Australian Government

Convergence Review

Final Report

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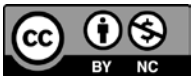

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Australian Government

Convergence Review

Senator the Hon Stephen Conroy
Minister for Broadband, Communications and the Digital Economy
Parliament House
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Dear Minister

In March 2011 my colleagues, Malcolm Long and Louise McElvogue, and I received terms of reference to undertake a review into Australia's media and communications policy framework and report to you in the first quarter of 2012.

I am pleased to present you with the final report of the Convergence Review.

In undertaking the review the Convergence Review Committee consulted with key industry leaders and organisations, received over 340 written submissions and 28000 comments and undertook an in-person consultation programme across Australia. In December 2011 the Committee released an Interim Report detailing our proposed recommendations. The final report builds on this work and subsequent feedback with detailed recommendations and suggested implementation plans.

Since the existing communications regulatory framework was introduced in the 1990s, communications convergence has brought fundamental change to the Australian media environment. Our report recommends a new principles-based policy framework that provides the media and communications sector with reduced compliance costs, increased certainty and flexibility while ensuring that services continue to meet the expectations of Australians.

The report also addresses the statutory review of Schedule 7 of the *Broadcasting Services Act 1992*, which is available in Appendix G.

We would like to thank the Convergence Review secretariat, organisations and members of the public for their contribution and assistance throughout the Review.

Yours sincerely,

Mr Glen Boreham AM
Chair, Convergence Review Committee
30 March 2012

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Executive summary

Introduction

Australia's media landscape is changing rapidly. Today Australians have access to a greater range of communications and media services than ever before. Developments in technology and increasing broadband speeds have led to the emergence of innovative services not previously imagined. It is now possible to access traditional communications and broadcasting services in new ways, such as radio and television delivered over the internet.

Users are increasingly at the centre of content service delivery. They are creating their own content and uploading it to social media platforms. They are controlling what content they want to view and when they want to view it, for example, through podcasts of popular radio programs and catch-up television services provided by free-to-air networks.

Despite these dramatic changes, Australia's policy and regulatory framework for content services is still focused on the traditional structures of the 1990s—broadcasting and telecommunications. The distinction between these categories has become increasingly blurred and these regulatory frameworks have outlived their original purpose. These frameworks now run the risk of inhibiting the evolution of communications and media services.

Convergence presents significant opportunities but also potential threats for traditional media, creating a need to transform both business and delivery models to keep up with changes in user behaviour. Australia's creative industries are well positioned to seize the opportunities offered by this new environment, and to ensure the development of our digital economy. Australian industry can expand our traditional screen businesses and develop excellence in emerging areas like smartphone and tablet apps. These industries can flourish in a converged environment that opens up new trade opportunities and cultural interactions with the rest of the world, where global distribution is virtually free. A new policy and regulatory framework is needed to support these outcomes.

The Convergence Review

The Convergence Review Committee was established in early 2011 to examine the operation of media and communications regulation in Australia and assess its effectiveness in achieving appropriate policy objectives for the convergent era. The terms of reference for the Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum.

Throughout 2011 the Review conducted a comprehensive consultation process to inform its findings and provide all Australians with the chance to have their say. During this process, the Review held public forums in metropolitan and regional locations across Australia, met with industry representatives, and analysed more than 340 detailed submissions and over 28 000 comments.

The Review was also asked to take into account the findings of the report of the recent Independent Inquiry into the Media and Media Regulation in its deliberations.[1] In addition, it has also taken into account the recommendations of the Australian Law Reform Commission's review of the National Classification Scheme.[2] The Convergence Review acknowledges the considerable work undertaken by these two concurrent reviews.

1 The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, www.dbcde.gov.au/digital_economy/independent_media_inquiry.

2 Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media: Final Report*, ALRC report 118, February 2012, www.alrc.gov.au/publications/classification-content-regulation-and-convergent-media-alrc-report-118.

Why regulate?

As part of its initial deliberations, the Review established a set of 10 principles to guide its work.[3] The first and most fundamental principle states that:

> Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.

The Review's starting point, guided by this principle, was that unnecessary regulation should be removed. A consistent theme of the submissions received by the Review was that parts of the current communications environment, particularly broadcasting, are overregulated and many of the existing rules are unnecessary and expensive to comply with. The Review has concluded that a range of existing regulations no longer serve their policy purpose. Some current regulation can be difficult for government to administer and is an unnecessary burden on industry.

The key example of this is the detailed legislative arrangements requiring a licence to provide broadcasting services in a specific part of Australia. With the increasing availability of broadband, services of these kinds can be delivered over the internet across Australia and the world. It is no longer efficient or appropriate for the regulator to plan for the categories of broadcasting service for different areas and issue licences to provide those services.

The Review recommends that the licensing of broadcasting services should cease. As a consequence, the current costs for government and business associated with planning and issuing licences and administering categories of broadcasting services will disappear entirely.

The effects of convergence have been profoundly positive, resulting in new services, expanded consumer choice and greater competition. In light of these changes some submissions to the Review proposed that no regulation at all is necessary in the global digital world. However, the Review concluded that convergence in itself does not totally remove the need for some regulation in the public interest. During its year-long process, the Review asked the question, 'Why should government regulate?' The Review has identified three areas where continued government intervention is clearly justified in the public interest:

- *Media ownership*—A concentration of services in the hands of a small number of operators can hinder the free flow of news, commentary and debate in a democratic society. Media ownership and control rules are vital to ensure that a diversity of news and commentary is maintained.
- *Media content standards across all platforms*—Media and communications services available to Australians should reflect community standards and the expectations of the Australian public. As an example, children should be protected from inappropriate content.
- *The production and distribution of Australian and local content*—There are considerable social and cultural benefits from the availability of content that reflects Australian identity, character and diversity. If left to the market alone, some culturally significant forms of Australian content, such as drama, documentary and children's programs, would be under-produced.

Who should be regulated?

Since the 1990s, there has been a diversification in the way Australians access media. Australians have embraced smartphones and tablets to access news and entertainment. This trend will only accelerate. Despite these changes, Australians continue to get the vast majority of news and entertainment from a relatively small number of established providers.

3 See Convergence Review, *Emerging Issues,* July 2011, pp. 8–10.

A key finding of the Review was that the community expects significant enterprises controlling professional media content to have some obligations, no matter how they deliver their services. The Review proposes a policy framework that will regulate these enterprises based on their size and scope, rather than how they deliver their content.

The Review recommends that these significant media enterprises be defined as 'content service enterprises' and be subject to regulation. Organisations would be defined as content service enterprises if they:

> have control over the professional content they deliver

> have a large number of Australian users of that content

> have a high level of revenue derived from supplying that professional content to Australians.

The threshold for users and revenue would be set at a high level to exclude small and emerging content providers. This proposed framework is only concerned with professional content. For example it would include 'television-like' services and newspaper content but exclude social media and other user-generated content. As a guide, modelling conducted for the Review indicates that currently around 15 media operators would be classified as content service enterprises.[4] This modelling suggests that currently only existing broadcasters and the larger newspaper publishers would qualify as content service enterprises.

The Convergence Review was required to take a long-term view. The content service enterprise concept is dynamic and is designed to be effective in a changing media landscape. Organisations may move in or out of the content service enterprise framework, with its related regulatory obligations, depending on the size and scope of the services they deliver in the future.

Chapter 1 provides further discussion on content service enterprises.

What should be regulated?

As outlined above, the Review has concluded that there are three areas where regulatory intervention is justified: media ownership, media content standards, and Australian and local content.

This section explores the rationale for regulation in each area in more detail.

Media ownership

Convergence has undoubtedly increased the range of information available to Australians. There are virtually no costs to publishing information on the internet. There are compelling examples where a viral video or a tweet can change the news agenda or when content can bubble up from social networking platforms into the mainstream media.

Despite these developments, news and commentary consumed by Australians across all platforms is still overwhelmingly provided by the news outlets long familiar to Australians. What has changed most dramatically is how Australians access their news—the source largely remains the same. For example, someone may read a news story on Facebook, but the originator of the article is a newspaper publisher.

Diversity of news and commentary is fundamental to a healthy democracy. The Review has concluded that rules preventing the undue concentration of ownership remain an important factor in maintaining diversity of news and commentary. Diversity of ownership at a local and national level will be maintained by revising the existing rules to ensure that they are targeted and effective.

4 See Chapter 1 for further discussion.

At a local level, the Review proposes a 'minimum number of owners' rule to ensure that no media operator has a dominant influence in a local market for news and commentary. The rule should apply to all content service enterprises and media operators that have significant influence in particular local markets.

Media convergence has made content readily available nationally; however, the current regulation is focused mostly on local areas. The Review recommends that a public interest test apply to changes in control of content service enterprises of national significance. The public interest test would be administered by a new communications regulator, which is described below.

The focus of the test would be on maintaining diversity at a national level and would complement, not duplicate, the Australian Competition and Consumer Commission's existing mergers and acquisitions powers.

With the introduction of the 'minimum number of owners' rule and the public interest test, the Review recommends that the '75 per cent audience reach' rule, the '2 out of 3' rule, the 'two-to-a-market' rule and the 'one-to-a-market' rule be abolished.

The media ownership rules recommended by the Review are discussed in Chapter 2.

Content standards across all platforms

Today, content that was previously only delivered in a cinema, on television or in a newspaper can be accessed on devices such as smartphones and tablets. However, this content is regulated differently depending on how it is accessed.

There should be a flexible and technology-neutral approach to content regulation that reflects community standards. The Review broadly accepts the recommendations of the Australian Law Reform Commission's recent classification report and recommends that a common classification scheme apply to media content. Significantly, under this proposed scheme content would be classified once and that classification would be applied across all platforms.

Content service enterprises should be subject to other media content standards where there is a case for regulatory intervention (for example, children's television standards). The new communications regulator should use the existing co-regulatory codes as a starting point. Content providers that are not of sufficient size and scope to qualify as content service enterprises should also be able to opt in to content standards or develop their own codes.

The regulator should work with industry to improve information for users about what they can do to control access to content and build on existing government programs to educate consumers. It should also set technical standards that assist users in managing access to content, such as parental locks or age-verification systems.

News and commentary play a vital role in any democracy. Content service enterprises that provide news and commentary should meet appropriate journalistic standards in fairness, accuracy and transparency regardless of the delivery platform. The Review has taken into account the findings of the Independent Media Inquiry. While agreeing with much of the analysis and some of the findings of the Independent Media Inquiry, the Convergence Review recommends an approach based on an industry-led body for news standards rather than a statutory body.

The Review's recommendations on media content standards can be found in Chapter 4.

Production and distribution of Australian and local content

Both the public and most industry stakeholders told the Review that it was important to ensure Australian stories and voices continued to be represented in our media. Despite Australian content regularly rating in the top 20 television programs, the Review has found that the high costs of Australian production relative to buying international programs mean that there is a continued case for government support of Australian production and distribution. The Review found that Australian drama, documentary and children's programming requires specific support as it would not be produced at sufficient levels without intervention.

While digital television multichannels are introducing new opportunities for content, these channels are not currently subject to Australian content requirements. Similarly, a new range of internet-delivered channels and services with television-like content are becoming available. These two factors are reducing the proportion of Australian content across all media available today. With the high costs of producing some Australian content, such as drama, documentary and children's programs, the Australian content obligations should be spread more evenly over the range of competing services.

The Review proposes a 'uniform content scheme' to ensure that Australian content continues to be shown on our screens. The uniform content scheme will require qualifying content service enterprises, with significant revenues from television-like content, to invest a percentage of their revenue in Australian drama, documentary and children's programs. Alternatively, a content service enterprise will be able to contribute a percentage of its revenue to a 'converged content production fund' for reinvestment in traditional and innovative Australian content.

Not all content service enterprises will be required to contribute under the uniform content scheme. To qualify for the scheme, content service enterprises will need to meet both 'scale' and 'service' criteria. The scale criterion will require the content service enterprise to meet minimum revenue and audience thresholds for the supply of professional television-like content to the Australian market. These thresholds should be set at a high level so only significant media enterprises will be required to invest in Australian content. As an example, if a new internet-delivered service grew revenue and audience from providing professional television-like content to a level comparable with today's established television broadcasters, it would then have obligations to contribute to Australian content.

In addition to the scale threshold, there will be a 'service' criterion. The service criterion will mean that only content service enterprises that offer drama, documentary or children's programs will be subject to the uniform content scheme.

Both the scale and service criteria can be reviewed over time as providers emerge and grow, and to take account of any changes to the targeted genres.

Adoption of the uniform content scheme will mark a significant departure from the present obligations. The Review therefore proposes a transitional framework to allow the government to address the challenges of producing Australian content while working on the implementation of the uniform content scheme. The key features of the transitional framework are:

- For commercial free-to-air broadcasters—there should be a 50 per cent increase in Australian sub-quota content obligations for drama, documentary and children's content to reflect the two additional channels each broadcaster currently operates that do not attract any quotas. The broadcasters should be able to count Australian content shown on the digital multichannels towards meeting the expanded sub-quota obligations.
- For subscription television providers—the 10 per cent minimum expenditure requirement on eligible drama channels should be extended to children's and documentary channels.

The Review has identified a number of other measures to directly support content production, including raising the Producer Offset from 20 per cent to 40 per cent for television drama and recommending the establishment of an interactive entertainment offset.

The increased offset for television drama recognises the significant investment being made in Australian television drama and the high production values and cultural benefits inherent in this genre. The new interactive entertainment offset would assist Australian industry to continue to develop emerging formats, which are expected to grow significantly. Adoption of the interactive entertainment offset would also recognise that games and other interactive genres make a significant contribution to cultural identity and innovation.

The Review has recommended the creation of a converged content production fund. This fund should have a broad focus that supports traditional Australian content, new innovative content, and services for local and regional distribution. The converged content production fund should also play a role in supporting Australian contemporary music. In addition to direct funding from government, this fund could be supported by spectrum licence fees from broadcasting services and contributions from content service enterprises under the uniform content scheme.

Further details on the Review's recommendations on Australian screen content can be found in Chapter 5.

The Review considered Australian music quotas on analog commercial radio. The Review found that the quotas are generally effective, and recommends that they apply to content service enterprises that offer both analog and digital commercial radio services. Occasional or temporary digital radio services should be exempted from this requirement. The diversity and emerging nature of internet-delivered audio services would make it difficult and ineffective to apply quotas to these services at this time.

Further details on the Review's recommendations on Australian radio content can be found in Chapter 6.

The importance of local news to regional communities was one of the key messages from the Review's consultations around Australia. Commercial free-to-air broadcasters using spectrum should continue to program material of local significance. The existing rules around complying with local programming can, however, be onerous and a more flexible reporting regime should be implemented. The Review recommends removing the current rules triggered by a change in control of a commercial radio broadcasting service that require minimum levels of local presence and additional local content requirements.

Content providers should also have access to the converged content production fund to encourage a diverse range of local services on new platforms.

Further details on the Review's recommendations on local television and radio content can be found in Chapter 7.

A principles-based policy framework

The recommendations in this report constitute a shift towards principles-based legislation to ensure the policy framework can respond to the future challenges of convergence. An independent regulator and a principles-based approach would provide increased transparency for industry and users. This approach moves away from detailed 'black-letter law' regulation, which can quickly become obsolete in a fast-changing converged environment and is open to unforeseen interpretations.

The current model of communications regulation relies largely on detailed requirements in Acts of Parliament. Much of this regulation is based on specific delivery platforms and business models and it cannot effectively address concerns that were not anticipated at the time the legislation was passed.

Given the ongoing changes in technology and in the way Australians use media, legislation would be more effective if it focused on creating a framework of principles within which an independent regulator could apply, amend or remove regulatory measures as circumstances require. This approach is used in comparable countries, such as the United States, the United Kingdom and Canada. It would enable the new communications regulator to adjust rules to respond quickly to changes in the industry. The regulator, when exercising its powers, would need to act in accordance with the principles set out in the legislation and be able to justify its decisions under administrative, parliamentary and judicial scrutiny. This model is the best approach to a changing landscape and would lead to more independent, open and consultative policy making in the media and communications sector.

Who regulates?

The Review recommends the establishment of two separate bodies:

> a statutory regulator to replace the existing Australian Communications and Media Authority

> an industry-led body to oversee journalistic standards for news and commentary across all platforms in the media and communications sector.

A new communications regulator

The Review recommends that a new communications regulator be established to replace the existing Australian Communications and Media Authority. The regulator should operate at arm's length from government direction, except in a limited range of specified matters.

The communications regulator should incorporate a Classification Board as recently recommended in the Australian Law Reform Commission's review of the National Classification Scheme.

Among its responsibilities, the new regulator will define the thresholds for content service enterprise, administer the 'minimum number of owners' rule and the public interest test, and ensure that Australian and local content obligations are applied.

In addition, the communications regulator should also have flexible powers to make rules on content-related competition issues. Content has the potential to be the new competition bottleneck in the digital economy, and the new regulator must have the necessary powers to promote fair and effective competition in content markets.

These powers will complement, rather than duplicate, the existing powers of the Australian Competition and Consumer Commission. The Review proposes that the commission retain its telecommunications-specific powers, and that these powers be reviewed once the National Broadband Network is implemented.

Further discussion on proposed content-related competition powers can be found in Chapter 3.

The Review believes that many of the changes recommended in this report will streamline regulation and increase the effectiveness of the regulator's operations. Removing the broadcast licensing regime and the duplication of classification functions will free up resources.

A new industry-led body to oversee standards for news and commentary

While the establishment of a publicly funded statutory authority to look at news and commentary as proposed by the Independent Media Inquiry remains an option available for government, the Review considers this to be

a position of last resort. Instead, the Review recommends that content service enterprises be required to be members of an industry-led body established to develop and enforce a media code aimed at:

> promoting news standards
> adjudicating on complaints
> providing timely remedies.

This body would ultimately absorb functions performed by both the Australian Press Council and the Australian Communications and Media Authority in news and commentary. Other media organisations would be free to become members of the news standards body and may see benefits in doing so.

The majority of funding for the body should come from its members. As it is in the public interest for the body to be appropriately resourced, government contributions should be available but limited to specific purposes, such as to cover a shortfall or to provide project-based funding.

In a converged world it is no longer viable to argue that news and commentary in print media should be treated differently from news and commentary in television, radio and online. The new industry-led body should cover all platforms—print and online, television and radio.

Further discussion of the Review's recommendations on news standards can be found in Chapter 4.

Other matters covered in this report

This report also makes recommendations in relation to the allocation and management of broadcasting spectrum, and public and community broadcasting.

New arrangements for the allocation and management of broadcasting spectrum

The Review recommends the government adopt a market-based approach to pricing broadcasting spectrum in line with arrangements for other types of radiocommunications spectrum. This would replace the existing approach of charging commercial free-to-air broadcasters licence fees, which are calculated as a percentage of revenues. Instead, existing holders of commercial broadcasting licences should be issued with spectrum licences planned for the supply of broadcasting services. This would enable the current broadcasters to continue to supply their existing services.

It would also give them the ability to adopt new business structures as they would no longer be required to be both a platform operator and a supplier of content services. For example, following the switchover to digital television, current licensees would have the opportunity to develop new channels, lease channel capacity, or sell their spectrum licence. The spectrum licence will continue to be used to supply digital television.

Spectrum on the 'sixth channel' should be allocated to new services and to maintain the distribution of community television services. The Review has concluded that the sixth multiplex should not be allocated to create a full fourth commercial television network operated by a single enterprise. The Review considers that allocating individual channel capacity to a range of providers will maximise diversity. Use of the sixth multiplex is a unique opportunity to encourage and promote innovative services, which will give consumers new content and contribute to competition and diversity.

Established commercial and public broadcasters should not be allowed to bid for channel capacity on the 'sixth channel.' The channel capacity should be awarded to a range of operators to increase the diversity of ownership and content in Australian free-to-air television.

Any new spectrum planning framework should take into account the public interest considerations currently reflected in the *Broadcasting Services Act 1992* that have contributed to the diversity of the Australian broadcasting system.

The Review also believes the government should consider reviewing its proposed spectrum arrangements for the post-analog television switch-off period to ensure that they maximise the provision of digital radio services in regional Australia.

The Review's recommendations for a new framework for the allocation and management of spectrum can be found in Chapter 9.

Recognition of the role played by public and community broadcasters

A key feature of the Australian media sector has been its sectoral diversity, including strong commercial, public and community broadcasters.

Our public broadcasters were among the first in Australia to embrace digital technologies and new platforms. This innovation has led to the development of a range of new services that have extended the reach and impact of publicly funded programming. However, neither the Australian Broadcasting Corporation (ABC) charter nor the Special Broadcasting Service (SBS) charter explicitly recognises the broad range of functions these broadcasters now perform. The Review recommends that the charters of the ABC and the SBS be updated to expressly reflect the range of existing services, including online activities, currently provided.

The Review considers that given the substantial taxpayer investment in the ABC and SBS, it is appropriate that these broadcasters also comply with Australian content transmission quotas. For the ABC, the Review recommends that a 55 per cent quota be applied to its main channel, and for the SBS the Review recommends a 27.5 per cent quota. The Review found that sub-quotas on the main channel and transmission quotas on the digital multichannels were unnecessary and impractical, given the public broadcasters' special commitment to broadcast a diverse range of genres. The new quotas would recognise that public broadcasters have a mission to support Australian content in meeting their charter obligations. The lower quota for the SBS recognises its mission to reflect multiculturalism to Australians and the need to achieve this objective partly through international content.

The Review also recommends continued support for community broadcasters through the availability of spectrum for radio services and availability of spectrum on the 'sixth channel', and access to funding to drive innovation in the delivery of these services on new platforms.

Further discussion on the Review's recommendations about public and community broadcasters is in Chapter 8.

Implementation

Given the far-reaching nature of the Review's recommendations and the substantial legislative changes proposed in this report, the Review recommends a staged approach to implementation.

Key transitional arrangements flowing from the removal of broadcasting licences and the development of a regulatory framework centred on content service enterprises would need to be planned in further detail. The planning process should include close consultation with industry and include the new communications regulator once it is established.

Important changes needed to implement the Review's recommendations include the development of legislation to establish the new regulator and develop a transition plan for the transfer of continuing functions from the Australian Communications and Media Authority.

This report proposes a three-stage approach to implement the Review's recommendations. Further discussion of the proposed implementation process is outlined in Chapter 10.

The Review's recommendations are listed in full below.

Recommendations

Chapter 1: The need for a new approach

1. The policy framework for communications in the converged environment should take a technology-neutral approach that can adapt to new services, platforms and technologies.
    a. Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.
    b. The focus of legislation should be on creating a sustainable structure within which a new independent communications regulator can apply, amend or remove regulatory measures as circumstances require.
2. There should be no licensing or any similar barrier to market entry for the supply of content or communications services, except where necessary to manage use of a finite resource such as radiocommunications spectrum.
3. Large enterprises that provide professional content services to a significant number of Australians should be expected to continue to:
    a. have proposed changes in ownership scrutinised
    b. meet community expectations about standards applicable to the content they provide
    c. contribute in appropriate ways to the availability of Australian content.
4. These enterprises (which would be called content service enterprises) should be identified by the following criteria:
    a. they have control of professional content they deliver
    b. they meet a threshold of a large number of Australian users of that professional content
    c. they meet a threshold of a high level of revenue derived from supplying that professional content to Australians.

    The thresholds for revenue and users would be set at a high level so that only the most substantial and influential entities are within the category of a content service enterprise.
5. The appropriate threshold levels of revenue and of users should be determined following a review of relevant media enterprises by the new communications regulator. The appropriate threshold levels should be reviewed periodically by the regulator.

Chapter 2: Media ownership

6. Media ownership and control rules should promote a diverse range of owners at a local and national level.
    a. Ownership of local media should continue to be regulated through a 'minimum number of owners' rule. The existing '4/5' rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a local market. The new communications regulator should be able to provide an exemption from the rule in exceptional circumstances, if it is satisfied that a transaction will provide a public benefit in a specific local market.
    b. The new communications regulator should have the ability to examine changes in control of content service enterprises of national significance. It should have the power to block a proposed transaction if it is satisfied—having regard to diversity considerations—that the proposal is not in the public interest.

7. The following rules should be removed and replaced by a 'minimum number of owners' rule and a public interest test:
   - the '75 per cent audience reach' rule
   - the '2 out of 3' rule
   - the 'two-to-a-market' rule
   - the 'one-to-a-market' rule.

Chapter 3: Content-related competition issues

8. The new communications regulator should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified.

9. The new communications regulator should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the Australian Competition and Consumer Commission to deal with anti-competitive market behaviour. These powers should only be exercised following a public inquiry.

Chapter 4: Content standards

10. There should be a technology-neutral and flexible approach to media content standards.
    a. The new communications regulator should be responsible for all compliance matters related to media content standards, except for news and commentary. This will include the responsibility for administering the new national classification scheme proposed by the recent Australian Law Reform Commission review. An independent classification board would be established as part of the organisational structure of the new regulator to undertake specific classification functions.
    b. An independent self-regulatory news standards body operating across all media should be established by industry to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.
       i. Content service enterprises should be required to be members of the news standards body, which should be established and adequately funded and resourced by its industry members.
       ii. As it is in the public interest that such a body be appropriately resourced, the government should make a financial contribution.
       iii. News and commentary providers that are not content service enterprises should be encouraged to join the news standards body.
       iv. The news standards body should have credible sanctions and the power to order members to prominently publish its findings.
       v. The news standards body should be able to refer to the new communications regulator instances where there have been persistent or serious breaches of the media code. The new communications regulator should also be able to request the news standards body to conduct an investigation.
    c. The new arrangements outlined at paragraph 10(b) should be implemented in stages and the co-regulatory broadcasting codes in relation to news standards should not be repealed until the communications regulator is satisfied that the new self-regulatory arrangements are working effectively.

d. Content service enterprises should also be subject to:

   i. children's television content standards, where appropriate

   ii. other content standards made by the new communications regulator where there is a case for regulatory intervention, with the starting point being the matters covered by the existing co-regulatory codes made under the *Broadcasting Services Act 1992*.

e. Content providers that are not of sufficient size and scope to be classified as a content service enterprise should be encouraged to opt in to content standards applying to content service enterprises, or to develop their own codes.

