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Content Access: The New Bottleneck?

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Why Consider Access to Content?

- Focus of telecoms/media competition regulators changing, from last mile/wireless spectrum monopolisation to content access
 - As these traditional concerns ease
 - As convergence happens apace
- Graeme Samuel, Chairman of the ACCC (July 2011) stated that:
“technological development would deliver no benefit to consumers if all the audiovisual content was locked up "n one or two hands, in monopolistic hands...then newcomers, new entrants, can't take advantage of the technology to provide real competition.”
- Receiving attention of OFCOM (UK), UK Competition Commission, CRTC (Canada), and the European Commission
- But both supply and demand developments may be eroding bottleneck status of content access

Key Questions

1. CONVERGENCE AND CONTENT ACCESS

Is access to content really an enduring bottleneck in a rapidly changing converged world?

2. REGULATORY APPROACHES

How are regulators looking at this issue? Are they taking account of content innovation?

**Content Access –
Bottleneck?**

3. RELEVANCE TO AUSTRALIA

Do competition issues appear to exist in Australia, and what might be their impact on innovation?

4. REMEDIES

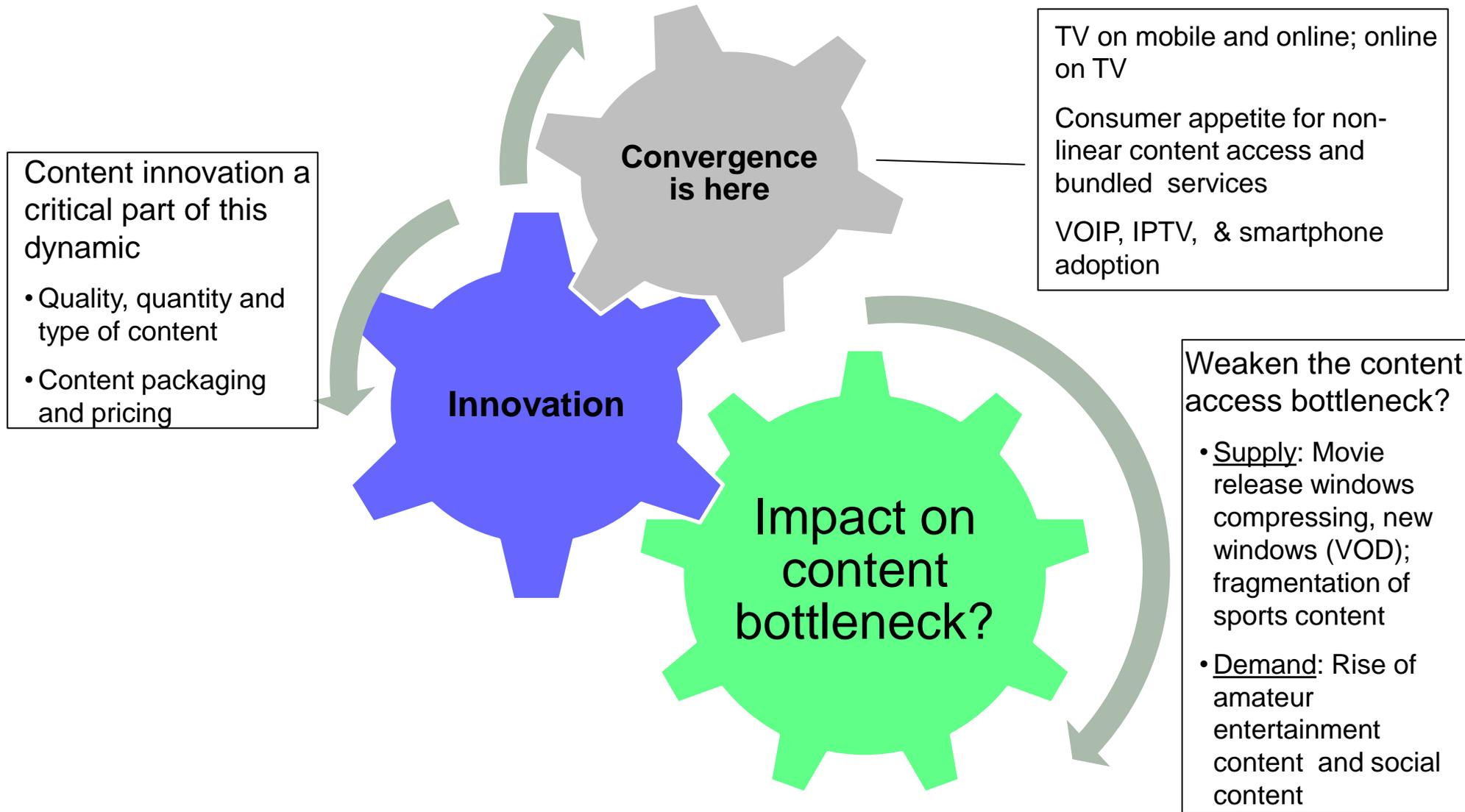
If enduring competition issues do exist, what might be appropriate remedies that minimise distortion to content innovation?

