



## SKY/VODAFONE: TVNZ CROSS-SUBMISSION

### PUBLIC VERSION

#### 1. Introduction

- 1.1 Television New Zealand (**TVNZ**) made an initial submission in response to the Commission's Statement of Preliminary Issues on 12 August 2016 (**TVNZ's Submission**).
- 1.2 In this cross-submission TVNZ responds to matters relevant to it raised in Buddle Findlay's letter of 9 September 2016 on behalf of SKY Network Television (**SKY**) - "full response to submissions on the Statement of Preliminary Issues", which contains a number of factual errors and unsubstantiated claims.
- 1.3 We also repeat our request for the Commission to invoke the procedural steps available to it, and issue a draft determination and hold a conference in relation to the clearance applications, given the complexity of the issues and the far-reaching and irreversible effects of a clearance being granted.

#### 2. SKY's response

- 2.1 We set out in boxes and italics below the specific claim made by SKY, followed by our response.

*"TVNZ submits that the retail supply of pay-TV services and FTA services are within the same product market"*

*Paragraph 9(b)*

- 2.2 SKY has misinterpreted TVNZ's Submission. We recommended that the Commission adopt the same approach as the Australian Competition and Consumer Commission (**ACCC**) adopted in *Foxtel/Ten*; that in addition to considering the impact of the transaction on competition in the pay TV and FTA markets, the Commission should *"also consider the impact of the transaction in a broader national market for the supply of television services encompassing FTA, subscription pay TV and VOD services"*,<sup>1</sup>

<sup>1</sup> *Foxtel/Ten* at para 2.3, new emphasis.

because “the area of competitive harm is in the level of competition **between** the FTA and pay platforms.”<sup>2</sup>

*“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 date of the Contracts Report [October 2013] any division between linear pay-TV services and on-demand pay-TV services has further lost significance”.*

**Paragraph 12**

- 2.3 TVNZ’s Submission did not comment on this issue. However, recent research shows that while 92% of households have either Freeview, Sky or an SVOD service, only 4% of households have SVOD alone<sup>3</sup>, and SKY itself stated that only 3% of its NEON and FanPass users had been SKY subscribers in the past.<sup>4</sup>
- 2.4 This suggests that SVOD services are complementary to, rather than substitutable for, linear pay TV services. In addition, SVOD rights are granted separately, or as a specific element of a pay TV bundle.
- 2.5 SKY’s approach to SVOD rights has changed in recent years. As noted in TVNZ’s Submission, in 2012 SKY asserted it held no video streaming or first refusal rights, and there were no barriers to new entrants in terms of acquiring those rights. Now SKY acquires bundled linear pay TV, FTA and SVOD rights, thereby creating an insurmountable barrier to new entrants who, wishing to acquire SVOD rights only, cannot match the price for the full bundle of rights.

*“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.”*

**Paragraph 14**

- 2.6 TVNZ’s Submission was that SKY withheld content from FTA transmission where it had FTA rights, to encourage uptake of its pay TV services. This is clearly demonstrated in Table 3 which shows that during the months of February and July 2016, SKY broadcast 505 hours of live sport on its pay platform, while during the same period, Prime broadcast only 8 hours, despite SKY presumably having the FTA rights to those events.
- 2.7 Prime owned by an FTA operator without a pay TV business to protect would therefore be a stronger (rather than weaker) FTA competitor. The current distortion in the content rights market as a result of SKY’s acquisition and warehousing of FTA rights would be removed.
- 2.8 The evidence shows that since SKY acquired Prime, SKY’s practice of purchasing bundled pay and FTA rights has foreclosed FTA operators such as TVNZ and MediaWorks from a wide range of content. This includes all CBS Studio content, all HBO content and a broad range of sports content. The impact of SKY’s purchasing patterns is evident in Table 2, which shows that the amount of FTA sports coverage

<sup>2</sup> Foxtel/Ten at para 2.2, original emphasis.

