Submission by TVNZ in response to the Commerce Commission Statement of Preliminary Issues

VODAFONE EUROPE B.V. AND SKY NETWORK TELEVISION LIMITED

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PUBLIC VERSION

1. Introduction and Executive Summary[1]

1.1 Television New Zealand (**TVNZ**) is the country's leading free to view video content provider. It reaches approximately 2.2 million New Zealanders every day (and 3.7 million per month), predominantly through its two main broadcast channels, TV ONE and TV2, as well as its TVNZ OnDemand and ONE News Now online services. TVNZ is owned by the Crown but operates as a self-funded, commercial entity by virtue of the Television New Zealand Act 2003. Its predominant source of revenue is from advertising.

1.2 When SKY sought clearance to acquire Prime in 2006, TVNZ submitted that SKY would leverage its Pay TV buying power into FTA, so that FTA broadcasters other than Prime would be denied access to premium FTA content; resulting in a less competitive FTA sector, and reducing the competitive constraint of FTA on the Pay TV sector. It would do this by either:

(a) making bundled offers for the acquisition of Pay TV and FTA TV rights (with the effect that FTA rights were not available to purchase unless Pay TV rights were also purchased) (**bundling strategy**); or

(b) over-bidding the price of stand-alone FTA TV rights by cross-subsidising from the Pay TV business, and therefore raising the costs of a stand-alone FTA TV provider (**overbidding strategy**).

1.3 As we explain in this submission, SKY has over the last decade engaged in both these strategies, and put more and more premium content behind its pay walls. This has had the effect of degrading the quality of programming available on FTA platforms, and therefore lessening the constraint imposed by FTA on SKY's Pay TV service.

1.4 As TVNZ submitted in 2006, a stand-alone FTA broadcaster simply cannot match the price a combined Pay TV/FTA operator is prepared to pay for premium live sports events. Since SKY's acquisition of Prime, TVNZ has been outbid by SKY for FTA rights to Sevens Rugby, Rugby World Cup, Netball Internationals, America's Cup, the Olympic Games, the Triathlon, FIFA World Cup, ASB Classic and Heineken Open Tennis, NZ V8s and MotoGP.

1.5 TVNZ has lost these sports' rights, not because it decided that sporting events were no longer of interest to FTA viewers, but simply because it could not afford to pay for FTA rights alone what SKY was prepared to pay for Pay and FTA rights combined. As a consequence, TVNZ has retrenched its sports department [ ] and exited its Outside Broadcast business.

1.6 SKY's acquisition of FTA rights has led to a dramatic reduction in the availability of live sport on FTA, even though SKY has paid for the rights to provide live FTA coverage. This is simply because SKY uses its FTA rights to advantage its Pay TV business, as can be seen clearly in a comparison of the FTA coverage of the 2008 Beijing Olympics with the FTA coverage of the 2016 Olympics. TVNZ provided over 800 hours of FTA coverage of the Beijing 2008 Olympics, the majority of which was live coverage. In comparison, SKY is projecting 240 hours of FTA coverage for Rio 2016, the vast majority of which is delayed (not live) coverage; as described in the New Zealand Herald, they

[1] In this submission TVNZ focuses solely on the impact of the proposed transaction on the markets in which it operates. While TVNZ is aware that telecommunications service providers have their own concerns about the impact of the transaction on telecommunications markets, we leave it to them to explain those concerns.

are "*devoting huge chunks of their schedule to covering the event in as much delayed detail as possible*".[2]

1.7 Premium international entertainment content is a critical component of an FTA offering. SKY adopted an over-bidding strategy to acquire exclusive rights to both FTA and Pay rights for content, by leveraging its buying power in Pay into FTA. As some of these rights were critical to the future of a FTA service, TVNZ was obliged to pay significantly more for FTA rights, to beat what SKY was prepared to pay for combined FTA and Pay rights.

1.8 As a consequence, the cost of overseas content has increased [ ] between 2006 and 2014. As advertising revenue over this period has been static or declining, the net result has been a significant reduction in the amount TVNZ has been able to invest in local production. The reduced volume and quality of local and international FTA content leads to reduced FTA audiences and advertising revenues, driving a further reduction in premium local and international FTA content, and reducing the constraint imposed on Pay by FTA.

1.9 The proposed merger of SKY and Vodafone will accelerate this process, by creating an entity with the ability and incentive to acquire premium content rights for live sports and entertainment in a single bundle across FTA, Pay TV, SVOD and TVOD, making it even more uneconomic for a stand-alone FTA provider such as TVNZ to acquire premium content for FTA alone, or for telecommunications companies to acquire VOD rights alone.

1.10 In 2012, SKY stated that there were no barriers to new entrants such as telecommunications companies in terms of availability of rights to streaming video, and that SKY itself held no streaming VOD rights, or first refusal rights to such content.[3] [ ]

1.11 We conclude that this consequence can be avoided only by removing from SKY's control the source of the market power which has wreaked such havoc: its FTA asset, by requiring that it dispose of its FTA TV operation, Prime.

