



**Discussion Document**  
**on**  
**‘Responding to convergence in  
communications markets’**

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## Introduction

Recent months have seen a rising tide of commentary on and interest in convergence in New Zealand. The blurring of the boundaries between media and telecommunications markets is creating new challenges to existing policy and regulatory frameworks. Competition may be under threat. Consumer interests aren't top of the list in this changing environment, and this poses risks to consumer welfare and the public interest.

This discussion document unpicks the challenge of convergence, and brings an Internet perspective to the debate. **InternetNZ seeks your input to test the ideas put forward here.**

After setting out some key questions, we define convergence, the challenges the process creates for the existing regulatory framework, and some basic principles that should drive New Zealand's response to this changing environment. We then consider the approach other jurisdictions take, many of which have been responding to the changes caused by convergence.

Bringing this evidence together, the paper sets out the existing policy and regulatory frameworks for telecommunications and broadcasting in New Zealand, recent market developments, and the Commerce Commission's investigation into Sky's contracts with content providers and resellers. Finally, it sets out some options for the future.

The scope of this paper is mainly limited to markets for content, their oversight and (if necessary) regulation, and the pressures on the status quo that convergence creates. The paper sets out InternetNZ's initial thinking and seeks input from the industry and the public on the options. A number of issues that are sometimes described as being about "convergence" are not covered by this paper. InternetNZ's interests do not extend to cultural policy matters like the future of public service broadcasting in New Zealand, public right-to-view requirements for major sporting fixtures, or the imposition of content standards on content that is available online (the Law Commission is considering parts of the latter).

The perspective of this paper is defined by InternetNZ's policy principles and vision of an open and uncaptureable Internet, and with a strong commitment to the gains consumers make from open, competitive markets. The only interest these proposals are designed to serve is that of the broad community of people who use the Internet in New Zealand.

Feedback on this document is very welcome and should be directed to me in the first instance. We will digest this feedback and present an updated version of this paper early in 2013. It will also incorporate any further developments from the current investigation by the Commerce Commission into Sky's contracts with content providers and resellers.

Vikram Kumar  
Chief Executive  
[vikram@internetcz.net.nz](mailto:vikram@internetcz.net.nz)

## Consultation questions

InternetNZ welcomes your views on any of the matters raised in this document, or any other convergence issues. To help focus feedback, we have developed the following consultation questions. These are included here to stimulate your attention while reading the document as a whole.

1. What impact is convergence having on the interactions between telecommunications, broadcasting and content markets (if any)?
2. Does New Zealand's regulatory framework need to change to account for the impact of convergence - if so, why; if not, why not?
3. Should any changes be restricted to market issues, or should cultural policy be incorporated in the discussion and response?
4. Do you have a different interpretation or application of InternetNZ's policy principles in this discussion?
5. Are there international examples of market behaviour or policy & regulatory best practice you would like InternetNZ to consider as it develops final recommendations?
6. What are the implications of the Commerce Commission's Sky investigation for this discussion?
7. What are the most important considerations in deciding what, if any, changes are required to respond to convergence?
8. Which of the four options set out in this paper do you prefer, and why do you find it preferable?
9. Would the Telecommunications Commissioner be the logical choice for a regulator with a wider mandate?

The questions are inserted in the document following the relevant section for ease of reference and as a prompt for input. **Your responses are welcome, by email to [susan@internetcz.net.nz](mailto:susan@internetcz.net.nz) before 1 May 2013.**

You are welcome to share off-the-record thoughts or information, which will remain confidential to InternetNZ. We are also happy to meet with interested parties to discuss these questions and other matters raised in this document.

InternetNZ will not publish any responses received, but will acknowledge those who have made input in the next paper.

Thank you in advance for any input you are able to make available.

## Convergence defined

A convenient definition of the phenomenon called “convergence” is presented in the Terms of Reference for the Convergence Review recently conducted by the Australian government:

*Over the last 15 years, the way that people get information, enjoy entertainment, stay in touch, acquire goods and services, work, learn, travel, and manage their time has undergone unprecedented change.*

*At the heart of this change have been developments in communications and media technologies—telecommunications, radio, television and the internet.*

*All these technologies provide services which underpin the functioning of our democratic society—enabling communications between individuals and groups, and providing content services that inform, educate and entertain audiences, citizens and consumers.*

*Historically separate, these technologies are increasingly performing similar tasks, and the content delivery and communications services they offer are becoming more analogous. The development of digital broadcasting, data compression and internet-based technologies, coupled with improved infrastructure capability, means that content and services that were previously constrained to one delivery channel can now be delivered over many different platforms.*

*This phenomenon is known as **convergence**.<sup>1</sup>*

This definition is equally applicable to the New Zealand situation.

Content that used to be dependent on a particular distribution technology (for instance, newspapers or broadcast television) is now available in many forms. Newspapers have websites and often send email updates, or use Twitter or Facebook to keep people up to date with the news. Television is available by broadcast, but also on demand or streamed on the Internet, or by IPTV or by satellite.