Outline

- Australian and international landscape
- The competition issues of content access
- Case studies: Canada, EU, UK, Australia
- Implications for Australia
- Summing up

AUSTRALIAN AND INTERNATIONAL LANDSCAPE

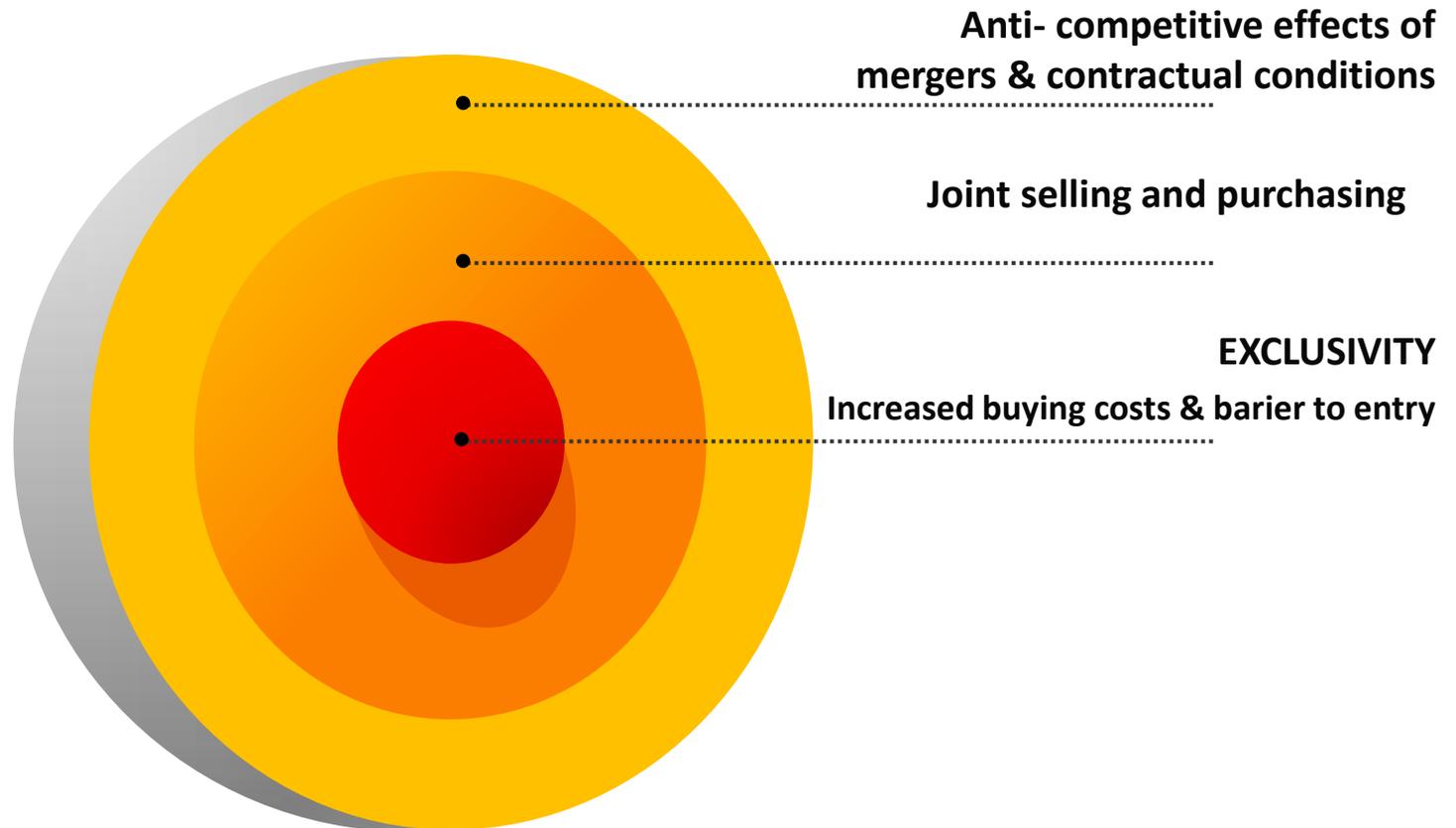
What is Happening Out There?