1.12 The competitive harm in the FTA and Pay markets is a direct result of SKY's ownership of both FTA and Pay platforms. Divestment of its FTA business will remove SKY's incentives to buy bundled Pay/FTA rights, will lead to greater availability of (and substantially reduced price of) FTA content, and lead to greater competition between Pay and FTA platforms, to the benefit of all New Zealand consumers, and in particular the close to 50% of New Zealand households that do not subscribe to SKY's Pay service.

2. The relevant markets

The retail markets for services

2.1 The Commission has traditionally distinguished between the services provided by Pay TV and free to air broadcasters, and defined the two services as separate markets. To a large degree this differentiation has arisen because Pay TV services are largely subscription-based, while FTA services are funded by advertising; the two-sided nature

[2] "Prime Olympics Coverage" *The New Zealand Herald Timeout*, (New Zealand, 11 August 2016) at 19.

[3] Ruth Laugesen "Sky TV's hold on the NZ market" *New Zealand Listener* (online ed, Auckland, 29 June 2012) available at http://www.listener.co.nz/entertainment/sky-tvs-hold-on-the-nz-market.

of the advertising-funded FTA market, it is said, needs to be analysed in a different manner to the one-sided Pay TV market.

2.2 With the increasing convergence of services and devices, the question arises whether this division into two product markets is still appropriate. Market definition is intended to isolate the area of competitive harm, and as we outline in this submission, the area of competitive harm is in the level of competition **between** the FTA and Pay platforms.

2.3 With that in mind, we recommend the Commission adopted the approach of the ACCC in its recent Foxtel/Ten decision, and also consider the impact of the transaction in *"a broader national market for the supply of television services*" encompassing FTA, subscription Pay TV, and VOD services.

2.4 We also suggest that the time has come to expand the definition of free to air and Pay TV to recognise the growing importance of fixed and mobile broadband infrastructure as platforms to deliver video content.

2.5 Accordingly, in this submission:

(a) The term **FTA** (free to air) is used to describe video content which the viewer receives without payment, on either a linear or on-demand basis, irrespective of the delivery platform; and

(b) The term **Pay** is used to describe video content which the viewer pays to receive, on either a linear or on-demand basis, irrespective of the delivery platform, including subscription video on demand (**SVOD**), pay–per-view, or transactional video on demand (**TVOD**) services.

The wholesale markets for the acquisition of video content rights

2.6 As is the case in the downstream retail markets, sports and entertainment content rights for FTA and Pay are granted separately (although in New Zealand sports rights are almost always sold as a single bundle of rights), and the competitive impact of the proposed transaction needs to be assessed separately for FTA and Pay rights.

2.7 The Commission in its *SKY/Prime* decision identified four separate markets for the wholesale acquisition of premium content:[4]

(a) The wholesale acquisition of live sports rights (the Sports Rights Market);

(b) The wholesale acquisition of movie rights for FTA (the FTA Movies Market);

(c) The wholesale acquisition of movie rights for Pay TV (the Pay TV Movies Market);

(d) The wholesale acquisition of first-run television series rights (the First-Run Series Market).

2.8 We agree with this characterisation of the market:

(a) Live sports rights: while content rights for FTA and Pay TV are granted separately, because sports rights are almost always sold as a single bundle of rights for the New Zealand market they are contestable for by FTA and Pay providers;

[4] Commerce Commission Decision No. 573, SKY Network Television Limited and Prime Television New Zealand Limited, 8 February 2006.

(b) Movie rights: Movies have separate Pay and FTA windows. The pay window comes first, and Pay providers compete for those rights. The FTA window is subsequent, and FTA operators compete for those rights;

(c) First–run television series rights: First run television series rights are available to both FTA and Pay providers, who compete for the first-run rights.

Conclusions on market definition

2.9 Accordingly, it is necessary to examine the competition effects of the proposed transaction in the national markets for:

(a) The retail supply of FTA services;

(b) The retail supply of Pay services;

(c) The broader market for television services (encompassing both FTA and Pay services);

(d) The wholesale acquisition of live sports rights (the Sports Rights Market);

(e) The wholesale acquisition of movie rights for FTA (the FTA Movies Market);

(f) The wholesale acquisition of movie rights for Pay (the Pay Movies Market); and

(g) The wholesale acquisition of first-run television series rights (the First-Run Series Market).

3. The constraint imposed by FTA TV services on Pay TV services

3.1 The competitive constraint that FTA TV imposes on Pay TV is well recognised.

3.2 For instance, in 2007 the UK Competition Commission recommended a reduction by 10% by BSkyB of its interest in ITV on the grounds that:

> *...FTA services posed a constraint to BSkyB's prices and that the BBC and ITV were both key to the strength of the FTA offer. ... Given the competitive constraint of the FTA offer on BSkyB's services, and the importance of ITV within the FTA offer, BSkyB would have the incentive to influence ITV's strategy in such a way as to minimize the constraint it offered to BSkyB.*

3.3 The Commission has also previously observed that "*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*."[5]

3.4 It is also well recognised that acquisition of content rights for premium entertainment and live sport is critical to the success of both FTA and Pay – poor quality content leads to fewer viewers and less advertising revenue for FTA, and fewer subscribers to the Pay service. The applicants acknowledge this at paragraph 4.5 of their applications.

