Windsor Place Consulting

Strategic Insights

EXPLORING CONTENT-RELATED COMPETITION ISSUES:

WILL EXCLUSIVE CONTENT RIGHTS BE THE NEW BOTTLENECK IN THE AUSTRALIAN TELECOMMUNICATIONS SECTOR?

PAPER FOR THE COMPETITIVE CARRIERS' COALITION

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From the perspective of infrastructure, the competitive landscape of Australian telecommunications is being flattened by the incremental arrival of the NBN and its associated regulatory changes. The main source of market power for the incumbent - vertical integration across infrastructure and retail - is being neutralised. But In the converged world there will be another significant source of economies of scale: content. The rights to content may be expensive to acquire but its marginal cost is very low – it costs almost nothing to sell an additional unit to another customer. This means there are very large economies of scale in content acquisition and distribution. Australian telcos that can secure exclusive rights to such content are likely to be able to exert influence over consumers' choice of telecommunications provider by offering attractive content and connectivity bundles.

If this is the case, it has the potential to lead to an anti-competitive dynamic: the telcos with market power will secure the most valuable rights, achieve the greatest economies of scale, attract additional market share and so on. This dynamic can be strengthened if telcos offer exclusive content on an 'unmetered' basis to their customers. We suggest that these considerations, particularly in the context of Australia's highly concentrated telecommunications market, constitute an a priori case for assertive regulatory responses to early signs of monopolisation in nascent IPTV markets. If such market concentration emerges there will be a strong case for such issues to be subject of early detailed regulatory scrutiny and legislative change in Australia consistent with the approaches of foreign country markets with weighting given to the relatively low level of competition in Australian telecommunications markets relative to international exemplars.

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EXECUTIVE SUMMARY

The Competitive Carriers' Coalition ('CCC') commissioned Windsor Place Consulting ('WPC') to prepare a paper on content-related competition issues, access to content and related issues in the Australian telecommunications market. By content access regimes we mean the legal and regulatory regimes, in combination with the commercial and market landscape, which determine how various telecommunications carriers in the market are able to access – and hence provide – the content that end users wish to consume.

From the perspective of infrastructure, the competitive landscape of Australia's telecommunications sector is being flattened by the incremental arrival of the National Broadband Network ('NBN') and its associated regulatory changes. The main source of market power for the incumbent, i.e., - vertical integration across infrastructure and retail - is being neutralised.

But in the converged world there will be another significant source of economies of scale: content. The rights to content may be expensive to acquire but its marginal cost is very low – it costs almost nothing to sell an additional unit to another customer. This means there are very large economies of scale in content acquisition and distribution. Australian telcos that can secure exclusive rights to such content are likely to be able to exert influence over consumers' choice of telecommunications provider by offering attractive content and connectivity bundles.

If this is the case, it has the potential to lead to an anti-competitive dynamic: the telcos with market power will secure the most valuable rights, achieve the greatest economies of scale, attract additional market share and so on. This dynamic can be strengthened if telcos offer exclusive content on an 'unmetered' basis to their customers.

This report articulates a strong case for such issues to be subject to early detailed regulatory scrutiny and legislative change in Australia consistent with the approaches of foreign country markets but acknowledging the high degree of market concentration in Australia requires early and decisive regulation.

This paper also includes detailed analysis of the efforts made in other markets to address the issues that have arisen in the content access space including the United States, United Kingdom, European and South East Asian markets. From such an analysis, while there is no single foreign regulatory model for access to exclusive content which is an exemplar for Australia, Australian regulation is sub-optimal and arguably outdated for the convergence world of the NBN compared with many foreign jurisdictions.

Key Observations

Australia's Current Legal and Regulatory Regime

- Australia's legal and regulatory regime for content access is far from optimal. Instead of a comprehensive and systematic framework for dealing with content access issues, the current system is arguably inadequate and insufficient going forward. This is notwithstanding the recent (2010) amendments to the applicable law. Importantly, the ACCC, as the competition regulator charged with policing such issues in the Australian telecommunications sector, considers that change is needed and is proposing a range of stronger powers and remedies be made available to it.

- Assuming the legislative passage of amendments to the anti-siphoning regime occurs in the next term, the timing for the formulation of a comprehensive framework for regulating access to content should be in the near term.

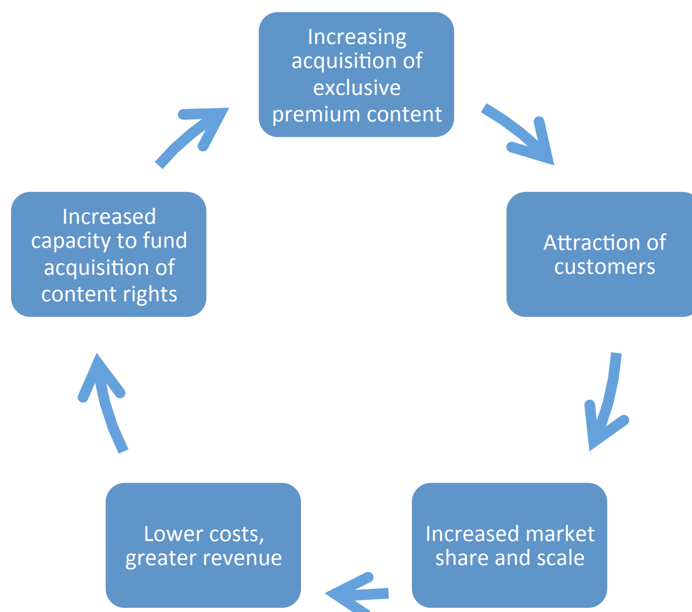
The role of Convergence in Content Access related Market Issues

- Telcos with significant market power, particularly any dominant telco, will face a significantly lower average cost per customer of content acquisition than the other participants. Therefore it is highly likely that the dominant provider will consistently out-bid the smaller providers in the acquisition of valuable content rights leading, over time, to the smaller players being increasingly disadvantaged.
- If content bundles become a more important consideration in consumer choice of telecommunications providers, the high levels of scale economies achievable in content provision are likely to lead to the larger players being able to acquire even more market power, creating a further dynamic for increasing concentration. This could lead to exit from the market by competitors, potentially reducing competition and harming the long term interests of end users.
- Bundling/Tying strategies are increasingly involving content as well as broadband and other services. The core concern from a competition perspective is that providers with market power in the primary market will use content bundling strategies to gain increased market share and potentially drive competitors out of the market. As to access to content matters, effective regulation of this issue is important.

Competition Issues

- There is a vicious cycle beginning with the ability to acquire exclusive access to premium content which leads to increased market share and therefore a greater ability to acquire content. The result of this cycle is the potential closing out of competitors from the market. This is detailed in the exhibit below.

The vicious cycle of market power and content acquisition



Key Recommendations of the Report

- A comprehensive and systematic framework for dealing with content access issues needs to be implemented in Australia, along with any legislative changes necessary for this to operate;
- Consistent with its request to the Convergence Review, the ACCC needs flexible rule-making powers in relation to content access in order to ensure that it, rather than the courts, is responsible for competition issues which may arise in this space;
- Legislative and regulatory changes must give the ACCC the ability to make *ex-ante* rulings to protect the competitiveness of content access markets;
- The ACCC must closely monitor the compliance of Foxtel with the undertakings it made in relation to acquiring Austar;
- A principle of 'any to all' access to content must be enshrined in the Australian regulatory system;
- It must be ensured that operators with significant market power do not gain exclusive access to content in a way which prevents their competitors from competing effectively. A means of determining the extent to which content-driven increases in market power lead to decreases in competition must be investigated as soon as possible;
- The regulatory regime must facilitate the ability of premium content creators, such as sporting codes, to distribute their content directly; and
- The focus on IPTV as a means of content access must take into account the increasing ubiquity of tablets and other wireless enabled devices as tools for this access.

1 INTRODUCTION

"Content is not just king, it is the emperor of all things electronic". — Rupert Murdoch[1]

It is not unreasonable to say that the Australian telecommunications industry is in a state of upheaval. Powerful industry trends and decisive Government interventions are gathering momentum and reaching points where they are exerting significant pressure on telecommunications and media industry business models. These include:

- The roll-out of the National Broadband Network ('NBN');
- The process of convergence which has now made its impact on newspapers obvious and is generating increasing pressure on the television industry; and
- The mobility revolution – fuelled by the rapid evolution of smart user-friendly devices (led by Apple), changing consumer preferences, innovative technologies and improving spectrum availability and utilisation technologies (including WiFi off-loading).

These changes are having and will have further profound impacts on the competitive landscape in telecommunications and media. Of particular significance in the context of this paper are:

- As the NBN rolls out, dominant operators such as Telstra are losing the competitive advantages of vertical integration across wholesale and retail activities and are already pursuing other strategies for generating margin and market share;
- As previously relatively highly differentiated Internet Service Providers ('ISPs') become resellers of NBN Co's wholesale services, their capacity to differentiate will become increasingly challenged. It is likely that end user access to exclusive ISP-specific content will become an increasingly important competitive differentiator; and
- Consumer behaviour is changing – more consumers are consuming more media online and so content-related considerations will likely become a more decisive factor in determining their choice of ISPs.

In this evolving market it is possible or even likely that content bundles offered by ISPs that are exclusive to their customers will become increasingly attractive to consumers. The important word here is 'exclusive'. Some content may, in fact, be available only from particular ISPs but other content, such as first release Hollywood movies, will be available from other sources – both other ISPs, from non-ISP (i.e. over the top ('OTT')[2] providers), online providers and on other 'platforms' – cinema, DVD, pay-TV etc.

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[1] NewsCorp Earnings call, 3 February 2010

[2] OTT means the delivery online of inter alia video and audio without the operator or ISP to whom the customer obtains connectivity services being involved in the control and/or distribution of the content.

A telco that can secure exclusive rights to such content is likely to be able to exert influence over consumers' choice of telecommunications provider by offering attractive content and connectivity bundles. If this is the case, it has the potential to lead to an anti-competitive dynamic: the telcos with significant market power will secure the most valuable rights, achieve the greatest economies of scale, attract additional market share and so on. This dynamic can be exacerbated if telcos offer exclusive content on an 'unmetered' basis to their customers.

In this context, the Competitive Carriers' Coalition ('CCC') commissioned Windsor Place Consulting ('WPC') (www.windsor-place.com) to prepare a paper on content related competition issues, access to content and related issues in the Australian telecommunications market. By content access regimes we mean the legal and regulatory regimes which determine how various telecommunications carriers in the market are able to access – and hence provide – the content that end users wish to consume. It also follows on from a review of content related competition issues by the Government's Convergence Review in 2011/12 and recent pivotal decisions from the Australian Competition and Consumer Commission ('ACCC') which are discussed in detail later in this paper. A summary of the final recommendations of the Convergence Review are provided in Exhibit 1 below.

Exhibit 1: Summary of Convergence Review including Final Recommendations on Content related competition issues

On 30 April 2012, the Government released the Convergence Review Final Report.[3] The report, which sets out the Committee's vision for fundamental change to the regulatory framework of Australia's digital economy and identifies key areas for reform, contains in Chapter 3 an examination of content-related competition issues.

While first discussion of content-related competition issues was made in the Convergence Review Emerging Issues paper[4], the ACCC submission to the Review included a focus on this topic. In that submission the ACCC stated *inter alia* that its current powers are too narrow to address evolving content-specific issues that have the potential to inhibit competition including exclusive rights arrangements and bundling, and network neutrality issues. Operators, namely Macquarie Telecom[5] and Singtel Optus[6], in their submissions to the Review also supported the need for changes in the regulatory regime in order to be capable of dealing with content related competition issues effectively and efficiently.

Specific issues which were the subject of the Review included:

- ***the extent of access to premium content*** . While exclusive content rights arrangements are not necessarily anti-competitive – such arrangements can encourage investment in content and a diversity of product and service offerings where premium content is 'locked' to an incumbent for an extended period – entry into the market could be difficult for new players; and

[3] Available at www.dbcde.gov.au/digital_economy/convergence_review/

[4] See pages 30 and 31

[5] See Macquarie Telecom, Submission on the Convergence Review Interim Report, page 5

[6] See Singtel Optus, Submission on the Convergence Review Interim Report, page 2

Exhibit 1 continued:

- ***the bundling of content and carriage services***. Bundling can provide a range of benefits, including allowing service providers to exploit economies of scale and scope, and offering users lower retail prices, quality improvements and lower transaction costs from consolidated billing arrangements. However, bundling may generate competition concerns in, for example, cases where access to premium content is dependent on the acquisition of other products, or where it reduces competition by leveraging market power from another market.

In addition, the Review examined a range of regulatory approaches adopted in other countries to gain a broader understanding of the most effective methods for dealing with such competition issues.

The Committee concluded that proactive (*ex ante*) regulatory powers were needed that can respond to fast-moving content-related competition issues and promote competitive outcomes, rather than relying only on powers to take action where anti-competitive conduct has already occurred (*ex post* powers).[7] The key Convergence Review recommendations are:

- The new communications regulator should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified; and
- The new communications regulator should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the ACCC to deal with anti-competitive market behaviour. These powers should only be exercised following a public inquiry.

This paper, as well as examining (a) international precedents which apply in relation to access to content, (b) the legal and regulatory environment applicable to access in Australia and how it compares with foreign exemplars, and (c) the possible economic implications in any diminished competition (if any) from anti-competitive conduct in relation to content access, attempts to address four specific questions. The questions which WPC has been asked to consider include:

(i) What are the sources of market power for access to content and how sustainable are they?

(ii) Will telcos who do not have access to content be significantly inhibited in competing with those that do? (i.e. how big is the market for bundling)?

(iii) How will the emergence of OTT, Internet Protocol Television ('IPTV') players impact the market?

(iv) What are the prospects of large players moving to a direct distribution model (at least for some channels)?

[7] In this context, the ACCC also recommended in its submission that 'regulatory intervention be considered if recent or near future developments do not result in improved opportunities for competition in content acquisition'.

Providing a definitive answer to all of these issues and questions, if not impossible, would be a herculean task. Instead, the goal of this paper is to formulate the right questions for sector stakeholders, highlight the approaches which other countries have and are taking, encapsulate the risks if Australia gets it wrong, and recommend the way forward. Clearly, industry participants and more particularly regulators, need to consider how the commercial, competitive and strategic landscape is likely to change and what optimal regulatory approaches are needed so that the long term interest of end users remain paramount. In doing so we explore the options that are available to them to respond.

This paper is therefore arranged as follows:

(i) ***Defining Content Access (Section 3):*** What are we referring to when we speak of content access content-related competition issues?

(ii) ***Australia's Legal and Regulatory regime in relation to Content Access (Section 4):*** What are the current general and specific elements of Australia's regulatory regime which apply to content related competition issues?

(iii) I***nternational precedents in relation to Access to Content (section 5 and Appendix A)***: What are the key and most persuasive global precedents in this area on which Australia should focus? And what are the common themes, the threads which prompt legislative and regulatory responses?

(iv) ***Access to Content in a world of Convergence (Section 6)***: Why is access to content important in a convergence and NBN World?

(v) ***Economic Benefits, Risks and Implications in relation to Access to Content Issues (Section 7)***: What are the economic implications of a more open market for content? And what are the possible downsides of not having the option of mandated content access requirements?

(vi) ***Conclusions, Issues to be resolved and way forward (Section 8):*** Proposed way forward for industry stakeholders and market participants.

2 DEFINING CONTENT ACCESS

Given that the scope of access to content is very broad, what are we referring to when we speak of content access or content-related competition issues?

As the Internet continues to evolve the term '*content*' becomes something that is increasingly difficult to define. To the traditional forms of content such as film, television programming, sports, music and photos we arguably need to now add user generated content (i.e. YouTube videos), social media pages and even 140 character tweets. A 'content service' is defined in the *Telecommunications Act 1997* as *inter alia* a broadcasting service, an online information service, and online entertainment service.[8]

From the perspective of Australia's telecommunications competitiveness, however, we can afford to focus on a narrower definition of content. The majority of content on the Internet is likely to remain openly accessible to all Internet users. However, the content that is most important to consumers, i.e., 'premium content', will likely become increasingly available only to the customers of telecommunications providers that have or seek to have exclusive rights to such content, at least in the absence of regulation which prevents this. Such premium content is typically live sports and first run movies and drama.[9] We are also focused on video, the moving image which is undergoing a profound change to become a digital product[10] and by 2016 is expected to comprise 86 percent of all global consumer traffic.[11]

While the law defines access,[12] for the purposes of this paper we are concerned with the right or an opportunity of consumers to be able to view or use content and whether the inability to do so – typically due to exclusivity – gives rise to broader competition issues. The *Convergence Review Discussion paper: Australian and Local Content* states that "… media and communications technologies now enable many Australians to access Australian content anywhere, anytime, on their fixed, portable or mobile device of choice."[13] The question is can they or will they be able to? And if they cannot, is content exclusivity or rights being used to distort or restrict competition in a way prohibited by law? It is to this central question that this document is focused.

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[8] See section 15 of the *Telecommunications Act 1997*.

[9] A recent example, is *Howzat!* on Channel 9. See http://channelnine.ninemsn.com.au/article.aspx?id=8251770

[10] See Side by Side. A film on the science, art, and impact of digital cinematography. See http://sidebysidethemovie.com

[11] Cisco, *Cisco Visual Networking Index: Forecast and Methodology, 2011-2016*, 30 May 2012

[12] See section 15AF of the *Competition and Consumer Act 2010*.