THE COMPETITION ISSUES OF CONTENT ACCESS

Competition Issues: Traditional Views

- **Starting premise** - Premium content is scarce – limited sports events and blockbusters



European Commission (2000) defined premium content as an “essential input”

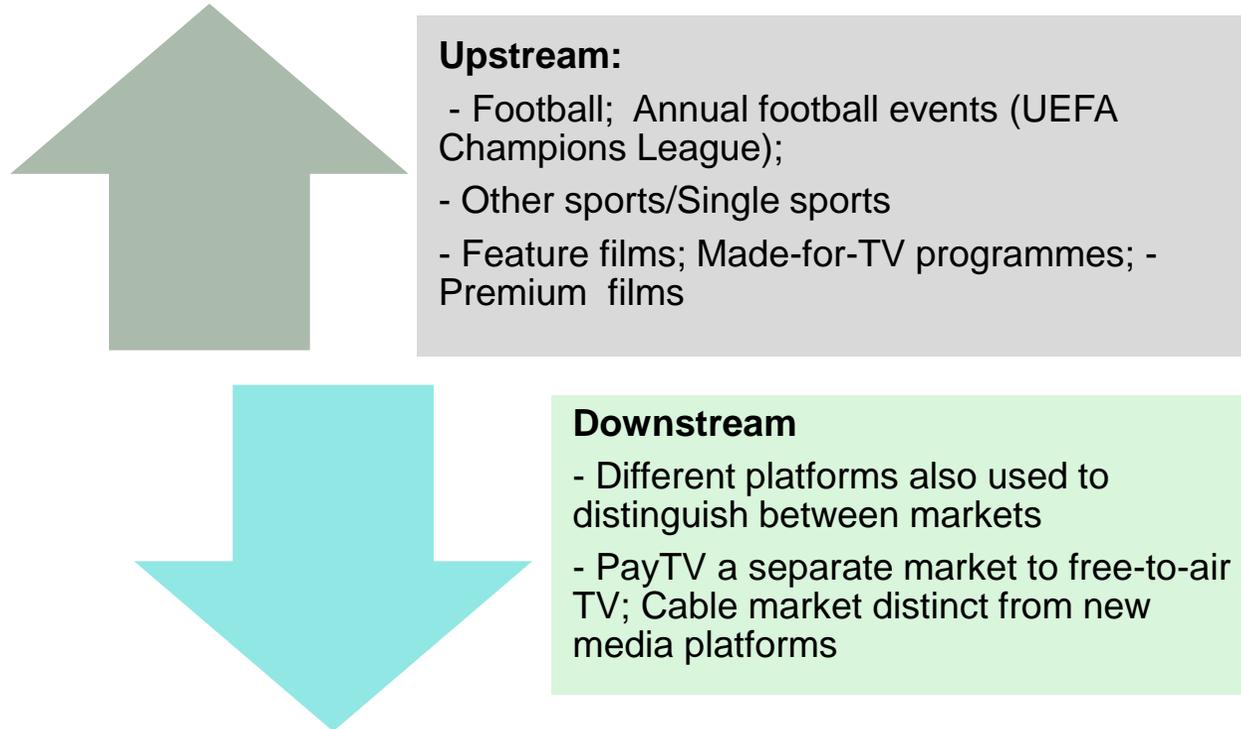
Regulatory objectives geared towards the ability of new media platforms to gain access to premium content

