

- ARTICLE -

Pie in the Sky? The Political Economy of the Failed Vodafone-Sky Merger

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Abstract

In June 2016 Sky Network Television Limited, New Zealand's predominant satellite pay-TV operator, and Vodafone Europe BV applied to the New Zealand Commerce Commission¹ for clearance to enter into a \$3.44 billion merger. The proposal was for Sky TV to acquire 100% of the shares in Vodafone New Zealand Limited while the latter's European parent company would acquire a controlling 51% stake in the post-acquisition Sky Network Television Limited. The primary motive was the opportunity to develop new triple or quadruple-play bundles of landline, mobile, internet and audiovisual content in response to the emergence of new subscriber video-on-demand services. The 'Skodafone' application was opposed by rival commercial interests in the telecommunications and television sectors who argued that the merged entity would have the ability and incentive to develop bundles of services including Sky's premium sports content (notably New Zealand rugby) against which rivals would be unable to compete. Sky and Vodafone argued that premium sports was not 'must-have' content for market entry into subscriber video-on-demand (SVOD) services, pointing to Spark's development of Lightbox in 2014 and the launch of Netflix in 2015. After numerous cross-submissions from various stakeholders, in April 2017 the Commerce Commission's final determination declined the application. Although Vodafone and Sky lodged a legal appeal against the ruling, they subsequently decided not to pursue the case.

Arising in the same timeframe as the (also declined) NZME-Fairfax merger application, the Vodafone-Sky case is symptomatic of several intersecting structural conditions in the New Zealand media ecology: deregulation, financialisation and convergence. On one level, the drive for consolidation and vertical integration can be regarded as a direct response to these pressures. However, there are also institutional-level contingencies which shape how structural pressures are articulated into decision-making as well as contested normative and epistemic assumptions about the definition of media markets, the nature of the public interest and the

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implications of the merger for competition. Drawing on document analysis of the merger submissions, this article analyses the significance of the Vodafone-Sky case through a critical institutionalist perspective and examines the key factors shaping the outcome. It concludes that while the Commission's decision was correct, it would be premature to conclude that existing competition law is sufficiently robust to prevent public interest considerations being subordinated to those of financial investors. Rather, the Commission's decision serves to underline the extent to which the commercial imperatives of the corporate media have sought to secure the political-economic conditions for accumulation by exploiting New Zealand's historically feeble regulatory framework.

Introduction

The Commerce Commission's decision to decline the Vodafone-Sky application for clearance to merge (Commerce Commission 2017)² was welcomed by rivals in the New Zealand media sector as well as by consumer and civic interest groups. The proposed \$3.44 billion merger would have entailed a double transaction whereby Sky Network Television Ltd. acquired Vodafone NZ, while the latter's parent company, Vodafone Europe BV, took a 51% holding in Sky. The vertical integration of Sky's subscription satellite free-to-air television channel (Prime) and subscriber video-on-demand service (NEON) with Vodafone's landline, mobile and internet services would have allowed the merged entity to develop new bundles of services potentially including triple/quadruple-play packages.³ While the applicants touted the consumer benefits of the new services, critics of the merger argued that the bundling of premium content (especially live sports) with broadband and mobile services would give 'Skodafone'⁴ too much market power. Although Vodafone and Sky initiated an appeal of the Commission's ruling through the High Court, arguing that various benefits of the merger had not been given adequate weighting (Bell Gully 2017; NZ Herald 2017), this action has now been discontinued.

The Commerce Commission's announcement of the final determination in February 2017 saw \$293m (17%) wiped off Sky's share price (TVNZ: Dann 2017), suggesting the likelihood of this outcome had not been factored into investor expectations. Indeed, the *Financial Times* called it a 'surprise decision' (Fildes 2017) while other market analysts suggested the decision was 'the first time a regulator has taken converged services into consideration with regards to competition' (BMI Research 2017). This might be taken as confirmation that competition law in New Zealand (primarily the *Commerce Act 1986*)⁵ is adequate, especially given the Commission's subsequent (and even more contentious) decision in April 2017 to decline the NZME-Fairfax merger application. However, there are both structural and institutional complexities in the 'Skodafone' scenario which preclude such a conclusion.

Although the Commerce Commission's decision was essentially correct and welcomed by many stakeholders, the determination reflects a media ecology in which the level of concentration and convergence now means that any new merger between the dominant players is potentially liable to have repercussions across multiple media sectors. Despite the

Commission's recent decisions, the *Commerce Act* has not prevented the emergence of media market structures characterised by a primary duopoly with a handful of peripheral competitors: Spark and Vodafone in the telecommunications sector, TVNZ and Mediaworks in the free-to-air-television sector, NZME and Mediaworks in the commercial radio sector, Fairfax and NZME in the print/online news sector, and (arguably) Sky and Netflix in the subscription content sector. Indeed, the current legislation has not deterred market incumbents from pursuing further mergers to increase their market power (as the NZME-Fairfax and Vodafone-Sky cases underline). The protracted deliberations and deployment of expensive legal and economic expertise required to defend the public interest from corporate opportunism are symptomatic of the weakness of existing regulatory frameworks for the media sector.

Theoretical and Methodological Framework

Drawing on document analysis of the merger submissions, this article analyses the political-economic issues arising from the Vodafone-Sky case through a critical institutionalist framework (see Winseck 2011 2016; Thompson 2011a; Fitzgerald 2012; Cunningham and Flew 2015). To do so, it examines the regulatory and economic conditions under which the merger initiative arose and the institutional context and interplay of interests which ultimately led to the proposed deal being declined. It lays out the basic features of the broadband/mobile and pay-TV services and markets implicated in the failed transaction, and the companies involved. The institutional context and interplay of interests which ultimately led to the deal's denial are also identified and examined.

The Vodafone-Sky merger case exemplifies the deeply contested normative and epistemic assumptions that underpin the structure, operation and dynamics of media markets and competition in the New Zealand media ecology. Almost all the corporate actors in the Vodafone-Sky case employed expert legal teams and/or commissioned specialist economic reports to support their claims.⁶ The Commerce Commission responses likewise reflect the imperative to legitimate its deliberations and final determination through explicit demonstration of legal and economic correctness. Methodologically, the respective submissions from the parties involved in the merger review process are a valuable resource which reveal the institutional interests, values and discourses in play.

This article uses these resources and the decisions and actions of media companies and regulators to analyse the run of events along three intersecting levels (see Figure 1). The first level concerns macrostructural configuration of relations among state, capital and civil society, the relative predominance of which shape the media sector and in turn are shaped and legitimated through the media sphere (see Galtung 1999; Thompson 2012b 2014). This level of analysis also considers the implications these configurations have for the media ecology, notably in regard to deregulation, financialisation and convergence. The

significance of these factors for the merger is discussed in more detail in the subsequent sections.

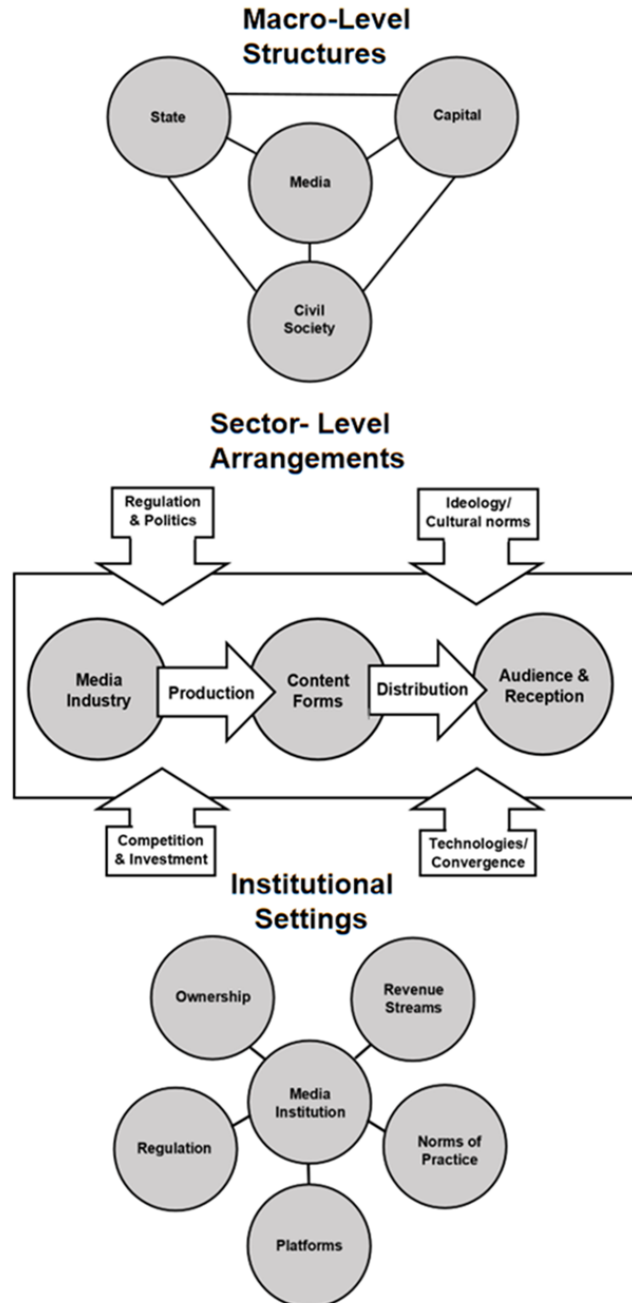


Figure 1: Levels of media analysis (source author)

The second level concerns the way these structural pressures are articulated through the respective media sectors (in this case pay-television/subscription video and broadband/

mobile services). The evolution of cross-platform competition and the reconfiguration of established value chains have significant implications for sector-specific regulatory provisions as new ambiguities and blind spots have emerged. Changes in audience behaviour, including willingness to pay for on-demand content and expectations of access through multiple platforms/devices also manifest on the sector level. The intensification of competition for premium content vertically integrated with the multiple channels of distribution and reception are particularly salient to the merger case.

On the third level, the articulation of structural and sectoral conditions is considered in relation to the ownership priorities, regulatory conditions, revenue streams, platforms, and operational norms of practice of the respective actors involved. This more granular level of analysis is important to explain how interests, institutional priorities and behaviours evolve contextually in response to competition, regulatory intervention, and technological change, how potential channels/modes of action are exploited, negotiated or foreclosed, and also how ostensibly similar institutions may perceive and respond to structural and sectoral level pressures in different ways.

Media policy and regulatory practices are often (mis)construed as being impartial, technical processes which verify and evaluate the facts of a case objectively, while market competition is often conceived as a natural condition liable to be distorted through regulatory intervention. These conceptions, however, overlook the extent to which policy definitions, problems and objects are themselves constructed (Edelman 1988; Shaw 2010; Thompson 2011b) and therefore always deeply political and normatively inflected (Freedman 2008; Maddison and Denniss 2009). In this respect, regulatory scenarios like mergers might be regarded as the political-economic front line wherein institutional contests of normative and epistemic legitimation are played out. This also directly informs the point of intervention for critical praxis as well as the normative orientation of the institutionalist framework, specifically in prioritising values and outcomes aligned to civic interests (see Thompson 2012b) as the benchmark against which the claims of the various counterparties are assessed.

