BUDDLEFINDLAY
NEW ZEALAND LAWYERS

9 September 2016 **PUBLIC VERSION**

To
Susan Brown
Senior Investigator, Competition Branch
Commerce Commission
44 The Terrace
Wellington

From
Tony Dellow
Susie Kilty
Dipti Manchanda

By Email
susan.brown@comcom.govt.nz

Dear Susan

SKY/Vodafone: SKY's full response to submissions on the Statement of Preliminary Issues

1. This letter sets out SKY Network Television's full response to submissions on the Commerce Commission's Statement of Preliminary Issues on the clearance applications filed by SKY and Vodafone Europe BV. It should be read alongside our letter to the Commerce Commission of 23 August 2016.

2. SKY submits that the submissions demonstrate that there is no case against the Commission granting a clearance for the proposed transactions.

3. In order to suggest there are any concerns that the proposed transactions may substantially lessen competition, the submissions rely on:

   (a) a fanciful counterfactual, that involves SKY making irrational business decisions;

   (b) an incorrect factual, that:

      (i) ignores the competition that SKY/Vodafone currently face, and will continue to face, in pay-TV and telecommunications markets;

      (ii) misidentifies the merged SKY/Vodafone's incentives, by underplaying SKY/Vodafone's incentives to wholesale. Submitters ignore the need for SKY/Vodafone to continue to wholesale pay-TV services, and to allow the 71% of broadband consumers and 60% of mobile consumers who do not purchase their services from Vodafone[1] to continue to purchase SKY services, in order to meet the increasing cost of content; and

   (c) an incorrect analytical framework for assessing mergers of this type. Submitters ignore the well-established analytical framework for analysis of mergers of this type, and the competition

[1] Based on the number of connections, as set out in the Commerce Commission's 2015 Annual Telecommunications Monitoring Reports, published in May 2016.

and consumer benefits of bundling. Instead, they treat the building of any competitive advantage as a substantial lessening of competition, and imply that the increased competition they will face as a result of the proposed transactions is synonymous with a substantial lessening of competition.

4. The submissions also include a number of factual errors, and complaints about a number of matters, that are not relevant to the effect of the proposed transactions on competition.

5. Rather than pointing to any competitive harm that could actually result from the proposed transactions, the submissions merely convey that:

   (a) TVNZ wants to compete with a weakened Prime;

   (b) Telecommunications providers, such as Spark, Trustpower, and 2degrees, and Freeview (partially owned by TVNZ) want SKY to give away its rights to content at unrealistic prices and on unrealistic terms; and

   (c) Fetch TV wants to partner with Vodafone.

Structure of letter

6. This letter responds to submissions on the following:

   (a) market definition for the supply of pay-TV services at the retail functional level, and the incentives on the merged entity in light of the proposed market definition;

   (b) the counterfactual and the factual;

   (c) conditions of entry and expansion in pay-TV markets and in telecommunications markets, in particular:

      (i) access to premium sport;

      (ii) access to first-run TV series and/or premium movies; and

      (iii) control of the "user interface" or set top boxes;

   (d) the competitive constraint on SKY services, whether those services are provided on a standalone basis or as part of a triple- or quad-play bundle, from SVOD providers;

   (e) SKY/Vodafone's incentives under the factual. The relevant submissions include those that put forward theories of harm under which, following the proposed transactions, SKY/Vodafone will:

      (i) foreclose competition in telecommunications markets by implementing a hard tie, that requires all SKY pay-TV customers to purchase Vodafone telecommunications services;

      (ii) foreclose competition in telecommunications markets by heavily discounting SKY pay-TV services when bought in a bundle with Vodafone telecommunications services, compared with the price of standalone SKY pay-TV services and/or SKY pay-TV services bundled with other telecommunications providers' services;

(iii) foreclose competition in pay-TV, free-to-air, and telecommunications markets by purchasing all premium content, in particular, all premium sports rights; or

(iv) no longer have incentives to move SKY's pay-TV services online, adversely affecting non-price competition; and

(f) requests for a conference.

7. In addition, the submissions make a number of incorrect statements on factual matters that relate to the current state of competition in the relevant markets. Those matters are addressed in **Appendix A**.

8. SKY understands that Vodafone's submission will address submissions on matters including those specific to Vodafone's expertise, such as competition in telecommunications markets and net neutrality.

Market definition for the supply of pay-TV services at the retail functional level

9. A number of submitters challenge how the Commission has previously defined markets. For example:

(a) A number of submitters argue that linear and on-demand pay-TV services are not substitutable for one another, and either imply or expressly submit that the supply of linear pay-TV services, and the supply of OTT, on-demand pay-TV services are separate product markets;

(b) TVNZ submits that the retail supply of pay-TV services and FTA services are within the same product market; and

(c) Blue Reach and Trustpower submit that there are separate geographic markets for the provision of pay-TV services in rural and urban areas.

10. These submissions, in substance, are put forward to highlight alleged incentives on the merged entity. SKY remains of the view that the correct market definition is the national market for the retail provision of pay-TV service. However, this submission focuses on the incentives of SKY, and of SKY/Vodafone, in response to the underlying concerns the submissions raise.

Linear and on-demand (SVOD and TVOD) pay-TV services

11. In the *Contracts Report*, the Commission stated that linear pay-TV services and on-demand pay-TV services were part of the same market. This conclusion was based on:

(a) The approach taken by competition authorities overseas;

(b) SKY's internal documents; and

(c) RSPs' internal documents.

12. The submitters have not pointed to any evidence as to why linear pay-TV services and SVOD pay-TV services may not be in the same market. In fact, since the *Contracts Report*, any division between linear pay-TV services and on-demand pay-TV services has further lost significance. For example, SKY now offers customers of its satellite service on-demand (EVOD) content, for no extra charge.

Pay-TV services and FTA TV services

13. As set out in the clearance applications, SKY agrees with the Commission that FTA TV services can and do provide a competitive constraint on pay-TV services. However, the Commission has previously found that they are in separate markets. This is because the supply of FTA TV services is a "two-sided platform" or "multi-sided market", where FTA providers compete for viewers in order to win advertising revenue. This creates an indirect network effect, and neither "side" of the two-sided platform can be considered independently of the other. On the other hand, pay-TV providers collect most of their revenue directly from their viewers, and the pay-TV format restricts pay-TV providers' ability to advertise.

14. In substance, the allegation in relation to FTA TV services is that SKY diverts content away from FTA providers. As noted in our letter to the Commission of 23 August 2016, the allegation is derived from TVNZ's desire to compete with a weakened Prime. TVNZ's ability to acquire rights to premium content could not be said to be affected by the proposed transactions.

