

Investigation report

The joint venture between Television New Zealand Limited and Sky Network Television Limited, Igloo

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Glossary

Digital Switch-Over. Analogue transmission is being phased out as part of a “digital switch-over” starting on 30 September 2012 with the Hawke’s Bay and the West Coast of the South Island, and finishing with the Upper North Island on 1 December 2013.

DTT – Digital Terrestrial Television. The broadcasting of television signals in a digital format, rather than the analogue signals previously used. DTT has the advantage that it provides a better quality picture using less spectrum, and offers lower operating costs to broadcasters once established.

EPG – Electronic Programme Guide. A service that provides users of television, radio, and other media applications with continuously updated menus displaying broadcast programming or scheduling information for current and upcoming programming.

IPTV – Internet Protocol Television. Internet Protocol television a system through which television services are delivered over a packet-switched network such as the internet, instead of being delivered through traditional terrestrial, satellite signal, and cable television formats

Linear TV. A linear service is one where the television service provider determines the schedule of programmes. This is in contrast to video-on-demand, where the television viewer picks which television programme he or she would like to view and the viewing time.

Over-The-Top (ie via the internet). Over the top content means on-line delivery of video and audio without the RSP being involved in the control or distribution of the content itself.

PPV – Pay Per View. A service by which a television audience can purchase events to view via private telecast. The broadcaster shows the event at the same time to everyone ordering it.

RSP – Retail Service Provider. An organisation that provides access to the internet.

SVOD – Subscription Video On Demand. A type of VOD system, where the subscribers have unlimited access to specific video content for a regularly charged fee.

TVOD – Transactional Video On Demand. Video on demand where the customer pays for each individual programme.

UFB – Ultra-Fast Broadband.

VOD – Video On Demand. A system that allows users to select and watch video content on demand. It can also be used to provide audio content. IPTV technology is often used to bring video on demand to televisions and personal computers.

Purpose

1. The purpose of this document is to report on the Commission's investigation under sections 47 and 27 of the Commerce Act 1986, of the completed joint venture between Sky Network Television Limited (Sky) and Television New Zealand Limited (TVNZ) to introduce a new low-cost subscription TV service to New Zealand consumers (the Igloo JV).¹

Summary and findings

2. In November 2011, TVNZ acquired 49% of a company owned by Sky, Crimple Limited (the JV Company), and entered into a joint venture agreement with Sky and the JV Company (the JV Agreement) to introduce a new low-cost subscription TV service to New Zealand consumers, known as Igloo.
3. Our investigation has looked into whether TVNZ's acquisition of shares in the JV Company itself, or the provisions of the JV Agreement, would substantially lessen competition in any relevant market in breach of the Commerce Act. This is not an assessment of the level of competition in the market. Rather, the legal test is whether the joint venture would lessen the level of competition in the market substantially compared to the situation without the joint venture.
4. On the basis of the evidence available, we consider that:
 - 4.1 TVNZ's acquisition of 49% of the JV Company is unlikely to have the effect or likely effect of substantially lessening competition and is therefore unlikely to breach section 47 of the Commerce Act.
 - 4.2 None of the provisions of the JV Agreement are likely to have the purpose, effect or likely effect of substantially lessening competition in breach of section 27 of the Commerce Act.
5. In order to analyse the JV Agreement and acquisition, we have defined the market as the supply of pay TV to consumers in New Zealand. This market definition includes all pay TV services, including both subscription video on demand (SVOD) and transactional video on demand (TVOD).
6. The key competitive issue we have looked at is whether the likelihood of TVNZ entering the pay TV market differs:
 - with the joint venture (the factual), and
 - in the absence of the joint venture (the counterfactual).

¹ TVNZ became part of the venture when it acquired 49% of the shares of the company formed by Sky specifically for the Igloo joint venture on 24 November 2011.

Section 47 analysis – Does TVNZ’s acquisition of 49% of the JV Company substantially lessen competition?

7. In our view, the acquisition is unlikely to result in a substantial lessening of competition in the retail pay TV market.
8. TVNZ does not currently provide pay TV services. However, competition could be substantially lessened if:
 - 8.1 with the joint venture, TVNZ will not launch a pay TV operation other than Igloo
 - 8.2 without the joint venture, TVNZ alone or with others will launch a pay TV operation
 - 8.3 the loss of TVNZ as a participant in the pay TV market in the situation with the joint venture compared to the situation without would result in a substantial lessening of competition.
9. In both the factual and counterfactual, TVNZ will have a similar ability and incentive to enter the pay TV market or offer content to pay TV operators. In other words, with or without the joint venture, the likelihood of TVNZ entering the pay TV market is not significantly different. We have investigated three specific issues, and have concluded that they do not raise competition concerns because:
 - 9.1 the likelihood of TVNZ entering into pay TV on its own is not materially different in the scenarios with and without the joint venture
 - 9.2 TVNZ is unlikely to enter into a pay TV joint venture with MediaWorks in the next two years with or without the joint venture.
 - 9.3 TVNZ’s entry into a pay video on demand (VOD) arrangement within Freeview continues to be a possibility both with and without the joint venture, and the level of likelihood does not differ materially between the two scenarios.
10. We have also investigated whether:
 - TVNZ would stop supplying free-to-air content to Freeview or disrupt the ongoing development of this service
 - TVNZ would deny access of free-to-air content to new competitors.
11. We have concluded that each of these is unlikely to occur, as TVNZ will retain strong incentives to reach as wide an audience as possible.
12. As we consider there are no material differences between the scenarios with and without the joint venture, we do not consider that the joint venture is likely to substantially lessen competition.

13. However, given the number of complaints we have received, we have investigated the potential for the acquisition to lessen competition, assuming that there is a material difference between the factual and the counterfactual. In other words, assuming:
- with the joint venture, TVNZ will not launch a pay TV operation other than Igloo
 - without the joint venture, TVNZ alone or with others will launch a pay TV operation.
14. Even if this was the case, we are of the view that any lessening of competition would not be substantial. This is because it is unlikely that TVNZ entering into pay TV would significantly increase competition in the market. In particular, we have identified a number of businesses with actual or potential plans to enter into pay TV in New Zealand. These include major businesses active in several countries overseas. These parties are at least as well-placed as TVNZ to compete in the pay TV market. Therefore, the loss of competition from TVNZ entering into the pay TV market is not likely to be substantial.
15. Our assessment has taken a conservative approach and adopted our usual two-year timeframe of analysis. We have considered whether we should adopt a longer timeframe for this analysis, due to the roll-out of ultrafast broadband potentially increasing the scope for entry by internet TV operators in the medium-term. We have decided not to, as this will not alter our conclusion that any lessening of competition is not likely to be substantial.
16. We have not reached a conclusion on the difficulty of entering the pay TV market as it is not necessary for this investigation. That said, our market inquiries and overseas competition inquiries² have identified potential barriers to entry into pay TV. In particular, we have heard concerns that access to content and Sky's contracts with internet retail service providers (RSPs) may be hindering competition.
17. Because of this, we have started a separate investigation to consider these issues more thoroughly under Part 2 of the Commerce Act, in particular:
- 17.1 whether Sky's agreements for the acquisition of content harm competition by denying actual or potential rivals access to a critical mass of quality content, in breach of sections 27 and/or 36, and
- 17.2 whether Sky's agreements with RSPs harm competition by limiting internet service providers' ability and/or incentive to offer competing pay TV products, in breach of sections 27 and/or 36.

² See the Undertaking to the ACCC regarding Foxtel Management Pty Limited's proposed acquisition of Austar United Communications Limited of 9 April 2012. See also the UK Competition Commission's provisional findings report of 19 August 2011 regarding its Movies on Pay TV investigation.

Section 27 analysis – Does the joint venture agreement substantially lessen competition?

18. We reviewed the JV Agreement for any clauses that might change Sky's or TVNZ's ability or incentive to compete. We identified one such possible clause.
19. Under clause 5.1 of the JV Agreement, TVNZ and Sky have agreed:

neither Party shall ... provide or otherwise make available Video Content on a linear Pay TV basis via a [digital terrestrial] Television service in New Zealand which competes with the Services offered by the Company and the Business
20. A linear service is one where the television service provider determines the schedule of programmes.³
21. The restriction in clause 5.1 is narrow and does not cover VOD or pay TV provided over a platform other than digital terrestrial TV, such as the internet. We also consider that TVNZ is unlikely to enter linear digital terrestrial pay TV in the absence of the joint venture.
22. We therefore consider that clause 5.1 does not have the purpose, effect or likely effect of substantially lessening competition under section 27 of the Commerce Act.
23. This report is structured as follows:
 - the joint venture
 - analytical framework
 - key parties
 - background
 - market definition
 - factual and counterfactual
 - section 47 analysis
 - section 27 analysis

The joint venture

24. In November 2011 TVNZ and Sky entered into the JV Agreement to launch a new television service in New Zealand (branded as "Igloo"). To achieve this, TVNZ acquired 49% of a previously wholly-owned subsidiary of Sky, Crimple Limited (the JV Company). The JV Company will carry on the Igloo business.

³ This is in contrast to video on demand, where the television viewer picks which programme he or she would like to view and the viewing time.

25. TVNZ and Sky have submitted that the joint venture does not affect their existing businesses and no existing Sky or TVNZ service will be reduced or restricted as a consequence of the joint venture. The parties have stated that:
- 25.1 Sky will continue to offer its premium Sky pay TV service.
- 25.2 TVNZ will continue to operate its FTA channels, TV One and TV2, TVNZ U, TVNZ 7 (until 30 June 2012) and its new time-shifted channel (from 1 July 2012). It will also continue to provide its two pay TV channels, Kidzone24 and Heartland, to the Sky pay TV platform, as well as providing them to the Igloo platform.⁴
26. Sky and TVNZ will remain separate for the purpose of acquiring content rights and selling advertising. They have said that the personnel responsible for the acquisition of content will not be appointed to the JV Company's Board. The joint venture will not sell or receive revenue from advertising.⁵
27. We have been told that:
- 27.1 The Igloo service is intended to be a low cost, subscription-based TV option. It will provide a platform for the delivery of all existing FTA channels (including Freeview channels) as well as selected channels or content available via Sky or TVNZ from content they have separately created and acquired.
- 27.2 The Igloo service will take advantage of the government-mandated digital switch over (which is to be completed by November 2013).⁶ For example, most existing free-to-air viewers will need to have bought a digital decoder or have a digital TV to continue to receive terrestrial TV transmissions.
- 27.3 Igloo users will be required to purchase an Igloo digital set-top box, which will retail for around \$200. The box will be able to be upgraded to connect to the internet.
- 27.4 The Igloo set top box will deliver 11 of the channels available on Sky's existing platform, plus all the existing Freeview channels at a pre-paid cost of around \$25 per month.⁷ Igloo will be a linear TV service.
- 27.5 Igloo will offer selected pay per view (PPV)⁸ live major sports events and will also have a VOD offering with blockbuster movies and television series for internet-connected boxes on a TVOD basis.

⁴ Letter from Sky and TVNZ to the Commission (11 November 2011).

⁵ Letter from Sky and TVNZ to the Commission (11 November 2011).

⁶ Analogue is being phased out as part of a "digital switchover" starting on 30 September 2012 with the Hawke's Bay and the West Coast of the South Island, with the last geographic region being the Upper North Island by 1 December 2013.

⁷ The channels included are Animal Planet, BBC Knowledge, BBC World News, Comedy Central, FoodTV, TVNZ Heartland, KidZone24, MTV Hits, National Geographic, UK TV and Vibe.

27.6 [

].

27.7 [

].¹⁰

]⁹[

27.8 [

]¹¹ [

].¹²

27.9 TVNZ's catch-up free VOD service, TVNZ Ondemand, [

].

Current status of the joint venture

28. The JV Agreement has been executed; TVNZ has acquired shares in the JV Company; and, the parties are taking steps to implement the joint venture.
29. Nevertheless, the Igloo service itself has not yet been introduced into the market. The parties have advised that they currently intend to launch the Igloo service by [].

Rationale for the joint venture

30. RSPs have complained that the intention of the joint venture is to harm competition. For example, [] said that Sky's only rationale to enter into the joint venture must be to harm competition, as it makes no commercial sense in any other way.¹³

Sky's reasons for low-cost pay TV product

31. Sky's stated rationale is to expand its subscriber base by filling a niche in the market by providing a low-cost pay TV option.¹⁴ Sky estimates that this niche is around [] of New Zealand households, or [] homes.

Sky's reasons for the Igloo joint venture

32. [].¹⁵ Sky has told us that it saw the advantages from its perspective of a joint venture with TVNZ, as opposed to an alternative low-cost pay TV option:

⁸ In this report, we use VOD to cover both video available at any time (which can be defined as VOD) or at specific times (which can be defined as PPV).

