Zealanders.

Scope of the Study

106. The Study sets out (Question 2) principles based on the competition and regulation for the long term interests of end users, which is the approach in the Telecommunications Act, as outlined in Section 18.
107. However, under Section 9A, the Commission can study not only matters relating to the long term benefit of end users but also "any matter relating to the telecommunications industry". Implicitly, the Commission can deal with issues beyond the constraints of the Telecommunications Act. Otherwise there would not be these two options in Section 9A.
108. We consider that it is important that the Commission uses those wider investigation and reporting powers where appropriate. For example, this enables the Commission to take into account wider issues, beyond the Telecommunications Act and the Commerce Act. As we identify above, what happens in the telecommunications industry is bound up with wider issues such as content creation for the benefit of New Zealanders and their culture and national identity, and plurality of voices. The Commission can, and should as appropriate, address issues outside pure economic considerations, to the extent

they relate to telecommunications (as online content does). Those wider issues usually overlap with economic concerns.

109. Leaving aside the legal position, the Commission has an opportunity to take a wide ranging and proactive approach in these studies, beyond pure economic analysis. That is valuable in enabling it to recommend and/or identify great outcomes.

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