Pay-TV services in urban and rural areas

15. Trustpower, supported by Blue Reach, submits that, in geographic areas covered by the Rural Broadband Initiative, Vodafone's "wholesale obligations … are limited to the relatively low sub-HD speed 5Mb/s service", and that this means that there are separate rural and urban markets for the retail provision of pay-TV services. In substance, Trustpower's submission relates to the ability of OTT providers to compete against SKY in rural areas.

16. SKY submits that OTT providers are able to provide a high-quality service in geographic areas that are covered by the Rural Broadband Initiative, as opposed to the UFB roll-out, to compete with SKY.

17. For example, Netflix states on its website[2] that:

    (a) Netflix recommends a broadband connection speed of 1.5Mb/s, or 3.0Mb/s for SD quality. However, the minimum broadband connection speed required to stream video content through Netflix is 0.5Mb/s; and

    (b) Netflix recommends a broadband connection speed of 5.0 Mb/s for HD quality.

18. This demonstrates that OTT providers are able to provide high quality pay-TV services in rural areas, even if internet speeds provided under the RBI only meet minimum wholesale obligations. In fact, a report released by the Ministry of Business, Innovation and Employment in August 2016, "Rural Broadband Initiative Phase I", found that average download speeds under the RBI were 10-

---

[2] https://help.netflix.com/en/node/306

40Mb/s. In addition, in August 2016, Vodafone agreed to increase its minimum wholesale obligations so that Vodafone is now required to provide minimum speeds of 30Mb/s. Further information about Vodafone's obligations is set out in Vodafone's submission.

19. Accordingly, there is no reason to define separate markets for the retail supply of pay-TV services in rural and urban areas.

The counterfactual and the factual

20. The submissions attempt to put forward two possible counterfactuals:

(a) A counterfactual under which SKY becomes an "enthusiastic wholesaler" or a "proactive wholesaler". Under this counterfactual, in a complete departure from SKY's approach to wholesaling to date, SKY will allow its wholesale customers to choose the individual rights they purchase from SKY, allow its wholesale customers to combine those rights with other rights to develop new pay-TV packages, and provide wholesale access for little margin. Submitters who presented this counterfactual also put forward a factual under which SKY/Vodafone does not provide wholesale access to the rights it acquires (in particular, sports rights), through an outright or constructive refusal to deal; and

(b) A counterfactual under which SKY enters the market for the supply of residential fixed-line broadband services, and, in response, Vodafone enters the market for the retail supply of pay-TV services.

Incentives to wholesale under the counterfactual

21. As set out in our letter of 23 August 2016, the "enthusiastic wholesaler" counterfactual is unrealistic. It requires SKY to make commercial decisions that are not rational. In summary:

(a) SKY would need to make a decision to share its margin with other entities, knowing that those entities will use SKY's foregone margin to develop alternative pay-TV products to compete with SKY's, including to outbid SKY for content;

(b) SKY would need to make a decision to allow other entities to develop alternative pay-TV services that contain SKY's most valuable content plus any other content, devaluing SKY's own pay-TV services; and

(c) If the "enthusiastic wholesaler" approach was realistic and rational, sports bodies would already engage in it.

22. The submitters argue that consumers' increasing preference to consume content OTT and on demand will drive SKY to become an "enthusiastic wholesaler". However, as NERA points out, that is not a factor that differs between the factual and the counterfactual. The submitters do not explain:

(a) why SKY would need to wholesale on the terms they describe to deliver OTT and on-demand content; or

(b) why SKY could not provide such services on its own (as it already does), or continue its current approach to wholesaling.

23. In the counterfactual, SKY's reseller and retransmission agreements would remain in place. SKY would continue to have incentives to wholesale on the same basis. That is, SKY will continue to offer wholesale access to its pay-TV services at SKY's retail price, minus avoided cost, including restrictions on bundling SKY's pay-TV services with other pay-TV services, and restrictions on the acquisition of other content exclusive from SKY.

Incentives to wholesale under the factual

24. The submitters base their assertions that SKY will refuse to wholesale under the factual on their characterisation of SKY's approach to wholesaling to date. The submitters argue that:

(a) SKY has developed a "single distributor" strategy, under which SKY's preference is that customers purchase SKY's services directly from SKY, or, if necessary, from Vodafone, but SKY discourages any other potential resellers of SKY from entering into wholesale deals; and

(b) SKY offers RSPs wholesale terms that are so restrictive, and so commercially unviable, that the terms amount to a constructive refusal to deal.

25. However:

(a) SKY's reseller arrangement with Vodafone, and the terms that SKY offers to any other party interested in wholesale access to SKY services, is priced on an ECPR basis. As evidenced by the information provided by SKY to the Commission on 2 September 2016, SKY has been willing to provide others wholesale access to its services on the same basis. SKY has entered into wholesale arrangements for various SKY pay-TV services (including SKY's SVOD services) with **[**

REDACTED

]. The ECPR pricing approach means that SKY is indifferent as to whether a consumer purchases SKY services directly from SKY, or from a reseller, whoever that reseller may be; and

(b) Vodafone is a rational commercial entity. If the terms in SKY's reseller arrangement and SKY's retransmission arrangement were commercially unviable, Vodafone would not have entered into them. Vodafone is currently the only reseller of SKY's linear satellite service. Vodafone would not have entered into the reseller arrangement or retransmission arrangement if Vodafone did not perceive there to be some sort of commercial benefit from the arrangements.

26. The submissions include allegations that:

(a) Spark developed Lightbox because SKY's wholesale terms were so restrictive and unviable that they left Spark with "no choice" but to develop its own pay-TV offering; and

(b) 2degrees has been attempting to negotiate a wholesale deal with SKY, and learn more about the wholesale deals SKY has on offer, but SKY has refused to engage.

27. Those allegations are not consistent with the evidence. SKY refers the Commission to its communications with telecommunications providers regarding potential wholesale deals, provided to the Commission on 2 September 2016, and the accounts of SKY's discussions with Spark and 2degrees set out in **Appendix B**. In summary:

    (a) SKY has been willing to enter into wholesale arrangements with Telecom/Spark, and has entered into a number of such deals over the years. Spark indicated to SKY that it developed Lightbox so that it could offer its customers something exclusive, and, earlier this year, approached SKY **[REDACTED]**; and

    (b) **[REDACTED]**. This limited what SKY could realistically offer to 2degrees. 2degrees' complaint about its more recent engagement with SKY enquiring about what wholesale arrangements SKY has on offer **[REDACTED]**.