Past distinctions between New Zealand and offshore-provided content are becoming less significant. Internet technologies allow a wide range of media from offshore to be enjoyed by New Zealanders – a further benefit arising from convergence.

Convergence means that markets which used to be quite separate are now beginning to overlap. National boundaries are blurring. Yet the institutional frameworks of these markets – policy, law, regulation and so on – were predicated on separateness. This is why the process of convergence creates a challenge for policymakers.

## The challenge

Why is convergence a subject that matters to those interested in the future of the Internet?

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<sup>1</sup> ‘Convergence Review Terms of Reference’, Department of Broadband, Communications and the Digital Economy: 2010, Australia. See [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review](http://www.dbcde.gov.au/digital_economy/convergence_review)

Convergence is a patchy process, partly driven by user choices, technological change and market change. These all happen within an existing set of laws / government policies and within existing networks of commercial and public service entities. The array of legal and institutional arrangements comes under pressure from the changes convergence creates. Technological change – in this case, driven in part by the rise of the Internet – has created such significant changes that, as was the case in telecommunications around the turn of the century, it raises the question if a similar response is required in relation to broadcasting, i.e. whether the general competition law applying to the rest of the communications industry needs to be supplemented by sector-specific oversight and the ability to deal with the new circumstances convergence creates.

It is helpful to break the picture into separate markets and areas of focus.

Since 2001, telecommunications markets have had their own sector-specific regulatory framework (the Telecommunications Act, extensively amended in 2006) as well as generic competition law controls (the Commerce Act 1986)<sup>2</sup>.

Broadcasting sits under generic competition law (the Commerce Act 1986). That is to say, content markets in broadcasting are not under sector-specific regulatory scrutiny<sup>3</sup>.

It is worth noting that due to this, New Zealand does not face one particular challenge that many other countries have faced: it does not have contradictory sector-specific economic regulation for telecommunications and broadcasting. Where countries have had detailed, specific regulatory frameworks applicable to these two markets, the growing overlap between the activities that used to be separate has caused complications, with competing and sometimes contradictory regulatory requirements applying to a single activity. The New Zealand situation means that direct clashes between frameworks do not therefore arise from convergence.

The need for a response to convergence does not go away because of the absence of this clash – the challenge is simply different. The arguments that led to the widely supported establishment of a sector-specific regulator for telecommunications could similarly apply in broadcasting<sup>4</sup>: namely, that in a fast moving, complex market, having an agency focused on understanding the relevant markets, and being able in a transparent manner to address problems as they arise with deep technical and industry knowledge, is likely to be to the advantage of consumers.

There are also some similarities in the market structures in both industries. Both telecommunications and broadcasting have historically been characterised by vertically integrated monopolies which control a number of upstream and downstream markets. For broadcasting this includes transmission, content procurement/production, programme

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<sup>2</sup> The introduction of sector-specific regulation in 2001 followed years of major concerns with a lack of competition in the telecommunications market.

<sup>3</sup> As an aside, New Zealand's approach to content *standards* regulation (broadcasting standards, censorship and so on) is quite conventional with statutory or industry agencies in place, and its approach to public service broadcasting is quite unconventional (with the absence of a public service broadcaster and a devolved purchasing model for public interest content). These two issues do not, however, fall within the scope of this paper.

<sup>4</sup> The arguments are well canvassed in the final report of the Ministerial Inquiry into Telecommunications (the Fletcher Report), 2000.

guides and receiver equipment in some cases. For telecommunications this includes physical network infrastructure and the services supplied over it. Given these similarities and the reality of converging markets, the common approach in other jurisdictions has been to bring both markets under a similar regulator, with an overarching oversight of the communications sector as a whole.

So what about the Internet? The first area of interest is a practical one related to how the Internet works: it does not distinguish between content types<sup>5</sup>. Whether an audio-visual file comes from a broadcaster or an Internet publisher is immaterial to how the Internet transports it. The work of those who provide Internet services would be more efficient if they only had to respond to the requirements of a single, clear regulatory framework, and could be sure that gaps in coverage did not create unexpected complications. Access to content is an example.

More significant in the New Zealand context is the huge public investment in high-speed broadband infrastructure that commenced in 2011. The Government is investing around \$2 billion in urban and rural broadband, and private companies are investing billions more. Recent work by the Commerce Commission in its demand side study<sup>6</sup> joined a range of other commentators in identifying access to high quality video content as a key driver of consumer take-up or adoption of high-speed broadband.

It is reasonable to assume that productivity-enhancing services made possible by widespread take-up of high-speed broadband will not be developed or rolled out until there is a reasonable sized market that can access them. This is an example of the “chicken and egg” dilemma at work. To solve this dilemma, current demand drivers need to be understood and acknowledged. Audio-visual content is a key driver for take-up and access to it across these networks becomes important as a precursor for greater economic gains. This is why there is both a public and a Government interest in ensuring that any emerging competition issues in content markets – which are converging with telecommunications in any case – are identified and, if necessary, addressed before they harm the prospects of widespread fibre take-up.