<sup>3</sup> Research undertaken during the first quarter of 2016 by The Nielsen Company.

<sup>4</sup> <https://www.nbr.co.nz/article/first-cut-sky-tv-fy-earnings-down-15-citing-merger-costs-and-content-arms-race-b-193499>

(including Prime) for the months of February and July 2016 was a mere 6% of the amount of coverage on SKY (for both live and non-live coverage).

2.9 The breadth of sports rights controlled by SKY is illustrated in Table 1.

*“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.”*

**Paragraph 36**

2.10 TVNZ does not agree that only one rights contract is required in order to develop a successful sports offering.

2.11 The costs of acquiring the rights to one sport, together with the costs of establishing a technology platform to distribute only one sport, would be more than the revenue that a single sport offering could generate, and would not be a viable consumer proposition. [ ]

2.12 Live premium sports rights are important for content providers because almost all other content is available (e.g. through pirate sites) immediately after it goes to air. As described in TVNZ’s Submission, all premium sports are locked-up by SKY for the next 5 – 8 years, and non-premium sport does not provide a viable consumer proposition.

*“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.”*

**Paragraph 38**

2.13 This statement is misleading. It overstates by a considerable degree the extent to which FTA providers have been successful in acquiring right to premium events.

2.14 In particular:

- (a) Rugby World Cup 2007 rights were acquired by MediaWorks in December 2005, **prior to SKY’s acquisition of Prime being cleared** by the Commerce Commission.
- (b) Rugby World Cup 2011 rights were shared by all NZ broadcasters, with SKY the only broadcaster having rights to all matches.
- (c) The Rio Paralympic Games 2016 rights were acquired by Attitude Pictures – a specialist disability production company. Funding was provided by New Zealand On Air and ACC in order to ensure full Paralympics coverage on FTA television.
- (d) The pay rights for the NFL have long been held by ESPN which forms part of Sky’s Pay TV sport offering. As ESPN have no means to utilise the FTA rights (as a Pay TV only operator) these FTA rights were available in the New Zealand market.

- (e) The AFL is also carried on SKY, and in any event we do not consider the AFL, or the Asia Pacific Rally Championship, to be premium sports events.
  - (f) The Commonwealth Games is the only premium event referred to in the Buddle Findlay letter for which rights are exclusively held by a FTA network, and the reasons for TVNZ being granted these rights has been explained in TVNZ's Submission.
- 2.15 The relevant question is not whether any premium sports rights have been acquired by FTA networks since SKY acquired Prime, but the scope and scale of exclusive FTA rights to premium sports events that SKY has acquired since that time, as shown in the tables included in **Attachment 1**:
- (a) Table 1 shows the 112 sports and events available during the months of February and July on SKY's sports channels;
  - (b) Table 2 shows the quantity of all sports coverage, live and non-live, across SKY and FTA for the months of February and July 2016. Pay TV delivered well in excess of 90% of live sports coverage in both periods; and
  - (c) Table 3 shows a comparison of premium sport available on SKY vs premium sport available on Prime.
- 2.16 TVNZ's Submission stated that where SKY holds FTA rights for sport, it minimises the amount of live content it shows on Prime to incentivise consumers to buy a SKY Sports subscription to view live sport.
- 2.17 Table 2 shows that during the two time periods sampled by TVNZ (February and July 2016), less than 2% of SKY's premium live sports coverage was broadcast on Prime (8 hours live on Prime compared with 505 hours live on SKY), although presumably SKY acquired the rights to show all of those events live on FTA. This percentage is also consistent with the total live sports coverage on SKY vs Prime in Table 2.