[13] Australian Government, *Convergence Review Discussion paper: Australian and Local Content*, Canberra, 2011, page 6

3 WHAT IS THE LEGAL AND REGULATORY REGIME APPLICABLE TO ACCESS TO CONTENT IN AUSTRALIA?

3.1 Introduction

Australia's principal legislation which regulates competition issues including arguably content access issues is the *Competition and Consumer Act 2010* ('CCA'). The CCA and its predecessor the *Trade Practices Act 1974* ('TPA') contain a range of general provisions focusing on fair trading, consumer protection and competition issues. Such general provisions are complemented and augmented by the specific regulatory powers in relation to the communications sector contained in Parts XIB and XIC of the CCA. Specifically, Part XIB provides for *ex-post* responses to anti-competitive conduct, where Part XIC relates to *ex-ante* interventions to allow access to carriage and infrastructure. Currently, the ACCC is responsible for both general and communications industry-specific competition regulation under the CCA.

As there is currently no specific regulatory framework designed to deal with content access issues, to examine content related competition issues requires an examination of both the general provisions of the CCA (including those in relation to mergers and acquisitions) as well as the specific regulatory powers in relation to the communications sector (including the 2010 amendments which specifically included content within the ambit of Part XIB of the CCA). Although, as will be explored in more detail later in this paper, the specific provisions are arguably focused on issues associated with infrastructure and services competition and therefore their application to content access issues are imprecise, *ad hoc* and often dependent on merger and acquisition activity for the opportunity to utilise regulatory powers. Actions by sector participants to address concerns with asymmetry of access to content has also resulted in expensive litigation.[14] Therefore they do not provide either a comprehensive regime for content nor a range of optimal *ex-ante* mechanisms which may be needed to ensure a competitive market for the long term benefit of end users.

3.2 General Provisions

Section 50 of the CCA prohibits acquisitions which have the effect, or are likely to have the effect, of substantially lessening competition in a market. The prohibition on anti-competitive mergers applies to acquisitions of shares or assets and performs an important regulatory function within the Australian economy, including the communications and media sector.

Two recent proposed important acquisitions, or consolidation plays in the sector and the regulatory response to them highlight the current applicable Australian law.

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[14] For example, the Optus Now case see *National Rugby League Investments Pty Limited v Singtel Optus Pty Ltd* [2012] FCAFC 59

3.2.1 Foxtel's acquisition of Austar United Communications Limited

On 10 April 2012, the ACCC announced its decision that it would not oppose the proposed acquisition of Austar United Communications Limited ('Austar') by Foxtel Management Pty Ltd ('Foxtel') subject to the undertakings accepted by the ACCC pursuant to section 87B of the CCA. The ACCC decided that Foxtel's proposed acquisition of Austar, in conjunction with the undertakings, would be unlikely to have the effect of substantially lessening competition in any market in contravention of section 50 of the CCA.

The approval process (at almost a year) took far longer than Foxtel anticipated and resulted in more restrictive undertakings than those originally proposed by Foxtel in March 2012 to secure the ACCC's approval for the acquisition. The reason for the close scrutiny was that the proposed acquisition would bring together the two market participants in Australia who had a substantial customer base in subscription television and access to compelling content and it would extend Telstra's 50 percent ownership from one of those key players namely Foxtel, to both Foxtel and Austar following the acquisition.

In its recently released Public Competition Assessment,[15] the ACCC outlined the basis on which the ACCC reached its decision on the proposed acquisition, subject to confidentiality considerations. While the key elements of the court enforceable undertaking made by Foxtel are summarised in Exhibit 2 below, the key competitive assessment for the purposes of this paper, namely the impact on telecommunications and content acquisition markets are explored below.

Telecommunications markets

In relation to the proposed acquisition, the ACCC considered that:

- Telstra's ownership of 50 percent of a combined Foxtel-Austar would be likely to limit the development of competition in markets for the supply of fixed broadband and fixed voice services;
- Telstra, by virtue of its shareholder relationship with Foxtel, would be likely to obtain preferential access to audiovisual content[16] from Foxtel and the proposed acquisition would have extended this advantage to the distinct geographic areas serviced by Austar; and
- As telecommunications networks and IPTV continued to develop, the ACCC considered that it would be likely that it would become increasingly important for retail telecommunications service providers to be able to offer consumers bundles comprised of subscription television content with fixed voice and broadband services in order to be able to compete effectively with other retail telecommunications service providers (i.e. so called 'triple play' services and with mobile 'quadruple play' services).

This was in addition to the ACCC's concern that the acquisition of Austar would remove a possible new entrant into telecommunications markets which would have had ability to offer compelling subscription television content.

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[15] ACCC*, Public Competition Assessment, FOXTEL – proposed acquisition of Austar United Communications Limited*, 14 June 2012

[16] We note that the term '*audiovisual content*' is not defined in the Telecommunications Act 1997 nor the CCA and is a simply a term adopted by the ACCC is relation to its review of the proposed acquisitions of Austar and CMH in 2012.

Content acquisition markets

The ACCC also considered whether Foxtel's proposed acquisition of Austar was likely to result in a substantial lessening of competition in the national market for the acquisition of audiovisual content. As Foxtel and Austar previously submitted joint bids for particular content, particularly many sports rights, the ACCC considered that the proposed acquisition was unlikely to substantially change the competitive dynamic in relation to the acquisition of audiovisual content, particularly for cable and satellite distribution rights. And where it might in the future, such effect was further limited as a result of the undertaking.

Exhibit 2: Summary of the key elements of the Foxtel undertaking

Aims of the undertaking

- Prevent FOXTEL from entering into arrangements to acquire content exclusively which would enable competing content aggregators and/or telecommunications service providers to acquire content rights for an IPTV service.
- Avoid exclusive arrangements that would have had the potential to stifle new entry in the IPTV sector before new entrants could secure sufficient scale to effectively compete with incumbent providers for access to that content.
- Lower barriers to entry and allow new or enhanced competition in telecommunications and subscription television markets.
- Make available sufficient attractive content to emerging competitors to enable them to develop competitive and sustainable IPTV offers.

Core elements of the undertaking

- An obligation on FOXTEL not to acquire certain distribution rights to certain independent content on an exclusive basis. These distribution rights include IPTV and some mobile distribution rights, but exclude most satellite and cable distribution rights.
- FOXTEL is prevented from acquiring those same rights from anyone if an ultimate shareholder, or related entity of an ultimate shareholder, acquires those rights on an exclusive basis.
- The content includes linear channels offered by independent content suppliers, subscription video on demand ('SVOD') rights from independent content suppliers for programs that are under licence for their linear channel, linear movie rights and current SVOD movie rights from 50% of the major movie studios and 50% of eight named independent studios, movie Transactional Video on Demand rights ('TVOD') and library SVOD movie rights.
- FOXTEL cannot prevent a party which acquires any of the above rights from offering a 'companion' mobile service using that content.
- Lowers barriers to entry by providing necessary signal access to linear channels distributed by independent content suppliers (and which FOXTEL itself distributes to its subscribers) to third parties.

Exhibit 2 continued:

- Extends FOXTEL's previous Special Access Undertaking so that content providers can access Austar subscribers as well as the existing arrangements for FOXTEL subscribers. The Special Access Undertaking provides terms on which content providers are able to access FOXTEL set top boxes for the purpose of providing services to FOXTEL's customers.

Permitted under the undertaking

- FOXTEL will retain the ability to acquire exclusive rights for the distribution of content by cable, satellite and mobile networks to mobile devices (other than 'companion' mobile rights) as the ACCC's competition concerns primarily related to competition using IPTV technology.

- FOXTEL will retain the ability to acquire exclusive rights in relation to individual sports. The ACCC considered that to the extent that FOXTEL's (and its shareholders') ownership of exclusive sports rights may raise competition concerns, these concerns existed independently of the proposed acquisition.

Length of the undertaking

- The term is eight years from 8 April 2012.

- ACCC considered that this was an appropriate length of time because (i) all of the exclusive content supply agreements between FOXTEL and independent content suppliers in existence at the date of the undertaking will have expired by 2016, meaning that third parties should have a number of years after this date to negotiate content supply arrangements without FOXTEL having the ability to acquire the relevant rights on an exclusive basis, and (ii) this period of time should be sufficient to give new entrants the ability to enter the market, or for existing players to expand, and achieve sufficient scale to be able to compete in the market without the protections.

3.2.2 Proposed acquisition of Consolidated Media Holdings by News Corporation

On 2 August 2012, the ACCC announced that it would not oppose News Corporation's proposed acquisition of Consolidated Media Holdings Limited ('CMH'). In acquiring the 100 percent of the shares in CMH, News Corporation's shareholding in Fox Sports Australia would increase from 50 to 100 percent and its shareholding in Foxtel would increase from 25 to 50 percent.

In assessing the proposed acquisition, the ACCC examined (i) the national market for the supply of subscription services and (ii) the national market for the acquisition of audiovisual content. However, the ACCC did not consider that it was necessary to undertake a competition analysis to form a concluded view in relation to market definition particularly with respect to the acquisition of audiovisual content.[17]

[17] ACCC, *News Corporation – proposed acquisition of Consolidated Media Holdings Limited*, Informal Review and associated Press Release # NR 162/12

The ACCC considered that the proposed acquisition – in merely increasing its shareholding – would not materially increase the incentive that News Corporation has to favour Foxtel in its content supply decisions in Australia, with respect to content owned by Fox Sports Australia or by News Corporation. What seems to have been determinative is that News Corporation did not have any direct interests in any other subscription or free to air ('FTA') television entity in Australia.[18]

Not specifically addressed, at least publicly in any formal statement, was the possible competitive implications for the supply of telecommunications services or the fact that News Corporation's subsidiaries BSkyB in the United Kingdom and other European pay television markets were the subject of considerable regulatory activism as a result of their market dominance, bundling of services and exclusive control of content.

3.2.3 Proposed acquisition of Consolidated Media Holdings by Seven Group Holdings

Almost concurrently to the proposed News Corporation acquisition of CMH, Seven Group Holdings ('Seven") informed the ACCC that it is actively considering acquiring further shares in CMH and it has asked the ACCC to review a proposal for an acquisition of all of the shares in CMH which it does not currently own (it currently owns 24 percent of the company). On 11 October 2012, the ACCC announced that it would oppose the proposed acquisition by Seven of the balance of CMH shares it does not already own. [19]

While a Public Competition Assessment which will outline the ACCC's reasons for opposing the proposed acquisition by Seven will be made available at a future date, the ACCC stated that the proposed acquisition is likely to result in a substantial lessening of competition in the market for FTA television services. In addition, the ACCC is concerned that the proposed acquisition would put Seven in a position of advantage over other FTA networks in relation to joint bids and other commercial arrangements with Fox Sports Australia for the acquisition of sports rights. The ACCC Chairman Rod Sims stated that "Access to premium sporting content is vital to the ability of free to air networks to compete strongly. The ACCC considers that the proposed acquisition would significantly reduce the ability of Seven Network's competitors to acquire such content".

As part of its current review the ACCC explored the extent to which emerging content distribution platforms such as IPTV, Internet or mobile could provide the FTA networks with avenues to exploit excess rights as an alternative to partnering with Fox Sports Australia or Foxtel.

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[18] Importantly, News Corporation's ownership of the National Rugby League ('NRL') has also changed with a move from 2012 to an independent ARL Commission structure.

[19] See ACCC, Press Release, *ACCC to oppose Seven Group Holding's proposed acquisition of Consolidated Media Holdings,* 11 October 2012. Available at www.accc.gov.au/content/index.phtml/itemId/1084351/fromItemId/142 and Seven Group Holdings Limited - proposed acquisition of Consolidated Media Holdings Limited, See www.accc.gov.au/content/index.phtml/itemId/1061153

3.3 Sector Specific Provisions

3.3.1 Recent Legislative Amendments

In December 2010, the Australian Parliament in the *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* amended Part XIB of the CCA to put beyond doubt[20] that 'content services' are included in section 151AF, which defines a telecommunications market. 'Content services' are defined in section 15 of the *Telecommunications Act 1997*[21] and are defined expansively to include a broadcasting service, online information service, online entertainment service, any other online service, or any other service determined by the relevant Minister. While such changes were only made two years ago, they are not that helpful in addressing the current situation and they may arguably already be out of date. We note that proposals for exclusivity arrangements such as those discussed in Exhibit 3 prompted such changes.

Exhibit 3: Foxtel Proposed Exclusivity Arrangement with Telstra

In May 2010 Foxtel sought authorisation from the ACCC to offer a content-on-demand service exclusively to customers of Telstra BigPond[22]. It proposed to have movies, TV shows and other material provided to Foxtel subscriber's iQ set top boxes via BigPond broadband on an unmetered basis. The content which was to be provided was not exclusive to either Foxtel or BigPond and could be sourced from other content aggregators or online content providers.

Foxtel claimed that the deal would be of public benefit and therefore sought exemption from the prohibition against exclusive dealing. Foxtel believed that consumers would receive greater value services and that this constituted a sufficient public benefit to warrant the exemption.

There were many counter-claims by various interested parties. In particular there were submissions that:

- The claimed public benefits were minimal, negligible or even non-existent;
- There would actually be public detriments in the form of decreased competition, an incentive for customers to choose Telstra, and foreclosure of access to content; and
- It was submitted that by increasing Telstra's share of the Broadband market Telstra would gain an unfair advantage in future dealings with the then nascent NBN Co.

Foxtel responded to these submissions asserting that its proposed service would have a public benefit and that many submissions as to its detriments were misleading or had not fully understood the arguments Foxtel had made for its exemption[23].

Ultimately Foxtel withdrew its request for an exemption from exclusive dealing regulations and did not proceed with the exclusive service. However, it continued to assert that the service would have provided a public benefit and therefore should have been allowable.

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[20] Previously there may have been a debate as content services were not specifically listed within section 1512AF of the CCA.

[21] Content services are also defined in section 152AC within Part XIC of the CCA.

[22] See Foxtel, Form G, Notification of Exclusive Dealing Conduct, 4 May 2010. Available at www.accc.gov.au

[23] See Foxtel, Exclusive dealing notification N94674, lodged by Foxtel Management Pty Limited – response to interested party submissions, 2 July 2010. Available at www.accc.gov.au

Consequently, while there are no examples of the provisions being applied, the competition notice regime contained in Part XIB of the CCA applies to content services delivered by carriers and carriage service providers. This amendment, clarifying the scope of Part XIB of the CCA, is designed to "increase regulatory certainty and reduce the risk of protracted legal disputes on this issue".[24] It ought be noted that arguably Division 2 of Part IV of the CCA may also be relevant to content access issues.

3.3.2 Further ACCC calls for stronger powers and remedies

Notwithstanding the 2010 amendments, as the ACCC is of the view that issues connected to content acquisition, in particular exclusive content arrangements, raise potentially significant competition concerns, it is continuing to consider the specific regulatory options that could potentially be utilised to address content acquisition issues in Australia.

In its February 2012 submission to the Convergence Review, the ACCC recommended that "regulatory intervention be considered if recent or near future developments do not result in improved opportunities for competition in content acquisition. The ACCC notes that if Australia wished to implement an access to content regime similar to those in operation in overseas jurisdictions, legislative amendments would be required."[25]

While the approach to content-related competition measures in foreign jurisdictions are examined in Section 4 of this report, it ought be noted that such regulatory regimes are more onerous and intrusive than Australia's current content access regime.

3.4 Anti-Siphoning Provisions

To complete the picture of content access and related regulation it is also necessary to highlight Australia's current anti-siphoning regime which also has a material impact on how exclusive content is exhibited in Australia.

Australia's anti-siphoning regime is a component of section 115 of the *Broadcasting Services Act 1992,* under which the Minister for Communications may specify an event, or events of a kind, the televising of which should, in the opinion of the Minister, be available free to the general public[26]. It is designed to ensure that events of cultural significance are not subject to monopoly licensing by pay TV operators to the detriment of the public as a whole.

Australia's anti-siphoning rules were created in 1992 in response to a growth in pay TV subscription rates. The rules stipulate that pay TV operators may not acquire the right to televise any event on the anti-siphoning list unless:

- FTA broadcasters have declined to acquire them 12 weeks before the event begins; or
- a commercial broadcaster who can broadcast to over 50 percent of the population already owns them; or
- the ABC or SBS already own them.

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[24] *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010*, Explanatory Memorandum

[25] ACCC, *ACCC submission to the Convergence Review Interim Report*, February 2012, page 7

[26] See www.comlaw.gov.au/Details/C2012C00624/Html/Volume_1#_Toc333499061

The rules do not reserve these events exclusively for FTA broadcasters, compel FTA broadcasters to acquire them, or compel FTA broadcasters who have acquired them to broadcast them live or in full. However, the rules do require FTA broadcasters who acquire the rights to broadcast the events on their main channel rather than on digital side channels. The list of events can be changed at the Minister's discretion. In Exhibit 4 below the proposed changes to Australia's anti-siphoning law are summarised.

Exhibit 4: Proposed changes to Australia's anti-siphoning laws

In March 2012 the Australian Government introduced the Broadcasting Services Amendment (Anti-siphoning) Bill 2012[27], which gives effect to the reforms proposed by the Government in November 2010 and introduces a new set of anti-siphoning and anti-hoarding provisions. The purpose of the reforms is to protect the availability of sport on FTA television and to maximise the FTA coverage of sporting events by encouraging broadcasting licensees and national broadcasters to use, and not hoard, their broadcasting rights for certain events.