Conducting this kind of analysis in a merger scenario is complex, not least because much of the business data underpinning a merger and acquisition transaction and review is redacted under commercial confidence provisions. Nevertheless, the documentation that is available is valuable because it manifests the different agendas and values that the various parties bring to bear on the process. The submissions made by various stakeholders are obviously rhetorically motivated and reflect the respective vested interests of its sources (see Deacon et al. 2009; Sapsford and Jupp 2006). The empirical, conceptual and legal claims made by Vodafone-Sky and, the opponents of the merger (including the author)⁷ and the Commerce Commission itself, were subject to intense disputation throughout the review process.⁸ Each party's submission typically aims to (de)legitimate the preferred (opposed) outcome they

are seeking from the Commerce Commission through technical legal interpretations of the *Commerce Act* and court precedents, as well as quantifications of efficiency benefits/detriments using formal econometric models. Given the level of commercial redactions and the complexity of validly inferring the real institutional agendas at work behind the public submission, the significance of the manifest content of the primary source material itself is not always self-evident. Instead, it needs to be read with all of the above considerations in mind and in reference to the structural, sector and internal factors motivating the institutions in question. In this case, this was informed not only by critical academic reflection but also through praxis, i.e. engagement with the submissions process itself (Thompson 2016).

Deregulation

The first key structural factor which underpins the Vodafone-Sky merger case is deregulation, or, perhaps more accurately, re-regulation in the sense of regulatory change to serve the interests of capital rather than civil society. The ‘Rogermonics’ reforms in the late 1980s saw New Zealand’s media sector transformed into one of the lightest-regulated in the OECD. There are no specific regulations limiting cross-media holdings, no requirements for anti-siphoning to ensure free access to culturally significant sports events, no minimum local content quotas, and (despite recent reviews of convergence regulation) still no net neutrality requirements to prevent internet service providers ‘throttling’ content-streaming from rivals or zero-rating preferred services.⁹ With the exception of some modest public broadcasting and local content subsidies, the policy framework since the 1980s has implicitly assumed that media market failures can be best offset by promoting and removing barriers to investment and market competition.

Competition laws were relaxed in the 1986 *Commerce Act*, which also established the Commerce Commission, to enforce consumer protection laws and provide anti-trust oversight of markets. Although the Commission does have statutory powers (and since 2001, plays a role in setting telecommunication wholesale prices), its role emphasises the maintenance and promotion of market competition as a mechanism for serving the long-term interests of New Zealand consumers, whereas the previous 1975 Act emphasised a broader conception of public interest (see Ahdar 1992). In that respect, the 1986 regulation could be regarded as pro-market re-regulation premised on a more commercial conception of consumer interests.

The Commission’s interventions in media markets through the 1990s suggested a default tendency to accommodate market incumbents, especially when market power accrued incrementally, rather than through a single major transaction (Thompson 2011b). Particularly after the 1987 financial crisis and the ensuing recession, the prevailing policy agenda prioritised further reduction of state-ownership and public spending while

incentivising greater foreign investment. The public telecommunications monopoly, Telecom NZ, was privatised in 1990, creating a private incumbent with enormous market power stemming from its ownership of the copper network and switching infrastructure. This network monopoly led to a series of competition disputes although pricing regulations were introduced in 2001, followed by local loop unbundling in 2006. Eventually in 2011, the Ultra-Fast Broadband initiative required structural separation of Telecom NZ's network and retail services into Chorus and Spark respectively (see Thompson 2014).

Unsurprisingly, several competition issues arose in the 1990s as new operators such as Clear Communications attempted to gain a foothold in the landline telephony market only to find their opportunities foreclosed by Telecom NZ's terms of access to its networks. In 1999, Telecom imposed special calling codes (the 0867 prefix) on non-Telecom customer calls and internet connections, citing network capacity limitations (Newman 2008). The widespread objections from other telephony and internet service providers led to the Commerce Commission initiating prosecution of Telecom in 2000. However, a series of deferrals and appeals through the High Court and Court of Appeal eventually led to the Commerce Commission's case being dismissed by the Supreme Court a decade later in 2010, by which time several of the smaller operators had either come to out-of-court settlements with Telecom, gone out of business, or been absorbed into larger entities (e.g. Clear was subsequently acquired by Telstra-Saturn¹⁰ to form TelstraClear in 2001; see Newman 2008). These cases are indicative of the propensity for competition issues to end up in protracted disputes when corporate interests are determined to contest Commerce Commission rulings, as well as the difficulty of 'clawing back' anti-competitive advantages accrued in the interim by an incumbent market actor.

In regard to the broadcasting sector, overseas ownership restrictions were removed in 1991 (primarily to enable CanWest to invest in the struggling TV3).¹¹ Coupled with the lack of other regulatory provisions, this paved the way to enable overseas investors to take a stake in pioneer pay-television provider, Sky TV. Initiated as a local business venture in 1987, it successfully bid for UHF spectrum in 1990 and subsequently found international backing from Bell Atlantic, AIT Corporation, Tele-Communications and Time Warner, among other local shareholders including TVNZ, Todd Corporation and Telecom NZ (Rosenberg 2008). In 1997, after gaining Commerce Commission clearance, News Corp's INL group (which at that time also controlled a substantial suite of New Zealand print media titles before their sale to Fairfax in 2003) sought to acquire an 83% share in Sky. In the event, it acquired 48% of Sky and helped drive Sky's expansion onto satellite after acquiring Optus b1 transponders (Rosenberg 2008; Thompson 2012a).

Sky adopted the same drive to penetrate the New Zealand market seen in other News Corp pay-TV subsidiaries; bidding aggressively for exclusive rights to premium content (especially live sports, notably rugby, league, netball and cricket) while subsidising

consumer reception hardware including satellite receivers and set-top boxes. Although Sky was at this stage a de facto subscription television monopoly, the 2000 Ministerial Inquiry into Telecommunications regarded its expansion positively and made no provision to regulate its proprietary set-top box and EPG (Thompson 2000). In 2006, the Commerce Commission cleared Sky's acquisition of free-to-air channel, Prime, despite opposition from TVNZ and Mediaworks which feared Sky would be able to leverage its dominance in the pay-TV sector into the FTA sector. Although Prime's market share has remained behind its rivals, Sky has used Prime as an outlet for some of its premium sports content (typically delayed broadcast) and intensified competition for other premium content packages in the FTA market.¹²

Sky actively lobbied successive governments to minimise the likelihood of regulation, and its executive positions include a dedicated role for 'government relations' (see Thompson 2009 2012a; Hirst, Hope and Thompson 2017). Sky has been particularly successful in its efforts to keep inconvenient regulations off the policy agenda (Thompson 2009 2012b), notably in respect to its strategic imperative to avoid licensing payments to the free-to-air channels (which it carries on its satellite services) and anti-siphoning regulations which would undermine its exclusive content rights deals for premium sports (notably rugby, rugby league, cricket and netball). When the 2008 Review of Regulation for digital broadcasting and content raised the prospect of such policy considerations being debated, Sky vehemently challenged other industry groups' demands for its market power to be redressed (Sky Network TV Ltd. 2008). Its wish was duly expedited in 2009 when the incoming National-led government prematurely terminated the review, having dismissed the need for regulatory intervention on the basis of an ambivalent report from the Ministries of Economic Development¹³ and Culture and Heritage (Thompson 2009).

In 2011, Sky outbid TVNZ for the rights to Netball NZ with an offer three times the size of its FTA competitor, leading to further criticisms of its market power (Thompson 2012b). In 2012, Sky also entered into a joint venture with TVNZ to provide a non-premium subscriber television service, Igloo¹⁴ (including its own set-top box), although the limited content and emergence of new subscriber video-on-demand services limited its appeal and it ceased operation in 2016. Sky's aggressive bidding for content rights and willingness to pursue strategically advantageous partnerships to maintain its dominant market position eventually provoked the Commerce Commission's attention, specifically in regard to the restrictive contracts Sky had agreed with internet service providers for the re-selling of Sky's content, notably TelstraClear which distributed Sky's services via cable (TelstraClear was then acquired by Vodafone in 2012). These contracts permitted the re-sale/redistribution of Sky's subscription television packages, but precluded the counterparty entering into any arrangement to re-sell/distribute subscriber content services from rival providers. If additional content/channels were desired, Sky had to be given first option to supply these

and even if it declined, its permission was still needed before the service could be provided. Breaching these conditions gave Sky the right to require the service to be shut down and for customer information to be handed over to Sky (see Winseck 2014).

The Commerce Commission's investigation led it to issue a formal warning to Sky (Commerce Commission 2013), censuring its anti-competitive behaviour, although this did not lead to actual prosecution. The report noted (2013, paras. 9-10 and 15-16) that the Commission considered Sky's contracts with RSPs to have breached section 27 (substantially lessening competition) and were likely to have breached section 36 of the *Commerce Act* (taking advantage of market power). Moreover, the Commission concluded – on the basis of Sky's own internal documents – that Sky had embarked on a deliberate strategy to foreclose competition (2013, para. 18). The report also noted Sky's dominant market position and suggested that internet data-caps had been deployed in an anti-competitive manner to disincentivise market entry by other over-the-top (OTT) or subscriber video-on-demand (SVOD) providers (Commerce Commission 2013, 70–1; Winseck 2014, 168-169).

To Sky's critics, the Commerce Commission's disinclination to prosecute or impose fines seemed incommensurate with the findings that Sky's contractual arrangements with internet service providers breached the *Commerce Act*. Indeed, it remains unclear whether the ongoing contract with Vodafone has deleted the restrictive clauses in question. The Commission's institutional reticence stemmed in part from the perceived risk of another protracted legal disputation and the (arguably correct) anticipation of the (then still-nascent) emergence of new SVOD services which would dilute some of the competition concerns. Indeed, Sky made much of the fact that Coliseum Sports won the English Premier League rights for 2013-15, although Sky's bidding power suggests this was probably an expedient strategy to deflect criticism that it was monopolising sports.¹⁵ The case nevertheless serves to illustrate both the impunity with which Sky was able push the legal boundaries to protect its commercial interests and also the high bar of proof set by the *Commerce Act* before meaningful action could be taken. As Winseck surmises, 'The regulator has yet to be either firm in its own convictions or entrenched within the institutional context of the network media ecology – or the system of government as a whole, for that matter [...] Incumbents continue to use their market power to their utmost ability to preserve legacy business models and extend their influence over the future' (2014, 168-169).

Even when the Commission does prosecute or issue fines for breaches of the *Commerce Act*, penalties are often disproportionately small. For example, in August 2012, Telecom NZ lost its case against the Commission in the Court of Appeal after contesting an earlier High Court ruling which found it had deliberately abused its market power (specifically overcharging rivals for network access) between 1999-2004 (see *New Zealand Herald* 2012). The fine at stake was \$12m – a paltry sum considering that the Commission had ruled this a 'serious breach' and that Telecom's EBITDA for 2012 was \$1079m from revenues of \$4576m

(Telecom NZ 2012). In another telecommunications-related case, the Commission's 2012 determination on the wholesale prices Chorus could charge for its UCLL and UBA network led to concerns about the potential impact on Chorus' capacity to roll-out its UFB connections and saw the government threatening intervention to circumvent the independent regulator (Thompson 2014).