11. Where the new communications regulator is responsible for approving and enforcing content standards, it should have:

    a. discretion to approve industry codes or adopt its own standards

    b. discretion to determine the most effective and efficient complaints and investigation procedures

    c. direct enforcement powers in response to a breach of codes or standards

    d. a graduated range of effective remedies to ensure compliance.

12. The new communications regulator should also:

    a. certify whether complaints systems, privacy controls and other measures in self-regulatory industry codes meet best practice standards

    b. work with industry to provide transparent information to content users about what they can do to control access to content, building on government programs to educate consumers about media and digital literacy

    c. set technical standards that assist content users in managing access to content (such as parental locks or age-verification systems).

Chapter 5: Australian content: screen

13. The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in recommendations 14 and 15.

14. Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund.

15. The government should create and partly fund a new converged content production fund to support the production of Australian content.

16. Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.

17. Interactive entertainment, such as games and other applications, should be supported by an offset scheme and the new converged content production fund.

18. The following transitional arrangements should apply for commercial free-to-air and subscription television broadcasters until they are included within the uniform content scheme:
    a. For commercial free-to-air television broadcasters:
        i. The existing 55 per cent transmission quota that is imposed on each broadcaster's primary channel should continue.
        ii. There should be a 50 per cent increase in Australian sub-quota content obligations for drama, documentary and children's content to reflect the two additional channels each broadcaster currently operates that do not attract any quotas.
        iii. The broadcasters should be able to count Australian content shown on their digital multichannels towards meeting the expanded sub-quota obligations.
        iv. The existing 80 per cent quota for Australian-produced advertising on each broadcaster's primary channel should be maintained.
    b. For subscription television providers:
        i. The 10 per cent minimum expenditure requirement on eligible drama channels should be maintained.
        ii. A 10 per cent minimum expenditure requirement should be placed on children's and documentary channels.

Chapter 6: Australian content: radio

19. Australian music quotas should continue to apply to analog commercial radio services offered by content service enterprises and be extended to digital-only radio services offered by content service enterprises.

20. Music quotas should not be applied to occasional or temporary digital radio services.

21. Given the evolving state of internet-based music services, quotas should not be applied at this time.

Chapter 7: Local content: television and radio

22. Commercial free-to-air television and radio broadcasters using spectrum should continue to devote a specified amount of programming to material of local significance.

23. A more flexible compliance and reporting regime for television and radio should be implemented for the obligations set out in recommendation 22.

24. The current radio 'trigger event' rules should be removed.

Chapter 8: Public and community broadcasting

25. The charters of the ABC and the SBS should be updated to expressly reflect the range of existing services, including online activities.

26. While Australian content quota obligations continue for commercial free-to-air television broadcasters as a transitional measure, quotas should also apply to the public broadcasters.
    a. The primary ABC channel should have a 55 per cent Australian content quota consistent with the obligation on commercial free-to-air television broadcasters.
    b. Reflecting its multicultural charter obligations, the SBS should be required to target half this amount (27.5 per cent).

Chapter 9: Spectrum allocation and management

27. There should be a common approach to the planning, allocation and management of both broadcasting and non-broadcasting spectrum that includes:

    a. a market-based pricing approach for the use of spectrum, and one that provides greater transparency when spectrum may be used for public policy reasons

    b. spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the *Broadcasting Services Act 1992*

    c. ministerial powers to reserve and allocate spectrum to achieve policy objectives considered important by the government and the Australian community, including public and community broadcasting, which have contributed to the diversity of the Australian broadcasting system

    d. certainty for spectrum licence holders about licence renewal processes.

28. Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:

    a. as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcasting use

    b. commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.

29. The new communications regulator should allocate channel capacity on the sixth planned television multiplex (known as the 'sixth channel') to new and innovative services that will increase diversity. The use of capacity on the sixth multiplex for the distribution of community television services should continue. Existing commercial free-to-air television broadcasters and the ABC and the SBS should be precluded from obtaining capacity on the sixth multiplex.

Chapter 10: Implementing the new approach

30. The Review's recommendations should be implemented in three distinct stages:

    a. Stage 1: Stand-alone changes that can be achieved in the short term should be made to policies, programs and legislation, including the public interest test that will apply to changes in control of content service enterprises.

    b. Stage 2: New content services legislation should replace the *Broadcasting Services Act 1992* and existing classification legislation.

    c. Stage 3: The reform of communications legislation should be completed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.

31. The new communications regulator should be established in time to implement the new regulatory arrangements recommended for stage 1, and assume the remaining functions of the Australian Communications and Media Authority at the conclusion of stage 2 of the implementation process outlined in recommendation 30.

1. The need for a new approach

Why is a new approach needed?

Convergence of media content and communications technologies has outstripped the existing media policy framework.

Many elements of the current regulatory regime are outdated or unnecessary and other rules are becoming ineffective with the rapid changes in the communications landscape.

A good example is licensing of television broadcasting services. With changes in technology, a new television service could launch with internet delivery without any requirement for licensing, while commercial television broadcasting remains heavily regulated.

This has led the Review to conclude that licensing of content services can be removed. The myriad categories of broadcast services and the separate regimes for planning and management for broadcast spectrum can also be discontinued. This in itself will significantly reduce the volume of regulation in the sector.

The Review has an underlying approach in favour of deregulation and has recommended intervention only where the public benefits outweigh the costs. The first and most fundamental of the 10 principles the Review adopted states:

> Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum necessary to achieve a clear public purpose.[1]

During the course of the Review, in public consultations, at industry meetings and in submissions, it became clear that there were two distinct constituencies. Many from industry argued that there is really little need for regulation at all, although some supported retaining regulation of commercial benefit to them. On the other hand, individuals and community groups identified areas where regulation should be retained and in some cases strengthened.

Three clear areas emerged from the Review's work where continued government intervention is clearly justified: Australians want diversity in media ownership and control, they expect content standards and they want Australian content. Any new policy framework should reflect these key expectations.

The Review proposes that regulation should have a light touch and be focused on significant enterprises. This is a significant change moving away from regulation defined by the platforms on which services are delivered. Under this approach, the type of content, the size of audience, and revenue would determine whether an enterprise is regulated. Content from social media including bloggers and user-generated content should be free from new regulation.

Initially, the entities that qualify as significant media enterprises to be regulated will most likely be the same media groups that currently have obligations. However, this is likely to change over time as the sector develops. Enterprises may move in or out of the scheme depending on the kinds of services they deliver in the future. These significant media enterprises—which the Review has called *content service enterprises*—will be subject to focused rules and a flexible rule-making approach that can respond as the sector develops.

1 The Review's 10 guiding principles were set out in Convergence Review, *Emerging Issues*, July 2011, pp. 8–10.

The Review has also concluded that there is a need for a new independent communications regulator to replace the Australian Communications and Media Authority (ACMA). The new regulator should be a smaller organisation because it will not have to administer the existing complex system of broadcasting licensing. Also, the regulator's ability to be flexible with rule-making—to remove and adapt rules as the market changes—will mean less regulation in many areas. Regulation will be focused and more effective.

Recommendations

A new policy framework for the converged world

1. The policy framework for communications in the converged environment should take a technology-neutral approach that can adapt to new services, platforms and technologies.
    a. Parliament should avoid enacting legislation that either favours or disadvantages any particular communications technology, business model or delivery method for content services.
    b. The focus of legislation should be to create a sustainable structure within which a new independent communications regulator can apply, amend or remove regulatory measures as circumstances require.

No licence required to provide any content service

2. There should be no licensing or any similar barrier to market entry for the supply of content or communications services, except where necessary to manage use of a finite resource such as radiocommunications spectrum.

Content service enterprises

3. Large enterprises that provide professional content services to a significant number of Australians should be expected to continue to:
    a. have proposed changes in ownership scrutinised
    b. meet community expectations about standards applicable to the content they provide
    c. contribute in appropriate ways to the availability of Australian content.
4. These enterprises (which would be called content service enterprises) should be identified by the following criteria:
    a. they have control of the professional content they deliver
    b. they meet a threshold of a large number of Australian users of that professional content
    c. they meet a threshold of a high level of revenue derived from supplying that professional content to Australians.

    The thresholds for revenue and users would be set at a high level so that only the most substantial and influential entities are within the category of a content service enterprise.
5. The appropriate threshold levels of revenue and of users should be determined following a review of relevant media enterprises by the new communications regulator. The appropriate threshold levels should be reviewed periodically by the regulator.

Why regulate?

The media and communications industry is at the heart of our society. More of our social and cultural lives are occurring in the digital realm. Its economic and cultural impacts are enormous. Rapid changes in the media and communications landscape are opening up new opportunities for Australia.

We need a flexible approach that can keep pace with these opportunities. Policy and regulatory settings will need to promote open access to information, competition and innovation. They will also need to encourage diversity of media ownership and provide incentives and government support to ensure that Australian and local content is still widely available in a globalised environment.

The changes in the media and communications industry demand a new approach to regulatory policy. The Review believes the default position should be deregulatory—to encourage new business and innovation and to reduce costs for businesses and consumers. A regulatory response should be used only where there is an identified problem that requires intervention.[2]

The development of the digital economy should be led by the market. Government's role should be to 'fill a gap left by the market, address social inequity, protect the community, assist markets to work fairly and efficiently, and address market failures'.[3]

New technologies, market structures and business models are challenging the existing communications and media policy framework. This has been recognised by the ACMA. In its *Broken Concepts* paper, the ACMA described the problems emerging in the new environment because of outdated legislative concepts that form the building blocks of current regulatory arrangements.[4] Some outdated broadcasting legislative concepts in the ACMA paper are considered further in Appendix K. In its subsequent *Enduring Concepts* paper, the ACMA identified some fundamental concepts that underlie the rationale for present and future intervention in communications and media markets.[5]

Submissions made to the Review indicated that many of the objectives of existing regulation remain appropriate, but that the regulatory mechanisms used to achieve those objectives are not working. There was general agreement that less regulation—the minimum necessary—should be a goal. However, there were a wide range of views about what such regulation should cover, who and what it should apply to, and what it should seek to achieve.

The ABC's submission articulated a common view that:

> while the media landscape has changed, the policy principles which have formed the rationale for regulation largely endure.[6]

The objective of regulating to promote a diversity of influential services was supported in a number of submissions. However, there were different views put as to what should be regarded as influential services in a converged environment. Telstra, for instance, stated that the internet is a platform that provides access to a multitude of services, and in this sense is not comparable to media services delivered by free-to-air television, an industry where players are few.[7] The Communications Law Centre noted that concepts of influence and reach can change over time. It suggested that a media ownership public interest test should be introduced, to allow for ongoing changes in media and content delivery arrangements.[8]

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2 Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, p. 19; see also ACMA, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, September 2011, p. 3, www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_410165.

3 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions*, 2009, p. 7, www.dbcde.gov.au/digital_economy/what_is_the_digital_economy/australias_digital_economy_future_directions.

4 ACMA, *Broken Concepts: The Australian Communications Landscape*, August 2011, http://engage.acma.gov.au/broken-concepts.

5 ACMA, *Enduring Concepts: Communications and Media in Australia*, November 2011, http://engage.acma.gov.au/enduring-concepts.

6 ABC, submission in response to open call, p. 2.

7 Telstra, consolidated submission in response to open call, p. 8.

8 Communications Law Centre, submission on discussion papers in response to open call, p. 7.

Submissions from the Communications Law Centre, FamilyVoice Australia and others emphasised the importance of upholding community standards in relation to content:

> maintaining community standards will continue to be a central basis for content regulation. Regulation should be responsive to changing community standards, views and expectations and adaptable to new media platforms.[9]

Most submissions supported the objective of providing access to Australian content, but again views differed on how this objective should be implemented. Research in Motion advocated that Australian content not be mandated for specific platforms but that the government should aim to promote Australian content on new and emerging media platforms.[10] The Australian Writers Guild, on the other hand, stated that:

> subsidy is important, but without regulation and targeted outcomes, Australian content will be the loser in convergence.[11]

Regional consultations confirmed the important role of access to local content in regional communities' economic and social life. Commercial Radio Australia also accepted the importance of local content in serving regional audiences, but questioned whether some of the prescriptive reporting and recordkeeping obligations continue to be an effective mechanism for supporting the production of local content.[12]

It is clear from the submissions received and the public consultations undertaken by the Review that Australians continue to place high value on the following:

- diversity in ownership of news, information and commentary sources
- content standards that reflect community expectations
- Australian and local content.

If these things are lost, it will be difficult to restore them. The Review does not believe that market forces alone will ensure the delivery of these objectives.

What regulation should be removed?

The Review has adopted the principle that 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. A restriction on freedom of communication is inherent in any requirement to obtain a licence to engage in media activity. Any such restriction would need to be justified by a clear public benefit.

There is a rationale for licensing in the management of the radiofrequency spectrum to control the use of a finite public resource. In many platforms in the digital realm, the argument of scarcity is no longer an issue. Therefore the Review sees no compelling reason to retain the current system of licensing content services under the *Broadcasting Services Act 1992*.

The current geographically based licensing system is becoming irrelevant now that commercial content services are increasingly available over the internet. Removing licensing requirements would not in itself mean that all obligations would be removed. Legal obligations are imposed on participants in the communications and media sectors without a need for them to hold a licence.[13]

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9 Communications Law Centre, submission on discussion papers in response to open call, p. 10. See also FamilyVoice Australia, submission in response to open call.

10 Research in Motion, submission in response to open call, p. 5.

11 Australian Writers' Guild, submission in response to open call, p. 3.

12 Commercial Radio Australia, submission in response to open call, pp. 28–29.

13 See Convergence Review, *Discussion Paper: Layering, Licensing and Regulation,* September 2011, p. 15.

The current commercial broadcasting licensing framework often combines a right to provide a content service in a geographic area with a right to use radiofrequency spectrum in that area. Removing content service licensing would remove the requirement for commercial broadcasters to be both platform providers and channel providers. Existing licence holders would be able to continue with existing business structures but would have the choice to be a platform provider, a channel provider or both. This change will allow more efficient use of broadcasting spectrum. Issues relating to spectrum allocation and management are discussed in Chapter 9.

What regulation is still necessary?

It is clear to the Review from its public consultations and from many of the submissions it received that the Australian public continues to expect large professional media organisations to meet appropriate content standards and provide an adequate level of Australian content. There was also serious concern in submissions from many individuals that any relaxation of existing controls over media ownership would create a more concentrated media, with a consequent reduction in the range of news and commentary.

The material presented to the Review about these issues is consistent with recent research by the ACMA into public expectations of large media enterprises in the converged world.[14] The ACMA's *Digital Australians* research report summarises these succinctly:[15]

> Most research participants distinguished offline or traditional media, such as newspapers, television and radio, from the internet or online content, but delivery platform was not the most important distinction that they made. The more important distinction was between types of content.
>
> Content produced by traditional media organisations—whether for print or broadcast, and whether offline or online—was seen as professional content, produced for broad audiences.
>
> Consumers appeared to bring their expectations of regulation from traditional, familiar media to similar content accessed online. Recognition of traditional media organisations by consumers was high. Similarly, branded content online was usually expected to meet the same or comparable standards as offline content. Whether professional content was broadcast or online, most consumers expected it to meet general community standards for taste and decency. For example, print, broadcast and online stories from traditional, reputable news organisations were expected to meet the same journalistic standards for accuracy and fairness.

The ACMA research also found strong support for regulatory intervention to support Australian content: 84 per cent of participants in the ACMA's *Digital Australians* research thought government should regulate to 'ensure that high-quality Australian content is available … online'.[16]

Given the importance of media content in shaping our national and cultural identity and the public expectations for professional content produced for broad audiences, irrespective of platform, there is a continuing case for targeted regulation to address market failure.

Has the internet 'changed everything'?

Submissions from major communications enterprises such as Telstra and News Limited contended that the online environment, with its relatively low barriers to entry compared to traditional media, has created a vast diversity of voices, removing all justification for any ongoing regulation of media ownership other than general competition law.[17]

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14 ACMA, *Digital Australians—Expectations about Media Content in a Converging Media Environment*, October 2011, http://engage.acma.gov.au/digital-australians.

15 ACMA, *Digital Australians*, p. 3; see also pp. 46–59.

16 ACMA, *Digital Australians*, p. 5; see also pp. 62–63.

17 Telstra, submission on emerging issues paper in response to open call, p 14; News Limited, submission on interim report, pp. 15–16.

However, those arguments overlook two important points.

First, in the online environment, a small number of media organisations remain by far the most influential sources of news and commentary. While there is a rich seam of information available on the internet from a multitude of sources, when it comes to consumption patterns for news and commentary little has changed. Many Australians are accessing news and commentary through new platforms like social media or over new devices such as smartphones and tablets—but they are getting their news from the same news gathering organisations.

Second, even if the current level of diversity is adequate, this could change. For example:

> Large media organisations and technology companies could become even more influential across platforms and control access to news and commentary.

> New media enterprises could become the new gatekeepers, exercising enormous influence through control over content delivered through popular platforms, social networks or devices.[18]

Once media diversity is lost, it would be very difficult to get back. Even for those who argue that diversity is greater than ever before, appropriately targeted media ownership and control rules can be regarded as an insurance policy. Issues relating to media ownership and control are discussed in Chapter 2.

Is broadcasting a 'special case'?

Some submissions, including those from News Limited and Google, contended that online media enterprises should not be subject to obligations relating to content standards, Australian content or changes in ownership. They asserted that the justification for the current obligations is that broadcasters use the scarce public resource of spectrum and should be subject to these obligations in return for their use of a public resource.[19]

News Limited stated:

> there is no basis on which to license or regulate media (subscription television and online services) which does not use public resources, is not protected from competition in the same way as licensed media and rather than being a universal service, is chosen and often paid for by consumers.[20]

However, the use of spectrum is not the criterion applied by the current legislation, which imposes community standards and Australian content obligations on broadcasters according to the nature of the content service provided and not according to whether the service is delivered using spectrum.[21] Media ownership laws have controlled ownership of services provided across different platforms—print media as well as broadcasting—for many years.[22]

Taking the argument put in these submissions to its logical conclusion, if use of spectrum were the rationale for imposing these obligations, then they ought to be imposed where spectrum is used to deliver media content on broadband wireless networks. Moreover, if the rationale for imposing these obligations is the use of any public resource, then it would follow that they ought to be imposed where the publicly owned National Broadband Network is used to deliver a content service. The Review does not accept these arguments.[23]

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18 See, for example, T Wu, *The Master Switch: The Rise and Fall of Information Empires*, Atlantic Books, London, 2010, pp. 289–98; *Economist*, 4–10 February 2012, pp. 9, 19–21.

19 News Limited, submission on interim report, pp. 6–7; Google, submission on interim report, pp. 7–8.

20 News Limited, submission on interim report, p. 5.

21 Section 123 of the *Broadcasting Services Act 1992* (BSA) provides for radio and television industry groups representing various categories of 'broadcasting service' to develop codes of practice relating to community standards for various specified matters. The ACMA is required to develop standards that relate to the Australian content of programs that are to be observed by commercial television broadcasting licensees (BSA section 122(2)(b)). However, where a commercial television broadcasting service that does not use the 'broadcasting services bands' spectrum is allocated on or after 1 January 2007, these Australian content standards will not apply to the licence for the first five years of its operation (BSA section 122(9)).

22 Cross-media rules were introduced by the *Broadcasting (Ownership and Control) Act 1987*.

23 See also The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, paras 6.26–6.27, pp. 166–67, www.dbcde.gov.au/digital_economy/independent_media_inquiry.

Who should be regulated?

As media content of wide appeal is increasingly delivered on new platforms like the internet and mobile networks, rules based on the concept of a 'broadcasting service' are increasingly ineffective. A new approach is required that identifies the major media enterprises that the community expects to be regulated.

The Review believes that a regulatory framework built around the scale and type of service provided by an enterprise rather than the platform of delivery is best suited to this environment. The Review has developed the concept of a 'content service enterprise' to identify significant enterprises that have the most influence on Australians.

The legislation currently declares that the degree of regulation should be in proportion to the level of 'influence' a category of service is 'able to exert in shaping community views in Australia'.[24]

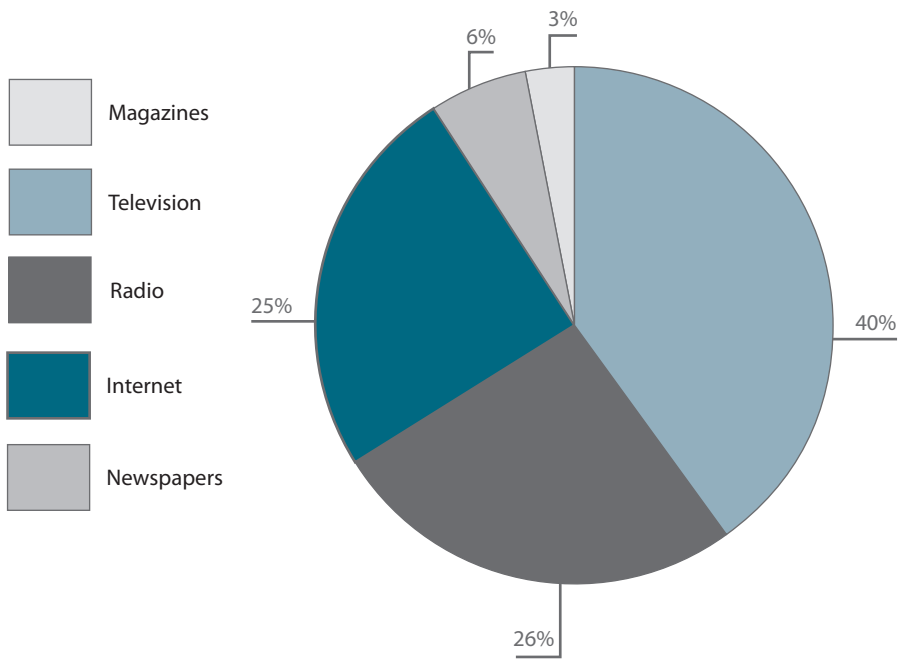
The potential to influence is still a critical consideration. At present, influence is identified through the breadth of appeal of a service—regardless of whether the service delivers news and commentary or other content such as entertainment and sport.[25] The Review considers that influence remains a relevant criterion in the converged world.

A policy framework based on content service enterprises is designed to work into the future. It is expected that only a relatively small number of organisations will qualify as content service enterprises.

The most significant content services

While time spent viewing content on the internet is significant, Australians on the whole still spend the most time per week accessing broadcast television. Figure 1.1 shows the time Australians spend consuming different media.

Figure 1.1: Time spent with different media



Note: Percentages refer to share of total time spent consuming media per week.

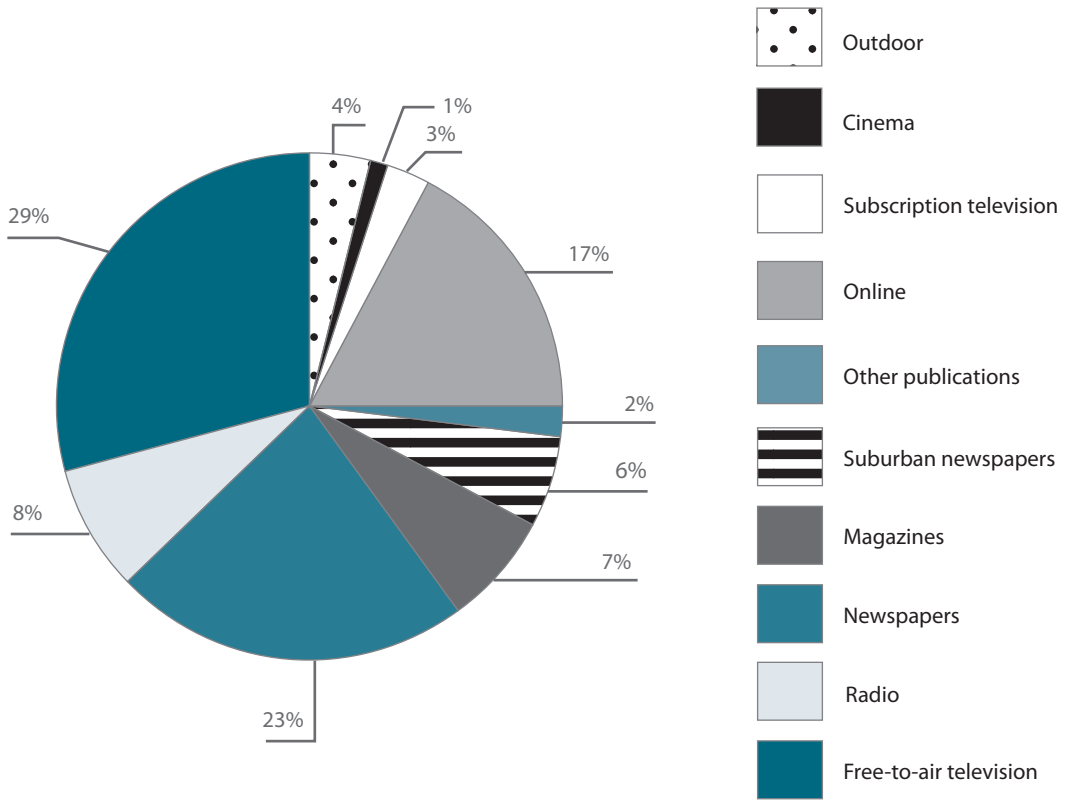
Source: *Think TV*, drawn from Roy Morgan single source, January–December 2010 (people aged 14+, sample 18 254).

24 BSA, section 4(1).

25 See Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, p. 16.

Australian advertising revenue from the internet is growing, but advertising revenue from traditional media still predominates. Figure 1.2 shows the relative shares by percentage of total ($11.8 billion) spent on advertising in the main media over the 12 months to June 2010.