28. SKY's incentives to provide wholesale access to SKY services are the same under the factual as under the status quo, and under the counterfactual:

    (a) SKY faces increasing content costs;

    (b) As a pay-TV service, SKY derives most of its revenue from subscriptions, and, because of what consumers expect from pay-TV services, has limited ability to generate revenue from advertising; and

    (c) To cover its increasing costs and generate margin, SKY needs to maximise its revenue from subscriptions. Part of this is ensuring that SKY gathers revenue from as broad a customer base as possible while maximising SKY's average revenue per user. Wholesaling, on a retail minus avoided cost basis, is a rational part of a strategy to achieve such an outcome, but the nature and extent of the wholesaling must be carefully calibrated, so as to not undermine SKY's pay-TV business as a whole.

29. Regardless of SKY's current willingness to wholesale, the submitters have put forward a counterfactual that is completely unrealistic. Particularly in the context of how the submitters have attempted to characterise SKY's current approach to wholesaling, they have not demonstrated how the proposed transactions would substantially lessen competition in any markets.

Entry of SKY into telecommunications markets, and entry of Vodafone into pay-TV markets, under the counterfactual

30. Axiom for Fetch TV submits that, under the counterfactual, SKY is likely to enter into telecommunications markets by:

(a) Reselling[3] another telecommunications provider's voice and broadband services, as part of a triple-play bundle;

(b) Purchasing wholesale inputs from Chorus and creating a new, standalone telecommunications provider; or

(c) Purchasing a smaller broadband provider.

31. SKY submits that, even if SKY did choose to enter telecommunications markets in any of the above ways, the factual does not result in a substantial lessening of competition. As outlined in the clearance applications, telecommunications markets are extremely competitive. Any entry by SKY by either reselling an existing telecommunications provider's services, or as a new, standalone telecommunications provider, would be unlikely to affect competition in telecommunications markets in any real or substantial way. This is consistent with the internal documents SKY has provided to the Commission. They show that SKY has considered entering telecommunications markets, and came to the view that SKY's commercial outcome from entering telecommunications markets in either of those ways would likely be inadequate to make a new telecommunications venture worthwhile to SKY. Factors relevant to this assessment included the expected risk and return on investment, and SKY's lack of expertise on telecommunications.

32. SKY understands that Vodafone's submission will address the likelihood of Vodafone entering pay-TV markets in the counterfactual.

Conditions of entry and expansion in pay-TV markets and telecommunications markets

33. Submitters identify the following as conditions of entry and expansion in pay-TV markets and telecommunications markets:

(a) Access to the premium sports rights currently held by SKY in respect of pay-TV markets;

(b) Access to the premium sports rights currently held by SKY in respect of telecommunications markets;

(c) Access to first-run TV series and/or premium movies in respect of pay-TV markets; and

(d) Control of the user interface or set top boxes in respect of pay-TV markets.

34. SKY addresses each of these below. In any case, whether or not those submissions are correct, they relate to the alleged current state of competition, do not state how those conditions would improve in the counterfactual, and do not identify how the proposed transactions would cause those conditions to further deteriorate. They certainly do not establish that the proposed acquisitions will result in substantial lessening of competition.

[3] As outlined in the clearance applications, SKY currently has a referral arrangement with Vodafone for Vodafone's telecommunications services. Under that arrangement, SKY refers its customers to Vodafone for residential fixed-line broadband services, and informs those customers that they will receive a discount off their SKY bill for as long as they continue to purchase services from both SKY and Vodafone. However, the customer then engages with Vodafone directly, and customers that choose to take up the offer separately contract with and are billed by SKY and Vodafone for their respective services. This means that SKY is not currently a "reseller" of Vodafone's services.

Access to premium sports rights: pay-TV markets

35. Spark submits that the premium sport rights *currently held* by SKY are "must have" inputs that are required to compete in pay-TV markets. Spark bases its submission on:

    (a) The Commission's previous finding in *SKY/Prime* that, in the event of a 5% increase in the price of pay-TV services "…for the majority of customers there would be no substitute for pay-TV. Industry participants noted that this is particularly true for fans of live sport";

    (b) The price differentials between SKY Basic+Sports and FanPass on the one hand, and Lightbox, Netflix, and Quickflix on the other. Spark submits that the price differentials demonstrate that SVOD services such as Lightbox, Netflix, and Quickflix are complements to, rather than substitutes for, services that include the premium sports for which SKY holds rights; and

    (c) The success of SKY Sports and FanPass, compared with Lightbox Sport.

36. As set out in the clearance applications, and as the Commission has previously found, it is not necessary to acquire rights to premium sports rights in order to compete in pay-TV markets. Pay-TV offerings can be developed without premium sport, rights to premium sport are contestable, and only one rights contract is required in order to develop a successful sports offering. That contract does not need to be for any of the premium sports currently offered by SKY.

37. The context of the Commission's statement quoted in paragraph 35(a) above was in considering and adopting separate market definitions for the retail supply of pay-TV services, and the retail supply of FTA TV services. The Commission has not identified separate markets for the retail supply of live sport pay-TV services, and other pay-TV services. Rather, the Commission's previous decisions have considered a single market definition for the retail supply of all pay-TV services. This can be contrasted with the Commission's previous findings that there are separate markets for the acquisition of live premium sports rights, the acquisition of first-run TV series, the acquisition of premium movies by pay-TV providers, and the acquisition of premium movies by FTA TV providers.

38. The reference to there being no substitute for pay-TV, "particularly … for fans of live sport" relates to the fact that, for most premium sports, consumers value watching those sports live and uninterrupted. The value of those sports to consumers tends to greatly diminish if coverage of those sports is delayed. Although FTA providers sometimes broadcast delayed sports coverage, the Commission had found that "pay-TV broadcasters have typically focused on live sport", but FTA providers had not. This meant that "…for the majority of customers there would be no substitute for pay-TV … particularly … for fans of live sport". However, FTA providers do compete for sports rights, and have been successful in acquiring rights to premium events, such as the Rugby World Cup 2007, the Rugby World Cup 2011, the Rio Paralympic Games 2016, the NFL, the AFL, the Asia Pacific Rally Championship, and the Commonwealth Games 2018.

39. Price differentials do not demonstrate whether goods are complements or substitutes for one another. In particular, consumers may consider services to be substitutes, even if the suppliers of

those services face different costs to provide those services, and reflect those costs in their prices. Consumers consider the overall value of the service, which involves an assessment of the features of the service offered as well as the price.

40. In the case of the relative costs and prices of SKY Basic+Sports and FanPass, compared with the prices of Lightbox, Netflix, and Quickflix:

(a) SKY Basic+Sports is a service delivered over satellite. The costs of providing a satellite-based pay-TV service are substantially higher than the costs of providing an OTT service such as Lightbox, Netflix, or Quickflix; and

(b) Rights to premium sport cost substantially more than rights to first-run TV series, and premium movies. **[**

REDACTED

].