3.5 This dynamic is well illustrated by the developments in content acquisition between FTA and Pay platforms, following SKY's acquisition of the Prime FTA TV operation in 2006. SKY leveraged its market power in content acquisition of live sports and premium entertainment rights to significantly weaken the constraint FTA TV is able to impose on Pay TV.

[5] Commerce Commission, *Igloo Investigation Report* (16 May 2012) at 12.

3.6 If the SKY/Vodafone transaction is cleared, it will have the ability to increase the extent and impact of that foreclosing behaviour, as we explain below.

3.7 Contrary to the applicant's assertion that "*SKY services are not 'must have' inputs*",[6] it is very clear that premium live sports content is an essential input to a successful linear Pay TV offering.

3.8 TVNZ learnt this the hard way through its Igloo joint venture with SKY. [

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3.9 Premium content is also an essential input to the emerging high speed broadband markets. The Commission recognised this in its *High Speed Broadband Services Demand Side Study Final Report*:[7]

> *Video content is likely to be the primary driver behind consumers' uptake of high speed broadband over the next several years. The rate of this uptake may be affected by the diversity of video on demand services that are available and the content that they offer*.

3.10 In sections 4 – 6 of this submission we:

(a) describe how SKY has used its market power since 2006 in the acquisition of sports and entertainment rights; and

(b) explain why SKY's conduct has had the effect of substantially lessening competition between FTA and Pay TV, by foreclosing access to sports rights (with the result that viewers have no choice but to subscribe for Pay TV services in order to view live premium sports events), and increasing costs for FTA entertainment rights.

4. SKY's acquisition of Prime

4.1 In the Commission's 2006 decision to clear SKY's acquisition of Prime it noted that:

(a) Live sports FTA and Pay rights are typically sold in a bundle to the highest bidder (so that there was no distinction between the acquisition of live sports content rights by FTA and Pay TV broadcasters);[8]

(b) The only significant competitors to SKY for sports rights were TVNZ and TV3 (then CanWest);[9] and

(c) As Prime had limited involvement in sports acquisition, the number of bidders for sports content would remain the same, and therefore *"there would be only minimal effect on the sports rights market as a result of the proposed acquisition*".[10]

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[6] SKY/Vodafone clearance application (29 June 2016) at 11.11.

[7] Commerce Commission, *High Speed Broadband Services Demand Side Study Final Report* (June 2012) at 34.

[8] Commerce Commission Decision No. 573, SKY Network/ Prime Television (8 February 2006) at 102 -111.

[9] Above, n 8 at 203.

[10] Above, n 8 at 205.

4.2 TVNZ had submitted to the Commission that if the acquisition was cleared SKY would:

(a) leverage its market power as the only purchaser of Pay TV rights in New Zealand to increasingly acquire bundled Pay and FTA rights;

(b) have no incentive to continue to sub-license FTA sports rights it had acquired on a bundled basis to any FTA broadcaster other than Prime;

(c) bid up the price of stand-alone FTA rights by cross-subsidising Prime from SKY's monopoly rent in the Pay TV market; and

(d) use SKY's ownership of Prime to control and manipulate the screening of premium FTA content on Prime, so as to lessen the impact of any FTA constraint on SKY as a further means to grow SKY's household penetration.

4.3 Further, TVNZ submitted that SKY would leverage its Pay TV buying power into FTA, by either:

(a) making bundled offers for the acquisition of Pay TV and FTA TV rights (with the effect that FTA rights were not available to purchase unless Pay TV rights were also purchased) (**bundling strategy**); or

(b) overbidding the price of stand-alone FTA TV rights by cross-subsidising from the Pay TV business, and therefore raising the costs of a stand-alone FTA TV provider (**overbidding strategy**).

4.4 This, TVNZ submitted, would result in:

(a) FTA broadcasters other than Prime being denied access to premium FTA content; and

(b) a less competitive FTA sector, which reduced the competitive constraint of FTA on the Pay TV sector.

4.5 The Commission however was of the view that *"the combined entity **could not** leverage its position as a purchaser of content in the upstream markets, by vertical linkages, to impact on the downstream markets*" (emphasis added).

4.6 The Commission accordingly concluded it was satisfied SKY's acquisition of Prime would not be likely to have the effect of substantially lessening competition in any market, because:

(a) "*the Commission does not consider that the combined entity could successfully bundle content or adopt a predatory strategy to the detriment of other competitors*";[11] and

(b) "*the Commission is of the view that, post-acquisition, the combined entity would be unlikely to be able to leverage its position as a purchaser of premium content...to substantially lessen competition in the downstream FTA broadcasting market*."[12]

[11] Above , n 8 at 243.

