

Convergence of Telecommunications, Broadcasting and the Internet: A Regulatory Perspective

Convergence of content across platforms – such as broadcasting, telecommunications, and the Internet – presents great opportunities. With the opportunities come considerable challenges, including the prospect of shifting concentration of control of content and content delivery platforms. There are other challenges as well, such as content regulation across broadcasting and internet platforms.

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1. Executive Summary

Convergence throws up many opportunities and challenges. Traditional telecommunications is in a quite different regulatory paradigm than, for example, the traditional broadcasting paradigm.

Some already understand the opportunities and challenges. Those people have a significant advantage.

Convergence brings with it multiple ways in which content can be delivered. Potentially this reduces barriers to entry and is pro-competitive.

However, with those opportunities come challenges. A provider with substantial control in one area (eg, a broadcaster with exclusive premium sport rights) can skew the market, creating barriers to entry. Bottlenecks in relation to content and its delivery can move from one place to another. The regulatory and competition challenges move as content and its delivery moves.

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Additionally, sufficient diversity of media that is providing content, such as news, can be an issue. There may need to be a sufficient number of different media providers (or “plurality”, to use the lingo). New Zealand should consider whether to introduce laws that encourage sufficient diversity (plurality) in the media.

A major dynamic, for traditional and new media, is the switch over of free-to-air TV from analogue to digital.

The “... equilibrium shift in the balance – and competitive interaction – between ... free-to-air

and pay TV platforms¹ may have significant impact, not just on traditional broadcasting, but also as to new media as well.

Against this background, Government has commenced a regulatory review of digital broadcasting. Key are the effects of convergence. Therefore, new content platforms such as TV over the Internet, and over mobile, will be considered.

Should there be a specialist regulator covering spectrum, broadcasting and telecommunications, given the increasing overlap? We think the answer is "Yes".

A specialist regulator (which includes much of the role of the Telecommunications Commissioner) should, largely driven by resource considerations, be located within the Commerce Commission. But other models are possible.

In this paper, we focus on Australia, the UK and the EU, to give examples of how these issues are being handled, including in relation to content regulation (to deal with inappropriate or harmful content).

We overview a useful current example – in the UK – of the sort of issues emerging in this converged environment: BSkyB's acquisition of 17.9% of the shares in ITV, at a time when Virgin Media had made a takeover offer for ITV.

We focus on some areas where bottleneck controls exist or can change. That includes:

- the control of premium sport content on various delivery platforms;
- whether channels must carry certain content; and
- the importance of the Electronic Programming Guide (EPG).

Getting the balance right between regulation, market forces and Government intervention (such as funding of public broadcasting and the digital transition) is difficult. That is so, given factors such as:

- the dynamic nature of the industries; and
- how hard it is to predict which way things will go.

However, there is a view that this does not mean that nothing should be done. Rather, regulatory intervention should be carefully considered.

¹ See the Office of Fair Trading BSkyB report referred to below at paragraph 7. The reference is to the UK environment but it is likely to apply equally here.

To the fore must be incentives to invest, along with sufficient regulatory certainty.

As content and the way it is provided converges, the market definitions that regulators use are likely to change as well. Sometimes, market changes in this area can have counter-intuitive effects. There is a useful recent paper from the ACCC Chairman which conveniently identifies some of these issues.

Content regulation (such as in relation to harmful content) also is not a simple issue. It is unlikely there is a "one size fits all" solution. A common approach overseas has been to have greater control over content regulation where content is "pushed" (linear transmissions such as broadcasting) rather than where it is "pulled" (that is, non-linear such as the use of video on demand, the Internet etc).

We have focused on the interplay between traditional broadcasting and new media, and its overlaps with telecommunications.

There is much else happening ranging from the Googles through to individually-generated content providers such as MySpace.

There is a glossary on page 12 which will help decode the many acronyms used in this area.

2. Convergence and Regulation: An Overview

Government has commenced a regulatory review of digital broadcasting.² The effects of convergence are key to the review. New content platforms such as TV over the Internet (IPTV) and over mobile (eg, 3G) will be considered.

Big initiatives like free-to-air (FTA) digital television, unbundling the local loop, operational separation of Telecom, etc, are significant. But in isolation they don't address all the challenges of convergence of content and its delivery.

Convergence and media controls can move bottleneck controls from one point to another.

There are multiple ways in which content is created and delivered. Often the same content can be provided by several channels, such as free-to-air (FTA) or pay TV, the Internet, mobile phones, etc.

Competition implications of convergence: Convergence, and the multiple ways in which content can be delivered, potentially opens up

² *Review of Regulations for Digital Broadcasting: Terms of Reference.*
http://www.med.govt.nz/templates/MultipageDocumentT_OC_27318.aspx.

additional channels to market. It potentially reduces barriers to entry, and is pro-competitive.

However, with those opportunities come challenges. It may in practice be anti-competitive, and providers can structure things so that the outcomes are anti-competitive.

Premium Sport: Because it is such a fundamental part of business models, we'll use premium sport as an example.

As Sky in New Zealand has said, the key driver for uptake of its subscriptions is premium sport.³ Consumers often buy pay TV subscriptions largely driven by the sport content.

Internationally, a frequent bottleneck is premium sport, such as rugby, and premier league soccer, etc.