41. Spark points to its experience as part of the Lightbox Sport joint venture with Coliseum as evidence that a new entrant requires a range of sports rights, specifically, rights that are currently held by SKY, in order to offer a pay-TV service that competes with SKY's. However:

(a) Importantly, Spark does not provide any convincing reason why the proposed transactions would substantially lessen competition by increasing the impediments to acquiring rights to premium sport (including those currently held by SKY) compared with the counterfactual. As previously outlined, Spark's submission relies on an unrealistic account of the counterfactual.

(b) It is not clear that the Lightbox Sport offering provides any evidence of the importance of sports rights. When Telecom first announced its plans to develop an SVOD pay-TV service in February 2014, Telecom referred to a streaming service for TV series, but not sports. Spark did not announce any intentions to offer live sports until it announced the Lightbox Sport joint venture with Coliseum in December 2014, four months after Spark launched Lightbox. From late 2015 to early 2016, Lightbox Sport lost its rights to the EPL (to beIN, not SKY), and ceded its rights to the PGA. Spark's annual report for the financial year ending 30 June 2015 and Spark's Business Strategy Update of 20 October 2015 made very little mention of sports rights. However, the annual report indicated that "Spark Ventures has launched new business offering media content … Successfully growing these business may be challenged by risk factors, such as … requirements for higher levels of investment than Spark New Zealand is prepared to make".

(c) When Lightbox Sport lost or ceded its rights, Lightbox did not approach SKY for wholesale access to FanPass.

(d) The trend overseas, and in New Zealand, for sports bodies to begin delivering coverage of their events direct to consumers supports the Commission's previous finding, that a pay-TV entrant with a sports offering initially only requires one contract for premium sports rights.

(e) Some of the most successful SVOD services around the world do not offer sports. Those include Netflix, Amazon and Prime, and HBO GO.

42. Spark asserts that SKY Basic+Sports subscribers only subscribe to SKY in order to access SKY Sports. However, Spark has no basis upon which to make this assertion, which is inconsistent with the fact that, as at 31 May 2016, SKY had almost **[REDACTED]**.

Access to premium sports rights: telecommunications markets

43. As outlined in NERA's report, the clearance applications, and our letter of 23 August 2016, rights to premium sport are not "must have" inputs that are required to compete in markets for the supply of telecommunications services in New Zealand, and that a combined SKY/Vodafone could leverage as part of a foreclosure strategy:

(a) Vodafone is currently the only telecommunications provider that resells SKY Sports. Most households do not have SKY Sports, and most telecommunications providers do not offer bundles that include SKY Sports; and

(b) Other telecommunications providers have expressed little interest in wholesaling SKY's sports packages until after the proposed transactions were announced. This applies to SKY's traditional SKY Basic+Sports package, and FanPass, SKY's standalone OTT sports offering. Copies of SKY's correspondence with telecommunications providers on this point were provided to the Commission on 2 September 2016, and accounts of SKY's discussions with Spark and with 2degrees are set out in **Appendix B**.

44. However, that has not resulted in Vodafone winning substantial market share from other telecommunications providers. This is supported by the data on broadband market shares by revenue displayed in Figure 3 of the clearance applications, **[REDACTED .]**

[

REDACTED

]

45. Telecom and SKY announced the end of the Telecom/SKY reseller arrangement in February 2014. At that point, Vodafone became the only reseller of SKY. However, as set out in the clearance applications, the data shows that, **[REDACTED]**, Vodafone's market share remained unchanged at **[REDACTED]**% throughout 2014 and 2015.

46. In addition, although Spark's market share has decreased slightly (by a mere **[REDACTED]**%) since it stopped reselling SKY, the decreases in Spark's market share correspond with increases in the market shares of providers other than Vodafone. In addition, Telecom lost market share at a greater rate when it resold SKY (a loss of approximately **[REDACTED]**% of the market per annum), than when Telecom/Spark did not resell SKY (a loss of approximately **[REDACTED]**% of the market per annum).

47. Consistent with SKY's and Vodafone's submissions that access to premium sport is not a "must have" to compete in telecommunications markets, this suggests that:

    (a) Broadband providers can increase their market share without access to premium sport content held by SKY; and

    (b) Decreases in Spark's market share are not obviously related to the availability of SKY Sports in Vodafone's triple-play bundle.

48. Although the data is consistent with the proposition that triple-play bundles help reduce churn, it does not support submissions that premium sport is a "must have" to compete in broadband markets in New Zealand. Similarly, submitters have not produced any evidence, or pointed to any relevant examples, to demonstrate why premium sport is a "must have" to compete in mobile markets.

Access to first-run TV series and/or premium movies: pay-TV markets

49. In relation to first-run TV series, other general entertainment content, and premium movies:

    (a) Axiom for Fetch TV submits that:

        (i) "access to well-recognised linear channels such as Disney and Discovery is crucial to supplying a competitive pay-TV platform";

        (ii) "linear channels have a substantial advantage over streaming services in the provision of the all-important first run content, which will be available between 1 and 3 years before it is offered on SVOD services"; and

        (iii) "the fact that Sky has exclusive access to such a significant number of high-profile linear channels … creates significant barriers to entry for potential competitors"; and

    (b) TVNZ submits that there are "only seven" output deals (for first-run TV series) with major studios, and that TVNZ has experienced substantial increases in the cost of acquiring premium international content since 2006.

50. The Commission has previously found that "sufficient content of all types appears to be available outside of Sky's exclusive contracts to enable a rival to put together an appealing pay TV package".

51. Consumers increasingly prefer to consume video content on-demand, and content creators increasingly sell catch-up or VOD rights with, or instead of, linear rights to content. For example, Lightbox and Netflix NZ are both competitive pay-TV platforms. SKY understands that:

    (a) Lightbox has exclusive first-run rights to Outlander, Better Call Saul, Mr Robot, Vikings, Wolf Hall, Underground, War and Peace, Flesh and Bone, Preacher, Kettering Incident, Deutschland 83, Unreal, Mozart in the Jungle, Transparent, Scream Queens, The Path, Black Sails, Stan Lee's Lucky Ma, and Powers; and

    (b) Netflix NZ has exclusive first-run rights to Grace and Frankie, Marco Polo, Bloodline, Bojack Horseman, Unbreakable Kimmy Schmidt, Narcos, House of Cards, Stranger Things, Daredevil, Jessica Jones, The Getdown, Orange is the New Black, Wet Hot American Summer, Scream, Sense 8, Fuller House, and Last Kingdom.