[12] Above, n 8 at 244.

4.7 However, as described below, history shows that SKY, after acquiring Prime **could, and in fact did**, leverage its position as an acquirer of Pay and FTA rights in a way that has had the effect of substantially lessening competition between the FTA TV and Pay TV markets, (or alternatively in the broader television services market) in relation to both sports and entertainment programming. This has occurred in the two ways TVNZ predicted in its submission (bundling and overbidding).

5. Acquisition of FTA sports rights

5.1 The SKY/Prime decision described FTA operators TVNZ and TV3 as significant competitors to SKY's sports rights:[13]

> *Industry participants advised the Commission that TVNZ and CanWest have been the only significant competitors to SKY for sports rights and have been successful in obtaining such rights.*
>
> *For example:*
>
> - *Rugby Sevens – TVNZ has the rights to this series of international tournaments;*
> - *Rugby World Cup – the Commission understands that CanWest outbid a joint bid from both SKY and TVNZ for the rights to the next Rugby World Cup. The rights to the previous tournament were held by TVNZ; and*
> - *International and domestic netball – the Commission understand that TVNZ outbid SKY for these rights.*
>
> *TVNZ also has the rights to a number of popular one-off events such as the America's Cup, the Olympics and the Commonwealth Games.*
>
> *Apart from these examples, which tend to be one-off events, the majority of sports rights are currently held by SKY.*

5.2 In the same theme, the applicants in the SKY/Vodafone matter state that, "*there is increasing competition in the markets for the acquisition of premium content. This is reflected in the increasing cost of premium content*. *Rights to premium content are contestable, and rights often change hands.*"[14]

5.3 The applicants' claim that TVNZ and Media Works compete vigorously (and successfully) for premium content:[15]

> *TVNZ and MediaWorks each have substantial catalogues and arrangements with the major studios, and – particularly in the case of TVNZ – have also shown a willingness to compete strongly for premium sports rights (for example, in recent times TVNZ has secured Wimbledon, NFL, AFL, certain EPL games and WRC content).*

5.4 An examination of the competition for sports rights in the New Zealand market over the last decade however, paints a very different picture. Since SKY's acquisition of Prime, SKY has acquired the rights to **all but one** of the sporting events listed by the

[13] Above, n 8 at 203-205.

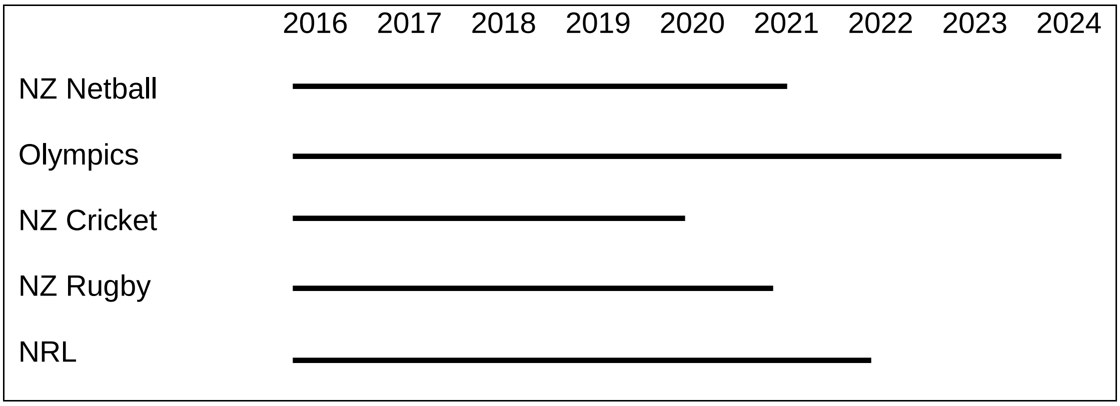
[14] Above, n 6 at 7.21.

[15] Above, n 6 at 7.18.

Commission as being held by FTA operators, namely Sevens Rugby, Rugby World Cup, Netball Internationals, America's Cup, and the Olympic Games. TVNZ has also lost rights to SKY which were not mentioned in the Prime decision, including the Triathlon, FIFA World Cup, ASB Classic and Heineken Open Tennis, NZ V8s and MotoGP.

5.5 SKY currently holds extensive long term exclusive rights to premium sports content rights for New Zealand, as shown in Figure 1:

Figure 1: SKY's Exclusive Sports Rights



5.6 Rights holders for major international sports events (Olympic Games, Rugby World Cup, FIFA World Cup) require rights holders to play some of these events on FTA television. This meant that prior to SKY's acquisition of Prime, an FTA TV New Zealand partner had to be secured to deliver the requisite FTA TV coverage in the territory of New Zealand. However following SKY's acquisition of Prime, SKY no longer needed to partner with an existing FTA partner to deliver FTA coverage. Accordingly over time SKY has used its Pay TV buying power to acquire exclusive FTA and Pay rights to almost all major sports events. This includes the 2012, 2014, 2016, 2018, 2020, 2022 and 2024 Olympics, the 2015 Rugby World Cup and the 2018 FIFA World Cup.

