Australian Government

Convergence Review

Convergence Review

Emerging Issues Paper

Comments and inquiries

Please submit your feedback on the Emerging Issues paper to the review secretariat using our online submissions form at www.dbcde.gov.au/convergence, or by email to convergence@dbcde.gov.au, or by post to

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Introduction

State of play

The Convergence Review was formed to examine the changes in media and communications caused by the convergence of older technologies such as television with the internet. Recent changes in online communications are having profound effects on businesses, consumers and governments. New revenue models are emerging; consumers are adopting different technologies for entertainment, work and communication; and governments are recognising that regulations designed for an analog era need review.

In December 2010, the Minister for Broadband, Communications and the Digital Economy, Senator Stephen Conroy, released the draft terms of reference for a review that would look at the current regulatory framework and make recommendations to the government on potential changes. Seventy-two submissions were received on the draft terms of reference, and these were taken into account in framing the final terms of reference released on 2 March 2011.

The government appointed an expert committee to conduct the Convergence Review. In April, the Convergence Review Committee released a framing paper outlining some initial principles that, within the bounds of the review's terms of reference, would guide the committee as it deals with issues throughout the review. The framing paper generated a lot of public interest, resulting in 65 formal submissions and online debate on the review's website and in social media.

During this initial phase the committee held some high-level meetings where stakeholders outlined their major issues. These issues, along with those raised in submissions, have fed into the committee's deliberations.

Emerging issues

This Emerging Issues paper summarises some of the information received throughout the last few months of consultation, and is intended to:

- finalise the principles put forward in the framing paper
- highlight the key issues distilled from consultations
- form the basis of further discussions
- outline the next steps for the review

The paper is not an exhaustive list of issues, and more opportunities for consultation will occur in the coming months.

Open call for submissions

The committee is issuing an open call for submissions for the period until 28 October 2011. In addition to responding to the Emerging Issues paper, stakeholders may respond to matters raised in the public hearings or in response to the detailed discussion papers. Timelines for these consultation processes will be released in July 2011.

Stakeholders may:

- make a submission on relevant matters at any point from the release of this paper until 28 October
- make a submission in response to either or all of the Emerging Issues paper, the public hearings, or the detailed discussion papers
- make multiple submissions, including to add to a previous submission.

The committee will consider in full all submissions received by 28 October 2011; however, submissions intended to inform the detailed discussion papers should be provided in July or early August.

In making submissions, stakeholders are also encouraged to:

- raise new issues they feel the committee has omitted
- provide ideas for changes to the current regulatory framework
- provide ideas about how policy frameworks can be reinvented
- identify barriers to innovation and competition in the current environment

- provide new and innovative mechanisms for addressing some of the issues raised in the emerging issues paper—for example, ways to increase competition, encourage innovation or provide better consumer and citizen outcomes
- provide details of regulatory, non-regulatory or de-regulatory solutions to issues raised so far.

The committee welcomes new ideas, particularly in submissions that are well-researched and, where relevant, with assertions and recommendations backed by evidence.

Submissions to the framing paper

Consultation process

On 28 April 2011, the Convergence Review Committee released a framing paper containing eight principles. These established a conceptual framework to guide the committee when considering the many issues that stakeholders may raise during the review.

These were not final principles, as they reflected the committee's initial thinking. The framing paper asked for submissions on whether the principles are appropriate, on the issues they raised, and on whether there are any other principles to include.

The committee received 65 formal submissions from industry groups, academia, government agencies, consumer groups and the general public. The committee also used social media tools, including Twitter and an online discussion page, which were valuable sources of views and opinions.

The submissions and comments raised a number of important issues and made suggestions on changes to the principles. The committee considered the suggestions on their merits and, where necessary, made changes to the original principles.

As well as making suggestions on the principles, many submissions proposed additional issues that the review should consider. These were valuable suggestions and some are incorporated into this Emerging Issues paper. In many cases, similar issues were raised by multiple stakeholders, so changes to the principles have not been attributed to any one stakeholder.

The principles

The principles should not be seen as an outcome of the Convergence Review. Rather, as noted in the framing paper, they are considerations that will guide the committee's deliberations on a new policy framework for media and communications services. They are not a substitute for the policy framework itself.

Based on submissions and recent consultations, the committee has established the following 10 principles to guide the review.

Principle 1 [NEW]: **Citizens and organisations should be able to communicate freely, and where regulation is required, it should be the minimum needed to achieve a clear public purpose.**

The addition of this principle arises from calls in submissions to overtly state the 'freedom to communicate' concept outlined in the foreword of the framing paper, as well as calls to establish the related principle of applying only the minimum regulation or other intervention necessary to achieve a clear public purpose.

Principle 2: **Australians should have access to *and opportunities for participation in* a diverse mix of services, voices, views and information.**

[**Original principle:** Australians should have access to a diversity of voices, views and information.]

The difference between 'theoretical access to services' and 'ready access to services', and the growing importance of user-generated content and social media were themes in the submissions. The changes to this principle highlight the importance for Australians not only to have access to content but also to have the ability to take part in the two-way interaction that new technology allows.

Principle 3: **The communications and media market should be innovative and competitive, *while balancing* outcomes in the interest of the Australian public.**

[**Original principle:** The communications and media market should be innovative and competitive, while still ensuring outcomes in the interest of the Australian public.]

Submissions noted that the original wording of this principle could imply that innovation and competition were opposed to the interests of the Australian public. This was not the intention, so the principle was clarified.

Principle 4: **Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity.**

This principle was not changed.

Principle 5 [NEW]: **Local and Australian content should be sourced from a dynamic domestic content production industry.**

A number of submissions noted that it is insufficient to say Australians should have *access* to Australian content. It is also important to recognise that a dynamic and capable industry should be able to generate that content. The committee felt this was an important distinction and decided to create a new principle incorporating this idea.

Principle 6: **Australians should have access to news and information of relevance to their local communities, *including locally-generated content.***

[**Original principle:** Australians should have access to news and information of relevance to their local communities.]

This change recognises the importance of the involvement of local communities in developing news and information and having opportunities to see local events and issues reflected in the media. It reinforces the idea that local news and information should have relevance and meaning for the community.