Economic Theory of Exclusivity: Alternative Views

- Economic theory traditionally offered no explanation for exclusive agreements other than a conscious effort to foreclose competition (**Price Theory**).
- Recent advances in economics have emphasised benefits that accrue from different contract forms and vertical restraints (**Transaction cost economics**):
 - this has helped understand the benefits of contractual forms such as franchising, sales agencies
 - Relationship specific investment
 - Protecting commercial value
 - Efficiently managing risk
- High sums for rights holders:
 - Anti-competitive view – purchasing of exclusive rights generally involves paying high sums to rights holders, but the initial loss of these high sums will be compensated by exploitation of exclusivity in the downstream market
 - Pro-competition view - paying high sums to rights holders provides the certainty that right holders need to innovate in the upstream market
- Exclusivity leads to efficiency losses:
 - Anti-competitive view – Exclusivity is not necessary to induce investments and innovation in the sector: rather, the victims are new media platforms
 - Pro-competitive view – rights-holders want to engage in exclusive agreement to protect the value of their rights (especially as the monetisation of content on new media platforms may not be fully developed or circumvented).

Market Definition Challenges

- Distinguish between upstream (content production) and downstream markets (delivery to consumers)



- Suitability of market definition approach used by competition authorities
 - Market definition in media may be narrow and case specific – **does the flexibility of approach outweigh the benefits of a consistent methodology and framework?**
 - With wider adoption of new media platforms and consumer preference for content access across all devices, **how relevant are platform based considerations for downstream market definition?**

CASE STUDIES

Case Study: Canada

Competition Issue & Case	Issue	Remedy
<p>Vertical Integration – BCE acquisition of CTV (2011)</p> <p>BCE is Bell Canada, incumbent telco in most parts of Canada</p> <p>CTV is one of Canada’s largest private media companies</p>	<p>Exclusive deals for TV content on mobiles and internet:</p> <ul style="list-style-type: none"> • Market structure dominated by vertically integrated companies (content owners and telcos) • Rogers owns CITY-TV network • BCE (also a mobile provider) owns exclusive mobile-only content deals such as NFL (before acquisition of CTV) • Concerns of restrictions on access and discrimination 	<ul style="list-style-type: none"> • CRTC has blocked telecommunications companies from providing content designed for television on an exclusive basis on new media platforms. • <i>“Ensures that consumers will not have to subscribe to several distributors in order to view the most popular programming” (CRTC, 2011)</i> • <i>“Canadians expect to be in control of what they watch...vertically integrated companies to report by 1 April 2012 on how they have provided consumers with more choice and flexibility...while at the same time providing them with the ability to only pay for the services they want to watch.”</i>

Case Study: EU

Competition Issue & Case	Issue	Remedy
Joint selling – UEFA (2003)	<p>Sale of rights for Champions League matches by UEFA:</p> <ul style="list-style-type: none"> • Joint selling of rights restricted competition among football clubs • had the effect of co-ordinating pricing policy 	<p>Agreement exempted, with conditions:</p> <ul style="list-style-type: none"> • 3 year max duration of contracts • Award of contract through open tenders • Unbundling of rights into smaller packages • Football clubs could sell in parallel on non-exclusive basis for their own games • provide video content on internet 1.5hrs after the match • right to provide audio/video content via mobile devices within 5 minutes
Merger – Newscorp/Telepiu (2003)	<p>Merger between two major Italian pay-TV operators</p> <ul style="list-style-type: none"> • Concern about the acquisition of exclusive rights for films • Possibility of Telepiu's reducing access to content via existing rights on second window movies. 	<p>Merger approved, with conditions:</p> <ul style="list-style-type: none"> • Waive exclusive rights with respect to TV platforms except DTH • Waive exclusive rights for PPV, VOD on all platforms • 2 year maximum contract for football ; 3 years for film studios • Offer a wholesale premium access product on an unbundled and non-exclusive basis to third parties on a retail minus principle