The main element of the new reforms is the coverage obligation, under which FTA broadcasters must not refuse to show an anti-siphoning event without first offering the rights to other FTA broadcasters for a nominal consideration of $1. If no other FTA broadcaster accepts the offer, then it must be offered to subscription television broadcasters. One of the core elements of the current scheme is that subscription television broadcasters are prevented from acquiring the rights to an anti-siphoning event until a FTA broadcaster has acquired the right. The reforms retain this provision, although there are exceptions to allow subscription television broadcasters to acquire the rights to a limited number of Australian Football League (AFL) and National Rugby League (NRL) matches.

The reforms give the Minister the power to declare certain sporting events as anti-siphoning events. Anti-siphoning events are classified as either Tier A or Tier B, with Tier A events including those that are nationally iconic, and Tier B events including those of national or local significance.[28] Tier A events will be required to be shown live, while Tier B events will be required to be shown live or with a delayed starting time of no more than four hours (although the Minister may specify a shorter delay). Tier A anti-siphoning events may not be shown on a FTA digital multichannel without first being shown on the broadcaster's primary service. Tier B anti-siphoning events may be shown on a FTA digital multichannel, giving broadcasters greater flexibility in the use of multichannels.

The Minister may declare Designated Groups and Quota Groups. Certain Tier B events may form a designated group for the purpose of coverage, with the Minister setting total and daily minimum hours of coverage. Quota Groups deal specifically with AFL and NRL matches, with the Minister declaring a quota number, which is the number of events that must be shown on FTA television each week.

The reforms also aim at preventing the rights to anti-siphoning events to be given to new media providers, and thus no longer freely available. Rights holders of anti-siphoning events must not enter into an exclusive rights deal with a new media provider. However, in the case of Quota Groups, new media providers are treated the same as subscription television broadcasters.

The Broadcasting Services Amendment (Anti-siphoning) Bill is currently before the Australian Senate and is expected to be passed and granted assent later this year. The Second Reading speech in relation to the Bill was made in the Senate on 12 September 2012.

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[27] http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/s872_first-senate/toc_pdf/1203020.pdf;fileType=application%2Fpdf

[28] www.dbcde.gov.au/__data/assets/pdf_file/0004/149467/Future_anti-siphoning_list.pdf

3.5 Assessment of the legal and regulatory regime applicable to content access in Australia

In summary, Australia's access to content legal and regulatory regime is far from optimal. Instead of a comprehensive and systematic framework for dealing with access to content issues, the current system is arguably inadequate and insufficient going forward. This is notwithstanding the recent (2010) amendments to the applicable law. Importantly, the ACCC as the competition regulator charged with policing such issues in the Australian telecommunications sector considers that change is needed and is proposing a range of stronger powers and remedies be made available to it.

Assuming the legislative passage of amendments to the anti-siphoning regime occurs in the next term, the timing for the formulation of comprehensive framework for access to content should be in the near term.

4 WHAT INTERNATIONAL PRECEDENTS APPLY IN RELATION TO THE ACCESS TO CONTENT?

Given the debate in Australia, an examination of the international precedents in relation to content-related competition issues may be instructive even though there are considerable differences between the market characteristics and dynamics, concentration and legal systems in foreign markets. The legal and regulatory positions on access to premium content in Canada, the European Union, France, Italy, Germany, Malaysia, Singapore, South Africa, the United Kingdom and the United States are set out in detail in Appendix A. From such an assessment of international precedents there are a number of common features and themes that emerge.

Broadly it can be said that:

- There is a particular regulatory interest in digital markets. Access to premium content, in particular, is perceived as an important issue for both consumers and competition in all markets. There are, however, different ways of addressing the issue and ensuring ongoing sustainable competition in international jurisdictions;
- Market concentration – and attempts to extend that concentration – is unsurprisingly a key barometer of whether regulatory interest in a particular market rises to such a level that active and concrete steps are taken to try and address it by Governments and regulators;[29]
- International precedents highlight that regulators in many markets are concerned about competition in the market for online entertainment services or online content being foreclosed, i.e. born monopolised, especially as such content makes the transition to a digital world. There is therefore a preparedness to recognise that even partial market foreclosure may have significant competitive impacts and hence restrictions on exclusive content were therefore necessary;
- Many of the "solutions" imposed in international markets are inelegant, driven by an *ad hoc* opportunity such as a merger and/or acquisition to use general competition law and conditions on such approval to promote competition. The same arguably applies in Australia with the Foxtel-Austar merger. As such, globally current legal systems have imperfect mechanisms to deal with non-infrastructure 'bottlenecks' or 'essential facilities' even though exclusive content similarly cannot practically or reasonably be duplicated by competitors;

[29] Given the higher market concentration in Australia, it is possible to contend that there are stronger arguments for advocating that pro-competitive steps ultimately held to be unfounded, or not supported by law in markets such as in the United Kingdom, ought apply locally.

- The processes internationally for dealing with transition and legacy arrangements around exclusive content arrangements, especially premium sport and filmed entertainment, are particularly problematic. This is because the revenues of sporting franchisees globally (and Australia is similar) are currently dependent on the exclusive sale of long-term television and recently on-line rights.[30] Time is therefore given for sporting codes to transition to new future arrangements; and

- There is an expectation from foreign regulators, and indeed many market participants, that with the proliferation of higher speed broadband and mobile services, sports codes in the future will be able to sell their content directly to consumers. In doing so, the hope is that content-related competition issues will fade away. This view is also shared by some Australian market participants[31] and there are a growing number of sport codes that do in fact offer online streaming services directly to their fans. This is highlighted in Appendix B.

In summary, while there is no single foreign regulatory model for access to exclusive content which is an exemplar for Australia, Australian regulation is sub-optimal and arguably out-dated for the convergence world of the NBN compared with many foreign jurisdictions. However, foreign precedents highlight the importance placed in foreign countries of competition and ensuring that consumers are able to access content on multiple platforms offered by multiple providers. Access to exclusive content often drives the development of the service, and will remain crucially important for the development of new platforms and new services. The same drivers are highly likely to apply in Australia.

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[30] Eg For example in AFL rights deal from 2012 to 2016 won by the Seven Network, Foxtel and Telstra was valued at AUD1.25 billion. The cash component is AUD1.118 billion with AUD135 million in contra arrangements. Telstra paid by AUD153 million for online rights. See www.afl.com.au/news/newsarticle/tabid/208/newsid/112560/default.aspx and the NRL Sports rights deal excluding online rights to Nine Network and Fox Sports for AUD1.025 billion with AUD925 million in cash and AUD100 million in advertising. See www.nrl.com/billion-dollar-deal-secures-games-future/tabid/10874/newsid/69393/default.aspx

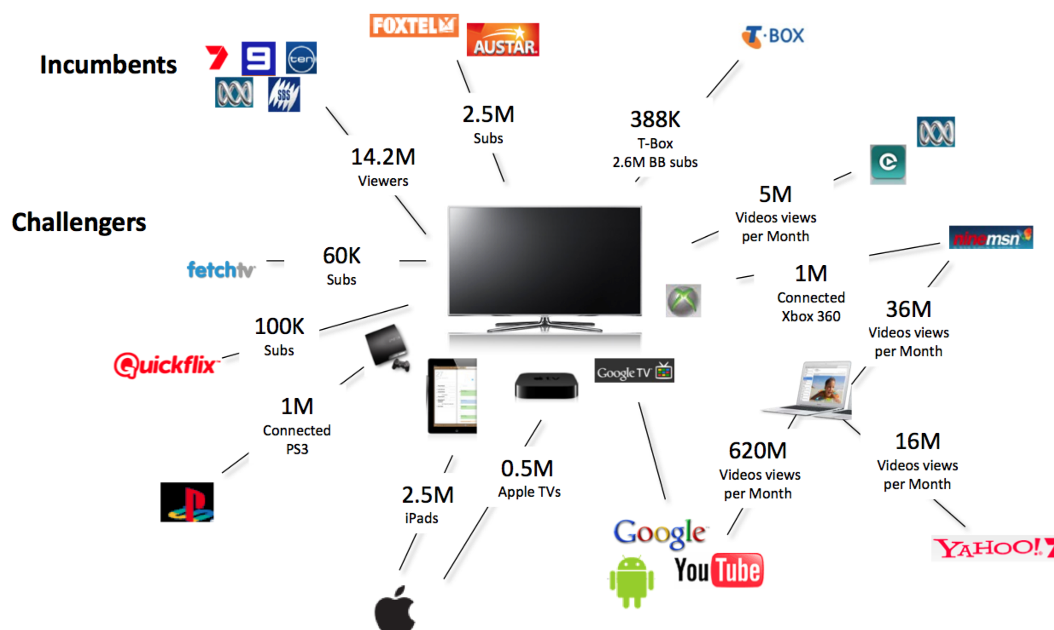
[31] Comments from Scott Lorson, CEO Fetch TV. See *Communications Day, Sports content model is changing: FetchTV*, 21 August 2012, page 6

5 ACCESS TO CONTENT IN A WORLD OF CONVERGENCE

5.1 Why is access important in a convergence and NBN World?

In relation to content and Internet connectivity two things are clear: Australians are consuming more content online than ever before and they will consume in varied ways in the future, as shown in Exhibit 6 below. Given that the market for online content will become more valuable to consumers in the future, it will be of increasing importance to ensure that this market is competitive and that it delivers maximum long-run benefits to consumers.

Exhibit 6: New competition in content delivery



Source: NBN Co, *The Changing Landscape of Media*, Landry Fevre, 14 August 2012

In this section, we identify sources of market power and types of anti-competitive behaviour based on access to content that could arise in the markets for Internet connectivity and online content. Clearly, the markets for connectivity and content are separate but related. Providers offer a range of options to consumers:

- Some providers offer connectivity-only services (e.g., iiNet) ;
- Some connectivity providers offer content services which come free with the connectivity service;
- Some providers offer content services at additional costs to consumers and, in addition, often on an 'unmetered' basis, that is, downloads of this content do not use up monthly download allowances (e.g., Telstra) ; and
- There are many OTT providers in the content-only space (e.g., iTunes, YouTube etc).

The extent to which content is bundled with or tied in some way to connectivity services may have a significant impact on competitiveness. It may be possible for connectivity providers that have market power to leverage this into market power in content markets. For example, a connectivity provider might use exclusive content to capture connectivity market share from competitors. This is not necessarily anti-competitive behaviour – consumers benefit from vigorous competition. Such competition ought be on the basis of price, quality, customer service etc rather than possibly be skewed by whether or not a particular market player, has exclusive premium content. If this was to occur then consumers may be worse off and potentially face higher prices, lower quality and poorer customer service.

Determining whether a particular bundling or tying behaviour is pro-competitive or anti-competitive is complex. In the next section we discuss the bundling and tying in telecommunications and its relationship to competition policy.

5.2 Bundling, tying and competitiveness

Most of the discussion of bundling strategies in telecommunications has hitherto focused on bundles of 'pure' telecommunications products, for example, landline phone plus mobile phone plus broadband. The bundling of content with broadband services raises similar but also some distinct issues. Nonetheless, the core concern from a competition perspective is that providers with market power in the primary market will use bundling strategies to gain increased market share and potentially drive competitors out of the market. The corollary is that is access to content matters, and this is why effective regulation of this issue is fundamentally important.

Economic consultants, NERA, in a 2003 paper for the ACCC[32], define the two main types of bundling:

> *There are two broad ways an integrated carrier could use bundling to reduce rivals' sales:*
>
> - *by setting prices such that consumers are encouraged to purchase the bundle rather than individual products – this can be done by setting the bundle price either below the aggregated price of individual products or insufficiently above the aggregated price to account for any added value consumers obtain from bundling; or*
>
> - *by providing the product for which it has market power only within the bundled package, thus "capturing" sales of the product for which the carrier faces competition – this is referred to as "tying".*

[32] *Anticompetitive Bundling Strategies*, A Report for the Australian Competition and Consumer Commission, Prepared by NERA, January 2003, Sydney

In order to determine whether a particular bundling strategy is anti-competitive it is necessary to determine whether, in the long run, consumers' interests are promoted or harmed. Bundling may promote consumers' interests if the bundle on offer enables providers to exploit economies of scale and/or scope and these cost savings are passed on to consumers. Bundling may also benefit consumers directly by reducing transactions costs, for example, by the provision of a single bill for the bundled products.

In contrast, bundling may harm consumers' interests if competitors are not able to offer similar bundles and therefore suffer loss of market share, perhaps to the extent they become unviable and are forced to leave the industry. If the market becomes less competitive structurally, remaining firms are likely to raise prices, thereby decreasing consumer welfare. As NERA[33] puts it:

> *Harm to rivals does not necessarily imply harm to competition. Examination of whether a firm's use of such mechanisms should be considered anticompetitive involves identifying the point at which aggressively competitive strategies become anticompetitive. In our view, the appropriate point for assessing when firms could be considered to have "crossed this line" is when their actions could no longer be considered consistent with behaviour that might be expected in a competitive environment.*

The ACCC has published an information paper[34] which describes its approach to making determinations about whether particular instances of bundling are anti-competitive. Given the complexities of making such assessments, the ACCC emphasises that a case-by-case approach is required, but two guiding principles are the basis for such deliberations:

- *whether the non-price effects of the conduct are anti-competitive, such as involving the leveraging of market power from non-competitive to competitive markets, or whether the conduct increases barriers to entry; and*

- *whether the price(s) for the bundled services involves any elements of predatory pricing or a vertical price squeeze in the relevant market(s).*

In order to determine whether the pricing of bundles is anti-competitive the ACCC applies a range of 'imputation tests'. There is a significant and growing literature[35] on imputation tests the details of which are outside the scope of this discussion. It is sufficient for us to note here that imputation tests can be based on a 'marginal cost' or 'average cost' approach and to emphasise the ACCC's distinctions between the two:

> *The distinction between the marginal and average total cost based imputation tests can be summarised as follows:*
>
> - *failing a marginal cost based test means the pricing practices are likely to be anti-competitive; and*

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[33] *Ibid*, page 1.

[34] ACCC, *Bundling in Telecommunications Markets*, An ACCC Information paper, August 2003

[35] See, for example, *ibid*, page 14.

- *failing an average total cost based test is a necessary condition for establishing that pricing practices are anti-competitive but it is not, on its own, sufficient.*

The Commission notes that if a predatory pricing or imputation test based on average total costs is passed, a marginal cost approach would also generally be passed. In essence, a marginal cost approach generally sets a higher threshold for establishing that pricing conduct is likely to be anti-competitive than an average total cost test.

It should be emphasised that imputation tests alone are not definitive – "pricing below average total cost is not necessarily indicative of predatory pricing or a price squeeze. Rather, the conduct may be consistent with competitive market behaviour where prices continue to make contributions above the average variable cost of supplying the service."[36]

The additional factors that may be relevant to a determination of anti-competitive behaviour include:

- *Are there any regulatory or commercial reasons that the firm is pricing in such a manner? What is the intent of the firm in pricing in such a way?*
- *Will the pricing have an appreciable effect on existing competitors or new or potential entrants to the market?*
- *Are the retail price decreases of some substance and duration?*
- *Are the retail price decreases selective in terms of customers?*
- *Do past patterns of pricing conduct point to similar levels of pricing? For example, is seasonal pricing or pricing related to the utilisation of infrastructure capacity involved?*
- *What will be the likely future impact of the bundling conduct on retail prices for the relevant products or services?*[37]

From this discussion the need for a case-by-case assessment is obvious – some cases of anti-competitive behaviour may be too complex to pinpoint with a rule-based approach. This raises a number of issues about the basic methodology outlined here and these will be discussed following consideration of the role of content in bundling strategies. As mentioned above, most of the discussion of bundling in the telecommunications industry has focused on bundles of telecommunications services. The bundling of content with telecommunications services, in particular, with broadband and mobile data services, raises additional issues and complexities.

5.3 Content bundling and competitiveness

5.3.1 Growing complexity in content consumption

As we noted above, issues of assessing the competitive implications of content bundling are complicated by the diversity of scenarios under which content can be accessed online by consumers.

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[36] *Ibid*, page 16.

[37] *Ibid*, page 17.

In addition to the availability of content online, other platforms that are, at least presently, significantly more heavily used in content consumption are widely available to consumers. These other platforms include: FTA television, subscription television, DVDs and CDs, cinema and live performance.

This wider availability of content across multiple platforms means that telecommunications companies have limited ability to use content bundling as a decisive factor in attracting users to their connectivity offerings. Having said this, it is critical to recognise that such limits are in a state of flux. We would contend that consumption of content online is growing faster than on other platforms. In addition, telcos have sought, and can be expected to increasingly seek, exclusive rights to distribute online premium content. Premier live sports is the iconic example, but as the use of the Internet content consumption increases, many types of increasingly niche content will become of greater significance to consumers and therefore potentially of greater influence in attracting customers for connectivity products.

The above discussion suggests that concepts of what is and is not premium content will need to evolve. Currently, Australia's anti-siphoning regulations constitute an all or nothing approach to what is defined as premium content. In a world of increasing online consumption, massively increasing bandwidth, multiple platforms and increasingly niche content supply and demand, it will almost certainly become necessary to develop a more nuanced approach to defining premium content.

5.3.2 Content bundling and price imputation tests

One of the most important characteristics of content products is that their marginal cost of provision is very low, often approaching zero. Once the rights for the product have been secured and the content is stored on a server, the cost of providing that content to an additional user is very low. It's important to point out, however, that fixed costs associated with negotiating, obtaining and paying for the rights may be very high, for example, as in the acquisition of exclusive online rights for AFL distribution.