Principle 7: **Communications and media services available to Australians should reflect community standards and the views and expectations of the Australian public.**

This principle was not changed.

Principle 8: **Australians should have access to the broadest possible range of content across platforms, services *and devices*.**

[**Original principle:** Australians should have access to the broadest range of content across platforms and services as possible.]

This addition recognises the growing importance of mobile devices as points of control for content and applications.

Principle 9: **Service providers should provide the maximum transparency for consumers *regarding their services* and how they are delivered.**

[**Original principle:** Service providers should provide the maximum transparency for consumers in how their services are delivered.]

The committee changed this principle in response to concerns that it only offered transparency for one aspect of a service. The revision expands the principle from focusing only on the relationship between the customer and the services provider to addressing other parts of the value chain.

Principle 10: **The government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services.**

This principle was not changed.

Convergence Review: emerging issues

Key concepts

Australia's communications sectors are undergoing profound change as a result of convergence.

Existing regulatory arrangements built around industry 'silos' are challenged by new technologies, market structures and business models.

In the committee's view it is likely that *revolutionary* change to the existing policy framework will be needed to respond to convergence.

The committee will have regard to its principles in developing recommendations for government.

In the process of examining issues raised by convergence, the committee will also re-consider the policies which underpin existing regulation.

This section highlights those emerging issues that the committee has identified from consultations to date, which have included industry meetings and submissions in response to the framing paper. It is important to note that this is not an exhaustive list of issues and the committee remains open and receptive to all ideas. The issues highlighted in this section will require further consideration in light of stakeholder views before the committee formulates recommendations to government.

New market structures

As noted in the framing paper, existing regulation is built around the distinct industries of the late 1980s and the early 1990s, predominantly in the form of the free-to-air broadcast sector and the telecommunications sector. One characteristic of these industries is that they tended to operate specific infrastructure to deliver a specific service.

Just about all platforms and devices in the convergent era are digital, which makes them able to converge to a common network that operates over a variety of infrastructure types[1]. This means you can access the internet on your TV, listen to radio on your PC, and watch video on your mobile device.

[1] For example, mobile wireless, copper phone lines, satellite and optical fibre-based infrastructure.

As a result of these developments, many stakeholders felt it is no longer useful for policymakers to look at broadcasting, radiocommunications and telecommunications industries as separate and distinct industries with unique policy frameworks. A more useful approach may be to recognise new market structures as a series of 'layers' created by convergence, including the underlying infrastructure which transports the content, the network which manages and directs the content, the specific content or application and the device upon which the content is accessed.

The diagram below provides a simplified illustration of the effect of this transformation and the general shift from industry 'silos' to a market structure based on 'layers'.

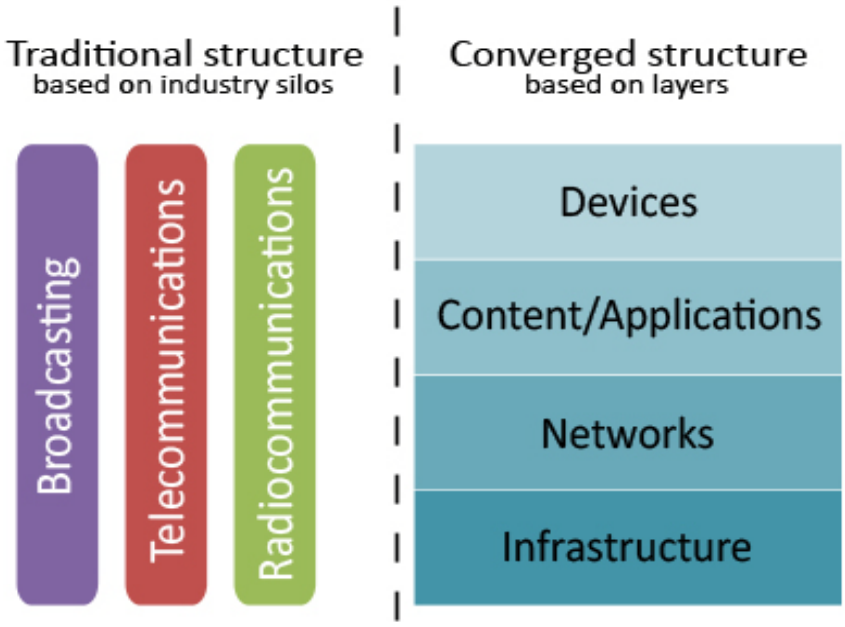

Figure 1: Comparing traditional industry silos with a layered structure likely under convergence

Stakeholders have suggested that this transformation better allows the policy framework to focus on services offered by each layer, rather than each industry. While reasons may exist for treating certain services differently based on delivery, a policy framework based on layers makes this treatment transparent.

Recognising layers in this way is not a new concept and the *Telecommunications Act 1997* partly reflects this approach by recognising 'carriers' who own and operate infrastructure, and

carriage and content service providers, who provide access to, and content and services over that infrastructure.

Regulatory parity

A logical extension of the 'layered' approach is that a policy framework can develop around a specific service regardless of its mode of delivery. 'Regulatory parity' is founded on ideas of fair competition[2] and technology neutrality[3], which—at their broadest—suggest treating all content equally. The concept of regulatory parity has appeal for many stakeholders although stakeholders may differ on whether it is best achieved by deregulating services or by regulating services that currently have little or no regulation.

Achieving regulatory parity may have difficulties in practice. For example, regulation that may be appropriate for programmed or linear content, such as broadcast classification time zones, may not be appropriate to an on-demand or non-linear delivery mode, even though the content is often the same.

In addition, regulatory parity (in a technology or platform sense) may need to be informed by community expectations or wider public policy objectives. For example consumers may still expect that certain types of content are restricted when delivered through free-to-air broadcasting but consider them acceptable on other devices which are used in different environments or circumstances.

Cross-border services

A feature of the internet is its global reach. For some stakeholders this may be a positive development as it allows Australians to access the world's content while providing opportunities to showcase and promote Australian stories to a global audience. As internet delivery of audiovisual content increases, it has become a competitor with broadcast channels

[2] The idea that government policies should, as far as practicable, not reduce or enhance the competiveness of competing products or services.
[3] The idea that government policies should not treat services differently purely on the basis of the technology used to deliver them.

for viewers and advertising or subscription revenues. It may even replace traditional broadcasting as the primary delivery mechanism for content sometime in the future.