⁹ Earnings before interest, taxes, depreciation and amortisation.

¹⁰ [].

¹¹ Clause 2.1(c)(iii) of the JV Agreement.

¹² Clause 2.1(d)(ii) of the JV Agreement.

¹³ [].

¹⁴ Meeting with Sky (26 March 2012).

32.1 []
].¹⁶ []
].

32.2 []
].¹⁷

TVNZ's rationale for joint venture

33. TVNZ has submitted that the advantages for it of entering the joint venture included:
 []
].

Framework

Section 47

- 34. Section 47 of the Commerce Act provides that a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market.¹⁸
- 35. Any person may apply for clearance for a proposed acquisition of assets of a business or shares, if they consider that the acquisition may breach section 47.
- 36. If the Commission is satisfied that the proposed acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market, the Commission must give a clearance for the proposed acquisition.
- 37. If the Commission is not satisfied that the proposed acquisition will not have or would not be likely to have the effect of substantially lessening competition in a market or it is "in doubt" as to whether that is the case, it must decline clearance.¹⁹

¹⁵ Email from TVNZ (17 February 2012). []

¹⁶ []

¹⁷ Phone call with Sky (14 February 2012). []

¹⁸ Section 27 prohibits a person entering into or giving effect to a contract, arrangement or understanding which contains a provision which has the purpose, effect or likely effect of substantially lessening competition in a market.

¹⁹ *Commerce Commission v Woolworths Ltd* (2008) 8 NZBLC 102,336 (CA). At para 105, the Court stated that the fact that the Commission is not satisfied does not require that the Commission be positively satisfied that a substantial lessening of competition is likely.

38. A clearance protects an acquisition from later challenge under section 47 by the Commission and by third parties.
39. While a person may choose to proceed with an acquisition without seeking clearance, if the Commission has concerns that the acquisition may contravene section 47 (as in this case), the Commission will investigate the likely effect of an acquisition.
40. Where an acquisition has not been completed, the Commission may take steps to preserve competition while it undertakes its investigation:
- by seeking a commitment from the parties not to complete the acquisition or
 - by seeking an injunction to prevent the acquisition going ahead or
 - by applying to the Cease and Desist Commissioners for an order to similar effect.
41. If as a result of its investigation the Commission is satisfied that the acquisition is likely to breach section 47 on the balance of probabilities, then the Commission has a range of enforcement options open to it to remedy the competition problem identified.
42. Where the Commission is unable to resolve competition problems by negotiation with the parties, the Commission is likely to start court proceedings seeking a declaration of breach and various remedies, including:
- injunctive relief
 - penalties against the acquirer, vendor and those who have aided and abetted a breach (up to a maximum of \$500,000 for individuals and \$5 million for a body corporate), and
 - divestment.²⁰
43. Ultimately, it is for the Commission to satisfy the Court, on the balance of probabilities, that the acquisition will contravene section 47.

Section 27

44. Section 27 prohibits a person entering into or giving effect to a contract, arrangement or understanding which contains a provision which has the purpose, effect or likely effect of substantially lessening competition in a market.
45. The application of section 27 is limited by section 46 of the Commerce Act, which provides that section 27 does not apply to provisions providing for the acquisition of shares.²¹ This means that TVNZ's acquisition of shares in the JV Company— which

²⁰ Such acquisitions will also be open to challenge by third parties, who may seek an award of damages.

²¹ Section 46 states that:

“Nothing in this Part of this Act applies—

may change TVNZ's incentives due to the consequential dividend payments from the JV Company and result in an anti-competitive effect – fall to be assessed under section 47 (discussed above). However, the JV Agreement is otherwise subject to section 27.²²

46. Unlike section 47, there is no clearance regime for section 27. However, where the Commission has concerns that provisions of an agreement may contravene section 27 the Commission will investigate.
47. As with section 47, if as a result of its investigation the Commission is satisfied that the any provisions are likely to breach section 27 on the balance of probabilities, then the Commission has a range of enforcement options open to it to remedy the competition problem identified. Ultimately, it is for the Commission to satisfy the Court, on the balance of probabilities, that the relevant provisions contravene section 27.

Analytical framework

48. For its competition assessment, the Commission generally determines the relevant market or markets: the Commission identifies the areas of actual and/or potential overlap between the parties to the transaction, and then considers what, if any, products and geographic regions constitute relevant close substitutes from both consumers' and suppliers' points of view.
49. The Commission's competition analysis is forward-looking. The Commission establishes appropriate hypothetical future with and without scenarios:
 - the scenario with the acquisition in question (the factual), and
 - the scenario without the acquisition (the counterfactual).
50. The Commission bases its analysis of these scenarios on a pragmatic and commercial assessment of what is likely to occur with and without the proposed acquisition.²³
51. The Commission relies on the best evidence available to establish what would occur in the factual and counterfactual scenarios. It is therefore able to assess whether there are any significant differences between the scenarios that may result in a lessening of competition. A close focus on reliable and up-to-date evidence is particularly important in markets that are fast-moving and facing significant technological change, such as the markets involved in this investigation.
52. The High Court has noted that:

(a) To the entering into of a contract or arrangement or the arriving at of an understanding in so far as the contract, arrangement, or understanding contains a provision that provides for the acquisition or disposition of assets of a business or shares; or

(b) To any act done to give effect to a provision of a contract, arrangement, or understanding that provides for the acquisition or disposition of assets of a business or shares.

²² *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 (*BoPE*) at [537].

²³ *New Zealand Electricity Market* (Commerce Commission Decision 277, 1996), at p 16.

Because “likely” means something less than “more likely than not”, there may be more than one “likely” counterfactual.... We consider that where there is more than one real and substantial counterfactual it is not a case of choosing the one that we think has greater prospects of occurring....We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed.²⁴

53. The Court further noted that:

If in the factual, as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a “likely” effect of substantially lessening competition in a market.²⁵

54. Accordingly where there is more than one potential counterfactual, the Commission considers the possibilities, discards those that have only remote prospects of occurring, and assesses each of the real and substantial possibilities as counterfactuals against the factual.

55. The Commission compares the extent of competition in the relevant markets in the factual and counterfactual scenarios to assess whether there is any likely lessening of competition and, if there is, whether it is likely to be substantial.²⁶

Key parties

Sky

56. Sky is the main pay TV broadcasting service in New Zealand. It began operating in New Zealand in 1990. Its principal business is the supply of foreign and local content to its subscriber base, predominantly through a digital satellite network. Sky broadcasts a total of 110 channels on its digital satellite platform.

57. Sky is listed on NZX and the ASX. Its largest shareholder is Nationwide News Pty Limited (NNL), which is a wholly-owned subsidiary of News Corporation.

58. Sky’s revenue for the year ended 30 June 2011 was \$797m. As of 30 June 2011, SKY had a total of 829,421 subscribers.²⁷

59. In February 2006, the Commission cleared Sky to acquire the free-to-air broadcaster, Prime. Since 2006, Sky has continued to operate Prime as a free-to-air channel. SKY is also a major shareholder in Fatso, an on-line DVD rental service in New Zealand.

60. In December 2005, Sky launched “MY SKY”, a hard-drive personal digital recorder. In July 2008 Sky launched MY SKY HDi which has enhanced features and can be rented by subscribers for a monthly fee.²⁸

²⁴ *Woolworths & Ors v Commerce Commission* (2008) 8 NZBLC 102,128 at 116, 118 and 122.

²⁵ *Ibid* at 122. This view was not challenged by the Court of Appeal.

²⁶ The term ‘lessens’ includes hindering or preventing the development of competition. Section 3(2) Commerce Act.

²⁷ Sky Annual Report 2011.

²⁸ www.skytv.co.nz

TVNZ

61. Publicly-owned TVNZ is New Zealand's largest television broadcaster. TV One and TV2 are TVNZ's flagship free-to-air channels. TVNZ also operates two pay TV channels, TVNZ Heartland and Kidzone24, and in March 2011 it launched TVNZ U, a social TV channel featuring reality and factual entertainment programming. TVNZ operates TVNZ Ondemand, its online television catch up website.²⁹ TVNZ operated a digital non-commercial channel, TVNZ 7, but the Government has discontinued funding this channel and the channel will cease broadcasting in June 2012. From July 2012, TVNZ will broadcast a 'Plus One' channel on the frequency occupied by TVNZ 7. The new channel will be an exact duplicate of TV One, broadcast one hour later.
62. TVNZ reported revenue of \$377.9m for the 2011 financial year. It reported an after tax profit of \$2.1m.
63. TVNZ is a commercial broadcaster, although it has some public broadcasting objectives set out in the Television New Zealand Act 2003. The Television New Zealand Act (as amended in July 2011) specifies that the objectives of TVNZ are to be: "a successful television and digital media company providing a range of content and services on a choice of delivery platforms and maintain its commercial performance."³⁰
64. TVNZ is the largest shareholder in Freeview (discussed below), holding 44.9% of the company.
65. Approximately [] of TVNZ's revenue is gained through commercial activity such as advertising, licensing and merchandising, and hiring out production resources. Approximately [] of TVNZ's revenue comes from government sources.

Other interested parties

MediaWorks NZ Limited

66. MediaWorks NZ Limited (MediaWorks) is a TV and radio operator in New Zealand. MediaWorks TV is New Zealand's other major free-to-air broadcaster. It broadcasts two free-to-air channels, TV3 and FOUR.
67. MediaWorks has an online television catch up website called MediaWorks Interactive at www.mediaworks.co.nz/interactive.
68. MediaWorks owns 32.4% of Freeview.

Māori Television

69. Māori Television is a public broadcaster. It was founded as a statutory corporation under the Māori Television Service Act 2003. Māori Television was launched in 2004. Its objective is to promote and revitalise the Māori language and increase the

²⁹ <http://tvnz.co.nz/video>.

³⁰ Television New Zealand Act 2003 s 12 (1).

speaking of Māori. It receives [] of its funding from the Government, and the remaining [] from advertising.

70. Māori Television owns and controls [] of its own content.
71. Māori Television has an online television catch up website.
72. Due to its public broadcasting aims, Māori Television does not expect to offer pay television services in the future.
73. Māori Television owns 17.7% of Freeview.

Freeview

74. In June 2006, the Government established Freeview, a not-for-profit organisation, to transition all free-to-air broadcasters from analogue to digital transmission. Freeview runs a hybrid terrestrial/satellite platform. It started satellite broadcasting in May 2007 and terrestrial broadcasting in April 2008.
75. The Freeview platform shows all the major free-to-air channels. There are currently 23 television and four radio channels available on Freeview.³¹ The Freeview shareholders are TVNZ (44.9%), MediaWorks (32.4%), Māori Television (17.7%) and Radio NZ (5%).
76. New televisions currently being sold in New Zealand can all receive Freeview via digital transmission, without a set top box.
77. Freeview receives \$5m a year in government funding. \$4m of this pays for transmission and the other \$1m is used for operational and capital requirements. The Freeview shareholders also provide financial support.
78. Freeview has a management agreement with TVNZ under which Freeview pays TVNZ to operate the electronic programme guide (EPG) and service data for Freeview.

Retail Service Providers

79. RSPs are organisations that offer access to the internet. The largest RSPs in New Zealand are Telecom New Zealand Limited (Telecom), Vodafone New Zealand Limited (Vodafone), TelstraClear Limited (TelstraClear), Orcon Limited (Orcon) and Callplus Services Limited (Callplus).
80. The availability of faster broadband speeds provides the opportunity for RSPs to bundle video content with existing broadband and voice services. This is known as “triple play”. The rollout of ultra-fast broadband (UFB) may present further opportunities for RSPs to offer triple-play offerings.

³¹ The TV channels available vary depending on the region and format, but include: TV One, TV2, TV3, FOUR, Māori TV, U, TVNZ 7 (till 30 June 2012), C4, Prime, Trackside, Choice TV (from 28 April 2012), Parliament TV, CUE (Satellite only), Te Reo (Satellite only), ShineTV (Satellite only), Chinese TV8 (UHF only), Channel 9 (UHF only), TV Central (BoP & Waikato UHF only), TV Rotorua & Info-Rotorua (both Rotorua UHF only), 33 Television (Auckland UHF only), Channel North (Whangarei UHF only).

81. Telecom, TelstraClear, Vodafone and CallPlus currently have reseller/retransmission agreements with Sky. Under these reseller agreements, RSPs can and do offer Sky TV in conjunction with RSPs' other services. RSPs are generally prohibited from offering competing pay TV products or directly assisting providers of such products. This is discussed further below.