The relationship between fixed costs and marginal costs create a powerful incentive for the telco provider of the bundled connectivity and content offering. That is, the provider has a strong incentive to maximise the number of customers – the greater the number of consumers the lower is the fixed cost and average cost per customer.

One possible counter to the proposition of very low marginal cost in content provision is that once all costs associated with the transmission infrastructure are included, the cost of providing an additional unit of content is positive. Connectivity providers, however, will attempt to minimise such costs by adopting efficient caching strategies. In addition, as we move towards a high bandwidth NBN world, it is likely that marginal costs will trend further towards very low levels. In any case, infrastructure costs are sunk costs and, once infrastructure is deployed, firms will tend to form strategy and pricing on the basis of variable and marginal costs.

These cost characteristics of content provision may create significant problems in the application of price imputation tests. The closer the marginal cost of content provisioning moves towards zero, the more difficult it will become to be conclusive about anti-competitive behaviour on the basis of imputation testing. This is because, as the marginal cost of content provision moves toward zero, the extent to which a bundle of services and content is priced in an anti-competitive way will be more and more difficult to determine.

Given that imputation tests may become more difficult to execute or less determinate, greater reliance will need to be placed on the additional factors enumerated in Section 2.1, including part of anti-competitive behaviours, duration and extent of unusual pricing behaviour and anticipated long-term structural impacts.

5.3.3 Implications of content bundling for regulation

While it may be an exaggeration to say that the marginal cost of content provision to additional consumers is zero, it is reasonable to say that such costs are very low, likely to fall and are substantially lower than the marginal cost of providing additional telecommunications services. The significant competitive implication of this point is that the pre-existing market share of the various telecommunications providers is important as we enter this new phase of 'telco as content distributor'. If one or two providers had a very large market share relative to the rest of the market participants, some important competitive implications follow:

- The telco with significant market power, particularly any dominant telco will face a significantly lower average cost per customer of content acquisition than the other participants; and
- For the acquisition of valuable content rights it is likely that the dominant provider will consistently out-bid the smaller providers leading over time to the smaller players to be increasingly disadvantaged.

These factors suggest that, if content bundles are to become an important consideration in consumer choice of telecommunications providers, the high levels of scale economies achievable and content provision are likely to lead to the larger players being able to create even more market power, creating a dynamic for increasing concentration. This could potentially lead to increased sector concentration, harming competition and resulting in the loss of long term interests of end users because competitors may be driven out of the market. Such adverse effects on broader telecommunications sector competition highlight why access to content matters, why effective regulation – including the possibility of *ex ante* regulation - is important, and this is why the framework governing Australia's access to content regulations needs to be improved in the near term.

We note that the market for broadband delivered content, especially video and in particular high definition video content, is nascent but is rapidly growing.[38] Given the relentless growth of the Internet over the past 15 years there is no reason to assume that it will not eventually become a major, if not the major, form of content delivery. This would happen even quicker if Australia was to adopt similar strategies such as those being recommended in the United Kingdom to consider the desirability of the transfer of terrestrial broadcast content from spectrum to the Internet.[39] The report in which that recommendation is contained went on to state that:

> *"A view which appears to be commonly shared by the major ISPs is that, initially, the strongest driver of consumers moving from basic to enhanced broadband will be Internet Protocol Television (IPTV) services...It is likely that IPTV services will become ever more widespread, and eventually the case for transferring the carriage of broadcast content, including public service broadcasting, from spectrum to the internet altogether will become overwhelming. This may well be a more sensible arrangement, as spectrum is perfectly suited to mobile applications."*[40]

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[38] See the Cisco Visual Network index, 2011-2016, Globally, Internet-Video-to-TV traffic will increase 6-fold between 2011 and 2016 and 3 trillion minutes of video content will cross the Internet each month in 2016, up from 735 billion in 2011. Available at www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html

[39] UK House of Lords Communications Committee, First Report, *Broadband for all - an alternative vision*, 24 July 2012

[40] *Ibid*, paragraphs 138 and 139

6 ECONOMIC BENEFITS, RISKS AND IMPLICATIONS IN RELATION TO ACCESS TO CONTENT ISSUES

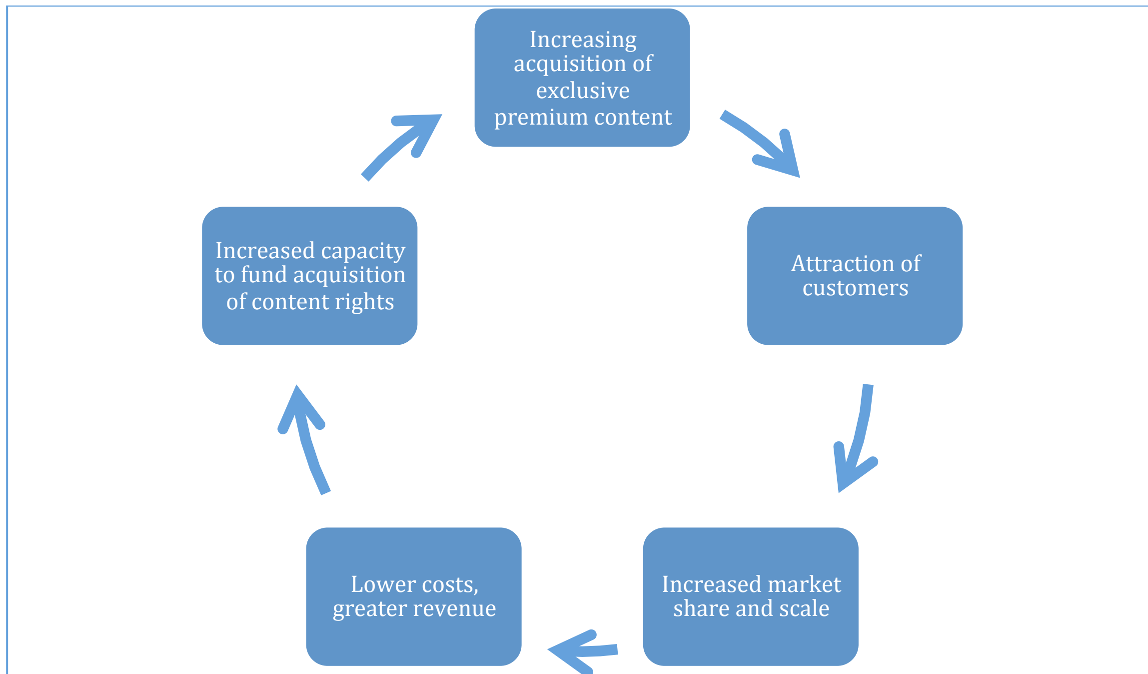
As the NBN rolls out one of the main sources of market power in Australian telecommunications – vertical integration across wholesale and retail activities – is being neutralised. The NBN will also likely change the potential for competitive differentiation among broadband suppliers. In particular, many of the mid-sized broadband providers have differentiated their services through a high level of technical proficiency and reliability, and through high quality help desk and customer service. To a significant degree this differentiation was possible because the provision of ADSL services over legacy copper telephone infrastructure was technically challenging and relatively prone to unreliability. NBN Co will supply a robust reliable service that retailers will not be able to use as a means for differentiating their retail offerings. Customer support should be significantly less challenging in this environment and retailers will be less likely to be able to differentiate on this basis.

These changes mean that it is likely that industry participants will seek other sources of market power and competitive differentiation and other characteristics, such as scale and market share, of industry participants may take on new significance.

The market share and scale of participants may become sharply more important as a source of market power. To the extent that there are significant economies of scale and scope in the production and provisioning of telecommunications services, scale is likely to be of increased relative importance as the significance of other types of competitive differentiation and market power decline.

As we have already noted, the economic characteristics of content – high fixed, but very low marginal costs – will also favour providers who have greater scale. Because larger providers are more likely to have the financial resources be able to secure exclusive premium content rights there is the potential for an anti-competitive dynamic to develop whereby bundles of premium content and telecommunications services attract customers away from smaller providers, gain greater scale and market share leading lower per unit content costs. Under such a dynamic, smaller providers could quickly lose market share and become non-viable. The adverse effects on competition are depicted in Exhibit 7 below.

Exhibit 7: The vicious circle in relation to content acquisition



Source: Windsor Place Consulting, 2012

If the bundling of content leads to increased market concentration and the accretion of market power, it is like that consumer welfare will be diminished. This will occur if decreased competitiveness leads to higher prices, lower levels of output, decreased quality of products and services, and/or lower levels of innovation.

When considering the potential harmful impacts of a loss of competitiveness it is common practice to differentiate between static and dynamic effects, namely:

(a) Static effects – including higher prices, lower adoption levels, higher barriers to entry, lower levels of infrastructure utilisation and potential benefits of scale and scope; and

(b) Dynamic effects – including decreased benefits of broadband use, decreased innovation, potentially decreased diversity of content because non-premium content producers are marginalised, potential loss of editorial diversity in news and information provision.

As discussed previously, the provisioning for telecommunications and content services by industry participants provides potential benefits for consumers. It may even be the case that some increase in industry concentration – basically, a decrease in the number of industry participants – is both efficient and in the interests of consumers as changes in input and product conditions alter the scale economics of the industry.

The danger is that any increase in concentration goes too far leading to effective re-monopolisation of the telecommunications industry in Australia. If this occurs the usual effects of lost of competitiveness will pertain: increased prices, decreasing quality, lost consumer surplus and a decrease in innovation. Essentially, the emergence of significant market power will shift the benefits that the industry generates away from consumers towards the shareholders of the telecommunication companies with the greatest market power. But in addition to this redistribution of benefits there will be (what economists call) a social deadweight loss – a net loss to society of the benefits generated by the industry. This results from the lower level of activity and higher prices that occur when competitiveness is diminished.

The identification of a social deadweight loss emerges from a 'static analysis' – that is, an analysis that essentially abstracts from changes over time. These dynamic effects, however, may be more significant than the static losses. Innovation is critical in convergence industries. If market power suppresses innovation, consumers will lose and these losses will accumulate over time as the Australian industry falls further behind the world's best performers as was occurring in the Australian broadband industry prior to local loop unbundling. There are issues of 'path dependence' to consider in a dynamic context: if the nascent IPTV market is 'born monopolised' it may be very difficult to introduce competition by any feasible intervention once this has occurred. The cost of neutralising Telstra's vertical integration is a case in point. In fact, it would be ironic if exclusive premium content rights drove the re-monopolisation of the industry by taking the place of bottleneck infrastructure in the pre-NBN world.

7 CONCLUSIONS, ISSUES TO BE RESOLVED AND WAY FORWARD

7.1 The competitive illusion?

In conclusion, there are more devices, platforms and distribution channels than ever before and the volume of content and near-content, such as social media, continues to expand rapidly. The content market looks competitive but is it?

The fact that there is a greater abundance of content than ever tends to obscure the fact that there is still a core of persistently premium content that is highly valuable to consumers and which motivates them to subscribe to a service or change service providers. The amounts that distributors are willing to pay for this premium content continues to increase in real terms as illustrated by the recent AFL and NRL rights deals which are 37 and 60 percent increases respectively on previous rights deals.

Anti-siphoning laws currently in place that are designed to stop premium sporting events moving to exclusive broadcast on subscription television are predominantly motivated by issues of social and cultural considerations. It is argued by government that some live sports programs are of such high value and are so defining of cultural identity that significant social harm would be caused – largely in terms of inequality of access and loss of shared experience – if such programming were not available on FTA television. In the case of online distribution of such content, given that a significant amount of this programming is available on FTA and subscription television, the concern is less about access and more about the potential anti-competitive outcome that might occur in association with its online distribution.

In the evolution of such a dynamic, starting positions matter a great deal. In Australia, Telstra is still by far the dominant provider of telecommunications with the greatest scale and market share. In terms of all the major segments of the telecommunications market – mobile telephony, wireless broadband, fixed telephony and broadband – Telstra is one of the most dominant providers in any national market among developed countries. It also owns 50 per cent of Australia's now monopoly subscription provider, Foxtel which is clearly a major buyer of content. In addition, Telstra enters the NBN era with enormous financial resources including its $11 billion deal with NBN Co for the progressive transfer of its customers to the NBN network.

Telstra therefore enters the NBN era with a far superior ability compared with its competitors to secure exclusive rights for broadband delivery of premium content, to achieve lower average costs for this content and to bundle and cross promote content and telecommunications services across its telecommunications and media vehicles. This capability is further enhanced by its market leading 4G mobile infrastructure which is uniquely well-placed to capitalise on the rapidly unfolding mobile revolution underpinned by the explosion in the market penetration of mobile smart devices which shows no sign of slowing.

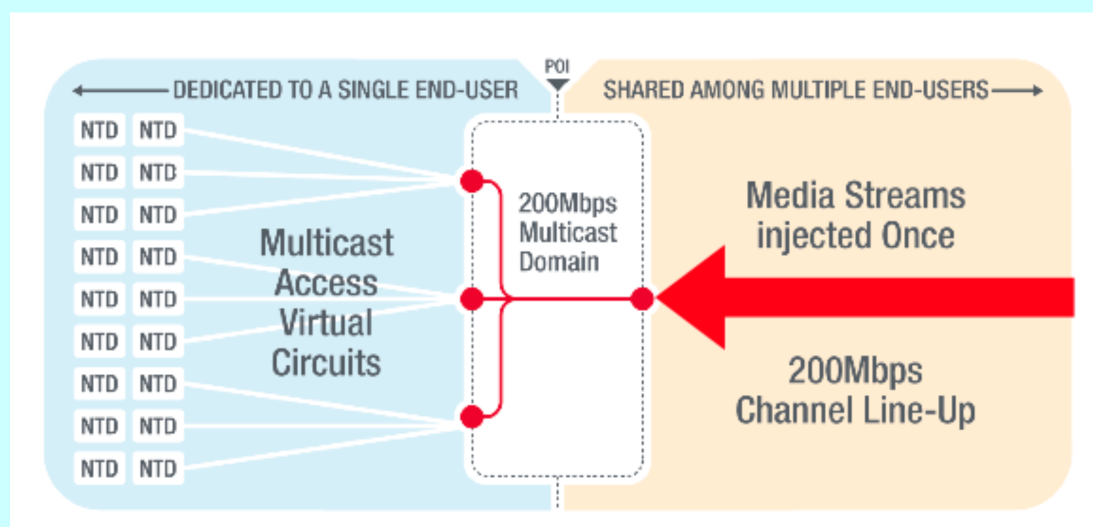
To restate the central concern for regulators and policy makers: to what extent will this content-driven potential for increases in market power be translated into competition-lessening outcomes? The likely outcome is essentially an arm wrestle between the range of diverse content available to end users and what end users regard as premium content. If the former outcome is likely to prevail, the market will provide a solution, if not, regulatory intervention is required. The alternatives are explored in the following section.

7.2 The case for complacency

The case for complacency would assert that media distribution channels, underpinned by the Internet, and increasingly the mobile Internet, will frustrate the attempts of large providers to use content as an anti-competitive tool. OTT services will continue to proliferate, large aggregators, such as Apple, will continue to offer a plethora of content options to consumers and the traditional media channels, primarily FTA television, will constitute an anchor for big telco's content ambitions. Likewise services like NBN Co's Multicast service, which is already of interest to the AFL,[41] would allow content creators to bypass traditional content distributors and distribute their content or services themselves (See Exhibit 8 below).

Exhibit 8: NBN Co's proposed multicasting service

The NBN Co has recently provided details of a new one-to-many broadcast service it is planning on providing on its fibre network. The '*Multicast*' proposal is a service whereby customers can upload their content to a single interface point from which it will be distributed around the country by the NBN Co as shown below.



Specifically:

- A Multicast service uses dedicated bandwidth per household in order to avoid being negatively impacted by other bandwidth usage within the household (e.g. Skype or other downloads) and to ensure that the quality of service remains high. This is important for content such as sport or HD video which require high bandwidth in order to maintain service quality. These are seen as two of the key driver markets for IPTV technology;
- In order to use Multicast to deliver content a customer is required to purchase a single Multicast Access Virtual Circuit and one Multicast Domain per point of interconnection through which they wish to distribute this content. Once these have been purchased 'Media Streams', which typically consist of a video channel or channels can be directly injected into the Multicast Platform where they will be distributed to any point of interconnect where the customer has a Multicast Domain and from there to any end-users who have a subscription.

[41] The Age, *AFL mulls new TV service*, 20 August 2012

Exhibit 8 continued

- It will be launched on 28 September 2012 and NBN Co envisages that it will be connected to a market of approximately 100,000 subscribers by August 2013. Multicast's launch will initially be focused around Victoria, South Australia and Tasmania and full details of this launch will be available from the end of August 2012.

Multicasting also has implications for the advertising market. Content is distributed to regional points of interconnection, and this potentially allows for local or region-specific advertising to be provided rather than the more generic advertising required by current broadcast methods. It is also possible to measure channel changes on a per-premises basis, allowing vastly improved audience measurement for both content provision and advertising purposes.

Source: NBN Co, *Multicast – Broadcasting the Future*, Steve Langdon, 14 August 2012

7.3 The case for caution

But perhaps not. As noted earlier, while content abounds, a relatively small subset of it commands premium status. The criticality of the definition of 'premium' in this discussion is clear. What is necessary for more informed policy making is a more analytically and quantitatively rich understanding of what 'premium' means and what is the quantitative extent of its ability to influence customers' decisions to choose one provider of telecommunications services over another.

