

PUBLIC VERSION

MICROSOFT CORPORATION

4 JULY 2023

RESPONSE TO NZCC STATEMENT OF ISSUES DATED 20 JUNE 2023

CONTENTS

1. PART 1: INTRODUCTION4

2. PART 2: EXECUTIVE SUMMARY5

3. PART 3: NO CREDIBLE POSSIBILITY OF CONSOLE FORECLOSURE IN NEW ZEALAND10

(3A): THE MERGED ENTITY HAS NO ABILITY TO FORECLOSE RIVAL CONSOLES AS IT WILL NOT HAVE A SUBSTANTIAL DEGREE OF MARKET POWER IN THE UPSTREAM GAME PUBLISHING MARKET12

(3B): THE MERGED ENTITY WILL NOT HAVE THE INCENTIVE TO WITHHOLD ACTIVISION BLIZZARD GAMING CONTENT (SPECIFICALLY *COD*) FROM DOWNSTREAM CONSOLE COMPETITORS21

(3C): ANY (HYPOTHETICAL) WITHHOLDING OF ACTIVISION BLIZZARD CONTENT WOULD NOT MATERIALLY ALTER CONSUMERS' CONSOLE PURCHASING DECISIONS27

(3D): ANY (HYPOTHETICAL) WITHHOLDING OF ACTIVISION BLIZZARD CONTENT WOULD NOT CAUSE CONSUMERS TO SWITCH CONSOLES TO SUCH AN EXTENT THAT THERE COULD BE A SUBSTANTIAL IMPACT ON PLAYSTATION'S COMPETITIVENESS30

(3E): THE MERGED ENTITY COULD NOT INCREASE CONSOLE PRICES, OR DECREASE CONSOLE QUALITY, SUCH THAT A SUBSTANTIAL LESSENING OF COMPETITION IN THE CONSOLE MARKET COULD RESULT31

(3F): CONCLUDING COMMENTS ON THE CONSOLE FORECLOSURE THEORY OF HARM32

4. PART 4: NO CREDIBLE POSSIBILITY OF CLOUD GAMING FORECLOSURE IN NEW ZEALAND33

(4A): CLOUD GAME STREAMING IS NOT A SEPARATE MARKET (IT IS A FEATURE THAT PROVIDES AN ALTERNATIVE MEANS FOR GAMERS TO ACCESS CONTENT IN THE BROADER GAME DISTRIBUTION MARKET) 33

(4B): THE MERGED ENTITY WILL NOT HAVE A SUBSTANTIAL DEGREE OF MARKET POWER IN THE UPSTREAM GAMING PUBLISHING MARKET AND, THEREFORE, WILL NOT HAVE ANY ABILITY TO FORECLOSE44

(4C): IN THE COUNTERFACTUAL, ACTIVISION BLIZZARD WOULD NOT MAKE ITS GAME CONTENT AVAILABLE TO CLOUD GAMING PROVIDERS46

(4D): IN THE FACTUAL, THE MERGED ENTITY WOULD NOT HAVE ANY INCENTIVE TO WITHHOLD CONTENT FROM OTHER CLOUD GAMING PROVIDERS GIVEN ITS DRIVER TO MAKE GAMES AVAILABLE ACROSS PLATFORMS, [], AND THE EC COMMITMENTS AND CONTRACTS48

(4E): THERE IS NO EVIDENCE THAT ANY (HYPOTHETICAL) WITHHOLDING OF ACTIVISION BLIZZARD CONTENT WOULD MATERIALLY ALTER CONSUMERS' CLOUD GAMING CHOICES60

(4F): THERE IS NO EVIDENCE THAT ANY (HYPOTHETICAL) WITHHOLDING OF ACTIVISION BLIZZARD CONTENT WOULD HAVE A SUBSTANTIAL IMPACT ON THE ONGOING COMPETITIVENESS OF OTHER CLOUD GAMING PROVIDERS, INCLUDING AS THERE IS NO EVIDENCE OF ANY MATERIAL "NETWORK EFFECTS" IN CLOUD GAMING, NOR ANY EVIDENCE OF UNIQUE ADVANTAGES TO MICROSOFT OR BARRIERS TO ENTRY62

(4G): THERE IS NO EVIDENCE THAT ANY (HYPOTHETICAL) WITHHOLDING OF ACTIVISION BLIZZARD WOULD RESULT IN A SUBSTANTIAL LESSENING OF COMPETITION IN ANY PROPERLY DEFINED MARKET70

5. PART 5: CONCLUDING COMMENTS78

6. PART 6: CONFIDENTIALITY79

APPENDIX THREE80

APPENDIX FOUR84

APPENDIX FIVE86

APPENDIX SIX93

PUBLIC VERSION

APPENDIX SEVEN.....99

PUBLIC VERSION

1. PART 1: INTRODUCTION

- 1.1 This submission sets out Microsoft Corporation's ("**Microsoft**") response ("**Response**") to the Commerce Commission's (the "**NZCC**" or "**Commission**") Statement of Issues dated 20 June 2023 ("**SOI**") in relation to Microsoft's application for clearance to acquire Activision Blizzard Inc ("**Activision Blizzard**") (the "**Transaction**") (together Microsoft and Activision Blizzard are referred to as the "**Parties**").
- 1.2 Microsoft is grateful for the NZCC's request for further information through the SOI process, and the opportunity to respond to the SOI (with the SOI acknowledging that the NZCC has not made any decisions, and that the purpose of the SOI process is to invite further submissions as part of the NZCC's assessment of the Transaction).
- 1.3 The evidence in this Response demonstrates there is no credible prospect that a substantial lessening of competition could arise in any markets in New Zealand as a result of the Transaction. Therefore, clearance must be granted.
- 1.4 The substantive parts of this Response are as follows:
- (a) Part 3: sets out that none of the preconditions necessary for a vertical foreclosure concern relating to consoles exist, so there is no prospect of a substantial lessening of competition in relation to any console markets in New Zealand.
 - (b) Part 4: sets out that none of the preconditions necessary for a vertical foreclosure concern relating to cloud gaming exist, so there is no prospect of a substantial lessening of competition in relation to cloud gaming in New Zealand.
- 1.5 **Appendix Three** provides a summary of the relevant New Zealand legal framework referred to in the Response.
- 1.6 Microsoft and Activision Blizzard are available to discuss this Response to assist the NZCC as it completes its clearance process.

PUBLIC VERSION

2. PART 2: EXECUTIVE SUMMARY

- 2.1 The NZCC has satisfied (or is close to satisfying) itself that, in most respects, the Transaction could not give rise to any competition concerns in New Zealand - namely, the SOI sets out that the NZCC currently considers that there are:
- (a) **No horizontal effects in any relevant market:** The Transaction "is unlikely to result in horizontal effects [either unilateral or coordinated] in any relevant market, as there will remain several well-resourced competitors and the merging parties do not appear to be each other's closest competitor";¹
 - (b) **No conglomerate effects:** The Transaction "would not be likely to result in a substantial lessening of competition in any relevant market via... conglomerate effects";² and
 - (c) **No ability or incentive to foreclose Nintendo in any market:** "The merged entity would [not] have the ability or incentive to foreclose Nintendo in any market".³
- 2.2 Indeed, the NZCC has narrowed its inquiry to consider just two vertical theories, namely:
- (a) confirming the absence of any vertical foreclosure concerns in relation to the supply of video game consoles in New Zealand ("**console foreclosure theory**");⁴ and
 - (b) confirming the absence of any vertical foreclosure concerns in relation to cloud gaming in New Zealand ("**cloud gaming foreclosure theory**").⁵
- 2.3 The evidence set out in this Response, together with evidence the Parties have previously shared with the NZCC, definitively demonstrate that this Transaction will benefit consumers by bringing more games to more people, and that there is no credible prospect that a substantial lessening of competition could arise as a result of this Transaction in console or cloud gaming in New Zealand
- 2.4 For a transaction to give rise to any vertical foreclosure concerns there are **cumulative** preconditions that must **all** be met. Without each precondition satisfied, there can be no vertical foreclosure concern. **This Transaction does not meet any of the required preconditions.** Evidence in this Response demonstrates that there is:
- (a) **No ability to foreclose downstream competition:** The merged entity would not have substantial market power through "must have" content in the upstream game publishing market,⁶ and therefore would not have any ability to foreclose downstream competition;
 - (b) **No incentive to withhold Activision Blizzard content:** The merged entity would not have the incentive to withhold Activision Blizzard content from downstream console or cloud gaming competitors;

¹ Para [5], SOI.

² Para [81], SOI.

³ Footnote [25], SOI.

⁴ Para [121], SOI.

⁵ Para [86], SOI.

⁶ For ease of reference this Response refers to "game publishing", but as outlined in Microsoft's clearance application, game publishing includes game development and publishing.

PUBLIC VERSION

- (c) **No material impact on consumers' choices:** Even if Activision Blizzard content was withheld (either partially or fully), it would not materially alter consumers' console or cloud gaming purchasing decisions;
- (d) **No harm to competitors:** Any withholding of Activision Blizzard content would not cause PlayStation or other console or cloud gaming competitors any material impairment; and
- (e) **No harm to competition:** There are no circumstances that would allow Microsoft to increase downstream console or cloud gaming prices (or decrease quality or delay releases of new content) such that a substantial lessening of competition could result from the Transaction.

2.5 Key factors for the NZCC to consider in making its decision:

- (a) The SOI rightly states the Transaction is "unlikely to result in horizontal effects", including because of other "well-resourced competitors".⁷ This finding demonstrates that the merged entity would not have market power in any upstream game publishing market (a "substantial lessening of competition" and "substantial market power" are "two sides of the same coin").⁸
- (b) In relation to the console foreclosure theory:
 - (i) **Neither Nintendo nor PlayStation could be foreclosed:** The evidence demonstrates that neither Nintendo nor PlayStation could be foreclosed:
 - (aa) The NZCC is already of the view that Nintendo could not be foreclosed.⁹ Indeed, Nintendo already has a similar console share to Xbox in New Zealand¹⁰ without currently having *Call of Duty* ("**CoD**") content,¹¹ which means there are *not even any (hypothetical) adverse effects* on two of the three console providers in the New Zealand console market; and
 - (bb) Rather, the focus of any (hypothetical) adverse effect is on the largest competitor, PlayStation, which has had a long-standing and clear market leadership position both globally and in New Zealand. With [] of the installed base of consoles (vs. Xbox's []) in New Zealand in 2022, Sony has dubbed New Zealand "**PlayStation Nation**".¹² Input foreclosure has never been found where one merging party is one of more than a dozen suppliers competing in the (highly competitive) upstream market

⁷ Para [5], SOI.

⁸ NZCC Decision No. 452 *Paloma Industries Limited / Southcorp Water Heaters New Zealand Limited* (18 January 2002) at [58]; NZCC Decision No. 456 *Shell New Zealand Limited / The Gas Company Limited* (1 March 2002) at [68]; NZCC Decision No. 496 *Pfizer Laboratories Limited / Pharmacia Limited* (3 April 2003) at [94].

⁹ Footnote [25], SOI.

¹⁰ Nintendo had a share of [] based on installed base in New Zealand in 2022, while Microsoft's Xbox had []. [].

¹¹ As discussed below at paragraph 3.13(c), Microsoft has entered into a licence and distribution agreement with Nintendo (the Nintendo Contract) granting the right to access *CoD* on new Nintendo consoles [] subject to the closing of the Transaction.

¹² See for example:

- (13 February 2012). PlayStation3 Dominates 2012 Sales. Scoop. Retrieved from: https://www.scoop.co.nz/stories/CU1302/S00349/playstation3-dominates-2012-sales.htm?_gl=1*10naexb*_ga*OTY4OTc1OTc2LjE2Njc4ODE5NTA.*_ga_GGVMM3MB82*MTY4NjI4MzQ3My40Ni4xLjE2ODYyODUwNTIuNiAuMC4w
- (18 February 2014). Is NZ a PlayStation Nation...? FutureFive New Zealand. Retrieved from: <https://futurefive.co.nz/story/is-nz-a-playstation-nation>

(with *CoD*'s share in New Zealand less than []),¹³ and where the other merging party (Xbox) is significantly out-sized in the downstream market by a much larger, clearly leading competitor (PlayStation) which would continue to be the market leader even in a (hypothetical) attempted withholding of *CoD* from PlayStation;

- (ii) **CoD is not "must have"**: The evidence demonstrates that *CoD* is not "must have":
 - (aa) **Nintendo has competed successfully without CoD, and Sony has recognised it would not be foreclosed by the Transaction**: The NZCC's view that Nintendo could not be foreclosed due to its focus on other types of content and titles demonstrates that *CoD* (or any other Activision Blizzard title) is not "must have" for console competition (if Nintendo can differentiate or focus on first-party titles, then PlayStation could too – indeed, Sony has done so successfully and has recognised in its internal documents that it would not be foreclosed by the Transaction);¹⁴
 - (bb) **Most New Zealand Xbox users do not play CoD**: [] of Xbox users in New Zealand spent no time at all playing *CoD* in 2022 (and a further []¹⁵ spent less than 25% of their console gaming time playing *CoD*); and
 - (cc) **CoD is only a small proportion of PlayStation's sales**: *CoD* represented only []¹⁶ of PlayStation's sales worldwide;
- (iii) **Any foreclosure strategy would be financially destructive**: Other regulators, including the European Commission ("EC") and the UK Competition and Markets Authority ("CMA"), recognise that the merged entity would have no incentive to foreclose rival consoles because any console foreclosure strategy would be financially destructive to the merged entity, likely resulting in losses in the billions. The same holds true for a hypothetical New Zealand targeted foreclosure strategy, which would make no economic sense because of New Zealand's small size but would nonetheless be value destructive, as explained by economic analysis from Keystone Strategy ("**Keystone**") (enclosed).
- (c) In relation to the cloud gaming foreclosure theory:
 - (i) **Activision Blizzard content would not be available in the absence of the Transaction**: Activision Blizzard content is not available to consumers via cloud game streaming, and would not be in the Counterfactual, so there can be no input foreclosure concerns from an input that would remain unavailable in the absence of the Transaction;

¹³ See Figure 3 below - "Game publishing shares for console gaming in New Zealand (by revenue for 2021).

¹⁴ (23 June 2023). Sony's PlayStation chief privately said Microsoft's Activision deal wasn't about Xbox exclusives. The Verge. Retrieved from: <https://www.theverge.com/2023/6/22/23769790/sonys-playstation-chief-microsofts-activision-deal-xbox-exclusives-ftc>

¹⁵ Analysis of Xbox data (based on sample).

¹⁶ []

PUBLIC VERSION

- (ii) **Activision Blizzard content is not "must have":** Activision Blizzard content is not a "must have" input for cloud gaming providers:
- (aa) First, other cloud gaming providers compete successfully without Activision Blizzard content. Consider, for example, GeForce NOW which is estimated to be the largest cloud gaming provider in the world.¹⁷ It has successfully competed without offering any Activision Blizzard content through its service.
- (bb) Second, *CoD* accounts for limited usage in New Zealand on PC. The entire *CoD* franchise was estimated to account for just [] of 2022 PC game time in New Zealand, compared to *Roblox* at [] and *Fortnite* at []¹⁸ – again, input foreclosure concerns have never been found to arise from such a competitive upstream market – there could be no ability to foreclose;
- (iii) **No incentive to withhold Activision Blizzard content:** Microsoft is incentivised to distribute Activision Blizzard content as widely as possible and would have no incentive to foreclose cloud gaming providers, and it [];
- (iv) **The EC Commitments and Contracts comprehensively address any (hypothetical) vertical foreclosure concerns:** Microsoft's contracts with NVIDIA, Ubitus, and Boosteroid (the "**Contracts**") and the undertakings given to the EC (the "**EC Commitments**") are legally enforceable (including by the EC) and apply globally, including in New Zealand.¹⁹ Microsoft faces strong incentives to comply with its commitments. The EC Commitments and Contracts are subject to careful monitoring by an independent Monitoring Trustee, and any violations could result in significant penalties for breach (which could theoretically run in the billions of dollars). As such, they have even more certainty, and come with more built-in independent enforcement and oversight than the usual commercial contracts the NZCC has accepted as part of the Factual (including in May in *Connexa / 2degrees*). Microsoft's adherence to the Contracts and EC Commitments would also be highly visible to gamers, and to the contractual counterparties, the Monitoring Trustee, and the EC. Therefore, the NZCC should consider the EC Commitments and Contracts as part of a "pragmatic and commercial assessment of what is likely to occur in the future"²⁰ as they comprehensively address any (hypothetical) vertical foreclosure concerns; and
- (v) **The EC found the Transaction enhanced competition:** Indeed, as the EC concluded, the Transaction, together with the Contracts and EC Commitments, "represent a **significant improvement** for cloud gaming

¹⁷ Excluding "try-before-download" gaming on Xbox Cloud Gaming, see paragraph 4.23 below.

¹⁸ Source: Newzoo.

¹⁹ As the NZCC is aware, in addition to the Contracts, subsequent to the EC Commitments being submitted, Microsoft also entered into a commercial agreement with Nware.

²⁰ NZCC's *M&A Guidelines* at [2.35].

PUBLIC VERSION

as compared to the current situation"²¹ that will enhance competition in cloud gaming services.

- (d) In relation to the legal framework:
 - (i) the Court of Appeal has:
 - (aa) cautioned that the NZCC must not "start at shadows"²² in making clearance decisions (including because "acquisitions can increase efficiency and benefit the public" so it would "be inimical to the public interest"²³ for them to be declined on spurious theories);
 - (bb) said that the NZCC is required to "discard possibilities that only have remote prospects of occurring";²⁴ and
 - (cc) stated that having popular titles (in the analogous context of music albums) is not evidence of market power, but rather that jockeying for positions "in the charts" of titles is evidence of competition;²⁵ and
 - (ii) as noted, the NZCC must consider the Contracts and EC Commitments and their relevance to the competitive conditions in the Factual. The NZCC has the legal ability to take into account contractual commitments and overseas behavioural undertakings as part of the Factual, and the Contracts and EC Commitments apply to New Zealand.²⁶

2.6 In light of the evidence summarised above, and as set out in this Response, any vertical foreclosure concerns would be highly speculative, and would fall far short of any threshold to be considered "likely" under the required legal framework. The Transaction, together with the EC Commitments will benefit competition. Therefore, clearance must be granted.

²¹ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

²² *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

²³ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

²⁴ *Woolworths Ltd v Commerce Commission* (2008) 8 NZBLC 102, 128 (HC) at [122].

²⁵ *Tru Tone v Festival Records* [1998] 2 NZLR 352.

²⁶ As submitted in Microsoft's submission to the NZCC dated 24 April 2023.

PUBLIC VERSION

3. PART 3: NO CREDIBLE POSSIBILITY OF CONSOLE FORECLOSURE IN NEW ZEALAND

3.1 The SOI indicates that the NZCC is already largely satisfied that the Transaction is unlikely to result in a substantial lessening of competition in any New Zealand console market,²⁷ with the NZCC indicating that the references to console foreclosure theory were to seek more information to confirm the NZCC's position, namely on (a) the extent of console multi-homing in New Zealand, (b) the extent to which *CoD* (or other Activision Blizzard content) could drive console sales, and (c) the average spend of console gamers in New Zealand over the lifespan of a console.²⁸ That information is provided as follows.

Figure 1 – Response to specific information requests in the SOI

(A) Multi-homing is a significant feature of the console market

The evidence demonstrates that multi-homing is a significant feature of the console market. Namely:

- both Microsoft and third-party data estimates that approximately [] of PlayStation customers internationally also own an Xbox. These metrics are as of the fall of 2021 and are likely to have increased materially at the time of this submission;²⁹ and
- while Microsoft does not have specific estimates on console multi-homing in New Zealand, it has no reason to consider that the proportion in New Zealand would be materially different to its international estimates, in particular given the high rates of multi-homing in New Zealand's closest neighbour, Australia. Third party survey data specifically in relation to Australia indicates even higher rates of console multi-homing there, namely that in Australia [] of owners of an Xbox Series console also own a PlayStation 5, [] of Xbox Series owners also own a Switch, [] of PlayStation 5 owners also own an Xbox Series, and [] of PlayStation 5 owners also own a Nintendo Switch.³⁰

See further at paragraph 3.19(f) and the **enclosed** Keystone paper.

(B) Neither *CoD* nor other Activision Blizzard content are a material driver of console sales in New Zealand

The evidence demonstrates that Activision Blizzard content would not be a material driver of console sales in New Zealand. In particular:

- Microsoft commissioned a survey in the UK, which confirms it likely that only [] of PlayStation gamers in the UK would actually switch to an alternative console if *CoD* was not available on PlayStation. Given PlayStation is even more popular in New Zealand than the UK (at [] of installed base in New Zealand, compared to [] in the UK), that figure would likely be even lower in New Zealand. Even the CMA's own survey of *CoD* gamers in the UK, which was considered an over-estimation,³¹ found that at most 24% of engaged *CoD* PlayStation gamers might divert away from PlayStation if *CoD* were no longer available on that platform. Microsoft has critiqued, in multiple submissions, the CMA's estimate of a 24% diversion rate as a significant over-estimation (Microsoft considers the true figure is closer to [] in the UK, correcting for the over-estimation in the CMA estimate);³²

²⁷ Para [121], SOI.

²⁸ Para [122], SOI.

²⁹ [] See further at footnote 236 below.

³⁰ Ampere Analysis survey of 2,000 individual in Q2 of 2023 in Australia.

³¹ See footnote 92 below.

³² Microsoft commissioned a survey in the UK which found it likely only [] of PlayStation gamers in the UK would actually switch to an alternative console if *CoD* was not available on PlayStation.

- Further demonstrating this:
 - *CoD*'s game publishing share on console in New Zealand is less than [], [] of Xbox gamers in New Zealand played no *CoD* during 2022, and a further [] spent less than 25% of their game time playing *CoD* during 2022. Xbox data also shows that between 2016 and 2022 [] of new Xbox gamers globally never played or purchased *CoD* content, only [] of gamers played *CoD* as their first game on their new Xbox console, and it is estimated that *CoD* represents only [] of PlayStation's sales worldwide.
 - PlayStation grew its console market share globally while Xbox had marketing exclusivity in relation to *CoD* titles between 2005 and 2015, and in New Zealand specifically during that period there is significant commentary (both from Sony and third parties) acknowledging PlayStation's market-leading position in New Zealand:
 - PlayStation "lead[ing] New Zealand hardware sales" and "remain[ing] particularly strong in the self-proclaimed "PlayStation Nation"" (2007);³³
 - PlayStation "lead[ing] console and software sales in New Zealand" (2009);³⁴
 - PlayStation "outperform[ing] other competitive game platforms, in both value and unit growth" in New Zealand (2010);³⁵
 - PlayStation "dominat[ing] 2012 sales", which "re-affirms New Zealand as a PlayStation Nation" (2013);³⁶
 - "PS3 and PS4 Sales Dominat[ing] in New Zealand" (2014);³⁷ and
 - "PlayStation 4 the No.1 selling home console for 2014" (2015).³⁸

See further at paragraphs 3.5(c), 3.16(a), 3.19(d) and the **enclosed** Keystone paper.

(C) The "Lifetime Value" of a console gamer demonstrates that any (hypothetical) targeted New Zealand foreclosure strategy would be unprofitable

In the ordinary course of business Microsoft calculates "Lifetime Value" ("LTV") for new console gamers, and these are usually calculated on a []. These LTVs are based on [], however, they provide the relevant indication of how profitable it is to sell an additional Xbox console in New Zealand. Based on the latest LTVs for New Zealand, a new Xbox purchase is expected to generate a [] of USD\$[].

See the **enclosed** Keystone paper, which provides more detail on this. That Keystone paper also demonstrates that even if a targeted New Zealand console foreclosure strategy could be said to be rational

³³ (17 December 2007). Sony leads New Zealand hardware sales - PlayStation Universe. PlayStation Universe. Retrieved from: <https://www.psu.com/news/sony-leads-new-zealand-hardware-sales/>

³⁴ (19 February 2009). PlayStation brand leads console and software sales. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU0902/S00359.htm>

³⁵ (11 February 2011). PlayStation3 delivers the industry's strongest 2010 results. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1102/S00268/playstation3-delivers-the-industrys-strongest-2010-results.htm>

³⁶ (13 February 2013). PlayStation3 Dominates 2012 Sales. Scoop. Retrieved from: https://www.scoop.co.nz/stories/CU1302/S00349/playstation3-dominates-2012-sales.htm?_gl=1*10naexb*_ga*OTY4OTc1OTc2LjE2Njc4ODE5NTA.*_ga_GGVMM3MB82*MTY4NjI4MzQ3My40Ni4xLjE2ODYyODUwNTluNjAuMC4w

³⁷ (17 February 2014). PS3 and PS4 Sales Dominate In New Zealand. PS3 And PS4 Sales Dominate in New Zealand. Just Push Start. Retrieved from: <https://www.justpushstart.com/2014/02/ps3-ps4-sales-dominate-new-zealand/>

³⁸ (20 March 2015). PlayStation@4 the No.1 selling home console for 2014. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1503/S00695/playstation4-the-no1-selling-home-console-for-2014.htm>

PUBLIC VERSION

(which it could not be given that New Zealand accounts for only [] of the global consoles worldwide and 0.06% of the world's population), based on these LTVs, the merged entity could never have a realistic prospect of recouping lost revenues from engaging in a targeted strategy of withholding *CoD* content from PlayStation. Recoupment would require [] of the *CoD* monthly average users ("**MAUs**") on PlayStation in a year in New Zealand to purchase an Xbox as a result of Microsoft's withholding of *CoD* (or at least [] if an over-estimation in the CMA's model is corrected). That level of required switching significantly exceeds any realistic level of potential gamer switching to Xbox as result of any withholding strategy. Therefore, the merged entity would not have any incentive to engage in such a strategy.

See further at paragraph 3.13(e) and the **enclosed** Keystone paper.

3.2 In addition to that specific information, this Response summarises the evidence demonstrating that there is no possibility of console foreclosure in New Zealand as a result of the Transaction.

3.3 In particular, as set out in paragraph 2.4 above, five cumulative preconditions must be met in order to establish that the Transaction gives rise to any possibility of console foreclosure in New Zealand. **None** of these preconditions are met, as evidenced further below.

(3A): The merged entity has no ability to foreclose rival consoles as it will not have a substantial degree of market power in the upstream game publishing market

3.4 The NZCC's *M&A Guidelines* state that a "firm is generally only able to foreclose competitors if it has **market power**"³⁹ (which the NZCC has referred to as requiring "must have"⁴⁰ or "essential" products).⁴¹

(3A1): The low market shares and lack of any horizontal concerns demonstrates that the merged entity does not have market power in game publishing

3.5 It is plain that neither Activision Blizzard, nor the merged entity, would have substantial market power in any upstream game publishing market:

- (a) First, the SOI says the Transaction is "unlikely to result in horizontal effects in any relevant market, as there will remain several well-resourced competitors and the merging parties do not appear to be each other's closest competitor".⁴² This demonstrates that the merged entity would not have market power in any upstream game publishing market as a result of the Transaction. In particular:
- (i) the NZCC has previously said that the concept of a "substantial lessening of competition" is inextricably entwined with the concept of "market power", which can be seen as "two sides of the same coin";⁴³ and
 - (ii) the NZCC's *M&A Guidelines*⁴⁴ and its merger decisions state, "[a] lessening of competition is generally the same as an increase in market power".

³⁹ NZCC's *M&A Guidelines* at [5.7]. [emphasis added]

⁴⁰ *Voyage Digital (NZ) Limited, Orcon Holdings Limited and Two Degrees Group Limited* [2022] NZCC 3 at [33].

⁴¹ *Trade Me Limited and PropertyNZ Limited* [2021] NZCC 11 at [106.2].

⁴² Para [5], SOI.

⁴³ NZCC Decision No. 452 *Paloma Industries Limited / Southcorp Water Heaters New Zealand Limited* (18 January 2002) at [58]; NZCC Decision No. 456 *Shell New Zealand Limited / The Gas Company Limited* (1 March 2002) at [68]; NZCC Decision No. 496 *Pfizer Laboratories Limited / Pharmacia Limited* (3 April 2003) at [94].

⁴⁴ NZCC's *M&A Guidelines* at [X6].

PUBLIC VERSION

Accordingly, given the NZCC is of the view that the Transaction is unlikely to result in any substantial lessening of competition in the game publishing market, it is self-evident that the merged entity would not have substantial market power in this upstream market.

- (b) Second, even if the NZCC were to focus just on game publishing for consoles:
 - (i) Activision Blizzard’s share in upstream game publishing on console is very minimal: [] by value globally in 2021, [] by value in New Zealand (and less than [], at [], if the NZCC were to focus just on *CoD*) in 2021. Those shares fall significantly short of any threshold where the NZCC would usually consider whether a firm has any market power.⁴⁵
 - (ii) Activision Blizzard is only one of many publishers with popular content, but certainly not the largest or the most popular in the broader, highly fragmented console publishing landscape. Popular titles released by other publishers in recent years include the following:

Figure 2 – Examples of popular console game franchises (and publisher)

FIFA (EA)	Apex Legends (EA)	Player Unknown Battlegrounds (EA)	Madden (EA)
Star Wars (EA)	The Legend of Zelda (Nintendo)	Super Mario (Nintendo)	Pokémon (Nintendo)
Red Dead Redemption (Take-Two)	Mafia (Take-Two)	Assassin’s Creed (Ubisoft)	Far Cry (Ubisoft)
The Last of Us (Sony)	Ghost of Tsushima (Sony)	Spider-Man (Sony)	Days Gone (Sony)
Battlefield (EA)	Need For Speed (EA)	Elden Ring (Bandai Namco)	The Tom Clancy Series (Ubisoft)
Animal Crossing (Nintendo)	Grand Theft Auto (Take-Two)	NBA2K (Take-Two)	Gran Turismo (Sony)
Final Fantasy (Square Enix)	Kingdom Hearts (Square Enix)	Fortnite (Epic)	Uncharted (Sony)

- (iii) Both at the publisher level (see Figure 3 below) and at the game title level (see **Appendix Six**) the evidence demonstrates the highly competitive nature of the market. For example, at the publisher level in New Zealand, Activision Blizzard’s share is lower than or similar to that of EA, Epic Games and Sony’s own in-house publishing (whose games are, with very limited exceptions, available only on PlayStation, exclusively). At the game title level, in 2021 Take-Two’s *NBA2K22* achieved the same revenue on console as *CoD: Black Ops Cold War* in New Zealand, and both of those titles had a share of just [] each, with a number of other popular titles from other game publishers, such as EA’s *FIFA 22*,

⁴⁵ As per NZCC’s *Misuse of Market Power Guidelines* (March 2022) at [45], recognising that market share is not a sole indicator of market power, “all other things being equal, the larger the sustained share of the market held by a firm, the more likely it is that the firm will have a substantial degree of market power”.

PUBLIC VERSION

Ubisoft's *Far Cry 6* and Take-Two's *Grand Theft Auto V* ([], []) and [], respectively) showing comparable shares and popularity.

Figure 3 – Game publishing shares for console games in New Zealand (by revenue for 2021)

[]

- (c) Third, the evidence demonstrates that the *CoD* franchise is not a “must have” product for downstream competition in console markets, nor does it have any sort of “market power”. For example:
 - (i) The SOI states that the NZCC has received industry feedback that it is not the case that “any one game title was a “must have””, and that any publisher is “only two weak releases away from the demise of a game franchise”.⁴⁶ That third party’s feedback is consistent with Microsoft’s view and experience in the industry.
 - (ii) The 2022 statistics available on the titles that New Zealand gamers play on Xbox also corroborate this view:
 - (aa) A large majority, [] (see Figure 4 below), of Xbox users did not spend *any* time playing a *CoD* title during the year.⁴⁷ Of all players on an Xbox console in New Zealand, [] either did not spend *any* time playing a *CoD* title during the year or spent only 0-25% of their total 2022 game time playing a *CoD* title.⁴⁸
 - (bb) The *CoD* franchise was estimated to account for less than [] of all console game time (with *Fortnite* (Epic Games) at [], *Grand Theft Auto* (Rockstar Games) at [], *NBA* (Take-Two) at [], *Apex Legends* (EA) at [], and *FIFA* (EA) at []).⁴⁹

Figure 4 – Xbox games split by *CoD* share of yearly game time in New Zealand in 2022 (based on sample data)⁵⁰

[]

- (iii) In relation to *CoD* on PlayStation, the Parties estimate that:⁵¹
 - (aa) *CoD* represents only [] of Sony’s annual digital PlayStation sales worldwide.
 - (bb) in any given month, only a limited number of PlayStation gamers globally played *CoD* at all. Namely, in 2021, globally,

⁴⁶ Para [94], SOI.