Background

82. TV may be transmitted by a variety of technologies, for example, analogue, digital terrestrial broadcast on UHF or VHF frequencies, satellite and internet. The anticipated roll out of UFB is expected to lead to particular growth of internet protocol TV (IPTV).^{32 33} This provides an alternative mechanism that could potentially bring new products to consumers and increase competition to Sky.³⁴
83. The anticipated timetable for the rollout of UFB has been set out by the Ministry of Economic Development:
- By 2020, 75 percent of New Zealanders will be connected to ultra-fast broadband. Schools, hospitals and 90 percent of businesses will be connected by 2015. Homes and the remaining 10 percent of businesses will be connected by 2019.³⁵
84. The television viewing market continues to change rapidly. Traditional, linear TV is increasingly being supplemented or replaced by VOD. VOD has become increasingly popular, and this trend is expected to continue.^{36 37}
85. VOD can include free content (free VOD) and content that viewers pay for (pay VOD). Overseas experience shows that there are different models of pay VOD:
- 85.1 SVOD. This involves payment of a monthly amount to view an unlimited amount of content. This is the model used by, for example, Netflix.
- 85.2 TVOD or PPV. This involves a one-off payment to view a particular film, game or show. This is the model adopted by, for example, iTunes.
- 85.3 "Freemium" involves viewers getting some content for free but paying, if they want more content or other options. A variation on this model involves a low entry price point, but with a range of add-ons that incur incremental charges.

³² IPTV is a system through which television services are delivered using the Internet protocol suite over a packet-switched network such as the Internet, instead of being delivered through traditional terrestrial, satellite signal, and cable television formats.

³³ The ACCC Statement of Issues for FOXTEL – proposed acquisition of Austar United Communications Limited dated 22 July 2011 (www.accc.gov.au) noted the potential for UFB (termed NBN – national broadband network) to lead to increased competition

³⁴ Sky's website viewed on 4 April 2012 at 4.20pm. See www.skytv.co.nz.

³⁵ See www.med.govt.nz/sectors-industries/technology-communication/fast-broadband/ultra-fast-broadband-initiative

³⁶ TVNZ launched its VOD services in 2006.

³⁷ Video is used more usually when talking about VOD, and TV is a more traditional term. However, in this report, we use the terms "video" and "TV" interchangeably.

86. VOD has the potential to allow new players to enter into the supply of low-cost pay TV, which is what has been observed overseas. We call SVOD and TVOD together pay VOD in this report.
87. TVNZ, MediaWorks and Māori Television all offer free catch-up VOD to viewers. They also offer some additional content that is not otherwise available: either series “for” VOD only or extra material relating to series shown through usual free-to-air channels as free VOD. Both these types of VOD carry advertising.
88. Sky’s catch-up VOD service, iSky, is free to all Sky subscribers (ie it is a form of SVOD). SKY also operates SKY Box Office, comprising 14 pay-per-view channels. SKY also offers a pay VOD service for MY SKY and MY SKY HDi consumers. New movies are downloaded to the MY SKY hard drives each week and can be purchased on a pay-per-view basis. Sky Box Office and the service for MY SKY and MY SKY HDi are forms of TVOD.
89. We consider that competition between TVNZ’s catch-up free VOD and Sky’s catch-up pay VOD is simply an extension of the competition between TVNZ’s free-to-air programming and Sky’s pay TV offering.

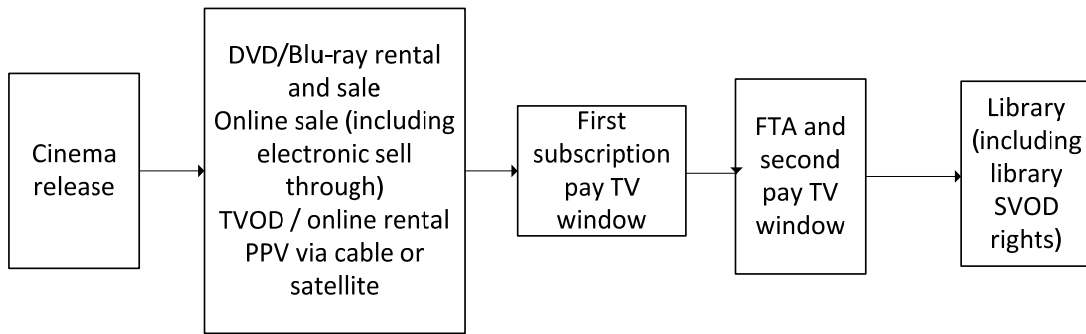
Content rights

90. The way in which content rights are sold in New Zealand varies for different types of content. We explain below how rights are sold in New Zealand for:
- films
 - general entertainment TV series, and
 - sport.

Film rights

91. Studios generally sell films through a window structure. This involves a series of discrete windows, or time periods, in which the film is available on one or more platforms/business models (eg cinema, pay TV). These windows may be time-limited (eg first pay TV window), or may be open-ended (eg once a film is on sale on DVD, it remains there).
92. We note that with the advent of VOD, the traditional window structure is evolving. However, the Commission considers that the window structure diagrams below are indicative of current market practice.
93. Figure 1 sets out the window structure sale for films in New Zealand.³⁸

³⁸ Sky suggested an SVOD window after pay TV window. (Letter from Sky, 23 March 2012). However, this is not consistent with Quickflix’s submissions to us (Email from Quickflix, 13 April 2012). It also suggests that the second and third windows may be blurred.

Figure 1 – Window structure for films in New Zealand

94. Rights for films in TV windows (both pay TV and free-to-air) are typically exclusive. However, there are some exceptions, particularly with the advent of VOD. We understand that:
- 94.1 In New Zealand, there is no “hold-back” against TVOD for “first run” movies in the pay TV window. This means that it is possible to show a new release movie on TVOD at the same time as it is being shown for the first time on Sky.³⁹
- 94.2 TVOD rights are sometimes available at the same time as DVD/Blu-ray rental (day and date release) or otherwise subject to hold-back for up to 60 days.
- 94.3 Overseas, SVOD operators (eg Netflix and LOVEFiLM) compete against pay TV operators in the first pay TV window.⁴⁰ This involves an SVOD operator competing head-to-head for content exclusivity with traditional pay TV operators. We understand that this model has yet to be tested in New Zealand.
- 94.4 Library SVOD movie rights (ie, rights to movies that have passed through the windows) and TVOD movie rights tend to be non-exclusive around the world.
- 94.5 It may take up to eight years after the first cinema release of a film for the library SVOD rights to become available.

Rights to general entertainment TV series

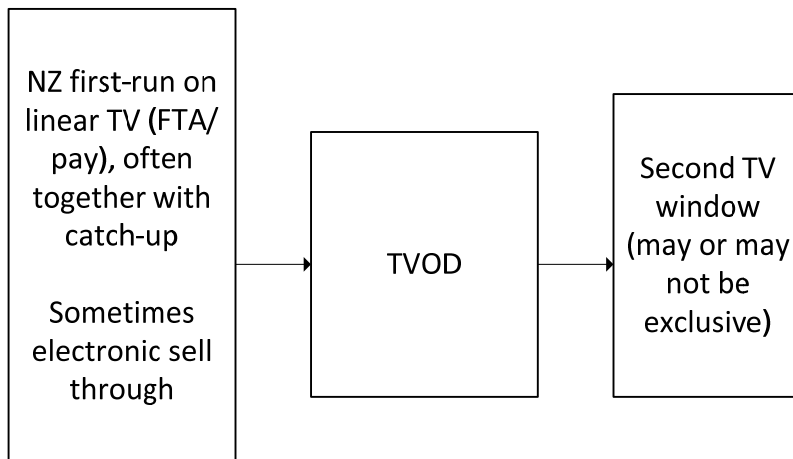
95. General entertainment rights are also sold through a window structure. Local general entertainment shows can also be commissioned directly by TV operators.⁴¹
96. Figure 2 sets out the window structure for general entertainment TV series in New Zealand.

³⁹ Email from Quickflix (4 May 2012), Interview with Sky (26 March 2012), email from Susie Kilty, Buddle Findlay on behalf of Sky (5 April 2012).

⁴⁰ UK Competition Commission, Provisional findings report – Movies on pay TV market investigation, 19 August 2011, paragraph 2.56. Email from Quickflix (13 April 2012).

⁴¹ [].

Figure 2 – Window structure for general entertainment TV series in New Zealand



Source: Letter from Sky of 23 March 2012. Email from Quickflix of 13 April 2012. It is unclear where SVOD rights would sit in this diagram, as these rights have not yet been obtained by any broadcaster in New Zealand. We consider that SVOD operators may be able to compete for these rights against traditional broadcasters in the New Zealand first-run linear TV window.

97. Historically free-to-air operators have held the majority of general entertainment TV rights.⁴² TVNZ submitted that free-to-air operators currently hold [] of these rights.⁴³ However, in recent years, Sky has acquired more of these rights, such as the right to show HBO series for the first time in New Zealand.⁴⁴ Nonetheless, free-to-air operators continue to obtain a large majority of the first-run rights to general entertainment series.
98. First-run rights for general entertainment TV series are often exclusive and often run for several years.⁴⁵ In New Zealand, there is also typically hold-back against TVOD for first-run television series until the date when the series has completed its first run.⁴⁶
99. First-run series are sometimes sold as part of output deals between a content rights holder and a broadcaster or other aggregator of content. These output deals typically involve the purchaser acquiring some or all of the TV series produced by the content right holder. They typically include exclusivity over the content for the length of the output deal (normally five to seven years). The rights holder's content is then subject to competition at the end of each output deal. Many overseas produced TV series are sold to New Zealand broadcasters in this way.

⁴² Decision No. 573, paragraph 123 states that: "first-run series have almost exclusively been shown by the three national FTA broadcasters".

⁴³ Phone call with TVNZ (20 April 2012).

⁴⁴ Quickflix may be well-placed to obtain HBO content, once the current deal with HBO expires, as HBO is a 15.7% shareholder in Quickflix.

⁴⁵ [

].

⁴⁶ [

].

100. Many other first-run television series are purchased on a one-off basis and are not subject to output deals (all New Zealand produced content is sold to broadcasters in this way). For these series, the exclusivity only lasts until the end of the individual series broadcast.
101. Certain channels may also be exclusive to one platform. For example, Sky has exclusive rights to some channels in New Zealand [].⁴⁷ [].⁴⁸ In Australia, Fetch TV has said that it has set up SVOD “channels” []. For example, it has 25 BBC documentaries available as VOD under the “BBC Earth” banner.⁴⁹
102. We have been told that, in general, only library rights for TV are non-exclusive.

Sport

103. Sports rights are not sold through windows, reflecting the value to viewers of live or recent sport events over historic sporting events. Rights are often sold on an exclusive basis to maximise the value obtained by the owner of the rights (such as the sports body in question).

Sky’s agreements with RSPs

104. Sky has reseller and retransmission agreements with four of the five largest RSPs whereby Sky’s services are provided on a wholesale basis to the RSP and the RSP then retransmits them (in the case of TelstraClear) or resells them. Telecom, TelstraClear, Vodafone and CallPlus currently have reseller and/or retransmission agreements with Sky.
105. The agreements all include a “key commitment” which states that an RSP will not, independently of Sky during the term of the agreement, provide pay TV services. The agreements also contain a clause which prevents RSPs from offering “direct assistance” to another pay TV operator providing services that would be prohibited under the key commitment. Sky has stated that the key commitment is important for Sky to protect its commercial interests.⁵⁰
106. The agreements include specific exceptions to the key commitment; []⁵¹
107. The Commission has commenced an investigation into Sky’s reseller agreements with RSPs under Part 2 of the Commerce Act.

⁴⁷ []

⁴⁸ Ibid.

⁴⁹ Phone call with Fetch TV (2 April 2012).

⁵⁰ Letter from Sky to the Commission (21 February 2012).

⁵¹ Letter from Sky to the Commission (21 February 2012).

Market definition

108. The Commission has previously defined a market for pay TV; free-to-air and pay TV were found to be in distinct markets. TVNZ and Sky are not currently competitors in the pay TV market.
109. However, from a consumer (ie, viewer) perspective, new low-cost pay TV products such as Igloo appear to fall between a high-cost pay TV product such as Sky, and free-to-air TV. This raises the possibility that such new products could provide competitive constraint on prices charged to consumers by traditional pay TV operators such as Sky, and start to blur the market boundaries between pay TV and free-to-air TV.⁵²
110. Since TVNZ and Sky are not currently competitors in the pay TV market, the key competitive issue is whether TVNZ would be likely to enter the pay TV market via a low-cost service in the counterfactual in a way it would not do in the factual, and what impact (if any) such entry would have on competition.
111. We assume for the purpose of this report that TVNZ has the potential to provide a pay TV product in the future. Given this, what is of concern is whether the likelihood of TVNZ offering a pay TV service differs with and without the joint venture.
112. This assessment does not require us to precisely define the markets. Consequently, for ease of exposition in this report, we have adopted our previous approach and defined the New Zealand market as the supply of pay TV to consumers.⁵³
113. Sky and TVNZ will remain separate for the purpose of acquiring content rights. We do not consider the markets for content acquisition further in this report. This section focuses on the product dimension of the relevant market. Consistent with a previous decision, we assume that the geographic dimension of the market is national.⁵⁴
114. The remainder of this section describes:

⁵² As regard to advertisers, Sky and TVNZ will continue their separate marketing, and new pay TV operators do not plan to offer advertising services in the foreseeable future. No party has approached the Commission or raised concerns regarding these markets, despite the investigation being well-known in the industry. Therefore, we do not consider the market for advertising further in this report.