Control of access to premium sport can skew the market from a competition perspective, creating barriers to entry for new and existing entrants. The TV broadcaster that has those premium sports rights has considerable advantage as against other broadcasters.

Content platforms that don't have that premium content will find it increasingly difficult to compete. Take, for example, the move to triple-play (voice, video, and data) and quad-play (which adds mobile to the triple-play mix). An ISP, or a mobile provider, that is precluded from access to premium content, may struggle to compete against competitors that have the premium content service.

This could happen for example as a result of a joint venture between a pay TV channel and a mobile provider and/or ISP. Or it could happen when a pay TV channel acquires an ISP and provides a bundled offering.

An ISP or equivalent supplier that gets the right to broadcast premium sport content over broadband may get bottleneck control as against other providers. That ISP could be owned by the TV broadcaster (so the possible anti-competitive effects of aggregation could be a risk). Or it could be another provider (an Xtra, an ihug, etc getting content from Sky). Various permutations are possible, including in relation to supply of content over mobile.

A UK example is the acquisition by the main UK pay TV operator (BSkyB) of UK ISP, easynet. This enables BSKyB to provide services bundled with Internet offerings.

Pro-competitive effects of convergence: While some variations can lead to bottlenecks and anti-competitive outcomes, others can be pro-

³ Commerce Commission decision 573 (Sky) relating to the acquisition of Prime TV by Sky.

competitive. For example, supply of sports content over multiple platforms (TV, broadband, WiMax, mobile phones, etc) may be positive depending on ownership, access, and other market conditions. Much depends on the detail. What might be pro-competitive could be anti-competitive if a different approach is taken.

Challenges: This presents major challenges. Other countries are increasingly concluding that generic competition law,⁴ and existing regulatory agencies,⁵ cannot handle these problems alone. This has led to substantial regulatory change and activity.

New Zealand is coming to this late as we note in our online article, *Update: Demystifying What's Happening in New Zealand Telecommunications Regulation – June 2007*.⁶

What may be happening in New Zealand is that, with focus on legacy issues such as LLU, savvy operators are proceeding "under the radar" and quietly consolidating their position in relation to media control and also new developments such as the Next Generation Network (NGN).

Regulatory silos: Traditionally, each of the content delivery mechanisms has been treated in its own silo from a regulatory perspective. For example, broadcasting is regulated in a different way than telecommunications and the Internet.

This may need to change with the increasing evolution toward convergence.

That's challenging.

Other countries recognised these problems some time back. For example, in 2003, the United Kingdom converged its radio communications, broadcasting and telecommunications regulators into one regulator: the highly effective Office of Communications (Ofcom).

The Australians did something similar in 2005 with the formation of the Australian Communications and Media Authority (ACMA).

Currently there is the high profile debate in Australia about cross-media ownership regulations. Additionally, the Australian equivalent of our Commerce Commission (ACCC) is focussing on the broadband, telecommunications and pay TV markets in relation to premium content and the potential stifling of competition.⁷

⁴ Such as our Commerce Act.

⁵ Such as our Commerce Commission, Telecommunications Commissioner, MED etc.

⁶ <http://www.wigleylaw.com/Articles/LatestArticles/demystifying-what-s-happening-in-telecommunication/>

⁷ *Regulating media and broadcasting networks in a changing media environment*. Speech by ACCC Chairman Graeme Samuel (March 2007).

The UK and other European countries have seen much regulatory activity such as in relation to:

- BSkyB (the main UK pay TV provider) and the regulatory attack on its acquisition of a minority shareholding in free-to-air channel ITV (which also has content and news interests). We set this out as an example in more detail below;
- a move, driven by the regulator, for the Football Premier League to auction rather than sell match broadcast rights (this has led to two providers splitting the live coverage between them in the current year); and
- an Italian pay TV merger clearance which included conditions allowing competitors of the merged pay TV operation to have access to bottleneck activities.

New Zealand review: In New Zealand, the Ministry for Culture & Heritage, working closely with the Ministry of Economic Development, has commenced a regulatory review, *Review of Regulation for Digital Broadcasting: Terms of Reference*.⁸

Initially the issues are being researched by Government. Then there is to be public consultation on the basis of that research, and an options paper produced for public review. The public aspect (in particular, submissions) is timetabled to happen between September and November 2007. Then there will be recommendations to Cabinet (for regulatory change or otherwise). This is timetabled for December 2007, although this seems very tight to deal with these complex matters.

An issue that might be up for review is the prospect that Sky TV could be required to provide certain content across its service (a “*must carry*” obligation).

Another is that Sky may be required to include particular programmes in what will be increasingly important: its Electronic Programming Guide (EPG). The EPG comprises the programme listing on the Sky service that allows quick selection of programmes, ease-of-recording using the MySky service, etc.

The EPG will increasingly become the main mechanism by which consumers access content. As it is so significant, in Australia, for example, specified channels are required to include reference to other broadcasters’ content (if requested). They must do so in a way which is fair. For example, the reference to public service channels can’t be left lurking at the bottom of the EPG.

<http://www.accc.gov.au/content/index.phtml/itemId/781929/fromItemId/8973>

⁸ http://www.med.govt.nz/templates/MultipageDocumentTOC_27318.aspx

All these issues raise challenging and complex competition and regulatory matters. There are few simple answers.