The history of the media industry is replete with examples of the decisive competitive advantage gained from the acquisition of the rights to even a single sports code. Rupert Murdoch's prescient and unprecedented bids for NFL and NHL rights in the USA in 1994 and 1995 respectively were decisive in securing subscribers for his upstart Fox network.

The assumption that FTA networks are a constraining anchor on the ability of telcos to use content anti-competitively could be challenged sooner than most think. The arrival of the NBN as it is currently envisioned, or even in a form short of that vision, could facilitate a change in consumer behaviour that would see online delivery become the mainstream. In this environment, premium content could become a more decisive driver of broadband market outcomes.

In the USA Comcast case, the DOJ and the FCC have indicated a desire to err on the side of caution in the case of the nascent IPTV market so that it does not become a market that is born monopolised.

At a more prosaic level, data costs in Australia are still high by world standards – extra gigabytes of data can be significant and video content, especially high definition video content, quickly eats into monthly household data caps. Industry participants that can offer 'unmetered' premium content have an advantage in the market place.

7.4 Possible Implications

At this stage it is certainly difficult to determine whether complacency or caution is the appropriate response to the potential threat of content-driven losses in competitiveness. It is reasonable to ask, however, what would we expect to observe if the dynamic described above did take hold in the Australian telecommunications market. We believe that if this were the case we would observe:

1. The large players would win rights for almost all premium content on offer for online delivery;
2. The market share of large providers would increase materially and disproportionately relative to smaller providers for reasons other than price/quality factors;
3. Large providers would be able to secure very large economies of scale in content acquisition and distribution. The rights to content may be expensive to acquire but its marginal cost is very low – it costs almost nothing to sell an additional unit to another customer. These economies augment the economics of scale available from other sources;
4. The large providers would be able to charge a premium for their products and product bundles – and across the broader product suite, although this might only occur in the longer term after competition diminishes;
5. The large providers could be expected to increase their market share in related horizontal and vertical markets, for example, cloud/hosting computing services,[42]
6. Increasing Telstra's and its affiliates' penetration of its hardware platforms T-Box, Fox IQ etc;
7. The ability to make exclusive or offer superior performance and/or features for previously open OTT services; and
8. A shift toward service/content bundles and away from stand alone telecommunications services within the customer base of the large players.

7.5 Recommendations and Suggested Remedies

7.5.1 Key recommendation

Given the significantly adverse implications not only for content acquisition markets but also for broader telecommunications sector competition in Australia, the single most important measure which can be put in place to address content-related competition issues, is the ***promulgation of a specific regulatory framework designed to deal with content access issues.***

This is strongly recommended. We believe that it is critical to have in place rules and regulations addressing competition and market conduct in the provision of content in the sector. The objective ought be to promote fair market conduct and effective competition for the long-term benefit of end-users. This would in turn foster investment in, and the development of, the end-to-end media and content markets, safeguard and promote the interest of end-users and the public, and ensure the availability of a comprehensive range of media/content services throughout Australia and which are available to all Australians.

[42] It is important that there is competition as this market segment is dynamic, growing rapidly and is facing important economic, privacy and data integrity issues. See *inter alia* Lateral Economics, *The potential for cloud computing services in Australia, A report to Macquarie Telecom*, September 2011

The formulation of a specific regulatory framework to deal with content access issues is therefore necessary so that Australia avoids depending on a regime which is imprecise, *ad hoc* and dependent on merger and acquisition activity for the opportunity to utilise regulatory powers in relation to access to content issues. Specifically such a framework should:

(a) Be comprehensive containing a range of optimal *ex-ante* mechanisms which may be utilised to ensure a competitive telecommunications market for the long term benefit of end users and provide a degree of certainty for sector investors;

(b) Provide for a range of mechanisms which are flexible to secure a balance between sector competition goals, market participants, and the rights of content owners and consumers. Such a framework while looking to foreign jurisdictions needs to be customised to take into account the high degree of market concentration in Australia;

(c) Be enshrined in law, ideally in a new Part XICA of the CCA entitled "The content-related competition regime".

We are also of the view that the ACCC's requests made during the Convergence Review are fair and reasonable. We concur that the ACCC ought have ***flexible rule-making powers that can be exercised to promote fair and effective competition in content markets***. These powers whilst complementing the existing powers of the ACCC to deal with anti-competitive market behaviour should permit the ACCC to put in place an *ex-ante* regulatory regime for content-related competition issues if it deems necessary in the future. It is more likely that empowering the ACCC in this way will avoid lengthy and expensive litigation and ensure that individual legal decisions – which can have a degree of variability and may not be consistent with the Government's overall policy goals -are not the key determinant of the sector's competition policy.

In doing so, we do not support the recommendation of the Convergence Review that a new statutory regulator should be granted the powers to make complementary rules in relation to content-related competition issues.[43] Instead we are strongly of the view that such powers are better entrusted to the ACCC who is best placed to provide a comprehensive and integrated view on all competition issues including content-related competition issues;

7.5.2 Supporting recommendations and remedies

In addition, a range of supporting measures ought be put in place to support the framework detailed in the key recommendation above in order to optimally address content-related competition issues. These include *inter alia:*

(i) ***A close monitoring by the ACCC of the compliance with the court enforceable undertaking made by Foxtel*** as a condition of the Foxtel-Austar merger is necessary. This is a key undertaking in respect of which there should be a high degree of regulatory scrutiny. Further, the ACCC should not entertain any extension of the transition arrangements which permit certain exclusivity arrangements to be grandfathered to 2016;

[43] Australian Government, *Convergence Review: Final Report,* March 2012, Chapter 3.

(ii) ***A principle of 'any to all' access to content should be enshrined*** either in any future legislative amendments or be explicitly supported by ACCC decisions and pronouncements. Such a principle should be similar to that adopted in certain foreign jurisdictions and permit end-users to have the freedom to gain reasonable access to all content available in the market. Depending on market developments it may also be necessary to go further as suggested by Optus[44] and formalize a content access regime if exclusive rights to premium content begin to distort or have adverse impacts on competition in Australia's telecommunications markets. Importantly, given the speed of market developments, diligence in monitoring market developments is critical;

(iii) ***The ACCC's focus on IPTV and related issues when examining content-related competition issues, must given profound and structural changes in the PC market[45] take into account the growth in tablets and other wireless connected devices***. It is possible that content-related competition issues maybe felt more profoundly in the mobile/wireless market given material changes in viewing habits, broadband speeds and device innovation. Anti-competitive conduct or adverse implications of exclusive deals for premium content maybe therefore become more amplified in this area; and

(iv) Agreements for premium content should to the extent possible, ***enable content creators or owners (e.g., a sports code) to bypass traditional content distributors and distribute their content or services themselves*** should they wish to do so (e.g., by use of NBN Co's proposed multicast service).

- **END –**

[44] See Optus, *Submission to the Convergence Review*, November 2011, page 13. If this was to occur, we prefer that the charge for access could be on fair, reasonable and non-discriminatory terms ('FRAND') either at the wholesale level or by retail customers.

[45] Or post-PC era if one ascribes to the view of certain commentators.

APPENDIX A: MANDATED CONTENT ACCESS REGULATORY REGIMES IN SELECTED COUNTRY MARKETS

A.1 SUMMARY

In Exhibit A.1 below, we present a summary of the approaches to content related competition issues in foreign markets before exploring each of these markets in more detail later in the Appendix.

Exhibit A.1: Summary of approach to content related competition issues in selected foreign markets

Market	Current Regulatory Position	Central issues
Canada	After a review, CRTC has made several orders relating to content access. In particular it has prohibited Internet and on-demand mobile platform content providers, from conferring any undue preference to anyone, including themselves, or from subjecting anyone to an undue disadvantage.	• Policy created by a series of rulings from June 2009 to July 2012 to address perceived market power. • Already a couple of cases adjudicated which in part highlight the difficulty of transition issues (where there are existing long term exclusive content distribution agreements in place) and the ongoing keenness of content owners (in the Canadian case US owned) to preserve such arrangements.
EU	The European Union has several Directives relating to access to and interconnection of communications networks and their associated content and facilities. The key Directives include: Directive 2002/19/EC which relates to access to and interconnection of telecommunications networks. It includes provisions for access to Conditional Access Systems "on fair, reasonable and non-discriminatory terms". Directive 2002/77/EC which deals with competition in telecommunications markets requires Member States to ensure that vertically integrated firms do not discriminate in favour of themselves.Directive 2010/13/EU which provides for coordination between Member States on regulations relating to audiovisual media services, includes provisions for	• Access to services and content to be on fair, reasonable and non-discriminatory terms. • Member States may prevent exclusive deals relating to content which is of major national interest. For example, the FIFA World Cup in most European countries. • Requirement for Member States to prevent vertically integrated firms from using their position to discriminate in their own favour.

Market	Current Regulatory Position	Central issues
	Member States to prevent exclusive broadcasting arrangements for events that are regarded as "of major importance to society" by the Member State.	
France	Content access issues first arose in 2006 with the merger of TPS and CanalSatelite to create Canal+France. As a result, the competition regulator imposed a large number of conditions, including restrictions on content acquisition, on the merger. In 2009, Orange attempted to offer what is described as 'double exclusivity'. This involved customers being required to subscribe to both a pay-TV service and a particular ISP's triple-play offer in order to receive certain content. The Regulator published recommendations against this following a referral from the government Minister.	• Dominance of Canal+France as pay-TV operator. • Merger agreement provided an opportunity to build restrictions and requirements. • The creation of double exclusivity arrangements and the need to regulate them. • A strong preference from the regulator for not having exclusive arrangements in relation to content.
Italy	In October 2002, News Corporation proposed to acquire the Italian pay-TV companies Telepiù Spa and Stream Spa through the purchase of shares. The acquisition allowed the combined businesses to provide Direct-to-Home (DTH) satellite pay-TV to customers. The European Commission determined that this would likely create a monopoly scenario in pay-TV. However, NewsCorp made a number of commitments which collectively convinced the Commission to allow the acquisition. This determination included a decision that in Italy the pay-TV market was separate to the free-to-air market. The key commitments NewsCorp had to make for the acquisition to be approved included: a limitation on the length of any exclusive contracts it entered into in the future of two years for football clubs and three years for film studios; an agreement to waive any exclusive rights with respect to TV platforms other than DTH as well as waiving any protection rights for platforms other than DTH; and a commitment to offer third parties on an unbundled and non-exclusive basis the right to distribute any premium content as long as the premium content is offered to retail customers. Based on these and other commitments the Commission decided to allow the acquisition.	• Limitation on the extent of possible future exclusivity deals in relation to sports and movies. • Pay-TV is a separate market to free-to-air TV and a monopoly situation is therefore easier to establish. • Requirement to offer competitors access to content and services on fair and non-discriminatory terms. • Waiving of rights on all platforms was necessary to prevent monopolistic situations.

Market	Current Regulatory Position	Central issues
Germany	In broad terms, German broadcasting regulation has been strongly influenced by EU law including the Access Directive and the Audiovisual Directive. Specifically in the proposed acquisition of a stake in KirchPayTV by BSkyB in 2000, a number of commitments were required including access to technology, interoperability of applications and technology, access to pay-TV services by other platforms, production of multiple system set top boxes and rights acquisition across multiple European markets.	• Regulator's concern was that BSkyB would provide the expertise to allow Kirch to expand into digital interactive TV which would strengthen their dominant position. • This was addressed by the Regulator by imposing a number of conditions on the acquisition, including access to technology, mandating the interoperability of applications and technology, providing for access to pay-TV by other platforms and placing limits on rights acquisition.
Malaysia	Ministerial determination issued in early 2012 requiring any broadcaster who acquired exclusive rights to broadcast certain sports events to offer the broadcast rights first to free-to-air broadcasters and then to any pay-TV broadcasters as a right of first refusal.	• Focus on sports with no provisions for other content. • Determination attempts to address dominant position of satellite operator ASTRO and potential anti-competitive conduct which may have a negative impact on nascent IPTV services.
Singapore	Content exclusivity first became an issue in 2006 in relation to the English Premier League broadcasts. A measure was passed in March 2010 requiring mandatory cross-carriage of exclusive content after 1 September 2010. This measure has been amended in 2011 and 2012 for clarity, but its effect is the same.	• Requirement to allow cross-carriage of exclusive content within five working days of request to do so. • Usage of one set top box to access any and all content in Singapore makes this unique.
South Africa	In 2005, the Independent Communications Authority of South Africa undertook a study of the South African pay-TV market. It concluded that while exclusive dealing was an issue, it was a necessary feature of the market at that time. It therefore did not make any ruling on the subject of exclusive content access agreements, except in the case of sports events of national interest, in regard to which it is prohibited to acquire any rights which would hinder or prevent their broadcast on free-to-air television. There was criticism of this approach, including from the Competition Commission of South Africa. In 2009, the South African Government passed the *Competition Act*	• Exclusive content access not necessarily prohibited, except in cases of national sporting events. • Competition law enacted in 2009 places restrictions on abuse of vertical integration and market power, and prevents price discrimination. • *Electronic Communications Act 2005* amended to ensure that competition laws can be applied to the telecommunications industry.

Market	Current Regulatory Position	Central issues
	2009, substantially amending the earlier Competition Act 1998 which covers *inter alia*: problems posed by vertical integration; abuse of market power; and price discrimination, broadly prohibiting abuse of any of these areas. The South African Government also amended the *Electronic Communications Act 2005* to stipulate that the *Competition Act* applies to competition issues in the telecommunications industry.	
United Kingdom	Beginning in 2010, Ofcom made several decisions which were aimed at limiting the ability of the vertically integrated firm BSkyB to use its position and influence to stifle competition and market outcomes. The first was a requirement to sell its premium Sky Sports channels on a wholesale basis to competitors at an Ofcom mandated rate. On 8 August 2012, in response to appeals by Sky and the Football Association Premier League among others against the mandatory wholesale decision, the Competition Appeal Tribunal announced rulings on many of Ofcom's decisions. In particular it ruled that Ofcom's determinations that Sky had deliberately withheld wholesale supply to weaken competition, and that Sky's pricing structure was anti-competitive, were incorrect. The CAT has invited submissions from the parties involved regarding the form of the appropriate ruling for Ofcom to make. The second Ofcom decision was that Ofcom would consult on referring concerns regarding premium movie markets to the Competition Commission. In an initial review, the Competition Commission determined that Sky was making 'excessive profits' from its Sky Movies service. However, it revised this position in May and August 2012, having determined that Sky's movie services were not a sufficient driver of subscriber's choices to give Sky an unnecessary advantage over its rivals.	• Dominant market power of Sky. • Issue as to whether Sky had used its Sky Sports channels as a means of stifling competition. • Issue as to whether Sky had used its exclusive access to premium movie content to stifle competition. • Determining whether or not exclusive access to some content gave sufficient market power to effectively foreclose competition from rivals. • Determining the impact new technologies have on what would otherwise be excessive market power.

Market	Current Regulatory Position	Central issues
United States	Content access has long been regulated by the Program Access Rules implemented by Congress in 1992 which prevent vertically integrated cable operators from abusing their positions. While the Program Access Rules expire in October 2012 due to an in-built sunset clause the FCC has indicated that they will not try to renew them. With convergence, a number of new regulatory principles were put forward by the DOJ and the FCC as a result of the Comcast Case. These effectively mean that online providers are no worse off than multichannel video providers, and receive the same quality of content as would be available from one of Comcast's rivals.	• Content access has been regulated since 1992. • Joint venture by Comcast and NBC Universal highlights related M+A issues driven by convergence and the ability to secure content. • The Comcast case saw a co-ordinated effort between the DoJ and the FCC to impose conditions on the transaction in order for the transaction to proceed after imposing (the FCC) or accepting in settlement (the DOJ) various conditions. • Most mechanisms expire after 7 years unless extended by the Court.

A.2 CANADA

Broadcasting Regulatory Policy

After a year long review, Canadian Radio-television and Telecommunications Commission (CRTC) issued on 3 June 2009, the Broadcasting Regulatory Policy CRTC 2009-329[46] using the Internet or an on-demand mobile platform. In 2009-329, the CRTC decided not to require mobile and Internet access providers to fund Canadian audiovisual content, nor to compel software-locked audiovisual devices to ensure shelf space for Canadian content. However, distributors of audio and audiovisual material over the Internet or on-demand mobile platforms will now be prohibited from conferring an undue preference or subjecting anyone to an undue disadvantage.[47]

Subsequent to that in Broadcasting Regulatory Policy 2011-601, the CRTC set out its determinations relating to its regulatory framework for vertical integration.[48] The CRTC's main objective in establishing its vertical integration framework was to ensure that consumers continue to benefit from a wide choice of programming in a broadcasting system where programming and distribution have become increasingly integrated. It did this by setting out an *Exemption order for new media broadcasting undertakings* relating to *inter alia* exclusivity of content, and anti-competitive head starts, and the introduction of specific dispute resolution provisions.

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[46] www.crtc.gc.ca/eng/archive/2009/2009-329.htm

[47] Other rulings include reservation of the power to require exempted Internet or mobile platforms to file information with the CRTC in order to help it monitor and release better information on Canadian new media markets; a recommendation to the federal government that it follow the lead of countries like France and the UK in creating a national digital strategy.

[48] In the Canadian context, vertical integration refers to the ownership or control by one entity of both audiovisual programming services, such as conventional television stations, or pay and specialty services, as well as distribution services, such as cable systems or direct-to-home (DTH) satellite services. It further noted that vertical integration also includes ownership or control by one entity of both programming undertakings and production companies.