Historically, there have been several significant examples of the courts overturning the Commission's rulings on appeal. Cases like the 0867 saga, the Sky contracts investigation, and the current legal appeal by NZME and Fairfax over their merger declination point to a policy context in which the Commission is institutionally obliged to weigh up the potential costs and likelihood of successfully defending any contentious ruling. The moral hazard which arises here is that, coupled with the default 'wait and see' policy thinking on digital media markets across key ministries and successive governments (Thompson 2009), market incumbents are perversely incentivised to 'game' the existing regulations to lock in their market positions and then resist claw-backs through retrospective regulation.

The Commission has presided over a range of problematic media market developments. However, it would be both normatively and empirically simplistic to attribute this stance to government interference, bureaucratic capture by market incumbents, or to some amorphous neoliberal agenda. It is crucial to recognise that the Commission's *raison d'être* is to promote market competition. As the 2012 amendment to the *Commerce Act* states, "The purpose of this Act is to promote competition in markets", although it also notes that the ultimate objective is to serve 'the long-term benefit of consumers within New Zealand' (Section 1A, Purpose; see New Zealand Legislation 2017). Importantly, the amendment is clear that competition is not an end in itself, but a means to realising benefits for the public, at least insofar as the legislation construes them as 'consumers' rather than as citizens (see, for example, Aufderheide 1999 2002; Thompson 2012b and 2014). The Commission has not been passive in accepting the constraints of the Act, however. The current chair, Dr. Mark Berry, recently wrote directly to the Minister of Commerce and Consumer Affairs, Paul Goldsmith, seeking amendments to strengthen the Act. His letter highlights the vested interests opposed to legislative reform and expresses the Commission's concerns about section 36, including the frank remark, 'we believe reform is necessary because s. 36 is not currently effective in promoting competition in New Zealand domestic markets for the long-term interests of consumers' (Berry 2016, para. 4; see also Underhill 2016). This is indicative of the Commissioners' willingness to proactively respond to the limitations of current legislation. This was underlined by the Commission's robust argument in declining the NZME-Fairfax merger in April 2017 despite arguments from the applicants that this placed too much weight on public interest principles outside the scope of the *Commerce Act* (see Russell McVeagh 2017).

Financialisation

The motivation for Sky and Vodafone's merger application and ongoing appeal stems in part from the pressures of increasingly financialised ownership. For a long time, analyses of media ownership arrangements have identified a seemingly relentless trajectory towards increasing conglomeration and concentration to entrench market power and maximise profits (e.g. Herman & Chomsky 1988; McChesney 1999; Bagdikian 2004; see also Hoynes 2000). While this 'monopoly capitalism' framework (Winseck 2011) is right to emphasise the accumulation imperatives of corporate media, it is important to recognise that ostensibly similar ownership structures can be articulated with operational practices and priorities in a variety of ways. For example, the potential synergies offered by the AOL-Time-Warner merger in 2000 turned out to be far more complex to harness than anticipated (see Aufderheide 2002; Bodie 2006; Fitzgerald 2012 and 2017) and by 2009 they had de-merged (followed in 2014 by a further split of Time Warner and Time Inc). The corporate rationalities behind vertical and horizontal integration (or divestment) therefore cannot be assumed to be uniform. That does not mean there is no continuation of an overall trend towards increasing concentration among global media; however, it is taking more complex forms in line with the perceived synergies and threats posed by the impact of convergence on media value chains. As Fitzgerald surmises, the recent demergers and divestments by Time Warner epitomise 'the processes of restructuring driven by financialisation and destabilising effects of new competition such as Amazon and Apple, Google and Netflix' (2017, 68). The recent merger proposition between a more streamlined Time Warner and AT&T still needs regulatory approval but raises concerns about market power (see Birkinbine 2016). Although the attempted merger between Time Warner Cable and Comcast was abandoned in the face of regulatory opposition by the Federal Communications Commission and the Department of Justice in 2015, as McGuigan and Pickard note, this 'merely preserved the status quo, albeit preventing a bad situation from worsening' (2017, 87).

Since the 1990s, the increasing level of financial-sector shareholding within the media industry has translated their priorities into operational decision-making, notably in affording priority to share-price maximisation in time-frames aligned to financial market cycles (Hope 2016). This also reflects a shift in financial investment practices as new financial instruments and metrics allow risk and return calculations to be made across previously discrete financial sectors, thereby increasing the pressure on company stocks to outperform forex, bonds and other capital investments (Bryan and Rafferty 2006; also see Thompson 2015). As Bodie (2006) points out, the rise of 'shareholder primacy' as a corporate epistemology contrasts with earlier managerialist norms which, while still focused on profitability, placed value on the longer-term interests of the company itself. As Bodie remarks, 'The basic structural component of shareholder primacy is the right of shareholders to elect the board of directors [...] However, the concept of shareholder

primacy extends well beyond these structural mechanisms. Shareholder primacy is a theory – a belief system, if you will – that maximising shareholder wealth is in the best interests of society’ (2006, 977). With this has come the relentless drive for efficiency and differentiation between business units perceived to optimise value (which are retained and grown) and those which do not (which are downsized or sold).

The weak regulatory environment in New Zealand has allowed the financialisation of the media sector to accelerate in recent years (Rosenberg 2008; Hope and Myllylahti 2013; Myllylahti 2015 and 2016). There are numerous examples of overseas shareholder priorities having an impact on commercial strategies and operational decisions.¹⁶

Vodafone NZ is a wholly-owned subsidiary of Vodafone Europe BV. As of July 2017, the parent company’s significant shareholders (>1%) were: Legal & General Investment Management (3.44%), The Vanguard Group (2.72%), Norge Bank Investment Management (2.14%), BlackRock Advisors (UK) Ltd (1.76%), Capital Research & Management Co. [Global] (1.51%), State Street Global Advisors (1.28%), Morgan Stanley Investment Management (1.21%), SSgA Funds Management Inc. (1.13%), BlackRock Fund Advisors (1.08%), and Capital Research & Management Co. [World] (1.05%) (4traders.com 2017b). The New Zealand subsidiary is obviously a minor component of the parent company’s operations, but its commercial expectations are therefore liable to be set by group-level performance and indeed the metrics of the banks and financial investment firms which comprise its shareholder base.

Sky Network Television Ltd., meanwhile, has had several significant changes in its shareholder composition in recent years. In 2013, News Corp sold its entire 44% holding in Sky for NZ\$815m (Myllylahti 2013), mainly to banks and other financial sector investors. Although this may have reflected strategic priorities at group level, it is significant that Sky’s rapid growth over the preceding decade had slowed. Market penetration had plateaued at just under 50% of households and the imminent market entry of several new online subscription services (including Netflix) represented an unprecedented source of competition to what had been an effective monopoly for the preceding two decades (Hirst et al. 2017).

As of December 2016, its major shareholders (>5%) were Perpetual Ltd (13.2%), Black Rock Inc. (9.3%) and Commonwealth Bank of Australia (5.0%) (Myllylahti 2016). However, as of July 2017,¹⁷ this had undergone several significant changes, notably the reduced shareholding of banks and increased shareholding of fund management firms. The current major shareholders (>5%) are: Perpetual Investment Management (14.3%), Kiltearn Partners LLP (8.56%), Lazard Asset Management Pacific Co. (7.29%), Harris Associates LP (6.09%), Colonial First State Asset Management (Australia) (6.02%), and BlackRock Fund Advisors (5.12%) (4traders.com 2017a).

The significance of these shareholder changes is twofold. Firstly, as a subsidiary of News Corp, Sky Network TV Ltd. was a minor holding, subject to group-level strategic imperatives, although arguably with the advantage of the parent's wider access to information about global market trends (including shifts in the packaging of content rights and competition from SVOD and OTT providers). Secondly, the loss of a significant shareholder with a global media presence and its replacement (initially, by international banks then increasingly financial investment and private equity funds) suggests a greater focus on financial performance and less consideration of the particular complexities of New Zealand media markets. Indeed, the considerable turnover of shareholders during the whole proposed merger with Vodafone suggest either short-term speculation on the merger outcome or the relative insignificance of such local upheavals to global investment groups.

Convergence

Another key structural factor underpinning the Vodafone-Sky merger is convergence. This is a complex idea, and it is important not to misconstrue it either as a reified technological force or as an abstract, mythologised digital imaginary. The material realities of the former can be inscribed with the latter in unpredictable ways; the failure of the vaunted AOL-Time Warner merger and the unanticipated but significant role social media platforms as the drivers of online content discovery and audience metrics are indicative of the contingencies and the discrepancies between imaginary and manifest market behaviour. For the purposes of analysing merger cases, convergence can be regarded as a multi-faceted process through which the digital production, distribution and reception of audio-visual and textual content comes to blur previously discrete media business models and value chains. This is further complicated by a) evolving content licensing/aggregation/distribution models (including the increase in SVOD providers investing in exclusive in-house content and traditional production houses moving to OTT platforms), and b) changes in audience behaviour related to on-demand reception on mobile devices coupled with new architectures of content discovery/navigation (which has seen social media and search engines increasingly driving news consumption, often at the expense of the traditional content providers).¹⁸

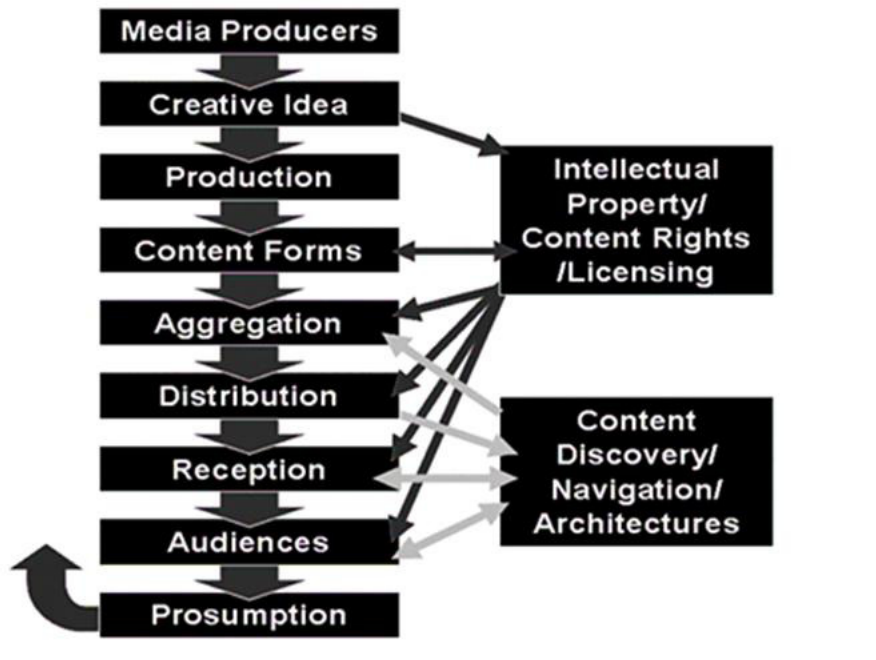


Figure 2: Convergence and media value chain

As the Ministries of Business, Innovation and Employment, and Culture and Heritage (2015) point out, the blurring of traditional media value chains also highlights gaps and ambiguities in policy frameworks:

‘[C]onvergence means different things to businesses, consumers and policy-makers. For communications businesses, convergence affects investment patterns and alters competition and market structures. The fact that different products and services are no longer bound to specific networks increases the accessibility of those products and services. However, it also increases the substitutability of products that were previously part of distinct industries [...] This exposes businesses to greater competitive pressure and adds new complexity to the decisions companies make on technology investments or in the pursuit of product innovation and market diversification [...] The evolution of this relationship means that the business models of both content creators and content distributors are changing at pace [...] For policy-makers and regulators, the emergence of new, converged services challenges existing policy and regulatory regimes. Rapid changes in technology create the risk that New Zealand’s regulatory regimes may fall out of tune with changing business models and consumer expectations’ (MBIE/MCH 2015, 4).