Also up for consideration in the regulatory review is likely to be the desire to both (a) encourage competition and also (b) meet public good needs (such as public broadcasting).

These are complex issues but Government, with its firm intervention in telecommunications, demonstrates a willingness to engage.

As well as competition issues, the review will cover areas such as regulation of content (such as porn), copyright, etc.

This also is challenging. For example, can and should the standards imposed on broadcasters by the Broadcasting Standards Authority be applied to the Internet? It may not be possible to have a uniform approach across traditional broadcasting, as well as mobile and Internet content platforms. But various solutions are possible (as Australian initiatives and the current EU *Audio Visual Media Content Without Frontiers Directive* demonstrate).

Government’s review is a particularly important and challenging initiative.

3. The New Zealand Market, and the Analogue Switch Off

There is an international move away from analogue broadcasting to digital. In New Zealand, while Sky’s satellite service is digital (DTT), its terrestrial transmissions, and those of the free-to-air (FTA) providers, have been analogue.

Transition from analogue to digital is particularly significant. A United Kingdom regulator⁹ has described the digital switchover there as something which “*could well culminate in an equilibrium shift in the balance – and competitive interaction – between the UK’s free-to-air and pay TV platforms*”.

It can be expected to have flow-on effects to other content platforms as well, such as the Internet, mobile and WiMAX.

A report by Spectrum Strategy Consultants for the NZ Ministry of Culture and Heritage notes the net cost benefits from the transition to digital at NZ\$230M.

The analogue to digital transition will take a number of years (finishing, at latest, in 2015). In the meantime, FTA channels will run simultaneous digital and analogue transmissions. This is being undertaken via a consortium (funded in part by Government) called Freeview. Its members are

⁹ The Office of Fair Trading in the BSkyB decision noted below.

TVNZ, CanWest, Māori TV and Radio New Zealand. Other providers, local, regional and national, including Sky FTA subsidiary, Prime, could also join the Freeview service.

As part of the policy settings, TVNZ received additional funding to provide further channels (without which it is said that their FTA service might not survive).

In May, Freeview launched its satellite (DTH) service carrying existing free-to-air channels. The terrestrial service (DTT) starts later this year.

TVNZ and CanWest have each agreed to launch two more channels by 2008. Other potential providers may start niche channels although this probably needs to wait until there is sufficient uptake of the Freeview service.

Over time we will see ramped-up publicity around the Freeview service and correspondingly greater purchase of the required equipment (set top boxes etc).

There is the need for allocation of appropriate spectrum both during and after the switchover from analogue to digital.

While opening up opportunities, these changes also bring regulatory and policy setting challenges.

These are illustrated by Sky's concerns that the approach should be one of fairness, that Sky are allocated spectrum equitably, and so on.¹⁰

Unlike many countries, New Zealand does not have a widespread cable network. This is limited to Wellington and Christchurch, via the TelstraClear service. Therefore, Sky is the sole pay TV provider (apart from this limited TelstraClear service).

The FTA providers using the Freeview platform will transmit via a combination of digital satellite (DTH) and terrestrial (DTT), utilising Kordia services (including satellite capacity purchased by Kordia).

Digital services will increasingly move to high definition TV (HDTV), a higher quality of service. This will require additional spectrum (whether broadband or Internet band width).

The Spectrum Strategy Consultants' report above concludes that IPTV penetration will only be about 19% of the population by 2025, although of course this is hard to predict. It's expected that there will be integrated IPTV/DTH and IPTV/DTT set top boxes (STBs). As the technology becomes more

user-friendly, further integration and convergence can be expected.

Already there are some developments in the New Zealand scene. For example, Sky and Vodafone have an arrangement by which Vodafone's 3G phones can take eight Sky channels.

Additionally, TVNZ has just launched its "On Demand" Internet service, which extends current Internet access to programmes. However, in the short term, the Internet will face challenges in competing with the traditional "one-to-many" broadcast services.

Wholesale between providers: Reference to the Sky and Vodafone relationship brings up the important aspect of wholesale arrangements between providers. This is where bottlenecks might be created. For example, this can happen if a content provider makes available content to another platform provider in an unduly limited fashion. We come back to this below when addressing market conditions. We observe that the *BSkyB* case noted below has wholesale issues. Also Ofcom is currently addressing these issues with a further report due out around this time.¹¹

Getting it right: There are fast changing commercial and technology models. There is also uncertainty as to how the markets will emerge. Therefore, getting the right regulatory and policy settings is difficult.

That does not mean that nothing should be done. Overseas, it has often been concluded that doing nothing is not the right answer. It is best to have an optimal mixture of regulation, Government assistance, and leaving developments to the market itself. Ensuring incentives to innovate - and creating regulatory certainty - will always be an important consideration.

Anti-siphoning: New Zealand does not have so-called "anti-siphoning" legislation which applies in Australia. This legislation empowers Government to list events that should be available on free-to-air television for viewing by the general public. Anti-siphoning may be one option that Government can look at in its current review. Anti-siphoning laws are designed to prevent pay TV broadcasters from buying monopoly rights to televise certain major events, before FTA television have a chance to bid on them.

Generally, those laws allow pay TV to seek to purchase the rights only if FTA television has declined to bid on them.¹²

¹⁰ Some of Sky's concerns are conveniently set out in its submission to MCH and MED on the Ministries' discussion paper on analogue switch-off dated 16 February 2007.