⁴⁷ Source: Microsoft data.

⁴⁸ Source: Microsoft data.

⁴⁹ Source: Newzoo.

⁵⁰ Microsoft notes that gamers are included in the 0-25%, 25-50%, 50-75%, 75-100% bands as long as they spent any amount of time playing *COD* – regardless of how short. Restricting attention to gamers who played any *COD* title for at least, say, one hour would further increase the share that falls into the “no *CoD* game time” band.

⁵¹ []

less than [] of PlayStation’s MAUs in a given month played *CoD*.⁵²

- (iv) The recently released *Digital New Zealand 2022* report,⁵³ prepared in collaboration between Interactive Games & Entertainment Association ("IGEA")⁵⁴ and Bond University, shows that first person shooter ("FPS") games (of which *CoD* is such a title) are only the seventh most popular gaming genre in New Zealand (see Figure 5 below).

Figure 5 – IGEA 2022 research on popularity of different game genres in New Zealand⁵⁵



- (v) To show the disaggregated and highly competitive nature of the game publishing market another way, Figure 6 below is an illustration of the relationships between game publishers and the three main console providers. The top 10 game publishers are separately identified. It is compiled by reference to global game sales in 2021, with the width of the lines approximate to the scale of game sales via each console. As the NZCC will see, PlayStation gamers buy games from a wide range of publishers, with EA the largest supplier of games to PlayStation, followed by Ubisoft and Take-Two. As will be explained in paragraph 3.19(b) below, the fact that the blue band running from Sony to PlayStation is so wide is an indication of the extent to which Sony keeps its own published games almost entirely exclusive to PlayStation. In fact, Sony has 286 games which are exclusive to PlayStation including some of the most successful and popular titles.

⁵² While Sony does not publicly release data on MAUs in New Zealand, Microsoft expects this penetration to be broadly similar in New Zealand. For Xbox, for example, approximately [] of MAUs play *CoD* worldwide, and approximately [] do so in New Zealand.

⁵³ (25 October 2021). *Digital New Zealand 2022*. IGEA and Bond University. Retrieved from: <https://igea.net/wp-content/uploads/2021/10/DNZ22-Report-Final-25-10-21.pdf>

⁵⁴ Which as noted at paragraph 3.10 below is the "peak industry association" for the video game industry in New Zealand and Australia. See <https://igea.net/>

⁵⁵ (25 October 2021). *Digital New Zealand 2022*. IGEA and Bond University. Retrieved from: <https://igea.net/wp-content/uploads/2021/10/DNZ22-Report-Final-25-10-21.pdf>

PUBLIC VERSION

Figure 6 – Illustration of the relationships between game publishers and the three main console competitors (global game sales, 2021)

[]

- (d) Fourth, further reflecting that there are many popular gaming titles in New Zealand, "Compare The Market" analysed Google search data during March and April 2020 to determine the most popular games during the COVID-19 lockdowns. That data found *Roblox* to be the most popular game in New Zealand during that period (see Figure 7 below).⁵⁶ SuperDry also analysed Google search data in October 2021, and found that *Fortnite* was the most popular game in New Zealand at the time of that analysis (see Figure 8 below).⁵⁷

Figure 7 – Compare The Market research into Oceania's favourite video game during COVID-19 lockdowns (March 2020 – April 2020)⁵⁸

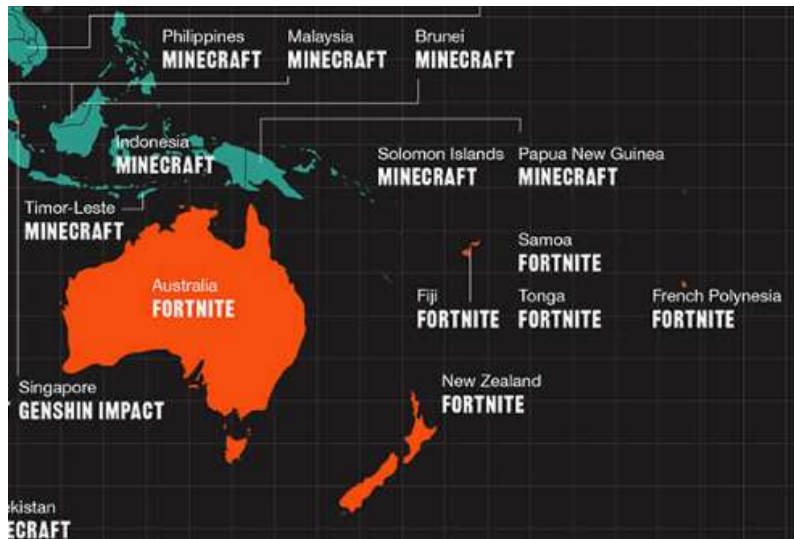


⁵⁶ *The 2020 Global Gamer Index*. Compare The Market. Retrieved from: <https://www.comparethemarket.com/broadband/news/global-gamer-index/>

⁵⁷ *The World's Favourite Video Game And Twitch Streamer Revealed*. Superdry. Retrieved from: <https://www.superdry.com/most-popular-gamers>

⁵⁸ *The 2020 Global Gamer Index*. Compare The Market. Retrieved from: <https://www.comparethemarket.com/broadband/news/global-gamer-index/> For completeness, Microsoft's *Minecraft*, which was listed as a popular game in other non-New Zealand countries, has been available broadly across platforms in New Zealand following Xbox's core strategy. See for example, as discussed in footnote 76 below, *Minecraft* is already accessible to New Zealand consumers through Nintendo consoles.

Figure 8 – SuperDry research into most popular video games (October 2021)⁵⁹



- (e) Sixth, as the NZCC will be aware, the standard framework applied by the Courts in New Zealand is that market power:
- (i) is the ability to profitably:⁶⁰
 - (aa) raise prices above the price that would exist in a competitive market; or
 - (bb) reduce non-price factors such as quality below competitive levels; and
 - (ii) can only be found where "there are barriers to entry or expansion which protect [the firm] from effective rivalrous reaction to the exercise of its market power",⁶¹ as "the threat of or the happening of new entry or expansion" is sufficient to constrain a firm from having any market power.⁶²

Even just looking at the number of game publishing studios in New Zealand, the New Zealand Game Developers Association's ("**NZDGA**") annual independent survey says that there are more than 70 game development studios in the country, with revenue to the New Zealand game development studio having more than quadrupled between 2017 and 2022 (see Figure 9 below)⁶³ – which demonstrates there are no barriers to entry or expansion.

⁵⁹ *The World's Favourite Video Game And Twitch Streamer Revealed*. Superdry. Retrieved from: <https://www.superdry.com/most-popular-gamers>

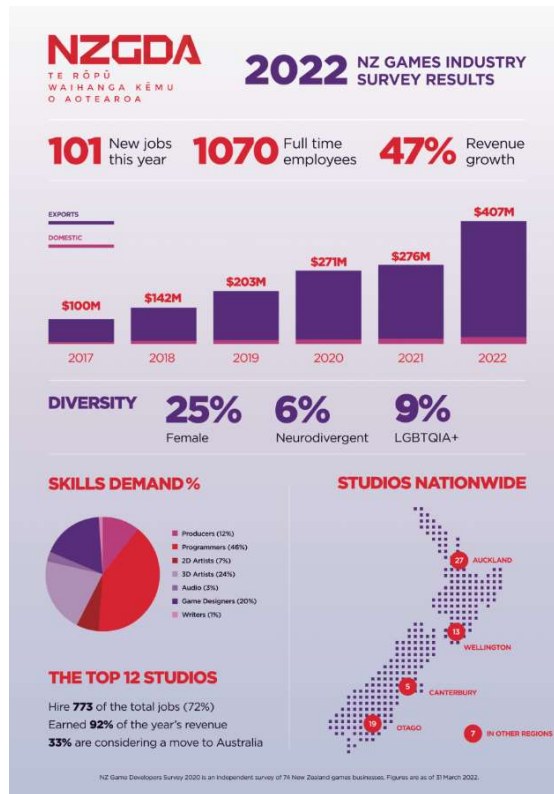
⁶⁰ *Air NZ Limited/Qantas Airways v Commerce Commission (No 6)* 2004 11 TCLR 347 at [42].

⁶¹ *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [86].

⁶² *Commerce Commission v Southern Cross Medical Care Society* (2001) 10 TCLR 269 (CA) at [93].

⁶³ New Zealand Game Developers Survey of 74 interactive media businesses. Figures are for the year ending 31 March 2022.

Figure 9 – NZDGA 2022 "NZ Games Industry Survey Results"⁶⁴



(3A2): A title being popular is not sufficient for vertical foreclosure concerns to arise; it must be essential to downstream competition

- 3.6 The SOI signals that "if access to Activision content is important for rivals to compete in the relevant downstream markets, and there are limited or no good substitutes available, then competition issues are more likely to arise".⁶⁵ However, the New Zealand console market dynamics demonstrate that Activision Blizzard content is neither essential nor important in order to compete in that market given Nintendo, who does not offer Activision Blizzard titles, holds an estimated [] share [].⁶⁶
- 3.7 The SOI appears to be relying on the statement that *CoD* is popular⁶⁷ (i.e. that gamers like *CoD*'s current product quality / price combination) to suggest that Activision Blizzard content may have upstream market power. However, this is merely reflective of a competitive product, not an indication of market power.
- 3.8 The market evidence demonstrates that there is ongoing rivalry for game sales, both globally and in New Zealand, through game publishing studios constantly needing to invest in achieving the right quality / price combination to attract customer sales. To achieve this, game publishers (both large and small) are constantly looking to develop new titles or product enhancements that resonate with consumers, with new game publishers launching

⁶⁴ New Zealand Game Developers Survey of 74 interactive media businesses. Figures are for the year ending 31 March 2022.

⁶⁵ Para [88], SOI.

⁶⁶ In any event, as discussed below at paragraph 3.13(c), Microsoft has entered into a licence and distribution agreement with Nintendo (the Nintendo Contract) granting the right to access *CoD* on new Nintendo consoles [] subject to the closing of the Transaction.

⁶⁷ Para [93], SOI.

PUBLIC VERSION

continuously, and developer talent readily able to move between game publishers as part of that competitive dynamism. For example:

- (a) EA has said in relation to the next release of its football gaming title (previously called *FIFA*, now *FC*), that it has been focusing on "how can we do more for the players, more for the fans, how can we offer them more modalities to play. How can we bring more partners into the game, how can we expand beyond the bounds of the traditional game".⁶⁸ This demonstrates EA's constant focus on innovating and achieving a quality / price combination that resonates with consumers.
- (b) In February 2023 (by way of just one example) it was announced that "[e]xperienced developers from a variety of AAA game studios have come together" to launch a new gaming studio, called Wildlight Entertainment.⁶⁹

Experienced developers from a variety of AAA game studios have come together to form Wildlight Entertainment. The fully-funded entertainment studio's team includes creators from some of the big IPs in the game industry, including Apex Legends, Call of Duty, and Titanfall.

Wildlight's initial post on Twitter mentions that the team has big dreams of creating an epic shooter IP. This does not come as a surprise, as the team has lots of prior experience with AAA FPS titles. Dusty Welch, who previously worked at Respawn and Activision Blizzard, will be at the helm of the brand-new studio.

3.9 Equally, even recognised game franchises can have titles that do not achieve the same sales / consumer resonance as previous instalments. For example, Activision Blizzard in its Second Quarter 2022 Financial Results noted "Activision's second quarter segment revenue and operating income declined year-over-year, reflecting lower engagement for the Call of Duty franchise", with that prompting Activision Blizzard to make "gameplay improvements... that were well received by players".⁷⁰

3.10 In New Zealand specifically, this ongoing rivalry for game sales is illustrated in the week-by-week "Top 10" games data collated by the IGEA (which is the "peak industry association" for the video game industry in New Zealand and Australia).⁷¹ This IGEA data shows that different game titles, produced by different publishers, are constantly moving in and out of the "Top 10" in New Zealand on a weekly basis, thus underscoring the contestability of a competitor's position on an ongoing basis. This is illustrated in the graph in Figure 10 below, for the period February to May 2023. Graphs for additional periods, and the underlying data itself (as published on the IGEA website), are **enclosed** as **Appendices One** and **Two** respectively.

⁶⁸ (17 May 2023). EA Sports FC release date rumours: All you need to know about 'FIFA 24'. RadioTimes.com. Retrieved from: <https://www.radiotimes.com/technology/gaming/ea-sports-fc-release-date/>

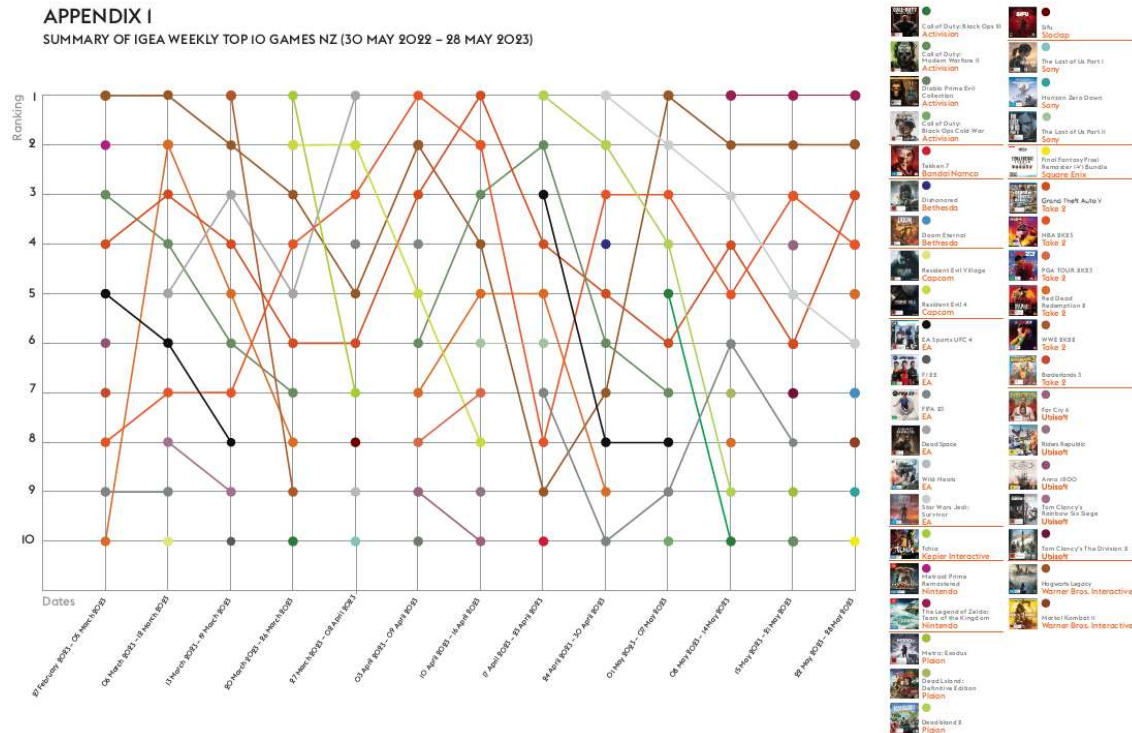
⁶⁹ (17 February 2023). Ex-Apex Legends, Call of Duty, and Titanfall talent forms Wildlight Entertainment. Mobicidictum. Retrieved from: <https://mobicidictum.com/game-industry/ex-apex-cod-talent-forms-wildlight-entertainment/>

⁷⁰ Activision Blizzard Announces Second Quarter 2022 Financial Results. Retrieved from: <https://investor.activision.com/node/35551/pdf>

⁷¹ <https://igea.net/>

PUBLIC VERSION

Figure 10 – IGEA information on the week-by-week "top 10" gaming titles in New Zealand



3.11 This ongoing rivalry (reflected in the continued investment in new titles, product enhancements, entry of new studios, and the constant changing of titles "in the charts") demonstrates that no one title has market power or is "must have", and that the game publishing market is highly competitive. That conclusion needs to be drawn not only based on market realities, but also in light of the legal precedent in New Zealand given the Court of Appeal has said:

(a) in relation to music titles:⁷²

"the movement of albums in and out of the charts and their constantly shifting positions are clear evidence of the manner in which, and the extent to which, **substitution takes place**"

"With only a **modest share** of the overall album market (six percent) and a greater but still small share of the chart market and **abundant evidence of rivalrous behaviour** on the part of the distributors with major impacts on both the distribution and retail segments, any question of dominance in the position of RML in a wider market was **rightly rejected** by the High Court." [emphasis added];

(b) that a firm can only be found to have market power if there are significant barriers to entry.⁷³

3.12 Supplying an attractive product, in the context of a market:

⁷² *Tru Tone v Festival Records* [1998] 2 NZLR 352.

⁷³ *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577, 583-584. Tipping J accepted this approach in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 at p 755. [emphasis added]

PUBLIC VERSION

- (a) with a significant number of different game publishers, including many that have a larger market share than Activision Blizzard;
- (b) where those game publishers are constantly competing with each other to develop attractive content for consumers; and
- (c) where titles are constantly moving in and out of the charts,

is not reflective of market power. Therefore, it is not credible to conclude as a matter of fact, economics, or New Zealand law, that Activision Blizzard (or *CoD*) has upstream market power in any game publishing market, nor therefore would the merged entity have any ability to foreclose downstream console competition.

(3B): The merged entity will not have the incentive to withhold Activision Blizzard gaming content (specifically *CoD*) from downstream console competitors

*(3B1): The merged entity will have no incentive to withhold relevant content from rival consoles, as Microsoft's clear incentives are to continue to distribute Activision Blizzard games, including *CoD* in particular, on other platforms like PlayStation*

3.13 The evidence also demonstrates that there is no way in which Microsoft could have the incentive to withhold *CoD* from other console competitors, such as PlayStation. That is for the following reasons:

- (a) First, as the SOI acknowledges,⁷⁴ doing so would immediately impair the value of the acquired asset. Withholding *CoD* from Sony post-Transaction would not be profitable for Microsoft. Microsoft's modelling of Activision Blizzard's value forecasts an average USD\$[] annual revenue from distributing *CoD* on PlayStation between 2023 and 2032. By comparison, the overall top line net revenue from the Xbox gaming business in FY 2022 was []. At a high level, withholding *CoD* from PlayStation would imply writing off the equivalent of [] of current total annual revenue of Microsoft's Xbox business. The model shows that anticipated future revenues from *CoD* on PlayStation account for [] of the overall value of the deal for Microsoft. To offset such certain losses, Microsoft would need to be able to count on a strong prospect of inducing commensurate benefits to its Xbox business in other ways. In particular, it would have to be the case that withholding *CoD* from PlayStation would lead enough PlayStation gamers to divert to Xbox with sufficient likelihood. However, it was demonstrated through survey evidence that at most [] of existing PlayStation gamers could possibly have diverted to Xbox when considering purchasing a new console. The position expressed consistently by Microsoft, in both public and private engagements with regulators since January 2022, is that it is simply unthinkable that Microsoft would give up approximately [] of its total revenue with certainty and write off [] of the value of the acquired asset, for the uncertain prospect of diverting no more than [] of gamers who would have purchased a PlayStation to purchase an Xbox instead. The EC's and the CMA's findings (see further at paragraph 3.13(d) below) confirm Microsoft's position.
- (b) Second, the position outlined above is also definitively the case in relation to New Zealand. In 2022, almost []% of the average MAUs in New Zealand for *CoD* played on Sony's PlayStation console, and only []% did so on Xbox (see Figure 11 below). The rest played on PC. Given PlayStation's position and percentage of

⁷⁴ Para [119], SOI.

CoD MAUs in New Zealand is even higher than in other jurisdictions, this further demonstrates that a withholding strategy in New Zealand would be even more value destructive than elsewhere (including those jurisdictions that already have concluded such a strategy would be irrational).

Figure 11: CoD Monthly Active Users (MAUs) by Platform, 2022⁷⁵

Console	Global		UK		New Zealand		Europe	
	MAUs (m)	%	MAUs (m)	%	MAUs (m)	%	MAUs (m)	%
PlayStation	[]	[]	[]	[]	[]	[]	[]	[]
Xbox	[]	[]	[]	[]	[]	[]	[]	[]
PC	[]	[]	[]	[]	[]	[]	[]	[]
Total	[]	[]	[]	[]	[]	[]	[]	[]

- (c) Third, Microsoft has entered into a licence and distribution agreement with Nintendo granting the right to access CoD on new Nintendo consoles [] (the "**Nintendo Contract**").⁷⁶ The Nintendo Contract applies worldwide (excluding China), including in New Zealand, and ensures that CoD will be available on the Nintendo eShop and operable on Nintendo consoles.⁷⁷ Having entered into the Nintendo Contract, any (hypothetical) strategic driver for foreclosing content to PlayStation is removed (i.e. Activision Blizzard content could not be exclusively available on Xbox regardless of any console foreclosure strategy), and so any potential gains from any (hypothetical) foreclosure strategy would not exist (i.e. as consumers would have an alternative choice – namely, Nintendo). The NZCC's assessment of the Transaction needs to take the Nintendo Contract into account as the NZCC makes its "pragmatic and commercial assessment of what is likely to occur in the future".⁷⁸
- (d) Fourth, any full console foreclosure theory has been **comprehensively rejected** by other regulators, including the EC and the CMA.⁷⁹ For example:
 - (i) The EC said: "Microsoft **would have no incentive to refuse to distribute Activision's games to Sony, which is the leading distributor of console games** worldwide, including in the European Economic Area ('EEA') where there are four Sony PlayStation consoles for every Microsoft Xbox console bought by gamers. Indeed, Microsoft would have strong incentives to continue distributing Activision's games via a device as popular as Sony's PlayStation."⁸⁰
 - (ii) The CMA conducted a straightforward, yet thorough, incentive analysis comparing Microsoft's gains and losses from a (hypothetical) strategy where CoD would be withheld from PlayStation. Based on diversion

⁷⁵ Source: Activision Blizzard data

⁷⁶ Three of Microsoft's top ten games – *Minecraft*, *The Elder Scrolls* and *Doom* – are already accessible to New Zealand consumers through Nintendo consoles. The Nintendo Contract is therefore consistent with Microsoft's overall gaming business strategy to maximise content distribution, and bring as many games to as many gamers as possible.

⁷⁷ This is conditional on the Transaction completing.

⁷⁸ NZCC's *M&A Guidelines* at [2.35].

⁷⁹ Other regulators also expressly rejected any partial console foreclosure strategy, with the CMA, for example, finding that "the Merged Entity would not have the ability to materially weaken PlayStation through partial foreclosure strategies". See: CMA's *Anticipated acquisition by Microsoft of Activision Blizzard, Inc. Final report*. (26 April 2023) at [7.307].

⁸⁰ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. *EU Commission*. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705 [emphasis in original]

ratios estimated by means of a survey of *CoD* gamers on PlayStation and on the LTV of a new Xbox gamer, the CMA compared Microsoft's losses from the foregone sales of *CoD* on PlayStation, against the margin recouped from gamers who switched from PlayStation to Xbox to continue playing *CoD*. The CMA's final conclusion was definitive: Microsoft's overall net loss was estimated in the range of billions of dollars over a five-year time period.⁸¹ Specifically:

- (aa) "[W]e found that making *CoD* exclusive to Xbox would result in significant financial losses for Microsoft over a five-year time period. Given the magnitude of those losses, we placed considerable weight on this quantitative evidence."⁸²
 - (bb) "Overall, our model suggests that it would not be financially profitable for the Merged Entity to engage in a total foreclosure strategy."⁸³
 - (cc) "We have, therefore, concluded that the Merged Entity will not have the incentive to engage in total foreclosure of PlayStation in the market for console gaming services in the UK".⁸⁴
- (e) Fifth, as the SOI acknowledges,⁸⁵ there is no prospect of a "targeted" console foreclosure strategy on a geographic basis. Microsoft would have no incentive to forego sales of *CoD* on PlayStation in New Zealand: this would accrue no benefit to Microsoft in the broader competition space for gaming consoles. In the (hypothetical) event that Microsoft were to withhold *CoD* from PlayStation only in New Zealand, it would have a *de minimis* impact on Sony's overall competitiveness, let alone present a threat of foreclosure on a global basis. Demonstrating this:
- (i) in 2022, consoles installed in New Zealand were estimated to account for only [] of the overall global installed base of consoles worldwide; and
 - (ii) New Zealand's population accounts for only 0.06% of the world's population.⁸⁶

Accordingly, as the SOI acknowledges,⁸⁷ any (hypothetical) withholding of *CoD* in New Zealand could not have any impact on PlayStation more broadly. Sony would continue to have the ability to compete globally and in New Zealand as a result of its global success in console gaming.

To further demonstrate why a (hypothetical) targeted New Zealand foreclosure could not make sense, and (as noted at paragraph 2.5(b)(iii) above) to respond to the SOI's request for information on "the diversion of NZ gamers and the extent to which *CoD* and other Activision content drives sales of video game consoles"⁸⁸ and

⁸¹ []

⁸² CMA Final report at [56].

⁸³ CMA Final report at [7.346].

⁸⁴ CMA Final Report at [7.400]

⁸⁵ Para [122.2], SOI.

⁸⁶ (2023). *New Zealand Population*. Worldometer. Retrieved from: <https://www.worldometers.info/world-population/new-zealand-population/#:~:text=The%20current%20population%20of%20New,the%20latest%20United%20Nations%20data>.

⁸⁷ Para [122.2], SOI.

⁸⁸ Para [122.2], SOI.

PUBLIC VERSION

"the average spend of console gamers in New Zealand over the lifespan of the relevant console",⁸⁹ Microsoft engaged Keystone⁹⁰ to conduct vertical arithmetic for any potential targeted New Zealand foreclosure (as **enclosed**).

That analysis demonstrates that for Microsoft to have the incentive to foreclose *CoD* from PlayStation, it would be necessary for [] of the *CoD* MAUs on PlayStation in a year in New Zealand to purchase an Xbox as a result of Microsoft's withholding of *CoD* (or at least [] if an over-estimation in the CMA's model is correct).⁹¹ Given even the CMA's own survey estimates that at most 24% of engaged *CoD* PlayStation gamers in the UK would have switched away from PlayStation if *CoD* were to not be available on PlayStation, this demonstrates that Microsoft would have no such incentive to do so. Furthermore:

- (iii) Microsoft has critiqued, in multiple submissions, the CMA's estimate of a 24% diversion rate as a significant over-estimation (Microsoft considers the true figure is closer to [] in the UK, correcting for the over-estimation in the CMA estimate);⁹² and
- (iv) as PlayStation has an even more popular presence in New Zealand in console gaming compared to the UK (at [] of installed based in the UK, compared to [] of installed base in New Zealand), it can only be expected that the percentage of PlayStation *CoD* gamers in New Zealand that would switch away from PlayStation if *CoD* were not to be available on PlayStation would be even lower than the [] estimated based on the CMA 24% diversion in the UK (and lower than the [] estimated by Microsoft in the UK).

The same conclusion can be drawn with respect to other non-*CoD* Activision Blizzard content given that only [] of Activision Blizzard's total [] share in console game publishing in New Zealand is non-*CoD* content.

- (f) Sixth, in addition to the vertical economic evidence above, it is necessary for the NZCC's analysis to reflect that any (theoretical) console foreclosure strategy would be demonstrably inconsistent with Microsoft's strategy:
 - (i) as the NZCC heard through its market feedback, "Microsoft has traditionally been a "good actor" in this space and there is no indication that they would look to "lock games away"";⁹³
 - (ii) as noted at paragraph 3.13(c) above, Microsoft has entered into the legally binding Nintendo Contract to bring *CoD* to Nintendo by [];
 - (iii) Microsoft has made it clear in numerous public statements that it would not withhold *CoD* from PlayStation, and that it will continue to make *CoD* and other popular Activision Blizzard titles available for purchase on any

⁸⁹ Para [122.3], SOI.

⁹⁰ Keystone (Strategy, Economics & Technology Consulting). See further: <https://www.keystone.ai/>

⁹¹ See the explanation in the enclosed Keystone paper.

⁹² See footnote 112 below for further information on the flaws in the CMA's survey. In order to draw more representative and complete conclusions, Microsoft commissioned a new survey in the UK (the "**YouGov Survey**") which found that likely only [] of PlayStation gamers in the UK would actually switch to an alternative console if *CoD* was not available on PlayStation.

⁹³ Para [95], SOI.

PUBLIC VERSION

platform on which they are currently available.⁹⁴ Any alternative approach would risk huge gamer backlash to Microsoft, including due to those public commitments. As recently as last week, Phil Spencer, CEO of Microsoft Gaming, testified to the US District Court under oath that "I'm making a commitment standing here that we will not pull Call of Duty - it is my testimony - from PlayStation;"⁹⁵ and

- (iv) it is Microsoft's intention that post-Transaction, *CoD* will be available on more consoles, not fewer. Indeed, Microsoft has also reached out to Sony to offer continued availability of *CoD* on PlayStation for the next 10 years []. The cross-platform and cross-device strategy which Microsoft is pursuing with the Transaction does not involve withdrawing, withholding from, or degrading *CoD* on PlayStation, and the loss of cross-play functionality that such a strategy would entail would result in significant consumer backlash, both by undermining the *CoD* experience on Xbox and undermining the relevance of *CoD*.

- 3.14 Accordingly, any (theoretical) console foreclosure strategy, at a time when Microsoft is shifting from a device-centric to a more flexible gamer-centric model, would be inconsistent with its rationale for the Transaction, Microsoft's financial incentives (i.e. console foreclosure would cause losses in the billions of dollars), its long-term strategy, its public statements, its legally binding Nintendo Contract, its reputation with gamers, and its contractual offers to Sony.

(3B2): The merged entity will not have any incentive to partially foreclose or degrade CoD on PlayStation as that would be contrary to Microsoft's incentives

- 3.15 The SOI says the NZCC is also testing whether the Transaction could result in partial foreclosure of gaming console rivals by:⁹⁶
- (a) making certain *CoD* versions exclusive to Xbox console;
- (b) making new versions of *CoD* exclusive to Xbox for a certain period of time by delaying release on other platforms; or
- (c) restricting availability of gameplay or console features on other platforms.
- 3.16 As is the case for a total console foreclosure theory of harm, Microsoft would not have the incentive to engage in any (attempted) partial foreclosure strategies by degrading the *CoD* experience on PlayStation. Demonstrating this:

⁹⁴ See, for example:

- (9 February 2022). Adapting ahead of regulation: a principled approach to app stores. Brad Smith – President & Vice Chair, Microsoft. Retrieved from: <https://blogs.microsoft.com/on-the-issues/2022/02/09/open-app-store-principles-activision-blizzard/>
- (20 January 2022). Tweet from Phil Spencer – CEO, Microsoft Gaming. Retrieved from: <https://twitter.com/XboxP3/status/1484273335139651585>
- (1 September 2022). Gaming for everyone, everywhere: our view on the Activision Blizzard acquisition. Phil Spencer - CEO, Microsoft Gaming. Retrieved from: <https://blogs.microsoft.com/on-the-issues/2022/09/01/gaming-everyone-everywhere/>

⁹⁵ (24 June 2023). Xbox Boss Phil Spencer Tells Judge 'I will do what it takes' to keep Call of Duty on PlayStation. IGN. Retrieved from: <https://www.ign.com/articles/xbox-boss-phil-spencer-tells-judge-i-will-do-what-ever-it-takes-to-keep-call-of-duty-on-playstation> Microsoft CEO Satya Nadella made the same commitment to the court under oath - See: (29 June 2023). Microsoft CEO Satya Nadella testifies in trial over Activision merger that Call of Duty will '100%' stay on PlayStation. Fortune. Retrieved from: <https://fortune.com/2023/06/29/microsoft-ceo-satya-nadella-testifies-trial-activision-merger-call-of-duty-100-stay-playstation/>

⁹⁶ Para [91.2], SOI.