5.7 The applicants' claim that TVNZ's acquisition of rights to Wimbledon, NFL, AFL, certain EPL games and WRC content is evidence of vigorous and successful competition for sports rights is misleading. The only events of significance TVNZ has won in competition with SKY since their acquisition of Prime have been the 2018 Gold Coast Commonwealth Games, and Wimbledon 2016, discussed below. NFL, AFL and WRC are "fringe" sports in New Zealand, so do not attract a sufficient audience to make them attractive to a Pay operator, and in any event, TVNZ does not hold exclusive rights to these events.

5.8 The reason TVNZ obtained the Commonwealth Games rights was [

]

5.9 In the case of Wimbledon 2016, [

]

5.10 The FTA rights for some EPL fixtures and PGA golf tournaments were obtained by TVNZ from Coliseum Sports in 2014-16. Coliseum successfully bid for the rights against SKY and, as they had no FTA assets, agreed to sub-license limited event coverage to TVNZ. [

]

5.11 SKY has now obtained exclusive NZ rights to EPL through a deal with beIN Sports. TVNZ has no rights to future EPL games. Likewise SKY has recently reacquired broadcasting rights for the PGA golf, and TVNZ therefore has no further rights to screen PGA coverage.

5.12 TVNZ's rights to NRL and AFL are not exclusive; SKY carries extensive NFL content through its ESPN channel as well as AFL content on its other sports channels.

5.13 As TVNZ submitted in 2006, a stand-alone FTA broadcaster simply cannot match the price a combined Pay TV/FTA operator is prepared to pay for premium live sports events. TVNZ has lost the sports rights listed above, not because it decided that sporting events were no longer of interest to FTA viewers, but simply because it cannot afford to pay for FTA rights alone what SKY is prepared to pay for both Pay and FTA rights.

5.14 The impact of the exit from live premium sports of the FTA broadcasters, with FTA rights acquired by the Pay operator SKY, has led to a dramatic reduction in the availability of live sport on FTA, even though SKY has paid for the rights to provide live FTA coverage.

5.15 This is simply because SKY uses (or more correctly put, doesn't use) its FTA rights to advantage its Pay TV business, as can be seen clearly in a comparison of the FTA coverage of the 2011 Rugby World Cup with Rugby World Cup 2015, and the 2008 Beijing Olympics with the 2016 Olympics.

RWC 2011/2015

5.16 In 2011, the FTA TV rights were separated from the Pay TV rights and acquired by TVNZ, Media Works and Maori Television. Sixteen matches were shown live on FTA TV.

5.17 In 2015, the FTA TV rights were bundled with the Pay TV rights and acquired by SKY. Only six matches were shown live on Prime, as shown in Figure 2:

Figure 2: Rugby World Cup FTA coverage

RWC FTA coverage	
2011	**2015**
All 4 NZ pool matches (including opening match)	No NZ pool match
4 other pool matches	1 opening match
All 4 quarter-finals	2 quarter-finals
Both semi-finals	1 semi-final
Bronze final	Bronze final
Final	Final
16	**6**

Olympics 2008/2016

5.18 The last Olympic Games for which broadcast rights were all held by a FTA TV operator was Beijing 2008, where the rights were held by TVNZ. TVNZ provided over 800 hours of FTA coverage of the Beijing 2008 Olympics, the majority of which was live coverage.

5.19 In comparison, SKY is projecting 240 hours of FTA coverage for Rio 2016, the vast majority of which is delayed (not live) coverage. According to SKY: [16]

> *Prime's Olympic coverage is programmed to appeal to a broad audience with an emphasis on key events that New Zealanders are participating in. In order to show this spectrum it's not possible to screen them live however Prime's programming team will do their best to have key events on air as soon as possible...*

5.20 This policy was described in the NZ Herald as follows: [17]

> *Free-to air channel Prime is putting on a gold medal-winning effort to bring all the glory of the Olympics to those of us without Sky.*
>
> *It's unfortunate that they're hamstrung by their parent company's unsportsmanlike iron grip on the live coverage, but that hasn't stopped them from devoting huge chunks of their schedule to covering the event in as much delayed detail as possible*.

5.21 As a consequence of being unable to secure FTA rights to live premium sports, TVNZ has retrenched its sports department [ ] and exited its Outside Broadcast business.

6. Premium entertainment content

6.1 Premium entertainment content from the USA is sourced by New Zealand FTA companies via studio output "first look" deals, or programme specific buying agreements. A studio output deal involves the New Zealand company agreeing to acquire a studio's entire annual output of content. Output deals with the major studios, of which there are only seven, involve thousands of hours of content, and annual expenditures are in the tens of millions of dollars. They are critical to the performance of FTA businesses.

6.2 [ ]

6.3 Also in 2011, [ ] TVNZ, which had previously shown key HBO series such as *The Sopranos*, *Band of Brothers* and *The Pacific* was no longer able to purchase any HBO FTA rights.