⁵³ We note that given the market definition adopted:

- For competition concerns to arise, TVNZ must be a potential entrant into pay TV.
- There may therefore arguably have to be supply-side substitutability between it (and perhaps other free-to-air operators) and the pay TV market in this case. We have not assessed this in any detail.

⁵⁴ See Decision 573, Sky Network Television Limited and Prime Television New Zealand Limited (Commission Decision 573, 8 February 2006), paragraphs 137-138. In time, the geographic dimension of the market may become increasingly global. On the demand-side, some consumers use technology (such as virtual private networks) to hide their geographic location from vendor websites, in order to purchase content overseas. (We have not explored the legality of this approach.) On the supply-side, content rights holders may also seek to sell rights globally. For example, Sky has submitted that Google has acquired the world rights for the Indian Premier League. At this stage, these developments are nascent, and are at too early a stage to change our view of the likely geographic dimension.

- relevant decisions on the question of market definition
- the two-sided nature of some TV services, and
- differentiation between TV operators from consumers' perspectives.

Relevant decisions

115. In 2006, the Commission considered Sky's acquisition of Prime Television.⁵⁵ In that decision, we considered the relevant markets were:

- retail pay TV broadcasting services
- retail free-to-air TV broadcasting services
- pay TV advertising services
- free-to-air advertising services.⁵⁶

116. There have been no more recent New Zealand decisions.

117. However, when assessing the proposed acquisition by FOXTEL of Austar, (two cable TV businesses), the ACCC has recently defined one of the relevant markets as the national market for the retail supply of subscription television services, which did not include TVOD.⁵⁷

Two-sided nature of some TV services

118. Some TV services, particularly free-to-air, are two-sided in that free-to-air TV operators compete for both viewers/subscribers and advertisers. In two-sided markets, it can be important to have regard to the competitive dynamics on both sides of the market.

119. As noted above, our focus in this report is on the competition for consumers for TV services.

Differentiation between TV operators from consumers' perspectives

120. From consumers' perspectives, television content is a differentiated product.

121. Consumers have two types of choices to make regarding TV:

- choosing which platforms to subscribe to and/or obtain the devices required to view,

⁵⁵ Ibid.

⁵⁶ Paragraph 139, *ibid.*

⁵⁷ The proposed acquisition by FOXTEL Management Pty Limited (FOXTEL) of all the issued shares in AUSTAR United Communications Limited. See the undertaking to the ACCC given under section 87B of the Competition and Consumer Act 2010 by FOXTEL dated 9 April 2012, paragraph 2.3(a)(i). We await the ACCC's public competition assessment to see any further public reasoning on point.

- choosing what to watch, given the platforms chosen.
122. In many cases, when choosing whether to buy pay TV, a consumer will already have access to free-to-air channels.⁵⁸ In that sense, the consumer may see pay TV as a complement to free-to-air TV. However, the number of viewers choosing to purchase pay TV will be impacted by the price of pay TV relative to the quality of that product and the quality of free-to-air product offerings. As such, these products may act as competitive constraints on each other to some degree.
123. Consumers view TV products as differentiated in a number of ways:
- 123.1 Value of the content to consumers, or perceived quality:
- Premium content – in the Sky/Prime merger decision, industry participants submitted that premium content was in three categories: live sport, blockbuster movies and first-run television series.⁵⁹ For certain content, there may be a niche audience which values the content highly.⁶⁰
 - Newness – newer content is typically valued much more highly than library content.
 - Type of content – some consumers value one type of content much more highly than others, eg sport.
- 123.2 Quality of the picture – currently, standard-definition TV is starting to be replaced by high-definition TV. In addition, two-dimensional (2D) TV may be partly supplanted in the future by three-dimensional (3D) TV.
- 123.3 Ease of access – consumers tend to value content that can be easily accessed. For example, it tends to be more valuable if:
- it can be accessed by one remote, and
 - it is linked to EPG data to allow recordability.
- 123.4 Price – Some TV content is free to view, once you have a TV (and potentially a set top box). To watch other content you must pay a subscription or one-off fee.
124. As a result, the degree of competition between TV operators is not uniform across the marketplace. Those operators whose characteristics are more closely aligned will tend to compete more closely.

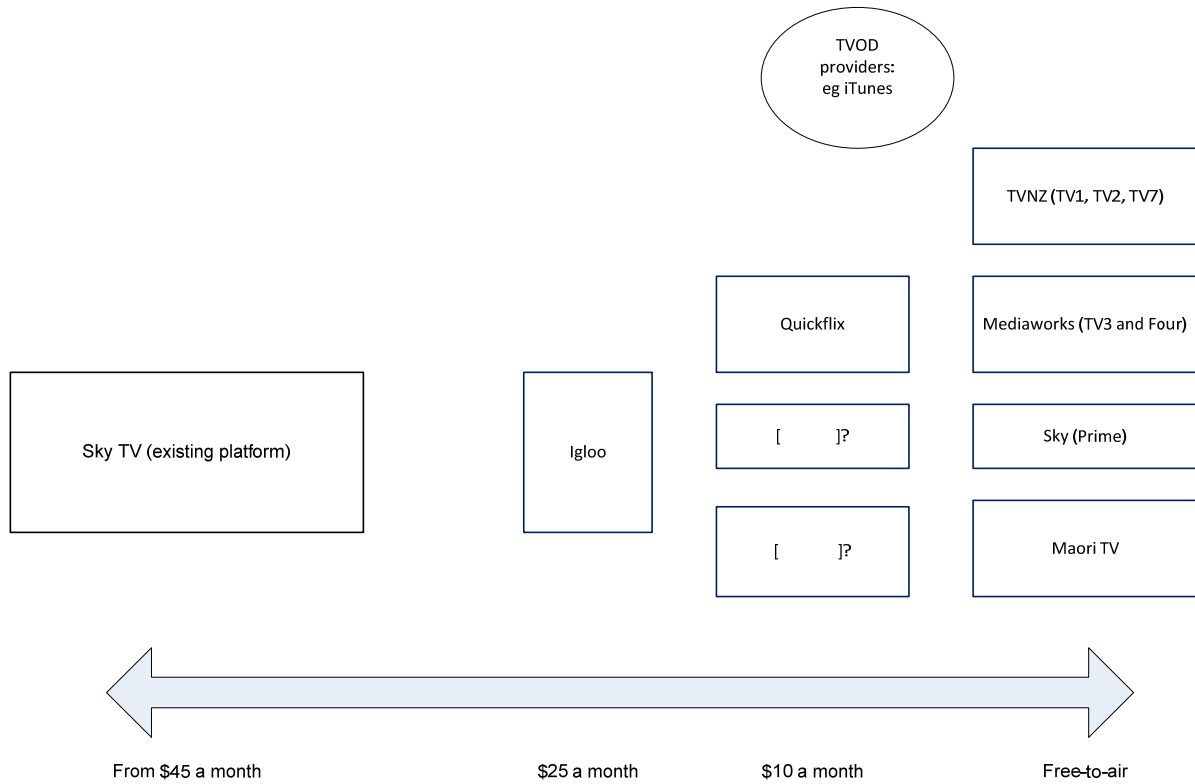
⁵⁸ However, not in all cases. A customer may need to buy new equipment, such as a Freeview set top box or a new TV, to watch free-to-air in the near future, and some consumers cannot receive free-to-air TV by digital transmission.

⁵⁹ See *Sky Network Television Limited and Prime Television New Zealand Limited* (Commission Decision 573, 8 February 2006), paragraph 98.

⁶⁰ Ibid. Paragraph 66 mentioned “special interest channels”.

125. Figure 3 uses price as a proxy for the closeness of competition between different TV operators:

Figure 3: Closeness of competition between TV operators



Note: It may be more accurate to articulate the spectrum by average revenue per user, but we do not have the data to do this. All \$ figures are minimum subscriptions, which may be topped-up by other subscriptions or transactions. TVOD providers are included, but do not charge a monthly subscription. [].⁶¹

126. This spectrum of competition is consistent with a report prepared for [].⁶²

127. We have considered the extent to which TVOD is a substitute for subscription pay TV services. We understand from the ACCC that their market inquiries []. The ACCC therefore excluded TVOD from the relevant market during its recent merger review (see paragraph 117 above).

128. There is limited evidence on this point from New Zealand:

⁶¹ [].
⁶² []

].

128.1 On the one hand, TVOD operators were some of the key threats listed [].⁶³

128.2 On the other hand, TVOD seems to be used in many cases as an add-on to a subscription service. For example, []. Sky offers PPV movies and sport in addition to its subscription model, as will Igloo. Quickflix also offers TVOD movies in addition to its subscription offering.

129. For the purposes of this investigation we do not need to determine whether or not TVOD should be included in the relevant market, as it will not alter our conclusions. For the purposes of this report, we assume that the relevant market is pay TV, including TVOD.

130. As can be seen from Figure 3, Igloo is intended as a low-cost pay TV option, as are Quickflix and other possible entrants.

131. We understand that:

131.1 [].⁶⁴

131.2 [].⁶⁵

132. Therefore we expect that from consumers’ perspectives low-cost pay TV will likely be:

- a closer substitute for free-to-air TV than Sky’s existing service is, and
- a closer substitute for Sky’s existing service than free-to-air TV is.

Conclusion

133. The introduction of low-cost pay TV services will start to blur the distinction drawn in Commission Decision 573⁶⁶ between pay TV and free-to-air TV from consumers’ perspectives. We do not need to conclude on the extent of this blurring, as the potential concern under investigation is that TVNZ’s involvement in Igloo has altered the likelihood of TVNZ entering into pay TV, and therefore competing significantly more closely with Sky. Consequently, for ease of exposition in this report, we adopt the market as the supply of pay TV to consumers in New Zealand.

⁶³ [].

⁶⁴ []

⁶⁵ [].

⁶⁶ Sky Network Television Limited and Prime Television New Zealand Limited (Commission Decision 573, 8 February 2006).

Counterfactual and factual

134. Our assessment of the likely factual and counterfactual is a pragmatic and commercial assessment based on the evidence available. Since the pay TV market is developing rapidly, we consider a two year time frame appropriate. This two year period accords with our usual approach when assessing the timeliness of potential entry into a market.⁶⁷
135. We find that there is likely no material difference between the situations with and without the joint venture (the factual and the counterfactual respectively). Therefore, the joint venture is unlikely to result in a substantial lessening of competition.
136. In relation to Sky this is because we consider that in the counterfactual scenario, Sky would likely launch the Igloo low cost pay TV service on its own, without TVNZ, this year. This is consistent with Sky's public statements on the matter.⁶⁸
137. However, our judgement turns mostly on the assessment of how likely TVNZ is to be an entrant into pay TV in the counterfactual, in comparison to how likely it is to enter into pay TV in the factual.
138. We consider that there is no material difference as to the likelihood of TVNZ entering into pay TV in the factual and counterfactual. Specifically:
- 138.1 We consider TVNZ is unlikely to develop a linear digital terrestrial pay TV service in the counterfactual within the next two years (it is prevented from doing so in the factual).
- 138.2 While we consider it is possible that TVNZ will enter into the provision of pay TV by offering pay VOD in the next two years, we consider that there is no material difference in the likelihood of TVNZ entering into pay VOD between the factual and the counterfactual.
- 138.3 Even within this two-year timeframe it is unclear whether the probability of TVNZ entry via pay VOD is sufficiently high to be "likely" for the purposes of the Commerce Act. While we consider that TVNZ's incentives to enter into pay VOD may decrease slightly in the factual, we conclude that the extent of this decrease is unlikely to be material (ie, if entry is likely in the counterfactual it will also be likely in the factual (and vice versa)). We note in particular that TVNZ was careful to ensure the contractual restriction was limited to linear digital terrestrial pay TV, which suggests TVNZ remains interested in examining other pay TV offers.
139. In considering the difference between the factual and counterfactual scenarios, we have assessed:

⁶⁷ Mergers and Acquisitions Guidelines, section 6.3.

⁶⁸ "Sky TV has plan B if Igloo deal blocked" 14 March 2012 www.stuff.co.nz. Sky publicly stated that if the Commission blocked the Igloo joint venture, Sky would undertake the Igloo venture on its own, without TVNZ.