PUBLIC VERSION

- (a) There is no evidence to suggest that PlayStation users would switch from PlayStation to Xbox under a (hypothetical) partial console foreclosure strategy. Historically, partial exclusivity has not materially impacted competition in consoles.

Both Microsoft's and Sony's consoles have, at one time or another, benefited from forms of content exclusivity in relation to *CoD*.⁹⁷ This has never marginalised – let alone foreclosed – PlayStation or Xbox.

In fact, PlayStation grew its console market share while Xbox had marketing exclusivity in relation to *CoD* titles between 2005 and 2015 – indeed, see the New Zealand media from that period, summarised in **Appendix Five**, referring to:

- (i) PlayStation "*lead[ing] New Zealand hardware sales*" and "*remain[ing] particularly strong in the self-proclaimed "PlayStation Nation"*" (2007);⁹⁸
- (ii) PlayStation "*lead[ing] console and software sales in New Zealand*" (2009);⁹⁹
- (iii) PlayStation "*outperform[ing] other competitive game platforms, in both value and unit growth*" in New Zealand (2010);¹⁰⁰
- (iv) PlayStation "*dominat[ing] 2012 sales*", which "*re-affirms New Zealand as a PlayStation Nation*" (2013);¹⁰¹
- (v) "*PS3 and PS4 Sales Dominat[ing] in New Zealand*" (2014);¹⁰² and
- (vi) "*PlayStation 4 the No. 1 selling home console for 2014*" (2015).¹⁰³

There is also an ongoing emergence of many popular games (including *Fortnite*, *PUBG*, *Apex Legends*, *Elden Ring* and many others) benefiting from the growing popularity of coding and the increasingly easier access to digital distribution platforms for developers (for example, via accepting platforms like ID@Xbox or Steam), which renders the importance of the *CoD* franchise even lower again in today's context, relative to the period where Sony's share grew despite Xbox's exclusive marketing rights.¹⁰⁴

⁹⁷ Previously, these *CoD* marketing arrangements have included: (i) exclusive console marketing arrangements following the release of new titles and downloadable content; (ii) priority access to new maps ; (iii) exclusive access to the online alpha version of the game and access to the beta version of the game 5 days earlier than gamers on Xbox consoles or PC; (iv) game bonuses such as extra "tier skips" on the battle pass; (v) the ability to access additional "experience points" (e.g. through exclusive events); and (vi) certain in-game character customisations and content bundles.

⁹⁸ (17 December 2007). Sony leads New Zealand hardware sales - PlayStation Universe. PlayStation Universe. Retrieved from: <https://www.psu.com/news/sony-leads-new-zealand-hardware-sales/>

⁹⁹ (19 February 2009). PlayStation brand leads console and software sales. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU0902/S00359.htm>

¹⁰⁰ (11 February 2011). PlayStation3 delivers the industry's strongest 2010 results. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1102/S00268/playstation3-delivers-the-industrys-strongest-2010-results.htm>

¹⁰¹ (13 February 2013). PlayStation3 Dominates 2012 Sales. Scoop. Retrieved from: https://www.scoop.co.nz/stories/CU1302/S00349/playstation3-dominates-2012-sales.htm?_gl=1*10naebx*_ga*OTY4OTc1OTc2LjE2Njc4ODE5NTA.*_ga_GGVMM3MB82*MTY4NjI4MzQ3MjY4NDI4LjE2ODYyODUwNTUuNjAuMC4w

¹⁰² (17 February 2014). PS3 and PS4 Sales Dominate In New Zealand. Just Push Start. Retrieved from: <https://www.justpushstart.com/2014/02/ps3-ps4-sales-dominate-new-zealand/>

¹⁰³ (20 March 2015). PlayStation@4 the No. 1 selling home console for 2014. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1503/S00695/playstation4-the-no-1-selling-home-console-for-2014.htm>

¹⁰⁴ Even in the period where these arrangements benefited PlayStation, Xbox – which already trailed PlayStation two-to-one in consoles sold – was not foreclosed.

PUBLIC VERSION

- (b) Attempting to do so would be extremely costly for Xbox, given gamers benefit significantly from cross-play which relies on a consistent experience across the gamer base and therefore across platforms. In addition, partial foreclosure would result in significant gamer backlash damaging both the Xbox and *CoD* brands and risking the loss of gamers to other popular franchises. The brand damage, and the loss of *CoD* MAUs would not be offset by the *de minimis* conversion to Xbox from PlayStation by only the most "hardcore" *CoD* fans.
- (c) A partial console foreclosure strategy could not have the effect of substantially lessening competition, given PlayStation's leading console position both globally and in New Zealand (see paragraph 3.22 below).

3.17 Therefore, as PlayStation is unlikely to lose any material number of gamers and suffer only a *de minimis* decrease in revenue and margin, whilst at the same time incurring significant costs and gamer loss and backlash, it is evident that Microsoft would not have the ability to leverage a partial foreclosure strategy to affect Sony.¹⁰⁵ That is consistent with the EC's conclusion that:

[]¹⁰⁶

[]¹⁰⁷

[]¹⁰⁸

(3C): Any (hypothetical) withholding of Activision Blizzard content would not materially alter consumers' console purchasing decisions

3.18 There is no evidence that the withholding of Activision Blizzard content would materially alter consumers' choice of which console to purchase.

3.19 Indeed, as outlined at paragraph 3.5 above, *CoD* content is just one title in a highly competitive game publishing market, and the downstream market is characterised by a number of titles being exclusive to certain consoles. There is no evidence that *CoD* (or any other Activision Blizzard content) could materially alter consumers' console purchasing decisions. Reflecting this:

- (a) Exclusive content has been a feature of the gaming industry for decades, with:
 - (i) exclusive content being just one of a number of ways in which console providers compete with each other in the downstream console markets, with other factors gamers consider when deciding to purchase a specific console including "*Performance (i.e., Speed), Content (i.e., Breadth of titles and Backwards compatibility), and Value*"; and
 - (ii) console providers competing vigorously with each other in the context of various different titles being exclusive to different console platforms at any given point in time, which is an area where Microsoft is significantly lagging behind Sony (as further detailed below, both Sony and Nintendo have a considerable quantity of exclusive content).

¹⁰⁵ []

¹⁰⁶ []

¹⁰⁷ []

¹⁰⁸ []

PUBLIC VERSION

- (b) For Sony in particular, exclusive titles accounted for approximately [] of consumer spend on PlayStation (compared to the equivalent first-party figure on Xbox of just []) over the period 2019 – 2021. In 2021, PlayStation had at least 286 exclusive titles generating revenue (as compared to Xbox's 59 exclusive titles), and Sony already has a range of exclusive first-party games that rank among the best-selling worldwide and will continue to attract users to its platform:
- (i) This includes prominent titles such as *The Last of Us* (which Sony – through its media production business – has recently turned into a hugely successful TV series¹⁰⁹), *Ghost of Tsushima*, *God of War*, *Spider-Man*, *Demon's Souls* and the *Final Fantasy* Series. In addition, a number of Sony's exclusive games – *Spider-Man*, *Ghost of Tsushima*, and *Ratchet and Clank* – featured in PlayStation's top 20 games by consumer spend on PlayStation game purchases in 2021.¹¹⁰
- (ii) PlayStation also has a spate of exclusive titles lined up for launch in 2023, including *Spider-Man 2*, *Wolverine*, *Horizon: Call of the Mountain*, and *Final Fantasy XVI*.
- (iii) The EC's investigation in *Microsoft / ZeniMax* also confirmed that Microsoft "holds the least attractive exclusive content compared to Sony and Nintendo consoles".¹¹¹
- (c) Xbox data shows that between 2016 and 2022, [] of new Xbox gamers never played or purchased *CoD* content and only [] of gamers played *CoD* as their first game on their new Xbox console. These numbers are inconsistent with the idea that *CoD* drives console platform adoption.
- (d) As referred to at paragraph 3.13(e)(iii) above, Microsoft commissioned a survey in the UK, which confirms it likely that only [] of PlayStation gamers in the UK would actually switch to an alternative console if *CoD* was not available on PlayStation. Given PlayStation is even more popular in New Zealand than the UK, that figure would likely be even lower in New Zealand. Furthermore, even the CMA's survey found that, at most, 24% of all PlayStation gamers might divert away from PlayStation if *CoD* were no longer available on that platform. While, as noted,

¹⁰⁹ The show has been a critical success, being cited as "*one of the finest TV shows you will see this year*" and with over 7.5 million viewers watching as of February 6, 2023. The success of the television series has translated into considerable video game sales.

¹¹⁰ Sony also continues to amass content via acquisition:

- In July 2022 Sony completed the acquisitions of Bungie, maker of *Destiny 2*, for USD\$3.6 billion and Montreal-based Haven Studios, co-founded by an *Assassin's Creed* co-creator.
- During its fiscal year ending in March 2022, Sony also acquired five studios including Returnal developer Housemarque, PC port specialist Nixxes Software, UK-based Firesprite, *Demon's Souls* remake studio Bluepoint, and Seattle-based Valkyrie. (29 August 2022). Sony spins up PlayStation Mobile division, plans major push to phones. Polygon. Retrieved from: <https://www.polygon.com/23326796/playstation-mobile-sony-buys-savage-game-studios>
- Further, it invested in Discord, Devolver Digital, and live service game platform AccelByte, and just this week Sony announced the acquisition of mobile game developer Savage Game Studios (which is developing a AAA shooter game for mobile devices), and that it would be increasing its ownership stake (alongside Tencent) in From Software (the studio behind *Dark Souls* and *Elden Ring*). (31 August 2022). Sony acquires a bigger stake in Elden Ring developer From Software. GameSpot. Retrieved from: <https://www.gamespot.com/articles/sony-acquires-a-bigger-stake-in-elden-ring-developer-from-software/1100-6507013/>
- On 21 April 2023 it was announced that Sony is acquiring Firewalk Studios to "build an "original AAA multiplayer game" for PlayStation 5. (21 April 2023). PlayStation acquires Firewalk Studios, which is building an "original AAA multiplayer game". The Verge. Retrieved from: <https://www.theverge.com/2023/4/20/23691580/sony-playstation-firewalk-studios-acquisition-bungie>

¹¹¹ Case M.10001 - *Microsoft / Zenimax* at [105].

PUBLIC VERSION

Microsoft considers that the CMA's figure is a significant over-estimate,¹¹² it is still significantly below any level where any foreclosure concerns could ordinarily be found to arise even if Microsoft had the incentive to engage in a console foreclosure strategy (which it would not, for the reasons outlined at Sub-Part 3B above).

- (e) Furthermore, gamers often multi-home across gaming consoles. As recognised by the EC in *Microsoft / ZeniMax*, “a material proportion of console video game players multi-home and own multiple consoles or play games on both PC and console”.¹¹³ Multi-homing gamers who already own an Xbox are not impacted by a withholding of Activision Blizzard content from PlayStation and/or Nintendo. Even to the extent such consumers do have a desire to access content that is exclusive to a particular console, they would not need to "switch away" from, say, their PlayStation or Nintendo console to access such content, instead they would simply purchase the exclusive content for their Xbox console.
- (f) In response to the SOI's specific request for data on "the extent to which NZ gamers 'multi-home' with respect to gaming consoles",¹¹⁴ Microsoft notes that:
 - (i) both Microsoft and third-party data estimates that approximately []¹¹⁵ of PlayStation customers internationally also own an Xbox. These metrics are as of the Fall of 2021 and are likely to have increased materially at the time of this submission;¹¹⁶ and
 - (ii) while Microsoft does not have specific estimates on console multi-homing in New Zealand, it has no reason to consider that the proportion in New Zealand would be materially different to its international estimates, in particular given the high-rates of multi-homing in New Zealand's closest neighbour, Australia. Third party survey data specifically in relation to Australia indicates even higher rates of console multi-homing there. Namely, in Australia, [] of owners of an Xbox Series console also own a PlayStation 5, [] of Xbox Series owners also own a Switch, [] of PlayStation 5 owners also own an Xbox Series, and [] of PlayStation 5 owners also own a Nintendo Switch;¹¹⁷

3.20 Accordingly, there is no evidence that the withholding of Activision Blizzard content would materially alter consumers' choice of which console to purchase.

¹¹² The CMA's survey was flawed in its methodology – for example, it only canvassed responses from “engaged” *CoD* gamers (defined as those who played the game for more than ten hours in a year and/or spent more than \$100 in-game purchases) who are the most likely to “switch” if they lost access to *CoD*. This methodology significantly distorted the pool of potential respondents and reduced the ability to draw conclusions about the wider PlayStation user base. In contrast, the new YouGov Survey commissioned by Microsoft in the UK canvassed responses from a wider, unrestricted group of PlayStation users (i.e. not limited to “engaged” *CoD* gamers). Using the YouGov Survey, Microsoft has calculated the likely diversion rate to be even lower, at only [] of PlayStation gamers.

¹¹³ Case M.10001 – *Microsoft / Zenimax* at [75].

¹¹⁴ Para [122.1], SOI.

¹¹⁵ []

¹¹⁶ []

¹¹⁷ Ampere Analysis survey of 2,000 individual in Q2 of 2023 in Australia.

PUBLIC VERSION

(3D): Any (hypothetical) withholding of Activision Blizzard content would not cause consumers to switch consoles to such an extent that there could be a substantial impact on PlayStation's competitiveness

- 3.21 In assessing the possibility of a vertical console foreclosure theory, the NZCC must find that the harm to a competitor (Sony) would be of such a significant degree that it would result in substantial harm to overall competition in the downstream market. In other words, a finding of foreclosure of Sony requires more than just a concern that Sony may suffer some "harm" (or inconvenience), but rather that there would be a "*substantial weakening*" of PlayStation's ability to compete in the context of the overall market.
- 3.22 That concern is simply not credible. In particular, it is inconceivable that any (hypothetical) withholding of *CoD* could realistically impact PlayStation's competitiveness in the downstream console markets, either globally or in New Zealand, given:
- (a) the evidence outlined in paragraph 3.5 above that *CoD* content is just one title in a highly competitive game publishing market, that the downstream console market is a market characterised by a number of titles being exclusive to certain consoles, and there is no evidence that *CoD* content could materially alter consumers' console purchasing decisions (and furthermore, there is evidence that [] which further rebuts any notion of *CoD* being a "must have" title for PlayStation's competitiveness);¹¹⁸ and
 - (b) PlayStation is the leading gaming platform and it has the brand, content, and community to maintain this position, and a vast array of tools at its disposal in order to respond to any (hypothetical) console foreclosure strategy. Demonstrating this:
 - (i) PlayStation's success across decades and multiple generations of consoles, both globally and in New Zealand, confirms its enduring market leadership over other console platforms, demonstrating significant consumer popularity, attractiveness, and brand loyalty across time;
 - (ii) indeed, Sony itself has named New Zealand the "**PlayStation Nation**",¹¹⁹ with multiple references in the media, and Sony's own media releases, to PlayStation "dominating" console sales in New Zealand, with console shares up to "65%" and headlines stating that "**Kiwis prefer PlayStation to Xbox**" (see **Appendix Five**); and
 - (iii) it is implausible that Sony, the largest console player in the market (with an installed base share of [] worldwide in 2022 and [] in New Zealand) in consoles vs. [] for Xbox worldwide and [] in New Zealand)¹²⁰ could be foreclosed by losing access to *CoD*, which

¹¹⁸ 2022 Xbox Telemetry data.

¹¹⁹ See for example:

- (13 February 2012). PlayStation3 Dominates 2012 Sales. Scoop. Retrieved from: https://www.scoop.co.nz/stories/CU1302/S00349/playstation3-dominates-2012-sales.htm?_gl=1*10naexb*_ga*OTY4OTc1OTc2LjE2Njc4ODE5NTA.*_ga_GGVMM3MB82*MTY4NjI4MzQ3My40Ni4xLjE2ODYyODUwNTluNjAuMC4w
- (18 February 2014). Is NZ a PlayStation Nation...? FutureFive New Zealand. Retrieved from: <https://futurefive.co.nz/story/is-nz-a-playstation-nation>
- (5 December 2014). Say it ain't 4... "fastest selling" PS4 leads the Kiwi nation. Computerworld. Retrieved from: <https://www2.computerworld.co.nz/article/561238/say-it-ain-t-4-fastest-selling-ps4-leads-kiwi-nation/>

¹²⁰ []

PUBLIC VERSION

represents only approximately [] of the upstream market of game publishing for consoles worldwide (and just [] in New Zealand).¹²¹

- 3.23 Furthermore, as the NZCC is aware, Microsoft has offered Sony continued access to *CoD* for the next 10 years []. The fact that Sony has rejected Microsoft's offers, itself demonstrates that Sony is not concerned about the prospect of there being a detrimental impact on its ongoing competitiveness (and rather is evidence that Sony is acting to protect its own, self-proclaimed, market "dominance").

(3E): The merged entity could not increase console prices, or decrease console quality, such that a substantial lessening of competition in the console market could result

- 3.24 Even if there were to be a material impact on PlayStation (which there would not be, for the reasons outlined above), for there to be any vertical foreclosure concerns the NZCC's *M&A Guidelines* set out that "[t]he ultimate question is whether the competition lost from potentially foreclosed competitors is sufficient to have the likely effect of substantially lessening competition in light of the remaining competitive constraints".¹²²
- 3.25 In assessing whether there could be a substantial lessening of competition the NZCC needs to ask "whether competition will be substantially lessened on the basis of **whether consumers in the relevant market(s) are likely to be adversely affected in a material way**"¹²³ (described in the SOI as whether "consumers (gamers) may be harmed through higher prices, lower quality, or less innovation" in the market).¹²⁴ In assessing this question, the Courts have set out that the NZCC needs to consider the "**competitive process**" (not focus on protecting any individual competitors or inconvenience to Sony),¹²⁵ i.e. the question is whether the competitive "process through which firms compete to win customers based in price, quality, service or any other dimension of competition"¹²⁶ is substantially lessened.
- 3.26 In other words, the question is whether:
- (a) this competitive process between PlayStation, Nintendo, and Xbox in the New Zealand console market will be significantly reduced if Activision Blizzard content is not available on PlayStation (i.e. that as a result of, say, *CoD* not being on PlayStation, whether PlayStation, Nintendo, and Xbox's competition to win customers in the overall console market based on price, quality, and service would be significantly reduced), in circumstances where the SOI states there are *not even any (hypothetical) adverse effects* on two of the three competitors in that market (Nintendo and Xbox);¹²⁷ and
 - (b) following that, Xbox would be able to significantly increase its prices such that console prices to consumers across the entire New Zealand console market would increase by 4 – 5% (or a commensurate reduction in console quality)¹²⁸ more than there otherwise would be in the Counterfactual and:

¹²¹ Based on the Parties' sales data, Microsoft's internal market intelligence data based on third-party sources (Newzoo, SuperData, Nielsen, PwC, IDG, IDC), public financials of other publishers and Wall Street Equity Research (with Geographic allocation based on Nielsen data).

¹²² NZCC's *M&A Guidelines* at [5.9].

¹²³ NZCC's *M&A Guidelines* at [2.24]. [emphasis added]

¹²⁴ Para [87], SOI.

¹²⁵ *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* CA181/04 [23 June 2005] at [242], per Glazebrook J. [emphasis added]

¹²⁶ NZCC's *M&A Guidelines* at [2.18].

¹²⁷ Footnote [25], SOI.

¹²⁸ NZCC's *M&A Guidelines* at footnote [37].

PUBLIC VERSION

- (i) customers would not react to that supra-competitive console pricing (or reduction in console quality) by switching to PlayStation or Nintendo; and
- (ii) PlayStation and Nintendo would not identify that Xbox's prices are above competitive levels (or quality is below competitive levels) and develop effective counterstrategies to attract consumers to their platforms (such as console quality enhancements, developing alternative content, alternative content exclusives, or console price reductions); and
- (iii) therefore that Xbox's supra-competitive prices would durably persist for a long-term period – i.e. have more than just a short-term effect (noting the New Zealand Court precedent referred to at paragraph 6.2(a)(ii) below that "**short term effects are unlikely to be substantial**").¹²⁹

3.27 As demonstrated above, there is simply no prospect of the Transaction substantially lessening competition in the New Zealand console market. As the evidence demonstrates, there would be no material impact on the market leader, PlayStation (see Section 3D above), and as the SOI states that the NZCC does "not currently consider that the merged entity would have the ability or incentive to foreclose Nintendo in any market",¹³⁰ meaning the NZCC has already (largely) satisfied itself there will be no impact on the continued vigorous competition between Nintendo and Xbox.

(3F): Concluding comments on the console foreclosure theory of harm

3.28 The evidence, as set out in this Part 3, demonstrates that any possibility of a vertical console foreclosure in New Zealand can be comprehensively ruled out (as it has been by other regulators).

¹²⁹ *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* CA181/04 [23 June 2005] at [247], per Glazebrook J. [emphasis added]

¹³⁰ Para [25], SOI

PUBLIC VERSION

4. PART 4: NO CREDIBLE POSSIBILITY OF CLOUD GAMING FORECLOSURE IN NEW ZEALAND

- 4.1 The same framework set out above in relation to consoles also applies to any cloud gaming foreclosure theory.
- 4.2 Namely, for there to be any possibility of concerns about foreclosure in cloud gaming in New Zealand as a result of Microsoft acquiring Activision Blizzard's game publishing activities, the following cumulative preconditions must all be met:
- (a) cloud gaming would need to be a properly defined downstream market; and
 - (b) the merged entity would need to have a substantial degree of market power in the upstream game publishing market (i.e. the ownership of content that is "must have" for downstream cloud gaming competition) in order to have any ability to foreclose downstream cloud gaming providers; and
 - (c) in the Counterfactual, Activision Blizzard would make its gaming content available to cloud gaming providers (in order for there to be the possibility of any Transaction-specific effect); and
 - (d) in the Factual, the merged entity would have the incentive to withhold that content from other downstream cloud gaming providers (which needs to be assessed in light of both [], and the EC Commitments and Contracts); and
 - (e) the withholding of that Activision Blizzard content would need to materially alter consumers' decisions in relation to whether they use cloud gaming, and if so which provider; and
 - (f) the withholding of that content would cause consumers to switch cloud gaming providers to such an extent that other cloud gaming providers would be substantially impaired in terms of their ongoing competitiveness; and
 - (g) as a result of that impact on other cloud game streaming providers, Microsoft would be able to increase cloud gaming prices, or decrease quality, such that a substantial lessening of competition in a properly defined market could result (being an assessment that must be founded on credible evidence, not speculative "starting at shadows"¹³¹ theories).
- 4.3 **None of these preconditions** are met. This is set out further as follows.
- (4A): Cloud game streaming is not a separate market (it is a feature that provides an alternative means for gamers to access content in the broader game distribution market)**
- 4.4 The SOI invites submissions on whether it "is appropriate to define a separate market for cloud gaming".¹³² Neither the required legal framework, nor the evidence, supports any finding that there is a separate market in New Zealand for the "supply of cloud gaming services".
- 4.5 In particular, as the NZCC will be aware:

¹³¹ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

¹³² Para [71], SOI.

PUBLIC VERSION

- (a) The Commerce Act defines the term "market" as meaning a market in New Zealand for goods or services as well as other goods or services that are substitutable for them as a matter of "fact and commercial common sense".¹³³ This means that market definition is not decided by "differentiated offerings" (as suggested by the SOI),¹³⁴ but rather by real world substitution between goods / services.
- (b) Applying this approach, the NZCC has said that "[s]imilar products may have different attributes causing a price differential, and yet still be close enough in attributes to be a substitute product".¹³⁵
- (c) The High Court has made clear the problems with defining a market too narrowly (for example, by defining separate markets when products appear different, but are in fact substitutable).¹³⁶

4.6 Applying the required framework demonstrates that there is no distinct market for cloud gaming services. Cloud gaming is no more than a feature that provides an alternative means for gamers to access content on a device (i.e. they can purchase a physical disc, download or stream content). That is consistent with the findings of the EC, which has concluded on the basis of feedback from market participants, that the relevant market is an overall market for game distribution and that this market should not be segmented based on type of access (i.e. physical disc, downloading or streaming).

4.7 The following evidence further substantiates that there is no separate market for cloud gaming, and that it is just (a very small) part of the broader game distribution market.

(4A1): []

4.8 []. That includes the following:

- (a) []
- (b) []¹³⁷
- (c) []
- (d) []
- (e) []
- (f) []
- (g) []
- (h) []

4.9 []¹³⁸

¹³³ Section 3(1A), Commerce Act 1986.

¹³⁴ Para [62], SOI.

¹³⁵ NZCC Decision No. 574 *Fonterra Co-Operative Group Limited Kapiti Fine Foods Limited / United Milk Limited* (23 February 2006) at [93].

¹³⁶ *Brambles New Zealand Limited v the Commerce Commission And Anor* HC AK CIV2115-03 [24 October 2015] at [137].

¹³⁷ []

¹³⁸ []

PUBLIC VERSION

[].

4.10 [] the CMA's Final Report did not engage with feedback from such an array of market participants in considering the relevant market definition applicable for cloud gaming.

4.11 Furthermore, [], in its testimony to the US District Court,¹³⁹ Google accepted that its cloud gaming service, Stadia, competed with consoles and PC distribution platforms.¹⁴⁰

(4A2): The required analytical framework to market definition confirms that cloud gaming is part of a broader game distribution market

4.12 As set out in the NZCC's *M&A Guidelines*,¹⁴¹ the analytical approach to defining a market is whether and to what extent consumers would substitute to alternatives in response to a small but significant non-transitory increase in price (a "**SSNIP**"). Gaming is a differentiated market, and a view that cloud gaming offers certain differences or advantages in comparison to other forms of gaming (for example in comparison to native gaming) is not sufficient to define a separate market, especially if those advantages are not taken into account "in the round" of the disadvantages of cloud gaming (such as latency / lagging).

4.13 Rather, for an economic analysis to conclude that there is a separate market for cloud gaming, it must be that the degree of substitutability between cloud gaming and other forms of gaming access is so low that gamers would hardly "switch in or out" of cloud gaming in response to a change in pricing or distribution policies.

4.14 This assessment is made, as set out in the NZCC's *M&A Guidelines*,¹⁴² by means of the "hypothetical monopolist test" ("**HMT**") which poses the question: what would cloud gaming users do if the price of cloud gaming were to change by a SSNIP?

4.15 Applying that framework, and notwithstanding that cloud gaming is a nascent technology¹⁴³ (which means data on customers' behaviour in response to a change in prices or content availability is scarce), there is nonetheless clear evidence that cloud gaming is, and will remain, a substitute to native gaming for the foreseeable future. Namely:

(a) Cloud gaming is simply a delivery mechanism that provides users with an alternative way to access content on a device. The content provided is no different to what is available to download or purchase on physical disc. Gamers are not motivated by the location of the content or the means of delivery (e.g. whether they are using computing power locally or in the cloud). They instead choose a gaming experience based on whether it provides enjoyment at an attractive price point. Key factors that users consider include the subject matter of the game, storylines, graphical performance, speed (e.g. loading times and latencies), mechanics, game selection, and game cost. This is true for all gaming platforms, with streaming being no exception.

(b) As a matter of practicality, gamers only have so much leisure time for gaming. Inevitably any time spent on cloud gaming constrains the time available for native gaming, and vice versa – demonstrating inevitable constraints between them (i.e.

¹³⁹ Northern District of California in *Federal Trade Commission vs Microsoft*.

¹⁴⁰ (27 June 2023). The FTC consults a Google spokesperson, but the testimony favors Microsoft. Italy 24 Press French. Retrieved from: <https://news.italy24.press/technology/657612.html>

¹⁴¹ NZCC's *M&A Guidelines* at [3.17], [3.18] and [3.19].

¹⁴² NZCC's *M&A Guidelines* at [3.17], [3.18] and [3.19].

¹⁴³ As recognised in para [107], SOI.

PUBLIC VERSION

that a provider of cloud gaming needs to ensure its price and service offering is sufficiently competitive with native gaming, and vice versa, to attract gamers' leisure time).

- (c) The very fact that cloud gaming accounts for a small share of the gaming market (approximately 1% in 2022 worldwide) indicates that it is constrained by existing means to access games such as native gaming on console, PC, and mobile – either on a buy-to-play basis or on a subscription basis.
- (d) While one feature of cloud gaming is to allow gamers to access their preferred titles on multiple devices, it is also the case that:
 - (i) a gamer will need at least a device;
 - (ii) the overwhelming majority of cloud gaming (approximately 98%) happens on devices capable of offering a native experience (PC, console, and mobile);
 - (iii) data on the use of cloud gaming today does not support the existence of an emerging demand for cross-device gaming. For example, in 2022, Game Pass Ultimate subscribers (i.e. gamers on Xbox, PC, mobile, or other devices who have access to Xbox Cloud Gaming) played on average on [] devices worldwide and in New Zealand. This suggests that gamers primarily play on a single device regardless of whether they play natively or on cloud – and that therefore the native experience will continue to constrain their cloud gaming adoption; and
 - (iv) mobile devices have increasingly powerful processing capabilities, and numerous games are available for native gaming on mobiles. This means that mobile native gaming is already a highly popular alternative, giving it higher potential for further growth than cloud gaming.
- (e) It is easy to conclude that native gaming (subscription or buy-to-play based) and cloud gaming belong to the same market when considering the options available to gamers depending on the specific devices they use to access cloud gaming – namely:
 - (i) It is uncontroversial to conclude that gamers who access cloud gaming through consoles would in response, for example, to a SSNIP for cloud gaming services, revert to playing natively on their device – as they face no switching costs in relation to the purchase of additional hardware.
 - (ii) The same holds for gamers on gaming-compatible PCs. An NVIDIA GeForce NOW subscriber with a PC capable of running native PC games, for example, would likely readily switch to native PC gaming if NVIDIA were to increase its subscription price by 5% or 10% (the standard level for SSNIP tests in a HMT framework).¹⁴⁴
 - (iii) On mobile, as noted further at paragraph 4.15(d)(iv) above and paragraph 4.24(c) below, mobile devices have increasingly powerful processing capabilities, and numerous games are available for native gaming on mobiles, which indicates that mobile native gaming is already a highly

¹⁴⁴ For example, the NZCC's *M&A Guidelines* state at [3.18] that the NZCC "generally use[s] 5% as the SSNIP".

popular alternative, and far more popular on mobile devices than cloud gaming. Demonstrating this:

- (aa) more than 90% of all gamers globally play games natively on their phones by downloading games (by contrast, cloud gaming currently only accounts for ~1% of worldwide consumer gaming spend); and
 - (bb) only a small fraction (approximately []) of MAUs on Xbox Cloud Gaming in April 2023 were on mobile devices or "other" (i.e. not PC, console, or mobile) devices.
- (iv) The last type of device remaining are low(er)-end PCs – i.e. PCs that cannot "run" more advanced games. While mobile devices are expected to be a greater area of growth for gaming than low-end PCs (for the reasons outlined above), the question for users of low-end PC devices is whether they would have different switching patterns than gamers on gaming-compatible PCs simply because they would lack the option to natively play some of the games that they could play via cloud gaming. However, from an economics of demand perspective, it is highly unlikely that a user on a low-end PC would not also own a device capable of playing at least some of the games they like if they do in fact have a demand for gaming. Furthermore, while it may be the case that some gamers will be financially constrained in their purchase of a device, it is worth noting that the cost of a subscription to Pentanet's GeForce NOW offering in Australia and New Zealand for a period of two years is close to AUD\$240 (~NZD\$260)¹⁴⁵ for "Casual" gaming, or AUD\$480 (~NZD\$521)¹⁴⁶ for "Priority" gaming,¹⁴⁷ which is more expensive than the cost in New Zealand of an Xbox Series S (currently available for NZD\$449 at Mighty Ape, NZD\$459 at Noel Leeming¹⁴⁸ and The Warehouse,¹⁴⁹ or NZD\$479 at JB Hi-Fi).¹⁵⁰ This is especially telling when [].