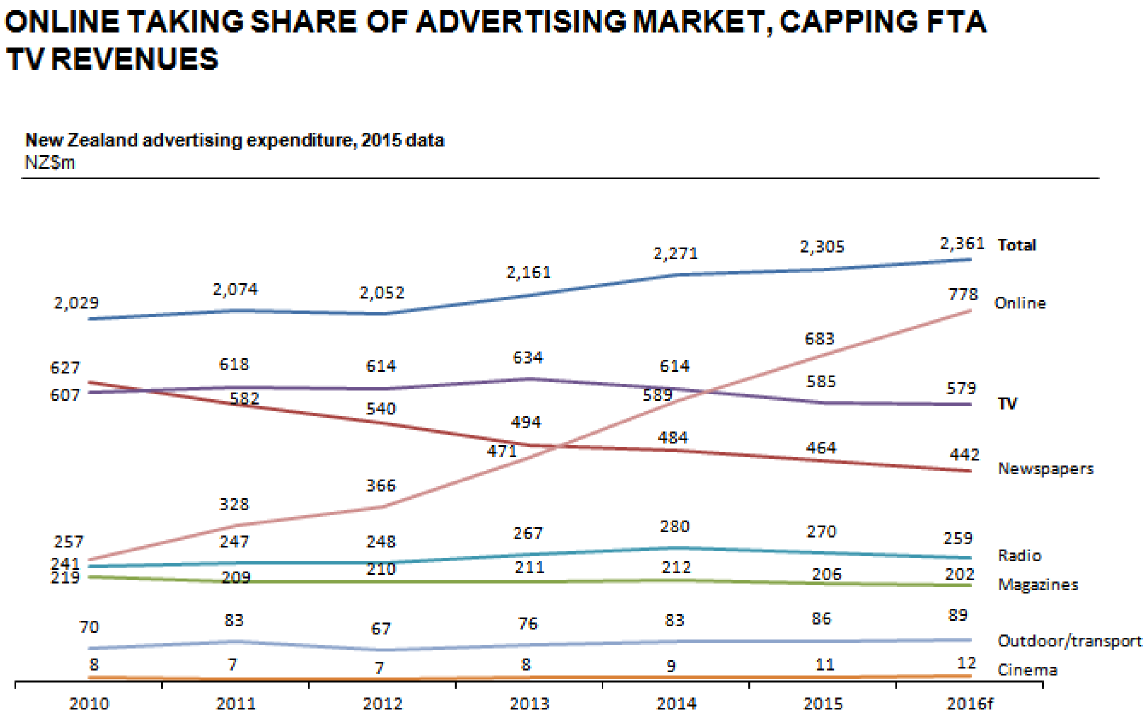
[16] "Prime Olympics Coverage" *The New Zealand Herald Timeout*, (New Zealand, 11 August 2016) at 19.

[17] Above, n 16.

Effect on local production

6.4 Between 2006 and 2016, TVNZ's cost of acquiring premium international content rose [ ], although the quantity of international content declined. Advertising revenue over this period was static or declining, as shown in Figure 3:

Figure 3: FTA advertising revenue 2010 -2016



6.5 TVNZ was accordingly forced to reduce its investment in premium local content [ ]. Premium local content is significantly more expensive to make than overseas content. [ ]

6.6 As Figure 4 shows, the cost of overseas content increased [ ], while local content costs reduced [ ]. In addition, sports costs reduced [ ] for the reasons set out in section 5 of this submission.

Figure 4: TVNZ Expenditure 2006 - 2014

[ ]

6.7 The reduction in premium local content, due to the requirement to pay more for international content, is pushing FTA operators into a downward commercial spiral. Local content is a critical component of the FTA product mix, as shown in Figure 5:

Figure 5: FTA Local Content Audience: 2007 -2013

LOCAL CONTENT CRITICAL TO AUDIENCE DELIVERY –
– HALF OF TOP RATING SHOWS ARE LOCAL

Local
Foreign

Top 20 series by rating amongst All People 18-54

Calendar 2007

Rank	Title	Channel	Aud (000)	Rating	Share %
1	Dancing With The Stars	TVONE	346	16.3	41
2	Desperate Housewives	TV2	343	16.2	39
3	Sensing Murder	TV2	329	15.4	38
4	Sensing Murder(R)	TV2	308	14.4	37
5	Ice (Doco)	TVONE	291	13.7	33
6	Greys Anatomy	TV2	289	13.6	37
7	C.S.I	TV3	288	13.6	34
8	Piha Rescue	TVONE	276	13	32
9	Outrageous Fortune	TV3	274	12.9	35
10	Mucking In	TVONE	268	12.7	33
11	House	TV3	266	12.6	31
12	Border Security	TVONE	265	12.5	31
13	NCIS	TV3	261	12.3	30
14	Hell's Kitchen	TV2	261	12.2	33
15	Fair Go	TVONE	254	12	34
16	Shortland Street	TV2	252	11.9	36
17	Flood	TV2	249	11.7	34
18	Mitre 10 Dream Home	TV2	246	11.6	33
19	Men In Trees	TV2	245	11.6	34
20	This Is Your Life	TVONE	246	11.5	29