In practical terms, InternetNZ notes there are a number of concerns with the status quo that have been expressed by a range of organisations. Situations are raised and assertions made. The critical issue for us is not whether such situations are true or not today: it is that no entity has the mandate and responsibility to monitor and prevent harms caused by a lack of competition in the converging broadcasting and telecommunications markets. The existence of a regulator charged with monitoring the converged markets and able to intervene if problems arise could itself prevent anti-competitive behaviour – it would raise the bar for firms behaving in anti-competitive ways because the consequences are higher if they are caught, and being caught is a more likely outcome.

The abovementioned study by the Commerce Commission was the first coherent attempt to identify the factors that would affect the demand side of the market for high-speed broadband.

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<sup>5</sup> Data transmitted over the Internet is broken into packets for transmission and reassembled at the destination. The same process operates no matter whether the data represents voice communication, text or video.

<sup>6</sup> “High speed broadband services demand side study” – Final Report, Commerce Commission, 29 June 2012. Online at <http://www.comcom.govt.nz/high-speed-broadband-services-demand-side-study/>

It did not however comprehensively cover the issues involved because, restricted by its telco-only mandate, the Commission could not fully consider everything that convergence has given rise to, or all the factors affecting the demand side of the market. A regulator with a wider mandate may be able to do a better job for New Zealand consumers. The outcome of effective competition would be the maximum possible array of broadcasting and telecommunications services at the best possible price.

For those sceptical about regulation being able to contribute to the development of a more competitive market, the telecommunications sector provides a good example. The Commerce Commission's monitoring reports since the 2006<sup>7</sup> reforms show that improvements to speed and quality, not to mention price, were the result of competition problems being resolved through effective regulatory interventions where markets were not working. The international trend has been to adopt regulatory frameworks in broadcasting that are consistent with those applicable to telecommunications, at least to the extent of the regulator being able to properly monitor markets.

In sum, the critical policy problem presented by convergence is as follows:

The drawing together of telecommunications and broadcasting markets that used to be separate means that the separate monitoring, oversight and regulatory approaches in place for these markets today are no longer suitable for the converging reality.

The result of this problem appears to be inadequate oversight of the consequences of convergence. The prospect is that New Zealand consumers may be worse off than they would be if the reality of convergence and its consequences was taken into account, and regulatory arrangements reconsidered in this light.

If competition problems emerge in these converging market with no mechanism to resolve them, New Zealand consumers will be worse off: paying higher prices for communications services, finding fewer choices in communications markets, and seeing less innovation and slower arrival of new services for them to choose.

#### **Consultation questions**

1. What impact is convergence having on the interactions between telecommunications, broadcasting and content markets (if any)?
2. Does New Zealand's regulatory framework need to change to account for the impact of convergence - if so, why; if not, why not?

## **Cultural policy issues**

This paper is focused on market and access issues in communications markets. Yet these markets operate in a wider context: broadcasting in particular is a cultural policy focus for governments well beyond its economic role. There are many facets to government interests in the cultural policy aspects of broadcasting:

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<sup>7</sup> See reports at <http://www.comcom.govt.nz/market-monitoring-2/>

- The availability of 'public good' news and current affairs programming
- The availability of sporting or cultural matters of national significance
- The balance between free-to-air and subscriber broadcasting content availability
- The imposition and reach of content quality and decency standards

All of these issues are part of the context within which content and broadcasting markets are converging with telecommunications. As previously noted however, this document focuses only on the economic regulation problem.

The reason for this is two-fold. InternetNZ is primarily interested in understanding the extent to which reform is needed so that new bottlenecks constraining the growth and development of the Internet do not arise in these converging markets. That is primarily an issue of economic regulation, not cultural policy. Secondly, InternetNZ's expertise is not developed in cultural policy matters. We have chosen in this instance to 'stick to our knitting', and retain a focus on economic matters.

Nothing in this decision should be seen as minimising the importance of cultural policy matters. We are considering a more in-depth review of some aspects of cultural production and how the Internet can support wider availability and lower-cost production of content in and for New Zealand in the 2013/14 year. This paper simply focuses on a potential threat to the open Internet, grounded in InternetNZ's policy principles.

#### Consultation question

3. Should any changes be restricted to market issues, or should cultural policy be incorporated in the discussion and response?

## A principled response

InternetNZ has published policy principles that guide and explain its approach to major issues. A full set of the principles and explanation is available on the InternetNZ website<sup>8</sup>.