One particular development related to convergence is the increased availability of, and demand for, online content. There is evidently a chicken-and-egg relationship between telecommunications/internet services and content-streaming services. Although free-to-air television catch-up services had been available since 2007, the historically limited capacity of internet and mobile bandwidth in New Zealand had, until recently, impeded the development and take-up of SVOD services (see Winseck 2014; Thompson 2014; Daubs 2014). The incentive to invest in the content rights needed to operate an online subscription service was inhibited as a result from these bandwidth constraints, as well as (arguably artificial) low data caps on internet and mobile connections. Consequently, the customer base with access to sufficient bandwidth to utilise such services remained small (especially those offering higher-end movie and drama content in high definition format). The government's commitment of \$2 billion to support the roll-out of fibre-optic and high-capacity wireless networks for 85% of New Zealand by 2024 (see Thompson 2014; Pullar-Strecker 2017) provided the impetus for change, however. The increase in higher bandwidth broadband plans with higher (or no) data-caps has seen significant increases in SVOD uptake, thus increasing the demand for higher speed broadband and data (see Commerce Commission annual telecommunication monitoring reports 2016c 2017b).

Quickflix NZ was an early SVOD market entrant in 2012, but with a limited library of content, it has struggled to grow its market share. Coliseum entered the market in 2013 after acquiring the rights to English Premier League for three years (an event which Sky found expedient to argue that the sector was competitive). Spark launched its own SVOD service, Lightbox, in 2014 (after dropping its re-seller agreement with Sky). The long-anticipated entry of Netflix came in 2015, although the range of content available is more limited in New Zealand due to pre-existing content rights held by rivals (although this did not preclude some domestic users accessing the US version through VPN functions – a practice which led to legal action against one of the service providers, CallPlus;¹⁹ see Pullar-Strecker 2015). Sky itself also started its own SVOD service, NEON, in 2015 (in addition to its OTT service SkyGo), although its uptake has been limited.

Operator	Service	Subscribers Dec 2015	Subscribers Dec 2016
Sky Network Television Ltd	Sky TV (satellite + OTT) NEON (SVOD)	852,000 total 22,000	816,000 total (?) ¹
Spark	Lightbox	285,000	630,000
Netflix	Netflix NZ	684,000	1,066,000
Other	Quickflix and others	<130,000	?

Figure 3: Subscription video content providers 2015-2016. Data from: Roy Morgan (2015 2016); Commerce Commission (2015; 2016c; 2017b); Sky Network TV Ltd. Annual Reports 2015-2016. Note the subscriber figures are not mutually exclusive. Roy Morgan estimates that the number of subscribers to both Lightbox and Vodafone increased threefold between 2015-2016 to 337,000. However, it is important to note that Spark now provides Lightbox as a free service to all its broadband and mobile subscribers (although this is not zero-rated for mobile), and since 2017, offers Netflix free for a year to new broadband subscribers.

Company/Group	Fixed Line Broadband % market share (subscribers) 2016/ 2017		Mobile connections % market share (subscribers) 2016	SVOD services/ resale contracts 2016
	2016	2017		
Vodafone	29	29	40	Sky, NEON
Spark (inc Bigpipe and Skinny mobile)	48	46	36	Lightbox, Netflix, Spotify
2degrees	-	3	24	NEON
Vocus (Call Plus, Flip, Orcon, Slingshot)	15	14	-	-
Other*	8	4	*	-
Trustpower	-	4	-	-

Figure 4: Telecommunications market share 2016-17. Data from Commerce Commission Annual Telecommunication Monitoring Reports (2016c; 2017b). Other entrants to the mobile market include Bluesky, Compass and Warehouse Mobile, but their current market share is negligible.

As the market share tables above indicate, there has been a substantial expansion of SVOD service takeup, especially since Netflix entered the market. Spark's Lightbox has also grown rapidly, but this is primarily because it is now offered free to all Spark broadband and mobile customers, essentially absorbing the cost to make its broadband/mobile service bundles more attractive. This indicates that telecommunication service providers value content packages primarily as a key driver of their broadband and mobile uptake. In 2017, Spark announced a re-selling agreement with Netflix, with new customers being given a free six-month subscription.

Although Sky remains the subscription content incumbent and continues to control the rights to premium live sports (notably rugby, league, netball and cricket), there is no doubt that SVOD services represent a significant challenge to its business model. Sky's satellite subscription model has long been structured so as to maximise average revenue per unit (ARPU) by requiring customers to have a basic package subscription before adding premium content such as its sports channels. As of May 2017, Sky's basic monthly package cost \$49.91, with the movie package costing an additional \$20.92 and Sky Sports costing \$29.90, with an additional \$8.81 for the Rugby channel and \$11.96 for BeIN sports). The stand-alone NEON service meanwhile costs \$20 per month. This revenue is augmented by payments for MySky PVR rental, high-definition services and multi-room functions. Although Sky GO, NEON and FAN PASS allow on-demand access, the core business remains premised on linear scheduling.

Sky's subscriber base has been declining because the cheaper Lightbox and Netflix services are broadly substitutable for Sky consumers only wanting premium movies and drama. As of May 2017, a monthly Netflix subscription costs \$9.99 for the basic service, rising to \$15.99 for high-definition and multiple screens/devices. Lightbox, meanwhile, costs \$12.99 for a stand-alone service but is free to Spark customers. Considering that a Sky customer wanting only premium movies would pay \$70.83, the attraction of the cheaper SVOD options is obvious. Sky's higher prices are to some extent a legacy of its historical monopoly but it is important to consider that its basic package alone provides 50 channels while it also has infrastructure costs (including satellite, spectrum and reception devices) which are borne by the consumer in the case of its cheaper SVOD competitors where on-demand content is accessed from a server without the need for receiver dishes, proprietary PVRs or expensive basic packages. Sky's imperative in sustaining this model is to leverage the range of content rights it controls into new bundles and platforms, for which it evidently needs vertical integration. Although Sky has a long-standing re-selling agreement with Vodafone (and with TelstraClear before it), this is not exclusive, and in fact Spark had a similar arrangement before developing Lightbox.

Meanwhile the main telecommunication/internet service providers, Vodafone and Spark, enjoy a dominant market share in both the broadband and mobile market, with Vocus group

and 2degrees being their next closest rivals (respectively). Although UFB roll-out has seen new competitors like Trustpower and Fairfax's *Stuff* enter the retail broadband market,²¹ these remain peripheral actors. Vocus currently has no formal re-seller agreements with SVOD providers. 2degrees has recently negotiated re-selling rights for Sky's NEON and offers this free with its higher cost monthly mobile plans, although it remains significantly behind its larger rivals. As mentioned, Spark bundles its broadband and mobile services with Lightbox and has recently entered a re-selling agreement with Netflix. Vodafone is now the sole re-seller of Sky's services. That being the case, a strategic question arises as to what advantage one of the two predominant telecommunications firms stood to gain from merging with an incumbent subscription provider facing a declining market share. The main competition challenge for Spark and Vodafone is not the imminent loss of customer base to its smaller competitors, although the proliferation of providers may see some marginal erosion. Rather, it is the pressure to continue revenue growth and find efficiencies to maintain their market position in an environment of rapidly-evolving services and consumer preferences as UFB roll-out accelerates. Spark's vertical integration through Lightbox arguably gives it greater flexibility to develop exclusive new bundles with its broadband and mobile services. Vodafone evidently discerned a comparable strategic advantage in its move to merger with Sky.

Process and Interests in the Vodafone-Sky Merger

Despite the relative magnitude of the proposed Vodafone-Sky merger for the New Zealand media ecology, the vertical integration of Sky's subscription content services with Vodafone's broadband and mobile distribution platforms permitted an application to Commerce Commission to be made in June 2016 for a straight clearance of the deal, on the grounds that there would be no self-evident reduction of competition because two separate markets were involved, i.e. telecommunications and television (as opposed to a horizontal merger within the relevant markets and/or across the same level of the value chain – as was the case of NZME-Fairfax) (Vodafone Europe BV & Sky Network Television Ltd. 2016).

Under the *Commerce Act*, the key criterion the Commerce Commission had to assess is whether the merger was likely to result in a significant lessening of competition. This entails comparing the relative benefits and detriments of the merger transaction scenario (the 'factual') with those under possible non-merger scenarios (the 'counterfactual'). After considering the merger application, the Commission issues a preliminary statement outlining the key aspects of the case likely to be salient to their determination of the case, and invites submissions from stakeholders in industry and the wider community. This is an important indicator of the way the Commission defines the regulatory issues and the sections in the Act deemed most salient to their determination. This is followed by a round of cross-submissions which clarify or challenge the assertions made by different parties. Depending on the additional evidence presented, there may be further rounds of

submissions and in some cases the Commission may call for meetings or a conference to hear further evidence (as in the NZME-Fairfax case). Although third party submissions sometimes call for conditionalities on a merger (e.g. approval subject to some form of undertaking not to exploit market power, or to divest in certain holdings), this is not part of the Act and the Commission cannot impose them. Once the Commission makes its final determination, this has statutory force, although it may be subject to legal challenge (which requires demonstration that the Commission has erred in its application of the law).

The *Commerce Act* is far from unambiguous and the legal interpretations are inevitably subject to vested interests. There is an interesting epistemic tension here; on the one hand, the legal-commercial framework is premised on neoclassical liberal definitions and models which in turn suppose an ontological-normative conception of markets as a natural formation and an epistemic assumption that economic models of calculation/quantification reveal objective truths about them. On the other hand, however, the fact that definitions of market boundaries, projected comparisons of factual and counterfactual scenarios, and the calculations of efficiency benefits/detriments are routinely subject to contestation, underlines the extent to which markets are constructed phenomena, the facts about which are never independent of how they are performatively conceptualised, modelled and rhetorically represented.

In the Vodafone-Sky case, over 60 submissions were made by various stakeholders,²² including Vodafone and Sky themselves, seven rival media groups (2degrees, TVNZ, Spark, Freeview, Fetch TV, Blue Reach and Trustpower – all of which opposed the merger),²³ three NGOs (InternetNZ, Telecommunication Users Association of NZ and the Coalition for Better Broadcasting²⁴ – again, all of which opposed the merger), five legal firms specialising in competition law (two representing the applicants) and eight economic analysis firms (again, two hired by the applicants).