*"Some of the most successful SVOD services around the world do not offer sports. These include Netflix, Amazon and Prime, and HBO GO."*

*Paragraph 41(e)*

- 2.18 This statement is misleading, as none of the SVOD services described by SKY as "successful" are in fact profitable stand-alone businesses:
- (a) Netflix's international streaming (SVOD) business is not currently profitable (Netflix reported a contribution loss of \$333 million for the 2015 calendar year), but is subsidised by its domestic and physical DVD business;
  - (b) Amazon Prime (which is a single offering, not two), is a subscription membership to the online retailer which includes access to TV shows among other benefits such as free game content, preferential shipping rates and unlimited music streaming. Its revenue isn't accounted for separately from the rest of Amazon's business;
  - (c) HBO Go makes available its own content only, the costs of which would already have been recouped through its cable service and international distribution deals.
- 2.19 We also note the recent exit of the Presto video streaming service in Australia with Seven West Media selling its stake to joint venture partner Foxtel, and Foxtel then

announcing it is discontinuing the service. This is further evidence of a stand-alone video streaming service not being commercially viable.

*“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.”*

**Paragraph 49(b)**

*“In relation to TVNZ's submission: 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.”*

**Paragraph 54(a)**

2.20 While it is correct that TVNZ acquired output deals with Warner Bros and Disney, [ ].

2.21 [ ]

]

*“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.”*

**Paragraph 54(b)**

2.22 We do not agree that the increasing cost of content is a function of increased competition at the retail level of pay-TV markets since SVOD players have entered the New Zealand market. [ ], content costs have been increasing since SKY acquired Prime.

2.23 [ ]

]

*“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.”*

**Paragraph 54(c)**

2.24 While TVNZ would like to respond to the claims in this paragraph, it is impossible given the redactions. We therefore request that we be provided with an un-redacted version of this paragraph in order to do so.

*“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.”*

**Paragraph 53**

- 2.25 TVNZ disagrees with this statement. As set out in SKY’s own response (at paragraph 52), the first run content made available by Netflix is its own original content. It is not licensed by “TV providers”. Netflix and Amazon Prime both commission original content as they are otherwise unable to access first run content (because first run rights are tied up with commissioning networks). Lightbox carries first run international content which either (i) it has outbid TV networks for (and would therefore be unable to generate enough revenue to cover the costs of); or (ii) the TV networks have passed on.

*“TVNZ submits that SKY has engaged in an overbidding strategy that, in particular, raises FTA providers’ costs for premium international content. 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.”*

**Appendix A**

- 2.26 As noted above and in TVNZ’s Submission, [ ]

*“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”.*

**Appendix A**

- 2.27 Duke is a channel targeted at a particular demographic – young males. [ ]

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

**Appendix A**

- 2.28 Prior to SKY’s acquisition of Prime, rights to premium sports were often sold in bundles of FTA and Pay rights. Where distributors required a FTA outlet for the content (such as for the Olympics, Rugby World Cup and Commonwealth Games), either (i) FTA broadcasters and SKY partnered to bid for the rights, or (ii) the rights were sold separately. Either way, this gave FTA operators the opportunity to purchase FTA-only rights, an option which is no longer available as SKY chooses to use Prime as its FTA outlet.

*“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.”*

**Appendix A**

- 2.29 SKY is the only operator who provides both pay and FTA services, and can accordingly bid for both pay and FTA rights without partnering, as it has the scale and scope necessary to fund both pay and FTA rights. There is no other pay operator in New Zealand of any scale with whom TVNZ could partner to acquire bundled pay and FTA rights in competition to SKY.
- 2.30 TVNZ did not partner with Coliseum to bid for pay-TV and FTA rights for EPL and PGA Golf. Rather, Coliseum unilaterally bid for and acquired all rights to EPL and some PGA events, and subsequently on-sold a limited package of content to TVNZ.

*“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.”*

**Appendix A**

- 2.31 The facts speak for themselves. As shown in Table 3, there were 48 hours of live coverage of sport on FTA in July 2016, and 788 hours on SKY.

*“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. 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.”*

**Appendix A**

- 2.32 TVNZ’s Sports Extra channel was available free-to-air throughout the country to any viewer with a Freeview device, although such devices were only in approximately 10% of homes at the time. In addition to TVNZ Sports Extra, TV ONE broadcast 11-14 hours per day of predominantly live coverage, and TVNZ streamed 370 hours online available free to any viewer.

