

# SUBMISSION OF MAORI TELEVISION, MEDIAWORKS, NZME AND TELEVISION NEW ZEALAND ON *REGULATING COMMUNICATIONS FOR THE FUTURE* DISCUSSION PAPER

## 1. Introduction

- 1.1 This submission on the Ministry of Business, Innovation & Employment (MBIE) Discussion Paper *Regulating Communications for the Future – Review of the Telecommunications Act 2001* (Discussion Paper) is made on behalf of Maori Television, MediaWorks, New Zealand Media & Entertainment and Television New Zealand (collectively referred to in this submission as **Broadcasters**.)
- 1.2 **Māori Television** is New Zealand’s indigenous broadcaster, providing a wide range of local and international programmes for audiences across the country and online. Maori television’s vision is for Māori language to be valued, embraced and spoken by all. Launched in 2004, Māori Television has two key long-term objectives:
- (a) to significantly contribute to the revitalisation of the Māori language; and
  - (b) to be an independent Māori television service that is relevant, effective and widely accessible
- 1.3 **MediaWorks TV and Radio (MediaWorks)** is a cross-platform media company, providing news and entertainment content across TV, radio and digital properties. MediaWorks TV operates three free to air channels, TV3, FOUR and Edge TV. MediaWorks Radio has a large number of key commercial radio stations throughout New Zealand (prominent brands include The Rock, More FM, The Edge, Mai FM, George FM and Radio Live). MediaWorks also has a number of websites, including a news website, entertainment and music websites, and a video on-demand service.
- 1.4 **New Zealand Media and Entertainment (NZME)** brings together radio, publishing, digital and e-commerce brands that were once operated by APN New Zealand, TRN and GrabOne. NZME has over 30 websites and an extensive national digital audience. NZME Publishing publishes The New Zealand Herald, The Herald on Sunday and 30 regional and community titles throughout the New Zealand. NZME Radio operates the following networked radio brands - Newstalk ZB, The Hits, Coast, ZM, Hauraki, Flava and Radio Sport - in total it operates more than 130 stations in New Zealand. NZME also has an all-in-one digital radio service iHeartRadio. NZME is 100% owned by APN News & Media Limited.
- 1.5 **Television New Zealand (TVNZ)** is a free to air broadcast and media company. It reaches approximately 2.2 million New Zealanders every day, predominantly through its two main broadcast channels, TV ONE and TV2, as well as its TVNZ OnDemand and ONE News Now online services. TVNZ is owned by the Crown but operates as a self-sufficient, commercial entity by virtue of the Television New Zealand Act 2003, and is supported by advertising revenue.
- 1.6 In this submission we outline our views on a number of assumptions and items outlined in the Discussion Paper.

## **2. Executive Summary**

- 2.1 The definition of convergence has been overstated. There has been no convergence between telecommunications networks and services, and TV/radio broadcasting services.
- 2.2 The Broadcasters agree with the proposal that any content transmitted over the networks would remain excluded from the proposed Communications Act.
- 2.3 Any provision for spectrum assignment objectives in legislation should be subject to consultation and the social policy considerations relating to the allocation of radio spectrum for broadcasting (both TV and radio) must also be considered.
- 2.4 Net neutrality could become a considerable issue and is an area which should be considered as part of an overall review of communications.
- 2.5 There is a need to extend the access regime which applies to telecommunications infrastructure providers to broadcasting infrastructure providers.