¹¹ See Ofcom, *Review of wholesale digital television broadcasting platforms – Update of review* (10 October 2006).

¹² For more information see http://www.minister.dcita.gov.au/media/media_releases/u

4. Some Policy Issues

Some of the policy and regulatory challenges include:

- Whether a service (pay TV and/or FTA) should have a “must carry” obligation in relation to certain content.
- Whether the all important Electronic Programming Guide (EPG) for pay TV (Sky) and/or FTA (eg, Freeview and/or specific channels) must contain reference to particular programmes (whether or not those programmes are broadcast on that channel).

Sky has already acknowledged that it will include FTA programmes that are rebroadcast on its service, in its EPG.¹³ But it has not confirmed that it will include programmes that are not rebroadcast by Sky.

The Australian solution is to:

- require inclusion of programmes in the EPG whether or not they are broadcast on the pay TV channel; and
- for those programmes to be given equitable representation in the EPG (that is, they are not just despatched to the end of the EPG).

There are a number of useful policy papers, some of which are referred to elsewhere in this paper.¹⁴

Among various OECD reports there is the useful January 2007 paper, *Policy Considerations for Audio-Visual Content Distribution and a Multiplatform Environment*.¹⁵

While there are a large number of complex and competing policy considerations, the following passage from that report provides a useful overview, when dealing with the opportunities and challenges of convergence:

“It has become easier to make a wider range of content available to more audiences. It could be said that convergence contributes to plurality and diversity, as it lowers market entry barriers. As Arino said: “First privatisation and now digitalisation have multiplied the number of channels available, and therefore, the number of potential voices. As services are personalised, the power of influence and the ability to control mass viewing habits would appear to be

[se it or lose it guidelines released for anti-siphoning sport.](#)

¹³ See the Sky submissions referred to above.

¹⁴ See also *Future Broadcasting Regulation*, an independent report by Robin Foster commissioned by the UK Department for Culture, Media and Sport (January 2007).

¹⁵ <http://www.oecd.org/dataoecd/21/41/37868139.pdf>

reduced. On this basis, some argue that strict regulations governing the protection of pluralism are no longer necessary.” (Arino, 2004, p99). IPTV may well contribute further to this diversity.

On the other hand, having more can also mean just more of the same. It could mean that Internet TV provides more choice of channels but market forces alone do not achieve the desired plurality of voices in the media. As Arino puts it: “The quality of channels and interactivity available in the delivery networks does not itself guarantee free consumer choice.....Plurality of players does not per se lead to diversity of content. In some circumstances increased competition can lead to a reduction in the range of goods.

The solution here is not to reduce competition in one way or another, but to develop or maintain complementary policy to create the circumstances in which competition does contribute to the different kinds of plurality: plurality of ownership, of content diversity and of “voices”. These all may require different if overlapping policies, from market regulation to content quota. Market definitions and a thorough understanding of market developments are crucial here. Convergence leads to an increased supply of broadcast services. Viewers will have a greater possibility to choose between platforms and/or different operators on the same platform. But many barriers to competition still exist. Full competition between providers of transmission services is not necessarily enough to provide full competition between content providers.”¹⁶

5. What are the Relevant Markets?

A primary issue for Government is whether the existing regime (in particular, the Commerce Act) is adequate to deal with the New Zealand environment. Australia, for example, has specific access and media cross-control legislation which we don't have.

The changing commercial and technology models also open up the question about how markets should be defined to enable consideration of competition/Commerce Act issues such as whether there is substantial lessening of competition in a particular market.

In a useful paper, which demonstrates some of the opportunities and challenges in this area, the ACCC Chairman, Graeme Samuel, addresses these issues.

¹⁶ Ibid at page 28.

With more ways of getting content to consumers,¹⁷ he notes that there may be a shift in market analysis from the **way** in which information is delivered to the actual **products** that media companies offer.

In assessing media merger situations, for example, he says there are likely to be three main categories to investigate: “the supply of advertising opportunities for advertisers; the supply of content to consumers; and the acquisition of content from content providers.”¹⁸

In some circumstances, specific products such as premium content and delivery of news will be relevant.

As noted above, control of premium sport content is key to the position of Sky. The European regulator moved to deal with this issue by requiring the football league to auction broadcasting rights for the premier league. Currently BSkyB has rights to broadcast some games and one of its competitors broadcasts other games.

Thus it is at least possible that the NZ Rugby Football Union could get embroiled in these issues.

For a useful summary of the issues see the Ministry of Culture & Heritage (MCH) paper, *Digital Television Strategy*.¹⁹

For an interesting and challenging perspective see Professor Eli Noam’s commentary, *Why TV regulation will become Telecom regulation*.²⁰ Professor Noam concludes that traditional media-centric regulation will ultimately become driven by Internet and telecommunications regulatory models.

6. Who are the Regulators? An Overview

New Zealand: Our general competition regulator is the Commerce Commission. For the subject of this paper, the Commission acts mainly under the Commerce Act, dealing with issues such as mergers and acquisitions, anti-competitive conduct etc.

Such regulators are often asked to clear transactions, like Sky’s acquisition of free-to-air channel, Prime.²¹

In relation to telecommunications, supplementing the Commerce Commission activities are those of

the Telecommunications Commissioner (who is based in the offices of the Commerce Commission).