*“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.”*

**Appendix A**

- 2.33 The fact that Game of Thrones is shown on Prime (after it has screened on SoHo) despite its R18 rating is inconsistent with SKY’s stated reasoning for not broadcasting such content on FTA.
- 2.34 On the other hand, the vast majority of sports content for which Sky holds FTA rights is not R rated but does not play on Prime. As shown in Table 3, Sky broadcast 505 hours of live premium sports in February and July 2016, but only 23.5 hours on Prime, of which only 8 hours were live. This equates to around 1.5%, which is significantly less than the 6% average overall of sports coverage available on FTA vs SKY.

### **3. Request for Conference**

- 3.1 TVNZ submits that the need for the Commission to publish a draft determination and hold a conference in relation to the proposed transactions has become even more apparent as a consequence of the responses from Sky and Vodafone to the submissions and expert reports filed by TVNZ and others.
- 3.2 We understand the Commission’s policy is to rarely hold conferences in relation to merger clearances, but that the Commission will hold a conference where it considers it appropriate. As Minter Ellison Rudd Watts’ 4 October letter on our behalf to the Commission explains, it is appropriate to hold a conference in this matter.
- 3.3 TVNZ was a participant in the only merger clearance conference the Commission has held, which involved an application in 1995 by Telecom NZ to acquire an interest in SKY. The matters at issue then were almost identical to those at large in the current applications, and included the convergence of telecommunications and television services, the availability and importance of sports and first run movies, the impact of bundling of Sky and Telecom services, and the competitive constraint that FTA imposed on pay TV. The Commission said that it “considered that, given the complexity of the issues relating to this application, it was appropriate to hold a conference.”<sup>5</sup>
- 3.4 The level of complexity of the issues relating to the current applications are a magnitude greater than the issues which were considered by the Commission in 1995; while then the Commission concluded that “the full implications of convergence are necessarily speculative at this stage,”<sup>6</sup> they are a key element of the current applications.

<sup>5</sup> NZCC, Telecom/HKP Partnership, Decision 276, 26 September 1995, para 34

<sup>6</sup> Above at para 113.



- 3.5 It therefore follows that the procedural steps of a draft determination followed by a conference are appropriate, and should be adopted by the Commission in this case.

**ATTACHMENT 1****Table 1: Sports Coverage on SKY**

<b>SKY Sport channels 1 - 4 + ESPN</b>		
1st XV Rugby	Football: U17 Women's	NCAA Basketball
2015 Crossfit Games	Football: Uefa	NCAA Women's Basketball
2016 New Zealand Rural Games	Formula 1	Netball: ANZ Championship
AFL	Golf: Asian Tour	NFL
AMA Supercross	Golf: European Tour	NFL Superbowl
Athletics	Golf: Kings Cup	Noosa Multisport Event
Athletics:IAAF	Golf: LPGA Tour	Poker
Australian Baseball	Golf: NZ Women's Open	Premier Boxing
Basketball: NBL	Golf: PGA Tour	Red Bull Global Rallycross
British Superbike Championship	Golf: The Open	Rowing
Canadian Football League	Golf: US Women's Open	Ruby: Rugby Sevens
Classic Boxing	Golf: Womens' British Open	Rugby 1st XV
College Football	Hockey	Rugby League: Holden Cup
Collegiate Rugby Championship	Ice Hockey	Rugby League: NRL
Cricket: Caribbean Premier League	Ironman	Rugby League: NRL Nines
Cricket: Ford Trophy	ITU World Triathlon	Rugby League: NSW Cup
Cricket: international tests	Kabaddi	Rugby League: State of Origin
Cricket: NZ ODIs	Kickboxing	Rugby League: UK
Cricket: NZ tests	Major League Baseball	Rugby League: World Cup Series
Cricket: Twenty20	Major League Soccer	Rugby: Six Nations
Cricket: U19 World Cup	Motorsport: 2016 FIA	Rugby: Super Rugby
Cycle Classic	Motorsport: EnduroGP World Championship	Rugby: Women's Sevens
Cycling: Dubai Tour	Motorsport: F1 British Grand Prix	Sailing: LV Americas Cup
Darts	Motorsport: FIM Speedway Grand Prix	Snooker
EnduroGP World Championship	Motorsport: FIM Speedway World Cup	Super League
Extreme Sports	Motorsport: FIM Superenduro WC	Superbikes
FA Cup Classic	Motorsport: GP2	Surfing
FA Cup Soccer	Motorsport: IndyCar	Swimming
Football: A League	Motorsport: Iowa Corn	Tennis: Australian Open
Football: Arsenal	Motorsport: Nascar	Tennis: Davis Cup
Football: ASB Premiership	Motorsport: Quaker State 400	Tour de France
Football: Champions League	Motorsport: Townsvilles 400	Triathlon
Football: Chelsea	Motorsport: Toyota Finance 86 Racing	UFC
Football: Euro 2016	Motorsport: Toyota Racing Series	UK Super League
Football: League Championship	Motorsport: US Round	X Games
Football: Man City	Motorsport: V8 Supercars	Youth Olympic Games
Football: MU	Motorsport: World Rally Championship	
Football: OFC	NBA	