More importantly again, the available evidence indicates that the use of cloud gaming among low-end PCs is limited and that low-end devices are unlikely to be a significant source of demand moving forward. Microsoft's data on Windows users shows that the share of low-end PCs used for playing games on cloud is lower than the share of low-end PCs used for playing any form of gaming (which is expected, as the decision to purchase a PC that cannot be used to play higher-end games is itself evidence of a lack of demand from such consumers for gaming functionalities). Even

¹⁴⁵ Exchanged at NZD\$1.00 = AUD\$0.92.

¹⁴⁶ Exchanged at NZD\$1.00 = AUD\$0.92.

¹⁴⁷ Pentanet's GeForce NOW service in New Zealand is AUD\$83.76 for 2 years for "Basic" gaming, AUD\$240 for 2 years for "Casual" gaming, or AUD\$480 for "Priority" gaming. See: <https://cloud.gg/>

¹⁴⁸ Xbox Series S 512GB Console at The Warehouse (as at 26 June 2023): \$459. Retrieved from: https://www.thewarehouse.co.nz/p/xbox-series-s-512gb-console/R2708604.html?&&&qclsrc=aw.ds&&qclid=Cj0KCQjwy9-kBhCHARIsAHpBjHh-q-NGt5qih0tX0WspjnJKk993P_aiKd6skgL2AHmZfwcDzx88VAaAvqNEALw_wcB&qclsrc=aw.ds

¹⁴⁹ Xbox Series S Gilded Hunters Console Bundle at Noel Leeming (as at 26 June 2023): \$459. Retrieved from:

https://www.noelleeming.co.nz/p/xbox-series-s-gilded-hunters-console-bundle/N215908.html?&&&qclsrc=aw.ds&&qclid=Cj0KCQjwy9-kBhCHARIsAHpBjHh-q-NGt5qih0tX0WspjnJKk993P_aiKd6skgL2AHmZfwcDzx88VAaAvqNEALw_wcB&qclsrc=aw.ds

¹⁵⁰ Xbox Series S 512 GB Console Gilded Hunters Bundle at JB Hi-Fi (as at 26 June 2023): \$470. Retrieved from:

https://www.jbhifi.co.nz/gaming/games/Gaming-Consoles/xbox-series-s/xbox-series-s-512gb-console-gilded-hunters-bundle/418047/?qclid=Cj0KCQjwy9-kBhCHARIsAHpBjHh-q-NGt5qih0tX0WspjnJKk993P_aiKd6skgL2AHmZfwcDzx88VAaAvqNEALw_wcB

more importantly, data shows that **in New Zealand** the share of low-spec PCs among PCs who play cloud is even lower than those used to play games. This implies that, to the extent there is any (albeit very small []) demand for cloud gaming), that demand is from mid- and high-end PCs, which are capable of running native games and can readily substitute between native gaming and cloud gaming (and, therefore, the two are competitive constraints on one another, and will remain so for the foreseeable future).

Figure 12: Share of PC users playing games by hardware in New Zealand¹⁵¹

[]

4.16 Accordingly, applying the standard SSNIP / HMT tests, and the required "commercial common sense substitutability" framework, it is clear that there is substitution and competitive constraint between cloud gaming and native gaming and, therefore, that they fall within the same market.

(4A3): Xbox Cloud Gaming users switching in and out of cloud services is strong evidence that cloud gaming is part of the overall market for digital game distribution

4.17 Moreover, the observed evidence of Xbox Cloud Gaming users is consistent with cloud gaming being part of the market for the digital distribution of games. In particular:

- (a) Xbox Telemetry data shows that Xbox Cloud Gaming gamers constantly switch in and out of cloud gaming while continuing to play games natively on their Xbox and PCs. For example, as Figure 13 below shows, [] of gamers on Xbox Cloud Gaming, both globally and in New Zealand, churn out of the service within seven days.¹⁵² The Telemetry data also shows that such gamers go back to playing games natively, either downloading the game via Game Pass or buy-to-play.
- (b) In 2022, in New Zealand, of those gamers churning out of Xbox Cloud Gaming:
 - (i) on console, [] continued to play on the Xbox console via Game Pass;
 - (ii) on any device, [] continued to play on Game Pass on console or PC via Game Pass.

Conversely, of those starting to play Xbox Cloud Gaming:

- (i) on console, [] continued to play on the Xbox console via Game Pass;
- (ii) on any device, [] continued to play on Game Pass on console or PC via Game Pass.

Figure 13 – Retention rate for the first six months following a session on Xbox Cloud Gaming

[]

(4A4): Cloud gaming is a feature of console gaming

¹⁵¹ Source: Windows telemetry data. Note: data excludes enterprise licences.

¹⁵² Gamers log into Xbox Cloud Gaming using their Xbox or Microsoft account and user ID. Microsoft can, therefore, via Telemetry data see where these gamers go after they stream.

PUBLIC VERSION

- 4.18 In addition, consistent with the Parties' view that cloud gaming is part of the broader market for digital distribution of games, console-based cloud gaming providers offer cloud gaming services as a feature of their overall console offering. Namely:
- (a) Xbox offers cloud gaming as part of its Game Pass subscription service, with cloud gaming being just one of the features included in the Game Pass Ultimate tier (alongside a number of native gaming features).¹⁵³ In other words, Microsoft does not sell cloud gaming as a standalone offering that is separate from its native gaming offering.
 - (b) PlayStation offers cloud gaming as part of its PlayStation Plus Premium tier, as one of several "service component" features.¹⁵⁴
 - (c) Nintendo, powered by Ubitus' white label cloud gaming service,¹⁵⁵ uses cloud gaming as a way to distribute games that are not available on the Switch – e.g. *Resident Evil Village*, *Hitman 3*, and *Control*, etc.¹⁵⁶
- 4.19 While some cloud gaming providers do offer the ability to play games on devices other than consoles, as noted at paragraph 4.15(d) above, in 2022 Game Pass Ultimate subscribers [], meaning that in practice they only used cloud streaming on their console given that the majority of Game Pass Ultimate gamers that played video games on Xbox Cloud Gaming are Xbox console gamers. In particular, the data shows that in New Zealand approximately [] of those Game Pass Ultimate gamers that used the cloud gaming feature in New Zealand accessed Xbox Cloud Gaming []. By contrast, the share of cloud gaming time among Game Pass Ultimate subscribers that have accessed the cloud gaming service [] in 2022 is [] of total cloud gaming time worldwide, and [] in New Zealand. The [] Xbox Cloud Gaming time, [] worldwide and [] in New Zealand at [], is accessed [].
- 4.20 This is consistent with the conclusion that cloud gamers are not unique or different from console gamers that play video games through subscription services or via buy-to-play. This in turn implies that there is no separate "pool" of demand for cloud gaming services. Cloud gaming and native gaming on console draw demand from the very same gamers and are, by definition, part of the same market.
- 4.21 Moreover, the use of Xbox Cloud Gaming remains extremely limited. In 2022, Xbox Cloud gaming hours were [] – of Xbox console gaming hours globally. In New Zealand, where Xbox Cloud Gaming has been available since June 2022, Xbox Cloud Gaming hours were []

¹⁵³ Additional features of Game Pass Ultimate include (1) the ability to play Game Pass' library games on both console and PCs; (2) access to Xbox Live Gold including additional games and access to Xbox's online multiplayer feature; and (3) Electronic Arts' EA Play, which includes access to Electronic Arts' titles on console and PC (<https://www.xbox.com/en-US/xbox-game-pass?xr=shellnav#join>). Xbox launched its cloud gaming feature, Xbox Cloud Gaming, in late 2021, approximately eighteen months ago. Xbox Cloud Gaming for PC was launched in October 2021 and for Xbox One and Series X|S consoles in November 2021. Prior, it was in "beta testing" and available only on mobile devices and for invitation-only.

¹⁵⁴ <https://www.playstation.com/en-us/ps-plus/>.

¹⁵⁵ (1 November 2020) Cloud tech firm Ubitus working with developers to bring more cloud games to the Nintendo Switch. My Nintendo News. Retrieved from: <https://myintendonews.com/2020/11/01/cloud-tech-firm-ubitus-working-with-developers-to-bring-more-cloud-games-to-the-nintendo-switch/>.

¹⁵⁶ See for example:

- Enjoy All the Horrors of the Resident Evil Series on your Nintendo Switch™ with Cloud Versions of the Games! Retrieved from: <https://www.residentevil.com/switch/cloud/en-asia/>
- (28 October 2020). 'Control' and 'Hitman 3' had to Switch via cloud streaming. Engadget. Retrieved from: https://www.engadget.com/control-hitman-3-switch-cloud-streaming-155306591.html?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAA GMpp2HhKlc4KkPes7qDwGEyK2HgcjKvttov-J6YNA0btUsiQ7Q6SIZS8uFkmlLsoG56UZ3kVpjiUm7F_w9WVPGN9fm9pbE4iW9NL5V86gzb0GNppzzPNsB0TnlWcDeCo_FZNqM7E-1UOJibmZzawIQn912FQQLdL2JGJuCGv4Xf

PUBLIC VERSION

Xbox gaming hours.¹⁵⁷ There are on average approximately [] monthly active users of Xbox Cloud Gaming in New Zealand across all devices, which accounts for [] Xbox MAUs in New Zealand.

- 4.22 Xbox Telemetry data is also consistent with Xbox's cloud gaming feature being rarely, if at all, the reason consumers purchase a subscription to Xbox Game Pass Ultimate, which is Xbox's only subscription service that contains Xbox's cloud gaming feature. In 2022, [], globally [], of Xbox gamers who had a Game Pass Ultimate subscription accessed the Xbox cloud gaming feature (the figure for New Zealand was also []). Moreover, globally, Game Pass Ultimate subscribers spent [], of their Game Pass Ultimate gaming time on Xbox Cloud Gaming.
- 4.23 Moreover, those Game Pass Ultimate subscribers who do use Xbox Cloud Gaming primarily utilise the feature to test a video game before downloading it ("try-before-download"). On Xbox Cloud Gaming in New Zealand, approximately [] of the usage on console is to try a game before downloading it. In other words, [] of the time that Xbox users played Xbox Cloud Gaming, they did so to play a game they never played before and to either continue playing it exclusively on a native basis (after having downloaded it) or they never played the game again (neither natively nor on cloud, nor on any other device they own).

(4A5): The factors identified in the SOI as potentially justifying a separate market for cloud gaming are incorrect – as a matter of both fact and law

- 4.24 The SOI identified a number of factors that it said could potentially justify a separate market for cloud gaming. However, none of those identified factors are grounds (either as a matter of fact or law) for justifying a separate market for cloud gaming. That is for the following reasons:
- (a) Supply-side reasons do not justify a separate market: The suggestion in the SOI that cloud gaming could be a separate market based on supply-side substitutability fails to take into account, as set out by the High Court, that the "commercial common sense" test in the Commerce Act means that a focus on "demand side and supply side substitutability", without the necessary "commercial reality check", risks markets being defined too narrowly.¹⁵⁸ In this instance, the necessary commercial reality check is that gamers can (and do) readily switch between cloud gaming and native gaming meaning that irrespective of considerations of supply side substitutability, there is competitive constraint and substitutability on the demand side (meaning that they are in the same market – see further at paragraphs 4.15 – 4.16 above).
- (b) Payment methods are common across cloud and native gaming, and do not justify a separate market: The suggestion in the SOI that cloud gaming could be a separate market "as it may allow [gamers] to access a greater catalogue of content without the additional high up-front cost of individual games"¹⁵⁹ fails to recognise that such a payment method is not a different or defining feature of cloud gaming versus native gaming, namely:
- (i) a number of cloud gaming offerings operate a "bring your own game" model (for example, GeForce NOW), whereby gamers can only stream games that they have purchased upfront; and

¹⁵⁷ Computed as Xbox Cloud Gaming console hours as a share of all Xbox hours from June 2022 – December 2022 inclusive.

¹⁵⁸ *Brambles New Zealand Limited v the Commerce Commission And Anor* HC AK CIV2115-03 [24 October 2015] at [81].

¹⁵⁹ Para [69], SOI.

PUBLIC VERSION

- (ii) a number of native gaming offerings enable gamers to download and play games without an up-front purchase fee – for example, Xbox Game Pass offers a multi-title gaming subscription service that is premised on native playing of such games. The vast majority of game time on Xbox Game Pass involves games which are downloaded and played natively and it is only the highest tier of Xbox Game Pass, Game Pass Ultimate that includes cloud gaming as an additional means of accessing games (and as noted, []).

Any suggestion that payment model is a distinguishing feature between cloud gaming and native gaming is fundamentally incorrect, nor is it any impediment to switching. Furthermore, while the SOI says that consumers using two different payment models simultaneously may imply they are "complements",¹⁶⁰ the High Court has previously said that "concurrent use" of two products can be used as evidence that they "are sufficiently close substitutes to be considered as part of the same market".¹⁶¹

Both the European Commission and, indeed, the CMA, have concluded that different payment methods do not give rise to separate markets.¹⁶² The CMA concluded this on the basis that it had seen:¹⁶³

no evidence that consumers choose between different MGS in isolation or the rate of switching between different MGS. Rather, we see that Xbox and SIE market their MGS as part of their overall console package, and these are therefore competitive parameters of their offering.

- (c) Hardware purchasing does not justify a separate market: The SOI suggests that cloud gaming could be a separate market because "gamers no longer need to pay the upfront cost associated with purchasing the relevant hardware".¹⁶⁴ But this fails to reflect the evidence provided at paragraph 4.15(d)(iii) above that while one feature of cloud gaming is to allow gamers to access their preferred titles on multiple devices, it is also the case that a gamer will need at least a device, and consumers overwhelmingly game through a single device that is, in any event capable of offering a native experience.

That statement in the SOI ignores that that the improvements in processing capabilities of smartphones make them a more attractive alternative to cloud gaming. [], mobile devices have increasingly powerful processing capabilities making more than 90% of all gamers globally comfortable to play games natively on their phones by downloading games (by contrast, cloud gaming currently only accounts for ~1% of worldwide consumer gaming spend). Reflecting the ever increasing processing capabilities of mobile devices, there are many mobile versions of popular console / PC video games available for download from mobile phone App stores for native gaming on mobile devices. For example, Figure 14 below shows a selection of titles available for download for native gaming on iPhones from the Apple App Store (amongst many other titles).

¹⁶⁰ Para [59], SOI.

¹⁶¹ *Brambles New Zealand Limited v the Commerce Commission And Anor* HC AK CIV2115-03 [24 October 2015] at [136].

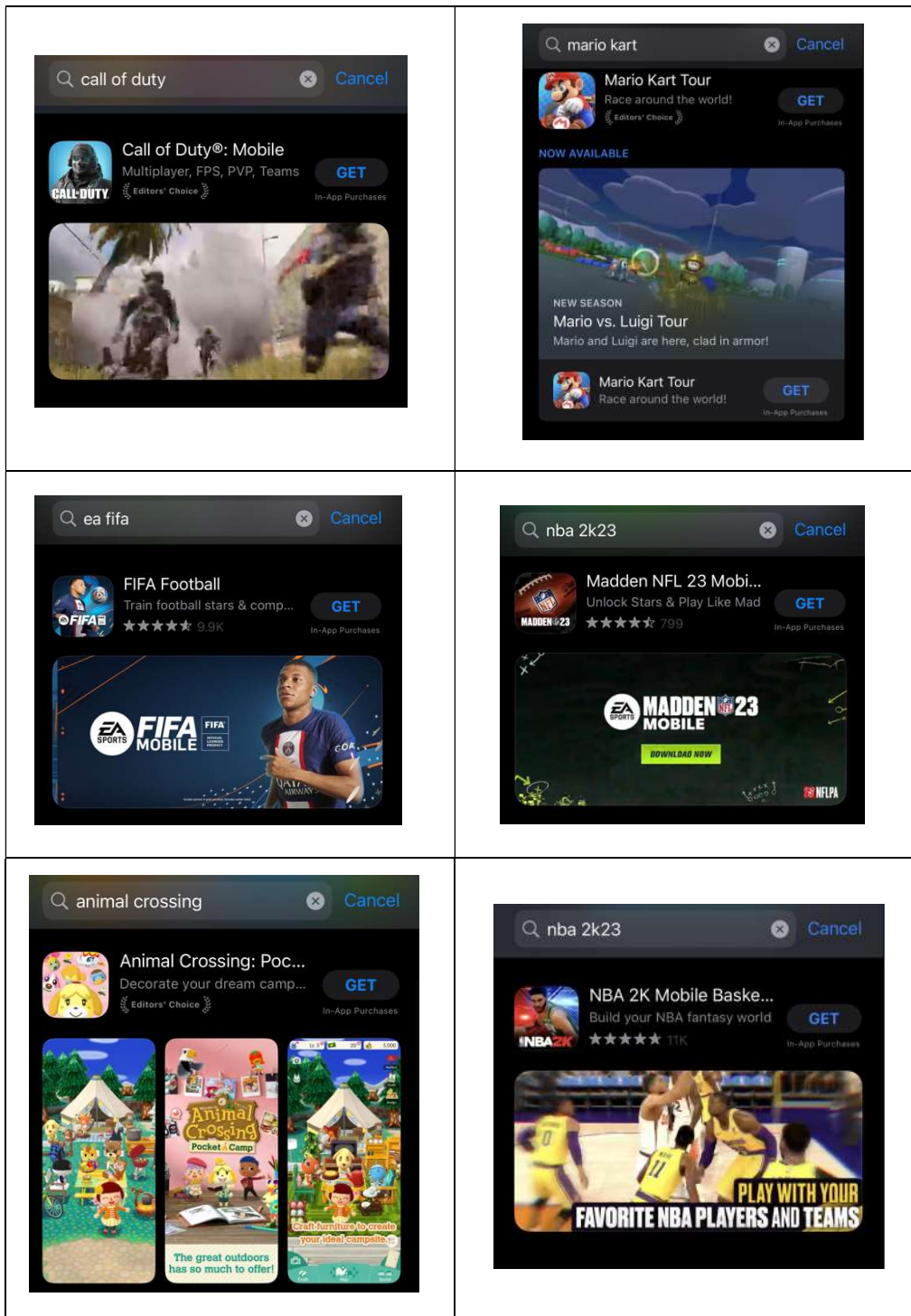
¹⁶² [], M.1001 – *Microsoft / ZeniMax* at [41]

¹⁶³ CMA Final Report at [5.67].

¹⁶⁴ Para [70], SOI.

PUBLIC VERSION

Figure 14 – Examples of games available for download for native gaming on the Apple App Store



Furthermore, as noted, the computing power of mobile phones only continues to improve, and this will likely render many of cloud gaming's claimed benefits redundant, meaning that not only is native gaming on mobile devices (including phones and tablets) a competitive constraint on cloud gaming (meaning that they are in the same market), but also that it will constrain the potential future growth

PUBLIC VERSION

and reach of cloud gaming (as gamers will readily be able to substitute between cloud gaming and native gaming on increasingly powerful mobile devices).

At the same time, each of Xbox, Nintendo, and PlayStation enable cloud gaming on their respective consoles. This, therefore, further demonstrates that the purchasing of gaming specific hardware (or not) is not a distinguishing feature between cloud gaming and native gaming (a gamer could be gaming natively on their mobile device, or could be gaming from the cloud on their console).

Accordingly, any approach that seeks to define a separate market for cloud gaming based on purchase costs of "gaming hardware" does not reflect fundamental market dynamics.

In addition, it is important to note that the suggestion in the SOI that Activision Blizzard is not a significant participant in mobile gaming¹⁶⁵ is incorrect. In fact, mobile gaming (and ancillary revenues) already represented approximately [] of Activision Blizzard's global revenues in 2022, and [] of Activision Blizzard's MAUs were from mobile games in 2021. While Activision Blizzard accounts for only a small share of mobile gaming due to the large number of strong competitors, including market leader Tencent, which accounts for more than [] of the worldwide mobile gaming revenues in 2021 and over [] in New Zealand, Activision Blizzard's mobile publisher King Digital Entertainment has found significant success with globally popular titles such as *Candy Crush*. Indeed, as clearly stated in Microsoft's press release announcing the Transaction,¹⁶⁶ a key consideration in Microsoft's rationale for pursuing this Transaction is to expand its limited offering in mobile gaming through access to Activision Blizzard's mobile platforms and presence.

- (d) *Seeking to "isolate an issue" does not justify defining a separate market:* The suggestion in the SOI that the NZCC may consider it appropriate "to define a separate market for cloud gaming as this best isolates issues"¹⁶⁷ also fails to apply the required statutory test. The Commerce Act requires markets to be defined by including "goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them",¹⁶⁸ not by excluding products that are substitutes with, and constraints on, each other in order to seek to "isolate" an issue for analytical simplicity.

(4A6): Concluding comments on market definition

- 4.25 Accordingly, consistent with the conclusions of the EC, the evidence demonstrates that cloud gaming is not a standalone market. Rather, it is simply another form of accessing content (alongside downloading or physical distribution), and even then it is an astonishingly small sub-segment of that broader game distribution market (estimated to account for just [] in 2022, or just [] of total gaming in New Zealand. This is consistent with cloud gaming comprising only a very small portion of the overall gaming industry (cloud gaming on PC will remain limited to 1 – 2% of total gaming revenue worldwide by 2025, and the same is true for cloud gaming on console)).

¹⁶⁵ Para [56], SOI.

¹⁶⁶ (18 January 2022). Microsoft to acquire Activision Blizzard to bring the joy and community of gaming to everyone, across every device. Microsoft. Retrieved from: <https://news.microsoft.com/2022/01/18/microsoft-to-acquire-activision-blizzard-to-bring-the-joy-and-community-of-gaming-to-everyone-across-every-device/>

¹⁶⁷ Para [71], SOI.

¹⁶⁸ Section 3(1A), Commerce Act 1986.

PUBLIC VERSION

4.26 In any event, while the evidence demonstrates that cloud gaming is part of a broader game distribution market (and the NZCC's decision needs to reflect that evidence), there is no prospect of foreclosure of other cloud gaming providers, irrespective of the market definition adopted, for the reasons outlined in this Part 4.

(4B): The merged entity will not have a substantial degree of market power in the upstream gaming publishing market and, therefore, will not have any ability to foreclose

4.27 In addition to the console specific evidence (at Sub-Part 3A), the evidence equally demonstrates that there is no way in which the merged entity (or Activision Blizzard's content) has market power in any upstream gaming content market of relevance to downstream cloud gaming. In particular, in addition to (and without repeating the evidence at Sub-Part 3A):

- (a) In relation to **PC gamers**, the data shows that *CoD* is not uniquely popular – not only globally, but also specifically in New Zealand. For example, in New Zealand:
- (i) *CoD* is estimated to only account for a share of [] of game time in 2021, placing it only 7th after other more popular franchises, such as first placed *Roblox* ([]), followed by *League of Legends* ([]). The figure is still only [] in 2022 (see Figure 15 below),¹⁶⁹ with *CoD* still only 6th place, including after first placed *Roblox* ([]) and *Fortnite* ([]).

Figure 15 – Game title by game time on PC (NZ, 2022)¹⁷⁰

[]

- (ii) The *CoD* figures are not materially different when looking at share of MAUs in New Zealand, with *CoD* estimated to account for only [] of MAUs in 2021, and [] of MAUs in 2022.¹⁷¹
- (iii) In 2022, there was only one *CoD* title in the top 20 PC games by game time, namely *CoD: Modern Warfare II* – accounting for just [] of PC game time in New Zealand.¹⁷²
- (iv) Even looking at all Activision Blizzard titles, together they only accounted for [] of total PC game time in New Zealand in 2022¹⁷³ (*World of Warcraft*, *Overwatch*, and *World of Warcraft Classic* are at numbers [] [], and [], with shares of just [], [] and [] of PC gametime respectively).¹⁷⁴ By contrast, the top ranked game by PC gametime in New Zealand in 2022 is *Roblox*, accounting for []% of PC gametime in New Zealand.¹⁷⁵

¹⁶⁹ Source: Newzoo. See also **Appendix Six**. Note Newzoo only reports its data based on franchise (rather than individual titles).

¹⁷⁰ Source: NPD / GfK

¹⁷¹ Source: Newzoo. See also **Appendix Six**.

¹⁷² Keystone analysis of Windows Telemetry data.

¹⁷³ Keystone analysis of Windows Telemetry data.

¹⁷⁴ Note that according to an alternative source, Newzoo, the share is only slightly higher at [] – see **Appendix Six**.

¹⁷⁵ Microsoft is not able to provide reliable / accurate revenue share data for PC titles due to data availability issues.

PUBLIC VERSION

- (v) Specifically in relation to cloud gaming, Amazon recently announced that “*Fortnite* has been the most requested game from Luna customers in the U.S.”¹⁷⁶
- (b) Globally, Windows Telemetry data similarly shows that *CoD* accounts for less than [] of game time on Windows PCs, and that other games are far more popular amongst PC gamers – namely:
 - (i) The game time share of the *CoD* franchise is low in comparison to the four highest ranked games or franchises during 2021 and 2022 – *League of Legends*, *Roblox*, *Minecraft* and *Valorant* (shown below in Figure 16).

Figure 16: Aggregate Game Time for Activision Blizzards’ Games vs Top 4 Games Globally, 2021 and 2022

[]

- (ii) For June 2021 through to December 2022, the *CoD* franchise did not always even rank among the Top 10 on PC.
- (iii) As noted above, *CoD*’s fraction of total user game time is less than [] each year (specifically []% in 2021 and []% in 2022). In contrast:
 - (aa) the top ranked game, *League of Legends*, alone accounted for around [] of total game time in both 2021 and 2022; and
 - (bb) *Roblox* accounted for around [] of gameplay.
- (c) Steam, which is the largest PC digital storefront, did not carry any new releases of *CoD* for three years (until November 2022) following Activision Blizzard’s commercial decision to sell its PC games only on Battle.net. This did not prevent Steam from maintaining its leading position in PC game distribution and increasing its revenues.
- (d) Activision Blizzard content (including *CoD*) is not currently available on any cloud gaming service. Absent the Transaction, Activision Blizzard content would not be on any cloud gaming service. It is not credible to suggest:
 - (i) that cloud streaming game distribution providers could be foreclosed due to an input that they never had access to in the first place (and would not have access to in the absence of the Transaction (see Sub-Part 4C below); or
 - (ii) that certain content could be “must have” for the entry, expansion, or viability of cloud streaming distribution of gaming content when cloud streaming game distributors are already entering and expanding without such content. For example, Pentanet (the distributor of the NVIDIA GeForce NOW cloud streaming game distribution platform in Australia and New Zealand) has:¹⁷⁷

¹⁷⁶ (4 May 2023). ‘Fortnite’ is now available on Amazon Luna. Amazon. Retrieved from: <https://www.aboutamazon.com/news/devices/fortnite-is-now-available-on-amazon-luna>

¹⁷⁷ See further at **Appendix Four**.

PUBLIC VERSION

- (aa) entered into both Australia (2021) and New Zealand (2022/23) in recent years providing cloud gaming; and
- (bb) announced to the ASX that it is achieving subscriber growth in Australia and New Zealand (see Figure 17 below),

despite not currently having CoD or other Activision Blizzard games within its offering.

Figure 17 – Extract of Pentanet Q2 FY23 investor update in relation to GeForce NOW subscriber growth¹⁷⁸



- (e) CoD was once available on a closed beta test of NVIDIA's GeForce Now service, but Activision Blizzard immediately removed its content when NVIDIA started taking the service out of beta and commercialising it without Activision Blizzard's consent, and NVIDIA was not foreclosed by the withdrawal of Activision Blizzard titles – instead, NVIDIA pointed customers to the wide array of alternative content available on its service.¹⁷⁹

(4C): In the Counterfactual, Activision Blizzard would not make its game content available to cloud gaming providers

4.28 For there to be any Transaction-specific concerns about foreclosure of other cloud gaming providers (i.e. concerns such foreclosure is "likely to occur as a direct consequence of a

¹⁷⁸ Source: Pentanet Investor Update Q2 FY23 Report. See: https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02625719-6A1133922?access_token=83ff96335c2d45a094df02a206a39ff4

¹⁷⁹ The GeForce Now beta test started in September 2017, and the service was officially commercialised in February 2020. After Activision Blizzard's demand that NVIDIA remove access to Activision Blizzard's content for failure to seek permission, NVIDIA complied and issued a public statement confirming that it had removed all Activision Blizzard games from the service. NVIDIA was not foreclosed by the withdrawal of Activision Blizzard titles and instead pointed customers to the wide array of alternative content available on its service: "we have over 1,500 games that developers have asked to be on-boarded to the service. Look for weekly updates as to new games we are adding". (See: 12 February 2020. Activision Blizzard games on GeForce Now. Nvidia. Retrieved from: <https://www.nvidia.com/en-us/geforce/forums/gfn-announcements/22/341852/activision-blizzard-games-on-geforce-now/2387378/>)

PUBLIC VERSION

change associated with the Proposed Acquisition"),¹⁸⁰ it would need to be the case that Activision Blizzard content would be made available to other cloud gaming services in the Counterfactual. However:

(a) that is not the case today (i.e. it is not the case in any "status quo" Counterfactual – the NZCC's *M&A Guidelines* say "[o]ften **the best guide of what would happen without the merger is what is currently happening**");¹⁸¹ and

(b) the evidence consistently shows that Activision Blizzard []:

(i) [] has serious challenges, in particular latency concerns, that means gamer experience can vary depending on the distance someone lives from the servers and the quality of their connection. That is a significant issue for a game publisher such as Activision Blizzard:

(aa) Cloud game streaming differs from, for example, cloud video streaming (such as Netflix), as cloud gaming requires instantaneous two-way communications as well as processing. All of these processes must happen instantly, smoothly, and consistently to provide an adequate gaming experience.

(bb) Achieving these objectives on cloud gaming becomes more complex with high-fidelity graphics and multiplayer online games (such as *CoD*), where sometimes more than 100 players are inputting their commands simultaneously.

(cc) Latency is critical to the gaming experience, and is particularly important for FPS games, like *CoD*. Even slight latency can ruin a user's experience, or the experience of others in the same game, by interfering with the required precision. For example, in *CoD*:

(1) users must precisely target opposing players and objects and shoot with equally precise timing; and

(2) users require low latency to be 'competitive' in online multiplayer matches.

The SOI acknowledges these latency concerns (referring to them as concerns about unacceptable levels of "lag").¹⁸²

(ii) These technical limitations risk damaging the gamer experience for Activision Blizzard games, which would conflict with Activision Blizzard's goal, to offer its gamers the best quality experience, and would risk tarnishing its reputation amongst the knowledgeable and vocal gaming community.

(iii) []¹⁸³ []

¹⁸⁰ *Mercury NZ Limited and Trustpower Limited's retail business* [2021] NZCC 16 at [87].

¹⁸¹ NZCC's *M&A Guidelines* at [2.36]. [emphasis added]

¹⁸² Para [31] and [32], SOI.

¹⁸³ Google's own website notes that it had to shut down its cloud gaming service, Stadia, as "it hasn't gained the traction with users that we expected so we've made the difficult decision to begin winding down our Stadia streaming service." (See: (29

PUBLIC VERSION

(iv) []¹⁸⁴

(v) []

[]

4.29 []

4.30 []¹⁸⁵ []

4.31 [] – see Figure 18 below.