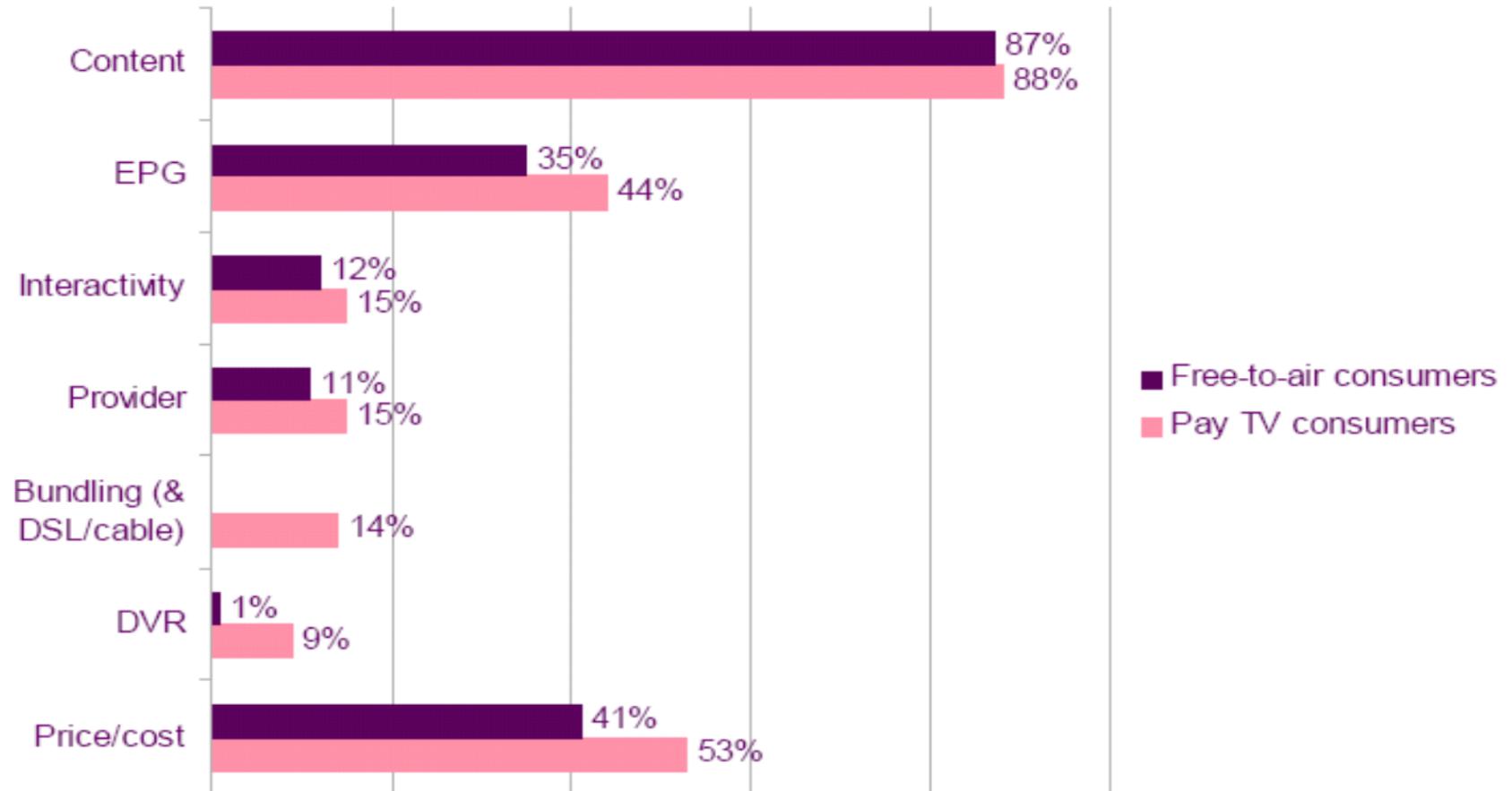
Case Study: UK

- After three rounds of consultation spanning three years, Ofcom concluded its pay TV investigation on 31 March 2010.
- At the conclusion of its investigation, Ofcom imposed a wholesale must offer (WMO) obligation requiring BSkyB to offer its two premium sports channels (Sky Sports 1 and Sky Sports 2) to rival retailers on non-BSkyB platforms, including those on DTT and IPTV platforms, on regulated terms.
 - Why?
 - because no other broadcasters are able to get access to Premier League matches (bar Virgin through a wholesale agreement and ESPN as a license holder)
 - Ofcom argues Sky has an incentive to withhold supply in order to protect its retail business and reduce the risk of stronger competition for content rights
 - Alliances
 - Sky and rights holders
 - Rights holders concerned that their largest income source will contract.
 - Sky argues it will not be incentivised to pay millions of pounds for exclusive English Cricket Board (ECB) or Premier League rights if other platform providers can simply purchase the live rights at knock-down prices
 - Ofcom, BT, Virgin, Top Up TV
 - Decision has been viewed by Sky's competitors as a victory against a company that they believe, and Ofcom agrees, to have market power in the wholesale distribution and retailing of its Sky Sports channels