Further on 26 July 2012, the CRTC issued amendments to the Amendments to the *Exemption order for new media broadcasting undertakings* (now known as the *Exemption order for digital media broadcasting undertakings*) CRTC 2012-409. *These changes followed a c*all for comments on proposed amendments to the *Exemption order for new media broadcasting undertakings* – provisions relating to vertical integration*, Broadcasting Notice of Consultation CRTC 2011-805,* 22 December 2011.[49]

The *Appendix to Broadcasting Order CRTC 2012-409: Exemption order for digital media broadcasting undertakings* applies to broadcasting services,[50] that are (i) delivered and accessed over the Internet; or (ii) delivered using point-to-point technology and received by way of mobile devices.

The undertaking is that it does not give an undue preference to any person, including itself, or subject any person to an undue disadvantage. In any proceeding before the CRTC, the burden of establishing that any preference or disadvantage is not undue is on the party that gives the preference or subjects the person to the disadvantage.

Specifically the Order:

- ***In relation to Exclusivity:*** States that the undertaking does not offer television programming on an exclusive or otherwise preferential basis in a manner that is dependent on the subscription to a specific mobile or retail Internet access service; and
- ***In relation to anti-competitive headstart:*** Provides, that an undertaking that has acquired exclusive rights to television programming from anew programming service shall, when ready to provide access to that programming in a manner that restricts access based on a consumer's subscription to a specific mobile or retail Internet access service, make all television programming from that new programming service to which it itself provides access available to all other undertakings operating over the same broadcasting platform that have communicated an intent to provide access to the television programming, notwithstanding the absence of a commercial agreement.

Selected CRTC Decisions under the New Media Exemption Order

Two selected CRTC decisions under the New Media Exemption Order are detailed in Exhibit A.1 below.

[49] Available at www.crtc.gc.ca/eng/archive/2011/2011-805.htm

[50] As defined in set out in *New Media*, Broadcasting Public Notice CRTC 1999-84/Telecom Public Notice CRTC 99-14, 17 May 1999

Exhibit A.1: Summary of CRTC Decisions

CASES	CRTC FINDING
12 December **2011 Broad-casting Decision CRTC 2011-765 TELUS v BCE, Bell Canada or Bell Mobility ('Bell')**[51]	CRTC found that Bell gave itself an undue preference and subjected TELUS to an undue disadvantage, contrary the New Media Exemption Order, when it secured exclusive programming rights of popular National Hockey League and National Football League content for its mobile platform. The CRTC found that Bell entered into arrangements for the exclusive mobile rights to certain NHL and NFL programming content. In light of these exclusivity arrangements, the CRTC considers that Bell has granted itself a preference. The CRTC further considers that by precluding TELUS from making this content available to its mobile subscribers, Bell has subjected TELUS to a disadvantage. The CRTC considers that although the Canadian mobile content distribution market is an emerging market, it is likely that sports will be a primary driver in the mobile video market and there will continue to be an increase in consumers' desire to have access to popular premium sports programming over mobile devices in Canada. This serves to increase the likelihood that the arrangements between Bell and the NFL and NHL would have a significant adverse impact on TELUS' ability to attract mobile subscribers for its broadcasting content. In March 2012, this decision was varied given responses by Bell to the CRTC, allowing Bell will continue to have exclusive access to NFL content on mobile devices based on a contract Bell and the NFL entered into before the new law was passed.
14 August **2012 Broad-casting Decision CRTC 2012-442 Stingray Digital Group v Canadian Broad-casting Corporation**[52]	CRTC found that Canadian Broadcasting Corporation did not contravene undue preference and disadvantage provision of the Amended Exemption order when it launched its online music service CBC Music. In its application, SDG contended that the CBC benefits from two main preferences: its reliance on government funding that is not available to private enterprises and its reliance on preferential copyright licence fees. SDG alleged that the CBC used its government funding to launch and operate its new music portal, and that CBC Music is in direct competition with SDG and other private enterprises without sufficient regard to the CBC's mandate and specific programming objectives set out in the Act. With respect to the issue of government funding, the CRTC noted that the CBC's government funding is set by Parliament and is not under the CBC's control. The CRTC further notes that the CBC has, since its inception, used government funding to operate its broadcasting undertakings in conjunction with, and often in competition with, commercial broadcasting undertakings. With respect to the issue of the copyright rates, the CRTC found that SDG provided no evidence beyond speculation that these terms are preferential.

[51] www.crtc.gc.ca/eng/archive/2011/2011-765.htm

[52] www.crtc.gc.ca/eng/archive/2012/2012-442.htm

A.3 EUROPEAN UNION

Access Directive

The European Union's Directive 2002/19/EC (Access Directive) of March 2002 provides for access to, and interconnection of, electronic communications networks and associated facilities. It includes provisions for access to Conditional Access Systems "on fair, reasonable and non-discriminatory terms". Article 6 of the Directive is provided below[53]:

Article 6

Conditional access systems and other facilities

1. *Member States shall ensure that, in relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, the conditions laid down in Annex I, Part I apply.*

2. *In the light of market and technological developments, Annex I may be amended in accordance with the procedure referred to in Article 14(3).*

3. *Notwithstanding the provisions of paragraph 1, Member States may permit their national regulatory authority, as soon as possible after the entry into force of this Directive and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis in accordance with the first paragraph of Article 16 of Directive 2002/21/EC (Framework Directive) to determine whether to maintain, amend or withdraw the conditions applied.*

   Where, as a result of this market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive), only to the extent that:

   (a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive 2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and

   (b) the prospects for effective competition in the markets for:

      (i) retail digital television and radio broadcasting services, and

      (ii) conditional access systems and other associated facilities, would not be adversely affected by such amendment or withdrawal.

[53] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:108:0007:0007:EN:PDF

An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of conditions.

4. *Conditions applied in accordance with this Article are without prejudice to the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.*

Commission Directive 2002/77/EC

Directive 2002/77/EC deals with competition in the markets for electronic communications networks and services. Article 3 provides for non-discrimination in the case of dominant and vertically integrated firms:

Article 3

Vertically integrated public undertakings

In addition to the requirements set out in Article 2(2), and without prejudice to Article 14 of Directive 2002/21/EC, Member States, shall ensure that vertically integrated public undertakings which provide electronic communications networks and which are in a dominant position do not discriminate in favour of their own activities.

Audiovisual Media Services Directive

Directive 2010/13/EU (Audiovisual Media Services Directive) provides for the coordination of regulations set by Member States of the European Community concerning audiovisual media services. Chapter V of the Directive deals with exclusive broadcasting rights for major events where there is a public interest, and states that Member States may prevent exclusive broadcasting of such events in a way which deprives the public from following it. The main provisions of Articles 14 and 15 are excerpted below[54]:

Article 14

1. *Each Member State may take measures in accordance with Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.*

   …

[54] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF

Article 15

1. *Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.*

2. *If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.*

3. *Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.*

…

These provisions provide the principles for Member States to ensure widespread coverage of major events, however, the implementation is left to individual governments. The directive does not cover issues pertaining to vertical integration and the impact of mergers and acquisitions and undertakings on product and content markets, which is covered in the EC Merger Regulation[55] and Directive 2002/77/EC on competition in the markets for electronic communications networks and services.

[55] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF

A.4 FRANCE

In France, content access and related issues are subject to regulation by the Authorité de la Concurrence which is France's chief competition regulator, and the French telecommunications regulator - Authorité de Régulation des Communications Électroniques et des Postes ('ARCEP').

Merger Policy

The issue of content first arose in 2006, when TPS and CanalSatelite merged to create Canal+ France, bringing together France's two major satellite TV operators. TPS was both an acquirer of broadcasting rights and a distributor of satellite TV services while CanalSatelite was active in satellite TV distribution.

The merger raised significant concerns in relation to the acquisition of broadcasting rights for premium content. Authorité de la Concurrence found that Canal+ France would hold a dominant position at every level of the Pay TV value chain and therefore there was a risk of it foreclosing access to the market. The merger was cleared subject to wide ranging commitments offered by the parties. Specifically:

- Canal+ France was required to unwind its exclusivity over existing content rights by negotiating in good faith with rights holders to permit the exploitation of exclusive pay per view and video on demand rights.
- A limit was placed on the duration and exclusivity of future content rights agreements. Notably contracts for American movie and sports content were limited to a maximum duration of 3 years and in relation to French movies, Canal+ France would be prohibited from entering into contracts with French producers and negotiating separate contracts for the acquisition of different types and forms of broadcasting rights (eg VOD, PPV etc) without the possibility of bulk purchasing;
- Wholesale premium channels must be provided to other retailers, by making channels available on transparent, objective and non- discriminatory terms. The channels must be made available on a non- exclusive basis.

Opinion on TV content access exclusivity offers by ISPs

Subsequently, in January 2009 the French Minister for the Economy, Industry and Employment made a referral to the Authorité de la Concurrence regarding exclusive relations between the activities of electronic communication operators and those of content and service distributors. In response the Authorité de la Concurrence issued a statement on 7 July 2009.[56]

The Authorité de la Concurrence highlighted the new regulatory issue of '*double exclusivity*' whereby there is distribution exclusivity where consumers must subscribe to both a pay TV service directly and transport and access service to an ISP's triple-play offer to access the contents. In combination it is referred to a double exclusivity, and was pioneered by Orange in France.

[56] www.autoritedelaconcurrence.fr/user/standard.php?id_rub=316&id_article=1228

This double exclusivity model led to regulatory issues in the view of the Authorité de la Concurrence, including its potential for restriction of competition or even the creation of duopoly scenarios. To address such concerns, it has recommended policies for the regulation of content exclusivity, which it considers beneficial for market outcomes.

The recommendations of the Authorité de la Concurrence include *inter alia*:

- Any exclusivity arrangements must remain exceptional, limited in time and scope, such as at most one or two years;
- That any exclusivity arrangements be limited in scope to true innovations of either a technical or commercial nature for which it is necessary to facilitate learning by subscribers or to test the market;
- In the eyes of the Authorité de la Concurrence regulation of the wholesale market for pay-TV channels would be an invaluable addition to strict restrictions being placed on the double exclusivity model.

The Authorité de la Concurrence further pointed out that it is necessary that the rules of the game be very clear, firstly for restricting exclusivity arrangements, and secondly for opening of the wholesale pay-TV market. This would also aid in promoting investment and innovation in both the technical and content creation spaces.

A.5 GERMANY

Broadcasting regulatory policy

National broadcasting regulation in Germany has been strongly influenced by European law. In Germany, legislative responsibility for broadcasting rests with both the federal and state governments. The *Interstate Treaty on Broadcasting* provides for the regulation of broadcasting and telemedia services, including conditional access systems, program guides and program-bundling.[57] Conditional access services must be offered on a non-discriminatory basis and under fair and reasonable conditions, in line with the European Commission's *Access Directive 2002/19/EC*. German law has also been affected by the European *Audiovisual Media Services Directive*, which extends previous regulatory coverage to all audiovisual media services, including video-on-demand.[58]

The most well-known case regarding access to content involved BSkyB's investment in KirchPayTV in 2000, which gave BSkyB joint control of the German pay TV operator. The case was dealt with by the European Commission and is discussed below.

BSkyB and KirchPayTV

In 2000, British Sky Broadcasting Ltd ("BSkyB") proposed to acquire a 24 per cent stake in the German pay TV operator KirchPayTV. Notification was given to the European Commission, along with commitments that addressed the Commission's concerns regarding the compatibility of the proposal with the common market. The Commission allowed the acquisition to take place.[59]

KirchPayTV is a German pay TV operator and premium content provider, offering premium movies, live sport and a range of pay TV channels. It is wholly owned by the holding company Kirch, which was the sole partner of KirchPayTV. BSkyB's investment created an additional partner, BSkyB General Partner, giving BSkyB joint control and the ability to exercise decisive influence over KirchPayTV's strategic direction.

The Commission determined that KirchPayTV had a dominant market position, particularly in the premium movie and sport domains. Kirch had a number of exclusive deals for pay TV rights with a number of film studios, and as a result enjoyed a *de facto* monopoly in this area. Kirch also controlled the pay TV rights to live sport events including the German *Bundesliga*, Formula One Grand Prix, boxing, tennis, golf, handball and others. As a result, any potential new entrant into the German pay TV market faced a significant lack of premium content.

The Commission's concern was that BSkyB would be able to provide the necessary resources and knowledge to allow Kirch to expand into digital interactive television services via its d-box, its set-top box used to distribute its pay TV channels. The Commission believed this would create a dominant position for Kirch. As the Commission stated:

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[57] www.kjm-online.de/files/pdf1/RStV_13_english.pdf

[58] http://ec.europa.eu/avpolicy/reg/avms/index_en.htm

[59] http://ec.europa.eu/competition/mergers/cases/decisions/jv37_en.pdf

> *"As a result of its monopoly position on the pay TV market, KirchPayTV will be the only undertaking in Germany able, in the foreseeable future, to offer pay TV in combination with digital interactive television services. This is likely to mean that consumers will choose KirchPayTV as it will allow them access, through the d-box, to both interactive services and pay TV without the cost or inconvenience of having two boxes. As a result the d-box will become the standard decoder in Germany for interactive services, as well as pay TV."*[60]

The Commission allowed the acquisition to proceed subject to the following commitments:

- **Access to technology**: Kirch agreed to provide third parties with access to its technical services on a fair, reasonable and non-discriminatory basis to allow third parties' digitally transmitted services to be received by viewers. Third parties wishing to provide a service to users of the d-box may do so on reasonable and non-discriminatory terms.

- **Interoperability of applications and technology**: Kirch agreed to ensure that a standardised application programming interface (API) is used for its d-box technology, and to publish its technical specifications. Kirch also agreed to develop and operate simulcrypt arrangements with all digital access providers in Germany on reasonable commercial terms.

- **Access to pay-TV services by other platforms**: Kirch agreed, at the request of a competing platform provider, to retail its pay TV services directly to subscribers via Simulcrypt arrangements to digital television decoders other than its d-box.

- **Production of 'multiple system' boxes**: Kirch agreed to grant manufacturing licenses for the production of the d-box to interested manufacturers or comparable hardware in a non-discriminatory manner and under terms and conditions which are customary in and normally applied by the industry.

- **Rights acquisition**: Each of News and BSkyB agreed that, in bidding for programming rights for pay-TV in the UK and Ireland, they will not impose upon the rights holder as a condition of their bids, that the rights holder must grant the pay-TV programming rights for Germany to Kirch. Likewise, Kirch agreed that, in bidding for programming rights for pay-TV in Germany, it will not impose on the rights holder as a condition of its bid, that the rights for the UK and Ireland be sold to BSkyB or News.

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[60] *Ibid*.

A.6 ITALY

Newscorp and Telepiù

In October 2002, News Corporation proposed to acquire the Italian pay-TV companies Telepiù Spa and Stream Spa through the purchase of shares. The acquisition allowed the combined businesses to provide Direct-to-Home (DTH) satellite pay-TV to customers.[61]

The European Commission challenged the acquisition's compatibility with the common market and EEA Agreement, but was ultimately satisfied that the acquisition would not impede competition so long as NewsCorp adhered to its commitments to allow access to premium content. The commitments offered by NewsCorp were (from the Commission's decision):

On-going exclusive contracts

(a) Right for Film Studios and Football clubs to unilaterally terminate contracts entered into with Stream and Telepiù with no applicable penalties.

(b) Newscorp shall waive exclusive rights with respect to TV platforms other than DTH (terrestrial, cable, UMTS, Internet, etc.). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH.

(c) Newscorp shall waive exclusive rights for pay-per-view, video on demand and near video on demand on all platforms.

Future exclusive contracts

(d) NewsCorp shall not subscribe contracts exceeding the duration of two years with football clubs and of three years with film studios. The exclusivity attached to these contracts would only concern DTH transmission and would not apply to other means of transmission (for example, terrestrial, cable, UMTS and Internet). Furthermore, the parties shall waive any protection rights as regards means of transmission other than DTH. As regards football rights and worldwide sports events, the contractual counterparts shall be granted a unilateral right to terminate contracts on a yearly basis.

(e) NewsCorp shall not acquire protection rights for DTH and will waive exclusive rights for pay-per view, video on demand and near video on demand on all platforms.

(f) NewsCorp shall not acquire, through future contracts or re-negotiations of the terms of the existing contracts, any protection or black-out right with respect to DTH.

Relations with competitors and third parties

(g) NewsCorp shall offer third parties, on a unbundled and non-exclusive basis, the right to distribute on platforms other than DTH any premium contents if and for as long as the combined platform offers such premium contents to its retail customers. Such offer will be made on the basis of the retail minus principle.

[61] Case No. COMP/M.2876 – Newscorp / Telepiù: http://ec.europa.eu/competition/mergers/cases/decisions/m2876_en.pdf

(h) NewsCorp shall grant third parties and possible new DTH entrants access to its platform and access to the application program interface (API) according to a cost-oriented non-discriminatory formula based on: directly attributable costs of the services, a share of relevant technical costs (fixed and common costs) and a reasonable return over an appropriate period. In the provision of access services, the combined platform shall not apply dissimilar conditions to equivalent transactions.

(i) NewsCorp shall procure that NDS shall grant to third parties on a fair and non-discriminatory prices basis licenses for its conditional access system (CAS).

(j) NewsCorp shall endeavour to enter into simulcrypt agreements in Italy as soon as reasonably possible and in any event within 9 months from the written request from an interested third party.