## **3. Regulatory Principles (Chapter 1)**

- 3.1 The regulatory principles in the Discussion Paper are based on an assumption that there is convergence between broadcasting and telecommunications sectors. This is reflected in the following statement (among others): “Broadcasting, information technology and telecommunications are no longer separate”. The Broadcasters have made a separate submission dated 16 October 2015 in response to the “Exploring Digital Convergence” paper, challenging the assumption that there has been a convergence between telecommunications services and broadcasting services and shall not re-state all of the points made in that submission. But the Broadcasters note the following [12]:
  - (a) While convergence between telecommunications voice and data services over fixed and cellular networks may be a reality, no similar convergence has occurred between telecommunications and radio and TV broadcasting.
  - (b) Broadcasting involves one-to-many transmission, while telecommunications involves one-to-one communications. Broadcasting technologies, unlike telecommunications, have not undergone substantial change. Broadcasting technologies, and the infrastructure that enables over the airwaves transmission, remain constant, with no immediate future change likely.
  - (c) Broadcasters are not launching telecommunications services, and do not have the ability to provide voice and high speed data services over their transmission networks.
  - (d) Telecommunications providers are beginning to launch their own video services. But this does not represent a convergence of broadcasting and telecommunications transmission services. Rather it demonstrates that in order to drive demand for their broadband offering telecommunications providers have recognised that they must make a compelling offering, either by bundling services with those of a broadcaster or by their own video content offering – without question premium video content drives demand and uptake of broadband services. The fact that they are launching a service which utilises broadband does not mean the industries are converging. By way of example, Spark has launched a home security business which is delivered over broadband (Morepork), but this does not mean that there is a convergence of the home security sector and telecommunications.

- 3.2 The principle around flexibility, including technology neutrality, states “[w]here possible, policies and regulation should be platform and technology neutral to support digital innovation and respond to technological change”. While the Broadcasters agree that any regulation should be as durable as possible, it should also recognise important distinctions – and in this case it is important that any regulation acknowledges that technology neutrality is not always appropriate. When technologies are not interchangeable, there may be substantially different approaches to the manner in which they should be regulated. For example, the two-way nature of a telecommunications network is fundamentally different to a one-way broadcast network and broadcasting is still the most effective and efficient means of communicating from one to many (for both radio and television). In addition, some technologies may be easily accessed and used by all, other technologies may be difficult to access and be expensive to either use or maintain.

#### **4. The Regulatory framework (Chapter 3)**

- 4.1 The Broadcasters note the proposal to create an overarching Communications Act which consolidates economic regulation across the communications sector by (a) amending the exception for broadcasting infrastructure; and (b) incorporating new tools relating to radio spectrum allocation. This proposal includes the provision that any content transmitted over the networks would remain excluded from the Communications Act. The Broadcasters agree with this approach. While economic regulation may be appropriate for broadcasting infrastructure, regulation of broadcasting content must be separated as the considerations and issues around content are not congruent with those that arise with infrastructure. If there is a need for content regulation (and broadcasters have made separate submissions regarding this) that should always be distinct from economic regulation called for in the infrastructure space.
- 4.2 In the Discussion Paper it is stated that *“over time, the importance of competition and social policy considerations<sup>45</sup> relating to the allocation of radio spectrum for mobile communications has increased. Both the Radiocommunications Act and Telecommunications Act are silent on this”*. The Broadcasters would emphasise that the importance of social policy considerations relating to the allocation of radio spectrum for Broadcasting (both TV and radio) must also be considered. New Zealand has healthy television and radio broadcasting markets, with a range of products which reflect the diversity of the country, and it is important to maintain these markets appropriately. There are distinct considerations that this paper does not touch upon regarding allocation of radio spectrum – social policy is but one. Broadcasters will (particularly with respect to radio transmission) continue to have a material interest in allocation of spectrum to enable their businesses to continue – unlike what has happened in the television industry (with the conversion from analogue to digital signal) there is no cost effective alternative to traditional FM coverage for radio operators. In addition, the high-availability, wide-reach and fast-delivery of television and radio broadcasting is dependent upon by both government and public in times of crisis, such as an earthquake or foot-and-mouth outbreak. [49]
- 4.3 The Discussion Paper asserts that “...the current arrangements, with the focus on telecommunications providers – rather than those who deliver their services over the top of the network at the content and application layers – are appropriate.” The Broadcasters agree with this view. It is appropriate that the telecommunications infrastructure providers are charged the TDL, as they are the companies who receive payment for the supply of the telecommunication services. It would not seem workable or logical to require businesses that provide services directly to end users, who in turn use telecommunications services to receive that service, to pay a TDL. The telecommunications providers will always receive a benefit from any increased use, as they charge the end user for the relevant access.