Figure 1.2: Australian advertising revenue by market share



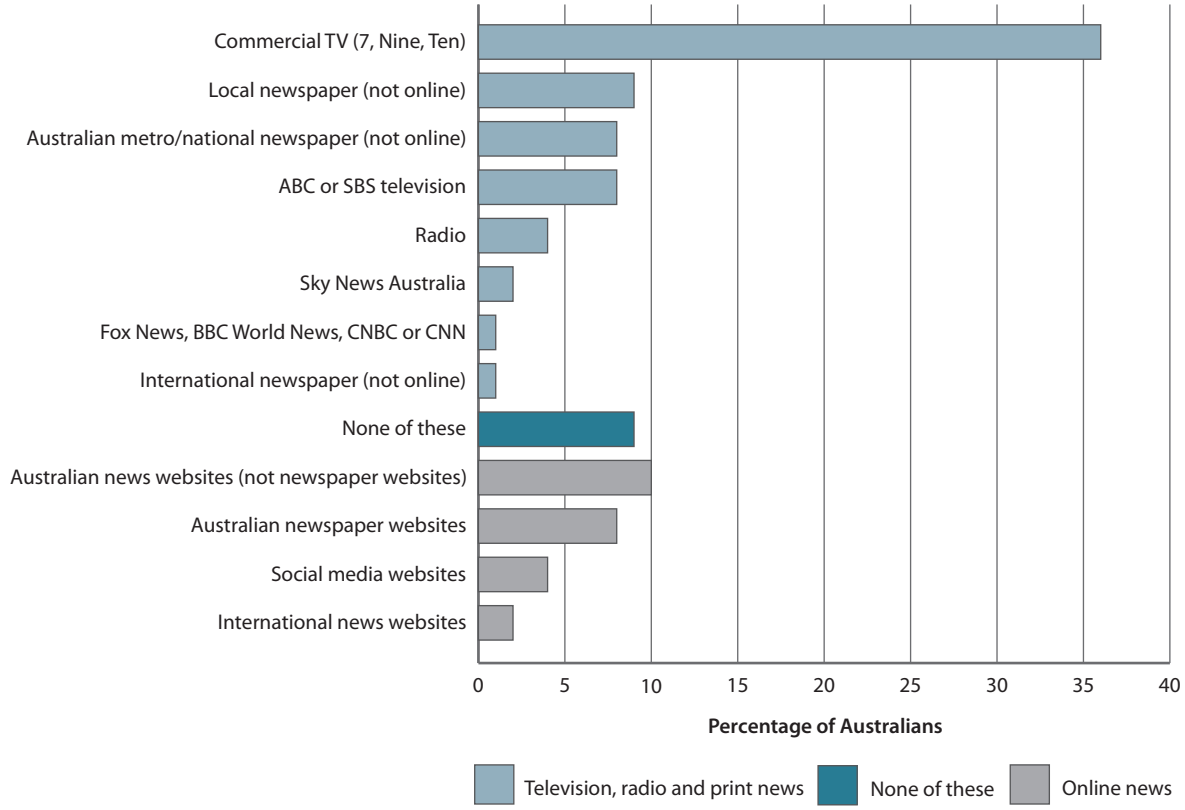
Source: *Think TV*, based on data from Commercial Economic Advisory Service of Australia, advertising expenditure, 1 July 2009 to 30 June 2010. Excludes print directories and community radio; newspaper magazine inserts are grouped with magazines; television, radio and newspaper categories include both metropolitan and regional; figures are rounded.

Despite the increase in usage of new platforms, traditional media remains dominant. This is also true in relation to the key area of news and commentary.

The ACMA's *Digital Australians* report found that commercial free-to-air television was the dominant source of news (used by 36 per cent of those surveyed).[26] Figure 1.3 details Australians' main sources of news (that is, the source of news that respondents identified as using the most).

26 ACMA, *Digital Australians*, p. 39.

Figure 1.3: Main sources of news



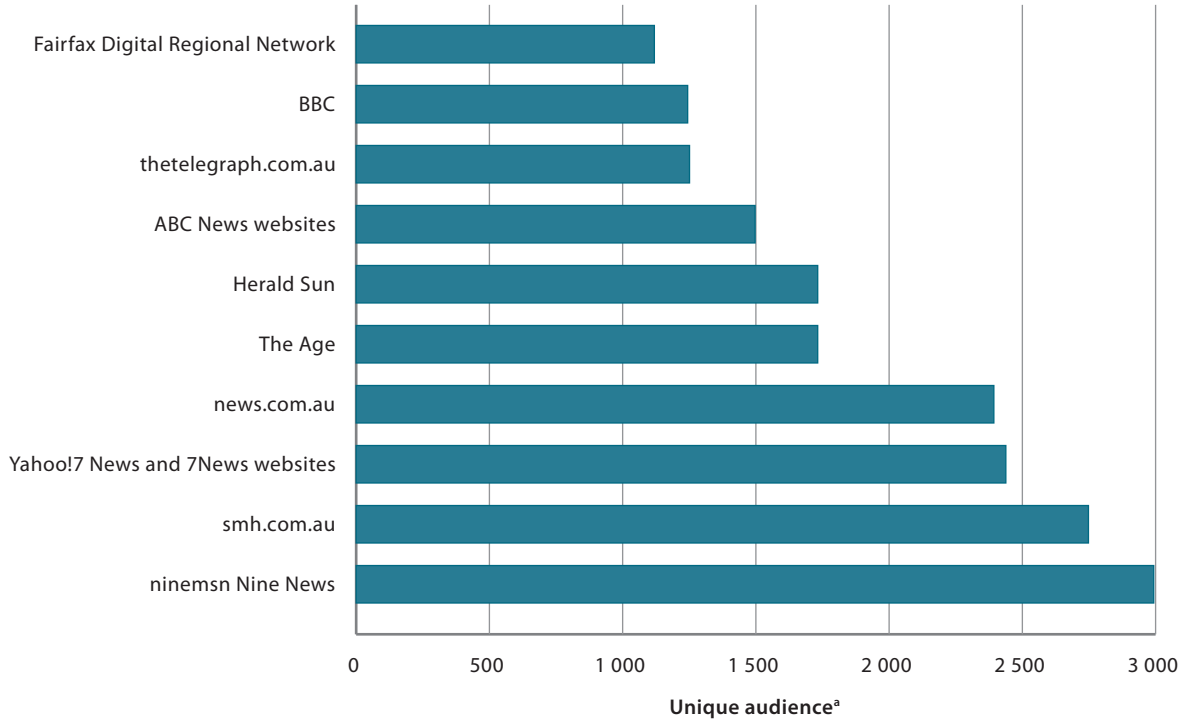
Source: ACMA, *Digital Australians—Expectations about Media Content in a Converging Media Environment*, October 2011, p. 39.

Facebook was by far the most popular source for those who access news through social media sites (83 per cent). The next most popular were Twitter (17 per cent), Yahoo!7 (17 per cent) and the former Windows Live Spaces (15 per cent).[27]

As Figure 1.4 indicates, the established media organisations control the online news sites most visited by Australians.

27 ACMA, *Digital Australians*, p. 23.

Figure 1.4: Online news sites accessed in Australia



a Unique audience is a people/reach based figure for the audience to a website—see Nielsen definition of 'Unique Audience': *UA Projects* http://au.nielsen.com/site/documents/NielsenOnlineRatingsFAQFINAL.pdf, p. 9.

Source: Nielsen Online Ratings, February 2012.

Australians overwhelmingly prefer to get their news from Australian sources, even in the online world:

> Australian websites were preferred by 88 per cent of those who visited news websites.[28]

> Only 5 per cent of those surveyed identified foreign news media (either online or offline) as their main source of news.[29]

Identifying significant content service enterprises

The concept of a content service enterprise outlined in this chapter underpins the Review's policy framework for media regulation. Under the Review's approach, the focus of regulation is significant enterprises that provide professional content to Australians. As the ACMA noted in its *Digital Australians* report, Australians expect these big brands to have the same obligations regardless of the platform on which they appear. The Review considers that the essential characteristics of the significant media enterprises that influence Australians' access to professional content are:

> they have *control* over the content supplied

> there are a large number of Australian *users* of that content

> they receive a high level of *revenue* from supplying that content to Australians.

28 ACMA, *Digital Australians*, p. 26.
29 ACMA, *Digital Australians*, p. 39.

Control over content

The Review believes that where regulation is necessary, it should focus on enterprises that control professional content and should explicitly exclude user-generated content. User-generated content is typically short-form amateur video published on social media sites where the only control open to the platform provider is the ability to take down the content.

However, that is not to say that enterprises which host user-generated content could never become content service enterprises. Platforms that host user-generated content are increasingly entering into arrangements with professional content providers. Content owners can establish and manage their own channels on a service like YouTube under a revenue-share advertising arrangement between content owner and platform.[30] In that role, the platform operator is acting like a channel aggregator, much like the subscription television service Foxtel. The platform operator has a financial interest in offering the content covered by that arrangement. Even if it cannot exercise direct editorial control over particular programs, the enterprise's financial agreement with the channel provider gives it significant control over the content.

Australian users and revenue

The best way to measure the scale of major media services of significance to Australians is to assess their levels of Australian users and revenue.

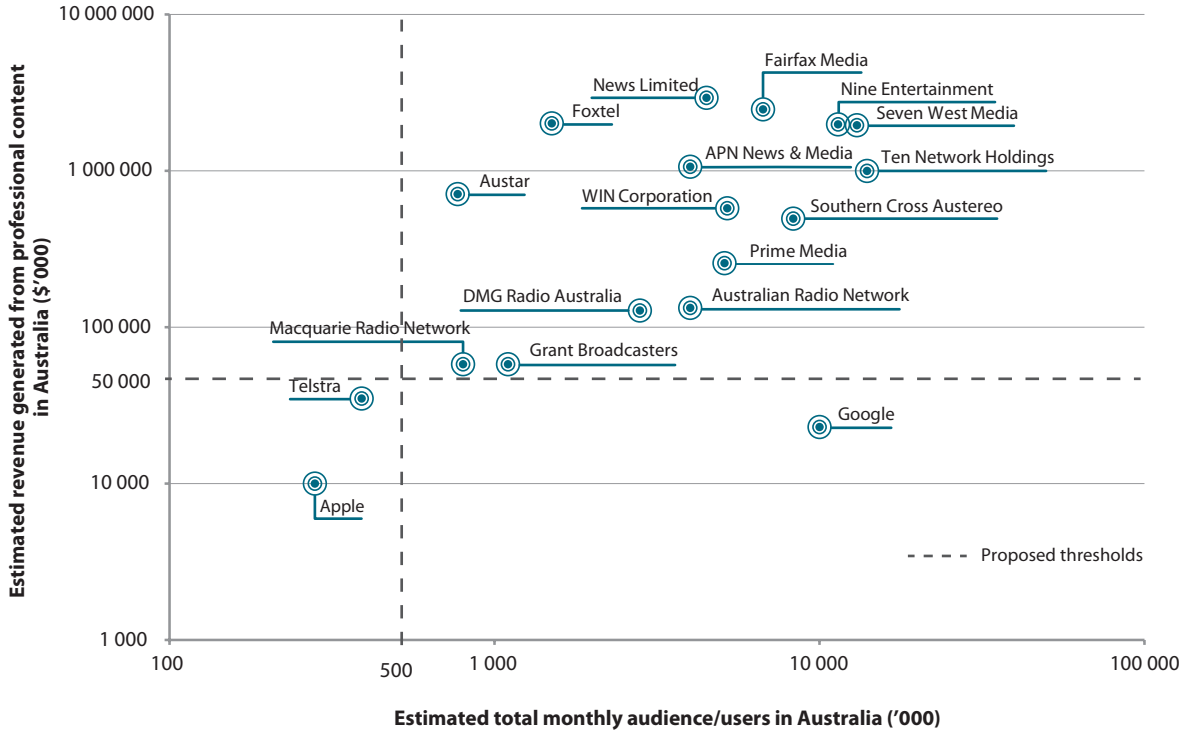
Many media platforms form part of a larger corporate structure. The enterprise providing the services needs to be looked at as a whole. The rules used in the *Broadcasting Services Act 1992* to trace corporate interests are well understood by the industry and should be used to identify the various entities that might comprise a single content service enterprise. Special rules may be needed to deal with joint ventures.

To identify content service enterprises in Australia there will need to be an analysis of the major media enterprises and their users and revenue from Australia. As indicated above, the analysis should apply only to content that the enterprise has control over. It should not include user-generated content or revenue from other sources.

The Review has obtained some estimates of current revenues and users for professional content provided by major media enterprises in Australia. These estimates indicate that there is still a gap between the established media groups and newer online services (see Figure 1.5).

30 See YouTube Partner Program, www.youtube.com/creators/partner.html; see also J Seabrook, 'Streaming dreams: YouTube turns pro', *New Yorker*, 16 January 2012, www.newyorker.com/reporting/2012/01/16/120116fa_fact_seabrook; J Vascellaro, A Efrati and E Smith, 'YouTube recasts for new viewers', *Wall Street Journal*, 7 April 2011, http://online.wsj.com/article/SB10001424052748704013604576247060940913104.html.

Figure 1.5: Estimates of professional content revenue/users for major media enterprises in Australia



Note: The information presented in this figure is indicative only and has been compiled by PricewaterhouseCoopers from a range of sources including industry data, reported financial results, and web reports. Some audience and revenue figures have been derived from publicly available data using assumptions on consumer activity and expenditure. Foxtel is a joint venture of other major media enterprises.

Source: Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise*, March 2012.

Emerging services should not be burdened by unnecessary regulatory requirements. The thresholds for revenue and users should be set at a sufficiently high level so that only the most substantial and influential media groups are categorised as content service enterprises. The Review expects that this will be around 15 enterprises.

From the information available, the Review considers that the threshold levels for content service enterprises initially should be around $50 million a year of Australian-sourced content service revenue and audience/users of 500 000 per month (see dashed lines in Figure 1.5). Using these estimates, it would appear that the established media organisations (the broadcasters and the major Australian newspaper groups) would be likely to reach the threshold for a content service enterprise. Enterprises such as Google, Apple and Telstra would not qualify as content service enterprises based on these estimates.

A content service enterprise that has Australian-sourced revenue from professional television-like audiovisual content of a specified level may have obligations regarding Australian content. The nature of those Australian content obligations is discussed further in Chapter 5.

Before the new scheme for regulation of content service enterprises can commence, the new communications regulator would need to undertake a thorough investigation into Australian-sourced revenue and Australian users of professional media content. This process is described in further detail in Chapter 10, which deals with implementing the new approach.

The relative influence of significant media enterprises will change over time.[31] The regulator should periodically review information about revenue and user numbers and, where necessary, determine revised threshold amounts.[32]

In a submission to the Review, Telstra suggested that the concept of a content service enterprise would not be workable in its potential application to foreign providers because it would be impossible in practice to identify the Australian-sourced revenue of foreign-based content providers.[33] However, any enterprise that reaches the levels of Australian-sourced revenue proposed will have an Australian business presence. Potential content service enterprises could be required to supply information about local revenues to the regulator. Under the Broadcasting Services Act, the ACMA has similar powers to obtain information to trace ownership of media groups.

The content service enterprise framework will provide a flexible model under which community expectations of major media entities may be fulfilled into the future, regardless of the technology or delivery platform used.

Is this 'regulation of the internet'?

There have been some suggestions that the Review's recommendations for the regulation of content service enterprises represent an attempt to regulate the internet.[34] The Review's proposal for regulation of significant media entities, which are increasingly operating across a range of platforms, is specifically designed to be platform neutral.

Any enterprise with a significant presence in Australia should be accountable in Australia. This is particularly true of those in the media. Just as online banking is regulated in the same way as banking in the branch, significant media enterprises should be expected to meet the expectations of the Australian public irrespective of the platform used.

What form should regulation take?

Australia is in a state of transition in communications technology and in the business models for content services. The Review recommends that, in this fast-moving environment, the current legislation be replaced with a more flexible scheme that allows for better-targeted regulation. This can be achieved through principles-based legislation rather than 'black-letter law'.

The current model of communications regulation in Australia relies to a large extent on requirements detailed in Acts of the Australian Parliament. Much of this legislation—most notably the Broadcasting Services Act—is based on specific delivery platforms and business models.

Detailed and prescriptive legislation leads to a lack of flexibility to address concerns that were not anticipated at the time the legislation was passed. New business models may emerge that are outside the scope of the legislation—as a consequence there is only limited ability to take action to address issues of concern. Moreover, this approach can encourage industry players to adopt gaming strategies to take advantage of particular regulatory benefits or avoid certain kinds of regulation.

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31 The need for regular review was acknowledged by the Canadian regulator: Canadian Radio-television and Telecommunications Commission, *Results of the Fact-Finding Exercise on the Over-the-top Programming Services*, October 2011, pp. 9–10, www.crtc.gc.ca/eng/publications/reports/rp1110.pdf.

32 This could be done by means of legislative instrument, disallowable by either House of Parliament.

33 Telstra, submission on interim report, p. 16.

34 See, for example, B Keane, 'Convergence review: time to regulate the internet', *Crikey*, 15 December 2011, www.crikey.com.au/2011/12/15/convergence-review-time-to-regulate-the-internet.

Given the ongoing changes in technologies and business models and the way in which the public uses new media, legislation will be most effective if it focuses on creating a sustainable structure within which the new independent regulator can apply, amend or remove regulatory measures as circumstances require. This may call for different kinds of regulation as appropriate: self-regulation, co-regulation (for example, administering an industry code of practice) or direct regulation.[35]

Under this model, the new regulator would be able to adjust rules to react quickly to changes in the industry. This model would entail giving the regulator a wider rule-making role, which could have the benefit of more independent, open and consultative regulation in the communications sector.[36]

Another argument for moving away from media regulation through detailed prescription by Acts of Parliament arises from community cynicism about the relationships between politicians and influential news media enterprises. It has been frequently observed that media is of more interest to politicians and governments than any other industry sector.

Journalists and academics writing about Australian politics and communications policy have provided vivid examples of legislation drafted to give effect to private agreements between government and significant media interests.[37]

Professor Mark Armstrong has commented on the tendency for amendments to broadcasting legislation to give effect to specific outcomes negotiated by government with industry.[38] He recommends instead that legislation focus on principles and give an independent regulator a greater policy role:

> A durable, efficient Communications Act would need to be implemented by an authority with expertise and independence. Without that, the Act would need to be excessively detailed, and subject to the same flood of amendments which made spaghetti of the Broadcasting Services Act, the *Telecommunications Act 1991* (Cth) and the *Radiocommunications Act 1992* (Cth); and for that matter the *Broadcasting & Television Act 1942* (Cth). Will the executive government tolerate an Act based on stated principles, plus an authority which implements those principles with the level of independence found in most developed economies?
>
> ... The problem is that the executive government is an interested party: in fact, it is the most interested party of all. Governments have a close interest in being favourably treated by the media, new or old, in print or online.
>
> All governments spend a lot of their time cultivating favourable coverage. That is why nearly all developed countries have an independent regulator, and usually an independent planning and policy body.[39]

Regulatory principles for new communications legislation

The new communications legislation should give greater emphasis to providing users with the tools they need to make informed decisions on the way they access, use and create content.

With this proposed flexible regulatory regime, it will be important that the legislation give the regulator clear guidance that 'regulatory forbearance'—that is, the option not to apply regulation in a specific case—is often the most desirable approach.[40]

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35 Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, pp. 21–23.

36 Rules made by the regulator generally would be legislative instruments that may be disallowed by either House of Parliament: see *Legislative Instruments Act 2003*.

37 See, for example, M Westfield, *The Gatekeepers: The Global Battle to Control Australia's Pay TV*, Pluto Press, Sydney, 2000, pp. 96, 131; J Given, *Turning off the Television: Broadcasting's Uncertain Future*, University of New South Wales Press, Sydney, 2003, pp. 152–57, 178–80, 184–85; P Barry, *The Rise and Rise of Kerry Packer Uncut*, Bantam Books, Sydney, 2007, pp. 331–49, 505–10.

38 M Armstrong, 'Will a new Communications Act be allowed to work?', *Communications Law Bulletin*, vol. 29, no. 2, 2010, pp. 7–8.

39 Armstrong, 'Will a new Communications Act be allowed to work?', p. 8.

40 Allen & Overy, *The Interim Report of the Australian Convergence Committee*, December 2011, p. 5, www.allenovery.com/AOWEB/Knowledge/Editorial.aspx?contentTypeID=1&contentSubTypeID=7944&itemID=65440&prefLangID=410; see also Telstra, submission on interim report, pp. 10–11.

The new legislation should set out the following objectives for the regulator to apply in formulating and implementing regulatory measures.

- There should be transparent regulatory arrangements that:
  - clearly identify the objectives of the regulation, the reasons for regulatory decisions and any differences in regulatory treatment between competing services or platforms
  - provide information to consumers about media content services and choices that are available to them.
- Regulation should *work in tandem with other policy tools* of government such as education.
- Regulation should be *flexible* and *adaptable to* the rapidly changing environment.
- A full range of regulatory tools should be available. Regulation should be *targeted* to the areas where it will most effective and most needed.
- There should be *parity of treatment* of similar services regardless of the underlying medium, platform or device used to deliver or receive the service, unless there are clearly articulated and compelling reasons to do otherwise.

Content regulation, in particular, should be applied as part of an integrated package of policy tools, together with other measures such as funding, education, digital literacy and engagement with industry.

Who should make the decisions?

The Review recommends two separate bodies in its regulatory framework for the converged environment. As mentioned above, a statutory regulator will replace the existing regulatory authority (the ACMA) and take on some new functions in the communications sector as outlined in this report. In addition, the Review proposes that an industry-led body oversee journalistic standards for news and commentary across all platforms and the media and communications sector. Further discussion about the industry body is in Chapter 4.

The new communications regulator

It is appropriate to create a statutory authority to perform regulatory functions where there is need for:

- *efficiency*—an agency must be given a clear purpose to achieve objectives
- *independence*—when functions require separation from government to ensure objectivity.[41]

It is the practice in Australia and comparable countries for public bodies to perform regulatory functions in communications and media. Moreover, the close relationship between media and politics noted above has led many countries to establish a media regulator that is largely independent from government control.[42] The former UK Communications Minister, Lord Stephen Carter, has attributed the success of the communications regulator in the United Kingdom (Ofcom) to the creation of an entity:

> independent of government ... in staffing and financing and in authority and therefore ... the brave decisions could be made independently of the political cycle in much the same way they are made in financial services.[43]

Accordingly, careful consideration needs to be given to any circumstances in which the regulator may be subject to government direction in the performance of its functions.

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41 J Uhrig, *Review of Corporate Governance of Statutory Authorities and Office Holders*, 2003, p. 7, www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf.

42 Arrangements in the United Kingdom, the United States and New Zealand are described in Telstra, submission on interim report, pp. 26–28.

43 S Carter, speaking at the Screen Producers Association of Australia Conference, Sydney, 14 November 2011. Audio of the speech is accessible from http://conference.spaa.org.au/displaycommon.fm?an=1&subarticlenbr=566.

The Review proposes that:

- the regulator should operate at arm's length from government direction except in a limited number of specified matters
- ministerial control over the regulator generally should be exercised through legislative instruments disallowable by either House of Parliament, to allow for greater parliamentary scrutiny.[44]

Further detail regarding the Review's proposals for the establishment and governance of the regulator is set out in Appendix D.

The following chapters in this report set out in more detail the new functions that the regulator would undertake. The regulator would be the successor to the ACMA for the range of regulatory functions that continue following the abolition of the broadcasting licensing regime:

The role of the regulator should not be limited to direct regulation. It should also:

- promote the development of the sector
- engage with industry in developing solutions to problems
- report on the state of the market and report on the performance of market participants
- protect users, including supervising complaints processes
- inform users through education programs
- provide advice and propose initiatives to government.

The regulator should be required to develop efficient and effective procedures for dealing with complaints from the public. The regulator should also have the ability to exercise discretion on how to most effectively deal with complaints.

The Review believes that many of the changes recommended in this report will streamline the regulator and increase the efficiency of the regulator's operations. In particular, the abolition of the broadcasting licensing regime and the removal in duplication of classification functions should have an impact on the resource requirements of the regulator.

How will the regulator be held accountable?

Accountability arrangements for the new regulator will be very important, given its independence and wide powers.

The objectives of regulation should be clearly stated in legislation, so that they can guide the regulator in exercising its discretionary powers and the courts in applying and interpreting the legislation.

Submissions on the Review's interim report, including those from Free TV Australia, ninemsn and Telstra, criticised the proposal for a regulator with broad powers to make rules largely free from ministerial direction.[45]

This overlooks the following:

- Under the Australian legal system, decisions made by a statutory regulator have to be made in an open, consultative fashion, and are subject to a very high degree of scrutiny, including judicial review. See the accountability arrangements described in Appendix D. In particular it should be noted that rules made by the regulator can be disallowed by either House of Parliament.[46]

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44 Under the *Legislative Instruments Act 2003*, section 44, item 41, a minister's directions to any person or body are exempted from being subject to parliamentary disallowance (although directions 'of a legislative character' are still subject to the parliamentary tabling requirements).

45 See submissions on interim report from Free TV Australia, p. 17; ninemsn, pp. 1–2; Telstra, pp. 7–11.

46 See *Legislative Instruments Act 2003*, section 42.

- Vesting rule-making powers in an independent regulator promotes a more transparent, consultative and open policy formulation process.[47]
- Broad rule-making powers are conferred on communications and media regulators in the United States, the United Kingdom and Canada.[48]

The Review notes another precedent that can be used to make an independent regulator accountable within the political system. Commonwealth legislation provides examples where a statutory parliamentary joint committee is given a specific role in examining the operations of a Commonwealth authority.[49]

A good example of parliamentary supervision of an industry regulator is the Parliamentary Joint Committee on Corporations and Financial Services. That committee scrutinises the operations of the Australian Securities and Investment Commission and a number of other authorities concerned with corporate regulation.[50]

It would be consistent with the governance model recommended for the regulator for the legislation to establish a joint parliamentary committee with the function of inquiring into and reporting on the activities of the regulator, the operations of the communications legislation, and related matters.