From a policy perspective the global nature of the internet makes it difficult to consider internet-based services not hosted or originated in Australia in the same way as local terrestrial, satellite or cable services. The reality of regulating Australian-based services linked to Australian-based infrastructure is very different to regulating offshore services which may often have little or no legal connection to the local market. There is no comprehensive global policy framework for content.

However, the internet enables substantial innovation in the delivery of media services and the resulting proliferation of services available to Australian consumers enriches the diversity of our media.

Given the growing importance of internet-based services the committee considers that recognition of services provided by the internet to some degree will be a necessary part of a balanced policy framework.

Emerging issues for the review

- Should regulatory parity underpin any new policy framework? In what circumstances should regulatory parity not apply? What might such a framework look like?
- How should internet services be recognised within a new policy framework—what features or characteristics of an internet service should qualify that service for recognition within such a framework?

Regulatory policy underpinning the existing regulatory regime

In addition to the converged media issues discussed above, the review will also consider the key policies underpinning the *Broadcasting Services Act 1992*.

Licensing and planning: Regulation of broadcasting services is primarily through the use of licences. These provide both a mechanism for imposing regulatory requirements on a business and determine a legal entity in Australia which is held responsible and accountable for those requirements.

Most commercial television and radio licences are allocated as part of the planning process for that section of the radiofrequency spectrum reserved primarily for broadcasting (known as the broadcasting services bands, or BSBs); that is, there is a close association between spectrum allocation and licensing of services. This planning process determines the number and type of services made available in different geographic areas and grants the recipient of some forms of broadcasting licence an allocation of the BSB spectrum to provide the service. The planning process must include consideration of overall broadcasting policy objectives, the economic and efficient use of spectrum, and a range of other factors including demographic, social and economic characteristics, existing broadcasting services and the demand for new services in the area. Such arrangements provide a mechanism to balance the range of services available (and the public benefits associated with these services) within a particular geographic area and demands for finite spectrum resources between different areas.

However, in the converging environment broadcast-like services are increasingly delivered via means such as smartphones and broadband without any need for BSB spectrum at all. This raises further questions as to whether an approach to broadcasting licensing that is hinged on the sharing of scarce BSB spectrum is likely to remain the most appropriate alternative into the future. It also calls into question the concept of a 'licence area'—a geographical area in which a service is licensed to operate.

In this regard it is possible that there might be a wider role for licensing arrangements that are 'content only' licences and confer no right to any distribution platform, with licence holders having to make separate arrangements to obtain a means of delivering the service. Other options include 'class' licences such as those used in the *Telecommunications Act 1997* and the *Radiocommunications Act 1992* where no formal government or regulatory approval is required before services can be offered.

The degree of influence principle: This principle is a key regulatory policy in the *Broadcasting Services Act 1992* and underpins the categories of broadcast licences, licence allocation, ownership and control, including cross-media ownership, and program standards. It provides that the level of regulation applying to a service should be in proportion to the level of influence the service has in shaping community views. Reliance on the 'influence' principle reflects the social and cultural objectives of the legislation, including that broadcasting has, over the last few decades, been considered to be perhaps the most influential of media voices in terms of community opinion. However, the terms of reference for the review also address economic policy considerations—for example, competition and innovation—as well as social and cultural considerations. An issue for the committee is how concepts such as audience influence, which would lead in the direction of particular policy outcomes, should be balanced with economic and market-led considerations, which might lead in other directions. The committee also recognises that the concept of 'influence' is less clear in the connected world of social media and networking.

Regulation by business model: The *Broadcasting Services Act 1992* currently distinguishes between commercial broadcasting services that are spectrum-based, free-to-air and use an advertising revenue model, and subscription broadcasters that use a subscription and advertising model. These sectors have varying regulatory requirements and obligations that largely reflect their funding and revenue bases in addition to their content. An issue for the review is whether there is an ongoing need to distinguish between business models, particularly where similar services and content may be offered, and where the services may compete for viewers.

Approaches to regulation and non-regulatory measures: The current policy framework relies to a substantial degree on self-regulatory[4] and co-regulatory arrangements[5], particularly in relation to the maintenance of community standards such as offensive television programming,

[4] Self-regulation is generally characterised by industry-formulated rules and codes of conduct, with industry solely responsible for enforcement. Its success will depend on the extent to which industry has incentives to comply with the rules or codes of conduct.
[5] Co-regulation typically refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable enforcement of the arrangements.

and broadcast classification. Each approach to regulation has its advantages and disadvantages. Legislation is clear and enforceable, but relatively inflexible and unresponsive to change. Co-regulation and self-regulation provide for greater industry autonomy and flexibility and lower compliance costs, but may not meet community expectations and can fall subject to self-interest at the expense of the community. A range of non-regulatory measures—such as information and education campaigns, taxation, incentive schemes and service charters—can address a public policy objective. An issue for the review is whether the existing policy approaches are effective and whether to consider alternative approaches. The committee is aware that the Australian Communications and Media Authority (ACMA) recently published some insights on the topic of co-regulation and self-regulation[6].

Emerging issues for the review

- Is the degree of influence principle still a useful way to distinguish between levels of regulatory intervention by government for media and communications?
- In what circumstances should the business model of a communications or media service be relevant in a converged policy framework?
- What are the appropriate regulatory approaches for government in a converging media environment and what are the critical factors in determining which approach is most suitable?

[6] See www.acma.gov.au/webwr/_assets/main/lib311886/self-_and_co-regulatory_arrangements.pdf

Australian and local content

Key concepts

Existing regulation imposes a number of Australian and local content obligations on broadcasters:
Australian content—commercial television broadcasters are required to show 55 per cent Australian content between 6 am and midnight, —including drama, documentaries and children's content[T1].

Australian music on radio stations[T2].

Local content—material relevant to a geographical licence area (for example local news or other material of local significance)[T3].

Australian produced advertising on commercial television[T4].