## **5. Mobile competition and radio spectrum (Chapter 5)**

- 5.1 The Discussion Paper asks: “Should there be any requirements on government to consult or establish objectives for spectrum assignments in legislation?” [92]
- 5.2 The Broadcasters consider that there should be a consultation in relation to this issue. If the government is “setting overarching objectives for spectrum assignment in legislation or regulation” then the need for viable television and radio broadcast services and industries, with existing and future potential requirements for spectrum, should be considered as part of those objectives, and the Broadcasters would want the opportunity to be consulted on the potential regulation. [see 4.2 above]

## **6. The Regulatory toolkit (Chapter 6)**

- 6.1 The Discussion Paper asks a number of questions in relation to net neutrality issues in New Zealand.
- 6.2 The Broadcasters are not aware of any current issues with net neutrality in New Zealand, but note that there have been in the past. Net neutrality could become more of a realistic threat, given (a) the influx of international on-demand content providers into the New Zealand market; and (b) the fact that a local telecommunications provider has entered the on-demand content market and others are partnering with on-demand video providers.
- 6.3 The current regulatory regime does not have any means to stop any provider (international or local) from purchasing preferential treatment, to the detriment of other providers. The Broadcasters have concerns about this lack of regulatory oversight and would support a review which looked into the different options. Any regulatory approach should also consider the potential impact of peering practices, as poor peering practices can have a detrimental effect on the public and content providers similar to lack of neutrality.
- 6.4 The Broadcasters respond to the specific points within question 28 as follows:
- (a) Telecommunications providers should not be able to block or deprioritise lawful content, applications, or services and it is not acceptable for telecommunications providers to block or deprioritise competing content, applications, or services.
  - (b) Telecommunications providers should not be able to enter into commercial agreements with content providers to prioritise certain traffic.
  - (c) It would be reasonable for telecommunications providers to be able to prioritise certain types of traffic when their network is congested (e.g. prioritising emergency services and de-prioritising illegal file sharing sites), but there should be a set of guidelines which ensure there is consistent practice between all providers and transparency over what prioritisations are given.

## **7. Broadcasting networks and content in the context of the Telecommunications Act (Section 6.9)**

- 7.1 As noted in our submission to the Ministry for Culture and Heritage on its Discussion Paper *Exploring Digital Convergence*, while telecommunications services in NZ were traditionally supplied by a single provider in a bundle with the underlying access network service, broadcasting services (television and radio) has always had separated infrastructure services (historically provided by Broadcasting Communications Ltd, now Kordia) which are acquired on a wholesale basis by broadcasters.