Divestiture of the DTT business and undertaking not to enter into DTT activities

(k) Divestiture of Telepiù's digital and analogue terrestrial broadcasting assets and commitment not to enter into any further DTT activities, neither as network nor as retail operator. The frequencies will have to be acquired by a company willing to include pay-TV broadcasting of or more channels in its business plan for the operation of the divested business after the switchover from analogue to digital terrestrial television broadcasting in Italy.[62]

The Commission determined that "the commitments presented by *Newscorp* are sufficient to resolve the identified anti-competitive effects in the relevant markets". One of the key interventions by the European Commission was the cap on the period of exclusivity to allow competitors to bid for premium content at more regular intervals. In this case, access to premium content was not mandated on a continuous basis. The effect of the regulation was to provide existing competitors and potential new entrants with the opportunity to bid for content that may otherwise have been denied to them due to exclusive dealing arrangements set over long periods of time.

Pay-TV as a separate market

The European Commission concluded in the NewsCorp case that the pay-TV market is separate to the FTA market in Italy. This view has also been established in other national markets by Commission decisions throughout Europe.[63] The Commission concluded that:

> *"…the market investigation has shown that in Italy, although there exists a dynamic interplay between free-to-air-TV and pay-TV, which has an influence on the penetration and the success of pay-TV, these are two separate markets at this point in time, similarly to the findings of previous Commission's investigations in the same sector."*

Although there are interactions between the pay-TV and FTA markets, in terms of analysing the impact on competition of dominant or monopolistic pay-TV providers, the market is considered separate.

[62] Newscorp / Telepiù, *Ibid*.

[63] See for example Case No. COMP/JV.37 – B Sky B / Kirch Pay TV: http://ec.europa.eu/competition/mergers/cases/decisions/jv37_en.pdf

Effect on access to content

While NewsCorp argued that "there is competition between pay-TV and free TV operators for the acquisition of rights", the Commission decided that in practice bidding was only available to pay-TV operators due to the business model of major film studios and sporting bodies. For example, for major sporting events such as Serie A and B football, the rights holders (in this case the football teams) prefer to sell to pay-TV operators to maximise stadium attendance.

The Commission therefore viewed NewsCorp's monopoly position in the Pay-TV market as a likely impediment to access in the absence of NewsCorp's commitments.

A.7 MALAYSIA

In Malaysia content access and related issues fall under the purview of the Malaysian Communications and Multimedia Commission ('SKMM') and the Minister of Information, Communication and Culture.

The most recent case in which content regulation was an issue in Malaysia involved exclusive distribution agreements for major sporting events. In response to complaints regarding the ability of ASTRO (a dominant market player with significant power) to monopolise the rights to broadcast certain high-demand sports events the Minister made a determination in February 2012[64].

This determination requires broadcasters who acquire the rights to broadcast any '*sports event of national significance'* to offer any FTA broadcasters first right of refusal over these broadcasting rights. Should no FTA broadcasters acquire these rights they must be offered to other pay-tv broadcasters. The determination also stipulates that this offer must be made on reasonable commercial terms.

The list of '*sports events of national significance'* includes *inter alia*:

- The Summer Olympic Games;
- The Commonwealth Games;
- The Asian Games;
- Certain Badminton Tournaments; and
- Certain Football matches (such as FIFA World Cup matches and the English Premier League Final).[65]

It was reported in the Malaysian press that the Minister had made content sharing mandatory for the listed events, meaning that the purchaser of the rights would be obligated to share the content. However, this is arguably not the case, as a requirement to offer first refusal would not constitute a requirement to share the content.

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[64] See www.skmm.gov.my/skmmgovmy/files/attachments/Min_Det_Sports_Events.pdf

[65] It should be noted that while the sports events of national significance refers to the final of the EPL there is no such final as the competition is a round robin competition.

A.8 SINGAPORE

In Singapore, content exclusivity first came under scrutiny in 2006 when SingTel appealed unsuccessfully to the Media Development Authority of Singapore ("MDA") to ban exclusive content such as the English Premier League ("EPL") on the grounds that it discourages competition. This issue was once again raised in 2009 when SingTel out-bid StarHub to secure the 2010-2013 broadcast rights for EPL.

The cross-media measure was first introduced by the MDA on 12 March 2010. The MDA had then revised the Media Market Conduct Code 2010 "as part of ongoing efforts to enable and maintain fair market conduct and effective competition in the media industry". [66] The revisions took effect from 12 March 2010 and *inter alia* included the incorporation of an additional Public Interest Obligation to enable mandatory cross-carriage of exclusive content that is acquired or renewed in the pay TV market on or after 12 March 2010. This means that exclusive content that is acquired or renewed from 12 March 2010 will be made available on a cross-carriage basis by 1 September 2010.[67]

The recent gazetted changes to the Code on 1 July 2011 requires the cross-carriage measure to be implemented from 1 August 2011. That is, from 1 August 2011, pay TV retailers who have acquired any exclusive content on or after 12 March 2010 ("Qualified Content") must widen the distribution of such content by offering it to other subscribers through the set-top boxes of qualified pay TV retailers. On 8 July 2011, the IDA designated SingNet Pte Ltd and StarHub Cable Vision Ltd to be Receiving Qualified Licensees pursuant to paragraph 2.7.2 of the Code.

Subsequent to the issuance by the MDA of the revised Code, the MDA received feedback that certain paragraphs within Appendix 4 of the Code could be drafted to reflect the MDA's policy intent. On 9 July 2012, the MDA announced amendments to Appendix 4 to provide greater clarity on the charging methodology which the MDA would adopt to if it was to determine a price or costs to be paid in the event of a dispute resolution.[68]

The changes made in 2011 aim to enhance consumer interest while creating business certainty for the industry. The cross-carriage measure in the Code does not apply to pay TV content delivered over the Internet and mobile platforms.

[66] The revisions took effect from 12 March 2010 and *inter alia* includes the incorporation of additional Public Interest Obligation to enable mandatory cross carriage of exclusive content that is acquired or renewed in the pay TV market on or after 12 March 2010.

[67] In clarifying what "cross carriage of content" entailed, the MDA clarified that while signing of exclusive carriage agreements are not prohibited, the cross-carriage measures will allow one retailer to leverage on another retailer's platform to widen the distribution of the former's channels. The content continues to be branded in its original form, and the subscriber relationship with the operator remains the same. As such, the content affected by the cross-carriage is not resold but merely carried on another platform.

[68] MDA, *Closing Note: Amendments to Appendix 4 of the Code of Practice for market conduct in the provision of Media Services 2012: Implementation of the Cross Carriage Measure*, 9 July 2012

The changes to the Code include:

- Consumers who wish to subscribe to the qualified content must be able to receive it within 5 working days of initiating the request with their respective pay TV retailers;
- All Qualified Content must be cross-carried in its entirety and in an unmodified and unedited form;
- Pay TV retailers are required to publish and maintain a list of Qualified Content on their respective websites and viewing guides to ensure that consumers have access to adequate information on Qualified Content;
- Pay TV retailers offering Qualified Content to its customers must do so at the same price, terms and conditions as that offered to its own subscribers; and
- Pay TV retailers are required to deal with customer feedback or complaints on a non-discriminatory basis.

It is important to note that the cross-carriage measures summarised in the Singaporean case study above differ from the cross-carriage measures implemented in other jurisdictions. This is because Singaporeans have the convenience and freedom of gaining access to all content available in the Singapore pay TV market, via a single set top box, for which they will be billed by the owner of that content.

A.9 SOUTH AFRICA

ICASA's position on the subscription broadcast market

In 2005 the Independent Communications Authority of South Africa ('ICASA') undertook a study of the South African subscription broadcast market, in consultation with industry stakeholders.[69] While access to content was considered an issue, and in particular exclusive dealing, ICASA accepted the view that exclusivity was often needed to attract and retain subscribers in the pay-TV market. Therefore, ICASA does not regulate the acquisition of exclusive content.

The only exception to this view is in the case of national sporting events, where ICASA enforces access. Section 60(1) of the *Electronic Communications Act 2005* is excerpted below:

Section 60

1. *Subscription broadcasting services may not acquire exclusive rights that prevent or hinder the free-to-air broadcasting of national sporting events, as identified in the public interest from time to time, by the Authority, after consultation with the Minister and the Minister of Sport and in accordance with the regulations prescribed by the Authority.*

   ...

Apart from the general provisions on competition law (discussed below) this is the only provision of South African law dealing with the issue of content access.

Criticisms of the South African approach

However, the position of the South African government and regulator has been challenged, including by the Competition Commission of South Africa. In a paper titled 'Preconditions of a Competitive Pay-TV Market: The Case of South Africa', Hardin Ratshisusu says of section 60:

"…(it) seems to only protect FTA vis-à-vis subscription television broadcasters. Any subscription service broadcaster could potentially acquire rights to broadcast sports of national interest and foreclose its direct competitors."[70]

The paper takes a favourable view of the European Commission's approach to regulating exclusive dealing in premium content. While acknowledging justifications for long-term exclusive contracts under certain circumstances, the author also stresses the "dampening effect" on competition. He states:

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69 www.icasa.org.za/Portals/0/Regulations/Working%20Docmuents/Subscription%20Broadcasting/Position-Paper-Subscription-Broadcasting-Services.pdf

70 www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-4A/Preconditions-of-a-competitive-payTV-market-the-case-of-SA-HR-2010-2010-Competition-conference-Wits.pdf

"It is therefore reasonable to conclude that for the pay-TV market to be competitive in South Africa there should at least be a framework for *ex ante* regulations to ensure that premium content acquisition from programme suppliers is not inhibited by the behaviour of the incumbent, and dominant, pay-TV provider."

South Africa's competition law

The *Competition Act*[71], which includes the 2009 amendments[72], covers problems posed by vertical integration and abuse of market power without specific reference to content access. Section 5 on restrictive vertical practices is excerpted below:

Section 5 Restrictive vertical practices prohibited

1. *An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.*
2. *The practice of minimum resale price maintenance is prohibited.*
3. *Despite subsection (2), a supplier or producer may recommend a minimum resale price to the reseller of a good or service provided –*
   - (a) *the supplier or producer makes it clear to the reseller that the recommendation is not binding; and*
   - (b) *if the product has its price stated on it, the words "recommended price" appear next to the stated price.*

Along with section 5, sections 8 and 9 of the Act deal with abuse of market power and price discrimination. The sections are excerpted below:

Section 8 Abuse of dominance prohibited

It is prohibited for a dominant firm to –

- (a) *charge an excessive price to the detriment of consumers;*
- (b) *refuse to give a competitor access to an essential facility when it is economically feasible to do so;*
- (c) *engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act out- weighs its technological, efficiency or other pro-competitive gain; or*
- (d) *engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive gains which outweigh the anti-competitive effect of its act –*
  - i) *requiring or inducing a supplier or customer to not deal with a competitor;*

[71] www.compcom.co.za/assets/Files/pocket-book-2005-R.pdf

[72] www.compcom.co.za/assets/Files/Competition-Amendment-Act.pdf

ii) *refusing to supply scarce goods to a competitor when supplying those goods is economically feasible;*

iii)*selling goods or services on condition that the buyer purchases separate goods or services unrelated to the object of a contract, or forcing a buyer to accept a condition unrelated to the object of a contract;*

iv)*selling goods or services below their marginal or average variable cost; or*

v) *buying-up a scarce supply of intermediate goods or resources required by a competitor.*

Section 9 Price discrimination by dominant firm prohibited

1. *An action by a dominant firm, as the seller of goods or ser- vices is prohibited price discrimination, if –*

(a) *it is likely to have the effect of substantially preventing or lessening competition;*

(b) *it relates to the sale, in equivalent transactions, of goods or services of like grade and quality to different purchasers; and*

(c) *it involves discriminating between those purchasers in terms of –*

i) *the price charged for the goods or services;*

ii) *any discount, allowance, rebate or credit given or allowed in relation to the supply of goods or services;*

iii) *the provision of services in respect of the goods or services; or*

iv) *payment for services provided in respect of the goods or services.*

2. *Despite subsection (1), conduct involving differential treatment of purchasers in terms of any matter listed in paragraph (c) of that subsection is not prohibited price discrimination if the dominant firm establishes that the differential treatment –*

(a) *makes only reasonable allowance for differences in cost or likely cost of manufacture, distribution, sale, promotion or delivery resulting from the differing places to which, methods by which, or quantities in which, goods or services are supplied to different purchasers;*

(b) *is constituted by doing acts in good faith to meet a price or benefit offered by a competitor; or*

(c) *is in response to changing conditions affecting the market for the goods or services concerned, including –*

i) *any action in response to the actual or imminent deterioration of perishable goods;*

ii) *any action in response to the obsolescence of goods;*

iii) *a sale pursuant to a liquidation or sequestration procedure; or*

iv) *a sale in good faith in discontinuance of business in the goods or services concerned.*

In 2009, the South African Parliament also amended the *Electronic Communications Act 2005* to include the following amendment to section 67:

Competition matters

Section 67

…

9. Despite the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry.'

See also ICASA '*Subscription Broadcasting Services: Position Paper*'[73] and Ratshisusu, '*Preconditions of a Competitive Pay-TV Market: The Case of South Africa*' (2010).[74]

[73] www.icasa.org.za/Portals/0/Regulations/Working%20Docmuents/Subscription%20Broadcasting/Position-Paper-Subscription-Broadcasting-Services.pdf

[74] www.compcom.co.za/assets/Uploads/events/Fourth-Competition-Law-Conferece/Session-4A/Preconditions-of-a-competitive-payTV-market-the-case-of-SA-HR-2010-2010-Competition-conference-Wits.pdf

A.10 UNITED KINGDOM

Introduction

In the United Kingdom, Ofcom had a number of concerns arising from Sky's market power. In particular, Ofcom was concerned[75]:

- That Sky, as a vertically integrated firm, with market power in a key upstream market, distributes its Core Premium channels in a manner that favours its own platform and its own retail business. It does so either by denying these channels to other retailers and / or other platforms, or by making it available on unfavourable terms. The effect can be to reduce consumer choice, and to inhibit the growth of innovative pay TV services. The increased importance of 'triple-play' bundles creates a further risk that this distortion will extend to the other services which are included in such bundles, notably broadband and telephony services. Sky's approach to the supply of Core Premium channels creates a position under which there is not, and there is not likely to be, fair and effective competition;
- That Sky is setting high wholesale prices for its channels in order to maximise wholesale profits. This can have the effect of keeping retail prices high; and
- About the unavailability of services based on particular types of subscription VoD rights, as a particular case of Sky favouring its own platform and retail business.

Sports Channels

Ofcom Review

After three rounds of consultation, in March 2010, Ofcom made three decisions in relation to Pay TV on 31 March 2010 as follows[76]:

- ***Sky Sports available on all platforms***: Sky must offer to supply Sky Sports 1 and 2 to other retailers at wholesale prices set by Ofcom;
- ***Sky pay services on terrestrial***: Ofcom gave conditional approval to Sky and Arqiva's request for Sky to offer its own pay TV services on digital terrestrial TV ("**Picnic**") but conditional on wholesale must-offer obligation of Sky Sports 1 and 2 being in place. This decision is also conditional on any movie channels included in Picnic being offered to other digital terrestrial TV retailers.
- ***Reference on movies***: Ofcom is to consult on a proposed decision to refer two closely related movie markets – for the sale of premium rights and premium movie services to the Competition Commission, with the view to asking the Commission to remedy the competition concerns that have been identified particularly in relation to restricted exploitation of subscription video on demand movie rights which cannot be adequately addressed by Ofcom.
- ***Innovation on HD:*** Sky must offer to wholesale high-definition versions of Sky Sports 1 and 2. Ofcom has not set wholesale prices of HD channels in order to promote future innovation although the prices must be offered on fair, reasonable and non-discriminatory terms.

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[75] Ofcom, *Pay TV Phase three* document – non confidential version, page 179

[76] Ofcom, *Pay TV Statement* dated 31 March 2010

On 29 April 2010, BSkyB reached an interim agreement with Ofcom to offer its flagship sports channels at a lower wholesale cost to Top Up TV, Virgin Media and BT Vision. This agreement between BSkyB and Ofcom resulted in the three competitors having access to Sky Sports 1 and 2 at an Ofcom mandated "wholesale must-offer" price for carriage on digital terrestrial and cable. This agreement was extended to include Real Digital in November 2010.

In July 2010, BT revealed plans to undercut Sky's prices by £10 a month, with Sky immediately responding by stating that it would raise its prices by £3 a month therefore driving up the wholesale cost to BT and forcing BT to provide the channels at a loss.

Some other key decisions are as follows:

- Sky had also attempted to block Top Up TV from distributing Sky Sports 1 and 2 via a conditional access module[77] but was subsequently forced by Ofcom to allow access in December 2010. Basically, Ofcom's decision would enable third party platforms to distribute Sky Sports channels without the use of a set-top box;
- In December 2010, Ofcom opened an investigation to consider a complaint by BT concerning the requirement on BT to provide Sky with information on BT Vision's total number of pay subscribers and total number of customers. The Ofcom decision on 29 March 2011 directed Sky to remove the clause from the agreement as it is in breach of one of the conditions in the television licensable content service licence; and
- In December 2010, Ofcom opened an investigation to consider a complaint by Virgin Media on the terms of wholesale supply by Sky to Virgin of Sky Sports 1 and Sky Sports 2 HD, that it is calculated on per device basis. A draft decision was issued to the parties in February 2011, and Virgin subsequently withdrew its complaint on 16 March 2011.