52. Much of the first-run premium content available exclusively on Netflix NZ is Netflix original content. In other words, Netflix does not make first-run rights available to linear TV providers.

53. The wide range of first-run TV series that is available exclusively on competitive SVOD pay-TV platforms indicates that premium first-run content can reach a wide enough audience on SVOD services, and TV providers do not need to air first-run premium content on linear channels.

54. In relation to TVNZ's submission:

(a) TVNZ has acquired two of the seven major output deals available (Warner and Disney), and is the only broadcaster in Australasia to have done so. One of those two output deals (Warners) is the largest output deal by volume in New Zealand;

(b) The increasing cost of content is a function of increased competition at the retail level of pay-TV markets. This indicates that other conditions of entry and expansion in pay-TV markets (such as data caps) are becoming easier to meet. A number of new providers have entered the retail pay-TV market since 2006. As competition at the retail level increases, competition for inputs also increases. This, naturally, drives up the cost of those inputs;

(c) TVNZ's own bidding behaviour has accelerated increases in the cost of content. For example, TVNZ has won the rights to **[REDACTED]** content **[REDACTED]** from SKY, but, in doing so, increased the cost of those rights from approximately **[REDACTED]**, to approximately **[REDACTED]** per hour of content. In addition, TVNZ's bid for **[REDACTED]** equated to over **[REDACTED]**. TVNZ ironically chose to air that content at **[REDACTED]**, limiting the value that TVNZ could derive from the content.

(d) The Commission has previously investigated allegations that SKY overbuys content in order to limit competition at the retail level, and found no evidence that this was occurring.

55. Further detail about TVNZ's rights to premium content and SKY's bids for premium content is set out in Appendix A.

Control of the user interface and/or set top boxes: pay-TV markets

56. Fetch TV and Freeview discuss the importance to a TV provider of controlling user interfaces and set top boxes to expand in TV markets. Freeview's submission appears to relate to both FTA TV and pay-TV markets.

57. Fetch TV and Freeview have not explained the link between the issues that they raise and the proposed transactions, or how any issues that they may perceive would be exacerbated by the proposed transactions, particularly in a context where content is increasingly delivered to consumers on OTT services.

The competitive constraint from SVOD providers

58. Various submitters suggest that SVOD providers' services are not effective constraints on SKY. Those submissions are based on references to the following statement in a *Listener* article entitled *"Sky's 'not at its limit'"*:

> *[SKY's Chief Executive Officer, John] Fellet discovered there was little cross over [between SKY's satellite service and NEON], with an average Sky subscriber aged about 50 compared with Neon viewers in their early twenties …*

"It was appealing to two separate segments, so my thinking is who else is better off trying to maximise this market than we are? I already have the content – let me leverage it into these new marketplaces."

59. However, all that quote shows is that SKY's own SVOD service has, to date, had greater traction with a particular segment of the market, and that SKY has responded to consumer preferences in light of competition. It does not show that SVOD services are unable to act as a competitive constraint on SKY.

60. The Coalition for Better Broadcasting also raises concerns that SVOD providers are unlikely to survive. Related to this point, Trustpower submits that Lightbox has not been successful. SKY incurred losses for the first ten years of its operation, while it focused on building market share. Once SKY had established a large enough customer base, SKY was able to shift its focus to growing and maintaining profitability. SKY considers that SVOD providers are likely to be focusing on building market share, and will experience a similar progression.

61. Axiom for Fetch TV refers to Netflix's practice of requiring telecommunications providers that sell Netflix as part of a triple-play or quad-play bundle to allow Netflix to bill consumers directly for Netflix services. Axiom for Fetch TV submits that the benefits of a triple-play or quad-play bundle to a telecommunications provider include that the bundle allows the telecommunications provider to issue a consumer with a single bill for multiple services, increasing the inconvenience to the consumer of switching to another telecommunications provider, which, in turn, reduces customer churn.

62. In SKY's view, the real benefit to a consumer of a triple-play or quad-play bundle is the discount that the customer receives by purchasing services in a bundle compared with individually, rather than the number of bills the consumer receives. This is consistent with the fact that 2degrees saw commercial value in entering into referral arrangements with SKY, under which 2degrees would offer discount codes for NEON and FanPass to its customers, but 2degrees customers would contract directly with SKY. Offering a discount benefits consumers, but is not the same as engaging in foreclosure. A firm does not leverage market power from one market to another if a firm simply lowers the price of its products or services. Any competitor, whether the competitor offers a standalone product or service or a bundle of products or services, is capable of competing for customers by offering a discount.

63. Triple-play and quad-play bundles that include non-SKY SVOD services are an effective competitive constraint on triple-play and quad-play bundles that include SKY services.

Incentives under the factual and theories of harm

64. Submitters have identified the following theories of harm:

   (a) SKY/Vodafone will foreclose competition in telecommunications markets by implementing a hard tie, that requires all SKY pay-TV customers to purchase Vodafone telecommunications services;

(b) SKY/Vodafone will foreclose competition in telecommunications markets by heavily discounting SKY pay-TV services when bought in a bundle with Vodafone telecommunications services, compared with the price of standalone SKY pay-TV services and/or SKY pay-TV services bundled with other telecommunications providers' services;

(c) SKY/Vodafone will foreclose competition in pay-TV, free-to-air, and telecommunications markets by purchasing all premium content, in particular, all premium sports rights; or

(d) SKY/Vodafone will no longer have incentives to move SKY's pay-TV services online, lessening non-price competition.

65. None of those theories of harm would be consistent with SKY/Vodafone's incentives under the factual, nor would SKY/Vodafone have the ability to engage in conduct that could result in foreclosure. This is for the reasons set out in the clearance applications, NERA's economic report, and below.

66. A number of submitters are of the view that SKY/Vodafone would only be able to achieve the $435 million of projected synergies associated with the transactions by pursuing a foreclosure strategy. This is not correct. A description of how SKY and Vodafone expect to achieve those synergies is set out in documents provided to the Commission, and in **Appendix C**.

Hard tie or heavy discounting of a SKY/Vodafone bundle, as compared with the standalone or wholesale price of SKY

67. In relation to the theories of harm described in paragraphs 64(a) and 64(b), in order to engage in anticompetitive bundling:

(a) SKY/Vodafone would need a high degree of market power, derived from a "must have" input;

(b) SKY/Vodafone would need to leverage its "must have" input in a way that forecloses competition; and

(c) SKY/Vodafone would need to recoup the losses incurred while pursuing its foreclosure strategy.

68. Paragraphs 35 to 48 and NERA's report explain why SKY/Vodafone would not have a "must have" input to compete in either pay-TV or telecommunications markets in New Zealand.