Our approach to convergence relates in particular to the following principles:

Principle	Relevance to Convergence
<b>1. The Internet should be open and uncaptureable</b>	As a sector (broadcasting) begins to have interactions with the Internet it used not to have, concentrations of commercial power that could pose a risk to openness may emerge. With broadcasting characterised by big companies and high concentration of the industry among few key firms, effective vigilance and oversight by regulators is important to protect the Internet's openness and uncaptureability.
<b>2. Internet markets should be competitive</b>	Competition drives innovation, quality and pricing improvements. In the absence of effective regulatory oversight, market power can be used to stifle competition. Effective regulation, by definition, succeeds in restraining such use of

<sup>8</sup> See website at <http://internetnz.net.nz/content/Policy-Principles>

Principle	Relevance to Convergence
	market power. Sector specific regulation is superior to generic competition law in handling markets converging with telecommunications, such as broadcasting, for the same reason it is superior in telecommunications: the speed of change and need for deep, specialised understanding of the sector in order to oversee such markets effectively and, if problems emerge, respond in a timely way.
<b>4. Laws and policies should work with the architecture of the Internet, not against it</b>	Convergence is bringing the Internet and broadcasting worlds closer together, and undermining the geographic boundaries that have been a feature of broadcasting markets in the past. To the extent that broadcasting in future is likely more and more to rely on Internet services for transmission of programming, having regulatory frameworks in place that recognise this reality should lead to more coherent oversight. It would reflect the fact that the Internet does not respect any particular industry boundaries in how it deals with data.
<b>6. The Internet should be accessible by and inclusive of everyone</b>	The mingling of broadcasting and telecommunications markets presents real opportunities: for example, broadcasting content made available on-demand expands the chances people have to access it. Making sure that policy and regulation supports the growth of such opportunities would give effect to this principle.
<b>7. Technology changes quickly, so laws and policies should focus on activity</b>	Technological changes are creating potential for convergence. The law needs to keep pace, to avoid unintended consequences arising from inconsistent regulatory treatment of the two sectors involved. Regulatory arbitrage arising from the gaps between treatment should be avoided.

These principles are the lens through which InternetNZ has considered the convergence issue. They give some indication that a potential resolution of the policy problem set out above would be the adoption of a similar approach to that taken today in telecommunications. Namely, supporting effective competition with a policy and regulatory framework that effectively oversees market dynamics, builds specialist knowledge and understanding of the sector, and which can recommend regulatory interventions if these become necessary.

**Consultation question**

4. Do you have a different interpretation or application of InternetNZ’s policy principles in this discussion?

## Lessons from Offshore

These brief vignettes from a range of other jurisdictions illustrate the range of different approaches taken to convergence. In contrast with New Zealand’s situation, in the following cases there is a single economic regulator responsible for the telecommunications and broadcasting markets. Sometimes the same regulator deals with content standards and other matters outside this paper’s scope (for example Ofcom in the UK) while in other jurisdictions a separate regulator does this (for example ACMA in Australia).

Table 1 summarises the approaches taken by other jurisdictions. The “Converged Regulator” column identifies whether there is a single regulator responsible for both broadcasting and telecommunications sector-specific economic regulation. The “Includes content stds” column identifies whether that converged regulator is also responsible for content standards regulation in the broadcasting environment.

**Table 1: Regulator convergence in other countries**

Country	Converged Regulator?	Includes content stds?
New Zealand	No	No
United Kingdom	Yes	Yes
Australia	Partial	Yes
United States	Yes	No
Canada	Yes	Yes

## United Kingdom

The United Kingdom deployed a converged regulator with the establishment of Ofcom (Office of Communications) in 2003. This replaced five previous regulators: the Broadcasting Standards Commission, the Independent Television Commission, the Office of Telecommunications, the Radiocommunications Agency and the Radio Authority.<sup>9</sup> While the UK situation is slightly complicated by separate regulation of aspects of public broadcasting (the BBC has some independent regulatory functions), in broad terms Ofcom is the unified regulator for telecommunications and broadcasting markets. Decisions on competition issues can be referred upwards to the Competition Commission or the Competition Appeals Tribunal, while Ofcom has competence for content standards regulation and wholesale access network regulation.

The legislative framework is a unified statute (Communications Act 2003) which is consistent with the European Union-wide frameworks set out in the Communications Directives of 2001. In many respects, New Zealand’s telecommunications regulatory framework has been inspired by the European and UK approach. Telecom’s operational separation in 2008 was based on that undertaken by British Telecom<sup>10</sup> earlier that decade.

Recent UK developments include an investigation into competition in the pay movies market, where Ofcom research suggested a competition problem but the Competition Commission (the

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<sup>9</sup> See <http://www.ofcom.org.uk/about/what-is-ofcom/a-case-study-on-public-sector-mergers-and-regulatory-structures/> for more.

<sup>10</sup> British Telecom was operationally separated into a network unit (BT Openreach) and existing retail units in 2005.

final decision body) found no issues requiring regulatory intervention. This investigation took around two years to complete<sup>11</sup> and was a good illustration of the need for careful analysis in rapidly-changing markets.

## Australia

The Australian Communications and Media Authority (ACMA) is a converged regulator with responsibility for many aspects of both broadcasting and telecommunications<sup>12</sup>. Some competition law issues, mainly those dealing with access to bottleneck facilities, are the responsibility of the Australian Competition and Consumer Commission (ACCC)<sup>13</sup>.

In 2012, the Convergence Review<sup>14</sup> commissioned by the Australian Government reported back, recommending the creation of a new converged regulator, replacing ACMA, which will be responsible for media ownership, content standards and broadcasting regulation. The economic regulation of the telecommunications network will remain with the ACCC as it is today.