This chapter has sought to outline the Review's approach to regulation: where regulation is still required and how it should be applied. The remaining chapters in the report deal in more detail with the major policies and mechanisms recommended by the Review.

47 See Armstrong, 'Will a new Communications Act be allowed to work?'.

48 The existence of 'generic' rule-making powers in these countries is noted in Telstra, submission on interim report, p. 8; see also pp. 26–28.

49 A joint parliamentary committee is one on which both senators and members of the House of Representatives serve. Joint statutory committees are established by statute (an Act of Parliament).

50 See *Australian Securities and Investments Commission Act 2001*, section 243.

2. Media ownership

Australia has had a long history of media ownership and control rules to promote diversity of news, information and commentary.

Two of the strongest messages from the Review's public consultation and submissions process were the continuing need for rules on media ownership and the importance of local news and information to communities.

Convergence is undoubtedly increasing the diversity of content from various sources both globally and nationally. However, it can have a negative impact on the amount of locally sourced news and information. In regional areas, in particular, measures are needed to ensure that Australians have access to a range of news and commentary from various local sources.

Today most people still get their news and information from the same traditional outlets, although it is often delivered through new platforms. A small number of media groups still own and control most media outlets. Regulation is needed to ensure a competitive media market that delivers a diverse range of news and commentary services for all Australians.

Recommendations

6. Media ownership and control rules should promote a diverse range of owners at a local and national level.
    a. Ownership of local media should continue to be regulated through a 'minimum number of owners' rule. The existing 4/5 rule should be updated to take into account all entities that provide a news and commentary service and have a significant influence in a local market. The new communications regulator should be able to provide an exemption from this rule in exceptional circumstances, if it is satisfied that a transaction will provide a public benefit in a specific local market.
    b. The new communications regulator should have the ability to examine changes in control of content service enterprises of national significance. It should have the power to block a proposed transaction if it is satisfied—having regard to diversity considerations—that the proposal is not in the public interest.
7. The following rules should be removed and replaced by a 'minimum number of owners' rule and a public interest test:
    - the '75 per cent audience reach' rule
    - the '2 out of 3' rule
    - the 'two-to-a-market' rule
    - the 'one-to-a-market' rule.

Existing ownership rules

A concentration of services in the hands of a small number of operators can hinder the free flow of news, information and commentary in a democratic society.

Historically, most broadcasting services have been delivered through spectrum—a finite public resource. The limited geographic reach of some types of broadcasting spectrum meant that services were restricted to geographic licence areas and it was difficult for people to have ready access to news outside their local

geographic area. Given the size of the licence areas and limited number of services, it was important for the government to provide a framework to ensure diversity of ownership of news, information and commentary services at both a local and national level.

Media ownership and control rules were last reviewed in 2006. The majority of ownership and control rules have been based on local commercial radio licence areas; the key features of current rules are outlined in Table 2.1. The Review's discussion paper on media diversity, competition and market structure contains detailed information on the current rules.[1]

Table 2.1: Current ownership and control rules

Media diversity rules	
Medium	**Rule**
Commercial television, radio, newspapers	Minimum number of voices: the '4/5' rule—there must be no fewer than five independent and separately controlled media operators or groups in a metropolitan commercial radio licence area, and no fewer than four in a regional area.[a]
Commercial television, radio, newspapers	'2 out of 3' rule—a person cannot control more than two out of three specified media platforms—commercial television, radio or an associated newspaper—in a commercial radio licence area.[b]
Commercial television	'One-to-a-market' rule—a person must not be able to exercise control of more than one commercial television broadcasting licence in a licence area, except for commercial licences issued under section 38C of the BSA.[c]
Commercial radio	'Two-to-a-market' rule—a person must not be able to exercise control of more than two commercial radio broadcasting licences in the same licence area, except for commercial licences issued under section 40 of the BSA.[d]
Commercial television	'75 per cent audience reach'—a person must not be able to exercise control of commercial television broadcasting licences if the combined licence area exceeds 75 per cent of the Australian population.[e]

BSA = *Broadcasting Services Act 1992*.

a Sections 61AB and 61A of the BSA.

b Fifty per cent of the geographic area of the radio licence must fall within the television licence area for this prohibition to apply. Also see section 53(2) of the BSA.

c Section 53(2) of the BSA.

d Section 54 of the BSA.

e Section 53 of the BSA.

Impact of convergence on diversity

In the past few years, there have been substantial changes in the range of services available and how users interact with news and current affairs. When the current media ownership and control rules were passed by Parliament in 2006, social media was in its infancy and broadband penetration and speeds in Australian households were relatively low.[2]

Today news aggregators, search engines and social media such as blogs play an increasing role in distributing news and information. Australians can now access international publications and watch news content online from around the world. Despite the uptake of these new services, recent research by the

1 Convergence Review, *Discussion Paper: Media Diversity, Competition and Market Structure*, September 2011.

2 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions*, 2009, p. 5, www.dbcde.gov.au/digital_economy/what_is_the_digital_economy/australias_digital_economy_future_directions.

Australian Communications and Media Authority (ACMA) suggests that consumers still primarily rely on traditional outlets for their local news and information even when access is through platforms such as social media and websites.[3]

This finding is supported by a Telstra submission to the Review:

> Despite the fact that new media has increased the diversity of voices in the Australian market, new media does not yet (and may never) command substantial influence over Australian consumers in the way that traditional media still do.[4]

Although a range of new platforms now provide news and commentary, many are simply extensions of existing services, linking to information from a traditional provider.[5] For example, most newspapers now have websites, offer apps for tablets, carry video and have a presence on social media. Commercial television broadcasters provide news services and full programs on their websites.[6]

Convergence has also allowed people to have instant access to information and services across platforms. The Australian Subscription Television and Radio Association (ASTRA) submitted to the Review that 'the growing number of news and information sources available online would suggest that regulatory intervention to ensure a diverse media is becoming increasingly unnecessary'.[7]

Many industry submissions, such as those from Free TV Australia, Telstra and News Limited,[8] supported the removal of all media ownership limits, arguing that convergence has improved diversity and that the existing powers of the Australian Competition and Consumer Commission (ACCC) are adequate to regulate ownership. News Limited stated that:

> there is no basis on which to license or regulate media (such as subscription television and online services) which does not use public resources, is not protected from competition in the same way as licensed media and is consumed and paid for, on a discretionary basis by consumers ... the digital economy is producing greater plurality of voices than at any time in history and additional regulations are unnecessary and inconsistent with the Committee's principle of regulatory forbearance.[9]

However, the introduction of new services into a market does not necessarily improve diversity of news and commentary on its own. While there may be multiple publications or outlets through traditional and online media, if they are owned and controlled by the same people this results in the same number of separately controlled media operators in a market. This is particularly the case in regional markets, where economies of scale naturally promote the tendency towards monopolies or oligopolies. Ownership and control rules provide a safety net to ensure that a diversity of ownership is maintained.

Most submissions that addressed diversity of ownership supported the need for existing rules to be strengthened and quantitative limits to be retained. The Review received more than 28 000 comments as part of separate campaigns by Avaaz and Friends of the ABC requesting the Review to support the strengthening of media diversity arrangements.

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3 ACMA, *Digital Australians—Expectations about Media Content in a Converging Media Environment*, October 2011, p. 39, http://engage.acma.gov.au/digital-australians.

4 Telstra, submission on interim report, p. 21.

5 'More than 99 per cent of blog links originate from traditional sources': News Limited, *The Future of Journalism*, http://futureofjournalism.com.au/451.

6 ABC News 24 provides a live stream to its news channel at www.abc.net.au/news/abcnews24 as well as catch-up services through its website and iview. Seven, Ten and Nine provide catch-up services of their news and current affairs programs in full or in part on their websites.

7 ASTRA, submission on interim report, p. 11.

8 Free TV Australia, submission in response to open call for submissions, p. 49; Telstra, submission on emerging issues paper, p. 15; News Limited, submission on interim report, p. 2.

9 News Limited, submission on interim report, p. 2.

'Minimum number of owners' rule for local markets

Following the release of the Review's interim report in December 2011, it was reported that the Review was recommending the removal of limits on media ownership.[10] This is not the case. With the changes in the media and communications markets, a quantitative minimum ownership limit in local markets should be retained.

Historically, 'voices' have been used as a proxy for owners of media operators. A revised rule should be named the 'minimum number of owners rule' to adequately reflect its objective—to ensure that no single operator or small group of operators has a dominant influence in a local market for news and commentary.

One of the flaws in the existing local rules is that they do not apply to some influential sources of news and commentary, such as national newspapers, online news providers and subscription television services. The Review received some feedback on extending the rule to additional platforms. Free TV Australia noted that:

> At the very least the definition of 'voices' should be significantly broadened to better capture the true diversity of views available to Australians, and to properly acknowledge the changes to the media landscape, that now includes pay television and internet content providers.[11]

In an opposing view, ASTRA stated in its submission that:

> the proposed 'diversity of voices' rule that would include new platforms and services is likely only to have the effect of stifling innovation and investment in areas that are currently not subject to existing cross-media rules.[12]

The new 'minimum number of owners' rule would apply to all content service enterprises that provide news and commentary services in a local market. The application of the rule to all content service enterprises will better reflect where Australians receive their news today and well into the future. With more and more services being delivered through technologies that are not limited to a specific geographic area, it is important to ensure that news at a local level is retained.

The importance of local media was a strong and consistent theme in the Review's consultations. In recognition of this, in some markets there will still be influential news and commentary services that are provided by media operators that do not meet the threshold for a content service enterprise. The new communications regulator should have the power to declare that the rule applies to these media operators in a particular local market if:

- the media operator has editorial control over its news and commentary service
- the number of users for that service reaches a minimum percentage of the population or reaches a minimum number of users in that market on an annual basis.[13] This threshold will be set deliberately high by the regulator to ensure that only influential media is captured.

The new 'minimum number of owners' rule may capture some larger media operators such as national newspapers for the first time. Conversely, it is anticipated that some smaller-scale media operators that are currently subject to the '4/5' rule in a particular location will no longer be subject to media ownership limits. This new rule will provide the flexibility for influential news and commentary services, not envisaged today, to be captured if they become content service enterprises or reach the required user threshold to be considered locally significant in a particular market.

The Review believes it remains appropriate for different quantitative limits to be set for metropolitan and regional markets as part of a new 'minimum numbers of owners' rule. Regional markets face unique challenges and a safety net should continue to exist to ensure a diversity of ownership in these markets.

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10 'Devil in the detail, and that's light-on', *Australian*, 16 December 2011, p. 6; 'Media ownership laws face overhaul', *Age*, 15 December 2011, p. 1.

11 Free TV Australia, submission on interim report, p. 16.

12 ASTRA, submission on interim report, p. 12.

13 As noted in Chapter 1, the regulator should have the power to obtain information from content service enterprises and content service providers. This could include information in relation to circulation and/or audience reach when requested.

The regulator should consider the existing quantitative limits in the 4/5 rule as the starting point when determining the minimum number of owners in each market. Following implementation, the rule should be reviewed to ensure its effectiveness every three years.

The number of media groups in some markets may already be below the 'minimum number of owners' rule. Under the existing '4/5' rule, in some regional media markets the number of media groups already falls below the level set in the legislation. The Review is not recommending forced divestments of media interests to ensure that a media group complies with the rule. As in the current scheme, the proposed scheme would simply prevent changes in control that would lead to a reduction in the number of owners in a media market.

The regulator should maintain a public list of media operators covered by the rule in each market. As with the existing rules, public broadcasters should not be captured by the rule. The regulator should also have the power to exempt content service enterprises from the rule in particular markets. This exemption should be used where a content service enterprise does not provide a news and commentary service or does not provide a service that reaches the user threshold in a particular market.

Determining local markets

The current media ownership and diversity rules are based on commercial radio broadcasting licence areas. With the abolition of broadcast licences recommended by the Review, there will be no need to retain this concept.[14] Existing licence areas in some cases will not reflect local markets. The regulator should be given the power to define local markets for the purposes of the rule, and the factors it would take into account would be similar to the planning criteria for the broadcasting services bands under the *Broadcasting Services Act 1992*.[15] A full list of markets should be published by the regulator and reviewed as necessary.

Public benefit exemption

In some exceptional situations, there may be a net public benefit in a change of control in small local markets. For example, a merger may ensure that a local radio station continues to operate if its owner goes bankrupt.

The concept of having a public benefit exemption to quantitative media ownership limits was supported in submissions. The Treasury stated:

> the current rules could, in future, benefit from greater flexibility, by adding an exception to the existing cross media ownership laws. The exception could operate so as to permit cross media mergers or acquisitions that would otherwise be contrary to the current rules, as long as a net public benefit was derived from the merger proceeding.[16]

Where a proposed merger between media groups in a local market would otherwise lead to a breach of the rule, the proponent would be able to apply to the regulator for an exemption. Potential exemptions should be focused on very small regional markets and only provided in extraordinary circumstances. The proponent should be required to demonstrate that the transaction would result in a public benefit in the local market. Criteria that the regulator could take into consideration may include whether it has been demonstrated that:

- the transaction would lead to a substantial increase in the volume of local news, advertising, current affairs and local information specifically relevant to the local market
- local news specifically relevant to the geographic area contained in the market would be available across more platforms
- it could mean the withdrawal of a service from a market.

14 Broadcasting licence areas do not necessarily always reflect boundaries required for minimising interference in spectrum planning.

15 See BSA, section 23.

16 Treasury, submission in response to open call, pp. 6–7.

The regulator should be required to conduct a public consultation process to inform its decision and consult with the ACCC.

As currently applies under the Broadcasting Services Act,[17] the regulator could also approve temporary breaches of the rule if an unacceptable media diversity situation were to be remedied within two years.

National public interest test

The increase in the number of media outlets with a national reach means that a media-specific regulatory measure is needed to ensure appropriate diversity of owners. The measure would maintain diversity at a national level. Current media diversity rules focus only on media platforms associated with local broadcasting licence areas. A public interest test should be developed to ensure that diversity considerations are taken into account in transactions where there are changes in control of content service enterprises of national significance.

The proposal for a public interest test in Australia is not new. The Productivity Commission's 2000 report on broadcasting recommended the introduction of a media-specific public interest test under the former Trade Practices Act.[18] The Review also proposed a public interest test in its discussion paper on media diversity, competition and market structure.

Some submissions to the Review, such as those from the Screen Producers Association of Australia, the Communications Law Centre and the University of Sydney, supported the idea of a public interest test at a national level.[19]

The Communications Law Centre stated:

> there is a strong case, in the medium to long term, for broadening the scope of media ownership regulation as concepts of influence and reach change. A public interest test should be introduced for flexibility, with the public interest at its core ... It is important that the test itself is assessed by an independent body. The decision to apply the public interest test must be free from political interference.[20]

One argument against a public interest test is that existing ACCC competition powers are adequate to address the issue of diversity of media ownership.[21] It has been long recognised that media diversity and competition are distinct though related concepts. The Productivity Commission's 1999 draft report on broadcasting noted that if cross-media regulation were accommodated in the general competition legislation:

> the public interest would need to be specifically defined for purpose of media acquisitions ... without a media-specific public interest test, [repealing cross-media rules] would not be able to prevent cross-media mergers and acquisitions among established players.[22]

A public interest test focused on media ownership would examine broader issues than the economic market analysis required under the *Competition and Consumer Act 2010*. As the Communications Law Centre pointed out in its submission:

> general competition laws are insufficient to address media ownership concerns. A pure competition analysis is likely to overlook important non-economic criteria when assessing media mergers.[23]

17 See BSA, section 61AJ(4).

18 Productivity Commission, *Broadcasting*, report no. 11, 2000, www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport.

19 Screen Producers Association of Australia, submission on interim report, p. 2; Communications Law Centre, submission on discussion papers in response to open call, p. 2; University of Sydney, submission on discussion papers in response to open call, p. 11.

20 Communications Law Centre, submission on discussion papers in response to open call, pp. 6, 7.

21 See News Limited, submission on interim report, p. 2.

22 Productivity Commission, *Broadcasting: Draft Report*, 1999, pp. 184–7.

23 Communications Law Centre, submission on discussion papers in response to open call, p. 7.

Objectives of a national public interest test

A national public interest test might apply to transactions involving a change of control[24] in any content service enterprise. The Review proposes that the regulator would develop, maintain and publish a register of content service enterprises of national significance.[25] Content service enterprises on this register would be subject to the public interest test. While the regulator should define the criteria for national significance, the Review considers that, at a minimum, an entity should provide a content service in multiple markets and more than one state or territory to be classified as a content service enterprise of national significance. Other factors the regulator could take into account include:

- whether the combined audience of a single service is above a threshold figure to be determined by the regulator
- whether the content service enterprise has a controlling interest in one or more prominent media operations on different platforms.

The onus should be on the regulator to demonstrate that the outcome of the proposed transaction is not in the public interest.

The focus of the test should be on maintaining the diversity of content services at a national level. It should be a separate test that complements rather than duplicates the ACCC's existing mergers and acquisitions powers. Factors the regulator could be required to take into account when making its decision include:

- whether the outcome of the transaction would diminish the diversity of unique owners providing general content services as well as news and commentary at a national level
- whether the outcome of the transaction would diminish the range of content services at a national level
- whether the person(s) taking control of a content service enterprise would represent a significant risk that the content service enterprise would not comply with its obligations.[26]

The proposed national public interest test should operate independently from the 'minimum number of owners' rule.

Operation of public interest test

It is proposed that all nationally significant content service enterprises notify the regulator of a potential change in control and seek a preliminary view as to whether the public interest test will apply.

The regulator should undertake an initial assessment and consult with the ACCC before making a final decision whether to conduct a public interest assessment. Once the regulator has made a decision, it should advise the applicant whether it will initiate a public interest assessment. At this time, it should also advise the ACCC and Australian Competition Tribunal of its decision.[27]

If the regulator was to decide that the transaction required a public interest assessment, it should conduct a public consultation process to seek industry and community views. Following the conclusion of the assessment process, the staff of the regulator should provide a report for a decision by its board.[28]

It is vital that the decision-making process is independent from government. The regulator would be best placed to administer the test, given its detailed understanding of both the media and communications markets.

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24 The Review proposes that the existing definition of control in Schedule 1 of the BSA be maintained for simplicity and continuity.

25 The regulator should be required to update the list annually.

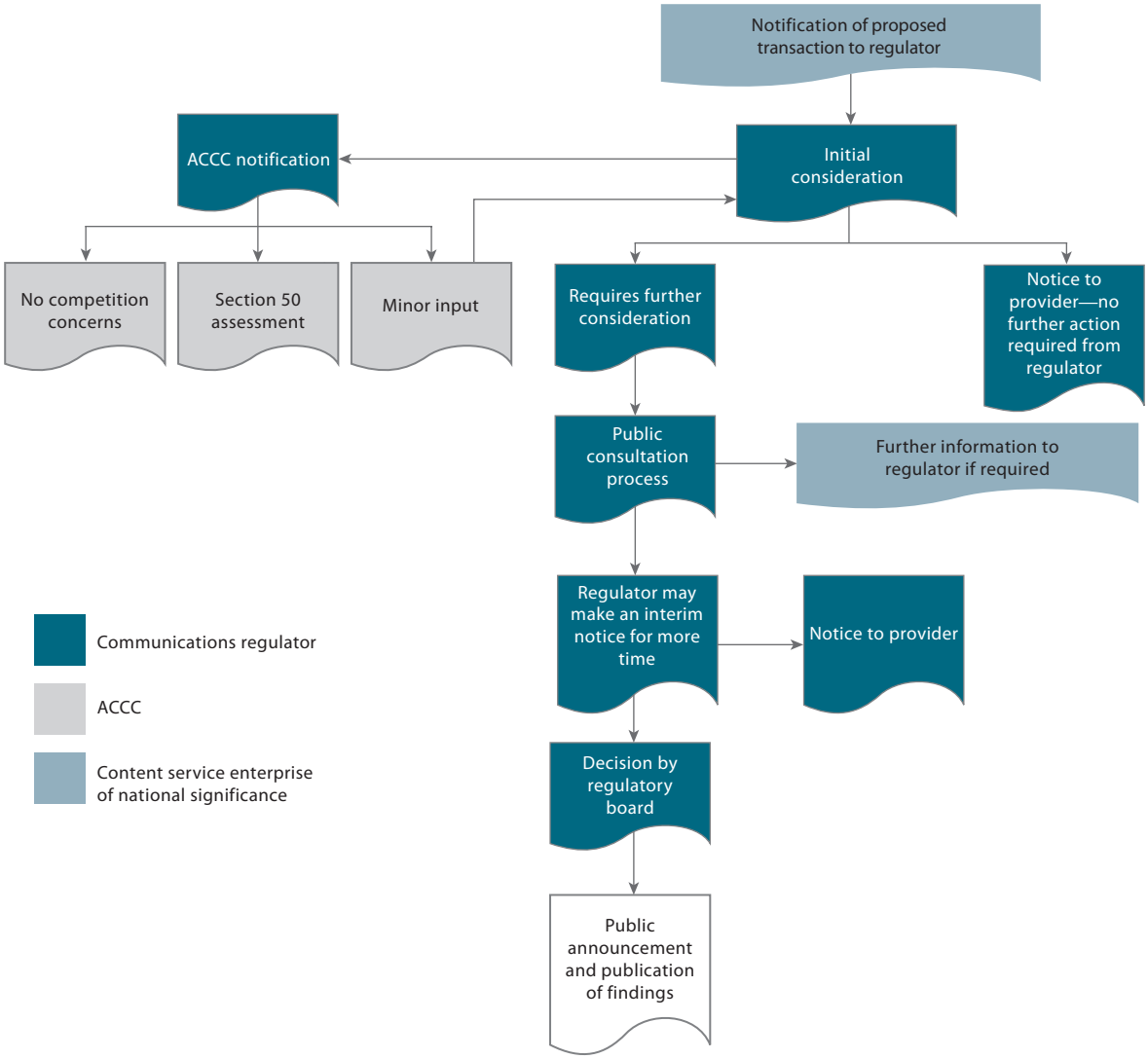
26 This is a principle already established in the BSA under section 41.

27 Although the public interest assessment will be a separate process to the merger clearance, the Review proposes that the communications regulator inform the ACCC and Australian Competition Tribunal should there be any related impacts on the merger authorisation and clearance processes under the *Competition and Consumer Act 2010*.

28 The operation of the regulator is discussed in Chapter 1 and Appendix D.

The board of the regulator would be the appropriate decision-making authority for the purposes of the test. Figure 2.1 illustrates how the test could work.

Figure 2.1: Process for administering public interest test



The Review recognises that the introduction of a public interest test may increase the regulatory burden on some companies. To minimise this burden, the regulator should adhere to strict time limits for administering the test, particularly when determining whether a transaction will be subject to a full public interest assessment. The regulator should also develop and issue guidelines on the test, akin to the ACCC's guidelines on mergers.

Broader concerns about vertical integration in the content and communications market should be examined under existing ACCC powers. There may be vertical and horizontal transactions that are not covered by the proposed public interest test but that could still attract the scrutiny of the ACCC if there were a substantial lessening of competition in a relevant market. As discussed in Chapter 3, the communications regulator should also be able to consider whether it is appropriate to make content-related competition rules if a change in control raised issues about the extent of effective competition in a content market.

Removal of existing regulation

Current rules are based on distinctions between traditional broadcasting and print media, but it is no longer practical to distinguish services in this manner. Media enterprises operate across a range of platforms, which makes the rules that classify different kinds of entities based on their historical platform increasingly irrelevant. The Review proposes that the public interest test replace these quantitative rules. The ACCC's powers in the areas of mergers and acquisitions that substantially lessen competition in markets in Australia, as well as the proposed national public interest test, provide sufficient safeguards to maintain diversity and a competitive market.

The proposed removal of licences and licence areas and the implementation of a public interest test would allow for the repeal of the following media ownership and control rules:

- the '75 per cent audience reach' rule
- the '2 out of 3' rule
- the 'two-to-a-market' rule
- the 'one-to-a-market' rule.

The Review received few specific comments on the removal of these rules. The majority of comments received on media ownership focused on removing existing rules or strengthening the existing framework.

Of submissions that commented on the rules specifically, Free TV Australia stated that it:

> supports the removal of these cross media rules and the 75% reach rule which is increasingly anomalous in a borderless media environment.[29]

In relation to the '75 per cent audience reach' rule in particular, Foxtel stated that:

> it should only be removed as part of an overall package of reforms which fairly balances the obligations and benefits conferred on industry stakeholders in line with the National Competition Review.[30]

Geographic markets are still relevant for maintaining an adequate level of access to local news and commentary. However, the internet has also made national media outlets accessible across the whole country. Media and communications are increasingly viewed nationally, with catch-up television services and online news websites allowing programming beyond 75 per cent of the population and bypassing geographic borders. The increase in nationally networked content has also diminished the effectiveness of the 75 per cent rule.

Implementation of new media ownership and control arrangements

The new communications regulator or the government in a phased approach to implementation should determine the criteria for identifying content service enterprises of national significance and the criteria for administering the public interest test.

In line with the introduction of legislation to establish a new communications regulator and the adoption of the concept of content service enterprises (as proposed in Chapter 1), legislative changes would be needed to introduce a public interest test and give the regulator the necessary authority to administer it.

Before the introduction of the public interest test, the regulator would need to develop and publish guidelines on the test's application to assist industry compliance.

29 Free TV Australia, submission on interim report, p. 16.

30 Foxtel, submission in response to open call, p. 14.

In order to implement the proposed 'minimum number of owners' rule, the regulator would need to define local markets and determine the minimum number of owners in new metropolitan and regional markets.

The proposed media ownership arrangements could be introduced in a two-stage process. In the first stage, the public interest test could be introduced and the '75 per cent audience reach', '2 out of 3', 'two-to-a-market' and 'one-to-a-market' rules could be abolished. The existing '4/5' rule should be retained during this stage. In the second stage the new 'minimum number of owners' rule could be enacted to replace the existing '4/5' rule.