**Table 2: Television sports coverage across SKY and FTA (February and July 2016)<sup>7</sup>**

	TOTAL LIVE HOURS	TOTAL NON LIVE HOURS	TOTAL HOURS
SKY Feb	594	1617.5	2211.5
SKY July	788.5	1048	1836.5
<b>SKY TOTAL</b>	<b>1382.5</b>	<b>2665.5</b>	<b>4048</b>
ONE Feb	8.5	2	10.5
ONE July	10	0	10
<b>ONE total</b>	<b>18.5</b>	<b>2</b>	<b>20.5</b>
TV3 Feb	0	16	16
TV3 July	0	8	8
<b>TV3 total</b>	<b>0</b>	<b>24</b>	<b>24</b>
Prime Feb	27	7	34
Prime July	0	10.5	10.5
<b>Prime total</b>	<b>27</b>	<b>17.5</b>	<b>44.5</b>
Maori Feb	0	34	34
Maori July	0	31	31
<b>Maori total</b>	<b>0</b>	<b>65</b>	<b>65</b>
<b>Duke total (July only)</b>	<b>38</b>	<b>70</b>	<b>108</b>
<b>FTA TOTAL</b>	<b>83.5</b>	<b>178.5</b>	<b>262</b>

<sup>7</sup> See footnote 3.

**Table 3: Comparison of live coverage of premium sports on SKY vs Prime (February and July 2016)<sup>8</sup>**

	SKY HOURS LIVE	PRIME HOURS LIVE	PRIME HOURS NON-LIVE
<b>Feb</b>			
A-League Football	49	0	0
Cricket (Ford Trophy final, NZ tests and ODIs)	104.5	8	7
NBL Basketball	36	0	0
NRL	6.5	0	0
Super Rugby	4	0	0
UEFA Football (Champions League and Europa League)	36.5	0	0
<b>July</b>			
ANZ Netball Championships	14.5	0	3
Golf (PGA, LPGA, The Open)	102	0	0
NRL	32.5	0	1.5
Super Rugby	56.5	0	4
Tour de France	63	0	0
<b>TOTAL</b>	<b>505</b>	<b>8</b>	<b>15.5</b>

<sup>8</sup> Source: *TV Guide* and TVNZ analysis

Notes:

- Two 4 week periods in 2016 were sampled: 30 January to 26 February and 9 July to 5 August (these periods were selected as a sample of both winter and summer seasons, during periods which weren't affected by any major sporting events (such as the Olympics).
- Duke was launched in March.
- Sports magazine and news programmes were excluded.