Calendar 2010

Rank	Title	Channel	Aud (000)	Rating	Share %
1	Outrageous Fortune	TV3*	395	18.4	39
2	Sensing Murder	TV2*	333	15.5	40
3	Motorway Patrol	TV2*	320	14.9	36
4	The Big Bang Theory	TV2*	318	14.8	35
5	Shortland Street	TV2*	317	14.7	40
6	Rescue 1	TV2*	315	14.6	35
7	Police Ten 7	TV2*	308	14.3	38
8	The Force	TVONE*	305	14.1	33
9	Hell's Kitchen	TV2*	301	14	33
10	Border Security	TVONE*	295	13.7	34
11	Greys Anatomy	TV2*	293	13.6	31
12	Two and a Half Men	TV2*	293	13.6	34
13	Cougar Town	TV2	292	13.6	32
14	Desperate Housewives	TV2*	291	13.6	30
15	Neighbours At War	TV2*	288	13.5	28
16	Highway Patrol	TV2*	288	13.4	37
17	The Mentalist	TV2*	287	13.3	31
18	Coastwatch	TVONE*	277	12.9	30
19	Road Cops	TV3*	273	12.7	27
20	The Middle	TV2	272	12.7	27

Calendar 2013

Rank	Title	Channel	Aud (000)	Rating	Share %
1	My Kitchen Rules	TV2*	355	15.9	39
2	The Big Bang Theory	TV2*	348	15.6	38
3	Shortland Street	TV2*	328	14.8	42
4	Dynamo Magician Impossible	TV ONE*	300	13.6	32
5	The Block NZ	TV3*	287	13.0	31
6	Mrs. Brown's Boys	TV ONE*	289	13.0	34
7	2 Broke Girls	TV2*	278	12.5	33
8	The X Factor (NZ)	TV3*	265	12.0	26
9	MasterChef New Zealand	TV ONE*	258	11.6	27
10	Police Ten 7	TV2*	252	11.4	32
11	New Zealand's Got Talent	TV ONE*	243	11.0	29
12	Two and a Half Men	TV2*	236	10.7	28
13	Miranda	TV ONE*	235	10.5	25
14	Highway Patrol	TV2*	234	10.5	29
15	Code 1	TV2*	232	10.5	28
16	Mitre 10 Dream Home	TV2*	227	10.2	26
17	7 Days	TV3*	226	10.2	29
18	Mrs. Brown's Boys (R)	TV ONE*	227	10.2	25
19	Arrow	TV2*	226	10.2	29
20	Random Breath Testing	TV2*	222	10.0	28

6.8 The reduced volume and quality of local and international content leads to reduced FTA audiences, which in turn leads to a reduction in advertising revenues, which drives a further reduction in investment in premium local and international content. Media Works TV business is in that downward spiral now, and its commercial viability is seriously threatened; [ ].

7. **The proposed merger is likely to further lessen the constraint imposed by FTA services on Pay TV**

7.1 The applicants acknowledge that premium content is a key input for any TV service.[18]

7.2 The Commission has previously observed that, "*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*."[19]

7.3 As noted above, SKY has, since its acquisition of Prime, adopted strategies of purchasing bundled Pay and FTA rights, and overbidding for FTA rights, in order to put more and more premium content behind its pay walls. This has had the effect of degrading the quality of programming which is available on FTA platforms, and therefore lessening the constraint imposed by FTA on SKY's Pay TV service.

7.4 The merger of SKY and Vodafone will accelerate this process by creating an entity with the ability and incentive to acquire premium content rights for sports and entertainment in a single bundle across FTA, Pay TV, SVOD and TVOD in a manner that makes it uneconomic for a stand-alone FTA provider such as TVNZ to acquire premium content.

[18] SKY/Vodafone clearance application, at 4.5.

[19] Commerce Commission, *Igloo Investigation Report* (16 May 2012) at 12.

7.5 In particular, SKY will have an increased ability to cross-subsidise content acquisition through the bundling of rights (across all Pay and FTA platforms), and services (triple/quad play offers), including to existing SKY and Vodafone customers, further marginalising FTA as a constraint on Pay TV services.

7.6 One of the stated objectives of the merger is to cross-sell across the 2.35m mobile connections, 0.51m fixed connections and 0.83m Pay TV subscribers of the combined entity. SKY/Vodafone will have the ability and incentive to use its increased buying power to gain even greater control of premium content rights, in effect leaving only content it does not want available to a stand-alone FTA operator.

7.7 In 2012 John Fellet said there were no barriers to new entrants in terms of availability of rights to streaming video, and that SKY itself held no streaming VOD rights, or first refusal rights to such content.[20] [ ]

7.8 If the transaction proceeds, video-on-demand streaming rights will be a critical component of Vodafone's triple/quad play bundles. SKY under Vodafone control will leverage its Pay TV buying power into this market segment in the same way as it did with FTA TV following its acquisition of Prime, locking up content on an exclusive basis, and lessening competition in telecommunications markets in the same way it has lessened competition from FTA over the last decade.