## United States of America

The Federal Communications Commission is a long-established regulator that deals with all communications markets – wireless, wireline and broadcasting. Its rulemaking powers were established in the 1930s and so convergence has never posed a particular challenge to the institutional framework. Competition (anti-trust) issues are canvassed separately, being dealt with by the Department of Justice (DoJ).

Historic deals such as the break-up of the Bell system were negotiated by DoJ under anti-trust law. More recent discussions show the breadth of the FCC mandate – with discussions around network neutrality and forbearance on the regulation of fibre broadband investments being conducted by the same agency under its statutory framework: the Communications Act of 1934<sup>15</sup>

The United States market, with its huge diversity, competing infrastructure (telephone lines, cable television and broadband, terrestrial and satellite analogue and digital broadcasting), does not map well to the New Zealand situation.

## Canada

Canadian telecommunications and broadcasting are regulated by the Canadian Radio-Television and Telecommunications Commission (CRTC)<sup>16</sup>. The Commission was established in 1968 with a single statute, and today regulates telecommunications and broadcasting under separate legislation – the Broadcasting Act (last major amendments in 1991) and the Telecommunications Act (passed in 1993). Canada's large landmass and low population density have some similarities with New Zealand, though the scale of the country does not.

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<sup>11</sup> See <http://www.competition-commission.org.uk/media-centre/latest-news/2012/Aug/cc-confirms-views-in-pay-tv-movies> for details.

<sup>12</sup> ACMA – [www.acma.gov.au](http://www.acma.gov.au).

<sup>13</sup> ACCC – [www.accc.gov.au](http://www.accc.gov.au).

<sup>14</sup> "Convergence Review Final Report" April 2012, at [http://www.dbcde.gov.au/digital\\_economy/convergence\\_review](http://www.dbcde.gov.au/digital_economy/convergence_review)

<sup>15</sup> <http://www.fcc.gov/what-we-do>

<sup>16</sup> CRTC - <http://crtc.gc.ca/>

#### **Consultation question**

5. Are there international examples of market behaviour or policy & regulatory best practice you would like InternetNZ to consider as it develops final recommendations?

## **New Zealand policy and regulation today**

### **Legal framework**

Business in New Zealand is subject to the Commerce Act 1986, which provides the Commerce Commission with tools to deal with anti-competitive behaviour. By international standards, the Commerce Act is a light-handed generic competition law framework, with relatively limited powers in dealing with competition issues.

In telecommunications, the Commerce Act was the main regulatory framework until the implementation of a sector-specific regulatory framework with the passage of the Telecommunications Act in 2001. This framework responded to a clear failure of the general competition law approach in telecommunications: the industry was characterised by Telecom's dominance and extensive, slow litigation over many critical issues (such as interconnection, which dragged through the courts for close to a decade), and little effective competition. The Act is implemented by the Telecommunications Commissioner, a member of the Commerce Commission (New Zealand's generic competition law regulator). The Commissioner and their staff comprise the sector regulator. The focus is on problems relating to access to and interconnection between telecommunications networks, and mechanisms for levies to fund universal service-related mandates.

Under the Act, the Commission has a wide range of market monitoring powers, and the ability to inquire into markets and other issues. As noted above, this monitoring power itself can be an inhibitor of anti-competitive behaviour. If the Commission finds evidence of anti-competitive behaviour and concludes that a market requires regulation, it can propose a regulated service to the responsible Minister. Once a service has entered the Act, the Commissioner can set price and/or non-price terms for services.

In broadcasting, there is little sector-specific regulation. The Broadcasting Act 1989 mainly deals with matters of content standards rather than the economic regulation of content markets.

It is partly the record of telecommunications reform that this paper draws inspiration from. It took New Zealand too long to recognise the inadequate nature of the regulatory framework, and years more once the problems were put right for consumers to benefit. Convergence demands a faster response in those markets converging with telecommunications, to avoid similar sorts of problems.

### **Policy and operating framework**

At a high level, the telecommunications industry and policy relating to it are broadly issues of economic and infrastructure policy. There is little public or government concern with the

content of ordinary telecommunications (though the Internet poses different challenges<sup>17</sup>). In contrast, broadcasting policy is generally approached through a cultural policy lens, with concerns about New Zealand content and maintenance of content standards often important<sup>18</sup>.

Telecommunications policy in New Zealand is largely done by the Ministry of Business, Innovation and Employment (MBIE), with some related operational aspects being the responsibility of the Department of Internal Affairs. The Telecommunications Carriers Forum is responsible for some aspects of industry self-regulation and associated policy development. Universal service obligations through the TSO<sup>19</sup> framework are administered by the Commerce Commission.

Broadcasting is a more complex arena. The lead department is the Ministry of Culture and Heritage, but aspects of radiospectrum policy (spectrum allocation, planning and interference management) are decided in MBIE. The Broadcasting Commission (NZ on Air) is responsible for contestable funds for production of broadcasting content, and there is a dedicated funding stream to Maori TV. The Broadcasting Standards Authority enforces content standards on television and radio. The Freeview consortium makes available digital terrestrial broadcasting of free-to-air television through Kordia's infrastructure.