69. Any foreclosure strategy associated with a hard tie would require SKY/Vodafone to stop wholesaling SKY pay-TV services, and to stop selling SKY pay-TV services on a standalone basis. Such an approach would not be consistent with SKY/Vodafone's incentives in New Zealand:

(a) As outlined in paragraphs 24 to 28 and our letter to the Commission of 23 August, SKY/Vodafone will continue to have incentives to wholesale under the factual; and

(b) SKY's pay-TV services generate higher margins than Vodafone's telecommunications services. If SKY/Vodafone required consumers to purchase Vodafone telecommunications services in order to purchase SKY pay-TV services, SKY/Vodafone would lose more pay-TV margin than the margin it gains from new Vodafone telecommunications customers.

70. Any strategy associated with heavy discounting of a bundle of SKY pay-TV services and Vodafone telecommunication services, compared with the standalone and wholesale prices of SKY pay-TV services, could only be anticompetitive if the SKY/Vodafone bundle included a "must have" input, was priced below cost, and was offered with the intention to recoup any lost profit. Again, such an approach would result in certain loss of higher margin customers for uncertain gains in lower margin customers, so would not be consistent with SKY/Vodafone's incentives.

71. As identified in NERA's report, the submitters do not apply the accepted economic framework for anticompetitive bundling, and do not identify how a foreclosure strategy could be implemented. NERA identifies a number of factors that mean that SKY/Vodafone will not have the ability to engage in a foreclosure strategy, including the absence of a "must have" input, the competitive and contestable nature of telecommunications markets, and the absence of any impediments to entry and expansion in telecommunications markets.

72. The competitive nature of broadband and mobile markets, and the absence of impediments to entry and expansion in those markets, also mean that SKY/Vodafone would be unable to recoup any losses incurred while pursuing a foreclosure strategy. For example, broadband markets are structurally separated, and wholesale access to fixed lines is based on an open access regime. If SKY/Vodafone attempted to increase its prices, this would likely lead to new entry in broadband markets. The competitive nature of telecommunications markets is discussed further in the clearance applications and in Vodafone's submission.

Purchasing all premium content, in particular, all premium sports rights

73. The Commission has previously investigated allegations that SKY overbuys content in order to limit competition at the retail level, and found no evidence that this was occurring. More importantly, the Commission found that there is an abundance of content available. It would not be rational or possible for SKY to attempt to buy all available premium content.

74. SKY/Vodafone would not have the ability to buy all rights to premium content:

    (a) Because competition in retail pay-TV markets is increasing, so is competition for rights to premium content. The greater number of pay-TV providers vying for rights to premium content has already pushed up the price of content, and the price of content is likely to further increase;

    (b) SKY now competes with a number of well-resourced, global OTT providers, such as Netflix and Apple. Those providers are likely to be in a position to outbid SKY/Vodafone for content. In particular, Netflix has stated that its ambition is to acquire global rights to content, and already appears to be pursuing that strategy. For example, Netflix has outbid all bidders for the rights to the Star Trek reboot, for all domestic markets except for Canada and the US (where the content creator, CBS, has retained those rights for its own, direct-to-consumer SVOD service); and

    (c) A number of OTT providers produce their own content, which, if they intend to compete in New Zealand, they are unlikely to make available for purchase by SKY/Vodafone. This is consistent with **[REDACTED]**. As outlined in the clearance applications, **[REDACTED]**.

Incentives to move content online

75. Contrary to Trustpower's submission, the proposed transactions are likely to improve SKY's incentives to develop quality OTT offerings. This is because the proposed transactions will put SKY in a position to monetise increases in data usage associated with the consumption of OTT video services. Also, as previously discussed with the Commission, SKY has a strong incentive to shift to providing OTT offerings, in order to optimise the cost of providing services over its satellite platform.

Requests for a conference

76. We refer the Commission to our comments in our letter of 23 August 2016 on TVNZ's, 2degrees', and Blue Reach's requests for a conference.

Confidentiality

77. Confidentiality is sought for the information in this letter that is highlighted and in square brackets. We are also providing you with a public version of this letter.

78. We request that we be notified of any request made under the Official Information Act for the information, and be given the opportunity to be consulted as to whether the information remains commercially sensitive at the time that the request is made.

79. These requests for confidentiality are made because the information is commercially sensitive, and disclosure would be likely to unreasonably prejudice SKY's commercial position.

Yours faithfully
Buddle Findlay

Tony Dellow
Partner

Direct: 64 4 498 7304
Mobile: 64 21 349 651
Email: tony.dellow@buddlefindlay.com

APPENDIX A: Factual matters

This appendix sets out factual allegations made by submitters in italics, and corrections to those allegations.

Spark (at 105-107), TVNZ (at 1.2(b), 1.3, 17-1.8, 3.5, 6.4, 7.3), Coalition for Better Broadcasting (footnote 7): SKY has artificially bid up the price of content in order to exert commercial pressure on its FTA rivals. Spark submits that SKY has been able to do this because it cross-subsidises Prime using monopoly rents from its pay-TV service. TVNZ submits that SKY has engaged in an overbidding strategy that, in particular, raises FTA providers' costs for premium international content. The Coalition for Better Broadcasting also submits that SKY has the financial capacity to outbid rivals for content rights packages.

The increasing cost of premium content is a function of competition in markets for the acquisition of premium content.

SKY has attempted, and failed, to win the rights to a number of content packages. For example, over the years, SKY has failed to win the output deals for Warner, Fox, and Universal Studios. SKY withdrew from the bidding process for Warner's output deal when the prices that were being bid rose too high, and TVNZ ultimately won the output deal.

SKY has also chosen **[**

REDACTED

].

TVNZ has successfully acquired two of the major output deals with US studios (Warner and Disney). TVNZ recently launched a new FTA channel, DUKE. This indicates that TVNZ considered that it had access to enough premium content to justify the cost of running an extra channel.

The Coalition for Better Broadcasting submits that SKY both artificially inflates the price of content with its bids in order to prevent FTA providers from being able to win premium content, and deliberately allows others to win rights to premium content.

Spark (at 2): SKY's distribution platform is incapable of meeting the needs of consumers, who increasingly prefer to watch media content over fixed line and mobile broadband networks.

SKY has launched a number of OTT offerings that can be used over fixed line and mobile networks (SKY Go, NEON, and FanPass).

Spark (at 39-41): The only way that new pay-TV entrants, such as RSPs, could outbid SKY to achieve a sufficient bundle of premium sports content is if they had guaranteed revenues from a sufficient subscriber base.