Telecommunications spectrum is handled by MED as it is for broadcasting spectrum.

In addition, broadcasting is regulated by a combination of agencies ranging from the Broadcasting Standards Authority to MCH, NZ On Air, etc.

United Kingdom: In 2003, the United Kingdom merged its broadcasting, spectrum and Telco regulators²² into one regulator, Ofcom. Ofcom is strongly resourced.

The UK has a body similar to the Commerce Commission (namely the Office of Fair Trading (OFT)). As the *BSkyB* case noted below illustrates, the OFT can refer matters (as can Ofcom in certain circumstances) to the UK Competition Commission.²³

The UK has specific cross-media legislation. In New Zealand, this is left to general competition law. For example, a UK media provider cannot buy more than 20% of the shareholding in certain media organisations.

A key driver of the UK legislation is to maintain sufficient plurality (that is, diversity of media), to avoid undue aggregation.

The issue of plurality is not just one for a competition regulator. It is both a social and an economic issue.²⁴

Ofcom is undertaking a number of reviews. Particularly relevant for New Zealand at present is its *Review of Wholesale Digital Television Broadcasting Platforms*.²⁵

We deal, in the section below in relation to content regulation, with the role of Ofcom, which is limited to regulating content as to broadcasting but not on the Internet.

Australia: Australia has a general competition regulator (ACCC). ACCC also undertakes much of the work that would otherwise be within the New

¹⁷ *Regulating media and broadcasting networks in a changing media environment* (Australian Broadcasting Summit 2007 – 5 March 2007).

¹⁸ *Ibid* at page 8.

¹⁹ <http://www.mch.govt.nz/publications/digital-tv/index.html>.

²⁰ Ofcom, 2006.

²¹ Determination 573 Commerce Commission.

²² Such as Ofcom and the Broadcasting Standards Commission.

²³ Via a reference by the Secretary of State for Trade & Industry. There are also appeal rights from certain decisions of Ofcom to a specialist tribunal, the Competition Appeal Tribunal.

²⁴ As noted by ACCC’s Chairman, Graeme Samuel, *Regulating media and broadcasting networks in a changing media environment – 5 March 2007* (ACCC) at pages 9 and 10.

²⁵ See the *Update of Review* dated 10 October 2006: A consultation document, which will be valuable for New Zealand, was due out in or around April 2007.

Zealand Telecommunication Commissioner's domain (such as regulated access to services).

In parallel, there is a communications and media regulatory body, the Australian Communications & Media Authority (ACMA). This was formed in 2005 by the merger of two regulators²⁶ into one: ACMA. ACMA is responsible for the regulation of broadcasting, radio communications, telecommunications and online content. It has a key responsibility in relation to the new cross-media legislation introduced in September 2006.

In relation to content regulation, ACMA is involved across the board as we note below.

7. What should Regulators in New Zealand look like?

We believe that New Zealand should move expeditiously to a regulatory body similar to Ofcom and ACMA that covers broadcasting, telecommunications, radio communications and the Internet. Having these roles separated will become increasingly difficult.

For a recent example, the Telecommunication Commissioner's review of mobile services demonstrated the difficulty of (a) MED dealing with spectrum and (b) the Commissioner dealing with other aspects of mobile services. Ideally this should be dealt with by one agency.²⁷

The real issue will be how optimally to structure a new regulator, and how that body relates with other bodies, such as the Commerce Commission.

ACMA and Ofcom provide different models to consider (there are of course others too).

Where should that regulator be based? There are arguments that the new regulator (the equivalent of Ofcom and ACMA) should be outside the Commerce Commission (just as the Electricity Commission is outside the Commerce Commission, with each Commission having overlapping roles).

This is, in part, because the media and communications regulator would have a wider and slightly different role than that of the Commerce Commission.

However, there is real concern about the unavailability of sufficient staff to populate yet another stand-alone organisation. Additionally,

²⁶ The Australian Communications Authority (ACA) and the Australian Broadcasting Authority (ABA).

²⁷ Mobile roaming regulation involves consideration of "three legs of a stool" that could be regulated: spectrum, co-location and roaming. Spectrum currently is the responsibility of MED. Co-location and roaming lie with the Telecommunications Commissioner. Yet all three should be considered together.

the issues handled by each regulatory body frequently overlap.

The same sort of problem crops up in the energy sector. Australia addressed this issue by locating its new Australian Energy Regulatory (AER) within the general regulator (ACCC) rather than as a stand alone organisation. This seems us to us to be a good model. See our article, *Is a Stand Alone Industry Regulator the Only Way? Australia has a great example from the energy sector.*²⁸

We consider a new regulator should be established within the Commerce Commission, but that is clearly not the only model.

8. United Kingdom Example: BSkyB, ITV and Virgin Media

Introduction: This is a great current example of how various areas, ranging from traditional media through to the Internet, will increasingly be handled. It demonstrates the challenges that are faced.

The regulators' review of the UK Sky channel, BSkyB's, acquisition of ITV shares is a current example of where things are heading.

BSkyB: BSkyB (which is 40% owned by the Rupert Murdoch News Corp Group) is the leading pay TV provider in the UK. It has also sold over 2,000,000 Personal Video Recorders (PVRs), that is, technology by which consumers can watch audio-visual programmes on a non-linear or pull basis rather than a traditional broadcasting linear or push basis. In other words, the viewer chooses what and when he or she watches.