## New Zealand markets today

This section provides a brief snapshot of the broadcasting and telecommunications markets.

### Broadcasting

- Highly concentrated markets<sup>20</sup>.
- Sky Television is the largest TV broadcaster, with a free-to-air and private subscriber model. Turnover around \$750m in 2010.
- TVNZ is the main commercial free-to-air TV broadcaster. Turnover \$380m.
- MediaWorks is the third free-to-air TV broadcaster. Turnover \$130m.
- Radio is dominated by MediaWorks and The Radio Network.
- Public broadcasting is confined to Radio New Zealand (\$35m) and Maori Television Service (\$30m).
- NZ on Air funding of around \$130m/year across all media<sup>21</sup>.
- Concentrated screen production industry dependent in part on NZoA support.
- Emerging over the top and Internet services – Sky resells through most ISPs, QuickFlix now available online as OTT.

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<sup>17</sup> For instance the debates about copyright law that continues in New Zealand.

<sup>18</sup> Ref the 2009 study by MED/MCH which shows the different perspectives in some depth.

<sup>19</sup> The Telecommunications Service Obligation is a universal service obligation framework imposed through the Telecommunications Act 2001. Funds from a levy under the TSO pay for a range of services and the Government's investment in the Rural Broadband Initiative. The TSO also obliges Telecom and Chorus to maintain the existing fixed line telecommunications access network at least as broadly as it is today.

<sup>20</sup> The turnover figures here are from a paper by Dwayne Winseck: "New Zealand's Ultrafast Broadband Plan: Digital Public Works Project for a Network Free Press in the 21<sup>st</sup> Century or Playfield of Incumbents?" February 2012. See table 5. Figures reported are from publicly cited sources.

<sup>21</sup> From 2011 Annual Report, at [http://nzonair.govt.nz/media/61106/nzair\\_11%20areport.pdf](http://nzonair.govt.nz/media/61106/nzair_11%20areport.pdf)

- No SVOD or TVOD available other than Apple iTunes and other internationals, with few domestic presences.

## Telecommunications

- Industry in a state of rapid change, also highly concentrated.
- Chorus owns ubiquitous copper network, and is rolling out large parts of the new FTTH network.
- Vodafone, now incorporating TelstraClear, is the second large fixed line operator, with extensive copper unbundling in place and a hybrid-fibre coax network in parts of Christchurch and Wellington.
- Mobile operators are Vodafone, Telecom and 2 Degrees, with 2 Degrees being a relatively new entrant.
- The Rural Broadband Initiative is now rolling out in rural areas.
- Telecom competes with a wide range of ISPs for Internet service provision.
- A range of smaller, specialist providers in the market for specialist business and consumer options.

## Recent Developments

- VodafoneNZ application for clearance to purchase TelstraClear was approved.
- Igloo joint venture between TVNZ and Sky may forestall future competition between the two for FTA or subscriber linear programming, but ComCom does not believe so.<sup>22</sup>
- Sky contracts with ISPs and Sky contracts with content providers – both subject to Commerce Act investigation by the Commerce Commission arising out of the Igloo clearance, with market intelligence and public comment suggesting that the contracts may be restrictive and limit the ability of ISPs to offer competing services.
- Absence of over the top providers with content (NetFlix, broader Apple content) is a concern for consumers, and may contribute to copyright infringement to obtain timely access to content.

Taken as a whole, both telecommunications and broadcasting are highly concentrated markets with a significant degree of change. There are matters not covered in this summary which also have effects on the convergence landscape, but this paper does not require a comprehensive survey.

## Sky investigation

The Commerce Commission is currently investigating two aspects of Sky's content arrangements - the contracts they have with content providers (Hollywood studios, for instance) and the contracts for resale of their programming that they have with ISPs in New Zealand (e.g. Telecom or Vodafone). Most public attention to-date has been focused on the deals with ISPs.

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<sup>22</sup> The Commerce Commission's investigation report from May 2012 is online at: <http://www.comcom.govt.nz/assets/Business-Competition/Enforcement-Outcomes/Investigation-report-TVNZ-Sky-16-May-2012.pdf>

This investigation is being conducted<sup>23</sup> under sections 27 and 36 the Commerce Act 1986, and follows public complaints from a range of groups. These sections of the Act<sup>24</sup> constrain anti-competitive behaviour by dominant firms. Results from the Commission's investigation are expected early in 2013.

While the results of the investigation are yet to be released, it is plausible that different results will give rise to different answers to the broader question tackled by this paper - whether changes to regulatory arrangements are needed to take account of convergence. Potential outcomes include the following:

- No issue is found, and no changes to the contracts are required.
- The Commission requires changes to some or all of the contracts that effectively loosen Sky's control over content or resellers.
- The Commission makes some other intervention, or accepts negotiated changes to Sky's approach to making content commercially available / purchasing content rights, or to its relationship with resellers.