Australian content

A number of submissions argued that Australian stories are fundamental to how Australians understand our place in the world. Consultations to date show a clear consensus that Australian content is a valuable part of the nation's social identity. The challenge for the review is how to ensure continued availability of Australian content in a convergent environment.

There is a long history of Australian content rules within the broadcasting sector dating as far back as 1956 for television[7].

It is important to note that there is strong demand for some Australian content. For example, the top 20 rating television programs in 2010 were all Australian and, although popular sporting events[8] dominate, the list does include drama and light entertainment. The fundamental issue with Australian content is that it can be relatively expensive; for example, television broadcasters pay

[7] The first comprehensive regulatory regime for television, the *Broadcasting and Television Act 1956,* stopped short of mandating quotas but imposed an obligation on licensees to use the services of Australians in producing and presenting television program.
[8] See www.screenaustralia.gov.au/research/statistics/wftvtopprog.asp

a minimum of $440 000 an hour to licence a local drama series that has been co-financed by Screen Australia[9]. The committee understands that prices for international series can be $250 000 or less reflecting the greater capacity to absorb costs across a global audience.

Submissions to the review have raised a number of issues in relation to existing arrangements. These include:

- content obligations on commercial broadcasters
- children's content
- the broader content 'ecosystem', including the role of national broadcasters such as the Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS).

Key concepts

Some subscription television providers are required to spend 10 per cent of programming expenditure on first-release Australian drama.[T5]

The Australian content requirements do not apply to services that deliver radio or television programs over the internet. The rules also do not apply to content service providers in the *Telecommunications Act 1997*.

There is a range of other incentives offered by government to encourage Australian content production.

Content obligations on commercial broadcasters:

Traditionally, Australian and local content obligations formed part of a broader regulatory paradigm that reflected the special status that commercial broadcasters enjoyed. This status involves a range of additional obligations (to other platforms) such as Australian content requirements and the obligation to pay broadcast licence fees but also has a number of advantages—for example, access to spectrum and (at least currently) a level of protection in the marketplace through restrictions on the awarding of new broadcasting spectrum licences.

[9] See www.screenaustralia.gov.au/funding/tvdrama/TVDrama.aspx

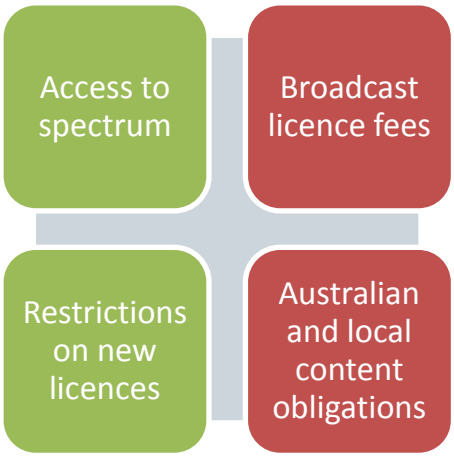

Figure 2: The historical paradigm for commercial broadcasting licensees[10]

There is also a range of significant regulatory concessions and requirements specific to the free-to- air sector including anti-siphoning rules, which mandate a range of sports that must be shown on free-to air television.

Stakeholders have suggested the paradigm in the existing regulatory framework appears to be changing. For example, new content services such as internet-based streaming services can enter the market without a broadcasting licence, which potentially dilutes the commercial benefits of a limited number of licences. The value of spectrum used by broadcasters may have increased in light of the popularity of mobile broadband and television multichannels as alternative spectrum users. In the committee's view, the consideration of future Australian and local content obligations is part of this broader regulatory paradigm.

A number of submissions noted that the Australian content requirements do not apply to services that deliver radio or television programs over the internet[11]. The rules also do not apply

[10] The diagram is indicative only. The committee is aware that other regulatory concessions and requirements are specific to the free-to-air sector; for example, anti-siphoning rules, program standards.
[11] As a result of the determination under 216E of the *Broadcasting Services Act 1992* available at: www.comlaw.gov.au/Details/F2004B00510

to online content service providers under the *Telecommunications Act 1997,* such as Bigpond TV, and apply only in part to subscription broadcasters. As such Australian content is one example of an issue where regulatory parity is raised including extending content obligations to other platforms or, alternatively, to reduce the 'burden' on the free-to-air sector. The committee is also interested in new ways in which Australian content can be made available to Australians—for example, using new or emerging online platforms.

The committee also acknowledges that stakeholders have raised local content requirements on commercial radio broadcasters and the quota for Australian music. Key issues for radio include the role of the existing code-based obligations in promoting Australian music artists and relationship between communications and media services and a healthy domestic music industry in a convergent environment.

Children's television content: Submissions have raised a number of issues in relation to children's content including the importance of continued access to television content suitable for children, the economic challenges of producing and distributing children's content in a commercial environment, and the most effective way to schedule children's programming. An issue for the review is how best to encourage continued production of and access to children's content in a convergent environment, responding to these challenges. The committee notes that public broadcasters, notably the ABC, have assumed a significant role in delivering children's programs.

The content 'ecosystem': A holistic examination of Australian content requires the committee to consider other aspects of the content 'ecosystem'. For example, ABC and SBS deliver Australian and local content as the result of general charter obligations but they are not subject to any specific quota or expenditure requirements. Consistent with Principle 5, an issue for the review is the inter-relationship between Australian and local content policies and a dynamic and capable Australian production sector that is able to produce high-quality, commercially-successful content. The committee is mindful of the differences in policies that stimulate the production of Australian content, and policies that support the transmission or distribution of Australian content. An effective policy framework may require both outcomes.

It is important to note that the committee does not assume that Australian content as a product is a static concept—could Australian content in the future include virtual worlds, for example, or user-generated content?

Local content

As per Principle 6, the committee considers that Australians should have access to news and information of relevance to the local community. An issue for the review is how to achieve this in a convergent environment, noting that local content requirements do not apply to non-terrestrial platforms such as cable or internet-delivered services.

The committee does not hold presumptions about the best platforms for local content. While it is recognised that traditional radio and television services play an important role, an issue for the review is how new and emerging forms of communications such as social media and online spaces have the potential to achieve beneficial outcomes. The committee notes that the ABC has invested in online spaces for local communities. More broadly, the internet offers increased opportunities for disseminating local news and perspectives to relevant communities[12].