To ensure compliance with the media ownership arrangements, the regulator should maintain a register identifying the ownership and control of media groups in each market, similar to the register of controlled media groups currently administered by the ACMA. The regulator should be required to make decisions within statutory time limits and should be able to accept an application, or agree that a transaction can proceed, subject to specified conditions or lodgment of undertakings.

The regulator should also regularly review the 'minimum number of owners' rule to take into account changing circumstances and amend it as necessary. The review would need to be publicly announced by the regulator and include a public consultation process.

3. Content-related competition issues

Competition is a key driver of innovation and investment and underpins positive consumer outcomes. Market forces are the most effective way of ensuring competition when the playing field is level for all participants. However, in a converged world there is a risk that content will be a new competition bottleneck for which regulatory intervention will be required. Establishing a new communications regulator with flexible powers to address content-related competition issues offers the most effective means of ensuring a competitive content market.

Recommendations

8. The new communications regulator should be empowered to instigate and conduct market investigations where potential content-related competition issues are identified.

9. The new communications regulator should have flexible rule-making powers that can be exercised to promote fair and effective competition in content markets. These powers should complement the existing powers of the Australian Competition and Consumer Commission to deal with anti-competitive market behaviour. These powers should only be exercised following a public inquiry.

Current arrangements

Under the existing framework, the Australian Competition and Consumer Commission (ACCC) is responsible for the competition regulation of the communications sector. The ACCC carries out its functions under industry-specific competition and access regulations set out in the *Competition and Consumer Act 2010* (CCA).[1] These regulations primarily concern anti-competitive conduct in the industry and access by companies to bottleneck telecommunications services—predominantly supplied by Telstra via its fixed line network at present, with extensive infrastructure services to be provided via the National Broadband Network (NBN) as it is rolled out across the country.[2]

Specific provisions in the CCA prohibit powerful players from abusing their market position and misusing market power. Also incorporated into the CCA is recognition of the potential for anti-competitive behaviour in exclusive contracts, and a prohibition on exclusive dealing that causes a substantial lessening of competition.[3] The *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* amended the part of the CCA that focuses on anti-competitive conduct in the telecommunications industry to clarify that the services it deals with include content.[4]

As identified in the Review's paper on emerging issues, the range of powers available to the ACCC is not comprehensive enough to effectively deal with particular aspects of the content market, such as content rights.

1 Relevant components of the CCA include sections 45, 46 and 47, while Parts XIB and XIC address anti-competitive conduct and network access regulation respectively.

2 ACCC, *The ACCC's Role in the Economic Regulation of the Communications Sector*, www.accc.gov.au/content/index.phtml/itemId/994966.

3 See CCA, sections 45, 46 and 47. For a description of market power and when misuse of it is considered to have taken place, see ACCC, *Misuse of Market Power*, www.accc.gov.au/content/index.phtml/itemId/816380.

4 See CCA, Part XIB, section 151AF.

Need for new powers

The ACCC's existing powers to address competition issues as they relate to content services in the communications market focus on anti-competitive conduct and economic market analysis. However, these powers are too narrow to address evolving content-specific issues, such as exclusive rights arrangements and bundling, and network neutrality issues that inhibit competition. These issues are explained in more detail below.

In a submission to the Review, the ACCC noted that the current regulatory framework may not address competition issues generated by convergence and emerging market structures.[5] Macquarie Telecom supported this view, stating that 'there is a clear absence of a regulatory framework which is capable of dealing with content-related competition matters effectively and efficiently'.[6]

Not all stakeholders agreed that specific content-related competition powers are needed. Some submissions, including from the Australian Subscription Television Association (ASTRA), APRA/AMCOS and Foxtel,[7] argued that there is no need to establish new powers at all, and that there are reasons for continuing to rely on the ACCC's economy-wide powers to deal with specific content-related competition issues. Reasons given for these positions included that markets are already working well, and that the ACCC already has sufficient powers to act if there are competition concerns.

The Review examined a range of regulatory approaches adopted in other countries to gain a broader understanding of the most effective methods for dealing with competition issues in communications markets.[8] This research has informed the Review's conclusion that proactive (ex ante) regulatory powers are needed that can respond to fast-moving content-related competition issues and promote competitive outcomes, rather than relying only on powers to take action where anti-competitive conduct has already occurred (ex post powers).

In this context, the ACCC recommended in a submission to the Review that 'regulatory intervention be considered if recent or near future developments do not result in improved opportunities for competition in content acquisition'.[9]

A regulator with proactive powers to make rules and issue directions as required in the content market will be better placed to administer regulation that is targeted, more responsive and effective. The regulator will also be better able to deal with emerging issues in a more flexible manner, including not intervening in the market where this is the best course of action.

The regulator's proactive content-related competition powers will complement rather than duplicate or replace the existing powers of the ACCC to deal with anti-competitive behaviour. The Review recognises that there is a close relationship between the issues the regulators will have responsibility for and that there will need to be a coordinated regulatory approach.

The Review proposes that the ACCC retain its telecommunications-specific powers for the present time, and that these powers be reviewed once the NBN is implemented.

Areas where powers are needed

A range of potential impediments to competition may arise in the content services market. Specific issues identified in submissions to the Review included the extent of access to premium content[10] and the bundling of content and carriage services.[11] This section provides an overview of potential content-related competition issues.

5 ACCC, submission on the interim report, p. 4.
6 Macquarie Telecom, submission on interim report, p. 5.
7 See submissions on interim report from ASTRA, pp. 12–13; APRA/AMCOS, p. 4; and Foxtel, pp. 24–25.
8 See Appendix E for an overview of international approaches to regulation of competition in communications markets.
9 ACCC, submission on interim report, p. 7.
10 See, for example, submissions on interim report from Optus, p. 2 and Macquarie Telecom, pp. 4–5.
11 ACCC, submission on interim report, p. 3.

Exclusive content rights

Exclusive content rights arrangements are not necessarily anti-competitive—such arrangements can encourage investment in content and a diversity of product and service offerings. However, access to premium content, such as first-release movies and live sport, can be vital to ensure the success of media platforms, including new and emerging platforms. Innovation, competition and positive consumer outcomes may be threatened where exclusive content rights prevent such access. For example, where premium content is 'locked' to an incumbent for an extended period, entry into the market could be difficult for new players.

In a submission to the Review, Optus noted access to premium content as an important issue and called for:

> the implementation of a carefully designed content access regime to overcome the anti-competitive effects of the bundling of exclusive premium content and promote competition in the market for telecommunications services.[12]

Bundling

Bundling can provide a range of benefits, including allowing service providers to exploit economies of scale and scope, and offering users lower retail prices, quality improvements and lower transaction costs from consolidated billing arrangements. However, bundling may generate competition concerns in, for example, cases where access to premium content is dependent on the acquisition of other products,[13] or where it reduces competition by leveraging market power from another market.[14]

Network neutrality

The term 'network neutrality', or net neutrality, reflects the principle that networks should not discriminate against or prioritise specific services, applications or content delivered over the internet. Internet service providers (ISPs) may sometimes employ network management practices, such as slowing down some users' traffic to avoid or reduce network congestion. However, there are concerns that internet traffic can be subject to management practices that are designed to limit competition and reduce innovation.

Metering

Some ISPs provide unmetered content to customers who access specific internet services that they control, often based on a relationship the ISP has with a third-party content provider. The term 'unmetered content' refers to content that ISPs exclude from the calculation of download caps,[15] allowing customers to access that content at no additional charge. This benefit is often provided to make a service more attractive to users.

Having access to unmetered content provides significant benefits to customers. For example, it increases the range of content and services they are able to access, and makes that range of services available at a lower price. However, the provision of unmetered content may also create competition concerns, where this practice is employed by dominant players in a market to keep out new entrants, or where customers of one ISP are allowed to access unmetered content from one particular content supplier.

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12 Optus, submission on interim report, p. 2.

13 For example, if customers wish to access certain video-on-demand content, they may be required to purchase or subscribe to internet and video-on-demand services from the same or related providers.

14 For a more detailed discussion, see ACCC, *Bundling in Telecommunications Markets*, August 2003, www.accc.gov.au/content/index.phtml/itemId/756876.

15 A download cap is a restriction fixed by ISPs to limit the volume of data downloaded by the user during a fixed period (e.g. one gigabyte a month). Once the user has reached the cap, the speed at which they access the internet is usually significantly slowed (known as shaping) or they are charged for excess data usage.

Regulatory approach to content-related competition

The scope of the regulator's powers should be as flexible as possible to allow it to respond to emerging issues. However, mechanisms should be put in place to hold the regulator accountable for how and when its powers are exercised. Like other legislative instruments, competition rules developed by the regulator would be subject to tabling in and disallowance by Parliament.

Who should have content-related competition powers?

In reaching its conclusion on who should exercise content-related competition powers, the Review considered the nature of the powers and the industry sector where they may need to be exercised. The Review believes that the new communications regulator, which will have sector-specific skills and knowledge, will be best placed to deal responsively with issues in the constantly evolving content and communications markets. The Review also notes that this power sits best with the communications regulator as the ACCC is not inherently a rule-making body, although it does have the power to determine terms and conditions of access under the telecommunications access regimes.

How should content-related competition powers be exercised?

The regulator must be able to promote competition in the content market and also offer certainty for industry and for potential market entrants.

A key issue for consideration is what factors or processes should trigger the regulator's use of its rule-making powers. The Review recommends that the regulator be able to exercise the powers only after a public inquiry has been conducted.

Where it identifies that an investigation and public inquiry process is warranted, the regulator should be able to use information-gathering powers in conducting that investigation. An investigation and public inquiry process could be triggered by:

- complaints by industry or members of the public
- ministerial direction to investigate and report on a particular content issue (which would involve the minister tabling a request before Parliament)
- referral by the ACCC
- ongoing monitoring of the market by the regulator.

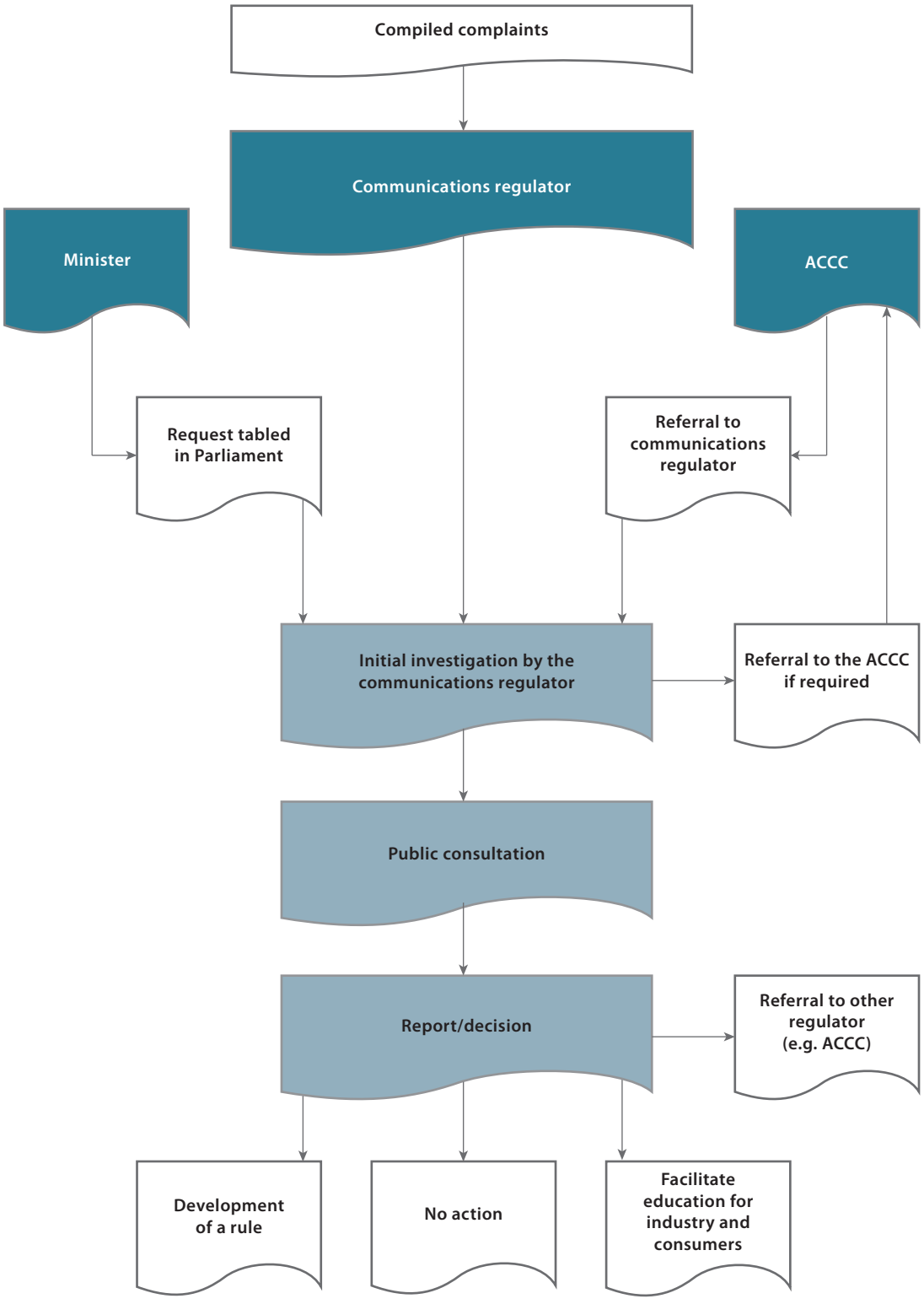
The outcome from an investigation and public inquiry process could include:

- no action (regulatory forbearance)
- advising industry and users on best practice
- a reference to the ACCC for possible action under the CCA
- development of a rule or rules to promote competition.

Sanctions for breaching a rule could include remedial directions and seeking court orders.

Figure 3.1 illustrates how the content-related competition powers could operate.

Figure 3.1: Process for the regulator to make content-related competition rules



The regulator's powers should complement the existing powers of the ACCC, and should be exercised in coordination with the ACCC. Where the regulator determines that a particular issue, or a particular aspect of an issue, would be better dealt with by the ACCC, the regulator should have the power to refer it to the ACCC for further investigation. The ACCC and the regulator should be permitted to share relevant information. This could be in the form of a memorandum of understanding or similar arrangement, such as that between the communications regulator (Ofcom) and the competition regulator (the Office of Fair Trading) in the United Kingdom.[16]

Peripheral content-related competition issues

Retransmission and copyright

Retransmission of free-to-air television signals is allowed in certain circumstances under existing copyright and broadcasting legislation. In these circumstances the permission of the broadcaster is not required provided that equitable remuneration is paid to the rights holders of the underlying content in the broadcast (for example films, music and screenplays). There is currently no requirement to remunerate the broadcaster for retransmitting their signal.

In a submission to the Review, Free TV Australia called for the existing regime to be updated to strengthen broadcasters' rights in relation to remuneration for retransmission of their signal.[17] In particular, it suggested the implementation of a US-style 'must-carry' regime. Under the US scheme broadcasters have the option of either requiring that free-to-air services are carried on a cable provider's system if the free-to-air broadcaster requests it, or requiring that the free-to-air broadcaster is remunerated where the cable provider chooses to retransmit the signal.

Other submissions—including from ASTRA, the Australian Content Industry Group and the Australian Directors Guild[18]—noted that copyright-related issues in general may have implications for investment in the content services market. Advances in technology and evolving business models are providing new ways of accessing and distributing content, which are likely to have implications for content rights holders, and for users, in the converged environment. These changes have been highlighted in recent developments, such as the ruling of the Federal Court on Optus's cloud-based TV Now service, which allows customers to record and watch free-to-air broadcasts on their computers or mobile devices. The Federal Court ruled that this service does not infringe any rights conferred by the *Copyright Act 1968*.[19]

Noting the recommendation that there be no licence required to provide any content service (see Chapter 1), the current retransmission rules will need to be reviewed. Attorney-General Nicola Roxon announced in February 2012 that Professor Jill McKeough will lead an Australian Law Reform Commission (ALRC) review into the operation of copyright in the digital environment.[20] The Convergence Review proposes that the issue of retransmission be examined as part of this ALRC review. The Review also proposes that in investigating content-related competition issues, the regulator should have regard to copyright implications and be able to refer any resulting copyright issues to the relevant minister for further consideration by the government.

16 Office of Fair Trading (UK), *Letter from the Office of Fair Trading (OFT) Setting out OFT/Ofcom Concurrency Arrangements*, Ofcom, 18 December 2003, www.ofcom.org.uk/about/organisations-we-work-with/letter-from-the-office-of-fair-trading.

17 Free TV Australia, submission on interim report, pp. 11–12.

18 Submissions on interim report from Australian Subscription Television and Radio Association, p. 10; Australian Content Industry Group, pp. 1–2; and Australian Directors Guild, pp. 8–11.

19 *Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2)* [2012] FCA 34, www.austlii.edu.au/au/cases/cth/FCA/2012/34.html.

20 The Attorney-General for Australia The Hon Nicola Roxon MP, 'Professor McKeough to conduct ALRC copyright review', media release, 8 February 2012, www.attorneygeneral.gov.au/Media-releases/Pages/default.aspx.

Anti-siphoning scheme

The anti-siphoning scheme was introduced in 1994 with the aim of ensuring that television coverage of events of national importance and cultural significance were not siphoned off exclusively to subscription television services. To date, the anti-siphoning list has only included major sporting events that have traditionally been available on free-to-air television.

Under the current scheme, a subscription television broadcaster cannot acquire any right to televise an event on the anti-siphoning list unless a free-to-air television broadcaster already has the right to televise that event. An event is automatically removed from the anti-siphoning list a defined period before the start of the event; if the rights are not taken up they can go to other rights holders. Events can also be removed from the anti-siphoning list by the minister via a legislative instrument. Free-to-air broadcasters are not currently permitted to premiere, or exclusively show, an event on the anti-siphoning list on a channel other than their primary channel.

In November 2010 the Australian Government announced reforms to the anti-siphoning scheme, which were informed by a statutory review of the scheme conducted in 2009. The implementation of the announced reforms requires amendment to the *Broadcasting Services Act 1992.* Legislation to amend the scheme was introduced into the Parliament on 22 March 2012.

- The reforms to the scheme will introduce a two-tiered list. Tier A events acquired by a free-to-air television broadcaster will be required to be shown live on the broadcaster's primary channel with limited exceptions. Tier B events acquired by a free-to-air television broadcaster will be able to be premiered or shown exclusively on one of its other digital free-to-air channels and generally be required to be shown live or with a maximum delay of not more than four hours from the start of the event.
- All listed events acquired by a free-to-air television broadcaster will have to be shown in line with the rights held or else be offered first to another free-to-air broadcaster and then if necessary to a subscription television broadcaster.
- The amending legislation outlines a quota mechanism that allows the minister to specify the number and type of listed AFL and NRL weekly matches that free-to-air broadcasters should be able to acquire.
- New media content providers (for example, IPTV and other online service providers) that provide services to end-users in Australia will be prevented from acquiring exclusive rights to provide coverage of anti-siphoning list events that are held in Australia.

Many countries have similar mechanisms for ensuring that sport is shown on free-to-air television. However, the composition and rationale for listing certain events and the type of coverage expected on free-to-air television differs. This makes it difficult to directly compare Australia's list with international counterparts. However, Australia lists a greater number of individual events than most other countries that operate such schemes. The current Australian anti-siphoning list covers more than 1100 individual events, excluding the Olympics. In contrast, New Zealand has no listed events and the United Kingdom has a 'Group A' list of around 45 individual events, excluding the Olympics, for which live coverage rights must be made available to a free-to-air television broadcaster. The UK also operates a 'Group B' list of more than 600 individual events which can be shown on any platform, but free-to-air television must be offered edited highlights of delayed coverage of at least 10 per cent of the event, or 10 per cent of the day's play.[21]

21 Department of Broadband, Communications and the Digital Economy, *Sport on Television: A Review of the Anti-siphoning Scheme in the Contemporary Digital Environment,* discussion paper, August 2009, pp. 10–14.

While sport on free television is highly valued by Australians, the anti-siphoning scheme creates commercial benefits for the free-to-air television broadcasters at the expense of other platforms. Having the first opportunity to acquire exclusive premium sports rights gives the free-to-air broadcasters a competitive advantage in the market. The 2000 Productivity Commission report into broadcasting concluded that:

> The 'anti-siphoning' rules of the BSA aim to ensure free to air coverage of major sporting events and prevent their migration to pay television. Their success has been mixed because they do not ensure either the free to air or subscription operators broadcast listed events.
>
> There is some evidence that the anti-siphoning rules can have perverse effects, reducing rather than increasing total consumer access to broadcast sport. They harm sporting organisations and impose a significant competitive disadvantage on subscription broadcasters. Further, the provisions will become less effective as the boundaries between media break down and convergence proceeds.
>
> The benefits of the current anti-siphoning provisions can be achieved with a much less anti-competitive regime. New provisions should be adopted with a narrower list that includes only sporting events of major national significance. For these listed events, no one form of broadcasting (for example, free to air or subscription television or datacasting) should be able to obtain rights that exclude other forms.[22]

In a submission to the Convergence Review, ASTRA contended that the regime still reduces competition in the negotiation of broadcast rights to listed events, affecting the price paid and the nature of the rights acquired.[23]

Given that the anti-siphoning scheme was recently reviewed by the government and a bill to amend the scheme is presently before Parliament, the Review believes that it is not appropriate to recommend detailed changes at this time.

The Review supports access to important sporting events. The underlying public policy objective that the public have free access to key sports is still relevant. With each revision of the list since it was established in 1994, the number of listed events has been reduced. The Review considers that the size of the list should continue to be reduced.

Future technology and business models may allow a large proportion of the Australian population to watch live sport for free at the point of access on platforms other than free-to-air television and future reductions in the anti-siphoning rules should be considered against these developments.

The legislation recently introduced into Parliament referenced above provides for the minister to review specified provisions of the Act before 31 December 2014. In any event, the Convergence Review considers that a full review of the anti-siphoning scheme should be conducted within five years.

It would be consistent with the new approach recommended in this Review that the new communications regulator would administer any future anti-siphoning scheme.

22 Productivity Commission, *Broadcasting report no. 11*, 2000, pp. 29–30, www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport.

23 See ASTRA, submission to the open call for submissions, p. 7.

Implementation

The key implementation steps arising from the recommendations in this chapter are:

1. The content-related competition powers outlined in this chapter should be introduced as part of legislation establishing the new communications regulator.
2. As part of the process of establishing the content-related competition powers of the regulator, the regulator's role and responsibilities should be clearly defined, including the scope of powers and when they can be exercised.
3. The regulator should work with the ACCC to develop a memorandum of understanding that formally sets out the relationship between the two organisations, the nature of their interaction and the arrangements for exercising their complementary powers.
4. The regulator should develop clear guidelines and processes for the execution of its rule-making powers. These would include clear processes for engaging with industry and consumers when developing rules.
5. Once the rollout of the NBN is implemented, the telecommunications-specific competition powers should be reviewed. The content-related competition powers proposed in this report should also be reviewed at that time.

4. Content standards

One of the guiding principles of the Convergence Review has been that communications and media services available to Australians should reflect community standards and the views and expectations of the Australian public. Historically, this has been achieved through the development of codes and standards that address a range of issues and specific platforms.

The challenge is to ensure that media content standards match community expectations and that any regulation in this area is efficient, effective and only applied to the extent necessary to meet identified policy outcomes. This is made more difficult in a converged environment where there are rapid changes in technology. Community expectations will also change over time, and the context in which the content is delivered will vary.

Media content standards are intended to meet a range of policy objectives:

- preventing harm, by prohibiting access to illegal content and restricting access to inappropriate content
- providing clear information to content users about content that may be unsuitable or offensive
- promoting fairness, accuracy and transparency in media content that provides news and commentary
- ensuring the availability and appropriate scheduling of children's content
- dealing with other matters relating to program content that are of concern to the community (for example, protecting privacy and respecting cultural sensitivities).

The Convergence Review was asked to consider the findings of both the Australian Law Reform Commission review of the National Classification Scheme (the ALRC review)[1] and the Independent Inquiry into the Media and Media Regulation.[2] Both of these reviews were considerable pieces of work and made a valuable contribution to the debate on content standards regulation.

Taking into account these related reviews, as well as consultations and submissions to this Review, a new approach to content standards is proposed. The proposed approach addresses standards across different platforms, provides effective complaints and enforcement processes and has a strong focus on providing Australians with the information and tools they need to manage content in the digital economy.

Under this approach, two new bodies to address media content standards would be established. The new communications regulator would be responsible for media content standards and incorporate classification functions recommended by the ALRC, but would not handle news and commentary. Separately, there would be a new industry body responsible for media standards relating to news and commentary on all platforms.

The Review endorses the findings of the ALRC review and later in this chapter explores how its findings could be incorporated in the overall recommendations of the Convergence Review.

The Review considers that the Independent Media Inquiry recommendation to establish a statutory authority that would regulate news and commentary should be an option of last resort available to government. The Review is recommending an industry-led approach that is more likely to produce immediate results and a better long-term solution.

1 ALRC, *Classification—Content Regulation and Convergent Media: Final Report*, ALRC report 118, February 2012, www.alrc.gov.au/publications/classification-content-regulation-and-convergent-media-alrc-report-118.

2 The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, www.dbcde.gov.au/digital_economy/independent_media_inquiry.

Recommendations

10. There should be a technology-neutral and flexible approach to media content standards.

    a. The new communications regulator should be responsible for all compliance matters related to media content standards, except for news and commentary. This will include the responsibility for administering the new national classification scheme proposed by the recent Australian Law Reform Commission review. An independent classification board would be established as part of the organisational structure of the new regulator to undertake specific classification functions.

    b. An independent self-regulatory news standards body operating across all media should be established by industry to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.

        i. Content service enterprises should be required to be members of the news standards body, which should be established and adequately funded and resourced by its industry members.

        ii. As it is in the public interest that such a body be appropriately resourced, the government should make a financial contribution.

        iii. News and commentary providers that are not content service enterprises should be encouraged to join the news standards body.

        iv. The news standards body should have credible sanctions and the power to order members to prominently publish its findings.

        v. The news standards body should be able to refer to the communications regulator instances where there have been persistent or serious breaches of the media code. The communications regulator should also be able to request the news standards body to conduct an investigation.

    c. The new arrangements outlined at paragraph (b) should be implemented in stages and the co-regulatory broadcasting codes in relation to news standards should not be repealed until the communications regulator is satisfied that the new self-regulatory arrangements are working effectively.

    d. Content service enterprises should also be subject to:

        i. children's television content standards, where appropriate

        ii. other content standards made by the communications regulator where there is a case for regulatory intervention, with the starting point being the matters covered by the existing co-regulatory codes made under the *Broadcasting Services Act 1992*.

    e. Content providers that are not of sufficient scale and scope to be classified as a content service enterprise should be encouraged to opt in to content standards applying to content service enterprises, or to develop their own codes.