InternetNZ's initial view is that a sector information monitoring regime, one of the options considered in this paper, could have led to the matters that generated complaints (and by extension the current investigation) being picked up earlier than has been the case. This does not imply that any particular intervention would have been required — it simply highlights the issue detection advantage inherent in an open, ex-ante, proactive monitoring regime (such as applies in telecommunications markets) compared with a complaints-based ex-post competition law regime (such as applies to content markets).

Your view on the implications of this market investigation for any needed changes is welcome. The final recommendations InternetNZ makes will be decided after the results of the investigation are known.

**Consultation question**

6. What are the implications of the Commerce Commission's Sky investigation for this discussion?

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<sup>23</sup> See the Igloo investigation report at <http://www.comcom.govt.nz/assets/Business-Competition/Enforcement-Outcomes/Investigation-report-TVNZ-Sky-16-May-2012.pdf>

<sup>24</sup> "The Commerce Act prohibits anti-competitive behaviour and structures in markets. Section 27 prohibits anyone from entering into, or implementing arrangements with the purpose, effect or likely effect of substantially lessening competition. Arrangements can include contracts, agreements or understandings. Section 36 makes it illegal for any business with a substantial degree of market power to take advantage of that power to deter or prevent rival businesses from competing effectively." From Commission media release at <http://www.comcom.govt.nz/media-releases/detail/2012/commission-finds-igloo-joint-venture-unlikely-to-lessen-competition-in-pay-tv-market>

## Options and Considerations for Reform

In considering options for reform, an obvious starting point is recent work by the New Zealand government on this policy question. A 2009 report to Ministers by MED and MCH<sup>25</sup> was the last official consideration of the matter. It set out a useful initial array of options, which can be repeated here:

1. Take no further action at this time.
2. Amend the Telecommunications Act s9A<sup>26</sup> to allow the Commerce Commission to undertake studies on the broadcasting market.
3. Amend the Telecommunications Act to allow broadcasting market studies and recommend regulation of particular services for Ministerial approval.
4. Amend the Telecommunications Act as above but also add particular services to the Schedule 1.
5. Introduce comprehensive new legislation comprehensively covering broadcasting issues.

While these broad options all remain viable, InternetNZ's view is that a further option would be a comprehensive unitary Communications Act that deals with all broadcasting and telecommunications issues in a single statute, with appropriate regulatory institutions.

What seems clear, three years on, is that the markets considered by Cabinet in 2009 have since changed, and convergence has accelerated: examples include the arrival of QuickFlix and the Igloo joint venture. The current investigations of Sky's contracts with ISPs and content providers, and considerable discussion about availability of content over the Internet and the international experience are further examples. All suggest that the issues causing pressure today are likely to intensify. Reassessing New Zealand's approach is timely.

The question is the nature and degree of response. InternetNZ does not have the resources or analytic capabilities to determine whether there are particular competition issues in particular markets that justify regulation, and we do not believe any other entity or agency in government or in the private sector has the mandate or role to determine these questions. But the concerns in the market and among stakeholders are real.

In specific terms, the experience of the Commission's demand side study illustrates the quandary the current situation creates. Its mandate excludes broadcasting and so a wide range

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<sup>25</sup> "Report to the Minister of Broadcasting and the Minister for Communications and Information Technology, February 2009: Television Broadcasting: Competition issues".

<sup>26</sup> **9A: Functions of Commission in relation to sector monitoring and information dissemination**  
(1) *In addition to the other functions conferred on the Commission by this Act, the Commission—*  
(a) *must monitor competition in telecommunications markets and the performance and development of telecommunications markets; and*  
(b) *may conduct inquiries, reviews, and studies (including international benchmarking) into any matter relating to the telecommunications industry or the long-term benefit of end-users of telecommunications services within New Zealand; and*  
(c) *must make available reports, summaries, and information about the things referred to in paragraphs (a) and (b).*  
(2) *The function in subsection (1)(c) does not require the Commission to release all documents that the Commission produces or acquires under this section.*

of issues could only be mentioned, not studied. Given the importance of the government's investment in faster broadband that is being rolled out, there appear to be material risks created by the status quo.

Officials in 2009 refined the options to two: amending the Telecommunications Act to include broadcasting, which could empower the (Tele)Communications Commissioner to study markets and make recommendations for regulation where necessary, with Ministers deciding whether regulation would be possible – or, taking no further action. MCH backed the first option and MED the second, largely in line with the views of their respective ministers at the time, and the different policy imperatives driving each (the MCH was focused on promoting domestic cultural production, with MED focused on globally open markets with an economic focus).

InternetNZ therefore seeks views from the public about which option might most usefully be pursued, acknowledging that any opinions offered may be affected by the Commission's investigations into Sky. The broad options are:

1. Take no action - the status quo is adequate.
2. Allow the Commission power to study and review the relevant markets.
3. Allow the Commission to propose regulation to the Minister, as well as study and review the relevant markets.
4. Comprehensively rewrite the legislative framework to integrate communications and broadcasting under a single framework.

The considerations we believe are important in determining our preferred approach include the following:

- Effectiveness in promoting competition in these converging markets.
- Efficiency – least intrusive/costly effective mechanism.
- Consistency with InternetNZ's policy principles.