7.9 SKY has been quite open that its subscriber base means that it can spend more than its rivals on content, and that its control of content allows it to leverage its content rights into new markets:[21]

> *With a much deeper subscriber base, Fellet says, the company can afford to spend more – while expecting profits – on new shows than his internet rivals. Although the average revenue per user for new services is lower than in the past, those customers come at little cost, meaning most of the money goes to profit.*
>
> *… "I already have the content – let me leverage it into these new marketplaces."*

7.10 With its unrivalled scale and resources, the merged entity will have substantially increased buying power in content acquisition markets compared with all other New Zealand buyers or potential buyers of content – FTA operators who seek only FTA rights, or telecommunications retail service providers who seek only VOD rights.

7.11 As a result (and in the absence of anti-siphoning rules common in other jurisdictions), content that viewers value will be available only on a Pay platform, and the commercial viability of FTA services, and their ability to constrain the Pay TV service, will be at risk. Poor quality content does not provide the scale required to attract good quality advertising and associated revenue.

8. Divestment of Prime is necessary to avoid further substantial lessening of competition

8.1 New Zealand is unique among OECD counties, as outlined in the Plum Report, in that it does not have:

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[20] Ruth Laugesen "Sky TV's hold on the NZ market" *New Zealand Listener* (online ed, Auckland, 29 June 2012) available at http://www.listener.co.nz/entertainment/sky-tvs-hold-on-the-nz-market.

[21] John Fellet quoted in Tina Morrison "Sky's 'not at its limits'" *New Zealand Listener* (online ed, Auckland, 13 June 2016) available at http://www.listener.co.nz/current-affairs/business/skys-not-limit/.

(a) anti-siphoning rules (designed to ensure premium sports content is available to FTA viewers); or

(b) Content regulation (such as “must offer”, “cross-carriage” or split auction requirements) designed to ensure premium content cannot be locked up by a single provider; or

(c) A regime for behavioural undertakings to be given or imposed as a condition of clearance, to create an open access content regime as part of the merger process (as for instance provided by Foxtel to the ACCC in Australia in relation to its acquisition of Austar, and imposed on Telefonica by the Spanish regulator in relation to its acquisition of Canal+).

8.2 The Commission can however accept structural undertakings, and in this case the substantial lessening of competition in the FTA market which is likely to occur if the SKY/Vodafone transaction were to proceed can be avoided by the divestment by SKY of Prime.

8.3 We have outlined in section 3, the devastating effect on the FTA TV market of SKY’s acquisition of Prime, which has resulted in FTA TV providers now providing a weak constraint on the Pay TV market; and how that constraint will be weakened even further should the SKY/Vodafone transaction proceed.

8.4 This consequence can be avoided by removing from SKY’s control the source of the market power which has wreaked such havoc: its FTA asset.

8.5 The harm in the FTA and Pay markets is a direct result of SKY’s ownership of both FTA and Pay platforms.

8.6 SKY’s over-riding incentive is to increase the quality of its Pay offerings in comparison to the quality of FTA services, driving more subscribers to pay for content which is not available on the FTA platform. Its decisions on what to show on Prime, and when, are driven solely by what is in the best interests of its Pay business.

8.7 Divestment of its FTA business will remove SKY’s incentives to buy bundled Pay/FTA rights, will lead to greater availability of (and substantially reduced price of) FTA content, and lead to greater competition between Pay and FTA platforms.

9. Request for Conference under section 69B(1) of the Commerce Act 1986

9.1 It is clear from our submissions, and the analysis and expert reports provided to the Commission by Plum Consulting and Covec on behalf of 2degrees and TVNZ, that the issues raised by the proposed transaction are complex, multi-faceted, and vigorously contested.

9.2 It is equally clear that if the transaction were to proceed, it would have significant ramifications for television and telecommunications markets and would in effect determine the structure of those markets for the next decade or longer – according to Vodafone UK the effects will be “*enduring and irreversible*”.[22]

[22] Vodafone Limited , response to Ofcom Consultation: Strategic Review of Digital Communications (October 2015) at 3.1.

9.3 As the Commission has stated, there is great benefit to the decision-maker and the parties in having opposing points of view tested and challenged through the interactive and transparent conference process:[23]

> *The conferences are an important part of the Commission's information gathering process. The Commission is currently working on a wide range of new issues in telecommunications regulation, including standard terms determinations and whether to accept an undertaking in lieu of further regulation. The conferences are a chance for the Commission to question the submitters and hear different perspectives that will inform final decisions.*

9.4 For these reasons, TVNZ requests that the Commission, before making a determination under section 66(3) of the Commerce Act in relation to the proposed acquisition, determine to hold a conference in accordance with section 69B(1) of the Act.

[23] Commerce Commission, "Commission To Hold Series Of Conferences" (press release, 19 September 2007).