11. Where the communications regulator is responsible for approving and enforcing content standards, it should have:

    a. discretion to approve industry codes or adopt its own standards

    b. discretion to determine the most effective and efficient complaints and investigation procedures

    c. direct enforcement powers in response to a breach of codes or standards

    d. a graduated range of effective remedies to ensure compliance.

12. The communications regulator should also:

    a. certify whether complaints systems, privacy controls and other measures in self-regulatory industry codes meet best practice standards

    b. work with industry to provide transparent information to content users about what they can do to control access to content, building on government programs to educate consumers about media and digital literacy

    c. set technical standards that assist content users in managing access to content (such as parental locks or age-verification systems).

Are the current arrangements effective?

Content is currently regulated by a range of bodies and codes based on delivery platforms. Radio and television broadcasters are regulated by the Australian Communications and Media Authority (ACMA).[3] The ACMA makes regulatory standards for Australian content (see Chapter 5) and children's television content.[4] The current legislation also provides for radio and television broadcasters to develop and maintain codes of practice that reflect community standards.[5] These co-regulatory codes cover matters such as inappropriate or offensive content, fairness and accuracy in news and current affairs programs and complaints procedures.[6] Internet content is only subject to the prohibited content scheme in schedules 5 and 7 of the *Broadcasting Services Act 1992* (BSA), which also provides for a co-regulatory code to include measures aimed at preventing the provision of prohibited content. Newspapers have self-regulatory standards of practice administered by the Australian Press Council.

The ABC and the SBS have a statutory responsibility under their charters to develop codes of practice relating to programming matters and must notify the ACMA of those codes.[7] The ABC also has explicit responsibility under its statutory charter to ensure that the gathering and presentation of news and commentary is 'accurate and impartial according to the recognised standards of objective journalism'.[8] The SBS has a statutory duty to ensure that the gathering and presentation of news and information is 'accurate and balanced over time and across the schedule of programs broadcast'.[9] The BSA also makes provision for the ACMA to investigate complaints that the ABC or SBS have breached their code of practice and to make recommendations that they take action to comply with the code.[10]

Co-regulatory content codes under the BSA make reference to the National Classification Scheme, which provides for the assessment of material based on the impact of classifiable elements of themes, violence, sex, language, drug use and nudity.[11] The ACMA has used its power under the BSA to make technical standards for domestic reception equipment[12] by making a standard that requires parental lock capabilities with specified requirements in digital television receivers.[13]

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3 BSA, section 5.

4 BSA, section 122.

5 BSA, section 123.

6 BSA, sections 123(2)(a), 123(2)(c), 123(d), 123(h).

7 *Australian Broadcasting Corporation Act 1983*, section 8(1)(e); *Special Broadcasting Service Act 1991*, section 10(1)(j).

8 *Australian Broadcasting Corporation Act 1983*, section 81(1)(c).

9 *Special Broadcasting Service Act 1991*, section 10(1)(c).

10 BSA, sections 150–153.

11 *Classification (Publications, Film and Computer Games) Act 1995*. References to this Act are made in section 123(3A) of the BSA (in relation to commercial and community television broadcasting), section 123(3C)(a) of the BSA (in relation to open narrowcasting—films) and Schedule 6, clause 28(4) of the BSA (in relation to datacasting).

12 BSA, section 130B.

13 Broadcasting and Datacasting Services (Parental Lock) Technical Standards 2010.

Current industry and co-regulatory codes have been developed to address a range of content issues across specific platforms and for specific providers. The overall picture that emerges from the Review is that these content-specific, platform-specific and provider-specific rules are inconsistent, confusing and inflexible.

These findings are broadly supported by the concurrent reviews into classification (by the ALRC) and into news standards (by the Independent Media Inquiry). This lack of coherence was raised during the Review's consultations by a range of stakeholders, including Free TV Australia and Telstra:

> Current community standards protections are technology specific, resulting in inconsistent regulation of content across platforms and a lack of regulatory parity, which imposes costs and restricts competition.[14]
>
> The National Classification Scheme as it stands today is a complex arrangement of parallel and sometimes overlapping systems of classification.[15]

Convergence is putting increasing pressure on the current platform-specific approaches to content standards.

- There is a blurring of boundaries between traditional media platforms. For example, free-to-air broadcasters and newspapers have an online presence that includes video as well as text, but these content providers have different content standards and complaint structures.
- Emerging platforms, such as internet protocol television (IPTV), video-on-demand services and entertainment sites are not comprehensively covered by existing content regulation.
- The community expects the broadcast environment to be a safe place for young people based on time zones and access controls.[16] The availability of internet content on connected televisions means that viewers can jump easily between regulated broadcast content and unregulated internet content. While many users expect that the content they access will be regulated, with due warnings on television, the stark difference in content regulation between broadcast and internet-delivered content means they may inadvertently encounter inappropriate content.
- Mobile content is a fast-growing segment of online activity. Content delivered to smartphones and tablet devices such as apps or video is not subject to the same degree of regulation as other platforms. In addition, many tools that can be used to monitor and control access do not work on smartphones and tablets. Many content sites that offer safety modes to block content are not adapted for mobile devices.
- Some social media sites, aggregators and hosts of user-generated material deliver content that is only scrutinised if users complain. These sites have limited accountability for their content standards systems.

A new approach to media content standards

There is strong community and stakeholder support for effective media content standards. However, there are differing views about the extent of regulation that is appropriate and the best way of implementing standards.

Recent consumer research from the ACMA showed that Australians expect that different standards and regulatory approaches may need to apply to different types of content. The research revealed that illegal content, whether online or offline, was expected to be treated in a consistent manner. A second level of differentiation was made for 'professionally produced content' and a third level of differentiation for non-professional content that is produced by individuals, or user-generated.

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14 Free TV Australia, submission in response to open call, p. 39.

15 Telstra, consolidated submission in response to open call, p. 41.

16 ACMA, *Digital Australians—Expectations about Media Content in a Converging Media Environment*, October 2011, www.acma.gov.au/WEB/STANDARD/pc=PC_410199.

> Content produced by a traditional media organisation—whether for print or broadcast, and whether offline or online—was seen as professional content, produced for broad audiences. Consumers appeared to bring their expectations of regulation from traditional media they were familiar with, to similar content accessed online … Whether it was broadcast or online, professional content was expected by most consumers to meet community standards for taste and decency generally. News stories from traditional, reputable news organisations were expected to meet the same journalistic standards for accuracy and fairness, for example, whether in print, broadcast or online.[17]

There is a clear expectation that content users will have common protections from major media enterprises in relation to content standards on all platforms, including those that deliver their services through the internet.

Scope of media content standards

The Review has concluded that there should be a tiered approach to media content standards, which takes into account the specific policy objectives for different classes of content.

Media content standards would operate in conjunction with the general criminal and civil law that applies to content (for example, contempt and defamation). Content providers would also continue to be subject to laws regarding particular subjects (for example, restrictions on tobacco advertising, online gambling and advertisements relating to medicine).

The proposed new national classification scheme, administered by the new communications regulator, should regulate the classification of content across all media platforms.

Two additional obligations should apply to content service enterprises:

- Content service enterprises that provide news and commentary should be required to participate in a self-regulatory media industry scheme intended to ensure standards of fairness, accuracy and transparency of that content.
- Content service enterprises should also be subject to other content standards set by the regulator, where there is a clear case for legislative intervention (for example, in relation to children's television content).

Feedback on the Review's interim report raised the concern that content standards may not be enforceable in a digital environment, where content can be supplied from anywhere in the world. As outlined in Chapter 1, the definition of 'content service enterprises' is intended to target only the significant media enterprises that have a substantial revenue and business presence in Australia. Therefore the Review believes its recommendations on content standards are enforceable. The ALRC review also recommended that obligations to classify or restrict access to online content should apply to any content with an appropriate Australian link.[18]

Content providers that are not of sufficient scale and scope to be treated as content service enterprises should be able to opt in to the relevant obligations, or to seek accreditation as a provider that has robust and transparent self-regulatory arrangements. Opt-in and accreditation arrangements would provide users with confidence that content providers will comply with best practice standards and enhance the brands of such providers.

Social media and user-generated content sites should be encouraged to adopt self-regulatory practices, such as some proactive monitoring of content and transparency on complaint numbers and handling. 'Trusted site' accreditation would encourage industry participants to take greater responsibility for monitoring and policing user-generated content. Concerns about the level of self-regulation of social networking sites were highlighted in a 2008 investigation by the UK House of Commons Culture, Media and Sport Committee into online content:

17 ACMA, *Digital Australians*, p. 6.

18 ALRC report, recommendation 5–9, p. 12.

> It is not standard practice for staff employed by social networking sites or video sharing sites to preview content before it can be viewed by consumers. Some firms do not even undertake routine review of material uploaded, claiming that the volumes involved make it impractical. We were not persuaded by this argument, and we recommend that proactive review of content should be standard practice for sites hosting user-generated content.[19]

Application of standards across platforms

A number of stakeholders (including Free TV Australia, Ericsson and the SBS)[20] endorsed the broad principle that media content regulation should be technology neutral. The Communications Law Centre stated:

> It is important that regulation, including classification of content, is at arms' length from government and technology neutral, applying consistently across media and platforms.[21]

The Review considers that 'technology neutral' should mean that there are common and non-discriminatory content standards across delivery platforms. There should, however, also be flexibility for standards to be applied in different ways, depending on how services are delivered. Time-zone requirements, for example, are only relevant to linear content.

As Ericsson pointed out:

> Within the scope of regulated media services, it is possible that all regulatory obligations are NOT applied symmetrically i.e. further flexibility can be introduced by focusing on the different nature of regulated services such as linear – push services and non-linear –pull services.[22]

Complaints systems and enforcement

A new scheme for media content standards should include effective mechanisms for complaints handling and enforcement.

Complaints procedures provide public feedback on the adequacy of content standards, as well as providing the impetus for most investigations and the enforcement of standards. The growth in the availability of online content means that Australians can find it difficult to know who to contact and how to resolve content-related complaints. This complexity will increase as the volume of content expands. Recent ACMA research has found that, while participants were aware of mechanisms to complain about online content that may breach personal privacy or be regarded as inappropriate, they were sceptical about online content providers acting on complaints and were unaware of who to complain to if the online content provider did not resolve the issue.[23]

Many submissions to the Review contended that the current complaints arrangements for broadcasting and online content are not meeting community expectations in terms of timeliness, transparency and effective sanctions. For example, FamilyVoice Australia stated:

> The present scheme generally allows the broadcaster 30 working days to reply to the complaint. This is far too long and contributes to the inordinate time taken to finalise complaints.[24]

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19 UK House of Commons Culture, Media and Sport Committee, *Harmful Content on the Internet and in Video Games*, 2008, www.publications.parliament.uk/pa/cm200708/cmselect/cmcumeds/353/353.pdf.

20 Free TV Australia, submission in response to open call, p. 39; Ericsson, submission in response to open call, p. 6; SBS, submission on discussion paper on community standards, p. 7.

21 Communications Law Centre, submission on framing paper, p. 5.

22 Ericsson, submission in response to open call, p. 6.

23 ACMA, *Digital Australians*, p. 48.

24 FamilyVoice Australia, submission on community standards discussion paper, p. 1.

> Another issue that has not been managed well in the current regime is the reluctance to use available powers to impose penalties on broadcasters for breaches of codes of practice which are sufficient to deter them from repeat offending.[25]

The BSA makes extensive use of co-regulatory arrangements, where the industry develops and administers industry codes of practice and the regulator has powers to step in and make new binding standards only if the code is not working. Co-regulation potentially offers greater flexibility than direct regulation by harnessing industry knowledge and being more responsive to changes in technology and business models. However, regulatory schemes based around industry codes of practice are not always effective. ACMA research has identified the circumstances where these work best.[26]

The co-regulatory system as currently set out in the BSA results in a cumbersome and elongated complaints process. It also artificially limits the capacity of the regulator to directly enforce breaches of content standards that may be discovered as a result of investigating complaints.

For example, individual complaints alleging a breach of a co-regulatory code must be made in the first instance to the service provider. The complaint is generally only investigated by the ACMA if it has not been dealt with satisfactorily by the service provider. If the ACMA finds that a complaint is justified, it has limited powers to take direct action to address the complaint. It can act prospectively, in the case of a licensed broadcaster, by imposing a licence condition relating to the matters in the code. Once an industry code has been registered by the ACMA, it can only make a directly enforceable standard for a sector of the industry if it has found that the code has failed.[27] As the Independent Media Inquiry has pointed out, the BSA does not provide a timely model for dealing with complaints.[28]

ACMA research has shown that the community supports a range of options, with a focus on corrections in all cases, reinforced by apologies and restitution for more severe errors.[29] Providing the new regulator with a wide range of mid-tier enforcement options will provide the flexibility to take enforcement action that is proportionate to the severity of a breach of content standards.

This approach has been adopted in other jurisdictions. For example, the UK regulator Ofcom has a range of available sanctions, including:

- issuing a direction not to repeat a program or advertisement
- issuing a direction to broadcast a correction
- issuing a statement of Ofcom findings
- imposing a financial penalty, which may be as high as 5 per cent of a broadcaster's qualifying revenue.[30]

Where direct regulation is applied, the regulator should have the discretion to determine the most effective mechanisms for dealing with different kinds of complaints, including:

- whether complaints should in the first instance be lodged with the provider
- time limits for investigating complaints
- the extent to which complaints are responded to on an individual basis
- transparency and reporting of complaints handling.

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25 FamilyVoice Australia, submission on layering, licensing and regulation discussion paper, p. 3.

26 ACMA, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, June 2010, http://engage.acma.gov.au/self-and-co-regulation.

27 BSA, sections 130T, 130U.

28 Independent Media Inquiry report, pp. 179–80.

29 ACMA, *Community Attitudes to the Presentation of Factual Material and Viewpoints in Commercial Television Current Affairs Programs*, 2009, www.acma.gov.au/WEB/STANDARD/pc=PC_311852.

30 Ofcom, *Procedures for Consideration of Statutory Sanctions in Breaches of Broadcast Licences*, 1 June 2011, p. 2.

The regulator should have a broader statutory role (outside of any specific regulatory arrangements that apply to particular content standards) in:

- providing information to users about complaints procedures
- acting as a first point of contact for complaints referral so that concerns are directed to the appropriate body.

National Classification Scheme

In February 2012, the ALRC provided its report on government classification, *Classification—Content Regulation and Convergent Media*. In the report, the ALRC made recommendations to provide an effective framework for the classification and regulation of media content in Australia. The executive summary of the ALRC report is at Appendix F. The current National Classification Scheme plays an important role in prohibiting or restricting content that is offensive or inappropriate and providing information to people about content that may not be suitable for them or those in their care.

There was a broad consensus among stakeholders, endorsed by the ALRC review, that regulatory arrangements in relation to illegal or inappropriate content should apply in both the online and offline environments, along with specific additional protections for children. For example, the Australian Christian Lobby has argued that:

> regardless of platform, content should be regulated in a consistent fashion. Community standards and protecting the best interests of children are paramount considerations which go across all types of media.[31]

This view was shared by the Australian Council on Children and the Media:

> the regulation of content is expected by the Australian community, especially when it is easily accessed by children, and it continues to be needed.[32]

Submissions to this Review and to the ALRC review strongly supported the need for a new national classification scheme, administered and enforced by a single regulator, and covering the classification of media content on all platforms. The ALRC report has developed its scheme based on this position.[33]

Consistent with the regulatory principles adopted in Chapter 1 of this report, the proposed communications regulator should be responsible for administering the new national classification scheme, as well as other communications and media regulation. A new classification board responsible for making classification decisions and approving industry classifiers should be located within the new communications regulator. However, the new classification board should be independent of the regulator in performing its statutory functions.

This would ensure that there is a single convergent regulator, while maintaining the independence of the classification board for specific functions.

The Review also endorses other key features of the national classification scheme proposed by the ALRC. These include:

- obligations to classify and restrict content that are technology neutral and apply to content providers that distribute content to the Australian public[34]
- an obligation to classify feature films, television programs and computer games before content providers sell, screen, provide online or otherwise distribute them to the Australian public[35]

31 Australian Christian Lobby, submission in response to open call, p. 2.
32 Australian Council on Children and the Media, submission in response to open call, p. 4.
33 ALRC report, recommendation 5–3, p. 11.
34 ALRC report, recommendation 5–6, p. 11.
35 ALRC report, recommendations 6–1, 6–2, p. 26.

- new classification legislation that incorporates all classification obligations currently applying to media content (including publications, films and computer games currently subject to the *Classification (Publication, Films and Computer Games) Act 1995* and state and territory classification enforcement legislation; online and mobile content, which is currently subject to the regulatory regime under schedules 5 and 7 of the BSA; and broadcasting and subscription television content, which is currently regulated under the BSA)[36]
- powers for the regulator to approve industry codes setting out how providers will comply with the scheme (if there is no suitable code, the regulator should be able to make a standard)[37]
- a requirement for content providers to 'take reasonable steps' to restrict access to adult content (that is or is likely to be 18+ or X18+), where that content is sold, screened, provided online or otherwise distributed to the Australian public[38]
- broad discretion for the regulator whether to investigate complaints[39]
- measures to restrict access that are complementary to other measures such as cybersafety education and use of parental controls on devices.[40]

The ALRC review recommended that the new national classification scheme not mandate time-zone restrictions for broadcasting services, but suggested that these restrictions may be addressed in industry codes that are submitted as part of that scheme.[41] The ALRC also considered whether there should be a phasing out of time-zone restrictions imposed on commercial broadcasting services, in the context of the digital switchover and as parental locks become more widely used.[42]

> In the ALRC's view, time-zone restrictions as they currently apply to commercial broadcasting services may become unnecessary in coming years. The restrictions are becoming anachronistic as media content is increasingly available online, such as on catch-up services, and on subscription television services at all times of the day.
>
> Industry and the Regulator should therefore plan for the gradual phasing out of these restrictions, perhaps by implementing a public education campaign about how to use parental locks effectively. However, the ALRC does not recommend the immediate removal of mandatory time-zone restrictions.[43]

The Review agrees that time-zone restrictions should not be mandated under the new national classification scheme. However, as discussed later in this chapter, the regulator should be able to determine time-zone restrictions under children's content standards (or more general content standards) if this is necessary to address issues of community concern.

Prohibited or restricted online content

Current regulation

Schedule 7 of the BSA provides a scheme for regulation of prohibited or 'potentially prohibited' mobile or online content that has an Australian connection. The scheme includes provisions enabling the ACMA to direct the removal (or 'take-down') of prohibited online content in response to public complaints. Schedule 7 operates in conjunction with Schedule 5 of the BSA, which deals with online content hosted overseas.

36 ALRC report, p. 25.
37 ALRC report, recommendations 13–3, 13–4, p. 19.
38 ALRC report, p. 26.
39 ALRC report, recommendation 14–2.
40 ALRC report, pp. 15–16.
41 ALRC report, recommendation 8–4, p. 16.
42 ALRC report, para 8.4, p. 184.
43 ALRC report, paras 8.76, 8.77, p. 196.

Both schedules operate through a complaints-based system that is administered by the ACMA in cooperation with industry bodies and both aim to limit the availability of online content classified as MA15+ or higher under the current National Classification Scheme. Prohibited, or potentially prohibited, audiovisual content includes content that has been or would be classified as:

- RC or X18+ by the Classification Board
- R18+ by the Classification Board, and which is not subject to a restricted access system[44]
- MA15+ by the Classification Board, and which is provided for a fee and is not subject to a restricted access system.[45]

The ACMA investigates complaints about the availability of prohibited or 'potentially prohibited' content under this regulatory scheme. The ACMA may also investigate such content under its own initiative.[46]

Clause 118 of Schedule 7 provides for a statutory review of the regulatory scheme. The statutory review of Schedule 7 has been conducted as part of this Review and takes into account the operation of Schedule 5 (online content tested outside Australia). The report on the statutory review is at Appendix G.

Future regulatory approach

As mentioned above, the ALRC review has recommended that all content providers be required to 'take reasonable steps' to restrict access to adult content (which is or is likely to be 18+ or X18+) that is sold, screened, provided online or otherwise distributed to the Australian public.[47] The ALRC review suggested that what is 'reasonable' would depend on the delivery platform and could be addressed in relevant industry codes.

The ALRC approach recognises that online content platforms may not know they are hosting prohibited content. The obligation to take reasonable steps might be met, in the first instance, by ensuring that users have the ability to complain about prohibited content. The platform operator could then be obliged to take reasonable steps to restrict access to that content and respond to enforcement notices issued by the regulator.[48] The ALRC says that restricting access is the most effective approach, given the sheer volume of adult content online.

> Formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to a minimum needed to achieve a clear public purpose.[49]

The effect of these ALRC recommendations, if implemented by government, would be to replace schedules 5 and 7 of the BSA with a technology-neutral scheme for regulating prohibited or restricted content. The Review endorses this approach and notes the 'restrict access notices' proposed by the ALRC. The new regulator may also need to be able to issue take-down notices, similar to the powers of the current regulator (the ACMA) to issue take-down notices in response to complaints.

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44 The ACMA may declare that a specified access-control system is a 'restricted access system'. In making the declaration, the ACMA may have regard to the objective of protecting children from exposure to content that is unsuitable for children and protecting children under 15 from content that is not suitable for that age group, and such other matters the ACMA considers necessary.

45 BSA, Schedule 7, clause 20.

46 See BSA, Schedule 7, clause 1; Schedule 5, clause 2.

47 ALRC report, p. 26.

48 ALRC report, recommendations 10–1, 10–2, pp. 16–17.

49 ALRC report, p. 26.

Adopting the ALRC recommendations would result in changes in the regulation and availability of currently restricted online content. MA15+ content would no longer require a restricted access system,[50] while X18+ content, currently prohibited under Schedule 7, could be provided if there is a restricted access system.[51] The Review endorses this approach.

News standards

On 28 February 2012, the Hon Ray Finkelstein QC presented the *Report of the Independent Inquiry into the Media and Media Regulation* to government. The Convergence Review was asked by the Minister for Broadband, Communications and the Digital Economy to consider the recommendations of the Independent Media Inquiry report.[52] The Independent Media Inquiry report concluded that the current approaches to regulation had not been successful in ensuring the media are accountable and recommended the creation of a new statutory body, the 'News Media Council'.[53] This council would:

- set and enforce standards for news media across all platforms[54] and educate the media and public on these standards[55]
- investigate and resolve alleged contraventions of the standards based on complaints from the public as well as its own motions[56]
- be fully funded by government, but structured to ensure that it was free from government influence[57]
- be empowered to require a media outlet to publish an apology, correction or retraction, or afford a person a right of reply[58]
- prepare or commission reports on the state of the news media in Australia.[59]

The executive summary of the Independent Media Inquiry report is at Appendix H.

The Convergence Review has taken into account the findings and recommendations of the Independent Media Inquiry in developing its own approach to news standards. A comparison between the Independent Media Inquiry recommendations and the Convergence Review's approach is contained in Appendix I.

The importance of news standards

The Convergence Review believes it is important for news and commentary to adhere to standards of fairness, accuracy and transparency. Evidence to this effect came from community and stakeholder submissions to the Review and the Independent Media Inquiry's own extensive examination of the issues.

In a submission to the Convergence Review, the Australian Press Council emphasised the importance of having minimum standards for accuracy, fairness, balance, integrity, civility and responsibility in news and commentary, stating that these standards are of 'fundamental importance to the general public interest, including the maintenance of democratic governance'.[60]

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50 ALRC report, para 10.117, p. 254.

51 ALRC report, Recommendation 10-1 p. 237.

52 Media release from Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, dated 14 September 2011, 'Government announces Independent Media Inquiry'.

53 Independent Media Inquiry report, p. 290.

54 Independent Media Inquiry report, p. 291.

55 Independent Media Inquiry report, p. 293.

56 Independent Media Inquiry report, p. 292.

57 Independent Media Inquiry report, pp. 290, 292.

58 Independent Media Inquiry report, p. 9.

59 Independent Media Inquiry report, p. 293.

60 Australian Press Council, submission on framing paper, p. 1.

Professor Lesley Hitchens of the Faculty of Law at the University of Technology Sydney, in a submission to the Review, highlighted the importance of ethical standards such as accuracy, fairness, transparency and independence in the quality of content—especially information and commentary—in providing:

> a way for the content to be mediated for the audience in terms of its authenticity, trustworthiness, and reliability, and offer[ing] a means whereby the public can negotiate the vast mass of information which can be accessed in the converged environment.[61]

However, any solution to the problem of enforcing such standards should also give due weight to freedom of expression.[62] The Independent Media Inquiry report also acknowledged a related concern that the government could regulate the media in its own interests, with the aim of limiting or preventing the media's ability to scrutinise the government.[63]

Current standards for news media

There is broad consensus on the standards that are expected of the news industry. The Independent Media Inquiry examined at length the standards or codes of ethics that are currently in place at major newspapers and news organisations and the co-regulatory codes observed by broadcasters. It concluded, in agreement with a similar international examination by the English academic Richard Keeble, that the codes have the following common values:

- fairness
- separation of fact and opinion
- the need for accuracy linked with the responsibility to correct errors
- condemnation of deliberate distortion and suppression of information
- maintaining of confidentiality of sources
- upholding journalists' responsibility to guard the citizen's freedom of expression
- recognising the duty to defend the dignity and independence of the profession
- protecting people's right to privacy
- respecting and seeking out the truth
- avoiding discrimination on grounds of race, sexual orientation, gender, language, religion or political opinions
- avoiding conflicts of interest.[64]

While the standards are largely the same, the methods and extent to which they are enforced differ by platform.