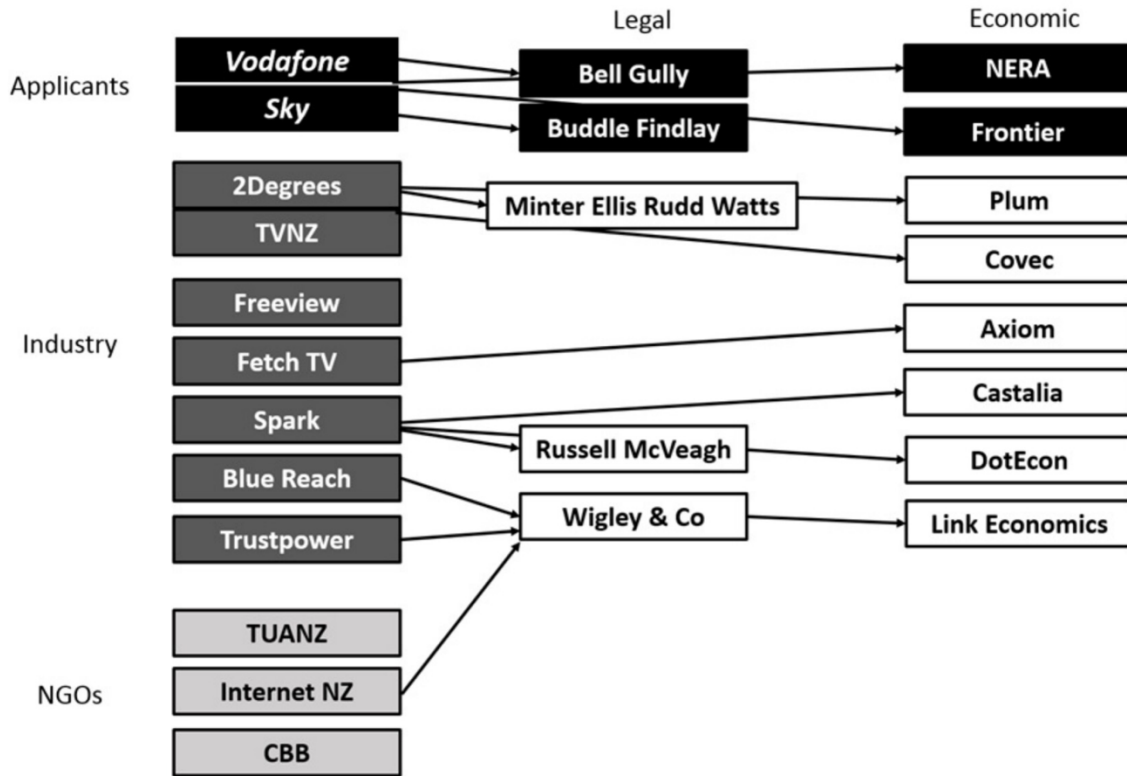


Figure 5: Alignment of institutional submissions to the Commission on Vodafone-Sky

The vested commercial interests at stake, both in favour of and opposed to the merger, explain the commissioning of specialist legal and economic reports (which unfailingly, albeit unsurprisingly, aligned with the interests of the commissioning party). The legitimation of claims about competition law hinges on demonstrating their validity relative to legal-economic epistemic frames. In effect, the lawyers and economists are hired to discursively translate corporate or civic norms and interests into forms salient to the institutional criteria of the Commerce Commission. This represents a significant challenge for NGOs and civic interests which typically lack the level of expertise to engage in technical legal analysis or the resources to hire specialists. This is exacerbated by the routine and extensive redaction of commercial data from industry submissions in all the publicly-available material. Indeed, of 145 pages in the Commission’s final determination report (2017a), 85 had redacted sections, including many where entire pages of text and data were completely blank. Although this is legitimate where industry submissions to the Commission include confidential institutional information with the potential to compromise commercial interests if shared with rivals (e.g. detailed customer information or strategic investment plans), the wholesale redaction of even basic market information makes it extremely difficult

for civic groups to verify or challenge corporate submissions. For example, descriptive data on the market shares of broadband and UFB (fibre) connections was deemed commercially sensitive and removed from public documents, thereby leaving the ridiculous blank table below as a part of the review process.

Vodafone-Sky Merger Deliberations

Space precludes a detailed chronological narrative and analysis of all the claims, counter-claims and disputed evidence put forward by intervenors in the review process. This section will nevertheless highlight some of the definitive themes and key points of contention which arose throughout the Commerce Commission’s deliberations, where possible taking account of the institutional agendas and rhetorical intentions reflected in the documentation. Vodafone and Sky’s application for clearance (2016) put forward complementary institutional rationales for the merger. For Vodafone (para. 4.2) the key issues were to enable faster innovation of new digital products which provided better customer experiences, to enhance cross-marketing opportunities (i.e. promoting Vodafone to Sky customers) and to accelerate the uptake of high speed broadband (which aligned with the government’s UFB strategy). Sky, meanwhile, highlighted the need to adapt to changing modes of video content delivery and reception, including mobile technologies, and also to respond to the impact of

Table 3: Share of broadband and UFB connections

TSP	Broadband connections	Broadband share	UFB connections	UFB share
Spark	[]	[]%	[]	[]%
Vodafone	[]	[]%	[]	[]%
Vocus	[]	[]%	[]	[]%
Trustpower	[]	[]%	[]	[]%
2degrees	[]	[]%	[]	[]%
Others	[]	[]%	[]	[]%
Total	[]	100%	[]	100%

Source: Broadband connections totals from Table 1. Total fibre connections from submission from Vodafone to the Commerce Commission (11 November 2016) at 24.

Figure 6: Example of redacted material in submissions (Commerce Commission Final Determination 2017a, para. 135)

convergence on traditional television business models, including the increased cost of wholesale premium content (paras. 4.3- 4.4). The application also claimed that the merged entity would benefit New Zealand consumers by allowing content to be delivered over multiple platforms and devices, enabling the development of more attractive bundles/packages of telecommunications and content services tailored to consumer needs (2016, 2).

From the previous discussion of the influence of deregulation, financialisation and convergence on the telecommunications and subscriber content sectors, the primary incentive of both parties in pursuing the vertical integration of Sky's content services with Vodafone's distribution platforms was to facilitate the development of new service bundles which could entrench and expand their respective market positions.

Particularly for Sky, the merger offered a way of stemming the loss of its subscribers to rival SVOD competitors. However, as the subsequent merger deliberations would underline, this raised questions about why the current re-selling arrangement between Vodafone and Sky was not an adequate basis for pursuing such developments. One issue here was the possibility of Vodafone and Sky creating a 'hard tie' or 'walled garden' between premium content and broadband/mobile services so as to limit access to the former to customers of the latter. However, as both the applicants and the Commission duly noted, this was not a probable factual scenario because a) it could engender consumer resentment from those who did not want this bundle, and b) even if this did attract Sky customers to switch to Vodafone for their broadband services, it would preclude expansion of revenues by supplying Sky's content to non-Vodafone customers, effectively foreclosing their own potential market (see Vodafone & Sky 2016, para. 11.22; Commerce Commission 2017a, para. 228).

However, that did not mean that there was no potential for the Vodafone-Sky merger to lessen market competition in other respects. Interestingly, the applicants identified only two salient market sectors; the national retail markets for the provision of residential fixed-line broadband services and pay-TV services (Vodafone and Sky 2016, 2). Perhaps expediently, mobile services and wholesale premium sports rights were not mentioned as distinct markets, despite their evident centrality to the merger. However, the capacity of a vertically-integrated broadband and mobile service provider to exploit the absence of net neutrality regulations by offering preferential bandwidth/mobile access to customers of its own services must have been evident to Vodafone and Sky, especially considering the significant growth potential in mobile services where data-caps currently limit the potential for heavy content-streaming.²⁵ The possibility of creating exclusive bundles including mobile 'apps' for streaming zero-rated premium content was an obvious potential motivation (Thompson 2016; see also Internet NZ 2016; Plum 2016), and indeed this had been signaled as a potential point of competitive constraint in SVOD markets in previous Commerce Commission discussions (Winseck 2014).

Perhaps inadvertently, Vodafone and Sky themselves framed the issue of whether premium content rights could confer market power by pre-emptively denying the possibility of their control over live sports content leading to market foreclosure on the pretext that this was not essential for entry into either subscriber content or broadband services; 'the Combined Group does not supply any "must have" inputs that either SKY or Vodafone's competitors

require to participate in telecommunications or pay-TV markets. In fact, despite wholesale access to SKY services being available to third parties, of the 80+ broadband suppliers in New Zealand, only Vodafone has opted to include the full suite of SKY services (i.e. including premium sports) in its bundled offer' (2016, 3). Emphasising that Sky would continue to make its content available to other broadband retailers to optimise revenue in an increasingly competitive and rapidly-evolving market, the Vodafone-Sky submission insisted that the merged entity would have neither the incentive nor the capacity to foreclose market competition. Unfortunately for the applicants, that was precisely the conclusion the Commerce Commission eventually drew.

The Commission's *Statement of Preliminary Issues* (2016a) identified the need to consider market definition (paras. 12-14), the merger's potential unilateral effects (e.g. whether the merged entity would have the market power to raise prices) and any vertical and conglomerate effects (whether the merger could foreclose rivals by removing competitive constraints elsewhere in the value chain) (paras. 15-18, 23). Specifically, it identified the need to consider whether Sky's premium sports rights were 'must-have' content without which subscription content or telecommunications providers could not enter the market or achieve scale in the digital media environment (para. 28), and also whether the merged entity could leverage its market power either to prevent its own customers from accessing rival content or consumers of other providers' content from accessing it through Vodafone's platforms (paras. 33-34).

This gave rise to a range of submissions from both the applicants and other stakeholders (almost all of which opposed the merger). Several noted the already high level of concentration in the telecommunications and subscription content markets (Plum 2016, TUANZ 2016; Thompson 2016). In respect to the identification of salient markets, several submissions highlighted both the retail and wholesale side of premium live sports as key markets. As the Telecommunication Users Association of New Zealand (TUANZ 2016) pointed out, premium content was increasingly becoming a 'must have' component of broadband and mobile bundles and 71% of Sky's customers took the sports or sports plus movies packages (para. 32-34).

Plum (commissioned by 2degrees and TVNZ) likewise identified the retail and wholesale side of subscription content markets as significant (2016, paras. 2.4-2.5), and argued that, although Sky's de facto monopoly was now being challenged, it retained a dominant position with market power. Plum also noted the importance of the mobile retail market (para. 2.3) and pointed to the way Vodafone (Europe) had itself identified premium sports as a critical component of its expansion strategy (para. 3.1). The analysis went on to argue that premium content rights, especially sports, afforded Sky market power and that it was difficult to enter the New Zealand market and achieve scale without access to this. The Plum analysis also noted that bundled services helped to reduce consumer 'churn', effectively disincentivising

the option of switching providers and argued that, ‘The ability for mobile operators to compete in the supply of 4G mobile services will increasingly depend upon access to premium video content’ (2016, para. 3.4). Plum concluded that the benefits of the merger in developing new services and bundles would be equally possible under the counter-factual scenario.