Case Study: UK *cont'd...*

- **The Competition Commission has provisionally found that Sky's control over pay TV movie rights in the United Kingdom is restricting competition between pay-TV providers leading to higher prices and reduced choice and innovation for subscribers.**
 - More specifically, the CC has provisionally concluded that Sky's market power in the pay TV retail market gives rise to barriers to the acquisition of the first subscription pay TV window (FSPTW) movie rights, and that Sky's control of the acquisition of the FSPTW movie rights gives rise to it controlling almost all movie content in the wholesale market for the FSPTW.
 - The CC has therefore provisionally concluded that Sky's control of the acquisition and distribution of FSPTW movie content on pay TV affects adversely competition between pay TV retailers.
- The CC suggested the following **three** possible remedies:
 1. Restricting the number of major studios from which Sky may license exclusive FSPTW rights
 2. Restricting the nature of exclusive FSPTW rights which Sky can license from the major studios (for example so that rights for distribution methods such as subscription video-on-demand could be made available to other providers); and/or
 3. "Must retail" measures requiring Sky to acquire on a wholesale basis and offer to its subscribers any movie channel containing FSPTW movie content created by a rival.

International Experience: Content is the Key *cont'd...*



Source: UK Competition Commission, 2011

International Experience: Regulator's' views: Content is the Key

- Growing regulator view that premium content is the new “bottleneck”
 - Vertical not horizontal product differentiation

- “Chicken and egg” problem for new entrants into Pay-TV retail
 - To gain market share/audience (and recoup costs) must have access to premium content
 - But to have access to premium content must have access to subscriber base (minimum efficient scale)
 - Hence there is an entrenched first mover advantage

- Regulatory remedies of varying “quality”

- No apparent recognition of content innovation as an important issue

Possible Remedies: Lessons Learned from International Case Studies

➤ **A range of remedies have been applied:**

- Ban on exclusive rights arrangements, or exclusive vertical contracts
- Limiting reach of exclusive rights arrangements
- Directing the nature of, and process of establishing, exclusive rights arrangements
- “Must wholesale” exclusive premium content (rights sharing)
- “Must retail” (“must carry”) channels created from wholesaled exclusive content

➤ **These remedies have different impact on market operations, and on incentives for content innovation:**

- Some remedies facilitate the free operation of the market (e.g. short exclusive rights contracts, and exclusive rights sold through open tender auctions)
- While other remedies replace, or severely limit, the operation of the market (e.g. ban on exclusive rights arrangements)
- In general, the former more favourable than the latter]
- Content innovation stimulated when consumer preferences clearly transmitted to content providers, and the rewards from successful innovation are not socialised

IMPLICATIONS FOR AUSTRALIA

Implications for Australia

➤ Is Australia different?

MARKET	MARKET STRUCTURE
<ul style="list-style-type: none">• Late start of pay TV• Low penetration levels• High retail costs – second highest in the OECD	<ul style="list-style-type: none">• High concentration levels• Proposed merger of Foxtel/Austar
CONTENT POLICY	OTHER
<ul style="list-style-type: none">• Anti-siphoning laws• Generation of Australian content• Content sharing amongst largest pay TV providers	<ul style="list-style-type: none">• NBN Co is likely to give rise to a larger number of IPTV providers• These IPTV providers are able to use free to air signals for retransmission

Possible Remedies to content bottlenecks in Australia

- Within the current regulatory framework
 - Where possible, want remedies that facilitate the working of the market, rather than replace the market
 - Want those that do not diminish incentives for content innovation
 - These will in general be those that allow robust negotiations between content providers and content retailers

- Changes to the regulatory framework
 - Not investigated – but if framework not right, better to fix this than struggle with remedies with prospect of doing damage
 - This needs to be considered in context of the current 3 pillars of content policy in Australia: anti-siphoning, local content requirements, competitive content access arrangements

SUMMING UP

Findings and conclusions

- Regulators in Australia and overseas see access to content as a potential/actual bottleneck
- Regulators overseas have been active in this area
- Not all regulation helpful with regard to effective competition and content innovation
- Need to design regulation to facilitate the market wherever possible, rather than replace the market
- Minimise the impact on incentives for content innovation
- Change the regulatory (legislative) framework where it is now deficient