The committee recognises the role of community broadcasters, which are required to serve the community of interest for which the licence was awarded. A large number of these broadcasters have received licences on the basis that they will serve their local (geographic) areas. In this context, the committee also recognises that public resources are used to support Indigenous broadcasting in radio and television around Australia.

[12] See for example Bendigo IPTV (http://bendigoiptv.com), which provides locally-produced programs including news, sport and music via Telstra's BigPond TV

Emerging Issues for the review

- In a convergent environment, are content quotas still an appropriate mechanism for Australian content, including music, and children's and local content?
- Are there alternative mechanisms which would more effectively encourage the production and distribution of this content to the Australian public?
- If consumer demand is a motivation for the continued production of Australian content, would the use of code-based system (or other co-regulatory model), rather than mandatory quotas, diminish the amount of high-quality Australian drama shown on Australian free-to-air networks?
- Are there measures which will encourage development of new forms of Australian, children's and local content such as local apps, online content and new media forms?
- Should content rules apply to:
  - terrestrial digital TV multichannels
  - public broadcasters like the ABC and SBS
  - other content delivery platforms?
- If content rules are not to apply to all content delivery platforms, what should be the points of difference for determining which platforms are subject to local and Australian content rules?
- What evidence is there for the relationship between Australian and local content policies and the ongoing health and viability of Australian's content production industries?

Market structure and media diversity

Ownership and control restrictions, through the varying iterations of broadcasting legislation, aim to limit the undue concentration of media and foster diversity in services offered to consumers[13]. Cross-media ownership restrictions have a long history in Australia, dating back as far as the 1920s when newspaper interests became involved in the broadcasting industry[14].

Key concepts

Australia, along with many other countries, has a long history of rules that aim to protect and promote media diversity. The rules are founded on social and political beliefs that the public should have access to a diversity of opinion, information, news and commentary.

Stakeholders have raised a range of market structure and diversity issues:

- media diversity, including cross-media ownership
- 'managed market entry' and the present arrangement where the government or the ACMA controls the number of commercial broadcast licences allocated in each licence area
- the role of mergers and acquisition laws in protecting diversity
- the idea of a 'public interest' test.

[13] Productivity Commission 2000, Broadcasting, Report no. 11, p. 331.
[14] Commonwealth, Parliamentary Debates, House of Representatives, 29 April 1987, 2191 (Michael John Duffy).

Media diversity

Key concepts

The present arrangements in the *Broadcasting Services Act 1992* preserve media diversity in a number of ways:

- There are restrictions on the number of commercial radio or television licences that can be controlled by one person or group in the same licence area[T6]—for example, Sydney or regional Queensland (one for television, two for radio).
- The *Broadcasting Services Act 1992* also prevents one person from controlling commercial television broadcasting licences that, in total, reach more than 75 per cent of the population (the audience reach rule)[T7].
- Cross media ownership rules consisting of the '2 out of 3' rule and the 4/5 rule.

The existing regulatory arrangements reflect in large part the 'audience influence' principle—the idea that the level of regulation attached to a sector is in proportion to its level of influence in shaping community views. Media ownership rules apply to commercial television, radio and newspapers as they have traditionally been considered the most influential services in the community.

The continuing appropriateness of the audience influence principle was raised earlier in this paper. A key issue for the review is the extent to which the influence of commercial television, radio and newspapers persists, or may have waned due to the increasing role of online services.

Australia's media diversity and control rules do not apply to certain media, including subscription television and online media. In recent years these services have grown more influential. For example, the penetration of subscription television has increased and it offers a variety of news and information channels. Online services are also becoming more influential sources of news and entertainment.

People commenting via the review's online discussion pages expressed a range of views on the extent of diversity in Australia's media. Some noted that the internet had significantly increased diversity and provided people with many more choices about where to access information and entertainment.

Cross-media ownership

The '2 out of 3' rule—a person cannot own more than two out of three specified media platforms (commercial television, commercial radio, or a newspaper) that service a particular radio licence area.[T8]

Minimum number of voices: the 4/5 rule—prevents acquisitions that would result in there being less than five independent and separately controlled media operators or groups in a metropolitan licence area, and four in a regional area[T9].

A contrary position was that a multitude of views available via the internet does not necessarily mean that Australians have access to a diversity of voices, as many of the most popular websites are owned by large media companies. Submissions also noted that the digital economy is delivering significant levels of diversity, and that professionally-produced or 'mainstream' media should not be considered the only source of diversity.

Managed entry

A further issue for the committee is whether continuing the principle of 'managed' or controlled entry to commercial radio and television broadcasting is appropriate.

Managed entry to commercial free-to-air broadcasting services, through licensing and planning, reflects a number of policy objectives (as already discussed above), including the limited availability of spectrum upon which these services depend. With the separation of content and delivery made possible by convergence, a question for the committee is whether there is any future need for restrictions on spectrum-based broadcasting licences, notwithstanding the issue of whether there is available spectrum. In such a future, a new broadcaster could purchase appropriate spectrum, if spectrum planned for television-like services was available, and provide a new digital channel.

Role of competition law

At present media diversity is primarily protected by the audience reach rule. This restricts the number of licences that one entity can control and the ownership and control provisions in the *Broadcasting Services Act 1992*. Some aspects of media ownership and control that are not covered by these provisions may be regulated by the *Competition and Consumer Act 2010*, including mergers that would have the likely effect of lessening competition in a market [15].

The dynamic nature of converging media markets makes it increasingly likely that mergers will occur beyond the television, radio and newspaper sectors within the scope of the Act. A key issue is whether in future it is sufficient to rely only on the competition provisions of the *Competition and Consumer Act 2010* in such a merger. A key consideration in such a case would be whether the existing provisions in the Act are sufficient to ensure media diversity, noting that the rules act to promote competition rather than a diversity of voices.

Competition

Media mergers and acquisitions are also subject to the competition law provisions of the *Competition and Consumer Act 2010.*

Media mergers which would likely substantially lessen competition in a relevant market are prohibited unless authorised or granted formal clearance[T10.]