Additionally, BSkyB has purchased ISP, easynet. So, it owns an Internet presence. It bundles that Internet service with its pay TV operations.

In addition, Murdoch's News Corp owns 36% of the UK newspaper market (including the Sun, the Times and the News of the World).

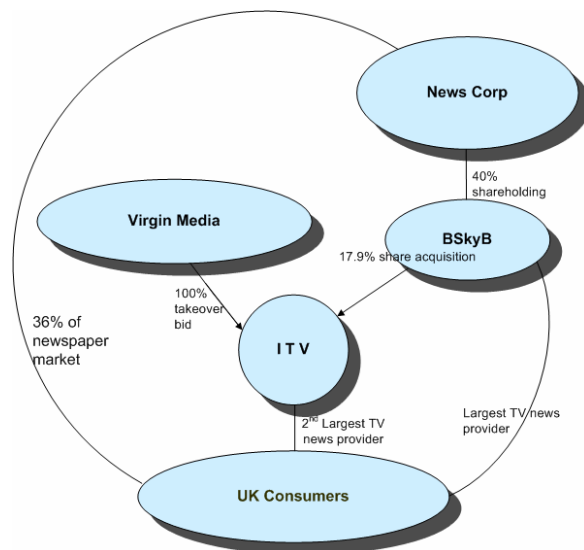
In November 2006, BSkyB bought 17.9%²⁹ in the content and free-to-air provider, ITV.

ITV is the leading commercial free-to-air (FTA) player in the UK.

Additionally, BSkyB and ITV are the first and second largest providers of TV news services to consumers (25.8% and 4.6% respectively). Further, they provide news content to other service providers.

²⁸ <http://www.wigleylaw.com/Articles/LatestArticles/is-a-standalone-industry-regulator-the-only-way-au/>

²⁹ Under the media cross ownership rules in the Communications Act 2003 (UK), BSkyB cannot raise its stake in ITV beyond 19.9%.



They provide other overlapping services.

Virgin Media: At the time of the share acquisition, NTL, now called Virgin Media, was looking to buy the entire troubled group, ITV.

Commentators like Sir Richard Branson claimed that the BSkyB move – to buy a minority shareholding – was designed to stop Virgin Media from buying ITV.

As the Guardian reported on 20 November 2006:

“Sir Richard Branson lashed out at Rupert Murdoch’s BSkyB yesterday, accusing the satellite TV group of a cynical attempt to control the British media by buying nearly a fifth of ITV.”

The Virgin tycoon’s attack sets the stage for a bitter struggle between the two businessmen over the fate of ITV, Britain’s leading commercial broadcaster, which has been hit by dwindling advertising revenues and declining audiences. ...

‘This move is seriously damaging to the interests of viewers, programme makers, artists and shareholders and the time has come for regulators, politicians and consumers to finally show that they are willing to stand up to reckless and cynical attempts to stifle competition and secure creeping control of the British media’, Sir Richard said.

BSkyB defended its business record since it was founded in 1989:

‘In its short history Sky has increased competition in the fast-changing media and now broadband and telephony sectors and has consistently been first at giving consumers more choice in entertainment and a wide range of innovations that they enjoy.’

Typical Rhetoric: This is the kind of rhetoric that is so often heard between incumbents and challengers in many industries. This time the regulators, so far, have accepted the challengers’ attack. It looks like Sir Richard will have *“his day in court”*. However, the reasons given by the regulators don’t relate to blocking out Virgin Media’s potential acquisition of ITV. Rather, they relate to other competition and media aggregation issues.

Regulatory Action: On 24 May 2007, the Secretary of State for Trade and Industry referred BSkyB’s acquisition to the Competition Commission for review.³⁰

The Competition Commission will consider whether the acquisition is anti-competitive. It will also consider whether it meets the English statutory requirements around sufficient plurality (that is, whether there is a sufficient range of parties controlling media enterprises serving relevant audiences).

The way the UK legislation works is that the Secretary of State requests a review of the transaction by the Office of Fair Trading and by Ofcom. The Office of Fair Trading (OFT) reported on competition aspects.³¹ This is similar to a Commerce Commission review. Ofcom reported on the plurality issues.³²

Report from Office of Fair Trading: The general competition regulator (OFT) undertook the sort of market analysis that would be undertaken by our Commerce Commission. It concluded that there may be substantial lessening of competition in four markets: (1) all TV; (2) premium pay TV; (3) television advertising; and (4) acquisition of premium sports rights.

Although only 17.9% was acquired, OFT concluded that there may be common control between BSkyB and ITV for a number of reasons. This included the reality that, at ITV’s AGMs, given that only around 65% of shareholders vote, BSkyB could have at least 25% of the total votes. This means that, as in New Zealand, BSkyB would be in a position to block special resolutions (which require a 75% majority).

Additionally, the relationship is such that there could be other activities that could then dampen competition (such as joint bids between ITV and a third party, for premium sports rights).

³⁰ Reference by the Secretary dated 24 May 2007.