- the likelihood of TVNZ entering into pay TV on its own
- the likelihood of TVNZ entering into pay TV with MediaWorks (within or outside of the Freeview platform)⁶⁹
- the likelihood of TVNZ entering into a joint venture for pay TV within Freeview, and if this is considered unlikely, the likelihood of TVNZ blocking the development of Freeview
- the likelihood of TVNZ refusing RSPs or other new entrants access to its content.

140. We note that each of these scenarios is possible in both the factual and the counterfactual. In the discussion below, we assess the likelihood of each scenario in the factual, and compare that to the likelihood of each scenario in the counterfactual.

141. We focus on entry using IPTV as we consider that entry into this form of pay TV is more likely than entry using satellite or digital terrestrial transmission (see paragraph 211 below for further details).

TVNZ enters into pay TV on its own

142. In the past, TVNZ has evaluated, or actually attempted, a number of pay TV opportunities (mainly pay VOD) (see paragraphs 145 and 166 below).⁷⁰ These have either [] . As a result, TVNZ stated that [

].⁷¹

143. TVNZ has catch-up (free) VOD rights for [] of its content on TV One and TV2.⁷² [] .

144. However, TVNZ contends that providing pay VOD is [

].⁷³

145. TVNZ's previous experiences with pay TV (unrelated to Freeview) are as follows:

145.1 [

].⁷⁴

⁶⁹ With or without further partners.

⁷⁰ Meeting with TVNZ (20 March 2012). [] .

⁷¹ Meeting with TVNZ (20 March 2012).

⁷² Letter from TVNZ to the Commission (18 March 2012).

⁷³ Letter from TVNZ to the Commission (18 March 2012).

⁷⁴ Phone call with TVNZ (8 February 2012).

145.2 TVNZ attempted to enter into pay TV services (in conjunction with Telecom and Channel 7 in Australia) with Hybrid Television Services (ANZ) Pty Limited (Hybrid TV). Hybrid TV sold TiVo set top boxes in Australia and launched in New Zealand in November 2009. Ultimately, Hybrid TV and TiVo [

].⁷⁵[

].⁷⁶

146. As indicated by Figure 3 above, a competing linear digital terrestrial or satellite pay TV operation would likely provide the closest competition to Igloo and Sky. However, we consider that any potential entry by TVNZ into pay TV would be a pay VOD offering over the internet, rather than a linear digital terrestrial or satellite pay TV service. As detailed below in the section on potential competition at paragraph 211, new entrants in New Zealand are mostly likely to tend to use the internet to transmit their services, as there is limited capacity for digital terrestrial or satellite transmission. So entry by linear digital terrestrial pay TV by TVNZ alone is unlikely to occur in both the factual and counterfactual.
147. TVNZ stated that the contractual restraints in the JV Agreement are narrowly confined to linear digital terrestrial pay TV services (see Section 27 Analysis section below for further details). The JV Agreement defines pay TV to exclude pay TV catch up and VOD. The JV Agreement does not prevent TVNZ from exploring a wide variety of other potential pay TV ventures involving pay VOD in the factual as well as the counterfactual.
148. We recognise that the joint venture may reduce TVNZ's incentive to explore opportunities in pay VOD. However, we consider that this potential change in incentives is small as TVNZ will continue to have a strong countervailing incentive to maintain, grow and diversify its business. We also note that TVNZ has stated that it remains open to pay TV in the future, and that in its negotiations with Sky it specifically sought to keep the contractual restriction narrow.
149. Consequently, while we consider it is possible that TVNZ will enter into the provision of pay TV on its own by offering pay VOD in the next two years, we do not consider that there a material difference in the likelihood of this occurring years between the factual or the counterfactual. Further, it is unclear whether the probability of TVNZ entry via pay VOD is sufficiently high to be "likely" for the purposes of the Commerce Act.

TVNZ enters into joint venture with MediaWorks

150. MediaWorks suggested if TVNZ had not entered into the Igloo JV with Sky, it would have entered into a joint venture involving [] with MediaWorks. MediaWorks suggested [].

⁷⁵ [

].
⁷⁶ Meeting with TVNZ (20 March 2012).

151. We have been told that:

151.1 TVNZ and MediaWorks discussed [].

151.2 [].

151.3 [].

151.4 [].⁷⁷

152. MediaWorks submitted that:

152.1 [].

152.2 [].⁷⁸

152.3 [].⁷⁹

153. In response to these submissions, we requested further documents and information from TVNZ and MediaWorks. As the discussions [], the parties could not provide many documents about the proposal.⁸⁰

154. TVNZ commissioned a report from [].⁸¹

155. TVNZ submitted that:

155.1 [].

155.2 [].

⁷⁷ Email from TVNZ to the Commission (5 March 2012).

⁷⁸ Meeting with MediaWorks (19 March 2012).

⁷⁹ Email from MediaWorks to the Commission (27 February 2012).

⁸⁰ [

⁸¹ [].

155.3 Given that the parties could not reach agreement on the terms of the core proposal for [], the discussions did not continue towards [].

156. TVNZ denies that it told MediaWorks [] TVNZ stated that the TVNZ Board was ultimately not supportive of the []:⁸²

156.1 [].

156.2 [].⁸³

156.3 [].

156.4 [].

157. Given the conflicting comments from TVNZ and MediaWorks, we also spoke to []. [] was the main [] employee involved in the discussions with [].⁸⁴

158. [] did not have access to [] prior to speaking to the Commission, so was unable to refresh [] memory. [] comments broadly aligned with the information provided by TVNZ. In particular, [] stated:

158.1 The primary reason for the proposal was [].

158.2 The parties also discussed extending the proposal to include [].

158.3 [] did not recall the proposals involving [], and thought any discussion of these topics at meetings between TVNZ and MediaWorks would have been off the cuff or informal remarks.

158.4 [] could not recall exactly why the proposal did not proceed, but thought that [].⁸⁵

⁸² Meeting with TVNZ (20 March 2012), email from TVNZ to the Commission (5 March 2012).

⁸³ [].

⁸⁴ [].

159. It appears that the discussions described above were primarily about []. The available evidence does not suggest that pay TV formed a core part of this proposal.
160. Given the statements above, we consider that even absent the joint venture with Sky it is unlikely that TVNZ would enter into a joint venture arrangement with MediaWorks, and unlikely that the joint venture would enter into pay VOD (or pay TV), in the next two years.
161. We therefore consider that there is no material difference between the factual and the counterfactual in this regard.

TVNZ and Freeview

TVNZ entering into a joint venture for pay TV within Freeview

162. Freeview, TVNZ, MediaWorks and Māori Television all submitted that they had discussed the possibility of providing VOD using the Freeview platform. This primarily related to providing free catch-up VOD, but pay VOD was discussed at a high level as an extension to this.⁸⁶
163. Before establishing pay VOD, Freeview would first likely establish a VOD platform.⁸⁷ [

].⁸⁸ We understand that pay VOD requires 'conditional access' which is more complicated technologically than just setting up access to catch-up services.

164. [].
165. We received different perspectives on the likelihood and attractiveness of pay TV through Freeview:
- 165.1 Sam Irvine of Freeview stated that although Freeview was initially set up as a free-to-air platform, there is nothing to stop a new venture offering pay content through Freeview. Enhancements to Freeview, such as pay TV, are necessary for the future success of the platform.
- 165.2 MediaWorks submitted that, [

⁸⁵ [].

⁸⁶ [

⁸⁷ [].

⁸⁸ [].

].⁸⁹[

].⁹⁰ [

].

165.3 TVNZ advised the Commission that a range of options is being considered by the Freeview shareholders for the future of Freeview post-digital switch over. These options include [].⁹¹ [

].

165.4 Māori Television stated that [

].⁹²

166. [

].⁹³ [

].⁹⁴

167. In the factual scenario, TVNZ will be contractually prevented (by the JV Agreement) from entering into a joint venture arrangement within Freeview that involves linear digital terrestrial pay TV, such as the [] proposal. As described above, the restriction in the JV Agreement is narrow and still allows for a wide range of possible collaborations, including pay VOD, in the factual.

168. In the counterfactual, it is possible that TVNZ could enter into a joint venture to provide pay TV within Freeview on a linear digital terrestrial pay TV basis or on a pay VOD basis. However, Freeview has stated that there is limited capacity for more channels via digital terrestrial TV without obtaining more digital spectrum (see

⁸⁹ Meeting with MediaWorks (19 March 2012).

⁹⁰ [].

⁹¹ [].

⁹² Meeting with Māori Television (12 March 2012).

⁹³ [

]. MediaWorks email to the Commission (12 April 2012).

⁹⁴ Phone call with TVNZ (8 February 2012).

paragraph 211 below for more details). All the recent discussions of pay TV within Freeview, []. We therefore consider any entry is more likely to happen through pay VOD, and entry using digital terrestrial TV is unlikely in the factual and the counterfactual.⁹⁵

169. We acknowledge that it is at least arguable that TVNZ may have less incentive to enter into pay TV in the factual because of the effect that a new pay TV venture may have on Igloo's sales and revenue. However, the extent to which TVNZ in fact has a lesser incentive is unclear:

169.1 TVNZ's previous ventures into pay TV [] demonstrate that TVNZ is interested in various pay TV opportunities and is willing to expend capital for new pay TV ventures.

169.2 There is a wide range of potential pay TV partners in the marketplace and if a new venture is initiated by a consortium of broadcasters and RSPs, TVNZ may still have the incentive to be involved in this, as well as Igloo.

169.3 Indeed, TVNZ stated that it has an aim of being across as many platforms as possible and being the [].⁹⁶ TVNZ stated that [

] ⁹⁷

169.4 TVNZ was careful to ensure the contractual restriction on it entering pay TV in its own right was limited to linear digital terrestrial pay TV, which suggests TVNZ remains interested in the factual in examining other pay TV offers such as pay VOD.

170. Therefore, on the basis of the evidence obtained from TVNZ and the other Freeview shareholders, we consider that:

170.1 TVNZ's entry into a pay VOD through Freeview continues to be a possibility in the factual and the counterfactual

170.2 the likelihood of TVNZ entry into pay VOD through Freeview in the next two years does not differ significantly in the factual and the counterfactual.

Potential for TVNZ to block Freeview's development

171. In addition to comments made by [] about Freeview becoming a vehicle for pay VOD (discussed above), these parties have also suggested that in the factual scenario with Igloo, TVNZ has the incentive to hinder competition in the

⁹⁵ For completeness, we also consider that entry using satellite is unlikely due to the lack of current transmission capacity (see paragraph 211.2 below).

⁹⁶ [

].

⁹⁷ Email from TVNZ to the Commission (17 February 2012).

effectively shut down promotion of the platform under the terms of the current constitution.¹⁰¹

178. In response to the suggestion that TVNZ will disrupt other enhancements to Freeview (including pay TV if it decides not to support this), TVNZ advised the Commission that [

].¹⁰² [

].¹⁰³

179. TVNZ stated that [

].

180. TVNZ is [

].¹⁰⁴

181. In addition, we note that the Freeview shareholders have been discussing [

]. TVNZ has submitted that it will assess any proposals on a case-by-case basis.

Conclusion on TVNZ and Freeview

182. We have considered the possibility of TVNZ entering into pay TV in the factual or the counterfactual via Freeview, and the possibility of TVNZ disrupting the future development of Freeview in the factual scenario. In our view, there is no significant difference between the factual and the counterfactual:

182.1 In the counterfactual, given the evidence before the Commission it is unlikely TVNZ would enter into a joint venture to provide pay TV within Freeview on a linear digital terrestrial TV basis. Entry on a pay VOD basis remains possible.

182.2 In the factual scenario, TVNZ would not be prevented from entering into a joint venture to provide pay VOD services through Freeview. We do not consider that its incentive and ability to invest in Freeview would be materially weakened by its investment in Igloo. In relation to pay VOD there is no significant difference in the likelihood of this occurring in the factual and the counterfactual.

¹⁰¹ [].

¹⁰² Email from TVNZ to the Commission (7 April 2012).

¹⁰³ Meeting with TVNZ (20 March 2012).

¹⁰⁴ Meeting with TVNZ (20 March 2012).

183. We do not consider that TVNZ will disrupt Freeview services, or act differently with respect to Freeview in the factual and counterfactual:

183.1 Free-to-air content: For free-to-air content, TVNZ will continue to support Freeview in its primary objective of providing free-to-air content, and is unlikely to refuse to supply its free-to-air content to Freeview in the factual or counterfactual. TVNZ wants to increase viewer numbers and wants its content to be available on as many platforms as possible. This remains the case in the factual and the counterfactual.