The media sector is treated as a 'sensitive sector' for the purposes of Australia's foreign investment regime, along with other sectors such as telecommunications and transport.

Apart from this, the media sector is not subject to specific foreign investment provisions.

Public interest test

A further issue for the committee is whether the introduction of a public interest test might protect media diversity. Such a test could apply in conjunction with the current ownership and

[15] Section 50 of the *Competition and Consumer Act 2010*.

diversity rules, or replace these arrangements. This issue was considered in the Productivity Commission's broadcasting review in 2000, which recommended the repeal of cross-media ownership rules and amendment of Australia's competition law to include a media-specific public interest test. Such a test would specifically promote diversity of ownership and diversity in the sources of opinion and information[16]. There are strengths and weaknesses of this approach. Notwithstanding the limited range of media to which the current rules apply, they do have the advantage of certainty because they are numerically-based. Public interest tests potentially have much greater flexibility but may occasion increased uncertainty for industry.

While the Productivity Commission's recommendations were ultimately not taken up, they are worth further examination as part of this review.

Australia's current mergers and acquisitions framework has a public interest test, allowing the Australian Competition Tribunal to authorise mergers and acquisitions that may substantially lessen competition if the transaction results in a public benefit. This authorisation has never been sought in the case of a media merger. However, this test does not provide the scope to prevent a merger that could result in a reduction in media diversity.

[16] Productivity Commission (2000). Broadcasting, Inquiry report No. 11, 3 March 2000, www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport

Emerging issues for the review

- In a multi-platform environment, are cross-media ownership rules still necessary to ensure a diverse media sector?
- Should cross-media provisions extend to cover new media services, such as IPTV and internet-based media and enterprises?
- Under what circumstances is managed entry to broadcasting services still appropriate?
- Does the success of new digital channels indicate a case for reducing restrictions (for example, licensing) on entry?
- To what extent do the current diversity rules impact on innovation in media and content services?
- Should cross-ownership rules be relaxed or removed in favour of a public interest test?
- Are the current merger provisions of the *Competition and Consumer Act 2010* sufficient to ensure media diversity in Australia? What changes might be required?

Content rights acquisition

Key concepts

Access to content is essential for the success of media platforms.

The acquisition of exclusive rights, particularly of premium content such as sports, can be used to starve competitors, including those on different platforms, of content.

In addition, there is evidence that independent producers face difficulties in negotiating rights with distributors, which ultimately affects their ability to maximise their revenue.

In Australia, access to premium content such as sports (especially AFL, NRL, cricket and tennis) is crucial to the success of platforms such as free-to-air, subscription and mobile television. Competition issues may occur when buyers acquire exclusive rights to premium content that to a degree effectively locks out competition. In addition, there is also the potential for rights bundling across platforms (one operator bundles rights across subscription television or internet protocol television—IPTV—or mobile).

Ultimately, this may deprive consumers of choice and quality. Exclusive arrangements can also cause immediate costs to consumers. For example, if a mobile operator holds exclusive rights to a sporting code, a consumer not contracted to that network would face significant switching costs to access the content. A similar scenario could arise with subscription television or IPTV services. A consumer may have to enter a contract with a new provider and buy a set-top box or hardware to receive the content they want.

The *Competition and Consumer Act 2010* recognises the potential for anti-competitive behaviour in exclusive contracts[17]. However, there is doubt as to whether the provisions in that Act can be successfully applied to content rights.

[17] Section 45 of the *Competition and Consumer Act 2010* prohibits companies from entering any arrangements that result in a substantial lessening of competition. Section 47 of the Act prohibits exclusive dealing that causes a substantial lessening of competition.

Not all exclusive rights to content are necessarily anti-competitive. Sale of distribution rights on an exclusive basis can result in higher prices for rights holders, which in turn can support industry development in sport and content development generally. In addition, if consumers do not face significant switching costs and there is no substantial lessening of competition, an exclusive content arrangement may not raise competition concerns.

Producers and owners of premium content, such as the AFL, have significant market power in negotiating rights deals with distributors. However, many independent content producers sometimes face significant difficulties in negotiating rights. Producers may be unable to negotiate the sale of their content in such a way that enables them to maximise revenue and ensure distribution of their content on a variety of platforms.

These issues may arise from several factors. Firstly, there may be a strategy on the part of distributors to warehouse rights to keep them from competitors. Secondly, in a particular market only one buyer (the content distributor) may face many sellers (content producers). The buyer is consequently able to force the seller to bundle rights.

The committee is of the view that if an acquirer of rights can force a seller to bundle the rights, then there is potentially an issue in the market. It will examine this matter further.

Emerging issues for the review:

- Are there issues with competition that arises from the exclusivity of content in the market?
- Do exclusive content arrangements have the potential to limit platform-based competition by restricting content available to new market entrants?
- Should policy incentivise investment in content production and distribution and ensure that new platform entrants have access to premium content?
- Do independent producers face difficulties in negotiating content deals with broadcasters and distributors? Why?

Community standards and public expectations

Key concepts

Under the existing arrangements, responsibility for ensuring that content appropriately reflects community standards and public expectations is primarily the responsibility of industry through the development of codes of practice.

Online and broadcast content services are subject to a series of inter-related but separate classification regimes relating to content that contains sex, violence and some other proscribed material.

In addition to these codes and schemes, Schedules 5 and 7 to the *Broadcasting Services Act 1992* define what online content is prohibited under Australian law and set out a complaints-based system for taking down or removing access to such content.

As the concept of community standards reflects a mix of individual preferences and social values, it can be subjective and yield different interpretations. In any community differing views will exist on what media content is acceptable for responsible adults to access, although the standards for what young people and children can access may find more ready agreement. If community standards are applied in the context of convergent media and rapid technological change, how should the appropriate standards be determined and applied?

Some submissions argue that the market is in the best position to determine community views and expectations, because any mistakes made are likely to reduce audience numbers and revenues.

Many standards that apply today were formulated in an era when there was much less content available and the majority of that content was professionally produced. Some stakeholders have argued that imposing standards that apply to traditional media on newer platforms may create barriers to entry and prove detrimental to the development of new services and industries.