The print media, including online publications, are subject to internal self-regulatory guidelines. The Australian Press Council oversees a self-regulatory standard of practice for its members, which consists of all major and some smaller news publishing organisations.[65]

Standards are enforced on broadcast news and current affairs through co-regulatory codes of conduct registered with the ACMA. Broadcasters may voluntarily apply the same standards to their online activities.

Online publishers of news and commentary are not generally subject to any form of news media standards regulation apart from general laws such as defamation and contempt.

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61 Lesley Hitchens, submission on framing paper, p. 2.
62 Independent Media Inquiry report, para 11.32, p. 287.
63 Independent Media Inquiry report, para 2.93, p. 52.
64 Richard Keeble, *Ethics for Journalists*, Routledge, 2001, p. 14, cited in Independent Media Inquiry report, p. 196.
65 Australian Press Council, 'Who we are', www.presscouncil.org.au/who-we-are.

The need for a new approach

While there is broad agreement on the standards that should apply to news organisations, there is considerable debate about whether they are achieving those standards and if changes are required.

The Independent Media Inquiry received 762 'short submissions' which it said were from people who were 'dissatisfied with media performance'. Of these, 460 submissions raised concerns related to accuracy, fairness and balance.[66]

The former chair of the Australian Press Council, Professor Ken McKinnon, in his submission to the Independent Media Inquiry, pointed out several examples of systemic errors that trespass constantly on the fundamental principles of fairness, accuracy and balance:

- bias in the reporting of government affairs
- obsessive attempts to influence government policy by day-after-day repetition of issues with little or no new information of news value
- opposition to government policy which is commercially driven
- the unfair pursuit of individuals based on information that is inaccurate
- the failure to separate news from comment
- treating expert and lay opinion as being of equal value or deliberately selecting opinions opposed to government policy while ignoring opposite views
- overuse of pejorative adjectives in reports of issues with which the media outlet does not agree.[67]

In 2000 the Senate Select Committee on Information Technologies, in its report *In the Public Interest: Monitoring Australia's Media*, found that 'self-regulation in the print media industry appears to be failing the community. In the television and radio industries, co-regulation has attracted widespread criticism'.[68] The conclusion of the Independent Media Inquiry was that the current methods of regulation have 'not been successful in dealing with irresponsible reporting'.[69]

There is also a concern from a convergence perspective that there is currently no consistency in the regulation of news content between platforms.

In accordance with the general approach of the Convergence Review, there is no justification for news and commentary to be subject to different systems for complaints and enforcement depending on the platform on which it is delivered. It is increasingly common for the same content to be published online and in print the following day.

This is an issue that has been recognised by the public. The Independent Media Inquiry received approximately 9600 comments calling for 'the creation of one strong and independent regulator that can hold all media to the same standards of conduct'.[70] The Australian Press Council, in a submission to the Convergence Review, stated that:

> The rapidly growing risks of manifestly inconsistent standards being applied between the two regulatory systems and of confusion and uncertainty about their respective areas of responsibility can cause considerable unfairness for complainants, would-be complainants, publishers and broadcasters. They can also weaken the efficiency, effectiveness and credibility of regulators.[71]

66 Independent Media Inquiry report, p. 350.

67 Professor Ken McKinnon, submission to the Independent Media Inquiry, 2011, pp. 5–6.

68 Senate Select Committee on Information Technologies, *In the Public Interest: Monitoring Australia's Media*, 2000, www.aph.gov.au/senate/committee/it_ctte/completed_inquiries/1999-02/selfreg/report/contents.htm.

69 Independent Media Inquiry report, p. 282.

70 These comments were facilitated by the advocacy organisation Avaaz. See Independent Media Inquiry report, p. 349.

71 Australian Press Council, submission in response to open call, p. 5.

The Independent Media Inquiry report also summarised the deficiencies it identified in the current self-regulatory arrangements administered by the Australian Press Council:

- lack of awareness of the council and its role
- inability to properly investigate a complaint for lack of binding powers
- lack of resources and funding
- insufficient powers of enforcement
- appearance of lack of independence from the publisher members
- insufficient streamlining of complaints procedures
- the ability of members to withdraw membership or reduce funding.[72]

In the light of the findings of the Independent Media Inquiry and submissions to the Convergence Review, the Review has concluded that the current system for regulating news media is not effective.

Convergence Review approach to news and commentary

A starting point for the Convergence Review is to promote consistency between platforms while being deregulatory where possible. The key features of the Convergence Review's approach include:

- major media organisations should be required to participate in any scheme regardless of platform and not be able to 'opt out'
- any scheme should have adequate funding, a majority of which should come from the industry
- sanctions for failure to meet standards should be meaningful and credible
- regulation should not impinge on free speech and an independent press.

The Convergence Review acknowledges that establishing a new publicly funded statutory authority with direct regulatory powers in relation to news standards is an option available to government for delivering reform in this area. However, the Review agrees with the point made in the Australian Law Reform Commission's 2007 discussion paper on its review of Australian privacy law, that 'appointing an independent government body to oversee the media is a measure of last resort'.[73]

Given that there is no longer any rationale to treat print and broadcast media differently, the Convergence Review believes there should be a single cross-platform body responsible for news and commentary standards. There are two options. One option is to move print and online media into statutory regulation consistent with the recommendations of the Independent Media Inquiry. The other option is to move broadcast news and commentary into a self-regulatory structure together with print and online media.

The Convergence Review has adopted a deregulatory approach and therefore proposes the self-regulatory structure for all news and commentary in the first instance. This will allow the industry to demonstrate the effectiveness of platform-neutral, self-regulatory arrangements. Once this scheme has operated for a period of time, the government can determine whether self-regulation is working or whether further measures should be considered.

The Review has concluded that a media industry scheme with an independent governance structure is the most effective way of promoting standards, adjudicating on complaints, and providing timely remedies. It would also avoid the sensitivities associated with direct regulation of journalism, which plays such a key role in scrutinising the processes and activities of government.

72 Independent Media Inquiry report, pp. 237–38.

73 ALRC, *Review of Australian Privacy Law*, discussion paper no. 72, vol. 1, 2007, para 38.105, p. 1109.

The Review proposes that the government first test the effectiveness of a self-regulatory arrangement that operates across all platforms. Under this approach, content service enterprises would be required to join and adequately fund an independent self-regulatory industry body which would develop self-regulatory standards for news and commentary and adjudicate complaints. As stated, this body would be predominantly funded by industry with some government contribution.

The news standards body would set clear goals to be achieved within a specified time frame. If, on review, this industry-led body was not effective, the government would have the last resort option of introducing some direct statutory measures.

News standards body

The Review proposes that an independent news standards body, operating across all platforms, be established by the industry to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.

The proposed news standards body would be independent of government. Government would not dictate its form, structure and operation. Legislation would require providers of news and commentary that qualify as content service enterprises (see Chapter 1) to become members of a standards body that meets specified requirements covering:

- the appointment of a board of directors, a majority of whom would be independent from the members
- adequate funding and resourcing of the body and its operations
- the establishment of standards for the production of news and commentary, including specific requirements for fairness and accuracy
- the maintenance of an efficient and effective complaints-based scheme
- a flexible range of remedies and credible sanctions, including the power to order members to prominently and appropriately publish its findings on the relevant media platform.

It is important to note that the current Australian Press Council regime where members can opt out or reduce funding is not an acceptable situation. The structural weakness of this purely self-regulatory model is addressed under the Review's approach, which will ensure that all content service enterprises are subject to standards and sanctions set by the news standards body.

Professional news and commentary providers that are not of sufficient scale to be classified as content service enterprises should be encouraged to join the news standards body and to participate in the regulatory scheme.

Membership of the news standards body could be a condition of retaining legal privileges currently provided for news and commentary in Commonwealth legislation.[74] In particular, it seems reasonable that only those organisations that have committed to an industry self-regulatory scheme for upholding journalistic standards of fairness and accuracy should be entitled to the exemptions from the provisions of the *Competition and Consumer Act 2010* concerning misleading and deceptive statements and from the obligations of *the Privacy Act 1988* that would otherwise apply to those organisations. However, there is not the same argument for applying this requirement to laws protecting journalists' sources.[75] These laws apply to information collected by individual journalists, who might be freelance journalists rather than employees of an organisation.

As outlined earlier in this report, the Review has found that Australians continue to access news and commentary generated by traditional sources whatever platform they use. The Review believes that targeting large news and commentary providers, consistent with the content service enterprise concept, is the most

74 Independent Media Inquiry report, pp. 127–36.

75 See, for example, *Evidence Act 1995,* section 126H; BSA, section 202(4)).

effective approach. By comparison, the Independent Media Inquiry report set a much lower requirement for coverage by its proposed scheme, recommending that regulatory news media standards should be applied to a publisher that distributes more than 3000 copies of print per issue or a news internet site with a minimum of 15 000 hits per year.[76] The Review considers that this threshold would be far too low and would require a very resource-intensive complaints and enforcement system.

The majority of the news standards body's funding should come from its members. Government should make some financial contribution—for example, to meet a funding shortfall or to fund specific projects—as it is in the public interest that such a body be appropriately resourced. The Review notes the recommendation from the Australian Press Council that at least one-third of funding should come from government or other non-media sources.[77] The Review concludes that the body should always remain majority industry funded.

The news standards body would be expected to impose credible sanctions on its members and have the power to order members to prominently and appropriately publish its findings on the relevant media platform. It should also be able to refer to the communications regulator any cases where there have been significant or persistent breaches and a member has refused to comply. The regulator should be able to request the news standards body to investigate an issue.

Application to ABC and SBS

The Review has also considered whether the ABC and SBS should be required to join the news standards body. The advantage of such a requirement is that it would ensure that all major news providers were subject to a common system of news standards and complaints procedures.

The ABC and SBS have distinct statutory obligations and processes of oversight (for example, parliamentary committee scrutiny) that do not apply to the commercial sector. On balance, the Review considers that the ABC and SBS should not be required to participate in the news standards body. However, in developing their own codes, the ABC and SBS should be required to take into account the standards and complaints procedures determined by the news standards body.

Phased implementation

There should be a phased and managed process for the establishment, operation and review of the news standards body.

Until the establishment of the news standards body, the Australian Press Council would continue in its current role and could potentially expand its coverage to include online news providers. The current co-regulatory broadcasting codes in relation to news and commentary would also continue to apply through the ACMA or the new communications regulator during this interim period.

Once established, the news standards body would cover all platforms and would replace the functions currently performed by the Australian Press Council and the ACMA. It would also cover online news and commentary provided by content service enterprises.

Incorporating broadcasters into one news standards body alongside print and online would be a considerable change from existing arrangements. The body should be encouraged to develop rules and sanctions that take into account the breadth of its membership.

The operation of current co-regulatory codes for news standards in the broadcasting industry should remain in place until the new body can adequately address complaints across all platforms, particularly broadcasting.

76 Independent Media Inquiry report, para 11.67, p. 295.

77 Australian Press Council, submission on interim report, p. 6.

Arrangements would need to be in place for a handover to the news body to avoid both bodies investigating complaints in parallel. After three years, the communications regulator would conduct a review into whether the new arrangements are effective and make a decision on whether those co-regulatory codes should be reinstated or abolished.

As an outcome of the review, the regulator could recommend that either:

- the news standards body should continue to function in its current form
- legislative requirements for content service enterprise membership of the body should be adjusted to improve the effectiveness of the body, or
- the body should be dissolved on the grounds that it has been ineffective, and that there should be direct statutory measures.

Children's content standards

Throughout the Review's consultation process, one of the clearest messages was the need to protect children from harmful or inappropriate content.

Broadcast program standards are aimed at providing a 'safe' place for children to view content appropriate to their age group. The Review has considered whether the traditional approach is still effective or necessary in a converged environment.

Current arrangements

The ACMA determines standards relating to programs for children for commercial television licensees.[78] The Children's Television Standards[79] are the primary regulatory requirements for children's television programs and provide safeguards and obligations for programming during designated children's viewing times on commercial free-to-air television. They set out certain bands of the day when children's content can be shown. Children's content is classified as either 'P' content, which is suitable for pre-school children, or 'C' content, which is suitable for older children. The P band is between 7.00 am and 4.30 pm Monday to Friday. The C band is between:

- 7.00 am and 8.30 am Monday to Friday
- 4.00 pm and 8.30 pm Monday to Friday
- 7.00 am and 8.30 pm Saturday, Sunday and school holidays.

Broadcasters are required to nominate periods within these bands where P and C content will be shown. With limited exceptions, such as live sport, only P and C material can be shown within the nominated periods. Schedules with nominated periods must be provided to the ACMA for approval in the year before the schedule begins.

The current Children's Television Standards also include a number of provisions for non-programming–related material such as news bulletins, advertising and program promotions that are shown during programming produced specifically for children. These provisions relate to inappropriate content that may upset children or provide undue pressure and influence through the use of characters, prizes and promotions in advertising.

The Children's Television Standards include requirements for broadcast channels to broadcast a minimum amount of suitable Australian children's programming in suitable children's viewing time zones.

78 BSA, section 122.

79 Children's Television Standards 2009, available at www.acma.gov.au/webwr/aba/contentreg/codes/television/documents/childrens_tv_standards_2009.pdf.

These requirements are discussed in more detail in the chapter on Australian content (Chapter 5). This section deals specifically with the protection of children from inappropriate content, in particular during times when children are the most likely audience.

Community television broadcasters are not subject to the Children's Television Standards, but their co-regulatory codes include provisions relating to program classification, provision of consumer advice and time-zone restrictions. Subscription broadcasters also have classification and consumer advice requirements for children's programming established under separate industry codes of practice.[80] There are no equivalent requirements for internet and mobile content.

The Review notes that the ABC provides a comprehensive range of content suitable for children, although this is not a regulatory requirement.

Is there a continuing need for children's television standards?

Submissions expressed mixed views about the ongoing need for and effectiveness of some children's television standards. The Australian Council on Children and the Media was one of a number of stakeholders that saw a continuing need for parental assistance in the identification and selection of programs for children both offline and online:

> if anything, parents are even less well-equipped now to go it alone in protecting their children. The content and carriage environments are so much more complex, and ever changing.[81]

Others, including Telstra, questioned whether a different emphasis is needed in an online environment:

> time zone classifications are both outdated and unnecessary in a modern convergent environment.[82]

ACMA research has found that:

> Most participants saw an ongoing role for current policy mechanisms (time zoning, ratings, classifications, and consumer advice and content warnings) for protecting children from unsuitable content broadcast on free-to-air television. But they recognised that some of these would be difficult or impossible to apply in an online setting, such as time zoning.[83]

Movie Network Channels pointed to the need for different standards to apply, depending on the nature of the service and how it is accessed by content users:

> The community may continue to expect, for example, to be able to rely on commercial and national broadcasters providing content suitable for younger audiences at particular times … In contrast, subscription television customers would expect to be able to view the content they want when they want, with the assurance that reliable parental controls enable access to content unsuitable for children to be restricted.[84]

The overwhelming majority of all viewing is still free-to-air television,[85] and viewers expect commercial and public broadcasters to provide content suitable for younger audiences at particular times.

The Review received submissions from Free TV Australia[86] and others arguing that children's content obligations and associated time-zone restrictions are too restrictive and no longer reflect the habits of the target audience. The Review has noted these arguments but has concluded that maintaining children's

80 BSA, section 123(2)(b).
81 Australian Council on Children and the Media, submission on framing paper, p. 2.
82 Telstra, consolidated submission in response to open call, p. 41.
83 ACMA, *Digital Australians*, p. 7.
84 Movie Network Channels, submission in response to open call, p. 5.
85 OzTAM, *Consolidated Metropolitan Total TV Shares of All Viewing, Week 10 2012 (04/03/12—10/03/12).*
86 Free TV Australia, submission in response to open call, p. 41.

content in particular time zones remains important. However, the Review considers that broadcasters should have the flexibility, as outlined in Chapter 5, to meet that obligation on any of their digital multichannels.

Research by the ACMA on children's viewing patterns on free-to-air and subscription television suggests that there could be wider viewing windows during the morning and evening time zones than those mandated under current standards.[87]

As discussed below under the heading 'Technical tools and standards', tools that assist parents in identifying age-appropriate content and restricting program access are becoming more widely available, including parental lock standards that apply to digital television sets sold in Australia since February 2011. As noted by the ALRC, over time these tools may reduce the reliance on time-zone restrictions as the primary means of identifying and accessing age-appropriate content.[88] However, tools like parental locks that need to be activated by the user have a low take-up rate and their adoption would need to be proven before any changes were made.

Proposed legislative arrangements

The Review proposes that the new communications regulator have the discretion to set standards for children's television content for relevant content service enterprises, either by adopting an industry code or making its own standards, like the current Children's Television Standards.

While many children's content requirements are only relevant to linear broadcasting, their applicability to children's content provided on all platforms should be taken into account in implementing future standards.[89]

A number of interim measures should also be considered. The current scheme for specification of time zones has not resulted in the broadcasting of children's content during the peak children's viewing times of 6 pm to 9 pm.[90] The Australian Children's Television Foundation identified one cause of this as being restrictions on advertising during children's programming, which reduces the ability for broadcasters to generate revenue from these programs.[91] It has previously been noted by the ACMA that showing C programs after 6 pm would have a 'significant impact on broadcaster revenue'.[92] While there should continue to be requirements to provide children's content and to protect children from inappropriate non-programming material shown during and around children's content, the Review supports a range of measures to increase the flexibility of meeting these requirements:

- removing the requirement for pre-approval of program scripts by the regulator and a greater reliance on assessment during classification for children's programming
- reviewing the restrictions for advertising during C-rated programming (directed at children aged 5 to 14) to expand the opportunity for broadcasters to generate revenue during this programming
- greater flexibility for commercial free-to-air television broadcasters to meet their children's obligations via their multichannels.

At the completion of the digital television switchover, it would be appropriate to review the arrangements for specification of children's time zones. The effectiveness and take-up of parental locks and the effect of any extended time zones should be carefully examined before changes are made.

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87 ACMA, *Children's Viewing Patterns on Commercial Free-to-air and Subscription Television*, May 2007, p. 3, www.acma.gov.au/webwr/_assets/main/lib310132/children_viewing_patterns_commercial_free-to-air_subscription_television.pdf. Analysis of the hourly viewing trends on weekdays shows that the 0–14 age group commercial television audience averages just over 100 000 during the morning timeslots of 7.00 to 9.00 am, with a peak of 114 000 viewers during 8.00 to 9.00 am. During 6.00 to 9.00 pm, the 0–14-year-olds average more than 400 000, reaching a peak of 492 000 during 7.00 to 8.00 pm.

88 ALRC report, p. 196.

89 Australian Children's Television Foundation, submission on interim report, p. 4.

90 Australian Children's Television Foundation, submission in response to open call, p. 23.

91 Australian Children's Television Foundation, submission in response to open call, p. 24.

92 ACMA, *Review of the Children's Television Standards 2005*, 2009, p. 14.

Other standards and codes

The Broadcasting Services Act currently makes provision for sections of the broadcasting industry to submit co-regulatory codes to cover a range of other standards issues that are of community concern (for example, limiting advertising times for commercial broadcasters[93] and billing, fault repair, privacy and credit management for subscription broadcasters[94]).

The new communications regulator should have a general power to set content standards in relation to content service enterprises if there is a need for regulatory intervention. Relevant content standards could apply to particular categories of service (for example, free-to-air or subscription services) and take into account how the content is accessed by users. As noted previously in this chapter, the principle of technology neutrality does not demand that standards be applied in an identical way to all services.

The regulator should be able to determine content standards for broadcasters addressing matters that are included in existing co-regulatory broadcasting codes. The regulator should review the need for and effectiveness of these codes over time.

An emerging issue for the regulator will also be the extent to which standards or codes should cover the online activities of content service enterprises, particularly in relation to online advertising, which is not currently subject to content standards.

Media advertising is a particular area that should be monitored by the regulator, and one where new codes may be needed. Areas of potential concern include the amount and type of advertising on all platforms and issues of transparency.

The line between advertising and programming has blurred considerably in recent years as brands look for new ways to inject themselves into programming, rather than just appear in the commercial breaks. Sponsorship, product placement (where an advertiser negotiates for its product to be featured within a program) and the emergence of branded content (where a brand pays for content and is featured within it) all raise important questions relating to transparency.[95]

Users need to be informed when commercial relationships are the reason for content being featured in a program. The regulator should be able to build on and refine its approach to related issues addressed in existing co-regulatory codes on these matters.

User control

One of the clear messages received during the Review's consultations was that, while the wider range of content enabled by the internet brings great benefits, it is also increasingly complex for users to manage the content that is available. Content users need to be armed with appropriate information, technical tools, warnings about content, and skills so that they can access only the content they want to see.

Transparency

Transparency, trust and informed choice should be at the heart of a new approach to media content standards. A new scheme should recognise the central role of users in managing their access to content, particularly in the online environment. The new regulator's role should not be limited to making and enforcing standards

93 BSA, section 123(2)(f).

94 BSA, section 123(2)(k).

95 One recent example was the sponsorship agreement between McDonald's and Channel Ten to produce *It's A Knockout*. See A Meade, 'It's a Knockout deal as Ten buys show for half the price in brand-funded program', *Australian*, 5 December 2011, www.theaustralian.com.au/media/broadcast/its-a-knockout-deal-as-ten-buys-show-for-half-the-price-in-brand-funded-program/story-fna045gd-1226213603085.

or supervising regulatory codes. It should also be required to work with content providers to help educate Australian audiences and provide them with the information and tools they need to make informed decisions about suitable content for themselves and those in their care.

The regulator should build upon existing education programs currently undertaken by the Department of Broadband, Communications and the Digital Economy and the ACMA to promote digital and media literacy.

Technical tools and standards

Technical tools and standards help individuals to manage access to content. With the increasing availability and use of online content, individual access controls are likely to become a more important feature of the content environment. An ongoing challenge will be ensuring that content user tools can continue to be updated to accommodate changes in technology and business models for the supply of content.

There are two core types of technology-driven tools to help consumers with content access:

> *parental locks*, which can be applied both on an individual computer or access point and at a network level

> *age-verification systems*, which are more likely to be applied at a network and content service provider level.

Since February 2011, digital televisions sold in Australia have been required to comply with the parental lock standard, which enables television receiver settings to block certain channels.[96] A common practice among manufacturers is to include parental lock functionality for television sets and set-top boxes, but require it to be enabled by the user. It is not clear how many households are aware of parental locks and the percentage of households that activate them. One regulatory option would be to require parental locks to be preset on the sale of the devices so that users can opt out.

The current parental lock system does not cover internet-delivered content. There may be potential in the future to expand parental lock systems to broader online content, either through the addition of browser-style parental controls, or through the incorporation of trusted sites to the parental lock system. The parental lock system also has the potential to be used for other devices. In Japan, mobile phones sold to under-18s have the parental lock enabled. No similar standards currently exist in Australia.

Age-verification tools are another important way to restrict access to inappropriate online content. These can be as rigorous as requiring proof of age to access adult content or as simple as users having to supply a birth date that is not verified by the website. Age-verification tools are most likely to be applied at a network and content service provider level; in some European countries they have become mandatory for 'television-like' services.

Currently the technical tools are specific to platforms, devices and service providers and may rely on a degree of technical skill by the user.

Some submissions to the Review questioned the effectiveness of these systems. This view is reflected in the submission from the Australian Christian Lobby:

> Australian Christian Lobby rejects the view that parental locks are a suitable or adequate substitute for time-zone restrictions.[97]

Given the rapid changes in technologies and commercial business models, the Review proposes that the new regulator have a broad power to make technical standards (for example, in relation to parental locks and age-verification tools) to assist content users in managing access to content in the digital environment. This power to make technical standards should complement the regulator's role in educating and informing content users.

96 *Broadcasting and Datacasting Services (Parental Lock) Technical Standard 2010*, www.comlaw.gov.au/Details/F2010L02220.

97 Australian Christian Lobby, submission in response to open call, p. 4.

Implementation

In light of the discussion and recommendations in this chapter, there are some steps that can be taken in relation to media content standards before the new communications regulator is established by legislation. After the regulator is established, the Review envisages certain further significant steps in the implementation process.

Before the establishment of the new regulator

1. Media industries should be encouraged to conduct a comprehensive review of existing co-regulatory and self-regulatory codes with a view to harmonisation of codes and developing common standards.
2. Interim measures in relation to children's television standards and improving the current operation of Schedule 7 of the BSA can be implemented.
3. A new national classification scheme can be developed based on the ALRC recommendations that builds on industry action in step 1 and that can be implemented when the regulator is established.
4. The news standards body could be established by industry, with progressive coverage of print, online and broadcasting.

After the establishment of the new regulator

1. The regulator and the new independent classification board would commence operations.
2. Content service enterprises would be required to join the news standards body (if they had not already done so).
3. Broadcasting co-regulatory codes would be suspended for a review period and then repealed at the end of that period if the regulator is satisfied that the new arrangements are effective in replacing broadcasting codes.
4. The government would decide, in the light of the regulatory review, whether further legislative intervention is required to ensure appropriate standards of news and commentary.

5. Australian content: screen

The ongoing production and distribution of Australian content is a key issue for the Review. Since the inception of television broadcasting, governments of all persuasions have sought to ensure that Australian professional content is shown on our screens. Support for Australian content is based on the social and cultural benefits that come from programs that recognise Australian identity, character and cultural diversity. The Review received many submissions supporting the value of Australian content and the continuing need to promote its production in a converged media environment.

The proposals in this chapter focus on Australian drama, documentary and children's content as the main genres requiring ongoing support. Drama contains the most artistically rich content and has the greatest capacity to tell complex stories and convey social and cultural messages. Documentaries play an important role in informing opinion and can be viewed as complementary to drama. The need for children's programs is generally accepted, but this genre is typically less commercially successful due to its lower advertising revenues and limited audience.