Covec’s (2016a) analysis (also commissioned by 2degrees and TVNZ) argued that subscription content providers competed against free-to-air television operators²⁶ and although the emergence of new SVOD services had begun to weaken Sky’s market dominance, the growing consumer expectations of triple/quad-play bundles meant the merger with Vodafone raised competition concerns. Covec acknowledged that Sky’s wholesale content bundles were available to rival broadband/mobile providers but argued that the fact only Vodafone currently had a re-seller agreement reflected the unattractive conditions offered (para. 23). Noting the absence of anti-siphoning legislation, Covec also highlighted Sky’s control of premium sports rights for both FTA and Pay platforms as problematic. In respect to the counter-factual (non-merger) scenario, Covec suggested that Sky would have greater motivation to offer more attractive wholesale terms to other telecommunication providers, whereas the merger posed a risk of the merged entity leveraging its ‘must-have’ content to create bundles with which rivals could not compete (2016a, section 4.1).

Castalia (commissioned by Spark) highlighted the anti-competitive outcomes of the merged entity’s market power stemming from its control of non-substitutable premium sports rights. The creation of new exclusive bundles would increase the barrier to market entry, foreclose competition from existing retail service providers and deter subsequent consumer switching: ‘The fact that Sky Sport is only available as part of a bundle of content is itself proof of the existence of market power. Only a firm with significant market power would be able to enforce a bundle when separate demand exists for the components of that bundle’ (2016, section 2). Castalia went on to argue that the merger would create a ‘vicious circle’ whereby Sky’s incumbent market position in regard to content rights combined with preferential terms of access for Vodafone subscribers effectively foreclosed the possibility of rivals competing: ‘The only way that RSPs could outbid Sky to achieve a sufficient bundle of premium sports content is if they had guaranteed revenues from a sufficient subscriber base, but the only way they can grow their subscriber base is by having access to a sufficient bundle of premium sports content’ (2016, section 4).

These arguments from merger opponents were evidently self-interested, but they rightly challenged Vodafone and Sky’s original market definitions and set out interpretations of the factual and counter-factual scenarios which the applicants had not addressed. Vodafone and Sky’s rather indignant cross-submission (prepared by Buddle Findlay 2016a) nevertheless reasserted that there was no case for the Commission to decline the clearance. Supported by

the influential, US-based economic consultancy NERA (2016a), they argued that its rivals' factual scenario arguments understated the level of competition the merged entity would face and the ongoing incentive to offer wholesale content after merging (Buddle Findlay 2016a, para. 3b). One key rebuttal concerned the counterfactual scenario outlined by Covec and others which envisaged Sky offering a wider range of wholesale content options to other telecommunications providers. The cross-submission dismissed this as a 'fanciful' argument premised on the assumption that Sky would make 'irrational business decisions' (Buddle Findlay 2016a, para. 3a), i.e. that the counterfactual would motivate it to become an 'enthusiastic wholesaler' extending flexible options to re-sell some or all of Sky's content. However, allowing other broadband/mobile providers to selectively access premium content to develop their own rival bundles would reduce the value of Sky's own products. As the cross-submission noted, were this indeed a rational business strategy, Sky would surely have pursued it already (paras. 20-21, 23).

Interestingly, Vodafone and Sky argued that critics had not observed the 'well-established analytical framework' for mergers and incorrectly conflated legitimate efforts to develop attractive, competitive bundles for consumers with a substantial lessening of competition (para. 3c). Although the 'correct' framework is not made explicit, Vodafone and Sky argue that, 'Offering a discount benefits consumers but it is not the same as engaging in foreclosure. A firm does not leverage market power from one market to another if [it] simply lowers the price of its product and services' (para. 62). The cross-submission also rejected the counterfactual scenario suggested by Axiom (on behalf of Fetch TV 2016) wherein Sky itself would enter the retail broadband market (para. 20b). Another crucial point of contestation concerned the status of premium content, especially sports rights. Vodafone and Sky rejected the claim by Spark, Castalia, Plum and Covec (among others) that live premium sports was a 'must have' input for SVOD or broadband/mobile services (paras. 35-38). The cross-submission points to previous Commerce Commission definitions of the subscriber content market as homogeneous and highlights the emergence of other SVOD services which have expanded without sports content, and indeed without a vertically-integrated broadband/mobile platform (paras. 36-38, 41). The Vodafone-Sky response concludes by rejecting all the notions of harm and potential risk of a substantial lessening of competition in the factual scenario.

Although Vodafone and Sky's arguments obviously reflect their institutional agenda, the rejection of the counterfactual scenarios wherein Sky might enter the broadband/mobile retail market or unbundle wholesale re-selling of their premium content are largely justified. The arguments that competitive bundling does not in its own right constitute a lessening of competition and that premium sports rights are not a 'must-have' for SVOD or telecommunications providers also seem formally plausible. However, further cross-submissions (e.g. Covec 2016b; Plum 2016b) suggested these claims overlooked other

substantive ways in which bundling premium sports rights with broadband and mobile services could still foreclose competition. The next phase of the deliberations saw further reassertions of the previous arguments with an increasing level of economic abstraction, including analogies with international competition cases as well as questions about the integrity of some submissions.

Round Two: Unresolved Issues

Although some merger opponents had called for the Commerce Commission to hold a full conference, this did not eventuate. However, in October 2016, it did issue a letter of unresolved issues, identifying the merger's potential to reduce competition in an evolving digital media ecology (Commerce Commission 2016b). This stated that the Commission was not satisfied, on the basis of the submissions thus far, that the merger posed minimal risk of substantially lessening competition in the broadband and mobile sectors. In particular, this recognised that the merger had implications beyond the national retail markets for residential fixed-line broadband services and pay-TV services that were identified by the applicants. The Commission requested further evidence on a range of factors in relation to three retail (consumer/demand side) markets – fixed-line broadband, mobile services, and pay-TV services – and also one wholesale market, the re-selling of pay-TV content (paras. 12-14). The Commission suggested that in the counterfactual scenario, there would still be scope for Sky and Vodafone to develop their relationship but Sky would have no incentive to give preferential content access to Vodafone (paras. 16-17). The letter of unresolved issues also highlighted concerns that the merged entity might exert market power in the broadband/mobile sectors through its control of premium live sports (paras. 19.1, 21). The reasoning here was that Vodafone-Sky's bundling of triple/quad-play services could make subscribing to Sky on a stand-alone basis relatively less attractive, motivating Sky customers not already with Vodafone to switch broadband/mobile providers (paras. 19.2, 22).²⁷ Although a 'hard tie', forcing consumers who want Sky to also utilise Vodafone services was deemed unlikely, the Commission did identify the potential for cheaper bundles to capture a substantial number of higher value (ARPU)²⁸ consumers from other telecommunications providers, even if Sky content remained available on a stand-alone basis (paras. 23-24, 38-39). Importantly, the increasing capacity and declining cost of mobile data along with the expansion of UFB is likely to see an increase in content-streaming on mobile devices (para. 26), including the potential for triple/quad-play bundling (para. 27)²⁹ which smaller rivals could not match, thereby foreclosing their potential for market entry and capacity to achieve scale (paras. 28, 38-39).³⁰ Although the letter of unresolved issues acknowledged that the merged entity would be unlikely to pursue a 'hard tie' restricting access to Sky content only to Vodafone broadband/mobile customers, it raised the possibility that the merged entity would still have less incentive to enter into wholesale re-selling agreements for content (i.e.

permitting third party distribution of its content) than Sky would have without the merger (paras. 30-33).

The Commission's letter confirmed several points of criticism put forward by opponents of the merger, especially in respect to market definition and the need to consider the possible conglomerate/vertical effects of bundling mobile and content services in ways that rivals could not match. The letter nevertheless provided Vodafone and Sky with an opportunity to put forward further evidence before the Commission made its final determination. This led a further round of submissions and cross-submissions evidencing increasingly technical legal and commercial disputation between the respective legal and economic firms. Vodafone and Sky roundly dismissed opponents' claims about the merger's effect on competition and insisted that the evidence they had presented thus far was sufficient to obviate such concerns while reasserting the consumer benefits of the merger (Buddle Findlay 2016b, 1). The Commission's earlier approval of Vodafone's 2012 acquisition of TelstraClear was also cited as a precedent for considering the effects of bundling only in the context of the merged entity substantially lessening competitive constraints to the point where it could increase prices or impede market entry (Buddle Findlay 2016, paras. 11,13-14). The Sky-Vodafone submission went on to reject any suggestion that premium live sports should be regarded as 'must-have' for SVOD or telecommunications competitors (paras. 15, 32), noting that its main telecommunication rival, Spark, already bundled Lightbox with its broadband and mobile services (paras. 42-44) and, indeed, had developed these despite the ongoing wholesale availability of Sky's content. This provoked a vehement reaction from Spark: 'It is deliberately disingenuous, and a bald denial of the known conditions for problematic anticompetitive bundling, for Sky/Vodafone to compare its post-merger ability to exclusively bundle Sky Sport + Broadband with, for example, Spark's bundles with Lightbox and Spotify. Spark does not have any market power in the provision of general OTT entertainment content (Lightbox), which competes against similar OTT offerings in the likes of Netflix, NEON, Quickflix, Freeview, etc.' (2016b, 10).³¹

Vodafone and Sky also denied that the factual scenario would give the merged entity the incentive to withdraw subscription content as a standalone (unbundled) retail service or make this less attractive than a bundled content/broadband/mobile service (paras. 17-18), arguing that this would drive away existing customers (paras. 23-26). Vodafone and Sky went on to argue that the changes in the market from UFB roll-out were likely to increase the opportunities for competitors to enter the market rather than enabling a merged entity to foreclose them (paras. 56-58), and that increases in mobile content-streaming were not being driven by a demand for premium live sports (paras. 62-64, 69-71). NERA also responded to the Commission's letter on behalf of Vodafone and Sky's legal teams, Bell Gully and Buddle Findlay, reinforcing the legal claims with economic arguments (NERA 2016b). NERA emphasized the claim that broadband/mobile and SVOD markets were highly

differentiated and dynamic, insisting that the Commission had overestimated the potential for a merged entity to exert market power (para. 2).

A range of responses to the Commission's letter of unresolved issues along with cross-submissions ensued. Space precludes detailed analysis, but two themes are highlighted: a) the increasingly technical legal-economistic modelling claims intended to defend/undermine the epistemic validity of rival submissions; and b) the challenges to the Sky/Vodafone arguments emphasizing factual and normative inconsistencies with other market competition cases (in some cases extending into claims of misrepresentation and disingenuousness). NERA Economics (2016b), acting for Vodafone and Spark's legal advisors (Bell Gully and Buddle Findlay), critiqued Covec's (2016c) (heavily redacted) submission on behalf of TVNZ and 2degrees which had reiterated the claims that under the factual scenario, the merged entity's market power over premium content rights would permit it to create bundles its competitors could not match, while under the counterfactual scenario, Sky would be incentivised to offer more flexible wholesale re-sale options to other broadband/mobile providers. For example, NERA queried Covec's interpretation of the ECPR (Efficient Components Pricing Rule)³² and their argument that, under the merger, Sky content (if construed as a 'must-have' input) would be available to Vodafone at zero 'internal transfer price' compared with a higher cost for other broadband/mobile competitors. As NERA comments, 'This argument reflects a misunderstanding of the implicit internal price that a vertically integrated business charges itself. Regardless of what internal 'transfer price' is recorded in the accounts of the merged entity, Sky would always implicitly charge Vodafone a price equal to ECPR' (2016b, section 2.2). Covec's point seems to problematise the relative efficiency and reduced transaction costs of content provision for the merged entity (which is arguably a legitimate aim of the merger); meanwhile, NERA's claim that the price the merged entity implicitly charges itself for its own content should be factored into the competition analysis begs the question of why the notional transfer price could not be also considered for a non-merged Sky. The confidence with which these formal economic arguments are asserted is partly attributable to the respective rhetorical motives. But their epistemic validity depends on how the merged or separate entities and their internal transactions are formally conceived while their rhetorical merit seems to be premised on a display of technical erudition as much as clarification of the substantive issues.