There are also practical hurdles in imposing content standards that reflect Australian community values on content produced internationally. Some stakeholders have suggested

difficulties of enforcement should not necessarily preclude regulation, as advances in technology and international cooperation can help in this area.

Online and broadcast content services are subject to a series of inter-related but separate classification regimes relating to content that contains sex, violence and some other proscribed material. The suitability of these schemes is a matter for the Australian Law Reform Commission's (ALRC) National Classification Scheme review; however, an issue for the Convergence Review is whether a unified classification scheme could apply to all content irrespective of its mode of delivery.

There are also questions of whether some issues are worthy of particular focus. For example, online content available to children and young people is not regulated in the same way as material that is broadcast. Warnings about inappropriate content are not available in many non-broadcast environments, nor are parental lock systems widely used on these services. This area of the review raises a question that is as much philosophical as it is regulatory: if regulation is likely to be ineffective but nevertheless responds to community opinion, should it be imposed in order to represent a standard? Or will its ineffectiveness undermine commitment by other parties to regulate standards more generally.

There is a further question as to whether community standards that apply to traditional media are equally relevant to internet services, noting that online services are already subject to the complaints based system set out in Schedule 7 to the *Broadcasting Services Act 1992.* Alternatively, some submissions argue that a different standard should apply to the internet in recognition of the practical difficulties of regulating content online and the user-generated nature of some internet content.

Effectiveness and efficiency of measures

Program content is regulated to meet community standards that are set out in legislation, licence conditions, co-regulatory and self-regulatory instruments. In determining which approach is most appropriate, the committee recognises that a range of criteria may be

relevant. Self-regulation will typically impose the lowest costs, but is reliant on industry wide-commitment.

Likewise, co-regulatory arrangements may fail if the regulator does not have access to appropriate enforcement mechanisms to ensure that violations are minimised.

The manner in which community standards are addressed is influenced by the relevant risk. For example, occasional broadcast of swearing on a live radio program is typically seen as less of an issue and is dealt with on a co-regulatory basis, such as through codes of practice. A number of more serious issues such as racial vilification and advocating terrorism are prohibited under separate legislative arrangements.

Media literacy campaigns can go some way to educate individuals and protect them from potentially offensive or inappropriate content. Platforms placing clear warnings about content and providing explicit age restrictions will also help. Technology-based solutions linked to universally-understood classification schemes could provide further support.

Many internet-based services point to content policies that are based on the input of users. For example, YouTube informs users in its terms and condition that content such as pornography, abuse of animals, drug use, or instructions on bomb-making is not appropriates. It relies on a system where users can flag content they regard as inappropriate for YouTube to then decide whether to remove.

Consistency in content regulation reflecting community standards and public expectations

Inconsistent treatment of content can be confusing from the perspective of those accessing the services, as well as those providing the services. It can also raise competition and equity issues where some businesses are forced to fund costs associated with the regulation from which competitors are exempt or are forced to apply different standards to the same content depending on the delivery platform used.

Free-to-air television broadcasters have argued that the current arrangements impose a disproportionate level of regulation on linear delivery platforms compared with platforms delivering content over the internet or by mobile.

The question of whether the platform on which content is delivered should continue to have a primary role in determining content classification is being considered in the ALRC's National Classification Scheme review. Despite convergent trends and the availability of technology such as personal video recorders (for example TiVo and FOXTEL's IQ2 box) and catch-up services such as the ABC's iView, the majority of Australians still watch live TV. Many Australians would expect that they can rely upon the safety provided by the existing regulation of free-to-air television services.

Emerging issues for the review

- Should a policy framework seek to apply community standards to all content regardless of origin or method of delivery?
- Is it preferable to impose standards (by cooperation or by regulation) when enforcement is limited or impractical?
- How should community standards be determined?
- Is self-regulation by content services an effective means of protecting community standards?
- How can consumer education and awareness initiatives help? Are there practical improvements relevant to a converged media environment?
- Are consumer complaints a good way to ensure inappropriate content is not shown?
- How can children and young people be protected from unsuitable content in a converged media environment?
- Are there specific areas of content regulation where government intervention is warranted?

Spectrum allocation

Spectrum is a vital input to all wireless services. The final principle adopted by the committee is that government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services.

Key concepts

Radiofrequency spectrum is a highly planned, scarce resource and is a vital input to radio and television broadcast networks as well as mobile communications networks.

A significant amount of audiovisual content in Australia is delivered on these networks and those parts of the radiofrequency spectrum available for use for these purposes are highly sought after.

There are separate regimes for spectrum planning depending upon whether it is used to provide broadcasting or other services.

Spectrum is used both for broadcasting and telecommunications as well as other forms of communication. But the current regulatory regime governing its planning and allocation differs according to the purposes for which it is used. Spectrum allocation and management is a significant issue in a converged environment and the committee will consider this issue in greater detail as the review proceeds.

Spectrum is a scarce public resource. There is both a need to make difficult decisions in relation to competing uses and also ensure that spectrum is used as efficiently as possible. The committee recognises the importance of a policy framework to ensure that government plans and allocates spectrum to maximise the public benefit, with regard to commercial, community and public interest uses. Ultimately, the framework will require objective means of determining future allocations where competing uses for spectrum arise.

As a starting point, the committee has identified a number of emerging issues relating to spectrum:

- broadcast licence fees
- the future of a further digital television channel
- the policy framework for allocating spectrum in the public interest.

Broadcast licence fees

Commercial radio and television broadcasters pay annual licence fees based on their advertising revenues. In the mid-1970s, the maximum rate was 4.5 per cent of gross earnings, increasing in 1977 to 6 per cent, in 1981 to 7.5 per cent, in 1983 to 8 per cent and subsequently to 9 per cent.

This is called a licence fee because it is based on the income generated from the licence. It is not a direct charge for the value of the spectrum provided to broadcasters.

Originally, commercial television and radio broadcasters were awarded broadcasting licenses and spectrum following 'beauty contests', which did not involve upfront payment for spectrum. In the case of the commercial television licensees, the policy justification to levy a licence fee 'tax' reflected the profitable oligopoly of commercial broadcasters that was maintained by government restrictions on additional spectrum and licences. Both radio and television licences are now subject to price-based allocation, meaning new commercial broadcasters would have to pay for radio broadcasting licenses and spectrum, in

Key concepts

Part of the radiofrequency spectrum, known as the Broadcasting Services Bands, has been set aside by the government for broadcasting uses[T12]. While all other radiofrequency spectrum is planned under the *Radiocommunications Act 1992*, planning of the BSBs is primarily dealt with under the *Broadcasting Services Act 1992*.