Figure 18 – []

Source	Detail
[]	[] <ul style="list-style-type: none"> • [] • [] • []
[]	[]
[]	[] <ul style="list-style-type: none"> • [] • [] • [] • [] • []¹⁸⁶

4.32 []. Accordingly, applying the standard of evidential rigour set out in both the NZCC's *M&A Guidelines*, and as mandated by the Courts, the NZCC must rule out the possibility of any likely Counterfactual in which Activision Blizzard content would be made available to cloud gaming services in the foreseeable future.

(4D): In the Factual, the merged entity would not have any incentive to withhold content from other cloud gaming providers given its driver to make games available across platforms, [], and the EC Commitments and Contracts

4.33 Not only would Microsoft not have the ability to foreclose cloud gaming providers, there is no evidence that Microsoft would have incentive to withhold content from other cloud gaming providers. Microsoft’s pre-Transaction conduct and business plans clearly demonstrate that Microsoft would have no incentive to pursue a cloud gaming foreclosure strategy.

September 2022). A message about Stadia and our long term streaming strategy. Google Blog. Retrieved from: <https://blog.google/products/stadia/message-on-stadia-streaming-strategy/>

¹⁸⁴ Native mobile gaming (i.e. playing a game via an app on a mobile phone) already far surpasses cloud gaming in terms of quality of consumer experience, and []

¹⁸⁵ []

¹⁸⁶ []

PUBLIC VERSION

Microsoft's gaming strategy is based on a gamer-centric approach designed to make content available to gamers on the device of their choice at any given time, including through cloud gaming.

(4D1): [] further demonstrates the merged entity would not have the incentive to foreclose

4.34 The evidence does not support any concern that Microsoft could have an incentive to withhold Activision Blizzard content from other cloud gaming providers, given []. [] in this unproven game distribution segment also highlights the undeniably speculative nature of the theory of harm itself. []:

- (a) []
- (b) []
- (c) []
- (d) []
- (e) []¹⁸⁷ []
- (f) Accordingly, [].

4.35 [] third party evidence too. For example:

- (a) In June 2023, Kenichiro Yoshida, the Chief Executive of Sony Group, noted that the "technical difficulties [of cloud gaming] are high", with Mr Yoshida citing latency as the biggest issue, along with the costs of investing in the necessary servers.¹⁸⁸
- (b) Google shut down its cloud gaming service, Stadia, on 18 January 2023 due to insufficient consumer uptake. Phil Harrison, the former Vice President and General Manager of Google stated that:¹⁸⁹

while Stadia's approach to streaming games for consumers was built on a strong technology foundation, it hasn't gained the traction with users that we expected...

- (c) In December 2022 it was announced that Amazon was making "mass layoffs" at its Amazon Luna service in light of "losses of up to \$5 billion in a single year".¹⁹⁰ In noting that announcement, industry commentator Paul Dawalibi observed:¹⁹¹

It goes without saying, but firings are always unfortunate. We hope those impacted land on their feet. I've barely heard anything about this product since it was announced. With Google's failure and

¹⁸⁷ For example, the majority of users of Xbox Cloud Gaming ([] worldwide) simply use it as an additional feature on their console (for example, trying a game before downloading it), rather than as a standalone service.

¹⁸⁸ (4 June 2023). Sony chief warns technical problems persist for cloud gaming. Financial Times. Retrieved from: <https://www.ft.com/content/4b410761-78d8-4bec-a48b-79f1373d42e1>

¹⁸⁹ (29 September 2022). A message about Stadia and our long term streaming strategy. Google Blog. Retrieved from: <https://blog.google/products/stadia/message-on-stadia-streaming-strategy/>

¹⁹⁰ (5 December 2022). Another Major Gaming Brand Has Been Hit With Layoffs. Business of Esports. Retrieved from: <https://thebusinessofesports.com/2022/12/05/another-major-gaming-brand-has-been-hit-with-layoffs/>

¹⁹¹ (5 December 2022). Another Major Gaming Brand Has Been Hit With Layoffs. Business of Esports. Retrieved from: <https://thebusinessofesports.com/2022/12/05/another-major-gaming-brand-has-been-hit-with-layoffs/>

PUBLIC VERSION

Luna’s likely failure, I’m surprised that people are STILL trying to figure out cloud gaming. Google did a few things right with Stadia. The first smart move they made was shutting it down. The other smart move was offering refunds for all Stadia products and purchases.

4.36 The same lack of uptake, growth prospects, revenue and profit described above also apply in relation to cloud gaming services in New Zealand. In particular:

- (a) Microsoft estimates that cloud gaming distribution accounted for just USD\$[] in revenues, and just [] of total gaming, in New Zealand for 2022. That is an insignificant share of the estimated USD\$[] gaming market in New Zealand. Furthermore, New Zealand is a limited and geographically distant national market with fewer resources to resolve the latency issues.
- (b) In relation to Xbox Cloud Gaming, Figure 19 below shows that, []¹⁹² [].

Figure 19: Xbox Cloud Gaming MAUs by platform in NZ excluding Fortnite

[]

Furthermore, Figure 20 shows that, even including *Fortnite* users, there has been a [].

Figure 20: Xbox Cloud Gaming MAUs by platform in NZ including Fortnite

[]

4.37 Accordingly, even if Microsoft could be said to have the ability to foreclose other cloud gaming providers through the ownership of Activision Blizzard content (which it could not), the evidence does not support any concern that Microsoft could have an incentive to withhold Activision Blizzard content from other cloud gaming providers, when, as noted at paragraph 4.34 above, [].

4.38 In addition, further demonstrating that Microsoft would not have the incentive to foreclose such other cloud gaming providers are the following:

- (a) Microsoft has already been willing to make a number of its first-party titles available on other cloud gaming providers,¹⁹³ and
- (b) Microsoft has been willing to enter into the EC Commitments and Contracts, as outlined further at Sub-Part 4D5 below, which comprehensively remove any (hypothetical) ability or incentive on Microsoft’s part to withhold Activision Blizzard content from other cloud gaming providers.

¹⁹² Microsoft is showing the NZCC data with, and without, *Fortnite* to demonstrate that while *Fortnite* is free-to-play and a popular franchise, the consumer adoption of *Fortnite* on Xbox Cloud Gaming was surprisingly low. This is a strong indicator that adding *CoD* to Xbox Cloud Gaming – or any cloud gaming service – would not attract a significant number of new players. Indeed, [] with *Fortnite* on Xbox Cloud Gaming, and gamers using the service are just [] of the levels seen when *Fortnite* was available as a native app on iOS, with significantly higher churn rates.

¹⁹³ For example, a number of Microsoft first-party games are currently available in Sony PlayStation Plus including: *Brink*, *Deathloop*, *Dishonoured*, *Doom (2016)*, *Fallout 3*, *Fallout 4*, *Fallout 76*, *Fallout New Vegas*, *Hunted*, *Hunted The Demons Forge*, *Prey*, *Rage*, *Rage 2*, *Rogue Warrior*, *The Elder Scrolls IV Oblivion*, *The Elder Scrolls Online*, *The Elder Scrolls V Skyrim*, *The Evil Within*, *The Evil Within 2*, *Wet*, *Wolfenstein II: The New Colossus*, *Wolfenstein: The New Order* and *Wolfenstein: The Old Blood*. Titles such as *The Elder Scrolls Online*, *Rage 2*, *Doom Eternal* and *Wolfenstein: Youngblood* were available on Google Stadia.

PUBLIC VERSION

4.39 []¹⁹⁴

[]

(4D2): There is no prospect of New Zealand specific cloud gaming foreclosure

4.40 As set out in relation to consoles at paragraph 3.13(e) above, there is similarly no prospect of a “targeted” foreclosure cloud gaming strategy on a geographic basis – whereby Microsoft withholds CoD from cloud gaming providers only in New Zealand – being profitable and, even more importantly, having any significant foreclosure impact on other cloud gaming providers. Reflecting this:

- (a) cloud gaming providers operate across multiple jurisdictions, and New Zealand's population accounts for only 0.06% of the world's population.¹⁹⁵ For example, NVIDIA's GeForce NOW offering is available in more than 100 countries;¹⁹⁶ and
- (b) competition regulators spanning 39 countries have already cleared the Transaction on the basis that those regulators did not have concerns that the Transaction would prevent cloud gaming providers from competing for gamers in those jurisdictions (with the population of those jurisdictions exceeding 2.6 billion).

4.41 Given the above, there is plainly no prospect of any targeted New Zealand specific cloud gaming foreclosure strategy, nor the prospect of the merged entity having the incentive to attempt such a strategy.

(4D3): The EC Commitments and Contracts are part of the Factual, apply to New Zealand, and adequately address any (hypothetical) concerns

4.42 In addition, as set out to the NZCC previously,¹⁹⁷ it is also necessary for the NZCC's assessment to take into account the contractual commitments that Microsoft has made to other commercial parties, including the Nintendo Contract, the Contracts, and the EC Commitments.

4.43 It is necessary and consistent with the NZCC's stated approach of taking "a pragmatic and commercial assessment of what is likely to occur in the future" for the NZCC to take into account forward-looking and legally enforceable commitments that the merger parties have made to other parties – including other commercial parties (such as NVIDIA, Boosteroid, and Ubitus) and the EC.

4.44 Demonstrating that such an approach would be in line with previous practice, and consistent with the NZCC's *M&A Guidelines*, is the fact that the NZCC, in forming its view of the forward-looking Factual, has taken into account the following in a number of previous clearance decisions:

- (a) behavioural undertakings given to other overseas regulators;
- (b) pre-existing long-term contracts with other commercial counterparties; and

¹⁹⁴ []

¹⁹⁵ (2023). *New Zealand Population*. Worldometer. Retrieved from: <https://www.worldometers.info/world-population/new-zealand-population/#:~:text=The%20current%20population%20of%20New,the%20latest%20United%20Nations%20data>.

¹⁹⁶ (30 May 2023). What are the supported locations for GeForce now? Nvidia. Retrieved from: https://nvidia.custhelp.com/app/answers/detail/a_id/5023/~/what-are-the-supported-locations-for-geforce-now%3F

¹⁹⁷ []

PUBLIC VERSION

- (c) executed long-term contracts with other commercial counterparties that are contingent on the transaction in question completing.
- 4.45 Examples of those previous clearance decisions are set out at **Appendix Seven**. Indeed, even just this May, the NZCC determined that forward-looking contractual commitments were sufficient to prevent any prospect of vertical foreclosure – namely in the *Connexa / 2degrees* determination, including as those contractual commitments could not be changed without 2degrees' consent.¹⁹⁸
- 4.46 Not only is it consistent with the NZCC's required approach to take the Contracts and EC Commitments into account, from a practical perspective, they will be relevant to the competitive dynamics in New Zealand as they will apply globally (excluding China) post-Transaction (and, therefore, will apply in New Zealand). As outlined further at Figure 21 below:
- (a) The EC Commitments apply in respect of all current and future PC and console franchises and titles developed or to be developed by Activision Blizzard studios, and for the benefit of all existing and potential cloud gaming providers located anywhere worldwide, and therefore cover such cloud gaming providers operating in New Zealand (with a term of 10 years). Furthermore, under the EC Commitments, all cloud gaming providers are in scope, regardless of their business model (i.e. buy-to-play, free-to-play, BYOG, subscription, or hybrid).
- (b) The legally binding commercial agreements that Microsoft has entered into with NVIDIA, Boosteroid, and Ubitus:¹⁹⁹
- (i) will involve the granting of streaming rights to individual consumers located anywhere worldwide (excluding China) which have a licence from these distributors, and thus would cover such New Zealand consumers (and are in place for 10 years);
- (ii) will involve the granting to those cloud gaming providers non-exclusive, royalty-free, non-transferable rights to Microsoft's gaming catalogue, including Activision Blizzard content from completion of the Transaction, everywhere where Microsoft makes the games available (which would include New Zealand); and
- (iii) cannot be varied without the game cloud streaming distributor's consent.
- (c) Furthermore, the EC's clearance decision itself is conditional on the full compliance by Microsoft with the EC Commitments, including Microsoft's legally binding obligation to grant a royalty-free, worldwide licence to stream Activision Blizzard's PC games to each of NVIDIA, Boosteroid and Ubitus for at least 10 years.
- 4.47 That the EC Commitments and Contracts are effective is also reflected in the market feedback – namely:
- (a) The EC received positive feedback from third parties in favour of the adequacy of the EC Commitments and Contracts, with the EC stating:²⁰⁰

¹⁹⁸ *Connexa Limited and Two Degrees Networks Limited and Two Degrees Mobile Limited* [2023] NZCC 10 at [93.1].

¹⁹⁹ As the NZCC is aware, Microsoft has also entered into an agreement with similar effect with Nware.

²⁰⁰ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

PUBLIC VERSION

The Commission carefully investigated the effectiveness of the remedies, collecting views from a large number of market participants and stakeholders. In particular, cloud game streaming service providers gave positive feedback and showed interest in the licenses. Some of these providers have already entered into bilateral agreements with Microsoft based on the proposed licenses to stream Activision's games, once the transaction is completed.

- (b) All four cloud streaming game distribution providers that have entered into the Contracts are supportive of the Transaction in light of Microsoft's commitments to provide access pursuant to the Contracts. []:²⁰¹

[]

4.48 The SOI states that the NZCC is still considering "whether the commitments are sufficiently likely" to be taken into account as part of its Factual assessment,²⁰² including:

- (a) "the safeguards in place to ensure Microsoft's compliance with its obligations";²⁰³
- (b) "the extent to which those safeguards extend to New Zealand";²⁰⁴ and
- (c) "the appropriateness of placing reliance on the existence of the commitments... given the emerging and uncertain nature of the market".²⁰⁵

4.49 The NZCC can be satisfied on all three of these factors for the reasons set out in Figure 21 below.

Figure 21 – Evidence demonstrating that the NZCC can be satisfied that the Contracts and EC Commitments form part of the Factual

Factor	Evidence
<p>The safeguards in place to ensure Microsoft's compliance with its obligations</p>	<p>There are numerous safeguards and legal obligations to satisfy the NZCC that Microsoft will comply both with the EC Commitments and Contracts.</p> <p>In relation to the EC Commitments:</p> <ul style="list-style-type: none"> • Microsoft has framed the EC Commitments to be simple, clear and self-executing²⁰⁶ – they do not require complex implementation or technical adaptation, or any significant monitoring or supervision. They are <u>legally binding</u>, and <u>enforceable</u> by the EC (at Microsoft's own cost). • Furthermore, the EC Commitments are subject to <u>independent oversight</u> by a "Monitoring Trustee" (who must be approved by the EC)²⁰⁷ to ensure compliance with the EC Commitments.

²⁰¹ []

²⁰² Para [114], SOI.

²⁰³ Para [114.1], SOI.

²⁰⁴ Para [114.1], SOI.

²⁰⁵ Para [114.2], SOI.

²⁰⁶ They are self-executing because they authorise cloud gaming providers to stream the game from their servers, and consumers to play the game on their devices.

²⁰⁷ Para [14] of the EC Commitments.

	<ul style="list-style-type: none">• That oversight is robust, including:<ul style="list-style-type: none">○ enabling the EC to request, for a period of 10 years from the completion of the Transaction, all information from the Parties that is reasonably necessary to monitor the effective implementation of the EC Commitments.²⁰⁸○ requiring the Monitoring Trustee to:²⁰⁹<ul style="list-style-type: none">▪ provide the EC with a written report at the end of each six-month period so that the EC can assess whether the EC Commitments are being complied with;▪ propose to Microsoft such measures as the Monitoring Trustee considers necessary to ensure Microsoft's compliance with the EC Commitments;▪ promptly report in writing to the EC if it concludes on reasonable grounds that Microsoft is failing to comply with the EC Commitments;▪ act as a contact point for questions from third parties about the nature and scope of the EC Commitments;²¹⁰ and▪ assume any other functions assigned to the Monitoring Trustee under the conditions and obligations attached to the EC's decision.○ requiring Microsoft to:²¹¹<ul style="list-style-type: none">▪ provide the Monitoring Trustee with all such cooperation, assistance and information as may be reasonably required to perform its tasks;▪ provide the Monitoring Trustee with full and complete access to Microsoft's books, records, documents, management or other personnel, facilities, sites and technical information necessary for fulfilling its duties; and▪ provide the Monitoring Trustee upon request with copies of any documents except where such disclosure would give rise to a loss of any applicable legal privilege.○ through periodic reports provided to the EC and prompt notification to the EC, if the Monitoring Trustee reasonably
--	---

²⁰⁸ Para [24] of the EC Commitments.

²⁰⁹ Para [18] of the EC Commitments.

²¹⁰ The contact details of the Monitoring Trustee will be published on the website of the Commission's Directorate-General for Competition and Microsoft is required to inform interested third parties of the identity and the tasks of the Monitoring Trustee.

²¹¹ Para [19] of the EC Commitments.

	<p>concludes that Microsoft is failing to comply with the commitments.²¹²</p> <ul style="list-style-type: none"> ○ through requiring Microsoft to remunerate the Monitoring Trustee in a way that does not impede the independent and effective fulfilment of its mandate.²¹³ <ul style="list-style-type: none"> • If the Monitoring Trustee, acting reasonably, suspects that Microsoft is not complying with the EC Commitments, Microsoft shall bear the burden of proof to demonstrate it is.²¹⁴ • Moreover, if the Monitoring Trustee, acting reasonably, suspects that Microsoft is using third-party IP rights to circumvent the application of the remedy Microsoft shall bear the burden of proof to demonstrate to the Monitoring Trustee that Microsoft is acting in good faith and without intention to frustrate the application of the remedy.²¹⁵ Cloud gaming providers themselves each have the right to inform the Monitoring Trustee of any failure and participate in a “Fast-Track” Dispute Resolution procedure overseen by an Arbitral Institution, with the EC able to participate in all stages of the Dispute Resolution process, including having the opportunity to file amicus curiae briefs, being present at hearings, and, in some cases, making oral observations.²¹⁶ • If Microsoft does not comply with the EC Commitments, the legal, financial and reputational consequences would be extremely severe: <ul style="list-style-type: none"> ○ From a legal perspective, the EC clearance decision would no longer be valid, and the EC would have the power to order dissolution of the Transaction, or disposal of all of the acquired shares in Activision Blizzard, as well as interim measures appropriate to restore or maintain conditions of effective competition.²¹⁷ ○ The EC can impose a fine of up to 10% of Microsoft's annual turnover, i.e. up to USD\$19.8 billion based on Microsoft's 2022 turnover,²¹⁸ including periodic penalty payments of up to 5% of the average daily turnover until it complies.²¹⁹ The EC may also re-open the investigation, with a view to adopting a prohibition decision on the matter. <p>In relation to the Contracts:</p> <ul style="list-style-type: none"> • The Contracts between Microsoft NVIDIA, Boosteroid, and Ubitus, are legally binding as between those parties (as is Microsoft's contract with Nware).
--	---

²¹² Para [18] of the EC Commitments.

²¹³ Para [12] of the EC Commitments.

²¹⁴ Para [25] of the EC Commitments.

²¹⁵ Para [26] of the EC Commitments.

²¹⁶ Para [30] and Annex 2 of the EC Commitments.

²¹⁷ EU Merger Regulation, Articles 8(4) and 8(5), Recital (31).

²¹⁸ EU Merger Regulation, Articles 14(2) and 15(1).

²¹⁹ EU Merger Regulation, Article 15(1).

PUBLIC VERSION

	<ul style="list-style-type: none"> • Furthermore, not only are the NVIDIA, Boosteroid, and Ubitus Contracts and the Nware contract subject to private enforcement by either party, the key operational terms of the NVIDIA, Boosteroid and Ubitus Contracts have also been incorporated into the EC Commitments. • As a result, the Contracts are not only enforceable privately but also by the EC, and they are subject to the oversight mechanisms established in the EC Commitments (see above), which provides even further assurance of the enforceability of the Contracts. <p>Accordingly, the EC Commitments and the Contracts are subject to both private and regulator enforcement, ongoing independent monitoring, and a robust monitoring dispute resolution procedure and, therefore, are subject to even more safeguards ensuring compliance, enforcement, and oversight than contracts that the NZCC has previously been satisfied to accept as part of the Factual, including in <i>Connexa / 2degrees</i> (2023), <i>Daiken / Dongwha</i> (2018), <i>Vector / Arc</i> (2014), and <i>Hancock / CHH</i> (2006).</p>
<p>The extent to which the safeguards extend to New Zealand</p>	<p>The benefits of both the Contracts and the EC Commitments will accrue to New Zealand businesses and consumers because:</p> <ul style="list-style-type: none"> • [] • []²²⁰ • [] <p>Accordingly, both the Contracts and EC Commitments apply to cloud gaming providers operating anywhere in the world, and will work to the benefit of any consumer playing an Activision Blizzard title regardless of their location, including in New Zealand.</p> <p>To be clear, any refusal to license Activision Blizzard content that was targeted just at New Zealand would not only not make any commercial sense (as there is no possibility of a New Zealand targeted foreclosure strategy having any effect), it would also breach both the EC Commitments and the Contracts, and therefore could be enforced by the EC as a breach of the EC Commitments (via the independent Monitoring Trustee appointed) and by the counterparties as a breach of the Contracts. Furthermore, any conduct that sought to restrict access to Activision Blizzard content to New Zealand gamers using cloud gaming services would (a) need to be a blatant targeted attempt to treat New Zealand differently from the rest of the world (because under the EC Commitments and Contracts, once a title is licensed for cloud gaming, no further approval is required for the game to be deployed on servers in any specific country), and (b) be highly visible to gamers (who would readily identify that content available on those same cloud gaming services overseas is not available in New Zealand), and would inevitably trigger gamer backlash, online commentary, and complaints to, and enforcement steps by, both the counterparties and the EC.</p>
<p>The NZCC's ability to rely on the EC Contracts and</p>	<p>While cloud gaming is a nascent service, and its future uncertain, that uncertainty in no way undermines the ability of the NZCC to rely on the EC Commitments and Contracts as forming part of the Factual.</p>

²²⁰ Annex 3 of the EC Commitments.

<p>Commitments given the emerging and uncertain nature of cloud gaming</p>	<p>In particular, the EC Commitments and Contracts fully address any (theoretical) input foreclosure concerns relating to cloud gaming – namely, they eliminate the potential for Microsoft to withhold or degrade access to Activision Blizzard titles by ensuring simultaneous release of new titles or title updates on other cloud gaming offerings globally. This has been recognised by the EC in its decision to clear the Transaction:</p> <p style="padding-left: 40px;">... These commitments fully address the competition concerns identified by the Commission and represent a significant improvement for cloud game streaming compared to the current situation. They will empower millions of EEA consumers to stream Activision's games using any cloud gaming services operating in the EEA, provided they are purchased in an online store or included in an active multi-game subscription in the EEA. In addition, the availability of Activision's popular games for streaming via all cloud game streaming services will boost the development of this dynamic technology in the EEA. Ultimately, the commitments will unlock significant benefits for competition and consumers, by bringing Activision's games to new platforms, including smaller EU players, and to more devices than before.²²¹</p> <p>Indeed, irrespective of how cloud gaming evolves, Microsoft has framed the package of EC Commitments and Contracts to be flexible to apply irrespective of developments to resolve any (hypothetical) foreclosure concerns. In particular:</p> <ul style="list-style-type: none"> • The EC Commitments provide consumers²²² a licence for the Activision Blizzard games irrespective of the streaming service's business model (including though either buy-to-play, free-to-play, BYOG, subscription, or hybrid). This includes existing cloud gaming providers, such as GeForce NOW, and also any future cloud gaming providers (including enabling any game stores, such as Steam and Epic Games Store, to launch streaming services in the future). The remedy, therefore: <ul style="list-style-type: none"> ○ is open as it grants a royalty-free licence to cloud gaming providers in all circumstances in which the consumer already owns the entitlement to the game and applies irrespective of whether the consumer obtains that entitlement from the cloud gaming provider itself (e.g. via a buy-to-play, free-to-play or freemium model) or from a third-party digital PC game store (e.g. via a BYOG model); and ○ does not give rise to any risk of distortion in cloud gaming irrespective of which business model is adopted, or how business models evolve. • Activision Blizzard games will not be exclusive to Xbox Cloud Gaming, and will not be timed exclusive to Xbox Cloud Gaming. As a result of the EC Commitments, it is guaranteed the games will be made available to other
---	--

²²¹ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705 [emphasis in original]

²²² Defined as a consumer based in the EEA who is licensed to play "Eligible Games" for their personal use pursuant to the Consumer License. Practically, this captures all game streaming services offered in New Zealand that are offered to EEA consumers as Microsoft is not aware of any game streaming providers who operate in New Zealand that do not also reach EEA consumers.

	<p>cloud gaming providers and at the time ("day and date") of release. The remedy, therefore, does not give rise to any risk of distortion arising from Activision Blizzard – it will be available across providers.</p> <ul style="list-style-type: none">• The licences will be granted for eligible games regardless of whether Microsoft itself offers eligible games for streaming on its own cloud gaming service, Xbox Cloud Gaming.• The structure of the EC Commitments is based on existing market-based terms and practice, commonly used by publishers, whereby licences are granted to each consumer and cloud gaming provider on PC (including the Contracts).• The streaming right granted to consumers in respect of any eligible games is "portable" in the sense that it can be used to access a game which the consumer has acquired on any eligible streaming service (including more than one eligible streaming service), so consumers can readily switch between providers and retain access to the content.• There is no requirement for the cloud gaming provider to have a minimum number of users or revenue or to stream games from any other publisher, the remedy is open to new entrant cloud gaming providers. There is also no risk of providers losing their status because they fall below a minimum threshold. Accordingly, there are no barriers to new entrants accessing the content. <p>Therefore, as noted above, irrespective of how cloud gaming evolves, the package is flexible and will apply to resolve any (hypothetical) foreclosure concerns irrespective of any developments in the provision of cloud gaming services.</p>
--	---

(4D4): The EC Commitments and Contracts comprehensively remove any (hypothetical) ability or incentive to foreclose

4.50 The Contracts and EC Commitments comprehensively remove any (hypothetical) ability or incentive on Microsoft's part to withhold Activision Blizzard content from other cloud streaming game distribution providers. In particular:

- (a) The fact that Microsoft has entered into the Contracts, and given the EC Commitments, shows that Microsoft would not have the ability to foreclose Activision Blizzard content to other cloud streaming game distribution providers – it has made legally binding commitments *not to do so*.
- (b) The fact that Microsoft has been willing to enter into the Contracts, and give the EC Commitments, shows that Microsoft is not incentivised to foreclose any other cloud streaming game distribution providers from Activision Blizzard content. In fact, the opposite is in fact true – Microsoft has agreed to make its first-party PC games available on NVIDIA GeForce NOW (with immediate effect)²²³ regardless of whether the Transaction proceeds. Microsoft announced:

²²³ [] See more here: (18 May 2023). Xbox Debuts PC Games to NVIDIA GeForce NOW Members Beginning Today. Xbox Wire. Retrieved from: <https://news.xbox.com/en-us/2023/05/18/xbox-games-to-nvidia-geforce-now-members/>. This announcement further demonstrates Microsoft's commitment to delivering its content through more partners and cloud gaming services ("*empowering [gamers] to play the games they want, with the people they want, on the devices they want*").

PUBLIC VERSION

This is the first in a series of partnerships we're activating to make our PC games available to players globally through a variety of cloud gaming services, starting with NVIDIA GeForce NOW, and with Boosteroid, Ubitus, EE and Nware in the future. We remain committed to releasing current titles from Xbox Game Studios and Bethesda, and future Activision Blizzard PC games once Microsoft's acquisition closes.

Delivering our content through more partners and cloud gaming services puts players at the center, empowering them to play the games they want, with the people they want, on the devices they want. NVIDIA has been an outstanding partner for team Xbox over the years, and we can't wait to see their devoted fans discover and play their next favorite PC games from Xbox.

This reflects Microsoft's incentives to distribute its content widely, including through different cloud gaming business models (e.g. BYOG) to its own.

- (c) In addition, not only do they demonstrate Microsoft is not incentivised to foreclose any other cloud streaming game distribution providers, they also comprehensively remove any (hypothetical) incentive on Microsoft's part to withhold Activision Blizzard content from other cloud streaming game distribution providers. In particular, any (hypothetical) allegation of a foreclosure incentive would need to rely on the notion that Microsoft would have a strategy to make first-party content exclusively available on Xbox Cloud Gaming for cloud gaming. However, having granted streaming rights to Activision Blizzard content to a number of other cloud streaming game distribution providers (both through the Contracts and EC Commitments), any such alleged strategic driver is removed (i.e. Activision Blizzard content could not be exclusively available for streaming through Xbox Cloud Gaming regardless of any cloud gaming foreclosure strategy). Moreover, the potential gains from any (hypothetical) foreclosure strategy would not exist (i.e. as consumers would have alternative choices).

- 4.51 Accordingly, the Contracts and EC Commitments fully address any (theoretical) input foreclosure concerns relating to cloud gaming – including in relation to New Zealand. Namely, they eliminate the potential for Microsoft to withhold *or* degrade access to key Activision Blizzard titles by ensuring simultaneous release of new titles or title updates on other cloud gaming offerings globally.

(4D5): No incentive to engage in any attempted partial foreclosure of other cloud gaming providers

- 4.52 The SOI says the NZCC is continuing to test whether the merger could have an effect of partially foreclosing rivals in cloud gaming by:²²⁴
- (a) making certain *CoD* versions exclusive to Xbox Cloud Gaming;
 - (b) making new versions of *CoD* exclusive to Xbox for a certain period of time by delaying release on other platforms; or
 - (c) restricting availability of gameplay or features on other platforms.

²²⁴ Para [91.2], SOI.

PUBLIC VERSION

- 4.53 As is the case for a total cloud gaming foreclosure theory of harm, Microsoft does not have the ability nor the incentive to engage in partial foreclosure strategies by degrading the *CoD* experience on rival cloud gaming platforms.
- 4.54 First, in addition to the reasons set out at paragraphs 3.5 – 3.11 above demonstrating that *CoD* is not "must have" content for other cloud gaming providers, Microsoft also does not have the ability to use a partial cloud gaming foreclosure strategy to harm rival cloud gaming services due to the Contracts and the EC Commitments. The terms ensure title and "day and date" parity with Microsoft.
- 4.55 Second, Microsoft does not have the incentive to engage in any partial cloud gaming foreclosure strategy. The dynamics disincentivising Microsoft from total foreclosure of cloud gaming rivals, such as Xbox's gamer-centricity strategy and [], are equally as applicable in the context of partial foreclosure. Furthermore, a partial cloud gaming foreclosure strategy would be detrimental to the gamer experience, because:
- (a) for *CoD* gamers to benefit from cross-play, Xbox must provide a consistent experience across the gamer base and therefore across platforms; and
 - (b) [] so further degrading rival cloud gaming platforms' access to *CoD* would create a significantly suboptimal experience for gamers.
- 4.56 This would result in significant gamer backlash (including by console users that also use cloud gaming services), damaging the *CoD* and Microsoft brands.

(4D6): Concluding comments on the evidence demonstrating that Microsoft would not have the incentive to withhold content from other cloud gaming providers

- 4.57 Paragraphs 4.33 – 4.56 above outline the significant evidence that Microsoft would not have the incentive to withhold Activision Blizzard content (either on a full or partial basis) from other cloud gaming providers.