Spark, meanwhile, commissioned a report by DotEcon (2016) which examined a number of European media competition cases and supported the Commission's identification of competition issues stemming from broadband/content bundling. In response, Frontier Economics (2016), acting for Vodafone/Sky, suggested the European comparisons had drawn invalid analogies with the New Zealand case on the basis that the former examples entailed horizontal merger cases rather than the conglomerate scenario which applied to the latter (2016, para. 3). Interestingly, InternetNZ (2016b) noted that Vodafone's submissions

to the Commission are inconsistent with the statements its European parent had made to other overseas regulators in respect to the development of competitive bundles, including acknowledgement that increasing consumer demand for fixed and mobile broadband expansions was indeed linked to content bundles (paras. 2, 4, 5). Internet NZ also pointed out that the Vodafone-Sky denial of lessened competition analysis was premised on past/current market behaviour rather than models of future scenarios with UFB (para. 3). Even if Frontier was correct in suggesting the European market competition issues were not directly comparable with the Vodafone-Sky case, there are some discrepancies in the perspective on bundled content/broadband services between the parent company and the NZ subsidiary. On that point, Wigley & Co. (2016) (acting for Blue Reach, Trust Power and Internet NZ) made strong allegations about 'inaccurate and incomplete information' being provided in Vodafone-Sky submissions, commenting that, 'it is submitted that what is now being said to the Commission is contrary on multiple issues to what the applicants have told each of their respective groups of shareholders' (2016, para. 1). Wigley & Co. also suggested that despite the applicants' insistence that Sky's content could not be leveraged to induce broadband customers to switch providers, Vodafone's annual report acknowledged that content and broadband bundles were a key driver of consumer demand.³³

End Game?

In February 2017, the Commerce Commission announced its final determination, declining the merger (the full report detailing its reasoning followed in April) (2017a). Despite the earlier unresolved issues letter signaling the Commission's misgivings about the transaction, there still appeared to be a market expectation that it would eventually capitulate. As one investment commentator remarked just before the announcement, 'the Commerce Commission would probably say yes [...] they have a track record of saying yes to most things, and they've said yes to things that are more anti-competitive than this' (Nick Dravitzky, quoted by Newshub, Satherley 2017). Indeed, rival telecommunication/SVOD operator, Spark, had sought a high court injunction to prevent what they feared was an imminent 'fait accompli' clearance of the merger (Pullar-Strecker 2017b). The announcement therefore caused some consternation in the market and Sky's share value fell by \$293 million.³⁴

The Commission had evidently not been persuaded that the unresolved competition issues had been adequately addressed by the applicants: Sky's domination of live premium sports content was highlighted as a key source of potential market power. Even if this content was not technically 'must-have' for all telecommunications and SVOD operators, for a substantial number of (high ARPU) consumers, it was nevertheless non-substitutable (2017a, para. X8, X19). Consequently, 'The Commission cannot exclude a real chance that the merged entity would leverage its market power over premium live sports content, foreclosing competition in the relevant broadband and mobile services over the medium to long term' (2017a, para.

X2). A further concern in this respect was the potential for the merged entity to develop bundles offering zero-rated premium content on mobile services which rival providers could not match (paras. X13, X14, X17). The Commission also suggested that, even without a ‘hard tie’, bundled triple/quad-play services could disincentivise subsequent consumer switching and reduce ‘churn’ for any incumbent: ‘Once customers have switched to one of the merged entity’s bundles, they are likely to become “stickier” and harder for rival TSPs to win back, requiring even better promotional or other deals to compensate for the fact that they do not offer a close substitute for the merged entity’s premium live sports offering’ (para. X21). It would be naïve to suppose that Vodafone and Sky’s merger application was not at least partly premised on the commercial opportunity these developments presented at a critical juncture in a rapidly evolving market.

The Commission (2017a, para. X6) duly highlighted the need to take account of the current context of convergence, noting rapid changes in the shape of broadband, mobile and pay-TV services as UFB and 5G mobile networks are expanded: ‘In the broadband services market, the roll-out of UFB presents a significant opportunity for Vodafone (and other TSPs) to attract new customers. During this period, an increased number of consumers are likely to be “in play” and looking at alternative offers, increasing the ability of the merged entity to attract these customers with exclusive bundles that rival TSPs cannot match’ (para. X16). The Commission identified a risk that the merged entity would develop bundled services which would motivate non-Vodafone customers wanting Sky content to switch broadband/mobile providers: ‘By offering bundles that include mobile, as well as broadband, services and pay-TV, Sky Sport customers are more likely to move both their broadband and mobile services to the merged entity, even if they are not currently viewing a lot of content over mobile’ (para. X18). Consequently, ‘we could not rule out the real chance that rival TSPs would lose a significant number of their customers in both the broadband and mobile services markets’ (para. X20). The Commission also noted that the potential foreclosure of the merged entity’s rivals’ prospects for expansion could result in new/smaller mobile and broadband operators failing to achieve the scale required to justify investment in new services (paras. X13, X22). The uncertainties in the evolving media market are significant because the Commission was obliged to decline a merger transaction if it could not rule out a ‘real chance’ that it would lead to a substantial lessening of competition (paras. X2, X4, X9, X27).

The Commission’s rationale for its ruling is explained in much more detail (albeit significantly redacted) in the final determination document (2017a), but the core arguments outlined above are well substantiated. The decision was naturally unwelcome for Vodafone and Sky, and in May 2017 their legal team issued notice that they intended to appeal the decision through the High Court (Bell Gully 2017), claiming that the Commission had ‘erred in fact and at law’. Although heavily redacted, the appeal notice rejected all the key

arguments which underpinned the Commission's determination, denying that premium live sports were 'must-have' (although this was not technically what the Commission had argued) or that the market power afforded the merged entity would permit it to foreclose rivals or induce consumers of rival broadband/mobile to switch to Vodafone-Sky. There may have been strategic and investor relations reasons for initiating the (now withdrawn) appeal, but the indignant aggression of the applicants in sweepingly dismissing the Commission's findings underlines the extent to which the *Commerce Act* had heretofore been regarded as a channel that could be used to advance the interests of market actors, rather than defend the long-term interests of consumers.

Conclusions: Pie in the Sky?

The *Commerce Act* itself is symptomatic of the broadly neoliberal policy settings which, despite some recent regulatory interventions, have remained fundamentally intact since the 1980s. Historically, the Act has arguably been a fig-leaf legitimating the accrual of market power by incumbents with the resources to deploy sufficient legal and economic expertise to use legal channels to advance their interests. Nevertheless, in rejecting the Sky-Vodafone and the NZME-Fairfax merger proposals, the Commerce Commission has demonstrated its willingness to defend the public interest as it is defined within the parameters of the *Commerce Act*. Although in the past the Commission has sometimes preferred non-intervention, its recent decisions should not be regarded as a sudden shift in its values and priorities. There are also numerous cases where the Commission has taken action against media sector incumbents only to be overturned in court, or else been inhibited from intervention by a weak *Commerce Act*. Given the historical difficulty of clawing back market power once it has been gained, risk aversion to a merger scenario with the potential to increase and lock in the market power of two of the largest incumbents is surely justified to protect the long-term interests of NZ consumers.

There are two other interpretations of the Commission's actions here. One is that the complexities of promoting healthy competition in a converged and highly concentrated media market require the Commission's interpretation of the *Commerce Act* to be subject to legal contestation in order to set precedents to guide future cases (and if a decision defending the public interest were overturned in court, the need to revise the current legislation would be made more compelling). Another interpretation is that the recent decisions reflect the emergent structural characteristics of the New Zealand media ecology stemming from the interplay of deregulation, financialisation and convergence, and thus amidst these extremely fluid conditions, a merger of Vodafone-Sky's magnitude is likely to have unforeseen consequences. Specifically, the already substantial market power of the dominant duopolies in fixed-line telephony and internet (Vodafone and Spark), mobile services (Vodafone and Spark), radio (NZME and Mediaworks), FTA television (TVNZ and Mediaworks), subscription TV (Sky and arguably Netflix) and print news (NZME and Fairfax) has reached

a point where any merger between any of these dominant media firms is now liable to affect competition in other sectors and levels of the value chain. In other words, New Zealand's converged media market now exhibits such concentration that even a weak *Commerce Act* obliges the Commission to decline any proposal for further conglomeration.

Although Vodafone and Sky initiated an appeal the decision through the High Court, this was subsequently withdrawn in June 2017. The outcome would have hinged on whether the applicants could demonstrate that the Commission had erred in its interpretation and application of the *Commerce Act*. This would doubtless have entailed protracted legal arguments, especially in respect to the weighting of different variables and models underpinning the contested factual and counterfactual scenarios. As Sky CEO John Fellet remarked, "The more we started looking at this, the more it looked like we could acquire the synergies without having to go through the merger [...] My attorneys were telling me the merger could take a year, we could probably bank on it being at least a million dollars and then it would still be a coin flip on whether you win or lose' (quoted in Ryan 2017). Vodafone and Sky have nevertheless reasserted that their current partnership will be developed. Sky has also restructured some features of its 'FANPASS' online sports service (Satherley, 2017b), deleting the daily/weekly options and hiking the monthly subscription fee from \$60 to \$100 (more expensive than a regular Sky basic + sports subscription). Insofar as the key source of market power underpinning the Commerce Commission's determination was Sky's continuing dominance over premium sports content, its critics might be excused a moment of *schadenfreude* in noting that Sky's historical efforts to ensure those rights remained uncontested also saw it hoisted by its own petard in the merger outcome.

It is nevertheless important to note that the Commission's determination reflects two key contingent factors: a) Sky's control of rights to live premium sports content (which could in theory change hands when the current deals expire); and b) the current uncertainty over how ultra-fast broadband and high-speed wireless developments will shape market competition. In this respect, the Commission's determination to decline must be regarded as a 'not now' deferral rather than a definitive 'never', meaning a fresh merger application could be made within three or four years. The fact that the appeal was dropped does not mean Vodafone and Sky no longer consider the merger strategy to be of longer-term strategic benefit. If, as the companies suggest, they can realise the synergies and efficiencies deemed to problematic for healthy competition without a formal merger, then there may well be grounds for continued Commerce Commission scrutiny and future intervention. Interestingly, in October 2017, Vodafone announced the launch of a new cross-platform set-top box which would allow Sky (and potentially other SVOD services) to be viewed on television via an internet connection (Pullar Strecker, 2017c). At time of writing, there are rumours of Amazon looking into the possibility of bidding for sports rights in New Zealand, although the formation of a new Labour-led coalition government has also raised the

possibility of anti-siphoning provisions being considered. Were either to eventuate, it could have significant repercussions for Sky's business model.