**Consultation question**

7. What are the most important considerations in deciding what, if any, changes are required to respond to convergence?

A brief outline of perceived advantages and disadvantages of each option is presented below. Your views on these and additional information are welcome.

### **Option 1**

This option would see no changes to the current regulatory framework. The key advantage of Option 1 is that it does not require any statutory or regulatory changes. The institutional framework is well known to existing market participants and to the public, and no transition costs for government or for industry would arise. It maintains a liberalised, non-interventionist posture common in New Zealand policy for a generation.

The potential disadvantage of Option 1 is that the issues identified in this paper have arisen under its settlement, and may not be considered appropriate. Many are waiting for the results of the Commission's investigation into Sky before concluding either way on this question.

## **Option 2**

This option would see a revision to the Telecommunications Act to extend the power to study markets into the broadcasting domain.

An advantage of this option would be that the quantity and quality of information available in the broadcasting market would expand, allowing for more informed discussion of market issues. This option would also lead to the Commission having a greater insight into market issues. The transparency may provide an incentive on market participants to be less likely to sail close to the wind in their commercial practice.

Disadvantages of this approach in part depend on the person's point of view. New market monitoring powers would require additional resources for the Commission to conduct the monitoring required. Even if problems emerged there would be no particular response available to the Commission other than the pressure of public commentary. From a different point of view, such a reform would require Parliamentary time in a busy government legislative programme. It could be seen as creating an opening for future regulatory initiatives, or pressure for further legislative change, and could potentially increase uncertainty in the market compared with the status quo.

## **Option 3**

This option would extend the monitoring powers in Option 2 by also allowing the Commission to propose regulatory remedies to the Minister, as can be done today in the telecommunications market.

Advantages in addition to those presented for Option 2 include that this would give the Commission powers to intervene if regulation is required without further legislation; that it would fully respond to the convergence question at the present time; that it would leave market participants concerned by current situations no room for complaints given that effective remedies would be available if market problems were found to exist after robust scrutiny. Future regulatory decisions would be taken in a transparent way, rather than through less-transparent government policy processes.

Disadvantages of this option include the uncertainty created by the relatively significant shift in regulatory arrangements for the broadcasting industry it represents; the Parliamentary time required to make the changes; the concerns some market participants would have about the Commission's intentions as to the use of its new powers.

## **Option 4**

This option would involve a fundamental rewrite of the Telecommunications Act to turn it into a converged Communications Act.

The main advantage of this option would be that a full process of consideration and review of the implications of convergence would be included, leading to new legislation that had comprehensive and coherent coverage. It would also have the advantage of taking a fresh look at the telecommunications legislative framework which faces a very different situation to that applying when the primary act was drafted in 2001. Cultural policy matters could form part of such a comprehensive review if the Government chose to proceed in that direction. If that was the case, costs could be reduced by including other relevant regulatory agencies within the new converged regulator.

The disadvantages include the time, resources and Parliamentary time required for such a review; the uncertainty that it would create in both the telecommunications and broadcasting markets while the review and legislative processes were under way; the uncertain additional benefits compared with less extensive reform like that in Options 2 or 3.

#### **Consultation questions**

8. Which of the four options set out in this paper do you prefer, and why do you find it preferable?
9. Would the Telecommunications Commissioner be the logical choice for a regulator with a wider mandate?

## **Conclusion**

Convergence is a complex phenomenon with many different impacts and outcomes. The discussion points raised in this paper address one challenge that convergence creates: getting the regulatory framework right. By contributing your views and information to this debate, you can help InternetNZ advocate for the best possible outcome for New Zealanders.

New Zealand's Telecommunications Act framework is well understood. Broadening its focus by several of the options canvassed above would see a competent and capable regulator developing real knowledge of and expertise in all communications markets. It would also set high thresholds for regulatory intervention, and incorporate a clear imperative towards effective, minimal intervention that is designed to pursue competitive markets rather than more complex and potentially difficult policy objectives. Other voices maintain that the existing regulatory settlement is most applicable to the New Zealand market given current circumstances and recent history. The investigation by the Commission into Sky's arrangements with resellers and content providers is often mentioned as a litmus test as to how suitable it remains.

Throughout this debate it is important to separate self-interest from the public interest. InternetNZ expects all market participants would welcome the resolution of the current debate on how to deal with converging markets. Certainty would increase for all, and future policy debates could focus on cultural policy matters, assured that competition concerns are not holding back the best possible outcomes that arise from the competitive operation of communications markets.

Given that market participants publicly argue that their business approaches are legitimate and consistent with the aims of competition policy already,<sup>27</sup> they should not fear this debate, whatever outcome eventuates.

InternetNZ once again welcomes feedback on the discussion set out in this document. Insights shared will be reflected in a fresh paper early in 2013.

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<sup>27</sup> See for example the views of Sky CEO John Fellet, as described in “Sky TV’s hold on the NZ market” by Ruth Laugesen, The Listener, 30 June 2012, at <http://www.listener.co.nz/current-affairs/sky-tvs-hold-on-the-nz-market/>