³¹ *Acquisition by British Sky Broadcasting Group plc of a 17.9 per cent stake in ITV plc – Report to the Secretary of State for Trade and Industry – 27 April 2007 (URN 07/1055).*

³² *Ofcom – Report for the Secretary of State pursuant to Section 44A of the Enterprise Act 2002 of British Sky Broadcasting plc’s acquisition of 17.9 per cent shareholding in ITV plc – 27 April 2007.*

BSkyB accepted that there are no efficiency-enhancing effects from the acquisition. Given no efficiency-enhancing effects, particularly important is the “... *digital switch over commencing in 2008 [which] could well culminate in an equilibrium shift in the balance – and competitive interaction – between the UK’s free-to-air and pay TV platforms*”.³³

As OFT noted, there is an inherent margin of error in all predictive merger assessments “... *not least when the markets are dynamic and possible effects are not all short-run in character. However, particularly where an equilibrium shift appears likely in the near future, the costs of error, and particularly of a mistake in clearance, are potentially high*”.³⁴ Thus the OFT concluded that the acquisition “*presents a risk of strategic harm to competition at an important juncture in the industry’s development and over a long term*”.³⁵

OFT was able to come to this conclusion without having to rely on other potential bottlenecks caused by the potential ability of BSkyB to use its blocking stake in ITV, to prevent the latter from pursuing new media platform options such as IPTV, Mobile TV etc.

These issues are at an embryonic stage. OFT noted “*Particularly where BSkyB has similar intentions [to ITV’s intentions] to provide a service across a new [media] platform, it would have a strong incentive to reduce potential competition, by preventing or delaying a strategic alliance or joint venture between ITV and another third party which combined would create a relatively stronger constraint on BSkyB*”.³⁶

Report from Ofcom: Ofcom’s job was to review whether there is sufficient plurality of parties with control of the media enterprises serving each audience. In doing so, it had particular regard to news channels, given the ability of merged news providers to control too much of the media, influence opinions, and set the political agenda.

It was claimed, for example, that the News Corp newspapers throughout the world all came out in support of waging the Iraq war.

With ITV and BSkyB amounting to over 30% of the national TV news audience, and News Corp having 36% of national newspaper sales, Ofcom concluded there may not be sufficient plurality of media providers.

Based on the Ofcom and OFT reports, the Minister has referred the acquisition to the Competition Commission.

Implications for New Zealand: The acquisition of free-to-air Prime TV by the dominant pay TV channel, Sky, was only reviewed under the general competition law by the Commerce Commission.³⁷ This is the type of analysis that the Office of Fair Trading undertook. Particularly significant is the OFT observation that the switchover from analogue to digital could in itself culminate in an equilibrium shift in the balance and competitive interaction. This same observation really extends to all developments in New Zealand’s converged environment.

While pro-active regulation may be important, care will be necessary in getting the balance right. The facts and circumstances are different here.

As to the Ofcom role, query whether cross-media legislation (including to deal with plurality issues) is necessary in New Zealand, and whether such an acquisition (like the Prime acquisition by Sky and similar transactions) should be reviewed, in the future, not only by a competition regulator but also by a specialist industry regulator.

In this smaller economy, it will always be challenging to deal with issues such as this, given less scale and the limited resources, etc.

However, there is still a considerable amount at stake, not only in money terms but also in terms of the risk of aggregated media control in relation to public interest concerns, freedom of the press, and so on.

It may be that some participants, whether in telecommunications, the Internet, broadcasting etc, will rely on this limited regulatory overview and resourcing, to push the boundaries (knowing that cases take years to pursue and they are expensive to run). This is a real issue.

9. Protective and Proactive Content Regulation

Traditional broadcasting and other media typically are subject to:

- **Protective** content regulation (to deal with inappropriate or harmful content, protect privacy, and protect minors);
- **Proactive** content regulation (which promotes content themes such as provision of children’s programming and encouragement of domestic production).

While there are potential regulatory backstops, the latter (proactive content regulation) is handled in New Zealand outside regulation (for example the TVNZ Charter, Government funding of Māori TV, and the activities of New Zealand On Air).

³³ OFT report para 7.

³⁴ OFT report at para 79.

³⁵ OFT report at para 78.

³⁶ OFT report at para 252.

³⁷ Determination 573.

Here we will focus on protective content regulation.

Traditional broadcasting in New Zealand is subject to regulatory review by the Broadcasting Standards Authority (BSA).³⁸

Additionally, for that and other content, including online, there is the general censorship legislation: the Films, Videos, and Publications Classification Act 1993.

Developing a regime targeted at all ways in which content is delivered, including online, has its challenges. A solution applicable to all platforms may not be a possible or even the optimal outcome.

For further detail see the November 2006 report to BSA and MCH, *Issues facing broadcast content regulation*.³⁹

Here we are dealing with the same sort of content (such as programmes, films etc) which can be delivered over different “pipes” such as TV, the Internet, mobile phone etc. Self-generated content (blogs, MySpace, etc) is likely to be subject to a quite separate regime such as combination of:

- self-regulation (eg, a code produced by InternetNZ in relation to the Internet and by the Telecommunications Carriers Forum in relation to mobile content; and
- the Films, Videos and Publications Classification Act 1993.

It's unlikely that a regime similar to the BSA Codes will be extended in its entirety to other platforms including the Internet and mobile phones. The two different BSA codes for FTA and pay TV illustrate this point. The latter is less stringent than the former, reflecting the greater control available via pay TV. (Only those over the age of 18 can purchase the service; it's possible to control access to programmes by PIN access; and so on.)