183.2 Other enhancements to Freeview: TVNZ may itself participate in enhanced services within Freeview and []
in the factual and the counterfactual.

184. For these reasons, we do not consider that in the factual the joint venture will result in TVNZ refusing free-to-air content to Freeview, or disrupting Freeview's potential development into pay TV. Therefore, there is no difference between the factual and counterfactual in this regard.

TVNZ refusing to supply content to RSPs

185. In addition to the suggestion that TVNZ might refuse its content to Freeview in the factual, we have considered the possibility that Igloo may change TVNZ's incentives, so that it will refuse to supply RSPs with its content in order to protect Igloo sales and market share. No party has raised this issue with us as part of our investigation.¹⁰⁵

186. Any concerns may be premised on the propositions that a critical mass of content is required by RSPs to set up a TV platform, that RSPs will want to transmit TVNZ's channels, and that RSPs will need to obtain agreement from TVNZ to retransmit its content.

187. TVNZ holds a library of archive content, as well as content for:

- its two pay TV channels, Heartland and Kidzone24
- its two main channels, TV One and TV2, and other channels.

188. We conclude that, in both the factual and counterfactual, TVNZ will not supply any pay TV channels to RSPs or new entrants, due to the [].

189. TVNZ has access to a library of archive content for which it retains rights. Overseas, this type of content has been commercialised as part of VOD. For example, in the UK, the BBC is considering introducing "pay-per-view" charges to watch content after it has been shown on its catch-up service, iPlayer.¹⁰⁶ New entrants may be interested

¹⁰⁵ [].

¹⁰⁶ Guardian, *BBC considers charging viewers for archive TV shows online*, 12 January 2012, viewed on 20 April 2012 at 11:01am <http://www.guardian.co.uk/media/2012/jan/13/bbc-archive-tv-online>.

in accessing this content. However, TVNZ has submitted (and other parties agree) that []. Our view is that TVNZ's incentives to provide this content to others will not change in the factual.

190. TVNZ's main content is in its two main free-to-air channels, TV One and TV2. TVNZ currently provides its free-to-air content to analogue, Freeview, SKY Digital and TelstraClear's cable service.
191. Industry parties stated that a new platform provider can technically access the free-to-air content of any broadcaster as the channel signals are unencrypted. However, platforms require the consent of each broadcaster to access EPG data and service information over which the broadcaster holds copyright.¹⁰⁷
192. All free-to-air broadcasters have stated that although it is technically possible to prevent a platform from accessing its free-to-air channels (by refusing to make its EPG data available), this does not generally happen in practice.¹⁰⁸ However, Sky and Māori Television did not provide TiVo access to EPG data until recently. []. It is therefore apparent that broadcasters can and do deny access to EPG data.
193. TVNZ has submitted that its business model is primarily based around advertising revenues.¹⁰⁹ As such, TVNZ likely has a strong incentive to reach as wide an audience as possible, and so generally has an incentive to provide its free-to-air content to, or partner with, third parties other than Sky (eg an RSP). This view is supported by TVNZ's business documentation, which states, for example:

[]^{110 111}

194. This suggests that TVNZ's current incentives to maximise viewers to increase the value of advertising will likely remain greater than any incentive arising from the joint venture.
195. TVNZ made the following further statements in response to the suggestion that it may refuse to supply content to other platforms in the future:¹¹²

¹⁰⁷ [].

¹⁰⁸ Meeting with Māori Television (12 March 2012), meeting with TVNZ (20 March 2012), meeting with MediaWorks (19 March 2012).

¹⁰⁹ We consider it unlikely that TVNZ would completely change its business model in the near future, in particular given the Television New Zealand Act 2003. TVNZ's share of revenue from the joint venture will be roughly [] of the TVNZ's total revenue.

¹¹⁰ TVNZ has stated directly to us that []

[]. TVNZ has also indicated that []

[]. Email from TVNZ to the Commission (17 February 2012).

¹¹¹ [].

¹¹² Meeting with TVNZ (20 March 2012).

195.1 [

].¹¹³

195.2 [

].

195.3 [

].

195.4 The Television New Zealand Act 2003¹¹⁴ specifies that TVNZ must make its channels available free-to-air, so TVNZ will be broadcasting its channels free-to-air as long as it exists. It will have arrangements with all platforms for access to TV One and TV2. TVNZ cannot make its channels exclusively available to Igloo.

196. In summary, since TVNZ's business model is primarily based on advertising revenues, we consider that TVNZ has a strong incentive to reach as wide an audience as possible, and an incentive to provide its content to other parties. We therefore consider it unlikely that TVNZ will deny access to its free-to-air content to new entrants in the factual or the counterfactual.

Conclusion on counterfactual and factual

197. We do not consider that there is a significant difference between the factual and counterfactual:

197.1 It is unlikely that TVNZ would offer a linear, digital terrestrial pay TV service in both the counterfactual and the factual.

197.2 It is possible that TVNZ will enter into the provision of pay TV by offering pay VOD in the next two years. While TVNZ's incentives to enter into pay VOD in the factual may decrease slightly compared to the counterfactual, our assessment is that, there is no material difference in the likelihood of TVNZ entering into pay TV on its own in the next two years in the factual as compared to the counterfactual.

197.3 It is unlikely that TVNZ would enter into a joint venture with MediaWorks in the next two years in the factual or the counterfactual.

197.4 TVNZ's entry into a pay VOD TV arrangement within Freeview remains a possibility in the factual, and the likelihood of such entry occurring does not differ significantly in the factual and the counterfactual.

197.5 The joint venture is unlikely to result in TVNZ refusing free-to-air content to Freeview, or disrupting enhancements to Freeview, including pay TV. Therefore, there is no difference between the factual and the counterfactual.

¹¹³ Email from TVNZ to the Commission (17 February 2012).

¹¹⁴ Television New Zealand Act 2003, section 12.

197.6 It is unlikely that TVNZ will deny access to its free-to-air content to new entrants in the factual or the counterfactual as TVNZ has a strong incentive to reach as wide an audience as possible, and therefore an incentive to provide its content to other parties.

Section 47 analysis – Does TVNZ’s acquisition of 49% of the JV Company substantially lessen competition?

198. While we consider that there is no material difference between the factual and counterfactual, for completeness, we have investigated the scope for the acquisition to lessen competition. In doing so we have assumed a material difference between the factual and counterfactual. In other words our analysis proceeds on the basis that:

- With the joint venture, TVNZ will not launch a pay TV operation competing with Igloo.
- Without the joint venture, TVNZ alone or with others will launch a pay TV operation. This hypothetical TV operation would more likely be a pay VOD service rather than a linear digital terrestrial pay TV service.

199. We conclude that, even if we considered that TVNZ entered into the pay TV market in the counterfactual, the loss of competition compared to the factual is unlikely to have amounted to a substantial lessening of competition.

200. The most credible way TVNZ might enter the pay TV market absent the joint venture is with other Freeview partners, in particular MediaWorks. However, even if there was a difference between the factual and counterfactual in this regard, we consider it is unlikely that this entry would provide significantly increased competition to Sky, given the number of other likely new and potential entrants. Therefore, we consider that any lessening of competition would not be substantial.

Existing competition

201. For many years Sky has been the largest provider in the pay TV market in New Zealand. As at June 2011, it had 829,421 subscribers, an increase of 27,024 from a year earlier.¹¹⁵ Its residential subscribers amounted to roughly 48% of households.¹¹⁶ Its share of viewing in all NZ homes has been relatively flat in the last two to three years: in the year to 1 July 2011, it was 27.9%, down from 28.2% the year before.¹¹⁷

202. TVNZ and Sky expect Igloo to have roughly [] subscribers by 30 June 2013 and roughly [] subscribers by 30 June 2014.¹¹⁸ It is unlikely to increase competition materially with Sky – controlled as it is by Sky.¹¹⁹

¹¹⁵ Sky, Annual Report 2011, page 11. 799,933 were residential customers.

¹¹⁶ www.skytv.co.nz

¹¹⁷ Ibid.

¹¹⁸ Igloo Business Plan v1.0, page 87.

¹¹⁹ It may increase competition with free-to-air TV.

203. Quickflix entered the New Zealand pay TV marketplace in March 2012. We understand its initial service contains SVOD of 650 films and 200 hours of BBC TV, and TVOD of 30-40 films.¹²⁰ It expects that the service will include [] films by the end of the year.¹²¹ Quickflix has deals with three of the six major studios, and expects to [] by the end of the year.¹²² It will then [].¹²³ [].¹²⁴ The Quickflix service currently costs from \$9.99 a month [].¹²⁵ Quickflix is a relatively new entrant, and its success cannot be taken for granted. Quickflix's current plans, if successful, will increase competition in the pay TV market significantly, as they obtain and place more content online.
204. In recent years, over-the-top providers have also started to provide TVOD movies. For example:
- 204.1 iTunes offers movies for rent in New Zealand. However, it has significantly less content in New Zealand compared to the United States. Apple has submitted that [].¹²⁶
- 204.2 Telecom and TVNZ supported TiVo which can access on-demand content via broadband through its website, "CASPA On-Demand".¹²⁷ However, TiVo had limited success in New Zealand.¹²⁸
205. To date, the constraint from TVOD movies through over-the-top providers appears to have been limited, but we expect this to increase in the future. This is consistent with Sky's business documentation (see paragraph 251 below).
206. While outside the relevant market we have adopted, there would remain some competitive constraint from free-to-air TV operators on Sky. We understand that [].¹²⁹ Of current free-to-air TV providers, MediaWorks, Māori Television and TVNZ should retain the incentive to compete against Sky – Prime (5% of the free-to-air market) will not, owned as it is by Sky. This suggests that, at least in the near future, free-to-air TV will provide some degree of competitive constraint.

¹²⁰ Meeting with Quickflix (23 March 2012).

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Email from Quickflix to the Commission (13 April 2012).

¹²⁵ Meeting with Quickflix (23 March 2012).

¹²⁶ Phone call with Apple (25 April 2012).

¹²⁷ We understand that content is provided by Hybrid Television.

¹²⁸ TVNZ submitted that there were numerous reasons for []

¹²⁹ []].

Potential competition

207. An acquisition is unlikely to substantially lessen competition if entry is sufficiently likely, effective and timely, such that the threat of entry constrains the decision-making of businesses in that market.
208. If it is to alleviate competition concerns, likely entry of a sufficient extent must be feasible within a reasonably short timeframe, which the Commission typically considers to be two years from the point at which market power is first exercised.¹³⁰ We have considered whether we should adopt a different timeframe for this analysis, due to the roll-out of UFB potentially increasing the scope for entry in the medium-term. We take a conservative approach in this case, and use the two-year timeframe for this analysis.
209. In addition to the recent entry of Quickflix (as discussed above), we expect further entry into the supply of pay TV in New Zealand within the next two years.
- 209.1 [] plan to offer TVOD movies in the near future.
- 209.2 [].¹³¹
- 209.3 [].¹³²
210. [] to have the ability to compete effectively in the New Zealand market, if [] decided to enter.
211. In New Zealand, new entrants are most likely to use high-speed broadband (internet) technology to transmit services. Neither digital terrestrial nor satellite transmission appear to be feasible:
- 211.1 For digital terrestrial transmission, there is limited spectrum available, and the bulk of that not used is owned by Sky.¹³³ This issue may become more acute over time, as high-definition video becomes more prevalent, as it requires more spectrum than low-definition video.
- 211.2 For satellite transmission, there is only one available satellite in geostationary orbit over New Zealand, Optus D1, and no significant capacity is available on it.¹³⁴
212. Internationally, we see several different models of entry using high-speed broadband technology:

¹³⁰ Mergers and Acquisitions Guidelines, section 6.3.

¹³¹ [].

¹³² [].

¹³³ [].

¹³⁴ Seven of the eight transponders are leased by Sky, and the remaining one to Kordia, which subleases it to free-to-air operators.

- 212.1 FTA+ (a freemium model): In the UK, free-to-air broadcasters plan to launch a service, YouView, that will allow access to free-to-air channels and their catch-up services, and also, if wanted, pay TV and video-on-demand.¹³⁵
- 212.2 Advertising-based VOD: Hulu, a joint venture of three major studios,¹³⁶ shows clips and episodes over the internet in US and Japan for free. It has also offered Hulu plus, a subscription-based service, since 2010.
- 212.3 TVOD: for example, iTunes, YouTube¹³⁷ etc.
- 212.4 SVOD (plus TVOD): for example, Netflix in the US (and elsewhere), Quickflix in Australia and New Zealand, and British Broadcasting Corporation (BBC) iPlayer.¹³⁸
- 212.5 Linear TV plus: Fetch TV recently entered the Australian marketplace and offers linear pay TV, as well as SVOD and TVOD.
- 212.6 Manufacturers of TVs, mobiles, and game consoles are developing content offerings and content stores. For example, Sony offers films to buy and rent (ie TVOD) to PlayStation owners over the internet in countries including the US and UK.¹³⁹
213. In the near future, a wide variety of business models may develop, such as those discussed above. For different models of entry, the key conditions in the New Zealand marketplace may differ, as we discuss further below.