Competition Appeal Tribunal Ruling

On 8 August 2012, the UK Competition Appeal Tribunal ('CAT') announced its judgment in the appeals brought by BSkyB and others including the Football Association Premier League against Ofcom.[78] These appeals, brought before the CAT in 2010, challenged Ofcom's decision to require Sky to wholesale its Sky Sports 1 and 2 channels to rival retailers on other pay TV platforms at prices set by Ofcom. Ofcom's proposed intervention was based on its conclusions that:

(i) Sky, in its dealings with other pay TV retailers who sought access to its premium sports channels, did not engage constructively with their requests and withheld wholesale supply; and

(ii) the level of prices charged by Sky for its current wholesale supply of its premium sports channels to Virgin Media prevented it from competing effectively against Sky.

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[77] "Conditional Access Module" is an electronic device, usually incorporating a slot for a smart card, which equips an integrated digital television or set-top box with the appropriate hardware facility to view conditioned access content that has been encrypted using conditioned access system.

[78] See www.catribunal.org.uk/237-6545/1157-8-3-10--The-Football-Association-Premier-League-Limited.html

The CAT examined the evidence in relation to both of these issues, and has concluded the evidence did not support Ofcom's conclusion that Sky has deliberately withheld wholesale supply of its premium sports channels in order to weaken its competitors and that in part regulatory gaming by other parties to the negotiations played a role. The CAT has also found that Sky's prices for the existing supply of its premium sports channels to Virgin Media are not anti-competitive. CAT has invited further submissions from the parties on the appropriate ruling for Ofcom to take in accordance with section 195(3) of the *Communications Act 2003*.

New English Premier League Rights ('EPL') Deal

Interestingly, during the CAT hearing Ofcom petitioned CAT to reopen the proceedings on the case, as a result of the EPL auction of rights. Such rights sold to a consortium of Sky and BT for £3.018 billion deal for domestic TV rights for three years.[79] The agreements, which start from the 2013-14 season, are a remarkable 70 percent increase on the current contract. Sky will show 116 games a season - the maximum allowed for one station (cost £2.28 billion over 3 years)- and BT will show a 38 games (cost £738 million over 3 years). Sky has been awarded live rights across all platforms, including satellite, cable, IPTV, online and mobile.

BT will launch a new interactive 'football-based' channel to its BT Vision carry its 38 Premier League games from the 2013-14 season and could distribute it to 'other platforms' like Sky or Virgin. The company is yet to release full details and pricing in 'due course', but non-BT customers could expect to pay around £10 per month.

Movies

Initial Competition Commission findings

In August 2010, Ofcom requested the Competition Commission to investigate the sale and distribution of subscription premium Pay TV movies following the March 2010 decision.[80] In particular, Ofcom was concerned about the way in which the movies were sold and distributed, creating a situation in which Sky has the incentive and ability to distort competition. The referral refers to two specific markets: (i) the rights to movies sold by major Hollywood studios to broadcast films for the first time on pay TV; and (ii) the wholesale supply of pay TV packages containing movies channels, which are based on those rights.

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[79] See www.dailymail.co.uk/sport/football/article-2158825/Premier-League-sell-TV-rights-3-billion-BT-Sky.html

[80] Ofcom cannot address these concerns fully using its powers and has referred them to the Competition Commission. The Commission has a maximum of two years to investigate and reach a decision on this issue.

In February 2011, the Competition Commission issued a paper entitled "Profitability of Sky"[81] and said that Sky is making "excessive profits" from its sky movies service. The Commission's preliminary findings was that the prices at which Sky wholesales its movie channels to other broadcasters are too high, Sky's contracts with the six major Hollywood studios means no rival operators can afford to risk bidding for them and that Sky prevented BT and Virgin Media from developing a business selling films on demand via subscription by warehousing or buying without using the exclusive right to let viewers watch film on demand via subscription.

On 19 August 2011, the Competition Commission issued its provisional decision and found that Sky's contracts with the six major Hollywood studios presented a significant barrier to entry to potential competitors and that prices charged by Sky was too high.

The key recommendations from the Competition Commission are:

- Restricting the number of major studios from which Sky may license exclusive "first subscription pay-television window";
- Restricting the nature of the "first subscription pay-television window" rights which Sky can license from the major studios (e.g., so that rights for distribution methods such as subscription video on demand could be made available to other providers); and/or
- "Must retail" measures requiring Sky to acquire movies on a wholesale basis and offer to its subscribers any movie channel containing "first subscription pay-television window" movie content created by a rival.

Final Competition Commission Findings

On 23 May 2012, which was subsequently confirmed on 2 August 2012,[82] the Competition Commission found that there have been a number of material developments in the market. They reappraised their previous analysis in the light both of these developments found there are no features of the relevant market(s) that, either alone or in combination with each other, prevent, restrict or distort competition such that there is an adverse effect on the market.

In its final report, the Competition Commission has concluded that Sky Movies, which currently offers the first pay movies of all the big Hollywood studios, is not a sufficient driver of subscribers' choice of pay-TV provider to give Sky such an advantage over its rivals when competing for pay-TV subscribers as to harm competition.

The Competition Commission found that:

- More consumers attach importance to other service attributes, like having access to a broad range of content and to price, than they do to seeing recent movie content;

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[81] See www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2010/movies_on_pay_tv/pdf/wp_2012_profitability_of_sky

[82] www.competition-commission.org.uk/assets/competitioncommission/docs/2010/movies-on-pay-tv/main_report.pdf

- The launch of new and improved movie services by Netflix and LOVEFiLM, which reflects an increasing trend of audio-visual content being delivered over the Internet, has increased competition and consumer choice; and
- The recent launch of Sky Movies on Now TV gives consumers for the first time a choice of subscribing to Sky Movies separately from their subscription to other pay-TV content (from whichever provider).

While the Competition Commission considers competition in the pay-TV retail market overall remains ineffective but we were asked by Ofcom to look specifically at the role of first pay movie content and Sky's position with regard to these rights. We have concluded that this content does not provide Sky with such an advantage when competing for pay-TV subscribers as to harm competition and thus are not proposing any remedies. They went on to indicate that were there to be a material change in the circumstances this might warrant renewed scrutiny of these issues.

A.11 UNITED STATES

Regulation of content access in the United States is framed by the long standing Program Access Rules which prohibit vertically integrated cable operators from:

(i) Significantly "hindering or prohibiting" a competing retailer from making programming available to subscribers or consumers;

(ii) Discriminating in the prices, terms and conditions of sale or delivery of channels to competing retailers; or

(iii) Entering into exclusive contracts with cable retailers unless the Commission finds the exclusivity to be in the public interest.

Such rules were promulgated by the US Federal Communications Commission ('FCC') following the promulgation by Congress of *Cable Television Consumer Protection and Competition Act 1992*. While the Program Access Rules expire in October 2012 due to an in-built sunset clause the FCC has indicated that they will not try to renew them even though they have been very effective with a satellite company (DirecTV) being the largest provider after Comcast. Following their expiry smaller companies will be able to lodge complaints about anti-competitive behaviour from vertically integrated providers to the FCC under normal competition rules. The FCC believes that this should be a sufficient safeguard.

Having said that, with the convergence in the sector, such issues have been the subject of further regulatory scrutiny by the FCC.

Over-the-top Content

Since cable networks began offering video-on-demand ('VOD') services, the widespread availability of the Internet has seen much of this content move online. Cable companies such as Comcast in the United States have sought to exploit to this transition, but they face competition from newcomers like Netflix who operate solely as online content providers.

Access to online video content is growing rapidly. In 2011 the number of viewers who watched full-length television shows was 72.2 million, compared to 41.1 million in 2008. This growth in online content could have a significant impact on the regulatory environment, and particularly on access to content.[83]

The Senate Committee on Commerce, Science & Transportation recently conducted a hearing into the state of over-the-top ('OTT') video content in the United States. Titled '*The Emergence of Online Video: Is It the Future?*' the hearing covered the evolution of video distribution and the implications for online competition and regulation.

While OTT has the potential to offer greater choice and accessibility for consumers, some argue that traditional market operators such as the major cable networks and Internet service providers have an incentive to limit its growth. In his written statement to the committee, Barry Diller, Chairman of IAC, said:

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[83] http://commerce.senate.gov/public/?a=Files.Serve&File_id=7c681d31-d73c-4ad7-9722-b87c2c1b6182

> *While all of this competition is good and healthy, the online video marketplace is still in its very early stages of development. Netflix's online video streaming service – the largest in the world – is only five years old.*
>
> *Incumbents have the means and incentive to engage in economic and/or technical discrimination against online video distributors. The FCC has sought to protect consumers against some of the technical means of discrimination in its Open Internet rules; but those rules may not survive judicial scrutiny. Even if they do, cable and telecom companies are experimenting with forms of economic discrimination at the margins of current law.*[84]

The most commonly criticised practice is data capping, where large cable and wireless carriers can restrict the growth of emerging online video services by placing limits on monthly downloadable data. David Hyman, Netflix's general counsel, said, "*When you couple limited broadband competition with a strong desire to protect a legacy video distribution business, you have both the means and motivation to engage in anti-competitive behaviour*."[85]

Cable companies such as Comcast have begun to loosen these data caps. In 2008, Comcast introduced a cap of 250 GB of data usage per month. The company is now trialing a data usage management approach, which started in May 2012.[86] This new system involves multiple tiers for usage allowance, starting with 300 GB of data and increasing with each tier. Users can also purchase additional data usage in 50 GB blocks. Comcast claims that when data caps were first introduced in 2008, they were above even heavy residential data use.

> *With the passage of time, it's important to remember that the purpose of the usage threshold was simply to ensure that all of our customers were treated fairly and had a consistent and superior experience while using our high-speed data service. That has been and will be our sole goal. We've never had any intention to limit the lawful use of the Internet or restrict our customers' ability to view online video.*[87]

However, Comcast's online competitors claim that the data cap is still too low, and reflects the lack of competition Comcast faces for high-speed Internet.

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[84] *Ibid*.

[85] www.reuters.com/article/2012/06/27/us-internet-data-caps-idUSBRE85Q1PM20120627

[86] http://blog.comcast.com/2012/05/comcast-to-replace-usage-cap-with-improved-data-usage-management-approaches.html

[87] *Ibid*.

Comcast Case

Comcast is the Unites States' largest cable company by subscribers. As of December 2011 Comcast's cable systems served 22.3 million video customers, 18.1 million high-speed Internet customers and 9.3 million voice customers. The Cable Communications segment of Comcast is the largest, generating 67 percent of consolidated revenue and 83 percent of operating income before depreciation and amortisation.[88]

In the *Comcast-NBC Universal case,*[89] Comcast and NBC Universal agreed to contribute all their programming assets to a joint venture that would be 51 percent owned by Comcast. The US Department of Justice feared that Comcast could use its control of a joint venture that owned valuable programming to prevent the entry and growth on online video distributors, a group of new entrants into video programming distribution. More specifically, the FCC considered Comcast's ability to harm its distribution rivals by engaging in three possible exclusionary strategies:

(i) Permanently cutting off a rival from access to the joint venture's video programming;

(ii) Temporarily withholding that access; and

(iii) Raising rivals' costs by increasing the price of programming to video distribution competitors. All of these strategies involved forms of input foreclosure. As a remedy, the parties were required to license programming to those distributors.

In closely coordinated enforcement efforts, both the FCC and the Department of Justice permitted the transaction to proceed after imposing (the FCC) or accepting in settlement (the DOJ) various conditions. Most mechanisms expire after 7 years unless extended by the Court.

In the *Comcast* decree, the FCC on-line distributors must be allowed two options for acquiring programming from the joint venture, namely:

- Distributors will be able to license programming at the same terms available to multichannel video programming distributors. As Comcast does not compete with many of those distributors, those terms may be good proxies for competitive terms; and
- Distributors will be allowed to license programming from the joint venture that is "comparable in scope and quality" to the programming that they receive from one of the joint venture's "programming peers."

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http://files.shareholder.com/downloads/CMCSA/1954679865x0x561695/79426950-eb48-4e46-a761-f999d155a226/BookmarkedComcast10K.pdf

[89] Competitive Impact Statement, *U.S. v. Comcast Corp.*, Case No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011) www.justice.gov/atr/cases/f266100/266158.htm and FCC - http://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf

The decree also provides that Comcast must abide by certain restrictions on the operation and management of its Internet facilities. This was viewed necessary, as Comcast would have the ability and the incentive to undermine the decree's effectiveness as it is the dominant high-speed ISP in much of its footprint and therefore could disadvantage online video distributors in ways that would prevent them from becoming better competitive alternatives to Comcast's own video programming distribution services. Such distributors are dependent upon ISPs' access networks to deliver video content to their subscribers. Without the protections Comcast would have the ability, for instance, to give priority to other traffic on its network, thus adversely affecting the quality of such online distributors services that compete with Comcast's own services. Comcast also would be able to favor its own services by not subjecting them to the network management practices imposed on other services.

APPENDIX B: SUMMARY OF SELECTED ONLINE SPORT OFFERINGS IN AUSTRALIA AND THE UNITED STATES

Exhibit B.1 Summary of AFL's consideration of its own television service[90]

The AFL may be considering launching its own television-like service, where customers gain access to content (such as broadcasting of games) directly from the AFL rather than by dealing with third parties (FTA television or Foxtel).

This is based on talks with the NBN Co about its new multicast service, which would allow simplified (and inexpensive) one-to-many broadcast over its new fibre network.

Currently the AFL distributes footage of matches via a four year exclusive rights deal, whereby 7 Network, Foxtel and Telstra Bigpond collectively paid AUD1.25 billion for the rights to broadcast games over FTA, Subscription TV and IP/Mobile Devices.

However, last year the AFL created a new media unit which now has 105 staff. This means that the AFL is now a significant content creator beyond the broadcasting of football matches. It now has a presence in both print and digital reporting in relation to its sport. When coupled with the possibilities of new fibre-based technologies, it is in a position to potentially bypass third parties and deliver content and services directly to consumers, while also gaining increased control over its products.

The AFL has most likely been in talks with NBN Co about using its Multicast service, which could see the AFL with access to a market of 100,000 fibre-enabled premises by this time next year, who would be able to purchase content directly from the AFL. This number would be expected to grow rapidly as the NBN Co's fibre rollout progresses.

AFL believes this would be an Australian-first service, and other sporting codes and industries both in Australia and elsewhere will be analysing it to determine its potential applications in other markets. As Multicasting requires less bandwidth than video-on-demand services, this potential is high.

[90] See SMH, AFL *mulls new TV-like service*, 20 August 2012. Available at www.theage.com.au/business/afl-mulls-new-tvlike-service-20120819-24gi6.html

Exhibit B.2 Summary of major sporting codes online offerings direct to consumers

Code	Product Name	Description	Pricing\
AUSTRALIA			
NBL	NBL.TV	The National Basketball League has signed a deal with sports media group Perform Media to have all games of the iiNet NBL Championship televised live across multiple digital platforms. The multi-year deal will see each game broadcast via an NBL TV subscription service for mobile, tablets, PCs and IPTV; fans will be able to view TV matches simulcast and other games live and on any platform via a login to NBL TV.	A full season pass to NBL TV will be priced at AUD79
UNITED STATES			
Major League Baseball	MLB.TV MLB.TV Premium	Live streaming of MLB games throughout the season including an archive of past games. The standard package makes viewing available on PC or Mac while the premium option makes the '*At Bat 12'* app free which allows for viewing over mobile devices as well. The premium service also allows access to both the home and the away team feeds of games, which viewers can choose between while watching the game.	Standard: USD19.99 per month or USD39.99 per year. Premium: USD24.99 per month or USD49.99 per year.
NBA	NBA.TV NBA League Pass	• NBA.TV has exclusive rights to broadcast up to 4 games per week including some playoff games. • NBA League Pass allows subscribers to view up to 40 out-of-market NBA games per week and includes a subscription to NBA.TV. The full number of games is available on the premium package, there is a cheaper alternative which allows viewers to choose 7 teams to watch. • Both of these services are blacked out when a game is being broadcast on either a local or national TV network. • The League Pass subscription includes an archive of all games played in the regular season which I maintained until the end of that season.	NBA.TV: USD5 per month NBA League Pass: Information is not available for the current season due to international IP address restrictions, however prices for the 2010-2011 season were Premium: USD189.95 for the regular season and Choice: USD119.95 for the regular season. The finals/playoff games were are an additional package which cost USD69.99 for the 2011-2012 season.

Code	Product Name	Description	Pricing\
NFL	NFL GamePass	There are three levels of this service. • Season Plus gives access to all NFL games for the pre-season, regular season and post season, including the upcoming superbowl. It includes access to NFL Network 24/7 and an archive of all games from the 2009-2012 seasons which is available after the season has ended. • Season access gives the same access as the Season Plus package except it does not include post-season games or the superbowl, and its access to archives finished when the season ends. • The Team Package has the same coverage as the season package except it only allows viewing of the games played by one team which must be chosen by the subscriber.	Season Plus Package: USD204.99 for the 2012 season Season Package: USD134.99 for the 2012 season Team Package: USD114.99 for the 2012 Season
NHL	NHL Game-center Live	This service allows subscribers to view up to 40 out-of-market games per week live on a variety of devices, including mobile devices and smart TVs. It includes all functions usually found on a DVR including live rewind and the ability to restart the game footage. It is possible to watch multiple games at once with multiview. This service also includes a subscription to the NHL archives including every game since 2008 and many historical games from before then. Like the MLB premium package it includes access to both the home and away commentary feeds for any games shown.	Current cost information is not available as the season is over, however in past years this service has cost approximately USD20 per month.

Source: Windsor Place Consulting analysis, August 2012