(4E): There is no evidence that any (hypothetical) withholding of Activision Blizzard content would materially alter consumers' cloud gaming choices

- 4.58 There is also no evidence that the availability of Activision Blizzard content would materially alter consumers' choices in relation to cloud gaming providers.
- 4.59 To the contrary, there is significant evidence that Activision Blizzard content would not be a material driver of consumers' choices in relation to cloud gaming providers. Reflecting this:
- (a) As noted at paragraphs 3.5 – 3.11 above, there is no evidence that Activision Blizzard content is "must have" content compared to other gaming content, or would be important content in relation to cloud gaming.
 - (b) Microsoft's recent experience with offering *Fortnite* on Xbox Cloud Gaming is a strong indicator that adding *CoD* to Xbox Cloud Gaming – or any cloud gaming service – would not attract a significant number of new players. Although *Fortnite* is free-to-play and a popular franchise, the consumer adoption was []. The gamers using the service are just []% of the levels seen when *Fortnite* was available as a native app on iOS, with significantly higher churn rates. []

PUBLIC VERSION

- (c) GeForce NOW does not currently have *CoD* or other Activision Blizzard games within its GeForce NOW cloud streaming game distribution offering, but nonetheless GeForce NOW:
 - (i) is estimated to be the largest cloud gaming provider in the world (excluding "try-before-download" gaming on Xbox Cloud Gaming, see paragraph 4.23 above);
 - (ii) is said to be growing in Australia and New Zealand (as noted at Figure 17 above); and
 - (iii) internationally is regarded as one of the best cloud gaming providers:²²⁵

Cloud gaming hasn't yet reached the point where any service can sit back and relax. Many of the device issues have been worked out, but they still have to deal with game support strategy and network latency. **Nvidia's GeForce NOW has the best combination of performance, game support and value we've seen thus far.**

- (d) There are numerous factors that would drive consumers' choices in relation to cloud gaming providers, including price, user experience, latency, functionality (e.g. multi-player, functionality and cross-platform functionality) and content (with content being a factor in the context of a highly competitive game publishing market with many alternative content providers). Furthermore, other cloud gaming providers would have the ability to engage in counter-strategies to attract consumers if they had any concerns about not having *CoD* content on their service, for example entering into partnerships with other content providers or even acquiring game studios / publishers (as Sony and Netflix have been doing recently, see footnotes [244] and [277] below). For example:
 - (i) While Sony's cloud gaming service is nascent, to the extent Sony seeks to expand that service, it is expected to offer Sony's existing content library and capitalise on PlayStation's existing game subscription base (which is significantly larger than Microsoft's).
 - (ii) NVIDIA's technical superiority (in terms of its graphics processing units ("GPUs"), etc) provides it with performance advantages over other cloud gaming providers. [].²²⁶ Third party industry commentators have made similar observations:²²⁷

"Nvidia is further bolstering its GeForce NOW cloud gaming service with browser-based 1440p at 120Hz. If we take only the technique as the only criterion, then there is no doubt: GeForce NOW largely dominates cloud gaming. **Whether it's image quality, low latency, or broad device compatibility, Nvidia's cloud gaming service has a big lead over its competition.**"

²²⁵ (2 June 2022). Nvidia GeForce NOW Review. Gaming Anywhere That Makes Sense. CNET. Retrieved from: <https://www.cnet.com/tech/gaming/nvidia-geforce-now-review-gaming-anywhere-that-makes-sense/> [emphasis added].

²²⁶ []

²²⁷ (18 August 2022). The cloud gaming service extends its lead with this function. Gearrice. Retrieved from: <https://www.gearrice.com/update/the-cloud-gaming-service-extends-its-lead-with-this-function/> [emphasis added]

PUBLIC VERSION

4.60 The above evidence demonstrates that even if the NZCC were to form the view (contrary to the weight of evidence) that in the Counterfactual *CoD* content would be available to other cloud gaming providers but in the Factual it would be withheld, the evidence outlined above demonstrates that *CoD* content would not be an important input to cloud gaming and, therefore, is unlikely to be a material factor in consumers' choices of cloud gaming providers.

(4F): There is no evidence that any (hypothetical) withholding of Activision Blizzard content would have a substantial impact on the ongoing competitiveness of other cloud gaming providers, including as there is no evidence of any material "network effects" in cloud gaming, nor any evidence of unique advantages to Microsoft or barriers to entry

(4F1): There is no evidence that any (hypothetical) withholding of Activision Blizzard content would have a substantial impact on the ongoing competitiveness of other cloud gaming providers

4.61 For the same reasons outlined at Sub-Part 4E above that there is no evidence that the availability of Activision Blizzard content would materially alter consumers' cloud gaming choices, there is also no evidence that the withholding of Activision Blizzard content would have a substantial impact on the ongoing competitiveness of other cloud gaming providers.

4.62 Reflecting this lack of evidence, the SOI does not specify which competitors could be affected by a cloud gaming foreclosure strategy or to what extent, nor does it specify:

- (a) why any counter-strategies would not be successful;
- (b) why the availability of *CoD* would be the *defining* factor as to whether or not alternative cloud gaming providers would be able to compete; nor
- (c) why it is considered that consumers would not simply "multi-home" across different cloud gaming providers if having access to different content was a driver of consumer choice of platform (indeed, as cloud gaming is effectively device-agnostic and does not require investment in hardware, gamers can easily switch and multi-home across services regardless of the device they choose to play, and there is substantial evidence from video streaming that consumers multi-home and subscribe to many services at the same time).²²⁸

4.63 Accordingly, there is no evidence that the withholding of Activision Blizzard content would have a substantial impact on the ongoing competitiveness of other cloud gaming providers.

(4F2): There is no evidence of any material "network effects" in cloud gaming

4.64 The SOI states that the NZCC expects that "cloud gaming would experience network effects",²²⁹ by suggesting (a) that the more gamers there are on a particular cloud gaming service, the more utility other gamers will obtain from that service,²³⁰ and (b) the more gamers on a service, the greater incentives for game publishers to have their games on that service.²³¹

²²⁸ For example, in Australia it estimated in May 2023 that each household has on average 3.4 video on demand streaming services. (See: (1 May 2023). Australian streaming market stabilises despite 1.1 million cancellations. Kantar. Retrieved from: <https://www.kantar.com/inspiration/fmccg/australian-streaming-market-stabilises-despite-1-million-cancellations>)

²²⁹ Para [99], SOI.

²³⁰ Para [99.1], SOI.

²³¹ Para [99.2], SOI.

PUBLIC VERSION

4.65 While network effects are present in many sectors (for example, a popular restaurant will attract more diners), the existence of any network effects could only be considered relevant to a vertical foreclosure theory if there were evidence that such effects were in fact *significant* and, therefore, could lead to a particular market "tipping".

4.66 There is no evidence of any material network effects that could contribute to any vertical foreclosure concerns in relation to cloud gaming (let alone significant effects), and the statements in the SOI in relation to the possibility of network effects in cloud gaming misunderstand the dynamics of gaming. In particular:

- (a) The SOI refers to the concept that "as there are more users on any one platform, they will derive utility by having other gamers to play with". This is incorrect in today's gaming world. Instead, due to the existence of the cross-play functionality, gamers derive higher utility by having more gamers playing the same game not on the same *platform*.

Cloud gaming is simply an alternative distribution option for gamers to play the same games that they could otherwise play via another medium (either via native gaming or another cloud gaming service). The existence of cross-play functionality (i.e. the ability of playing online multi-player games across different platforms and services) ensures that any network effects tied to the number of gamers playing at the same time occurs on a *game title*, not due to the distribution service used to access that game title. This also explains why the Parties would keep *CoD* available on multiple platforms rather than withholding it from rivals. As all gamers significantly benefit from cross-play, a hypothetical foreclosure strategy involving withdrawing *CoD* from rival distribution channels would be self-defeating because it would hurt the whole gamer base of *CoD*, including gamers via both Xbox and rival channels. This, among other factors, means that any strategy to make *CoD* exclusive to Xbox channels would inevitably result in significant gamer backlash that would adversely impact both Xbox's and *CoD*'s reputations, upsetting the *CoD* gamer community and tarnishing the *CoD* and Xbox brands.

Indeed, gamers today playing the same game via different distribution options can commonly play together, with cross-play both a significant feature of native console gaming and increasingly in relation to cloud gaming (with cross-play enabled between different cloud gaming options, and between cloud and native gaming options). For example:

- (i) NVIDIA GeForce Now and Boosteroid gamers can play online multiplayer sessions together;²³²
- (ii) Ubitus markets the cross-platform functionality of its cloud gaming offerings on Nintendo Switch, for example noting: "The cloud version of Aliens: Fireteam Elite features cross-play capabilities across all platforms, allowing Nintendo Switch™ users to team up with players on Xbox, PlayStation, and PC to face the Xenomorph menace together."²³³
- (iii) Game publisher Ubisoft markets that its games enable cross-play between native and cloud gaming, and between different consoles: "Rainbow Six Siege supports cross-play between PlayStation and Xbox

²³² The condition for this to happen is that the gamers have purchased the title through the same online platform – e.g. Steam.

²³³ (26 April 2023). Aliens: Fireteam Elite Arrives On The Nintendo Switch™ Today with Terminal Containment Update. Ubitus. Retrieved from: <https://ubitus.net/aliens-fireteam-elite/>

consoles, or between PC and Luna. This means you can matchmaking with others who are playing on compatible platforms."²³⁴

- (iv) Game publisher EA enabled cross-play functionality between native gaming on console and PC with cloud gaming on (the now defunct) Stadia.²³⁵

Accordingly, cross-play functionality ensures that any network effects operate **at the game level**, not at the platform level – and cannot therefore fuel foreclosure concerns in relation to cloud gaming.

- (b) The suggestion that the number of gamers on a service will have a material impact on the number of publishers on a service also fails to reflect the relevant dynamics of cloud gaming distribution. While some publishers, including Activision Blizzard, would need to bear costs and invest time into adapting its games to work as efficiently on cloud as they do natively today, once this cost is paid, publishers have the incentive to distribute on as many services as possible. Cloud gaming is likely to decrease the cost of publishers to multi-home across different services – i.e., to distribute their games through multiple cloud gaming services. That is because, while for console gaming a publisher needs to “code” the game to be playable on each different operating systems and devices (for example, PlayStation, Xbox, Nintendo), which incurs optimisation costs, the most prominent cloud gaming providers today (for example, Amazon Luna, NVIDIA GeForce Now, Boosteroid etc), stream the same (PC) version of games. Therefore, publishers do not need to incur additional costs to distribute their games on multiple cloud gaming services. This means that publishers' incentives will be to distribute their game titles across as many cloud gaming services as possible as that will maximise their access to gamers without incurring additional development costs.

Further, gamers themselves also multi-home across different gaming options. Namely, multi-homing is a feature of console gaming (as noted at paragraph 3.19(f), it is estimated that [] of PlayStation customers internationally also own an Xbox),²³⁶ and multi-homing across cloud gaming services is expected to be even higher again given one of cloud gaming's claimed benefits is that it is device agnostic, and payment for a cloud gaming service is premised on ongoing subscription fees (which means that, like television streaming services, consumer multi-homing is likely to be common).²³⁷ Indeed, games are increasingly offered as part of popular television streaming services. Providers such as Amazon offer cloud gaming (including *Fortnite*) as part of the Amazon Prime offering,²³⁸ Netflix is expected to offer PC (as well as mobile) game streaming as part of its streaming subscription,²³⁹ and YouTube is testing a product for playing online games, known

²³⁴ Crossplay and cross-progression in Rainbow Six Siege. Retrieved from: <https://www.ubisoft.com/en-ca/help/rainbow-six-siege/gameplay/article/crossplay-and-cross-progression-in-rainbow-six-siege/000097631>

²³⁵(July 2022). Fifa 23 Cross-Play Deep Dive. EA Sports. Retrieved from: <https://www.ea.com/en-gb/games/fifa/fifa-23/news/pitch-notes-fifa-23-cross-play-deep-dive>

²³⁶ []

²³⁷ For example, in Australia it estimated in May 2023 that each household has on average 3.4 video on demand streaming services. (1 May 2023). See: Australian streaming market stabilises despite 1.1 million cancellations. Retrieved from: <https://www.kantar.com/inspiration/fmcg/australian-streaming-market-stabilises-despite-1-million-cancellations>

²³⁸ (4 May 2023). Prime Gaming members can now play Fortnite on Amazon Luna. Prime Gaming. Retrieved from: <https://primegaming.blog/prime-gaming-members-can-now-play-fortnite-on-amazon-luna-8e222a20b71f>

²³⁹ (30 March 2023). Netflix Games Could be Coming to TV and PC. Comic Book. Retrieved from: <https://comicbook.com/gaming/news/netflix-video-games-tv-rumor-iphone-controller/>

PUBLIC VERSION

as Playables.²⁴⁰ Multi-homing by gamers in this way further mitigates any material network effects in respect of cloud gaming, given the more that gamers multi-home across services, the easier it is for rival services to attract publishers and scale irrespective of having the user base advantage or not. As noted in the economic literature on multi-product ecosystems "[i]n general, the more multi-homing users there are, the easier it will be for multiple platforms to co-exist in a market, and the less 'tippy' the market will be." This is particularly the case for gaming as evidenced by the economics and business literature.²⁴¹

4.67 Given these dynamics, there is no evidence that network effects could support any cloud gaming vertical foreclosure theory of harm.

(4F3): No unique advantage from Microsoft having a cloud platform (Azure)

4.68 The SOI says that the NZCC is considering whether Microsoft has an advantage over rivals in cloud gaming through its ownership of the Azure cloud platform.²⁴²

4.69 First, and importantly, Microsoft's ownership of Azure is not Transaction-specific, and therefore will be the case in both the Factual and Counterfactual.

4.70 Second, Microsoft's cloud gaming service, Xbox Cloud Gaming, uses bespoke infrastructure that utilises Xbox console motherboards – it is not provided by Azure.

4.71 As the NZCC will be aware, "cloud" refers to the infrastructure necessary to deliver cloud-based game streaming, which enables gamers to access games across a range of different endpoints.²⁴³ There are many different ways a cloud gaming provider can access such infrastructure. Namely, a provider may:

- (a) build their own infrastructure (which is what providers such as Microsoft, Amazon, Google, Sony, NVIDIA GeForce NOW, Meta and others have done);
- (b) partner with a cloud computing provider; or
- (c) use a white-label service provided by another provider.

4.72 For Xbox Cloud Gaming, the development is led by Microsoft's Gaming business and Microsoft has chosen to run Xbox Cloud Gaming on dedicated Xbox consoles in Microsoft data centres, rather than Azure servers. Sony is pursuing a similar strategy, and has acquired cloud-based game streaming companies (i.e. Gaikai and OnLive and a minority shareholding in specialist cloud-based game streaming provider, Ubitus).²⁴⁴ In contrast,

²⁴⁰ (23 June 2023). Google's YouTube Is Testing an Online-Games Offering. Wall Street Journal. Retrieved from: https://www.wsj.com/articles/googles-youtube-is-testing-an-online-games-offering-16d1e772?mod=Searchresults_pos1&page=1

²⁴¹ (3 December 2020). Digital competition policy: Are ecosystems different? – Note by Amelia Fletcher Hearing on Competition Economics of Digital Ecosystems. OECD. Retrieved from: [https://one.oecd.org/document/DAF/COMP/WD\(2020\)96/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2020)96/en/pdf) at para [12]. As for the economics and business literature, see for example: Robin Lee, American Economic Review, *Vertical Integration and Exclusivity in Platform and Two-Sided Markets*, 2013. Retrieved from: <https://www.aeaweb.org/articles?id=10.1257/aer.103.7.2960>, and (January 2019). Why some platforms thrive and others don't. Harvard Business Review. Retrieved from <https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont>

²⁴² Para [102.1], SOI.

²⁴³ **Annex 6.15** – "Gaming Strategy Review Memo (Mar. 2019)", 1 March 2019, page 4.

²⁴⁴ For example:

- Sony acquired a cloud gaming start-up Gaikai in 2012 in order to "deliver a world-class cloud-streaming service that allows users to instantly enjoy a broad array of content ranging from immersive core games with rich graphics to casual content anytime, anywhere on a variety of internet-connected devices". See: (2 July 2012). Sony acquires Gaikai for \$380 million. GamesIndustry.Biz. Retrieved from: <https://www.gamesindustry.biz/sony-acquire-gaikai>

PUBLIC VERSION

Amazon's strategy is to integrate its cloud-based game streaming service with Amazon Web Services ("AWS"), promoting Luna as "powered by AWS, the world's most comprehensive and broadly adopted cloud platform".²⁴⁵ The Luna cloud-based streaming service runs PC games on AWS virtual machines.²⁴⁶

- 4.73 There have also been a number of partnerships in relation to cloud-based streaming infrastructure. For example:
- (a) Meta has partnered with NVIDIA to build a hosting environment on top of NVIDIA's GPUs, using its own edge computing operating system.²⁴⁷
 - (b) Google markets its cloud infrastructure offering to other cloud gaming providers. That includes Google:
 - (i) stating that its "Google Cloud for Games" business unit is "commit[ted] to powering live service games on any connected device";²⁴⁸ and
 - (ii) signing, in March 2023, a "strategic partnership" with Ubitus to provide cloud infrastructure to support Ubitus's cloud gaming service (see Figure 22 below).²⁴⁹

- Sony subsequently acquired OnLive, a cloud gaming start-up in April 2015. See: (2 April 2015). Sony buys streaming games service OnLive only to shut it down. The Verge. Retrieved from: <https://www.theverge.com/2015/4/2/8337955/sony-buys-onlive-only-to-shut-it-down>
- As noted in Section 8.11, Microsoft and Sony signed a memorandum of understanding in May 2019 to explore game related cloud solutions. However, this memorandum of understanding has not yet resulted in any formal partnership agreement and discussions between the companies have ceased. See also: (16 May 2019). Sony and Microsoft to explore strategic partnership. Yahoo! Finance. Retrieved from: https://news.microsoft.com/2019/05/16/sony-and-microsoft-to-explore-strategic-partnership/?ranMID=24542&ranEAID=kXQk6*ivFEQ&ranSiteID=kXQk6.ivFEQ-1tW0YiZNZ3zVqbZRcqwRUg&epi=kXQk6.ivFEQ-1tW0YiZNZ3zVqbZRcqwRUg&irgwc=1&OCID=AID2200057_aff_7593_1243925&tduid=%28ir_nh0ngola3kkf6im6bgr2v0zknv2xvwgknqge3uuh00%29%287593%29%281243925%29%28kXQk6.ivFEQ-1tW0YiZNZ3zVqbZRcqwRUg%29%28%29&irclidid=nh0ngola3kkf6im6bgr2v0zknv2xvwgknqge3uuh00
- (22 October 2021). Ubitus Supports Square Enix to Launch Marvel's Guardians of The Galaxy: Cloud Version on Nintendo Switch, 26th October. Ubitus. Retrieved from: <https://ubitus.net/ubitus-supports-square-enix-to-launch-marvels-guardians-of-the-galaxy-cloud-version-on-nintendo-switch-26th-october/>
- (27 October 2018). Meet Ubitus, the company behind Switch's cloud-powered games. Nintendo Everything. Retrieved from: <https://ubitus.net/ubitus-supports-square-enix-to-launch-marvels-guardians-of-the-galaxy-cloud-version-on-nintendo-switch-26th-october/>

²⁴⁵ <https://developer.amazon.com/luna>

²⁴⁶ [AWS.amazon.com](https://aws.amazon.com)

²⁴⁷ (9 June 2022). Under the hood: Meta's cloud gaming infrastructure. Engineering at Meta. Retrieved from <https://engineering.fb.com/2022/06/09/web/cloud-gaming-infrastructure/>

²⁴⁸ (20 March 2023). Ubitus and Google Cloud Announce Strategic Partnership to Power Cloud-Based Game Streaming. PR Newswire. Retrieved from: <https://www.prnewswire.com/news-releases/ubitus-and-google-cloud-announce-strategic-partnership-to-power-cloud-based-game-streaming-301775697.html>

²⁴⁹ Further context on this strategic partnership is as follows:

- (20 March 2023). Ubitus and Google Cloud Announce Strategic Partnership to Power Cloud-Based Game Streaming. PR Newswire. Retrieved from: <https://www.prnewswire.com/news-releases/ubitus-and-google-cloud-announce-strategic-partnership-to-power-cloud-based-game-streaming-301775697.html> [emphasis added]:

Ubitus K.K., a leading cloud streaming technology provider, and Google Cloud today announced a new partnership to advance the development of cloud streaming in the games industry. Under the collaboration, Ubitus has chosen Google Cloud as its primary cloud provider and will run the majority of its workloads onto Google Cloud. ...

"As we looked to the future of cloud streaming for games at Google, we found that Ubitus' robust offerings set a new bar for the games industry," said Jack Buser, Director, Google Cloud for Games. "Our partnership with Ubitus further **underscores Google Cloud's commitment to powering live service games on any connected device.**"

Figure 22 – Screenshot of Ubitus (21 March 2023) Tweet in relation to its strategic partnership with Google²⁵⁰



4.74 The evidence above reinforces the statement in the SOI that any cloud gaming provider could "partner with a cloud computing infrastructure provider".²⁵¹ Indeed, there are multiple cloud / Infrastructure as a Service ("IaaS")²⁵² providers that a cloud gaming provider could partner with, not only internationally, but also specifically in relation to the Australia / New Zealand region. Indeed, New Zealand is said to be currently going through a "boom in data centre[s] here", with more than "10 new "hyperscale" data centers being built or updated" in New Zealand, demonstrating the numerous options available.²⁵³ See further in Figure 23 below.

- (21 April 2023). Gaming via Cloud Streaming: Will Ubitus and Google Cloud Make it Happen?. Cloud Computing Magazine. Retrieved from: <https://cloud-computing.tmcnet.com/breaking-news/articles/455652-gaming-via-cloud-streaming-will-ubitus-google-cloud.htm> [emphasis added]:

Ubitus has stated that it is "the world's most scalable and flexible end-to-end cloud gaming system for fixed and wireless network service providers, game manufacturers and OEMs," **but the company is also very much leaning on Google's AI, ML, GPU and VM resources.** With Google Cloud's global infrastructure, Ubitus will use the resources available for improving the quality and power of its streaming and gaming-on-demand services, and for streamlining cloud game distribution worldwide. (Ubitus has VR/AR headset gaming in its sights, as well.)

²⁵⁰ <https://twitter.com/UbitusKK/status/1637831377142919170>

²⁵¹ Para [103], SOI.

²⁵² IaaS comprises the basic capabilities provided by a physical server, namely data processing (or computing), data storage and networking, each supported by "virtualisation" software allowing the simulation of individual "virtual machines" allocated to specific customers (often referred to as "tenants"), residing on clusters of physical servers located in a data centre.

²⁵³ (3 March 2022). Why hyperscale data centres are blossoming in NZ. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/sponsored-stories/why-hyperscale-data-centres-are-blossoming-in-nz/ZDFS3CQ5MKTPL6LUSCUUHNS7U/>

PUBLIC VERSION

Figure 23 – Cloud infrastructure providers with footprints in Australia / New Zealand that could partner with a cloud gaming provider

Cloud infrastructure provider	Commentary
<p>NEXTDC</p>	<p>In May 2023 it was announced that NEXTDC will spend AUD\$140 million on its first New Zealand data centre, being built in Auckland.²⁵⁴</p> <p>Pentanet (the distributor of the GeForce NOW cloud gaming service in Australia and New Zealand) has contracted with ASX-listed NEXTDC as the cloud infrastructure provider for its GeForce NOW service (with Pentanet currently using NEXTDC infrastructure in Australia to offer GeForce NOW into New Zealand);²⁵⁵</p> <p>Pentanet selected NEXTDC’s Tier IV P2 Perth and S2 Sydney data centres as the logical locations for 18 RTX blade server deployments for the GeForce NOW Powered by Pentanet pilot program...</p> <p>In addition, to providing safe havens for Pentanet’s critical cloud gaming infrastructure, NEXTDC supports the CloudGG user access portal with critical interconnectivity to ecosystem partners such as the public cloud platforms and national carrier networks who will bring customers to the gaming platform...</p> <p>NEXTDC was Pentanet’s first choice data centre partner for this project. Without having to worry about managing any of the risks around security, availability, connectivity and scalability, Pentanet are freed up to focus on innovation and growth and delivering true user experience differentiation among the critical mass of players.</p> <p>Once NEXTDC has built its data centre in New Zealand, this will be an additional option for cloud gaming providers, including Pentanet / GeForce NOW.</p>
<p>Amazon Web Services</p>	<p>In September 2021 it was announced that Amazon Web Services ("AWS") will invest NZD\$7.5 billion over the subsequent 15 years building data centres in New Zealand, and in April 2023 it was reported that AWS intends to invest AUD\$13 billion in expanding its cloud computing operations in Melbourne and Sydney.²⁵⁶</p>
<p>Google Cloud</p>	<p>In August 2022, Google announced that it would be bringing its Google Cloud offering to New Zealand,²⁵⁷ with Google understood to be offering that service in New Zealand "[using] the giant</p>

²⁵⁴ (16 May 2023). \$148m giant data centre for Auckland CBD. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/business/148m-giant-data-centre-for-auckland-cbd/CLEFSMJ7AJBLFN6MZYYWJ3ALJA/>

²⁵⁵ (6 October 2021). Unleashing the full force of cloud gaming in Australia. NEXTDC. Retrieved from: <https://www.nextdc.com/blog/unleashing-full-force-cloud-gaming-australia>

²⁵⁶ See:

- (22 March 2023). Amazon Luna launches in the UK, Germany, and Canada. GamesIndustry.biz. Retrieved from: <https://www.gamesindustry.biz/amazon-luna-launches-in-the-uk-germany-and-canada>
- (23 September 2021). AWS to Open Data Centers in New Zealand. Amazon. Retrieved from: <https://press.aboutamazon.com/2021/9/aws-to-open-data-centers-in-new-zealand>
- (3 April 2023). Amazon Web Services to invest \$13bn in expanding Australian cloud computing. The Guardian. Retrieved from: <https://www.theguardian.com/technology/2023/apr/04/amazon-web-services-to-invest-13bn-in-expanding-australian-cloud-computing>

²⁵⁷ (10 August 2022). Announcing new Google Cloud regions in Asia Pacific. Google Cloud Blog. Retrieved from: <https://cloud.google.com/blog/products/infrastructure/announcing-new-google-cloud-regions-in-asia-pacific>

PUBLIC VERSION

	data centres that will be built in northwest Auckland by DCI ²⁵⁸ (see further in relation to DCI below). As noted at paragraph 4.72 above, Google Cloud has started partnering with third party cloud gaming providers, including Ubitus.
DCI	<p>Google Cloud will launch in New Zealand using DCI's data centres. DCI, which is Sydney-based and owned by Brookfield Asset Management, is currently building the largest data centre in Auckland²⁵⁹ and is said to be spending NZD\$600 million building two data centres in total in Auckland.²⁶⁰ DCI's business model has been described in the following way:²⁶¹</p> <p style="padding-left: 40px;">The largest player in construction terms [in New Zealand] at present is DCI – the data centre builder and operator owned by Canada's Brookfield Asset Management, which "white labels" facilities for the likes of top-tier players like AWS and Microsoft.</p>
Canberra Data Centres	In May 2020 Canberra Data Centres (" CDC "), the largest privately owned data centre business in Australia ²⁶² (which is 48% owned by New Zealand infrastructure investor, Infratil), ²⁶³ announced it was expanding into New Zealand, ²⁶⁴ which has resulted in CDC "open[ing] its first New Zealand hyperscale data centres" in November 2022, with "plans for more". ²⁶⁵
Intergrid	Intergrid markets itself as offering "baremetal servers optimised for gaming in Sydney, Brisbane, Melbourne, Canberra, Adelaide, Perth, Townsville, Hobart, Darwin and Auckland", ²⁶⁶ and that "[t]he world's largest game server providers and game publishers choose Intergrid to host their servers. We deliver fast, low-latency connectivity to your players through our network of 10 regional datacentres which reach 90% of the Australian population in under 20 milliseconds." ²⁶⁷
Equinix	Equinix has datacentres in Asia-Pacific, including in Perth, Adelaide, Melbourne, Canberra, Sydney, and Brisbane, ²⁶⁸ and has previously worked with Boosteroid in installing Boosteroid servers for cloud gaming in Equinix data centres in the Middle East and Germany. ²⁶⁹

4.75 In light of all these different ways to access cloud infrastructure for cloud gaming, it is clear there is no unique advantage to Microsoft, nor that access to cloud infrastructure gives rise to any barriers to entry to other cloud gaming providers. Further, Microsoft does not even utilise its own cloud computing infrastructure for Xbox Cloud Gaming. Therefore, Microsoft's ownership of Azure cannot be used to support any potential vertical foreclosure theory of harm.

²⁵⁸ (10 August 2022). Google reveals NZ "Cloud Region" plans. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/business/google-reveals-new-zealand-cloud-region-plans/3QLDSDXX4T3ICABJMGKQV34HDI/>

²⁵⁹ (1 August 2022). DCI Data Centers commences construction on Auckland's largest data centre, set to inject another \$400 million into local economy. DCI Data Centers. Retrieved from: <https://dcidatacenters.com/news/dci-starts-aki02-construction/>

²⁶⁰ (12 June 2022). Aotearoa, Land Of The Digital Cloud?. North & South Magazine. Retrieved from: <https://northandsouth.co.nz/2022/06/12/data-farming-data-grid-new-zealand/>

²⁶¹ (16 May 2023). \$148m giant data centre for Auckland CBD. NZ Herald. Retrieved from: <https://www.nzherald.co.nz/business/148m-giant-data-centre-for-auckland-cbd/CLEFSMJ7AJBLFNM6MZYWJ3ALJA/>

²⁶² <https://cdcdc.com.au/about-us/>

²⁶³ (21 May 2020). CDC Data Centres to develop two world-class NZ data centres. Infratil. Retrieved from: <https://infratil.com/news/cdc-data-centres-to-develop-two-world-class-nz-data-centres/>

²⁶⁴ (21 May 2020). CDC Data Centres to develop two world-class NZ data centres. Infratil. Retrieved from: <https://infratil.com/news/cdc-data-centres-to-develop-two-world-class-nz-data-centres/>

²⁶⁵ (29 November 2022). CDC Data Centres opens hyperscale facilities in Auckland, buys land for more. Reseller News. Retrieved from: <https://www.reseller.co.nz/article/703654/cdc-data-centres-opens-hyperscale-facilities-auckland-buys-land-more/>

²⁶⁶ <https://intergrid.au/solutions/gaming.php>

²⁶⁷ <https://intergrid.au/solutions/gaming.php>

²⁶⁸ <https://www.equinix.com/data-centers>

²⁶⁹ <https://www.facebook.com/boosteroid.info/posts/pfbid0hKfEg4GhZbtd4pYuSAYhznhLEudu5h6rYz8efWxpVgR7FqvUsUwWNdWwHBrVtz/>

(4F4): No unique advantage from being a game publisher

4.76 The SOI also says that the NZCC is considering whether Microsoft has an advantage over rivals in cloud gaming by being a "developer and publisher of video games".²⁷⁰ Again this is not unique to Microsoft – there are many other video game publishers, including a number with significant shares both globally and in New Zealand, such as Sony, Nintendo, Tencent, EA, Take-Two, Epic, Ubisoft, Konami, Bandai Namco and Amazon. Those publishers could equally establish their own cloud gaming service (as Sony and Amazon have done) or partner with any of the number of cloud gaming providers (as EA and Ubisoft have done).

4.77 Therefore, Microsoft's presence as a publisher does not give Microsoft any unique advantage or reflect a unique barrier to entry, and so that cannot be used to support any potential vertical foreclosure theory of harm.

(4G): There is no evidence that any (hypothetical) withholding of Activision Blizzard would result in a substantial lessening of competition in any properly defined market

4.78 As set out at paragraph 3.24 above in relation to the console foreclosure theory, for there to be any vertical foreclosure concerns in relation to cloud gaming "[t]he ultimate question is whether the competition lost from potentially foreclosed competitors is sufficient to have the likely effect of substantially lessening competition in light of the remaining competitive constraints".²⁷¹

4.79 In other words, again the question would be whether:

- (a) the **competitive process** in any properly defined market would be significantly adversely reduced if one game franchise is not available (i.e. that as a result the process of cloud gaming providers competing to win customers based on price, quality, and service will be significantly reduced); and
- (b) then as a result of that, Xbox Cloud Gaming would be able to significantly increase its prices such that its cloud gaming prices to consumers across the entire properly defined New Zealand market would increase by 4-5%²⁷² more than they otherwise would be in the Counterfactual²⁷³ and:
 - (i) customers would not react to that supra-competitive cloud gaming pricing (or reduction in quality) by switching to alternative providers; and
 - (ii) alternative cloud gaming providers would not identify that Xbox Cloud Gaming's prices are above competitive levels (or quality is below competitive levels) and develop effective counter-strategies to attract consumers to their platforms (such as service quality enhancements, alternative content exclusives, price reductions); and
 - (iii) therefore, that Xbox Cloud Gaming's supra-competitive prices (or sub-competitive quality) would durably persist for a long-term period – i.e. have more than just a short-term effect (noting the Court precedent

²⁷⁰ Para [102.1], SOI.