For critical media scholars, the Vodafone-Sky case serves to illustrate the complex interests and forces that come into play in competition disputes. The structural characteristics of the media sector broadly shape the scope of the arena and the channels of action through which mergers are contested, but the outcomes are not a foregone conclusion determined either by prevailing neoliberal ideology or by the magnitude of the corporate interests in play. The Commerce Commission's own institutional role is prescribed in law but shaped contextually, partly by evolving market conditions but also the way the evidence from the various stakeholders is deployed to discursively construct the definitions of, and (de)legitimate claims about, the competition issues and normative conceptions of the public interests at stake. As one submission suggested, some cross-submissions were 'incorrect, disingenuous or deliberately obscure' (Spark 2016b, 5). These epistemic contests are not peripheral to the political economic forces in play. On the contrary, they constitute the front line of the nexus between the media sector's macro-structural articulation with state, market and civil society, and the interplay of sectoral institutional-level interests.

The epistemic contest is skewed in three important ways, however. First, the way the current *Commerce Act* defines the procedures, channels and scope of the Commerce Commission's powers conceives of competition and the public interest in neoclassical-consumerist terms. The 'epistemic quarantining' of media competition determinations needs to be challenged in favour of a broader, civic conception of the public interest not circumscribed by technical, econometric definitions of efficiency gains. Second, the asymmetric access to market information and the use of commercial sensitivity provisions to redact core market data from public documentation represents a significant impediment to non-corporate stakeholders seeking to exert a civic influence on proceedings. The protection of the public interest in competition determinations therefore requires more comprehensive public disclosure of market data from private corporate entities. Third, the asymmetric access to the legal and commercial expertise required to engage in technical legal disputation eligible for consideration in competition determinations needs to be actively challenged. Critical academic praxis has an important role to play here in discursively translating public interest arguments into the legal-econometric frames that have purchase in competition determinations.

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Notes

1. For access to the complete range of documents submitted to and issued by the Commerce Commission, see <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/vodafone-europe-b.v.-and-sky-network-television-limited/>
2. Note that Commerce Commission approval for mergers and acquisitions transactions may be sought either as ‘clearances’ or ‘authorisations’. Vodafone and Sky applied for a clearance which can be granted where a merger transaction entails no self-evident lessening of competition (vertical integration between a content aggregator and distribution provider operating mainly at different levels of the value chain ostensibly represented no lessening of competition). In contrast, the concurrent merger application by NZME and Fairfax entailed a horizontal integration of two businesses operating across the same level of value chain (i.e. news production and aggregation). Their application for authorisation required a higher level of justification to show that the reduction of competition is offset by other market benefits to the consumer.
3. ‘Triple-play’ and ‘quadruple-play’ respectively include three or four of: voice, data, mobile and video services, i.e. phone, broadband internet, mobile and (subscriber) video-on-demand.
4. William Earl is duly credited with this neologism.
5. The 1986 *Commerce Act* is the primary legislation on competition which sets out the scope of the Commerce Commission’s powers. A summary is available from: <http://www.comcom.govt.nz/the-commission/about-us/the-legislation/>
6. Despite the ostensible independence of the legal firms and economic think-tanks, the respective conclusions drawn about the Vodafone-Sky merger invariably aligned with the vested interest of the institution which commissioned them. The fact that expert analyses can result in diametrically opposed conclusions serves to underline the need to take account of epistemic contestation.
7. Peter Thompson is currently Chair of the Coalition for Better Broadcasting which opposed the merger. The CBB is a non-profit trust which campaigns for public service media principles and civic-oriented media policies. Its board comprises several academics and media industry experts. The CBB website can be found at <http://betterbroadcasting.co.nz/>
8. The full range of submissions to the Commerce Commission can be accessed here: <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/vodafone-europe-b.v.-and-sky-network-television-limited/>
9. A learned colleague from North America contacted the author for advice after unsuccessfully trying to identify the regulatory mechanisms in New Zealand controlling overseas/cross-media ownership and other media frameworks common to most of the OECD. The conversation ended in bemused profanities when the total absence of such provisions in New Zealand was explained.
10. Saturn had initially pioneered cable television in New Zealand, beginning with cable network development on the Kapiti coast, later extending cable television services to suburban Wellington and Christchurch up to the point of its takeover by Telstra.
11. TV3 was the first private commercial television channel. It commenced operations in 1989 but found itself in receivership by 1990, partly because its state-owned but newly-commercialised rival, TVNZ aggressively acquired and hoarded content rights – ironically a claim TVNZ was to subsequently level at Sky/Prime.

12. Free-to-air television operators have suggested that Sky was pursuing a deliberate strategy to drive up FTA content costs and hoard rights to increase the pressure on the free-to-air operators whose advertising revenues were being eroded by online competitors. Privately, former Sky employees have confirmed this effect on the FTA market was recognised, but the Commerce Commission's deliberations on the Prime takeover and the Vodafone-Sky merger have not found sufficient evidence of a significant lessening of competition.
13. The Ministry of Economic Development is now the Ministry for Business, Innovation and Employment. It was this Ministry which insisted that the television market did not evidence any current sign of competition problems and recommended a 'wait and see' approach to the development of digital media services. The Ministry for Culture and Heritage was less sanguine and although it agreed that there were no current competition issues, it considered future problems could arise unless the regulatory frameworks were updated.
14. Thus for a period, Sky and TVNZ became 'frenemies' in regard to the Igloo joint venture. For TVNZ, this appeared to present an opportunity to develop a new revenue stream in a slowly-fragmenting advertising market. For Sky, it provided an opportunity to reduce the likelihood of another non-premium market entrant into the subscription TV market and also made use of some of the digital spectrum rights Sky had acquired in the run-up to digital switch-over in 2013. Sky also bought out most of TVNZ's stake in Igloo in 2013, with TVNZ writing off its remaining investment in 2014.
15. Coliseum entered the SVOD market after outbidding Sky to the rights for English Premier League soccer. There is no doubt that Sky could easily have outbid Coliseum had it been motivated. Given that a) Sky's contracts were under investigation by the Commerce Commission, b) the EPL was popular in New Zealand but (unlike rugby) not considered premium sports content, and c) Sky subsequently cited Coliseum's acquisition of EPL as ostensible evidence of increasing competition, it would be naïve to dismiss the possibility that Sky allowed its smaller rival to win the bid as a strategic manoeuvre to moderate the Commerce Commission's concerns. Coliseum never achieved scale and entered into a short-lived partnership with Spark's Lightbox. In 2016, the EPL rights were picked up by Al Jazeera subsidiary, BeIN, which formed a partnership with Sky to provide its OTT service FANPASS (including short-term options for access by the day although this was discontinued in May 2017). *FAN PASS* was restructured in May 2017, with BeIN's sports content becoming an add-on package for regular sky subscriptions.
16. These include the Australian parent of Fairfax NZ driving the 2012 sale of TradeMe (helping exacerbate the decline of its revenue base which increased the incentive to merge with NZME) and Mediaworks' cancellation of the critical current affairs programme *Campbell Live* in 2015 under pressure from its owner, US private equity firm, Oaktree Capital, to increase prime-time commercial performance.
17. This appears not to have been a direct consequence of the Commerce Commission's final determination on the merger with Vodafone, because many of the recent shareholding changes occurred before February 2017.
18. Indeed, the impact of Facebook and Google on New Zealand print/online news was a key factor driving the NZME-Fairfax merger bid.
19. A group of broadcasters including Sky and TVNZ took CallPlus to court over its provision of the Global Mode virtual private network which circumvented geo-blocking and enabled New Zealand users to access content to which the broadcasters owned the content rights from overseas SVOD services. It eventually withdrew the service as part of an out-of-court settlement in 2015. Vocus group subsequently acquired CallPlus when it merged with M2 group in 2016.
20. In the 30 June Annual Report, Sky reported 852,679 subscribers. For the period ending 31 December this number fell to 816,135. CEO John Fellet explained that, 'It is important to understand this change. We do not break out the categories of subscribers for competitive

reasons but [...] the bulk of net subscriber gains came from internet delivered services such as FAN PASS and NEON. Likewise, in the December figure it was FAN PASS and NEON that accounted for more than half of this loss' (Sky Interim Report December 2016, 4).

21. At time of writing there are 121 NZ retail broadband providers. See <https://www.broadbandcompare.co.nz/broadbands/index>
22. The complete set of submissions are available from the Commerce Commission website at <http://www.comcom.govt.nz/business-competition/mergers-and-acquisitions/clearances/clearances-register/vodafone-europe-b.v.-and-sky-network-television-limited/>
23. Two media groups were conspicuously unrepresented in the submissions: Mediaworks (FTA radio and television) and Vocus (telecommunications, broadband, mobile).
24. The author wrote the submission for the Coalition for Better Broadcasting opposing the Vodafone-Sky merger.
25. The Commerce Commission's annual telecommunication monitoring report (2017b) noted that in 2012, only 5% of consumers had uncapped broadband; by 2016, this had increased to 49%. However, this still means that, even with increased bandwidth from fibre optic and high-speed wireless connections, the majority of New Zealand consumers cannot yet download content indiscriminately without incurring lower speeds of additional charges. More recently (after the Commerce Commission final ruling), both 2degrees and Spark have moved to offer uncapped mobile data plans for \$129 and \$130 respectively (see Keall 2017) including unlimited calls and texts (including Australia) and unlimited mobile data within New Zealand (although 2degrees has a 'fair use' limitation).
26. TVNZ had long been critical of the absence of any requirement on Sky to pay licensing fees for carrying the FTA television channels and also its ability to leverage its content rights in the pay-TV sector to support its FTA subsidiary, Prime.
27. 71% of Sky customers also have the sports package.
28. Average revenue per unit – in other words, the most lucrative customers willing to spend more on services like higher speed/higher capacity broadband and mobile and premium content like live sports.
29. Triple and Quad-play refers to the bundling of subscriber content with landline, broadband and/or mobile services.
30. Achieving 'scale' here means sufficient market growth to cover the cost of market entry and sustain the business, including the viability of investing further capital to enable expansion.
31. Spark's own record on being forthright is hardly exemplary. Former Telecom NZ CEO, Theresa Gattung, provoked angry reactions in 2007 when her comments admitting to confusing consumers as a strategy to drive up prices was made public. See <http://www.converge.org.nz/watchdog/15/07.htm>
32. The Efficient Component Pricing Rule or 'retail minus' principle is a competition pricing model focused on relative opportunity costs. It suggests that where an incumbent wholesaler's profits from providing infrastructure/network access to rivals is no greater than the profits from providing retail services themselves, then competitors will not be able to enter the market unless they can provide the retail service more efficiently. For instance, consider the aforementioned scenario whereby Telecom's monopoly over the copper network meant it suffered opportunity costs by allowing rivals like Clear to utilise its infrastructure: <http://www.wigleylaw.com/assets/pdfs/2007-%282%29/retail-minus-pricing-panned-by-cat.pdf>
33. Wigley and Co (2016, para. 1.5) give the following example of discrepant statements made by Vodafone to the Commission and its shareholders: '... the merged entity will not be able to leverage SKY content to switch substantial numbers of customers to the merged entity's broadband', while its 2016 annual report stated that 'Television and content, when bundled

with broadband, are becoming increasingly important drivers of customer demand', and 'We're aiming to expand our TV services, to support the takeup of broadband. We already have TV services in seven markets'.

34. Vodafone was not significantly affected because its parent company was much larger and traded on other exchanges.

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