¹³⁵ With British Telecom.

¹³⁶ NBCUniversal, Fox Entertainment Group and Disney-ABC Television Group.

¹³⁷ Google recently added 600 movies from Metro-Goldwyn-Mayer to YouTube. NZ Herald, *Google gets MGM movies*, 18 April 2012.
http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10799605, viewed on 18 April 2012 at 4pm. Previous reports referred to it adding 3,000 movies to its website: NZ Herald, *YouTube adds to US movie rental offering*, 10 May 2011.

http://www.nzherald.co.nz/technology/news/article.cfm?c_id=5&objectid=10724590, viewed on 18 April 2012 at 4pm. We understand that website is still in beta as at 7 May 2012.

¹³⁸ We understand that the latter is currently SVOD only. However, the BBC has stated that it may move to a TVOD model for access to some of its content in the UK, so this may evolve. The Guardian, *BBC boss confirms TV download pay service*, 14 March 2012 at <http://www.guardian.co.uk/media/2012/mar/14/bbc-boss-confirms-download-pay-service>, viewed at 11:07am on 7 May 2012.

¹³⁹ We understand that Sony's aim is to establish "a global comprehensive network platform of services across games, movies, music and more". Stuff.co.nz, *PlayStation Network merged with other services*, 8 February 2012, viewed on 19 April 2012 at 11:11am. In relation to mobile telephone manufacturers, Nokia is planning to launch a TV service in Finland "in the coming weeks". Nokia, *Nokia TV coming to Lumia smartphones in Finland*, 4 April 2012, <http://conversations.nokia.com/2012/04/04/nokia-tv-coming-to-lumia-smartphones-in-finland/>, viewed on 19 April 2012 at 11:56am. Even, Intel is reported as planning to enter pay TV in the US by creating a web-based TV service. Wall Street Journal, *The New Cable-TV Guy – Intel*, 13 March 2012 <http://online.wsj.com/article/SB1000142405270230445000457727732222512596.html>, viewed on 20 April 2012.

214. Before discussing the conditions facing new entrants, we discuss possible entrants [] and []:

215. [], has told us that it is a “very credible market entrant”:

215.1 [].¹⁴⁰ [

].

215.2 [] is partly owned by a []. It planned to launch in [], and expects to be [] by the end of the year.

215.3 [].

215.4 [].

216. [].¹⁴¹

217. [

].¹⁴² [].¹⁴³

218. [] has no issue with content rights, as it develops its own shows and has a significant quantity of content rights. [].

219. [].¹⁴⁴

220. [].¹⁴⁵

221. [

]:

221.1 [

].

¹⁴⁰ [].

¹⁴¹ [].

¹⁴² [].

¹⁴³ [

].

¹⁴⁴ [].

¹⁴⁵ [].

221.2 [

]:

221.2.1 [

].

221.2.2 [].

Conditions of entry

222. We consider that there are four main conditions of entry into IPTV:

- access to content
- achieving scale
- data caps
- partnership with RSPs.¹⁴⁶

223. Like all other potential entrants, TVNZ would face all of these conditions if it were to enter pay TV. We therefore do not need to conclude the extent of each of these conditions. Rather, the question is whether there is a significant difference in the conditions of viable entry faced by TVNZ relative to other entrants, which would suggest possible greater competitive constraint by TVNZ.

Access to content

224. Several businesses, [],¹⁴⁷ have raised access to content as a – perhaps the – key barrier to entry into the supply of pay TV. This issue seems most acute for entrants who might rely on linear TV, as we have been told that rights for SVOD library rights and TVOD are more likely to be non-exclusive.¹⁴⁸

225. We received mixed views on the extent to which access to content rights may hinder or prevent entry:

¹⁴⁶ The first two are relevant to any transmission means; the second two are specific to IPTV.

¹⁴⁷ [].

¹⁴⁸ This is consistent with the preliminary view of the UK Competition Commission (UKCC) in its investigation of Movies on Pay TV Market. At paragraph 8.136 of the UKCC's provisional findings report of 19 August 2011 that: "[o]ur analysis suggests that parties other than Sky face material barriers to acquiring the FSPTW rights of a major studio, whether to offer a linear movie channel or to create an SVOD movie service, through the barriers to create a stand-alone SVOD service appear to be lower." The barriers to entry identified by the UKCC include Sky's ability to outbid rivals, due to its large subscriber base (paragraph 8.137).

225.1 [] submitted that access to content rights limited the prospects of entry.¹⁴⁹ Of these, only [] had experience acquiring content rights.

225.2 On the other hand, [] had no concerns about acquiring content: [].¹⁵⁰

225.3 []
[]¹⁵¹ []
[]

226. We understand that many content rights agreements for linear TV are exclusive. However, many VOD rights appear to be non-exclusive:

226.1 TVOD rights are non-exclusive around the world (see paragraph 94 above).

226.2 SVOD library rights are also non-exclusive around the world. []
[]

226.3 SVOD rights for movies can be bought in the pay TV windows. []
[]¹⁵² We understand that these rights are typically exclusive.

226.4 SVOD rights for TV series can also either be library (such as Quickflix's current offering of BBC TV series) or obtained in direct competition with traditional, linear TV rights. However there may be ways around this:

226.4.1 []
[]
[]
[]
[]¹⁵³

226.4.2 []

¹⁴⁹ []

¹⁵⁰ []
[]

¹⁵¹ []
[]

¹⁵² []
[]

¹⁵³ []
[]

].¹⁵⁴

227. Entry using library SVOD rights and TVOD rights as Quickflix has done is relatively straightforward. However, this entry may not provide significant competition to Sky. To compete more strongly with Sky, an entrant needs to provide new and recent content, and therefore likely needs to acquire rights in the first pay window, or first-run rights of TV shows.¹⁵⁵
228. Access to content rights is unlikely to prevent major UK and US content rights holders from expanding overseas, if it makes commercial sense.¹⁵⁶ This could include the BBC, which is currently piloting iPlayer outside of the UK, and Hulu, which has publicly stated plans to expand globally.¹⁵⁷
229. Generally, the challenge of acquiring content would face any new entrant, including a TVNZ pay TV offer. While TVNZ could use some of its existing library or other rights in any such offer, it is still likely that it would need to acquire a substantial quantity of rights to support its offer.¹⁵⁸ TVNZ has submitted that [].¹⁵⁹ We do not consider that TVNZ is any better placed to acquire the necessary pay TV content rights than the other potential entrants.

¹⁵⁴ [].

¹⁵⁵ Acquiring these rights would likely significantly increase the level of competitive constraint Quickflix would place on Sky. This would be similar to the preliminary view of the UK Competition Commission in its investigation of Movies on Pay TV Market. At paragraph 8.18 of the UKCC's provisional findings report of 19 August 2011: "we think it is unlikely that a rival could assemble a movie product which could compete with Sky's movie products without any (first subscription pay TV window) content from a major studio". The UKCC considered that in fact rights from two major studios in the [first subscription pay TV window content] and other rights were likely necessary (paragraph 8.19). The UKCC is currently considering submissions on its provisional findings report, in particular in the light of the new entry of Netflix and LOVEFiLM to the UK market since its provisional findings report. Ofcom has recently stated that "[o]n the evidence presented by the (UKCC), it is far from clear that the nascent offerings from LOVEFiLM and Netflix have changed the nature of the competition facing Sky's movie offering. It is also unclear whether they have the potential in future to address the adverse effect on competition and the resulting detriment to consumers identified by the (UKCC) in its Provisional Findings." Ofcom, *Ofcom comments on Working Paper 29*, 20 April 2012.

¹⁵⁶ This is linked to another trend: content right holders are increasingly seeking to sell direct to consumers. For example, Paramount has since January this year sold digital copies of its movies online, although not to New Zealand. The Verge, *Paramount is the first studio to directly sell Ultraviolet digital movies through its site*, 24 January 2012 <http://www.theverge.com/2012/1/24/2730212/paramount-selling-ultraviolet-digital-movies-directly> viewed at 10:50am on 7 May 2012.

¹⁵⁷ Digital Spy, *Hulu 'puts UK launch back on agenda'*, 9 July 2010, <http://www.digitalspy.co.uk/tech/news/a240992/hulu-puts-uk-launch-back-on-agenda.html> viewed at 10:22am on 7 May 2012.

¹⁵⁸ []

¹⁵⁹ Meeting with TVNZ (20 March 2012), Response from TVNZ to the Commission (18 March 2012).

Achieving scale

230. Several TV operators said it was important to achieve a sufficiently large customer base to reach profitability.¹⁶⁰ Only if they achieved scale, or expect to shortly, could they compete for rights with Sky for pay TV rights when they come up for renewal.
231. In particular, studios and other content rights holders tend to require minimum guaranteed payments for VOD content, which require a subscriber base of a certain size to justify. []¹⁶¹ []¹⁶² []¹⁶³ []¹⁶⁴
232. TV platforms / broadcasters also have other fixed costs, which are easier to cover with a larger subscriber base. For example, IPTV operators have costs of developing a hardware and/or software platform, or related research and development costs. These costs may be covered across different countries: []¹⁶⁵ This may tend to favour the development of large multinational VOD competitors.¹⁶⁶
233. Again this issue would face any new entrant, including a TVNZ pay TV offer. We do not consider that TVNZ is any better placed to achieve scale for a pay TV offer than other potential new entrants.

Data caps

234. New Zealand data caps are small compared to many OECD countries.^{167 168} This is important for an IPTV service as video contains lots of data: a high definition movie may be 2.5GB, and some data caps are 10GB.¹⁶⁹ Therefore, in the New Zealand context, a VOD service is considerably more valuable to consumers if it is unmetered (ie it will not count towards customers' monthly data caps).

¹⁶⁰ []
¹⁶¹ Meeting with TVNZ (20 March 2012).
¹⁶² []
¹⁶³ []
¹⁶⁴ []
¹⁶⁵ []

¹⁶⁶ Which is to some extent what we are seeing happen: for example, Netflix has expanded from North America into Europe and South America, Fetch TV has plans to expand (see paragraph 184 above).
¹⁶⁷ A data cap is the amount of data that a customer can download and/or upload in a month under their broadband plan. If a customer exceeds their data cap, their RSP can charge an additional sum or lower the speed of internet access.
¹⁶⁸ For a fuller discussion of these issues, see Commerce Commission, *High-speed broadband demand side study issues paper 1: technical issues*, 19 December 2011, pages 34-40.
¹⁶⁹ Although data caps are generally rising (45% of broadband consumers had data caps of less than 5 GB in June 2009 compared with 20% in June 2011), they are still relatively low compared to the size of a typical HD movie.

235. However data caps continue to expand. For example, Telecom and Orcon have recently increased the data caps on their plans.¹⁷⁰ Furthermore, data caps may increase substantially with roll-out of UFB,¹⁷¹ although this will have a limited impact within a two-year time period.
236. Netflix commented publically in 2011 that it would not be entering in New Zealand, in part due to data caps.¹⁷² [] submitted to us that they understood that Sky's contracts with RSPs prevented unmetering of new entrant over-the-top providers such as Quickflix.¹⁷³ During the course of our investigation, Sky confirmed to the Commission and RSPs that its contracts do not prevent unmetering,¹⁷⁴ and indeed Slingshot (which has a reseller agreement with Sky) has unmetered Quickflix. [].¹⁷⁵
237. Again this issue would face any new entrant, including a TVNZ pay TV offer. We do not consider that TVNZ is any better placed to obtain unmetering for a pay TV offer than other potential new entrants.

Partnership with RSPs

238. A potentially important element of the competitive dynamic is triple-play offers. Bundling of TV, telephone and internet into a "triple-play offer" is a feature of many markets overseas. RSPs here in New Zealand currently offer triple-play offers, but are keen to expand their scope. More than 30% of broadband consumers buy a triple-play, or quadruple-play, offer in France and the USA.^{176 177}
239. Under Sky's reseller and retransmission agreements with RSPs, RSPs can and do offer Sky TV in conjunction with RSPs' other services. RSPs are generally prohibited from offering competing pay TV products or directly assisting providers of such products (see paragraph 242 below).
240. RSPs informed us that they are interested in using video content to differentiate their offering from competitors – in particular as internet access may increasingly be viewed as a commodity – and drive sales of the other, complementary elements of

¹⁷⁰ Telecom announced on 2 April 2012 that it is doubling (and in some cases tripling) the data caps on its standard broadband plans, without increasing prices, and its top plan will be going to 160GB (currently 80GB): <http://www.telecom.co.nz/whatsnew/moredata>. Orcon announced on 17 April 2012 that it has increased its data caps significantly, with the top plan two plans now being 200GB and 1000Gb (1Tb) per month: http://www.orcon.net.nz/about/article/orcon_boosts_genius_plans. Both websites last viewed on 27 April 2012.