²⁷¹ NZCC's *M&A Guidelines* at [5.9]. [emphasis added]

²⁷² NZCC's *M&A Guidelines* at footnote [37].

²⁷³ Or a commensurate reduction in quality.

PUBLIC VERSION

referred to at paragraph 6.2(a)(ii) below that "**short term effects are unlikely to be substantial**").²⁷⁴

4.80 Again, there is no evidence that such a substantial lessening in the competitive process in a properly defined market could occur as a result of the Transaction:

- (a) First, as outlined at Sub-Part 4C above, *CoD* content would not be available in the Counterfactual, so there would be no reduction in the availability of *CoD* content as between the Factual and Counterfactual and so no lessening of competition at all could result (in fact, the Transaction is *pro-competitive*).
- (b) Second, as outlined at Sub-Part 4A above, there is no properly defined cloud gaming market.
- (c) Third, as outlined at Sub-Part 4E above, irrespective of the market definition, the evidence demonstrates that *CoD* (or any other Activision Blizzard) content would not be a material factor in consumers' choices of cloud gaming providers.
- (d) Fourth, as outlined at Sub-Part 4F above, there is no evidence that withholding of *CoD* (or any other Activision Blizzard) content would have a substantial impact on the ongoing competitiveness of other cloud gaming providers.
- (e) Fifth, there is no evidence that the provision of cloud gaming services in New Zealand would not remain highly competitive, including in light of the significant number of different providers (operating different business models), and as any assessment of the forward-looking Factual needs to take into account the rights to Activision Blizzard content that are committed via the Contracts and the EC Commitments.
- (f) Sixth, the legal framework is clear that the NZCC can only raise concerns with an acquisition:
 - (i) based on Transaction-specific effects; and
 - (ii) by making a factual assessment based on the balance of probabilities, and discarding any possibilities that "have only remote prospects of occurring"²⁷⁵ (with the Courts cautioning against "starting at shadows").²⁷⁶

4.81 Further detail on these fifth and sixth points are at Sub-Parts 4G1 and 4G2 below as follows.

(4G1): There is no lessening of competition in the provision of cloud gaming in New Zealand (in fact, the Transaction is pro-competitive)

4.82 Given cloud-based streaming as an alternative distribution channel for gaming is still very much in its infancy, and there are a multitude and diversity of different cloud gaming business models and different functionalities offered by each service, it is challenging to quantify the relative size of each active provider. However, Microsoft can make the following estimates:

- (a) As noted at 4.23 above, almost [] of Xbox Cloud Gaming users actually use the service to test games (i.e. "try-before-download") as opposed to playing games

²⁷⁴ *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* at [247], per Glazebrook J. [emphasis added]

²⁷⁵ *Woolworths Limited v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [122].

²⁷⁶ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

PUBLIC VERSION

online in the way users of more dedicated cloud gaming services (e.g. NVIDIA GeForce NOW) would do. Once these users are excluded from Microsoft's numerator, Xbox Cloud Gaming's share of subscribers is estimated to be [].

- (b) Other global providers include the following (with shares estimates, as above, based on figures excluding Xbox Cloud Gaming users using the service to test games) NVIDIA GeForce NOW (estimated share of []), Sony PlayStation Plus ([]), Amazon Luna ([]), (the now defunct) Google Stadia ([]), and a long list of providers (Boosteroid, Blacknut, Game Stream, Netboom, Playkey, Shadow, Utomik, Wiztivi, Nware, Rainway) accounting for the remaining [] of cloud gaming subscribers.
 - (c) Others, such as Netflix, are also developing their own cloud streaming game distribution offerings (and Netflix has been acquiring game publishers in anticipation of that).²⁷⁷ Having started by streaming mobile games, Netflix is expected to also start streaming PC games.²⁷⁸
 - (d) Google's YouTube is also reported to be adding games to its platform.²⁷⁹
- 4.83 The fact that a large number of companies have entered (or are looking to enter) the cloud gaming space, utilising a range of different business models and infrastructures, demonstrates that barriers to entry are low.
- 4.84 Furthermore, while there is a significant range of different providers, if the NZCC were to focus on the five providers that the CMA identified as the "five main global competitors

²⁷⁷ For example see Netflix has been quoted as follows:

The company's VP of games, Mike Verdu, announced in October that Netflix was "seriously exploring" a cloud gaming service, and work on the project is "underway," Leanne Loombe, Netflix's VP of external games, said in a briefing with reporters.

"We are very early in that side of our journey," Loombe said. "We do believe that cloud gaming will enable us to provide that easy access to games on any screen and be frictionless and provide the accessibility into gaming experiences."

At the same time, Netflix has acquired three video games studios in recent years, as well as establishing a fourth (led by a former EA executive), with an independent industry analyst noting:

"[Netflix] have so much data on customer preferences on the video-streaming content side, my sense is they can probably bring some of that to bear. I think ultimately what they want to do is utilise these games as part of the product content package, and then funnel into the Netflix universe."

See:

- (21 March 2023). Netflix wants to make its games 'playable on every Netflix device that you have'. The Verge. Retrieved from: <https://www.theverge.com/2023/3/20/23641611/netflix-cloud-gaming-service-underway-playable>
- (27 September 2022). Netflix sets up first internal games studio in push to retain subscribers. Japan Times. Retrieved from: <https://www.japantimes.co.jp/news/2022/09/27/business/netflix-develop-video-games/>
- (27 September 2022). Netflix plans to launch its own video game studio. BBC. Retrieved from: <https://www.bbc.com/news/technology-63048019>

²⁷⁸ (30 March 2023). Netflix Games Could be Coming to TV and PC. Comic Book. Retrieved from: <https://comicbook.com/gaming/news/netflix-video-games-tv-rumor-iphone-controller/>

²⁷⁹ (23 June 2023). Google's YouTube Is Testing an Online-Games Offering. Wall Street Journal. Retrieved from: https://www.wsj.com/articles/googles-youtube-is-testing-an-online-games-offering-16d1e772?mod=Searchresults_pos1&page=1

PUBLIC VERSION

offering cloud gaming services today"²⁸⁰ (namely, NVIDIA GeForce NOW, Boosteroid, Microsoft Xbox Cloud Gaming, Sony PlayStation Plus, and Amazon Luna), the evidence demonstrates that, even if it could be said that *CoD* content would be made available in the Counterfactual and that *CoD* content would be important to cloud game streaming competition (neither of which is correct), there is no prospect of vertical foreclosure of such providers offering services into New Zealand or any downstream substantial lessening of competition in New Zealand.

- 4.85 In particular, of those five providers identified by the CMA, three are currently available for cloud gaming in New Zealand, namely:²⁸¹
- (a) NVIDIA GeForce NOW (distributed in Australia and New Zealand by ASX-listed Pentanet using servers in Australia²⁸² and reported to have plans for servers in New Zealand).²⁸³ See further at **Appendix Four** in relation to Pentanet's distribution of GeForce NOW in New Zealand;
 - (b) Boosteroid; and
 - (c) Xbox Cloud Gaming (serviced from an Australian data centre).
- 4.86 In the Factual all three would have the right to distribute Activision Blizzard titles via their services in New Zealand, including due to the Contracts (which Microsoft has specifically entered into with each of NVIDIA and Boosteroid) and the EC Commitments.
- 4.87 Therefore, even looking just at those three providers currently offering services in New Zealand, there is no prospect of any of them not having the right to distribute Activision Blizzard titles via their cloud-based distribution services in New Zealand. That can be contrasted to the Counterfactual, where none of those three providers would have the right to distribute Activision Blizzard titles via their cloud-based distribution services in New Zealand.
- 4.88 In addition, to the extent any other providers of cloud-based streaming distribution were to launch in New Zealand (for example, PlayStation Plus, Amazon Luna, Ubitus, Nware, etc), they would also have the right, pursuant to the EC Commitments²⁸⁴ or, for Ubitus and Nware, the Contracts, to distribute Activision Blizzard titles via their services in New Zealand.
- 4.89 Accordingly, not only does the Transaction not lessen competition, it is *pro-competitive* in New Zealand (and elsewhere) by enabling those providers to distribute content that would

²⁸⁰ CMA Final Report at [8.79].

²⁸¹ The fifth, Amazon Luna, is not yet available in New Zealand, but (like the other providers) is still very early in its expansion (having only launched in the US in March 2022, and expanding into Canada, Germany, and the UK in late March 2023). In September 2021 it was announced that AWS will invest NZD\$7.5 billion over the subsequent 15 years building data centres in New Zealand, and in April 2023 it was reported that AWS intends to invest AUD\$13 billion in expanding its cloud computing operations in Melbourne and Sydney. See references here:

- (22 March 2023). Amazon Luna launches in the UK, Germany, and Canada. GamesIndustry.biz. Retrieved from: <https://www.gamesindustry.biz/amazon-luna-launches-in-the-uk-germany-and-canada>
- (23 September 2021). AWS to Open Data Centers in New Zealand. Amazon. Retrieved from: <https://press.aboutamazon.com/2021/9/aws-to-open-data-centers-in-new-zealand>
- (3 April 2023). Amazon Web Services to invest \$13bn in expanding Australian cloud computing. The Guardian. Retrieved from: <https://www.theguardian.com/technology/2023/apr/04/amazon-web-services-to-invest-13bn-in-expanding-australian-cloud-computing>

²⁸² (19 August 2022). Pentanet hits double-digit profit growth on back of subscriber boom. Business News Australia. Retrieved from: <https://www.businessnewsaustralia.com/articles/pentanet-hits-double-digit-profit-growth-on-back-of-subscriber-boom.html>

²⁸³ (22 October 2021). Cloud gaming service GeForce NOW is live in Australia. Gameshub. Retrieved from: <https://www.gameshub.com/news/news/cloud-gaming-service-geforce-now-hits-australia-next-week-here-are-the-details-4713/>

²⁸⁴ As noted at footnote [222], the EC Commitments would practically capture all game streaming services that could likely be offered in New Zealand, as it is likely that any game streaming providers that operate in New Zealand would also reach EEA consumers.

PUBLIC VERSION

not have otherwise been able to. The fact that the Transaction will be *pro-competitive* is reflected in:

- (a) the statements of the EC in granting clearance to the Transaction (see Figure 21 above);²⁸⁵
- (b) the fact that all three cloud gaming providers that entered into the Contracts with Microsoft (NVIDIA GeForce NOW, Boosteroid, and Ubitus) are supportive of the Transaction (see paragraph 4.47 above), as is Nware, which entered into a contract with Microsoft after the EC Commitments were submitted; and
- (c) closer to home, the statements to the ASX of GeForce NOW's distributor in Australia and New Zealand, Pentanet, outlining the positive impacts of the Contract with NVIDIA;²⁸⁶

On February 21, 2023, Microsoft and NVIDIA announced a 10-year strategic partnership to bring popular Xbox PC games such as Minecraft and Activision Blizzard PC titles like *Call of Duty* to millions of users worldwide through the GeForce NOW cloud gaming platform. As a result, gamers can now play their favourite Xbox titles on multiple devices, including desktops, laptops, and mobile devices, which enhances accessibility and convenience. This collaboration marks an important milestone in expanding the gaming industry and increasing the earnings potential of the GeForce NOW cloud gaming platform.

4.90 Finally, it is noted that the SOI states that the NZCC does not consider that the merged entity would have the ability or incentive to foreclose Nintendo in any market.²⁸⁷ This means even if cloud gaming could be assumed to be a growth area in the future in New Zealand, Nintendo would also need to be viewed as a likely competitor in New Zealand, and the NZCC has already reached a view could not be impacted by the Transaction (Nintendo is one of the largest gaming companies in the world, with a market capitalisation of USD\$51 billion,²⁸⁸ and is already active in offering cloud gaming in other countries,²⁸⁹ including via working with Ubitus).²⁹⁰ The NZCC could not assume that cloud gaming would emerge as a distribution channel, but also assume Nintendo would not participate in that distribution channel.

²⁸⁵ (15 May 2023). Mergers: Commission clears acquisition of Activision Blizzard by Microsoft, subject to conditions. European Commission. Retrieved from: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2705

²⁸⁶ (17 April 2023). Pentanet Secures Binding Commitment to Raise \$6.1 million. ListCorp. Retrieved from: <https://www.listcorp.com/asx/5gg/pentanet-limited/news/pentanet-secures-binding-commitments-to-raise-6-1-million-2861964.html>

²⁸⁷ Footnote [25], SOI.

²⁸⁸ (June 2023). Market capitalization of Nintendo. Companies Market Cap. Retrieved from: <https://companiesmarketcap.com/nintendo/marketcap/>

²⁸⁹ [https://en-americas-support.nintendo.com/app/answers/detail/a_id/53518/~cloud-versions-of-games---faq#:~:text=Cloud%20versions%20of%20games%20available,the%20United%20States%20and%20Canada](https://en-americas-support.nintendo.com/app/answers/detail/a_id/53518/~/cloud-versions-of-games---faq#:~:text=Cloud%20versions%20of%20games%20available,the%20United%20States%20and%20Canada)

²⁹⁰ See for example:

- (29 September 2021). Ubitus and Dear Villagers jointly release "The Forgotten City – Cloud Version" to Nintendo Switch on September 23. Ubitus. Retrieved from: <https://ubitus.net/ubitus-and-dear-villagers-jointly-release-the-forgotten-city-cloud-version-to-nintendo-switch-on-september-23/>
- (5 October 2018). Ubitus Provides Cloud Gaming Technology for "Assassin's Creed Odyssey" on Nintendo Switch. Ubitus. Retrieved from: <https://ubitus.net/ubitus-provides-cloud-gaming-technology-for-assassins-creed-odyssey-on-nintendo-switch/>
- (26 April 2023). Aliens: Fireteam Elite Arrives On The Nintendo Switch Today with Terminal Containment Update. Ubitus. Retrieved from: <https://ubitus.net/aliens-fireteam-elite/>

PUBLIC VERSION

4.91 For all the reasons outlined above, there is no prospect of any substantial lessening of competition in relation to the provision of cloud gaming in New Zealand.

(4G2): Any theoretical competition concerns need to be based on the evidence (they cannot be speculative nor "start at shadows")

4.92 The SOI recognises that "the merging parties are active in dynamic markets in which innovation may occur with or without the merger",²⁹¹ and there is uncertainty about "how cloud gaming is likely to develop in New Zealand", with cloud gaming being "nascent".

4.93 As the NZCC will be aware, the New Zealand Courts have said that the NZCC should not "start at shadows",²⁹² including as "acquisitions can increase efficiency and benefit the public unless there is good reason to prevent them", which means that a "starting at shadows approach to what constitutes an anti-competitive effect might thus be inimical to the public interest."²⁹³ The Courts in Australia have similarly cautioned that assessments on competitive effects and the counterfactual cannot be based on "pure speculation".²⁹⁴

4.94 This means that any NZCC assessment on the future state of competition must not be speculative and must be evidence based and amount, on the balance of probabilities, to a "real and substantial prospect".²⁹⁵ Reflecting this, the NZCC's decision-making in other clearance decisions has observed the need to ensure:

- (a) any competition concerns are **not "overly speculative"**, for example, noting in its 2020 *Cengage / McGraw* clearance:²⁹⁶

We also considered whether, absent the Proposed Acquisition, the Applicants would have been close competitors in an emerging market for the supply of digital educational publishing services such as subscription services. However, we have **found no evidence** that the Applicants are currently providing such services in New Zealand [redacted] and therefore considered any competition concerns relating to this issue in New Zealand **would be overly speculative**.

- (b) any assessments of future market dynamics (including whether a new narrower market could emerge) need to be **based on "sufficient evidence"**, for example, noting in its 2020 *Pact / Flight* clearance:²⁹⁷

Our analysis is forward-looking, and we considered whether a narrow market for NZ RPET could develop in future as customers are increasingly considering environmental impacts when selecting packaging. However, **we did not consider there is sufficient evidence** indicating that a market would be likely to emerge in the coming years.

²⁹¹ Para [79], SOI.

²⁹² *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

²⁹³ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

²⁹⁴ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [211].

²⁹⁵ *Commerce Commission v Woolworths Limited* [2009] NZCCLR 12 at [135].

²⁹⁶ *Cengage Learning Holdings II, Inc. and McGraw-Hill Education, Inc* [2020] NZCC 10 at Footnote [44]. [emphasis added]

²⁹⁷ *Pact Group Holdings Limited and Flight Plastics Limited* [2020] NZCC 27 at [47]. [emphasis added]

PUBLIC VERSION

- (c) that the NZCC does not try to predict potential concerns into the future beyond a period that can be assessed with any **accuracy**, for example, noting in its 2006 *CRB / CHH* clearance:²⁹⁸

The Commission relies upon relatively accurate wood flow forecasts in its assessment of the competition implications of the proposed acquisition. Industry participants advised the Commission that the further into the future that the harvest is projected, **the higher degree of speculation is involved in the projection, and therefore the less certainty as to the accuracy of the projected harvest level. To this end, the Commission has not included the 2019-2023 time period in its assessment of the likely competition implications of the proposed acquisition.**

4.95 In this case, there is no evidence (let alone evidence on the balance of probabilities), that there is a real and substantial prospect that:

- (a) *CoD* (or any other Activision Blizzard content) has market power or is a "must have" input to downstream cloud gaming (see Sub-Part 4B above);
- (b) in the Counterfactual *CoD* (or any other Activision Blizzard content) "is likely to be made available to cloud gaming providers in future"²⁹⁹ (see Sub-Part 4C above). In particular, not only is there no reliable evidence that Activision Blizzard would have made its content available via cloud gaming absent the Transaction, the evidence plainly shows that [];
- (c) in the Factual Microsoft would not have the ability and incentive to withhold *CoD* (or any other Activision Blizzard content) from other cloud gaming providers (see Sub-Part 4D above). In particular, any suggestion that that Microsoft could have an incentive to foreclose other cloud gaming providers:
- (i) is directly contrary to Microsoft's observed conduct (of licensing Microsoft and Activision Blizzard content) towards other cloud gaming providers, and the evidence the NZCC has received that Microsoft is a "good actor" in this space and there is no indication that they would look to "lock games away";³⁰⁰
- (ii) is directly contrary to the legal obligations that Microsoft will face under both the Contracts and the EC Commitments; and
- (iii) is pure speculation when, at best, the future of cloud gaming is highly uncertain, and it will comprise only a small portion of the overall gaming industry (cloud gaming on PC will remain limited to ~1% of total gaming revenue worldwide by 2025, and the same is true for console), such that there is no current evidence that [], and as Figures 19 and 20 (at paragraph 4.36 above) show, the adoption of Xbox Cloud Gaming in New Zealand [] (as of April 2023, Xbox Cloud Gaming had []).³⁰¹

²⁹⁸ NZCC Decision No. 589 *CRBF Limited / Carter Holt Harvey Limited* (5 October 2006) at [119]. [emphasis added]

²⁹⁹ Para [80], SOI.

³⁰⁰ Para [95], SOI.

³⁰¹ MAUs are in relation to Game Pass Ultimate subscribers who use Xbox Cloud Gaming and exclude gamers playing *Fortnite* for free outside of the GPU service. However even including free users, []. This is evidence of no demand growth for cloud gaming in New Zealand.

PUBLIC VERSION

- 4.96 Accordingly, any conclusion by the NZCC to the contrary on any of these points would fail to meet the required standard of proof and evidential burden, and would run counter to requirements of the Courts that the NZCC not "start at shadows"³⁰² or make decisions based on "pure speculation".³⁰³

³⁰² *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76].

³⁰³ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 at [211].

PUBLIC VERSION

5. PART 5: CONCLUDING COMMENTS

- 5.1 For the reasons set out in this Response, and summarised in the Executive Summary, Microsoft is clear that all the evidence demonstrates that there is no prospect of the Transaction substantially lessening competition in any market in New Zealand in comparison to the Counterfactual.
- 5.2 Microsoft trust that this further information will assist the NZCC in satisfying itself of the same and, therefore, that clearance must be granted.

PUBLIC VERSION

6. PART 6: CONFIDENTIALITY

- 6.1 Microsoft notes that the information identified as confidential (by square brackets and highlighting) is highly confidential and it is requested that such information be treated accordingly. It is requested that this information is held by the NZCC in strictest confidence, and the information is provided on the basis that it may only be used for the purposes of the NZCC considering the application for clearance for the Transaction.
- 6.2 Confidentiality is sought for the purposes of section 9(2)(b) and (ba) of the Official Information Act 1982 on the grounds that:
- (a) the information is commercially sensitive and valuable information that is confidential to Microsoft and / or Activision Blizzard (as relevant); and
 - (b) disclosure would be likely to unreasonably prejudice the commercial position of Microsoft and / or Activision Blizzard (as relevant), and prejudice the supply of similar information to the NZCC in the future.

APPENDIX THREE

SUMMARY OF RELEVANT LEGAL FRAMEWORK REFERRED TO IN THE RESPONSE

- In addition to the references in the SOI to the legal framework the NZCC needs to apply in assessing the Transaction, the following summarises other key aspects of the required legal framework for that assessment as referred to in this Response:

(a) the Court of Appeal has said that:

(i) "competition" refers to the "**competitive process**":³⁰⁴

I move now to the term "competition", which in s3(1) is defined as workable or effective competition. The Commerce Act is concerned with competition in the economic sense, which is distinct from the concept of rivalries. Rivalry emphasises the behaviour of individual buyers and sellers and the independent striving for custom. Competition is a process that emphasises the structural conditions under which rivalry occurs. **The Commerce Act is not concerned with protecting individual competitors but with the competitive process...**

(ii) any "**short term effects are unlikely to be substantial**",³⁰⁵ with the Court of Appeal citing *Universal Music* that:³⁰⁶

The Court has to make a qualified judgment about the impact of the impugned conduct on the competitive process. For example, **a short term effect readily corrected by market processes is unlikely to be substantial**. The lessening of competition must be adjudged to be of such seriousness as to adversely affect competition in the market place, particularly with consumers in mind.

(iii) in assessing a transaction, the NZCC needs to conduct "a comparison of the likely state of competition if the acquisition proceeds ("the factual") against the likely state of competition if it does not ("the counterfactual")"³⁰⁷ – in other words, isolate forward-looking transaction specific effects in a market.

(b) in so doing:

(i) the NZCC has said that for effects to be relevant to the assessment of a transaction, they need to be "**likely to occur as a direct consequence of a change associated with the Proposed Acquisition**"³⁰⁸ (i.e. the effects to be "**transaction specific**").

³⁰⁴ *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* at [242], per Glazebrook J. [emphasis added]

³⁰⁵ *ANZCO Foods Waitara Limited & Ors v AFFCO New Zealand Limited* at [247], per Glazebrook J. [emphasis added]

³⁰⁶ *Universal Music Australia v Australian Competition & Consumer Commission* [2003] FCAFC 193 at [242]. [emphasis added]

³⁰⁷ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [63].

³⁰⁸ *Mercury NZ Limited and Trustpower Limited's retail business* [2021] NZCC 16 at [87].

PUBLIC VERSION

- (ii) the Courts have said that determining "what is likely to happen in the future" needs to be based on economic principles³⁰⁹ as an assessment of the future conduct that a firm would rationally take.³¹⁰
- (iii) the High Court has said that in assessing whether an acquisition would be "likely" to have substantial lessening of competition compared to the counterfactual it is necessary to "discard those possibilities that have only **remote prospects** of occurring",³¹¹ and that factual assessments need to be made on the **balance of probabilities**.³¹²
- (iv) the Court of Appeal has cautioned against a "**starting at shadows**" approach given "acquisitions can increase efficiency and benefit the public unless there is good reason to prevent them".³¹³

On the other hand, acquisitions can increase efficiency and benefit the public and thus should be permitted unless there is a good reason to prevent them. A **starting at shadows** approach to what constitutes an anti-competitive effect might thus be inimical to the public interest.

- (c) in applying its assessment of what is likely to occur in the future, the NZCC's *M&A Guidelines* set out that this involves the NZCC making:³¹⁴

a pragmatic and commercial assessment of what is likely to occur in the future with and without the merger.

Relevantly, in making a "pragmatic and commercial assessment of what is likely to occur in the future", the NZCC has in a number of cases taken into account forward-looking and legally enforceable commitments that the merger parties have made to other parties – including other commercial parties and other regulators. That includes within the last month,³¹⁵ where the NZCC determined that contractual commitments were sufficient to prevent any prospect of vertical foreclosure – namely in the *Connexa / 2degrees* determination, including as those contractual commitments could not be changed without 2degrees' consent.³¹⁶

2degrees' contractual protections (in its MISA and in *Connexa*'s governance arrangements with Spark), **on their own, are sufficient to protect it from harm** that would be extensive enough to materially raise its costs, impair its current network or undermine its

³⁰⁹ *Commerce Commission v New Zealand Bus Limited* (2006) 3 NZCCLR 111 at [160].

³¹⁰ *Commerce Commission v Bay of Plenty Electricity Ltd.* CIV-2001-485-917 High Court Wellington Registry (12-16, 19-23, 26-28 February, 1, 2, 5-8 March, 13 December 2007) at [317] - [318], per Clifford J.

³¹¹ *Woolworths Limited v Commerce Commission* (2008) 8 NZBLC 102,128 (HC) at [122]. [emphasis added]

³¹² *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [97]. [emphasis added]

³¹³ *Commerce Commission v Woolworths Limited And Ors* CA55/2008 [1 August 2008] at [76]. [emphasis added]

³¹⁴ NZCC's *M&A Guidelines* at [2.35]. [emphasis added]

³¹⁵ [], other decisions in which the NZCC has taken into account behavioural undertakings given to other overseas regulators and long-term contractual commitments include:

- *Gebr. Knauf KG and USG Corporation* [2019] NZCC 3: Behavioural undertaking given to an overseas regulator.
- *Vector Limited and Arc Innovations Limited* [2014] NZCC 36: Pre-existing long-term contracts with commercial counterparties
- *Hancock Natural Resource Group and Carter Holt Harvey Limited* [2006] Decision No. 588: Pre-existing long-term contracts with commercial counterparties
- *Daiken New Zealand Limited and Dongwha New Zealand Limited* [2018] NZCC 4: Executed long-term contracts with other commercial counterparties that are contingent on the transaction in question completing.

See further at **Appendix Seven**.

³¹⁶ *Connexa Limited and Two Degrees Networks Limited and Two Degrees Mobile Limited* [2023] NZCC 10 at [93.1].

rollout of 5G. 2degrees' proposed MISA with Connexa – **which would only be able to be changed with 2degrees' consent** – []. With such protections in place, any impacts that Spark could have on 2degrees by influencing Connexa to favour its own interests marginally or in times of capacity constraint are likely to be relatively minor.

- (d) in relation to vertical foreclosure theories, the NZCC's *M&A Guidelines* state:
- (i) that a "firm is generally only able to foreclose competitors if it has **market power** at one or more level(s) of the supply chain. If a firm does not have market power, its competitors could switch to other suppliers or purchasers".³¹⁷ In previous NZCC decisions, the NZCC has referred to this as requiring "must have"³¹⁸ or "essential" products;³¹⁹ and
 - (ii) that a firm will only have the incentive to "foreclose competitors if it is profitable to do so",³²⁰ in other words that the costs of doing so are outweighed by the additional profits (i.e. requiring the prospect of recoupment).
- (e) the Court of Appeal has set out, in relation to music albums, that having a particular title that is popular at a given time is not itself evidence of market power, but rather is evidence of rivalrous behaviour and the way in which substitution takes place:³²¹

"the movement of albums in and out of the charts and their constantly shifting positions are clear evidence of the manner in which, and the extent to which, **substitution takes place**"

"...in view of the short average time that such an album remains popular we see the albums which displace it in the chart ratings as clear substitutes. And it is clear from the evidence that at any one time when an album is enjoying popularity, promotion of another is gathering momentum. In our view **the places at the top of the charts are a constant battleground in which rivalrous conduct abounds.**" [emphasis added]

- (f) the Court of Appeal's approach in relation to music albums reflects the New Zealand Courts' approach that having an attractive product, or even a high market share, is not sufficient to have market power, but rather:³²²

It is only when for some reason it is not rational or possible for new entrants to participate in the market that a firm can have market power: see *Continental Can* (ECR at 248; CMLR at 227). There must be barriers to entry. As Professor F M Scherer has written, "significant entry barriers are the *sine qua non* of monopoly and oligopoly, for sellers have little or no enduring power over price when

³¹⁷ NZCC's *M&A Guidelines* at [5.7]. [emphasis added]

³¹⁸ *Voyage Digital (NZ) Limited, Orcon Holdings Limited and Two Degrees Group Limited* [2022] NZCC 3 at [33].

³¹⁹ *Trade Me Limited and PropertyNZ Limited* [2021] NZCC 11 at [106.2].

³²⁰ NZCC's *M&A Guidelines* at [5.8].

³²¹ *Tru Tone v Festival Records* [1998] 2 NZLR 352. [emphasis added]

³²² *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Co Ltd* (1989) 83 ALR 577, 583-584. Tipping J accepted this approach in *New Zealand Magic Millions Ltd v Wrightson Bloodstock Ltd* [1990] 1 NZLR 731 at p 755. [emphasis added]

PUBLIC VERSION

entry barriers are nonexistent": Scherer, *Industrial Market Structure and Economic Performance*, 2nd ed. (1980), p 11.

APPENDIX FOUR

TIMELINE OF PENTANET'S DISTRIBUTION OF GEFORCE NOW IN NEW ZEALAND

Pentanet Limited ("**Pentanet**")³²³ is an ASX-listed Australian based telecommunications company.

Pentanet is the official distributor of NVIDIA's GeForce NOW cloud gaming distribution platform in Australia and New Zealand, having first launched the "GeForce NOW Powered by Pentanet" service in 2021.³²⁴ The website for "GeForce NOW Powered by Pentanet" is available at: <https://cloud.gg/>

NVIDIA has signed a number of such partnership / distribution agreements with telecommunication businesses around the world, known as the GeForce NOW Alliance, including Pentanet, SoftBank, KDDI, LG Uplus, Taiwan Mobile and GFN.RU.³²⁵ NVIDIA enters into these partnership / distribution agreements with telecommunication businesses in different regions to "plac[e] NVIDIA RTX Servers on the edge, [so that] GeForce NOW Alliance partners deliver even lower latency gaming experiences"³²⁶ as part of its global expansion.

Pentanet delivers the GeForce NOW game streaming service using servers in Perth and Sydney.³²⁷

From the first announcement of Pentanet's partnership / distribution agreement with NVIDIA in November 2020, it was envisaged that Pentanet would likely not only offer the service in Australia, but also New Zealand.³²⁸

Gamers need to be close to our infrastructure, so our deployment strategy will be guided by level of demand across Australia, and potentially even New Zealand" Cornish says. "The sooner gamers register on our website, the sooner our infrastructure could find its way to their city.

While New Zealand gamers have been able to subscribe to the GeForce NOW service as part of a "beta program" since 2021 / 2022,³²⁹ it was in November 2022 that Pentanet announced to the ASX that it was close to completing discussions with NVIDIA for "New Zealand [to] also be formally recognised as a Pentanet serviceable territory with a pathway to include new additional neighbouring territories."³³⁰

In its Q2 FY23 Investor Update, Pentanet announced that "[o]n the back of a successful launch into the Australian market, Pentanet has secured the expansion of the NVIDIA Alliance Agreement for GeForce NOW cloud gaming into New Zealand"³³¹ (see Figure 24 below).