As outlined in the clearance applications, there are a number of ways that new pay-TV entrants can achieve the scale necessary to acquire rights to premium content. Scale can be achieved without a pre-existing pay-TV subscriber base in New Zealand. Putting aside new pay-TV entrants with global scale from pay-TV subscriptions overseas, a new pay-TV entrant can achieve scale by leveraging a revenue base derived from the sale of other products and services. Examples are listed in paragraph 7.15 of the clearance applications.

Spark (at 43) and TVNZ (at 1.2(a), 1.3-1.5, 2.8(a), 3.5, 5.4, 5.6, 5.13 and 7.3): SKY's ownership of Prime allows SKY to make bundled offers for pay-TV and FTA rights, shutting others out of the market. Spark submits that SKY's ownership of Prime allows SKY to provide rights holders with a guarantee of FTA and pay-TV coverage, and to combine advertising revenue from both subscriber and FTA channel ads with subscription revenues, to outbid all other bidders for almost all premium sports content across both pay-TV and FTA. TVNZ submits that an FTA broadcaster cannot match the price that a combined pay-TV/FTA provider is prepared to pay for premium live sports events.

Even before SKY's acquisition of Prime, rights to premium sports were usually sold in bundles of FTA and pay-TV rights.

Nothing prevents FTA providers and other pay-TV providers (including new entrants) from partnering with one another to submit joint bids for pay-TV and FTA rights. TVNZ identifies an example of such an arrangement in paragraph 5.10 of its submission, when it describes a partnership it entered into with Coliseum in respect of the EPL and PGA golf.

Spark (at 88(a)): 40% of households with fixed line broadband connections subscribe to SKY Sports.

As Spark has no way of knowing whether or not each individual household with a fixed line broadband connection subscribes to SKY Sports, SKY does not know how Spark arrived at this figure.

TVNZ (at 1.3, 1.6, 5.14-5.15, 7.3): Since SKY acquired Prime, SKY has been putting more and more premium content behind its pay walls. SKY uses its FTA rights to benefit its pay-TV business. As a result, there has been a dramatic reduction in the availability of live sport on FTA television.

As outlined in our letter to the Commission of 23 August 2016, SKY does not accept that its acquisition of Prime has reduced the availability of premium content to FTA providers. SKY also objects to TVNZ's use of the number of hours of live sports that it broadcast on a platform that was available only to a minority of New Zealanders, to suggest that SKY has reduced the amount of live sport that is available to all New Zealanders.

TVNZ (at 1.6, 5.18-5.21): During the 2008 Beijing Olympics, TVNZ provided over 800 hours of FTA coverage. The majority of those hours were live. For the 2016 Rio Olympics, SKY projected 240 hours of FTA coverage. The vast majority of that coverage was delayed, not live.

As outlined in our letter to the Commission of 23 August 2016, the vast majority of TVNZ's hours were broadcast on the TVNZ Sports Extra channel on the Freeview platform, which, at the time, was available to just 10% of New Zealand households.

TVNZ (at 8.6): SKY's overriding incentive is to increase the quality of its pay offerings in comparison to the quality of FTA services, driving more subscribers to pay for content. Its decisions on what to show on Prime, and when, are driven solely by what is in the best interests of its pay-TV business.

SKY's decisions regarding what to show on Prime are based on maximising viewership of Prime, within the context of Prime's target audience and budgetary constraints.

Because Prime is an FTA platform, much of the content SKY airs on its pay-TV platform is inappropriate for Prime. For example, series that include a substantial amount of R rated content, appeal to niche audiences, and do not make accommodation for commercial advertising breaks, are not appropriate content for Prime. Examples include VEEP, Banshee, Ray Donovan, and True Detective.

On the other hand, SKY has aired a number of premium first-run series on Prime, that appeal to Prime's target audience of viewers of high quality drama. Examples include Downton Abbey, Top Gear, NCIS New Orleans, Scorpion, Elementary, Madam Secretary, Limitless, The Odd Couple, Bones, Sleepy Hollow, and Modern Family. SKY often makes reruns of those series available on SKY's pay-TV platforms, but has used the first-run rights to those series on Prime.

2degrees (at 1.6-1.7, 5.15): Triple-play and quad-play bundled offerings are growing in importance overseas, but have not yet materialised in New Zealand. This is a direct consequence of the lack of wholesale content available to telecommunications RSPs.

A number of triple-play offerings have been or are offered in New Zealand. In addition to triple-play offerings in the market that include SKY services, Spark offers all of its residential broadband customers a triple-play offering with Lightbox, and offers triple-play or quad-play bundles with free Spotify and/or Lightbox to many of its mobile customers. Vodafone has also offered bundles of telecommunications services and Netflix.

2degrees (at 2.16): SKY has 100% of the subscriber pay-TV market.

SKY is not aware of the basis of this submission, as 2degrees has no way of knowing whether this is the case. SKY, like 2degrees, has no way of knowing whether or not subscribers to services such as Netflix, Lightbox, and foreign pay-TV offerings also have subscriptions to SKY services. However, SKY would be surprised if this submission was correct, and has anecdotal evidence that the submission is not correct.

2degrees (at 5.10): RSPs who resell SKY are unable to differentiate the SKY service in any way. This means the resale offer has no attraction to RSPs, as it provides no competitive benefit to outweigh the costs of becoming a reseller.

The fact that Vodafone resells SKY suggests that the reseller arrangement is attractive to Vodafone, and that Vodafone sees some benefit to the arrangement.

Trustpower (at 1.5, 10.1): SKY's key sports rights are locked in for over four years, and often more.

Sports bodies prefer not to enter into shorter term contracts, because of the time and resource required to negotiate new contracts.

Trustpower (at 4.1): Telecom decided that it had no choice but to establish its own content play, Lightbox, because of SKY's restrictive price and non-price terms (even with an exemption)/it was untenable for Telecom to continue acquiring SKY services. Telecom had a reduced incentive to remain with SKY, because the price and non-price terms were too restrictive "and led to SLC".

SKY understands that Telecom/Spark developed Lightbox in order to differentiate its offering from those of other telecommunications providers, such as Vodafone's triple-play bundle with SKY TV.

Trustpower (at 4.1, 5.4): Lightbox has not been successful, because SKY has control of key content that cannot be accessed on reasonable price and non-price terms.

The basis upon which Trustpower claims that Lightbox has not been successful is not clear. Lightbox has acquired a number of premium rights, such as the first-run rights to Suits and Better Call Saul.

SKY does not have information regarding the revenue that Spark generates from Lightbox. However, SKY incurred losses for a number of years before its pay-TV service became profitable, and this appears to be a trend for pay-TV services.

Trustpower (at 5.4): The clearance applications imply that Vodafone wholesales SKY services at a net loss.

As outlined in the clearance applications, Vodafone's margin on its reseller arrangement with SKY **[REDACTED]**.