¹⁷¹ Orcon's announced UFB plan has a cap of 40GB.

¹⁷² NZ Herald, Netflix turned off by low data caps, 26 November 2011.

¹⁷³ [].

¹⁷⁴ Email from Susie Kilty, Buddle Findlay on behalf of Sky to the Commission (5 April 2012). It has also publicly stated that this is the case: for example, <http://computerworld.co.nz/news.nsf/news/sky-tv-stands-by-claims-that-big-telcos-can-zero-rate-competitors>, last viewed on 27 April 2012.

¹⁷⁵ [].

¹⁷⁶ Figure 6.75 of Ofcom, *Communications Market Report: UK*, 4 August 2011.

¹⁷⁷ There are also quadruple play offers. Quadruple play is a marketing term combining the triple play service of broadband, internet access, television and telephone with wireless service provisions. Orcon sees the future in terms of "double-play" which, for it, is internet, including telephone over IP, and video.

the triple-play offer. For RSPs, triple-play can (a) increase revenue per user and (b) reduce customer churn thereby reducing marketing and transaction costs. Consumers can obtain benefits of lower overall prices and a single bill / provider. IPTV providers also benefit by being part of a potentially superior product, and potentially having greater sales as a result.

241. Even if IPTV operators do not have their product offered by RSPs as part of a bundle (or otherwise), they may benefit from RSPs promoting their services. []. For over-the-top providers, such as Quickflix, it may be less of an issue, but it may remain a source of competitive disadvantage in comparison to TV providers who are part of a triple-play bundle.¹⁷⁸

242. RSPs, [] have submitted to us that RSPs' reseller and retransmission agreements restrict RSPs' ability and incentive to partner with new entrants, because:

242.1 Sky's agreements last several years ([]).

242.2 During that time, RSPs must work exclusively with Sky:

242.2.1 Subject to limited exceptions, RSPs cannot provide their own pay content.

242.2.2 RSPs cannot offer special /direct assistance to other pay TV operators. Sky has explained that under this provision the other party to the contract [

].^{179 180}

242.3 RSPs have incentives not to breach their agreements with Sky.¹⁸¹

243. Again this issue would face any new entrant, including a TVNZ pay TV offer. We do not consider that TVNZ is any better placed to partner with one or more RSP than any other potential new entrant.

244. Therefore for the purposes of this investigation we do not need to conclude on the extent to which Sky's agreements with RSPs (or any provision of those agreements)

¹⁷⁸ This is consistent with the stated views of the US Federal Trade Commission and Department of Justice to an OECD forum in 2011 (see their Contribution to the OECD Latin American Forum on Triple/Quadruple Play in Telecoms, 13-14 September 2011).

¹⁷⁹ [].

¹⁸⁰ Email from Susie Kilty, Buddle Findlay on behalf of Sky to the Commission (5 April 2012). This example was non-exhaustive of what amounts to special/direct assistance.

¹⁸¹ If an RSP commits a material breach of its reseller or retransmission agreement with Sky, and that breach is unremedied [], Sky can:

- []
- [], and
- [].

There are similar clauses in the retransmission agreements.

hinder entry. We have started investigating whether these agreements breach Part 2 of the Commerce Act.

Conclusion of potential competition

245. Quickflix has recently entered the New Zealand market for pay TV. We are also aware of other potential entrants.
246. We have identified a number of potential conditions of entry, in particular access to content, the need to achieve scale, and potentially Sky's agreements with RSPs.
247. TVNZ would need to obtain sufficient pay TV content and achieve scale in pay TV service, if it were to enter. It may also gain a competitive advantage if it could partner with a RSP. However, TVNZ has no material advantages in these respects over other potential entrants identified by our investigation.
248. As the focus of this investigation is the potential impact of TVNZ not entering into the pay TV market either on its own or in conjunction with a partner as result of the Igloo JV, we do not need to conclude on the extent of the above identified conditions of entry. Rather, we need only conclude whether TVNZ would have been better placed to overcome these barriers relative to other actual and potential entrants. We conclude that they are not any better placed.

Countervailing power

249. Individual consumers do not likely have any countervailing buyer power.

Conclusion on section 47 analysis

250. Even if there was a difference between the factual and counterfactual scenarios regarding the likelihood of entry of TVNZ into pay TV, it is unlikely that TVNZ's entry would significantly increase competition in the market given the number of other likely new and potential entrants, and so any loss in competition would not be substantial.
251. This is consistent with Sky's business documents prepared prior to the possibility of Igloo, which we have reviewed. They identify a range of other competitive threats, but not TVNZ, including:
- 251.1 Online TV offerings including TVOD: "1. Competitive Situation – online offerings are emerging as stronger competitive threats (e.g., Apple TV, Google TV)..."¹⁸²
- 251.2 [

¹⁸² [].

].¹⁸³

252. Therefore even if it was likely that TVNZ would have entered pay TV absent the acquisition, on the basis of the evidence available, we consider it unlikely that it would have breached section 47 of the Commerce Act.

¹⁸³ [].

Section 27 analysis – Do any provisions of the JV Agreement substantially lessen competition?

253. We consider that none of the provisions of the JV Agreement are likely to have the purpose, effect or likely effect of substantially lessening competition in a market contrary to section 27 of the Commerce Act.
254. As described above, the section 27 analysis of the JV Agreement is limited by section 46 of the Commerce Act, which provides that section 27 does not apply to provisions providing for the acquisition of shares.¹⁸⁴ This means that the provision setting out TVNZ’s subscription of shares in the company cannot be considered under section 27, but that the JV Agreement is otherwise subject to section 27.¹⁸⁵
255. We have reviewed the JV Agreement for any clauses that might change Sky or TVNZ’s ability and/or incentive to compete, and therefore likely have the purpose, effect or likely effect of substantially lessening competition in a market under section 27. We have identified one such possible clause, clause 5.1, which we find is unlikely to have the purpose, effect, or likely effect of substantially lessening competition.

Meaning of purpose, effect and likely effect

256. Effect is concerned with the actual or potential consequences of the provision in question. When considering whether a provision of an agreement has the “effect” of substantially lessening competition in a market, it is the actual results of the provision that are relevant.
257. However in many cases the alleged breach has not occurred, or has not yet had time to have its effect. In such cases we consider the “likely effect” of the provision, which involves considering results that may occur.
258. In either case, the Commission must compare the state of competition with the provision (the factual) with the state of competition without it (the counterfactual), and determine whether the difference is substantial.¹⁸⁶
259. The New Zealand Courts have interpreted “likely” to mean “something that might well happen”, or a “real or not remote chance or possibility”. The degree of likelihood necessary to establish that a provision is “likely” to have the effect is

¹⁸⁴ Section 46 states that:

“Nothing in this Part of this Act applies—

(a) To the entering into of a contract or arrangement or the arriving at of an understanding in so far as the contract, arrangement, or understanding contains a provision that provides for the acquisition or disposition of assets of a business or shares; or

(b) To any act done to give effect to a provision of a contract, arrangement, or understanding that provides for the acquisition or disposition of assets of a business or shares.

¹⁸⁵ *Commerce Commission v Bay of Plenty Electricity Ltd* HC Wellington CIV-2001-485-917, 13 December 2007 (*BoPE*) at [537].

¹⁸⁶ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238 at pp 259, 260, approved in *Air New Zealand v Commerce Commission* (No 6) (2004) 11 TCLR 347 at [40]. See also *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [112] and the cases cited therein.

“above mere possibility but not so high as more likely than not and is best expressed as a real and substantial risk that the stated consequence will happen”.¹⁸⁷

260. The purpose of the provision is objectively assessed on the basis of subjective and/or objective considerations:
- 260.1 ‘subjective’, meaning direct evidence that an anti-competitive outcome was a real and substantial purpose¹⁸⁸ of one or more of the parties, which can include direct evidence from parties’ written and oral statements contemporaneous to the conduct;¹⁸⁹ and/or
- 260.2 ‘objective’, meaning an anti-competitive purpose can be inferred from objective facts, such as actions and circumstances; relevant situations include that in which it is obvious on the face of the agreement¹⁹⁰ and that in which an anti-competitive purpose can be inferred from a likely anti-competitive effect.¹⁹¹
261. The following principles apply when assessing whether a provision has an anti-competitive purpose:
- 261.1 The lack of any substantial anti-competitive effect or likely effect does not vitiate any anti-competitive purpose.¹⁹² However, if the prospect of achieving a substantial lessening of competition is objectively impossible, this may or may not overcome countervailing evidence of an anti-competitive purpose, depending on the strength of the countervailing evidence.¹⁹³
- 261.2 If an anti-competitive purpose is established using the ‘objective’ approach above, it is not a defence to say the subjective purpose was otherwise.¹⁹⁴
262. “Purpose” in section 27 need not be a purpose common to both parties to the agreement.¹⁹⁵ This stems from the focus on the term “provision”. Section 2(5)(a) of the Commerce Act provides that a provision will be deemed to have a particular purpose if the provision was included in the arrangement for that purpose, and the purpose was a substantial purpose.

Clause 5.1

263. Clause 5.1 of the JV Agreement states:

¹⁸⁷ *Port Nelson v Commerce Commission* (1996) 3 NZLR 554, pp562-563 (CA).

¹⁸⁸ *Commerce Commission v Telecom* CIV 2000-485-673 (CA) at [92].

¹⁸⁹ *ANZCO Foods Waitara Ltd v AFFCO NZ Ltd* (2005) 11 TCLR 278 (CA) (*ANZCO*) at [306(a)] and *BoPE* at [493]-[530] and [547].

¹⁹⁰ *Tui Foods Ltd v NZ Milk Corp Ltd* (1993) 5 TCLR 406 at p409. The case related to s 29 of the Act, but is relevant to s 27, see *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 at p426.

¹⁹¹ *ANZCO* at [304]. Also see *Commerce Commission v Telecom* CIV 2000-485-673 (CA) at [92].

¹⁹² *ANZCO* at [152], [302]. See also *Commerce Commission v Ophthalmological Society of NZ* (2004) 10 TCLR 994 (HC) at [122] and *BoPE* at [547].

¹⁹³ *BoPE* at [548] and [550].

¹⁹⁴ *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC) at p429.

¹⁹⁵ *Ibid* at p425.

neither Party shall ... provide or otherwise make available Video Content on a linear Pay TV basis via a DTT Television service in New Zealand which competes with the Services offered by the Company and the Business

264. The JV Agreement defines Pay TV to exclude pay TV catch up and VOD.
265. Clause 5.2 clarifies that this restrictions in clause 5.1 does *not* prevent or restrict inclusion of video content:
- 265.1 in other, non-digital terrestrial TV services or
- 265.2 on a free-to-air basis to a competing alternative digital terrestrial TV service (including where other third parties make video content available on a linear pay TV basis) or authorising use of EPG data for that video content.
266. Clause 5.4 sets out that nothing in the JV Agreement should be interpreted as limiting the activities or separate businesses of either party, unless expressly provided. The clause clarifies that nothing in clause 5.1 limits Sky or TVNZ's rights to provide:
- 266.1 sports programming by any distribution mechanism (including digital terrestrial TV), or
- 266.2 any video content or channels by any distribution mechanism (including digital terrestrial TV) to any mobile device.
267. The combined effect of those clauses is that TVNZ retains the option of setting up, or providing content to, a pay TV platform on IP, satellite or other transmission platform.

Analysis – effect and likely effect

268. The Commission's view on the factual with the JV Agreement is outlined earlier in the report (see paragraphs 134 – 197).
269. In the counterfactual we assume that TVNZ and Sky will enter into the Igloo joint venture but with the removal of clause 5.1 from the JV Agreement.¹⁹⁶ As a consequence, in the counterfactual, TVNZ would be *able* to set up a pay TV platform using digital terrestrial TV, in competition with Igloo. However for the reasons outlined earlier in the report (see paragraphs 142 – 149 and 162 - 170), TVNZ will be unlikely to do so (on its own, or with a third party).
270. The Commission therefore concludes that clause 5.1 is unlikely to result in any effect, let alone a substantial effect, on competition between Sky and TVNZ in the relevant market.

¹⁹⁶ An alternative counterfactual could be that Sky and TVNZ would not continue the joint venture absent 5.1. In these circumstances, Sky would likely pursue Igloo on its own. However adopting this counterfactual would not make any difference to our conclusion, as TVNZ would still remain unlikely to set up a pay TV platform using digital terrestrial TV.