³²³ <https://pentanet.com.au/>

³²⁴ <https://pentanet.com.au/about/>

³²⁵ (21 January 2021). GeForce NOW Alliance Expands to Turkey, Saudi Arabia and Australia. NVIDIA Blog. Retrieved from: <https://blogs.nvidia.com/blog/2021/01/21/geforce-now-alliance-pentanet/>

³²⁶ (21 January 2021). GeForce NOW Alliance Expands to Turkey, Saudi Arabia and Australia. NVIDIA Blog. Retrieved from: <https://blogs.nvidia.com/blog/2021/01/21/geforce-now-alliance-pentanet/>

³²⁷ (19 August 2022). Pentanet hits double-digit growth on back of subscriber boon. Business News Australia. Retrieved from: <https://www.businessnewsaustralia.com/articles/pentanet-hits-double-digit-profit-growth-on-back-of-subscriber-boom.html>

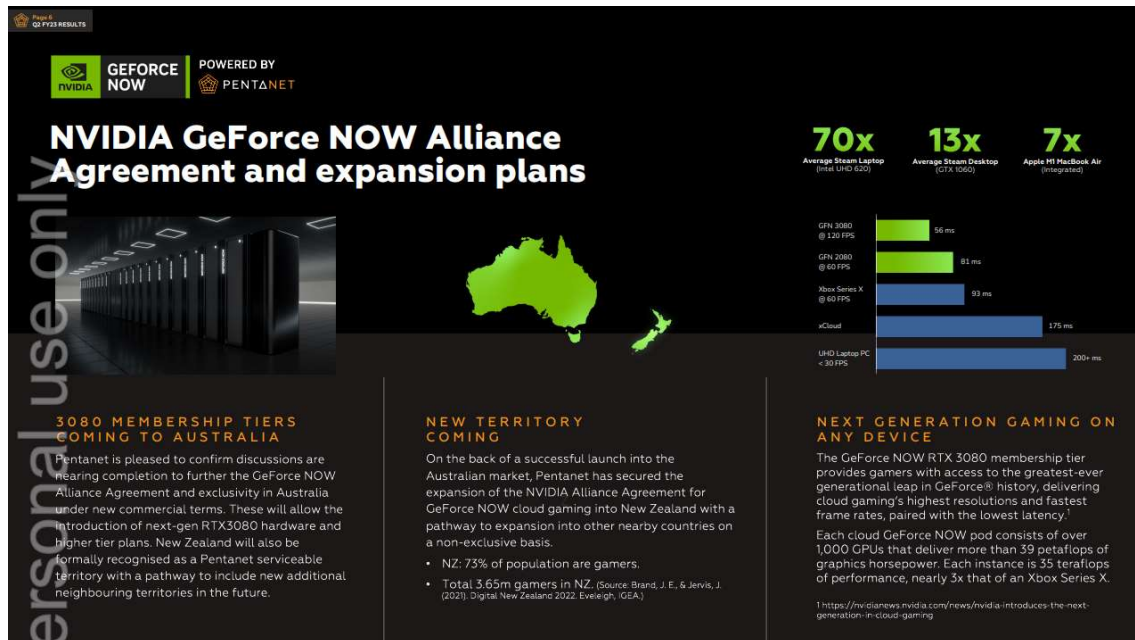
³²⁸ (25 November 2020). Pentanet Is bringing 'GeForce NOW' Cloud Gaming Service to Australia In 2021. Pentanet. Retrieved from: https://pentanet.com.au/documents/investors/Media_Release-Pentanet_Is_bringing_GeForce_NOW_Cloud_Gaming_Service_To_Australia_In_2021.pdf

³²⁹ (16 November 2022). Perth's Pentanet to expand Nvidia cloud gaming service. CRN. Retrieved from: <https://www.crn.com.au/news/perths-pentanet-to-expand-nvidia-cloud-gaming-service-587853>

³³⁰ (16 November 2022). Company Update on Nvidia GeForce NOW Alliance Agreement and Expansion Plans. Pentanet - ASX Announcement. Retrieved from: https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02598515-6A1122352?access_token=83ff96335c2d45a094df02a206a39ff4

³³¹ Pentanet Investor Update Q2 FY23 Report. Retrieved from: https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02625719-6A1133922?access_token=83ff96335c2d45a094df02a206a39ff4

Figure 24 – Extract of Pentanet's Q2 FY23 Investor Update³³²



In its 27 February 2023 Interim Results Announcement, Pentanet advised the ASX that as at "31 December 2022, more than 311,676 gamers across Australia and New Zealand have registered as members."³³³ It has also been reported that Pentanet has plans to "eventually implement a New Zealand server".³³⁴

In a 17 April 2023 ASX release, Pentanet outlined the positive impacts of Microsoft's Contract with NVIDIA:³³⁵

On February 21, 2023, Microsoft and NVIDIA announced a 10-year strategic partnership to bring popular Xbox PC games such as *Minecraft* and Activision Blizzard PC titles like *Call of Duty* to millions of users worldwide through the GeForce NOW cloud gaming platform. As a result, gamers can now play their favourite Xbox titles on multiple devices, including desktops, laptops, and mobile devices, which enhances accessibility and convenience. This collaboration marks an important milestone in expanding the gaming industry and increasing the earnings potential of the GeForce NOW cloud gaming platform.

³³² Pentanet Investor Update Q2 FY23 Report. Retrieved from: https://cdn-api.markitdigital.com/apiman-gateway/ASX/asx-research/1.0/file/2924-02625719-6A1133922?access_token=83ff96335c2d45a094df02a206a39ff4

³³³ (27 February 2023). Pentanet Interim Results Announcement. ListCorp. Retrieved from: <https://www.listcorp.com/asx/5gg/pentanet-limited/news/interim-results-announcement-2842099.html>

³³⁴ (22 October 2021). Cloud gaming service GeForce NOW is live in Australia. Gameshub. Retrieved from: <https://www.gameshub.com/news/cloud-gaming-service-geforce-now-hits-australia-next-week-here-are-the-details-4713/>

³³⁵ (17 April 2023). Pentanet Secures Binding Commitment to Raise \$6.1 million. ListCorp. Retrieved from: <https://www.listcorp.com/asx/5gg/pentanet-limited/news/pentanet-secures-binding-commitments-to-raise-6-1-million-2861964.html>

TIMELINE OF MEDIA REGARDING PLAYSTATION'S LEADING POSITION IN NEW ZEALAND

Date	Media headline
17 December 2007 ³³⁶	<h2 data-bbox="367 352 1406 422">Sony leads New Zealand hardware sales</h2> <p data-bbox="367 443 808 466">MICHAEL HARRADENCE / DECEMBER 17, 2007</p>  <p data-bbox="367 573 1419 680">According to the latest sales figures, the Sony PlayStation brand remains particularly strong in the self-proclaimed "PlayStation Nation", New Zealand, where all three of the companies systems currently occupy the top three positions in the region.</p>
19 February 2009 ³³⁷	<h2 data-bbox="358 747 1373 894">PlayStation brand leads console and software sales</h2> <p data-bbox="358 940 824 968">Thursday, 19 February 2009, 2:55 pm</p> <p data-bbox="358 982 797 1010">Press Release: Sony Entertainment</p> <p data-bbox="358 1100 1227 1127">PlayStation® brand leads console and software sales in New Zealand</p>

³³⁶ (17 December 2007). Sony leads New Zealand hardware sales. PlayStation Universe. Retrieved from: <https://www.psu.com/news/sony-leads-new-zealand-hardware-sales/>

³³⁷ (19 February 2009). PlayStation Brand Leads Console and Software Sales. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU0902/S00359.htm>

11
February
2011³³⁸

PlayStation3 delivers the industry's strongest 2010 results

Friday, 11 February 2011, 4:08 pm

Press Release: **Sony Entertainment**

PlayStation®3 delivers the industry's strongest platform results in 2010

Auckland, February 11, 2011: Sony Computer Entertainment New Zealand (SCE NZ) today revealed another strong performance for the total PlayStation®3 (PS3™) platform which in both real and relative terms outperformed other competitive game platforms, in both value and unit growth. The PS3 platform^[1] achieved the number one place in terms of value and year-on-year value growth, representing 31.5% of the approximate NZ\$158 million industry.

³³⁸ (11 February 2011). Delivers the Industry's Strongest 2010 Results. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1102/S00268/playstation3-delivers-the-industrys-strongest-2010-results.htm>

<p>13 February 2013³³⁹</p>	<h1>PlayStation®3 Dominates 2012 Sales</h1> <p>Wednesday, 13 February 2013, 12:03 pm Press Release: PlayStation</p> <p>PlayStation®3 Dominates 2012 Sales Re-affirms New Zealand as a PlayStation Nation</p> <p>Auckland, New Zealand, 13 February 2013 – Sony Computer Entertainment New Zealand (SCE NZ.) has today confirmed that PlayStation®3 (PS3™) established the sales leadership position for the 2012 calendar year.</p>
<p>17 February 2014³⁴⁰</p>	<h2>PS3 and PS4 Sales Dominate In New Zealand</h2> <p>FEBRUARY 17TH, 2014 DAMIAN ANTONY SEETO NEWS, PS3, PS4 1 COMMENTS</p>
<p>18 February 2014³⁴¹</p>	<h3>Is NZ a PlayStation Nation...?</h3> <p>By Damian Seeto Gaming Contributor</p> <p>Tue, 18th Feb 2014</p> <p># gaming # technology gifts # sony computer entertainment</p> <p>Sony New Zealand has announced that the PlayStation brand is the best selling video games entity in the country.</p> <p>For the third straight year running, the PlayStation 3 console was the best selling console in the country in 2013. The PlayStation 4 sold very well when it launched in late November last year to become the best selling next-generation console.</p> <p>"It has been an enormous 12 months for PlayStation in New Zealand," says David Hine, Sales and Marketing Director, Sony Computer Entertainment New Zealand.</p> <p>"These results in 2013 not only truly underpin New Zealand as a PlayStation Nation, but also the strength of the individual platforms we have.</p> <p>"For PS3 to perform so well, nearly seven years after its launch, is testament to the features, entertainment services and quality gaming titles delivered throughout its lifecycle and in 2013.</p>

³³⁹ (13 February 2012). PlayStation3 Dominates 2012 Sales. Scoop. Retrieved from: https://www.scoop.co.nz/stories/CU1302/S00349/playstation3-dominates-2012-sales.htm?_gl=1*10naexb*_ga*OTY4OTc1OTc2LjE2Njc4ODE5NTA.*_ga_GGVMM3MB82*MTY4NjI4MzQ3My40Ni4xLjE2ODYyODUwNTluNjAuMC4w

³⁴⁰ (17 February 2014). PS3 and PS4 Sales Dominate In New Zealand. PS3 And PS4 Sales Dominate in New Zealand. Just Push Start. Retrieved from: <https://www.justpushstart.com/2014/02/ps3-ps4-sales-dominate-new-zealand/>

³⁴¹ (18 February 2014). Is NZ a PlayStation Nation...? FutureFive New Zealand. Retrieved from: <https://futurefive.co.nz/story/is-nz-a-playstation-nation>

<p>5 December 2014³⁴²</p>	<h1>PlayStation® 4 crowned fastest selling video games console</h1> <p>Friday, 5 December 2014, 8:46 am Press Release: Sony New Zealand Limited</p>
<p>20 March 2015³⁴³</p>	<h1>PlayStation® 4 the No.1 selling home console for 2014</h1> <p>Friday, 20 March 2015, 9:47 am Press Release: PlayStation</p> <p>PlayStation®4 the No.1 selling home console for 2014</p> <p>PS4 the platform of choice for 2014 top 20 multi-platform software titles</p> <p>Drove 65% next gen value for 2014</p> <p>Sony Computer Entertainment New Zealand (SCE NZ) today confirmed that PlayStation®4 (PS4™) was the number one selling home console in New Zealand during the 2014 calendar year (CY14). According to data from NPD Group Australia, PlayStation also held the market leadership position in the total interactive entertainment category for 2014^[1].</p>

³⁴² (5 December 2014). PlayStation®4 Crowned Fastest Selling Video Games Console. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/SC1412/S00024/playstation-4-crowned-fastest-selling-video-games-console.htm>

³⁴³ (20 March 2015). PlayStation®4 the No.1 selling home console for 2014. Scoop. Retrieved from: <https://www.scoop.co.nz/stories/BU1503/S00695/playstation4-the-no1-selling-home-console-for-2014.htm>

December
2015³⁴⁴

PlayStation: 20 glorious years ...

TimeOut

Save | Share



















The first Playstation Console. Photo / Russell Smith

Siobhan Keogh explains how New Zealand became a Playstation nation.

Playstation is 20 years old now, and holds a special place in console gaming history, especially in New Zealand. We've long been described as a "PlayStation Nation", because Sony's consoles have always outsold Microsoft's, with the notable exception of 2010 - the year the Xbox 360's Kinect released.

³⁴⁴ (December 2015) PlayStation: 20 glorious years... NZ Herald. Retrieved from: <https://www.nzherald.co.nz/entertainment/playstation-20-glorious-years/I4IMZ6FX3JHIA6WNC42YFM7I3Q/>

10 March 2016 ³⁴⁵	<h2>PlayStation New Zealand Breaks Records</h2> <p>By Ben Carmichael — On Mar 10, 2016</p> <p>Share    </p> <p>As Sony Computer Entertainment New Zealand (SCENZ) looks towards 2016, with the promise of groundbreaking innovation, great games and all round home entertainment services, the company releases 2015 results demonstrating record-breaking momentum.</p> <p>NPD Group data shows that PlayStation platform value share of the total market grew to 57%, which equates to a 10% increase on the company's own performance for the previous calendar year. PlayStation 4 accounted for well over half the total console hardware value in 2015 with 59%. In fact, the PS4 overall platform accounted for 65% of the total current generation market value, which includes Nintendo Wii U, PS4, and Xbox One home consoles, games and peripherals.</p>
11 March 2016 ³⁴⁶	<p>PriceMe Consumer / Technology</p> <h2>PlayStation 4 Dominates the NZ Console Market</h2> <p>  </p> <p>Henrik Posted on 11/03/2016</p>
14 March 2016 ³⁴⁷	<h2>Kiwis prefer PlayStation to Xbox</h2> <p>10:29, Mar 14 2016</p> <p>    </p>
1 March 2018 ³⁴⁸	<h2>NZ CONSUMER SPEND ON VIDEO GAMES HEADED TOWARDS HALF A BILLION DOLLARS</h2> <hr/> <p>#NZENTREPRENEUR MARCH 1, 2018</p> <p>   </p>

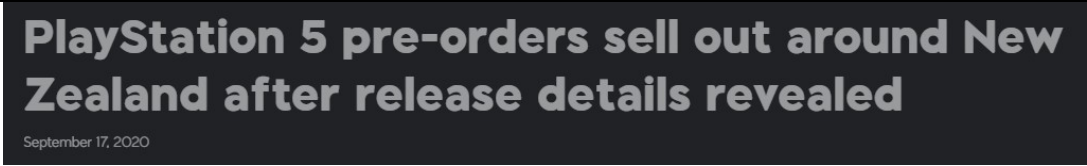


³⁴⁵ (10 March 2016). PlayStation New Zealand Breaks Records. 8-Bit Island. Retrieved from: <https://8bitisland.co.nz/playstation-new-zealand-breaks-records/>

³⁴⁶ (11 March 2016). PlayStation 4 Dominates the NZ Console Market. PriceMe Consumer. Retrieved from: <https://www.priceme.co.nz/consumer/playstation-4-dominates-the-nz-console-market/>

³⁴⁷ (14 March 2016). Kiwis prefer PlayStation to Xbox. Stuff. Retrieved from: <https://www.stuff.co.nz/entertainment/games/77845525/kiwis-prefer-playstation-to-xbox>

³⁴⁸ (28 February 2018). NZ consumer spend on video games headed towards half a billion dollars. NZ Entrepreneur. Retrieved from: <https://nzentrepreneur.co.nz/new-zealand-consumer-spend-video-games-headed-towards-half-billion-dollars/>

PUBLIC VERSION

	<p>According to data from The NPD Group, overall physical retail sales experienced a slight four per cent decline, however this was offset by an increase in sales volume, which was up four per cent in 2017. Home console hardware and accessories sales also increased last year. Kiwis embraced both new and retro consoles. PlayStation®4 continued to dominate the hardware sector with Xbox One bolstering category growth with the introduction of Xbox One X. The Nintendo Switch also entered the market, performing well alongside the Nintendo Classic Mini: SNES and Nintendo Classic Mini: NES.</p>
17 September 2020 ³⁴⁹	 <p>September 17, 2020</p>
29 July 2021 ³⁵⁰	 <p>29/07/2021 Reuters Mike Kilpatrick</p> 

³⁴⁹ (17 September 2020). PlayStation 5 pre-orders sell out around New Zealand after release details revealed. 1 News. Retrieved from: <https://www.1news.co.nz/2020/09/17/playstation-5-pre-orders-sell-out-around-new-zealand-after-release-details-revealed/>

³⁵⁰ (29 July 2021). PlayStation 5 surpasses 10 million sales as New Zealand supply cannot meet demand. Retrieved from: <https://www.newshub.co.nz/home/technology/2021/07/playstation-5-surpasses10-million-sales-as-new-zealand-supply-cannot-meet-demand.html>

PUBLIC VERSION

APPENDIX SIX

(a) PC shares

Figure 25 – Top 30 PC games in New Zealand in 2021 and 2022 (by game time)

New Zealand top 30 PC games by game time 2021 and 2022						
Rank	2021			2022		
	Title	Publisher	Share of game time	Title	Publisher	Share of game time
1	[]	[]	[]	[]	[]	[]
2	[]	[]	[]	[]	[]	[]
3	[]	[]	[]	[]	[]	[]
4	[]	[]	[]	[]	[]	[]
5	[]	[]	[]	[]	[]	[]
6	[]	[]	[]	[]	[]	[]
7	[]	[]	[]	[]	[]	[]
8	[]	[]	[]	[]	[]	[]
9	[]	[]	[]	[]	[]	[]
10	[]	[]	[]	[]	[]	[]
11	[]	[]	[]	[]	[]	[]
12	[]	[]	[]	[]	[]	[]
13	[]	[]	[]	[]	[]	[]
14	[]	[]	[]	[]	[]	[]
15	[]	[]	[]	[]	[]	[]
16	[]	[]	[]	[]	[]	[]
17	[]	[]	[]	[]	[]	[]
18	[]	[]	[]	[]	[]	[]
19	[]	[]	[]	[]	[]	[]
20	[]	[]	[]	[]	[]	[]
21	[]	[]	[]	[]	[]	[]
22	[]	[]	[]	[]	[]	[]
23	[]	[]	[]	[]	[]	[]
24	[]	[]	[]	[]	[]	[]
25	[]	[]	[]	[]	[]	[]
26	[]	[]	[]	[]	[]	[]
27	[]	[]	[]	[]	[]	[]
28	[]	[]	[]	[]	[]	[]
29	[]	[]	[]	[]	[]	[]
30	[]	[]	[]	[]	[]	[]
	[]	[]	[]	[]	[]	[]
	TOTAL		[]	TOTAL		[]

Source: Newzoo

PUBLIC VERSION

Figure 26 – Top 30 PC games in New Zealand in 2021 and 2022 (by MAUs)

New Zealand top 30 PC games by MAUs 2021 and 2022						
Rank	2021			2022		
	Title	Publisher	Share of MAUs	Title	Publisher	Share of MAUs
1	[]	[]	[]	[]	[]	[]
2	[]	[]	[]	[]	[]	[]
3	[]	[]	[]	[]	[]	[]
4	[]	[]	[]	[]	[]	[]
5	[]	[]	[]	[]	[]	[]
6	[]	[]	[]	[]	[]	[]
7	[]	[]	[]	[]	[]	[]
8	[]	[]	[]	[]	[]	[]
9	[]	[]	[]	[]	[]	[]
10	[]	[]	[]	[]	[]	[]
11	[]	[]	[]	[]	[]	[]
12	[]	[]	[]	[]	[]	[]
13	[]	[]	[]	[]	[]	[]
14	[]	[]	[]	[]	[]	[]
15	[]	[]	[]	[]	[]	[]
16	[]	[]	[]	[]	[]	[]
17	[]	[]	[]	[]	[]	[]
18	[]	[]	[]	[]	[]	[]
19	[]	[]	[]	[]	[]	[]
20	[]	[]	[]	[]	[]	[]
21	[]	[]	[]	[]	[]	[]
22	[]	[]	[]	[]	[]	[]
23	[]	[]	[]	[]	[]	[]
24	[]	[]	[]	[]	[]	[]
25	[]	[]	[]	[]	[]	[]
26	[]	[]	[]	[]	[]	[]
27	[]	[]	[]	[]	[]	[]
28	[]	[]	[]	[]	[]	[]
29	[]	[]	[]	[]	[]	[]
30	[]	[]	[]	[]	[]	[]
	[]	[]	[]	[]	[]	[]
	TOTAL		100.0%	TOTAL		100.0%

Source: Newzoo

PUBLIC VERSION

(b) Console shares

*Figure 27 – Top 30 console games sold in New Zealand in 2020 to 2022 (by revenue)³⁵¹
(NB: Data excludes free-to-play games, such as Fortnite)*

New Zealand top 30 console games by revenue 2020 – 2022												
Rank	2020				2021				2022			
	Title	Publisher	Revenue (\$)	Share (%)	Title	Publisher	Revenue (\$)	Share (%)	Title	Publisher	Revenue (\$)	Share (%)
1	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
2	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
3	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
4	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
5	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
6	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
7	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
8	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
9	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
10	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
11	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
12	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
13	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
14	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
15	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
16	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
17	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
18	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
19	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]

³⁵¹ Microsoft is not able to provide reliable / accurate revenue share data for PC titles due to data availability issues.

PUBLIC VERSION

20	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
21	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
22	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
23	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
24	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
25	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
26	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
27	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
28	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
29	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
30	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
	TOTAL		[]	[]	TOTAL		[]	[]	TOTAL		[]	[]

Source: NPD/GfK

PUBLIC VERSION

*Figure 28 – Top 30 console games in New Zealand in 2021 and 2022 (by game time)
(NB: Data excludes Nintendo therefore materially overstates CoD titles (and others))*

New Zealand top 30 console games by game time 2021 and 2022						
Rank	2021			2022		
	2021	Publisher	Share of game time	2022	Publisher	Share of game time
1	[]	[]	[]	[]	[]	[]
2	[]	[]	[]	[]	[]	[]
3	[]	[]	[]	[]	[]	[]
4	[]	[]	[]	[]	[]	[]
5	[]	[]	[]	[]	[]	[]
6	[]	[]	[]	[]	[]	[]
7	[]	[]	[]	[]	[]	[]
8	[]	[]	[]	[]	[]	[]
9	[]	[]	[]	[]	[]	[]
10	[]	[]	[]	[]	[]	[]
11	[]	[]	[]	[]	[]	[]
12	[]	[]	[]	[]	[]	[]
13	[]	[]	[]	[]	[]	[]
14	[]	[]	[]	[]	[]	[]
15	[]	[]	[]	[]	[]	[]
16	[]	[]	[]	[]	[]	[]
17	[]	[]	[]	[]	[]	[]
18	[]	[]	[]	[]	[]	[]
19	[]	[]	[]	[]	[]	[]
20	[]	[]	[]	[]	[]	[]
21	[]	[]	[]	[]	[]	[]
22	[]	[]	[]	[]	[]	[]
23	[]	[]	[]	[]	[]	[]
24	[]	[]	[]	[]	[]	[]
25	[]	[]	[]	[]	[]	[]
26	[]	[]	[]	[]	[]	[]
27	[]	[]	[]	[]	[]	[]
28	[]	[]	[]	[]	[]	[]
29	[]	[]	[]	[]	[]	[]
30	[]	[]	[]	[]	[]	[]
	[]		[]	[]		[]
	TOTAL		[]	TOTAL		[]

Source: Newzoo

PUBLIC VERSION

*Figure 29 – Top 30 console games in New Zealand in 2021 and 2022 (by MAUs)
(NB: Data excludes Nintendo therefore materially overstates CoD titles (and others))*

New Zealand top 30 console games by MAUs 2021 and 2022						
Rank	2021			2022		
	2021	Publisher	Share of MAUs	2022	Publisher	Share of MAUs
1	[]	[]	[]	[]	[]	[]
2	[]	[]	[]	[]	[]	[]
3	[]	[]	[]	[]	[]	[]
4	[]	[]	[]	[]	[]	[]
5	[]	[]	[]	[]	[]	[]
6	[]	[]	[]	[]	[]	[]
7	[]	[]	[]	[]	[]	[]
8	[]	[]	[]	[]	[]	[]
9	[]	[]	[]	[]	[]	[]
10	[]	[]	[]	[]	[]	[]
11	[]	[]	[]	[]	[]	[]
12	[]	[]	[]	[]	[]	[]
13	[]	[]	[]	[]	[]	[]
14	[]	[]	[]	[]	[]	[]
15	[]	[]	[]	[]	[]	[]
16	[]	[]	[]	[]	[]	[]
17	[]	[]	[]	[]	[]	[]
18	[]	[]	[]	[]	[]	[]
19	[]	[]	[]	[]	[]	[]
20	[]	[]	[]	[]	[]	[]
21	[]	[]	[]	[]	[]	[]
22	[]	[]	[]	[]	[]	[]
23	[]	[]	[]	[]	[]	[]
24	[]	[]	[]	[]	[]	[]
25	[]	[]	[]	[]	[]	[]
26	[]	[]	[]	[]	[]	[]
27	[]	[]	[]	[]	[]	[]
28	[]	[]	[]	[]	[]	[]
29	[]	[]	[]	[]	[]	[]
30	[]	[]	[]	[]	[]	[]
	[]		[]	[]		[]
	TOTAL		[]	TOTAL		[]

Source: Newzoo

APPENDIX SEVEN

EXAMPLES OF THE NZCC TAKING INTO ACCOUNT FORWARD LOOKING COMMITMENTS AS PART OF ITS ANALYSIS

Type of forward-looking commitment taken into account	NZCC clearance decision	Relevant extract / summary
Behavioural undertaking given to an overseas regulator	<i>Gebr. Knauf KG and USG Corporation</i> [2019] NZCC 3	<p>As part of its clearance determination of the multi-jurisdictional merger between Knauf and USG (two suppliers of building products), the ACCC accepted an undertaking from Knauf imposing supply obligations on Knauf in respect of the purchaser of the divestment business.</p> <p>The NZCC, in determining whether the divestment undertaking would remedy the NZCC's competition concerns, took into account the likely implications of the ACCC behavioural undertaking for competitive conditions in New Zealand.</p> <p>In particular, that decision included the following commentary:³⁵²</p> <p>"As the Act specifies that in our consideration of a clearance application we may accept only structural undertakings, we are unable to accept an undertaking from Knauf that would ensure a purchaser has a guaranteed supply of modular suspended ceilings.</p> <p>Nonetheless, Knauf submitted that the behavioural undertaking accepted by the ACCC forms part of the factual matrix before the Commission. It submitted that, as the ACCC will be able to enforce this undertaking, it should give the Commission comfort that the divested business will be supplied on terms favourable to the purchaser of that business...</p> <p>The Supply Agreement does not specifically relate to New Zealand and the ACCC cannot insist on supply to the New Zealand divestment business. However, USG Boral's New Zealand business is a wholly owned subsidiary of its Australian business and we understand that []. Because of this, enforcement of the Supply Agreement in Australia is likely to ensure access to supply for the New Zealand business...</p> <p>We consider that the existence of the Supply Agreement in the ACCC Undertaking will likely be sufficient to ensure stability of supply to the Main Divestment business in New Zealand [] following the sale of the Main Divestment business." [emphasis added]</p>

³⁵² *Gebr. Knauf KG and USG Corporation* [2019] NZCC 3 at [126] to [132].

PUBLIC VERSION

<p>Pre-existing long-term contracts with commercial counterparties</p>	<p><i>Connexa Limited and Two Degrees Networks Limited and Two Degrees Mobile Limited</i> [2023] NZCC 10</p>	<p>the NZCC determined that contractual commitments were sufficient to prevent any prospect of vertical foreclosure, , including as those contractual commitments could not be changed without 2degrees' consent:³⁵³</p> <p>"2degrees' contractual protections (in its MISA and in Connexa's governance arrangements with Spark), on their own, are sufficient to protect it from harm that would be extensive enough to materially raise its costs, impair its current network or undermine its rollout of 5G. 2degrees' proposed MISA with Connexa – which would only be able to be changed with 2degrees' consent – []. With such protections in place, any impacts that Spark could have on 2degrees by influencing Connexa to favour its own interests marginally or in times of capacity constraint are likely to be relatively minor."</p>
<p>Pre-existing long-term contracts with commercial counterparties</p>	<p><i>Vector Limited and Arc Innovations Limited</i> [2014] NZCC 36</p>	<p>The NZCC considered the forward-looking impact of long-term contracts in its assessment of the merger between Vector and Arc's respective advanced electricity metering businesses. Specifically, the NZCC said that:</p> <p>"any potential unilateral effects of the transaction [would] depend on whether a customer has already entered in a contract or not."³⁵⁴</p> <p>"Electricity retailers that control the majority of meters in New Zealand have concluded, or are in the process of concluding, agreements. The competition for those deployments has already occurred. These retailers will be protected from any harmful effects from the transaction until those contracts come up for renewal, starting in the mid 2020s."³⁵⁵ [emphasis added]</p>
<p>Pre-existing long-term contracts with commercial counterparties</p>	<p><i>Hancock Natural Resource Group and Carter Holt Harvey Limited</i> [2006] Decision No. 588</p>	<p>Consistent with its approach in other forestry clearance decisions, in Hancock's acquisition of Carter Holt Harvey's forestry assets the NZCC also took into account the forward-looking impact of long-term contracts:</p> <p>"For the purpose of assessing the competition implications of the current application, the Commission considers that it is only residual wood flows that could be controlled or influenced by the merged entity. That is, wood flows that are committed to long-term contracts are not contestable in the market for pulplogs in the CNI."³⁵⁶ [emphasis added]</p>
<p>Executed long-term contracts with other commercial counterparties that are contingent on the transaction in question completing</p>	<p><i>Daiken New Zealand Limited and Dongwha New Zealand Limited</i> [2018] NZCC 4</p>	<p>Prior to the transaction, Dongwha was 20% owned by Laminex Group (N.Z.) Limited, which was Dongwha's largest customer. Dongwha had a supply agreement with Laminex in place (and had for a decade), pursuant to which it committed to supply a certain volume of raw MDF panels.³⁵⁷</p> <p>Daiken entered into a new product supply agreement with Laminex, conditional on completion of the transaction, under which it would continue to supply Laminex with raw MDF so that Laminex could continue to compete in the market for the supply of raw MDF in New Zealand.³⁵⁸</p>

³⁵³ *Connexa Limited and Two Degrees Networks Limited and Two Degrees Mobile Limited* [2023] NZCC 10 at [93.1]. [emphasis added]

³⁵⁴ *Vector Limited and Arc Innovations Limited* [2014] NZCC 36 at [40].

³⁵⁵ *Vector Limited and Arc Innovations Limited* [2014] NZCC 36 at [40.1].

³⁵⁶ *Hancock Natural Resource Group and Carter Holt Harvey Limited* [2006] Decision No. 588 at [126].

³⁵⁷ *Daiken New Zealand Limited and Dongwha New Zealand Limited* [2018] NZCC 4 at [21].

³⁵⁸ *Daiken New Zealand Limited and Dongwha New Zealand Limited* [2018] NZCC 4 at [22].

PUBLIC VERSION

		In clearing the transaction, the NZCC found the long term supply agreement that Laminex had negotiated with Daiken "would enable Laminex to continue to provide some indirect competitive constraint". ³⁵⁹
--	--	---

³⁵⁹ *Daiken New Zealand Limited and Dongwha New Zealand Limited* [2018] NZCC 4 at [92].