The two key issues raised in submissions relate either to spectrum allocation—how to arbitrate between competing uses and encourage efficient use—or how to ensure that a scarce resource is used efficiently to enable provision of as many services as possible.

addition to the annual broadcasting licence fee, should the government decide to allocate additional commercial licences.

Commercial TV and radio broadcasters argue that Australian licence fees are high in comparison with international broadcasters. They also argue for the lowering of licence fees as broadcasters face increasing competition from other platforms.

Other submitters argue that the full economic cost of broadcasters' use of spectrum is not realised under the licence fee regime. They argue that under the current system broadcasters have no incentives to provide their services in a spectrally efficient way and are not paying market value for the spectrum used for commercial purposes.

Additional television services

As part of this review, the committee will consider potential uses for spectrum which will become available after digital switchover. With the rearrangement of digital television broadcasting services (known as 'restacking') following switchover, one 7 MHz national spectrum channel will become available, which new services could use[18].

The remaining 7 MHz channel has the potential, after 2014, to accommodate services equivalent to four or five standard definition television services[19].

The committee is considering the best use in the public interest for this valuable spectrum, planned for television-like services. Options include allocating capacity for different kinds of services or leaving capacity on the channel unallocated at this time. In considering options, the committee will take into account the principles it has adopted for the Convergence Review.

[18] Originally two channels (known as Channel A and Channel B) were reserved for a limited range of in-home broadcasting services (datacasting and narrowcasting) and mobile television. The channels were never allocated for these purposes and the government has decided to roll one of them into the digital dividend.

[19] Part of this 7 MHz channel is currently used to provide the community television digital service in Melbourne, Sydney, Brisbane and Adelaide, and Perth, on a temporary basis until the end of 2013. The remaining spectrum currently remains unused.

Under current broadcasting regulation, the government is required to conduct a statutory review into whether to allocate any new commercial television broadcasting licences by 1 January 2012. The outcomes of the current review will inform that process.

Policy framework for allocating spectrum in the public interest

An important consideration for government in spectrum management is to determine rules that work for public benefit. This could include the promotion of national cultural goals and media diversity.

As noted earlier in this paper, there are currently three broadcasting sectors in Australia—commercial, national and community. Each has specific objectives and meets different needs of the community through its use of spectrum. The Minister for Broadband, Communications and the Digital Economy currently has special powers under the *Broadcasting Services Act 1992* to reserve spectrum for national and community broadcasting uses. These powers have allowed the preservation of sectoral diversity in the broadcast system.

Spectrum services such as broadband wireless access services, including broadband for mobile devices, are growing in popularity. As a result, mobile network operators estimate that much more spectrum will be needed for wireless access services to meet demand. Market-based spectrum allocation will therefore become a major activity for government into the future.

Mobile communication is a high-value use of spectrum and is likely to have positive productivity implications for the economy. Telecommunications companies will be prominent in the competition for spectrum resources. Submissions have argued that it is important to take full account of diversity, competition and innovation issues in determining the allocation of wireless access spectrum.

The review's terms of reference require it to consider the appropriate future processes for spectrum allocation in the light of convergence. For clarity, allocation processes that are already underway during the review process will proceed as planned.

Emerging issues for the review:

- Does the designation of broadcasting spectrum remain a useful approach in the era of convergence?
- Are the current broadcast licence fees set at the right level?
- Should the value of spectrum used for broadcasting be reflected in the broadcast licence fees?
- Should the sixth television channel spectrum be utilised? If so, what services could it deliver on its multichannels?
- Should the Minister have powers to reserve spectrum for other public purposes in addition to national and community broadcasting?
- How might diversity, competition and innovation be promoted in the market allocation of spectrum?
- Should such licences for spectrum be for fixed terms and be contestable on a regular basis?

Next steps

There are a number of other opportunities for people to engage with and contribute to the review. Earlier in this paper, the committee put out an open call for submissions, which will close on 28 October 2011. As stated, this is an opportunity for stakeholders to raise any issues they see fit or provide advice and recommendations to the committee.

The committee will hold a series of consultations in locations around Australia during the year. Information regarding these events will appear on the Convergence Review web page (www.dbcde.gov.au/convergence).

The committee is also planning to release detailed discussion papers that will identify draft options for regulatory reform and will invite comment from stakeholders.

The committee intends to publish for comment a draft report on its findings before submitting a final report to the government in March 2012.

References

Text boxes

[T1] See the Australian Content Standard at www.acma.gov.au/WEB/STANDARD/pc=PC_91809

[T2] See Commercial Radio Australia Codes of Practice and Guidelines (Code 4: Broadcast of Australian Music) and Community Radio Broadcasting Codes of Practice (Code 5: Australian Music) at www.acma.gov.au/WEB/STANDARD/pc=IND_REG_CODES_BCAST

[T3] See www.acma.gov.au/WEB/STANDARD/pc=PC_91817 for TV, and ss43A-C, *Broadcasting Services Act 1992*.

[T4] See the Television Program Standard for Australian Content in Advertising at www.acma.gov.au/WEB/STANDARD/pc=PC_91796

[T5] Sections 103A—103ZJ of the *Broadcasting Services Act 1992.* ACMA website reference to eligible drama expenditure scheme: www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_310687

[T6] Sections 53 and 54 of the *Broadcasting Services Act 1992*.

[T7] Section 53(1) of the *Broadcasting Services Act 1992*.

[T8] 50 per cent of the population of the radio licence must fall within the television licence area for this prohibition to apply, as per section 59 of the *Broadcasting Services Act 1992*.

[T9] Division 5A of Part 5 of the *Broadcasting Services Act 1992*.

[T10] Section 50 of the *Competition and Consumer Act 2010*.

[T11] The ALRC issues paper is available at www.alrc.gov.au

[T12] Section 31 of the *Radiocommunications Act 1992.*