A distinction may be drawn between whether the platform is linear (push), such as FTA, or a non-linear (pull) platform such as the Internet.

As the viewer has greater control at the non-linear end of the spectrum, less stringent controls are often said to be appropriate.

There is not, however, a simple distinction between non-linear and linear, nor even a simple

continuum between the two. Take for example, Sky's Video On Demand recorder service, MySky. While it is a non-linear service, it is based on a linear service.

Additionally, mobile phones are used in an environment where minors are less controlled than they might be with a TV or even an Internet service. According to research in the report to BSA and MCH noted above, 73% of people in the 12-19 age range have mobile phones.

Countries are moving to solve these issues in various ways. Co-regulation is a common model: a code is agreed between a particular industry sector (eg, mobile operators or Internet providers) and the relevant regulator.

Who should regulate content?

There are also issues around whether there should be a combined regulator dealing with content regulation. Ofcom, for example, has responsibility for content regulation in respect of broadcasting (a linear platform). However, the Internet is left to self regulation (via a code put out by the Internet Service Providers Association). Video On Demand is also self-regulated (via ATVOD).

In Australia, on the other hand, the combined regulator, ACMA, has responsibility across all platforms. It takes a co-regulatory approach.

Europe: In May 2007, political agreement was reached to introduce a new EU directive to replace the long-standing *Television Without Frontiers* directive. This is the *Audiovisual Media Services Without Frontiers* directive. It is likely that EU countries will need to implement this directive within around two and a half years.⁴⁰

The directive recognises that traditional broadcasting is linear or “push” in nature and new media tends to be non-linear (“pull”) in nature. As the consumer has more choice in the non-linear “pull” environment, the censorship regime is less intrusive in the new media “pull” environment.

The traditional model remains for existing broadcasting.

One commentator notes that this distinction may still remain, in reality, on the basis of traditional divisions between the EU's Information Society's sector on the one hand and its broadcasting sector on the other.⁴¹ Yes, these quirks continue to drive regulation!

³⁸ This form of regulation will be limited by the definition of “broadcasting” in the Broadcasting Act which, arguably, can apply to many forms of transmission of content via the Internet. The BSA Codes apply, in relation to the Internet, only to programmes which are also transmitted via normal TV or radio.

³⁹ A Millwood Hargrave, G Lealand, P Norris, A Stirling.

⁴⁰ For more detail, see <http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/708&format=HTML&aged=0&language=EN&guiLanguage=en>.

⁴¹ H Lutz, *The Distinction between Linear and Non-linear Services in the New Proposal for an Audiovisual Media*

Like most regimes, there is particular focus on the protection of children.

Australia: In April 2007, a Bill was introduced to amend the Australian online content monitoring regime. This is designed to remove uncertainty as to whether the current regime adequately covers convergence, particularly in relation to mobile devices such as 3G cell phones.

For background see the Internet Industry Association's summary⁴² which includes links to the Bill as well as its explanatory statement (the opening pages of the explanatory statement provide a useful summary).⁴³

10. Universal Service Obligations (aka TSO)

We briefly comment on this topic which is under review currently by Government. That is not surprising, given the challenges:

- in rolling out telecommunications in rural areas;
- the implications of next generation networks (NGNs); and
- the reality that telecommunications is not just about voice traffic but increasingly about data and broadband.

Interleaved with these issues is convergence overall, including content and the way in which it is delivered.

Government therefore has significant decisions ahead of it as to how the methodology on which it will ensure provision of universal service, who is to provide it and how it is to be funded.⁴⁴

11. Glossary

ACCC	Australian Consumer & Competition Authority
ACMA	Australian Communications & Media Authority
Conditional Access	Access other than free-to-air (FTA): in particular subscription services such as Sky
DTH	Direct-to-Home via Satellite (or

Directive [2006] Computers and Telecommunications Law Review 141.

⁴² http://www.iiia.net.au/index.php?option=com_content&task=view&id=551&Itemid=32

⁴⁴ For a useful policy paper see the OECD report, *Rethinking Universal Service for a Next Generation Network Environment* – 18 April 2006.

	DVBs)
DTT	Digital Terrestrial Broadcast (or DVBT) (via UHF spectrum)
DTV	Digital TV
DVB	Digital Video Broadcast
EPG	Electronic Programming Guide (such as the programme details that come up when Sky's "guide" button is pushed)
FTA	Free-to-Air
HDTV	High definition TV. Digital television is likely to move to this high quality service which also requires greater wireless spectrum (or broadband)
IPTV	Television delivered via the Internet
Linear	Traditional means of viewing broadcast programmes, on a "push" basis, as opposed to viewing on a "pull" basis (non-linear)
MCH	Ministry of Culture & Heritage
MED	Ministry of Economic Development
Non-Linear	See Linear
Ofcom	UK Office of Communications
OFT	UK Office of Fair Trading
Plurality	Also known as diversity. Whether there is sufficient plurality raises the question of whether there is a sufficient range of parties controlling media enterprises serving relevant audiences
PVR	Personal Video Recorder
STB	Set top box, for example, the set top box required for the Freeview service or the set top box required for the Sky service (MySky has an STB which allows satellite access as well as PVR functionality)

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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