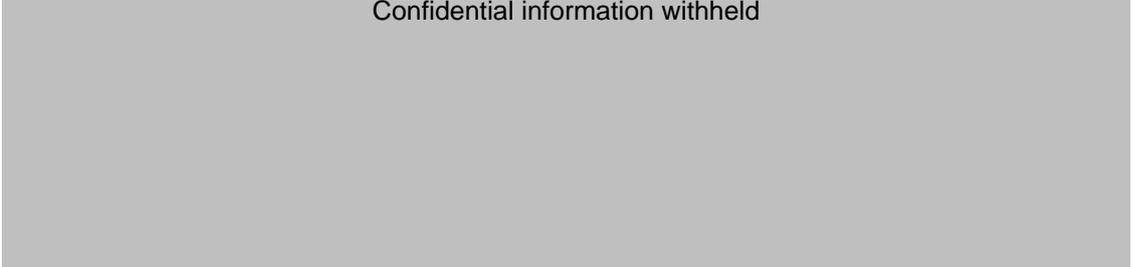
- 7.2 Broadcasters agree with the basic principle underpinning the Discussion Paper that the regulatory system should *'treat likes alike'*, and that regulation should only be imposed in markets with natural monopoly characteristics, where general competition law is insufficient to promote the long-term benefit of end-users. [15]
- 7.3 We also agree with the Discussion Paper's characterisation of telecommunications infrastructure and broadcasting infrastructure providers as natural monopolies, characterised by high barriers to entry because of the significant sunk investment involved. Yet while telecommunications networks are subject to access regulation under the Telecommunications Act (or in the case of the UFB fibre network, quasi-regulation by way of contract with Crown Fibre Holdings), broadcasting transmission and infrastructure networks are not subject to regulation at all. This has meant the provision of these services has no oversight. The controller of the critically important high sites<sup>1</sup> can command a monopolistic price as there is no (or no viable) alternative in the market for such sites.
- 7.4 The Telecommunications Paper proposes that content transmitted over broadcasting or telecommunications networks should remain excluded from such regulation. [110].
- 7.5 Broadcasters agree with that proposal. In relation to content, as we have each submitted in response to the *Content Regulation in a Converged World* consultation, there is no case to extend existing broadcasting content regulation, which already ensures appropriate standards are set for broadcast content available to the public.
- 7.6 There is, however, a need to extend the access regime which applies to telecommunications infrastructure providers to broadcasting infrastructure providers.
- 7.7 The primary broadcasting infrastructure provider in New Zealand is Kordia, a State Owned Enterprise fully owned by the New Zealand government. Broadcasting infrastructure services are also provided in New Zealand by Johnson Dick & Associates (JDA, an independent commercial organisation) and by Sky City in Auckland, but these providers do not have the same extensive network as Kordia (which is the sole provider in a number of key sites).
- 7.8 Broadcasters are currently faced with having to negotiate terms of access with Kordia, an unregulated natural monopoly in some or all of the sites as part of their broadcasting infrastructure requirements. As a consequence, access prices in sites where Kordia is the sole provider are higher, and terms of access more restricted, than would occur in a competitive market (and in relation to sites where there are competitors), to the long term detriment of end users of broadcasting services. Examples of this issue are set out in paragraph 7.11 below.
- 7.9 Significantly, unlike Australia or the UK, no new HD services have been launched in New Zealand, because of prohibitive terrestrial transmission costs and lack of transponder capacity.
- 7.10 The Broadcasters propose that in addition to an amendment to the Telecommunications Act (to extend the access regime to broadcasting infrastructure providers) a review of the provision of broadcasting infrastructure be conducted in general. This review might ask the following questions:

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<sup>1</sup> Premium hill top transmission facilities are largely controlled by Kordia, with Auckland being the sole exception – in Auckland Sky City controls the premium space on its Sky Tower)

- (a) Is it appropriate that the provision of broadcasting infrastructure services to free-to-air broadcasters be provided by an effective pure monopoly (Kordia), where such monopoly is not subject to any of the usual regulatory frameworks on returns and pricing, as comparative companies such as Chorus, and Vector are?
- (b) Would an alternative ownership structure of Kordia (for example owned and operated by a private telecommunications infrastructure provider or an industry joint venture), combined with the same regulatory requirements, be a more effective model?
- (c) Do the fees charged by Kordia, or the lack of transparency of the rates, act as an effective barrier to entry to further, viable, Free to Air TV channels? In particular, free to air regional channels?

7.11 Set out below are a number of examples where the lack of regulation of broadcasting infrastructure services and the behaviours of the monopoly provider have caused substantial issues for broadcasters. As these are confidential, we request that they are removed from our submission before publication. Further examples can be provided upon request by each of the Broadcasters on a confidential basis.

- (a)  Confidential information withheld
- (b)
- (c)

(d) See also

[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10777896](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10777896)

[http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=11458071](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=11458071)

**3 November 2015**