Fetch TV (at 5.1): SKY is able to use its position as the operator of the only major subscription TV platform in New Zealand to require content providers to enter into exclusive arrangements. Some of SKY's exclusive content arrangements include the use of other mechanisms to entrench exclusivity in SKY's acquisition of content. Those mechanisms include exclusive rights to brands (e.g. the History Channel) and specific content in channel licensing agreements, and the use of SKY-controlled play-out facilities.

Content creators often prefer to sell their premium content on an exclusive basis. Exclusivity allows content creators to extract a higher price from rights purchasers. SKY is unable to require global studios to enter into exclusive arrangements with SKY.

A number of studios have chosen not to sell their content to SKY. For example, NBCUniversal chose to partner with MediaWorks to launch a new Bravo TV channel on Freeview, rather than sell the rights to that channel to SKY.

A number of SKY's channels are not exclusive. For example, SKY could not afford to obtain exclusive rights to Cartoon Network, the National Geographic Channel, and CNN.

Coalition for Better Broadcasting (footnote 6): When SKY lost the rights to the EPL, SKY could have outbid Coliseum. However, SKY chose not to because it was under scrutiny from the Commerce Commission.

SKY only makes bids for content that make commercial sense, and SKY has a finite budget for the acquisition of all of the content it offers to consumers. SKY considered that the commercial value of the rights to the EPL were less than what it would have cost to win the rights to the EPL, so did not outbid Coliseum.

SKY also lost rights after the Commission concluded its investigation. For example, SKY lost the rights to Top 14 Rugby and to golf, and lost the rights to the EPL again to beIN.

Coalition for Better Broadcasting (footnote 7): SKY pays nothing to carry Freeview/FTA channels on its platforms, even though a significant proportion of SKY subscriber viewing is of Freeview's channels.

Freeview asked SKY to set up SKY's decoders so that they show Freeview's channels. SKY does not charge Freeview for this service, even though Freeview's channels draw viewership away from SKY's channels, and the availability of Freeview channels on SKY enables Freeview's shareholders to reach a wider audience (and consequently generate more advertising revenue).

Coalition for Better Broadcasting (at 5): The Coalition for Better Broadcasting understands that a FTA provider explored options for delivering online content services in partnership with an RSP. However, the RSP's contract with SKY prevented the RSP from progressing that venture.

SKY's contracts with RSPs have not prevented RSPs from coming to arrangements with FTA providers.

Coalition for Better Broadcasting (at 6): The Commerce Commission has previously found that SKY hoarded content rights to deter potential competitors.

This is incorrect. The Commerce Commission found that there was no evidence to suggest SKY was overbuying content.

Blue Reach (at 3.13): For many years, SKY's strategy has been to discourage wholesaling competition and favour selling to its retail customers.

This is inconsistent with SKY's incentives, and SKY's actual approach to wholesale pricing. SKY has incentives to ensure that its revenue base is as broad as possible. SKY sets its wholesale prices on an ECPR basis, which makes SKY indifferent as to whether consumers purchase SKY services from SKY directly, or from a reseller.

Blue Reach (at 3.15): SKY's and Vodafone's modelling will probably show that bundling must-have content in retail telecommunications packages will gain market share beyond Vodafone's and SKY's current retail footprint, and substantially reduce churn.

As set out in the clearance applications, SKY and Vodafone expect market share increases of **[REDACTED]**.

SKY disagrees that any of its pay-TV content is a "must-have" input for telecommunications providers.

TUANZ (at 28): To date, the emergence of OTT offerings has been limited to movie and TV series catalogues.

A number of premium sport OTT offerings have emerged in New Zealand. Those include Coliseum's offering, and a number of direct-to-consumer offerings launched by sports bodies.

As outlined in the clearance applications, although Coliseum is not currently active in New Zealand, Discovery Communications recently acquired a minority stake in Coliseum's RugbyPass web platform, in relation to which Coliseum is clearly seeking global scale. RugbyPass has acquired the rights for 23 countries to all home games played by the All Blacks, Wallabies, Springboks, and England, Ireland, Scotland and Wales (other than Six Nations Games), Super Rugby games, NRL games, State of Origin games, and the British Lions' 2017 tour of New Zealand.

Sports bodies that have launched, or have experimented with, direct-to-consumer OTT offerings include Auckland Cricket, Hockey New Zealand, New Zealand Football, the New Zealand National Basketball

League, the UFC, the NBA, the NFL, MLB, and the US PGA.

Anonymous consumer 1 (third paragraph): SKY requires SKY customers to pay fees for relocating to new premises and when upgrading equipment. This demonstrates that SKY has been taking advantage of its market power in TV markets.

SKY requires customers to pay fees for relocating to new premises and upgrading equipment because SKY incurs costs when customers move or upgrade their equipment.

Anonymous consumer 1 (sixth paragraph): Coliseum was a cheaper service than SKY. It cost just $199/year to watch golf in HD on Coliseum, but costs more than $100/month to watch golf in HD on SKY.

SKY's offering includes a much broader range of sports than what was offered by Coliseum. SKY must recover its costs for the rights to all of those sports. In addition, it costs more to deliver video content over satellite than over the top.

Anonymous consumer 1 (eighth paragraph): The sport SKY makes available on a FTA basis on Prime is of questionable quality and interest. SKY broadcasts only the first two days of golf tournaments on Prime. The important days of tournaments are not FTA.

The anonymous consumer appears to be referring to the availability of golf on TVNZ under Coliseum's previous arrangement with TVNZ, rather than SKY and Prime.

Prime airs highlights of all four days of golf tournaments. Because Prime is a single linear channel, Prime does not have the capacity to broadcast complete rounds and days of golf tournaments.

However, Prime does broadcast a range of quality sports content. For example, in addition to golf highlights, Prime provides live coverage of twelve FIFA matches and two ODI Black Caps matches, and delayed coverage of every All Blacks game and Silver Ferns game played in New Zealand.

Anonymous consumer 1 (ninth paragraph): SKY offered me a $10 discount if I switched to Vodafone broadband, despite SKY'S claims that it will not increase the price of SKY for non-Vodafone customers.

The anonymous consumer appears to be referring to SKY's broadband referral arrangement with Vodafone. This arrangement is described in the clearance applications, and has been in place for some time. From a consumer's perspective, it is similar to a triple-play bundle. Triple-play bundles are common in the market and generally regarded as pro-competitive.

APPENDIX B: SKY's discussions with Spark and 2degrees

[REDACTED]

[REDACTED]

BUDDLEFINDLAY
NEW ZEALAND LAWYERS

[REDACTED]

APPENDIX C: [REDACTED]