These traditional genres are joined by the newer forms of content currently being produced and distributed through social media; these new forms of content are flourishing. Professional Australian drama, documentary and children's content will continue to be the most significant forms of programming in the short to medium term. However, this may change over time as new genres emerge.

While the Review found that the production and distribution of Australian content is generally healthy, the emergence of new online services, digital multichannels and on-demand programming makes the current support measures unsustainable in the longer term. Under the proposed uniform content scheme described below, content service enterprises that earn significant revenues from providing professional 'television-like' content to large audiences will be required to invest in the production of Australian content.

The Review also examined direct and indirect production incentives and has made a number of recommendations as to how these can be recast to support content production appropriate to a converged media environment.

Recommendations

13. The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in recommendations 14 and 15.

14. Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund.

15. The government should create and partly fund a new converged content production fund to support the production of Australian content.

16. Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.

17. Interactive entertainment, such as games and other applications, should be supported by an offset scheme and the converged content production fund.

18. The following transitional arrangements should apply for commercial free-to-air and subscription television broadcasters until they are included within the uniform content scheme:

    a. For commercial free-to-air television broadcasters:

        i. The existing 55 per cent transmission quota that is imposed on each broadcaster's primary channel should continue.

        ii. There should be a 50 per cent increase in Australian sub-quota content obligations for drama, documentary and children's content to reflect the two additional channels each broadcaster currently operates that do not attract any quotas.

        iii. The broadcasters should be able to count Australian content shown on their digital multichannels towards meeting the expanded sub-quota obligations.

        iv. The existing 80 per cent quota for Australian-produced advertising on each broadcaster's primary channel should be maintained.

    b. For subscription television providers:

        i. The 10 per cent minimum expenditure requirement on eligible drama channels should be maintained.

        ii. A 10 per cent minimum expenditure requirement should be placed on children's and documentary channels.

Existing arrangements for Australian content

The existing set of measures for Australian content focus on supporting its distribution by broadcasters (distribution measures) and supporting the production of Australian content by content producers (production measures). These two sets of arrangements are complementary and ensure continuous Australian content production and distribution.

Distribution measures

Australian content on free-to-air television

The rules relating to Australian programs on commercial free-to-air television are set out in the Australian Content Standard.[1] The standard is designed

> to promote the role of commercial television broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity by supporting the community's continued access to television programs produced under Australian creative control.[2]

The Australian Content Standard requires all commercial television broadcasting licensees to broadcast an annual minimum transmission quota of 55 per cent Australian programming between 6 am and midnight.[3] It also imposes specific minimum annual sub-quotas for Australian adult drama, documentary and children's programs.

The Australian content requirements for commercial free-to-air television are summarised in Table 5.1.

1 Broadcasting Services (Australian Content Standard) 2005.

2 Broadcasting Services (Australian Content Standard) 2005, section 4.

3 For the purposes of the Australian Content Standard and the Children's Television Standards, Australian programs include Australian official co-productions, New Zealand programs and Australian/New Zealand programs.

Both first-release and repeat programs may contribute to the transmission quota.

Table 5.1: Content requirements for primary channel of commercial free-to-air television

Content type	Minimum Australian content requirements
Overall	55 per cent of all programming broadcast each year between 6 am and midnight
Australian adult drama[a]	860 points of first-release Australian drama programs broadcast over a set three-year period between 5 pm and 11 pm and at least 250 points of first-release Australian drama programs broadcast each year between 5 pm and 11 pm
Australian C (children's) and Australian P (preschool) programs	260 hours of C material broadcast each year 130 hours of P material broadcast each year 50 per cent of the total time occupied by C periods[b] each year must be first-release Australian C programs All P programs broadcast must be Australian programs
Australian C (children's) drama	96 hours of first-release Australian C drama programs broadcast over a set three-year period in the C band[c] and at least 25 hours of first-release Australian C drama programs broadcast each year in the C band 8 hours of repeat Australian C drama programs broadcast each year in the C band
Australian documentary	20 hours of first-release Australian documentary programs broadcast each year between 6 am and midnight

a The drama score for an Australian drama program is calculated by multiplying the format factor for the program by the duration of the program. Different format factors apply to different program genres (Australian Content Standard section 11).

b C period means a period nominated by, or on behalf of, a licensee under Australian Content Standard section 9 during which the licensee will broadcast C programs.

c C band means the following periods: 7.00 am to 8.30 am and 4.00 pm to 8.30 pm Monday to Friday and 7.00 am to 8.30 pm Saturday, Sunday and school holidays.

Australian content in advertising

The objective of the rules for Australian content in advertising is to ensure that the majority of television advertisements are Australian made.[4] The rules require at least 80 per cent of the total advertising time (other than the time occupied by exempt advertisements) broadcast annually between 6 am and midnight to be Australian-produced advertisements.[5]

Subscription television

Subscription television broadcasting licensees that broadcast drama channels are required to maintain a minimum level of expenditure each year on new Australian drama.[6] At least 10 per cent of the total program expenditure on a subscription television drama service must be on new eligible drama programs.[7]

4 Television Program Standard 23—Australian Content in Advertising, section 3.

5 Television Program Standard 23—Australian Content in Advertising, section 5. Exempt advertisements include advertisements for imported films, videos and recordings or for live appearances by overseas entertainers and some community service announcements (section 8). 'Australian' is defined as a person who is a citizen or ordinary resident of Australia or New Zealand (section 6).

6 BSA, section 103B; see also Part 7, Division 2A. The scheme only applies to a 'subscription TV drama service', which is a subscription television broadcasting service devoted predominantly to drama programs.

7 BSA, section 103A. A drama program is an 'eligible drama program' if it would qualify as an Australian program, an Australian/New Zealand program, a New Zealand program or an Australian official co-production under the Australian Content Standard.

Production measures

Direct subsidies

Screen Australia is the Australian Government's primary agency for delivering direct investment in the independent screen production sector through grants, interest-free limited recourse loans and pro rata equity investment.

The 2010–11 budget allocation for Screen Australia's direct production investments was approximately $60 million, of which around $30 to $35 million went to content that had television as the primary distribution platform; around $2 to $5 million to innovative screen content including online and games; and around $22 million to feature film content.

Indirect subsidies

The Producer Offset is one of the principal incentive funding arrangements for the film and content production industries. Administered by Screen Australia, the Producer Offset complements distribution measures such as Australian content quotas and minimum expenditure requirements.

The Producer Offset is a refundable tax offset available to producers of content projects that are issued with a certificate by Screen Australia. As part of the assessment process for certification, Screen Australia determines a project's qualifying Australian production expenditure (QAPE).

If eligible, the producer will receive a refundable tax offset equal to 40 per cent of the QAPE for feature films or 20 per cent of the QAPE for other projects. The Producer Offset is one of three tax offsets available. The other two are the location offset and the post, digital and visual effects (PDV) offset. Collectively, these three are called the Australian Screen Production Incentive. The three offsets are mutually exclusive, and participants in the scheme are only eligible to claim for one of the offsets. Unlike Screen Australia funding, which is predominantly directed towards independent production studios, broadcasters are eligible to apply for and receive funding under the offset scheme.

To qualify for the offset the QAPE must reach certain expenditure thresholds. For example, the threshold for a feature film must be at least $500 000, and for a television series at least $1 million in aggregate and the QAPE per hour $500 000 to qualify for the offset.[8]

New forms of Australian content

Technological developments, particularly in the internet and social media, have revolutionised content production and distribution. The ability to produce content for others to consume is no longer the exclusive realm of professionals and large organisations. Now almost anyone can do it and increasingly Australians are grasping this opportunity to tell their stories.

User-generated content is flourishing, in both the amount and variety being produced and the amount being accessed by Australians. Popular online video content such as video blogging, DIY shows, product reviews and travelogues are produced and accessed by Australians. Typically, younger Australians are doing more of the production and consumption, but older Australians are increasingly embracing the opportunities presented by the online environment and social media.

The Review recognises that these forms of content are flourishing and offer substantial value in social and cultural terms. The Review is not recommending any additional regulation of this material. Despite the growth

8 See www.screenaustralia.gov.au/producer_offset/changes2011_QAPE.aspx, and Division 376, *Income Tax Assessment Act 1997*.

of new material, professionally produced content still has a crucial role to play and has a powerful cultural impact. Submissions also highlighted the need to support those employed in the industry to earn a reasonable living, develop skills, build sustainable enterprises and communicate their stories and visions to the widest possible audience.[9]

The Review considers that government intervention is necessary to ensure the production of content forms that the public considers valuable, but which would be under-produced if market forces alone were at play. In 2012, the content forms in need of such intervention remain Australian drama, documentary and children's programs. However, the situation may change in the future and the regulatory environment should be flexible enough to allow for this.

Drama, documentary and children's programs are not confined to traditional platforms. The ongoing popularity of these genres is driving the success of new platforms. For example Netflix, which provides drama, documentary and children's content, now accounts for a significant percentage of broadband traffic in the United States.

The need for continued support for Australian programs

The Review heard a range of views on measures to protect Australian content, ranging from no action through to greater protection. However, the social and cultural value of Australian content in all its forms was not contested.

The rationale for regulation that requires minimum levels of Australian content, and for direct and indirect subsidy schemes, is that without such measures inadequate levels of Australian content would be produced. This is primarily due to the widespread availability of international content, which can be sourced at much lower costs than Australian content, with the cost difference unable to be offset by advertising revenues.

This rationale is not universally accepted. For example, the Treasury noted:

> While the cost of particular programs is a factor in deciding what to buy or develop, it is unlikely to be the determining factor. Rather ratings, or consumer demand, should be the primary consideration. As such, Treasury is not swayed by the argument in the Committee's Paper that without regulation, Australian media companies will prefer foreign content over Australian content due to lower costs.[10]

The Review accepts that ratings are a key element in programming decisions, and that Australian content rates well.[11] However, the primary consideration for broadcasters in deciding whether to source international content or to invest in Australian content is: Does the potential increased advertising revenue from Australian content offset the higher costs, in light of the risk involved?

It is difficult to accurately determine the difference between the cost of international content rights and the cost of Australian content for Australian broadcasters. Complicating factors include the confidential nature of deals on acquiring content between networks and production studios, and the practice of buying these programs in bulk in what is known as 'output deals'. Other factors include equity investments by broadcasters; presales and non-broadcast revenues such as through DVD sales; and other forms of government support such as those offered by state, territory and Commonwealth screen funding agencies. In its submission to the Review, Screen Australia estimated that a typical cost difference might be in the order of $100 000 to $400 000 for licensing US content, and $350 000 to $1.4 million net cost for Australian content.[12]

9 Australian Directors Guild, submission in response to open call, p. 5.

10 Treasury, submission in response to open call, p. 13.

11 See, for example, www.screenaustralia.gov.au/research/statistics/wftvtop50titles.asp#Rag83361.

12 Screen Australia, submission in response to open call, p. 34.

PricewaterhouseCoopers has estimated that the indicative licensing costs for international content range from $75 000 to $125 000 per hour.[13] Costs for producing and licensing Australian shows range from $268 000 to $1.6 million, depending on the genre.[14]

While some Australian content may deliver higher ratings and therefore higher advertising revenues over time, in most cases this will not offset the substantially higher production costs. In its report on broadcasting the Productivity Commission noted:

> The broadcaster's main concern is the program's ability to generate a profit—that is, its advertising revenue relative to its cost. High cost programs with social and cultural value may be vulnerable to replacement by programs with a better revenue-to-cost ratio, even if the alternative is less popular with viewers and advertisers.[15]

What is the impact of removing existing quotas?

Research commissioned for the Review investigated the impact of Australian content requirements on the levels of expenditure on Australian content by commercial free-to-air and subscription television broadcasters. The economic modelling used in the analysis showed that there would be a significant drop in overall expenditure on Australian content in the absence of existing quotas and minimum expenditure requirements. The falls in expenditure were particularly acute in Australian documentary, drama and children's programming, which are currently subject to sub-quota protections. This is illustrated in Table 5.2.

Table 5.2: Estimated change in Australian program expenditure from the removal of Australian content requirements

	2008–09 expenditure ($m)	Change in expenditure (%)	Estimated new expenditure ($m)	Estimated % of expenditure after the removal of content quotas
Total Australian (excludes sport)	619.8	–43	350.8	57
Adult drama	132.1	–90	13.2	10
Children's—drama	12.7	–100	0	0
Children's—other	9.8	–100	0	0
Documentaries	26.7	–50	13.4	50
News and current affairs	111	–25	83.3	75
Light entertainment—variety	176.7	–25	132.5	75
Light entertainment—other	132.3	–25	99.2	75
Other programming	18.5	–50	9.25	50

Note: Excludes sport. Estimates are based on compliance results (where averages for each network have been aggregated) and adjusted ABS 8679.0 publication data from 2006 for non-regulated categories (figures have been normalised). Figures are indicative only.

Source: PricewaterhouseCoopers, *How Do Local Content Requirements Impact Australian Productions? Review and Analysis of Broadcast Sector Minimum Content Requirements*, report prepared for the Department of Broadband, Communications and the Digital Economy, May 2011, p. 49.

13 PricewaterhouseCoopers notes that the cost per hour could be as high as $150 000 to $250 000, noting that the output deals with studios often require broadcasters to purchase more content than is actually shown (PricewaterhouseCoopers, *How Do Local Content Requirements Impact Australian Productions? Review and Analysis of Broadcast Sector Minimum Content Requirements*, report prepared for the Department of Broadband, Communications and the Digital Economy, May 2011, p. 30).

14 PricewaterhouseCoopers, *How Do Local Content Requirements Impact Australian Productions?*, p. 29, quoting from Screen Australia, *Drama Report 09/10*, 2010.

15 Productivity Commission, *Broadcasting*, report no. 11, 2000, p. 383, www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport.

Research commissioned by the Review shows that more than 1300 direct full-time equivalent jobs in the broadcasting and production sectors would be lost with a flow-on effect to the broader economy if support for Australian content were removed.[16]

Submissions to the Review generally supported the effectiveness of content quotas. For example, after some analysis of Australian content on digital multichannels, the Australian Research Council Centre of Excellence for Creative Industries stated:

> in situations in which the commercial [free-to-air] broadcasters are not required to screen Australian content, they don't, so if quotas are removed from the main channels it is reasonable to assume that overall levels will decline dramatically as broadcasters screen cheaper imported or archival programming rather than commissioning and producing new Australian programming.[17]

The Review has concluded that effective content incentives are required to support the ongoing production and distribution of Australian drama, documentary and children's content in order to prevent a reduction in investment and production levels.

Are the existing distribution measures appropriate?

The significant variation in the scale of media services and enterprises means that Australian content obligations that may be appropriate for a large enterprise could put an unreasonable burden on a small enterprise. Australian content obligations should be appropriately targeted at those enterprises that stand to gain the most from delivering content services to Australians and have the financial capacity to invest in Australian content.

Existing measures are too narrowly focused on the main commercial free-to-air broadcast channels. While the main channels attract large audiences, their audience share is likely to continue to fragment over time as digital multichannels and other services evolve and gain in popularity. Unless the scope of Australian content measures is broadened to include a wider range of platforms, the amount of Australian content consumed will diminish as users move to other services.

There is also a strong equity argument for broadening the current reach of Australian content obligations. Australian content can be expensive to produce; the cost of producing some high-quality drama exceeds $1 million per hour. While the commercial free-to-air networks currently bear the brunt of this investment, the increasing diversity of the media landscape indicates that other content service enterprises also need to contribute if Australian content levels are to be maintained in the medium to longer term.

Non-broadcast platforms employ a range of content delivery models, including linear models (programmed content with a programmed schedule) and non-linear models (which deliver content at the request of the viewer). If the principle of regulatory parity is to be observed, content rules should apply to content service enterprises irrespective of the content delivery model used. However, the current quota system does not suit non-linear content delivery models, and it does not easily suit those enterprises that have no production capability, capacity or expertise to invest in or commission new work.

The minimum program expenditure model that applies to subscription television is more suitable in a converged environment as it adapts to an enterprise's financial capacity. However, a minimum expenditure model is also unsuitable for enterprises that offer non-linear services. It does not take into account new approaches to acquiring programming rights, such as revenue-sharing agreements, which make program expenditure a difficult number to quantify. A model based on investing a percentage of revenue in Australian content overcomes these issues by providing a measure that is consistent with all businesses and content delivery models.

16 PricewaterhouseCoopers, *How Do Local Content Requirements Impact Australian Productions?*, p. 61.

17 ARC Centre of Excellence for Creative Industries and Innovation, supplementary submission in response to open call, p. 2.

Governments in other countries are increasingly including new media services that provide non-linear content within the ambit of regulation. For example, in Canada—a country with content challenges similar to Australia's—the Canadian Radio-television and Telecommunications Commission requires video-on-demand services to ensure that minimum levels of local content are available and to contribute to a Canadian program production fund.[18] The European Union's Audiovisual Media Services Directive includes video-on-demand services within its framework and a requirement to promote 'European works' on these services.[19]

It is reasonable to expect that non-linear content such as video-on-demand will increasingly attract regulatory obligations globally as consumer patterns shift and new media services continue to compete with traditional linear content services for audiences.

Proposals for reform—distribution measures

The Review recommends that, in the longer term, the existing requirements based on quotas and minimum expenditure be abolished and a new uniform content scheme be developed. The scheme would require all content service enterprises that provide drama, documentary and children's programs and that meet the scale and service criteria to either:

> invest a percentage of their Australian market revenue from professional television-like content in new Australian drama, documentary and children's content (investment option), or

> contribute to a central converged content production fund (contribution option).

The two options recognise the range of business models used to provide content services and the reality that not all content service providers have the desire or expertise to invest in Australian content production. In the longer term, the Review anticipates that most content service enterprises will choose to directly invest in content due to the greater benefits inherent in the investment option. The contribution option would support Australian content indirectly through the proposed converged content production fund.

Service and scale criteria

In public statements following the release of the interim report, the Review reaffirmed the view that qualification to be a content service enterprise represents a high bar that will only apply to a limited number of organisations. It was also noted that the uniform content scheme would be aimed at professional television-like services that offer drama, documentary or children's programs.[20] It is not intended, for example, that revenue from user-generated content be taken into account in determining any requirement to invest in Australian programs.

Service criteria

Content service enterprises that offer *professional television-like drama*, *documentary or children's content*, and meet the scale criteria (discussed below), should contribute to the production of Australian content in those genres. Targeted genres may change in the future as audience preferences evolve. It is foreseeable that other forms of content, including interactive content, may become significant forms of content for Australian voices and stories. The uniform content scheme will not apply to those services that provide a platform for user-generated content, or social media.

18 Canadian Radio-television and Telecommunications Commission, CRTC 2000-172, http://crtc.gc.ca/eng/home-accueil.htm.

19 European Union, Directive 2010/13/EU, http://ec.europa.eu/avpolicy/reg/tvwf/index_en.htm.

20 G Boreham, 'Recalibrating policy as new era dawns', *Australian*, 30 January 2012, www.theaustralian.com.au/media/monday-section/recalibrating-policy-as-new-era-dawns/story-fna1k39o-1226256662567.

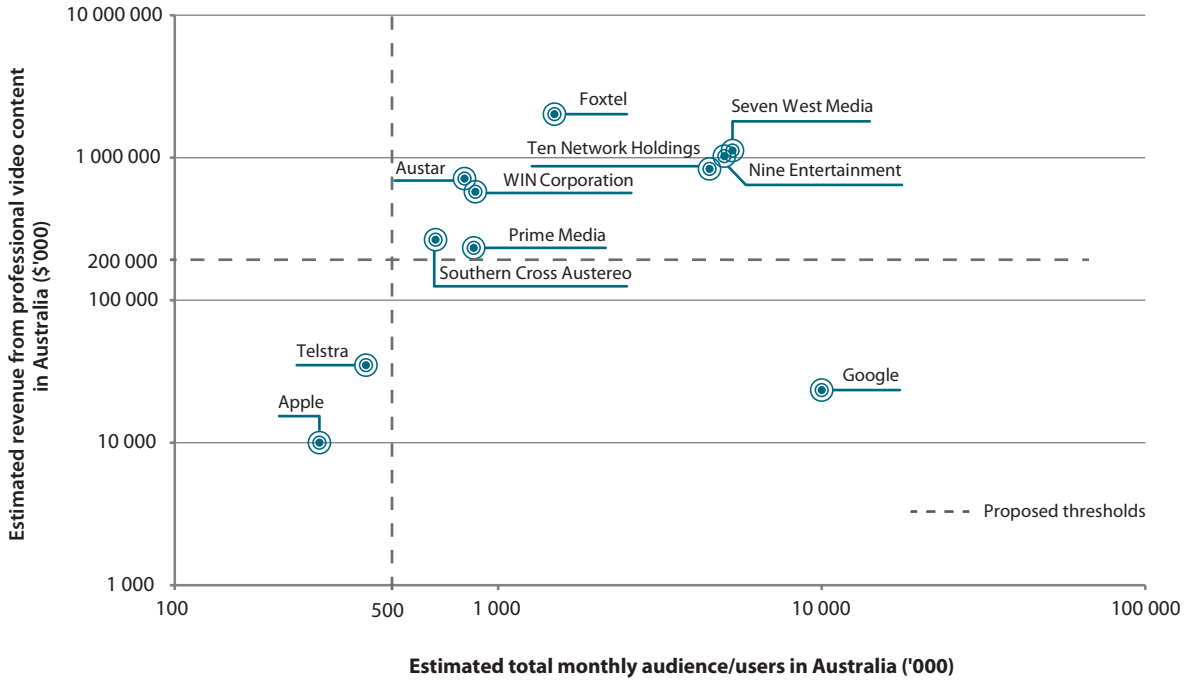
Scale criteria

Introducing scale criteria for the Australian content obligations reflects the view that those enterprises that stand to make the most from the Australian market should make the greatest contribution to the achievement of public policy outcomes.

Existing distribution incentives for Australian television content only apply to commercial free-to-air broadcasters and, to a more limited extent, subscription television broadcasters. Commercial free-to-air broadcasters include the Seven, Nine and Ten networks, and regional affiliates including Prime, WIN and Southern Cross. Subscription television broadcasters include Foxtel in metropolitan areas and Austar in regional areas. New and emerging services are currently of a far smaller scale than the suggested thresholds for qualification as content service enterprises.

Figure 5.1 shows indicators of both revenue and audience and indicates that there are no comparable enterprises to the 'traditional' broadcasters that offer the targeted genres of adult drama, documentary and children's programs at a sufficient scale to qualify for this scheme.

Figure 5.1: Revenue and audience from professional video content



Note: The information presented in this figure is indicative only and has been compiled by PricewaterhouseCoopers from a range of sources including industry data, reported financial results, and web reports. Some audience and revenue figures have been derived from publicly available data using assumptions on consumer activity and expenditure.

Source: Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise*, March 2012.

It is important that qualifying services are able to contribute to Australian content outcomes without being subject to a commercially unsustainable regulatory arrangement. Given that the broadcasters that exceed the revenue and audience thresholds in Figure 5.1 (see dashed lines) have demonstrated their capacity to contribute to Australian content outcomes over a significant period of time, a revenue threshold of $200 million and an audience threshold of 500 000 is consistent with sustainable investment in Australian content at this time. In the future it is realistic to expect that this group of services will be joined by non-broadcast services as those services continue to expand in line with shifts in consumer preferences.

Contribution rates

The benefit of a revenue-based scheme is that it reflects the relative scale of enterprises in the marketplace. Research commissioned by the Review indicated that, to maintain Australian content at its current level, the traditional broadcasters would need to invest 3 to 4 per cent of their revenue on Australian drama, documentary and children's programs if the scheme were implemented now. This is an indicative figure only. The actual contribution rate would need to be set by the new communications regulator after determining the number of qualifying content service enterprises and assessing their revenue at the time the scheme is introduced.

The rate should be set at the same percentage regardless of whether the content service enterprise chooses the contribution option or the investment option. In practice, the Review expects that most content service enterprises will choose the investment option, noting that this option would deliver benefits in terms of both programming and potential revenue from the further exploitation of the content. The investment option would also be eligible for support from the Producer Offset, subject to the conditions of that scheme.

Ensuring a level of investment in children's content

Some submissions, including from the Australian Children's Television Foundation and a group representing children's content producers, strongly argued that the uniform content scheme as set out in the Review's interim report does not directly ensure a level of investment in each of the specific genres. This is most notably an issue for children's content, which research and submissions to the Review indicate is difficult to exploit commercially.[21]

The uniform content scheme proposed in this report provides that, once the scale and service requirements are met, a content service enterprise would be required to invest a percentage of its Australian market revenue in Australian content. To ensure that there is a level of ongoing investment in Australian children's content, a component of this commitment should be dedicated to this genre.

A precise proportion could be determined by the new regulator. As a guide, however, 25 per cent of each qualifying content service enterprise's contribution could be directed towards Australian children's content, including preschool content. The Review recognises that some enterprises may either not wish to invest in children's content or consider that this content is inconsistent with their service—in this case, the relevant proportion would be provided to the proposed converged content production fund to be earmarked for children's content.

Transitional arrangements for free-to-air and subscription television broadcasters

The uniform content scheme represents the long-term vision of the Review. Combined with other key recommendations, including the concept of content service enterprises, the scheme provides a long-term, platform-neutral approach to the support of Australian content. However, the Review is aware that the uniform content scheme, in combination with other key recommendations, marks a substantial departure from the existing suite of rules.

Submissions to the Review and independent commentators have also noted that Australia's obligations under the Australia – United States Free Trade Agreement will need to be considered in implementing the uniform content scheme. The Review's proposed transitional arrangements should apply until the government is in a position to implement the uniform content scheme.

21 See, for example, submissions on interim report from Australian Children's Television Foundation, p. 4 and 'Children's content producers', p. 6.

The Review believes that the uniform content scheme can be successfully implemented. The Review recommends that the arrangements set out below apply as an interim step while the government works towards the earliest possible introduction of the uniform content scheme.

Commercial free-to-air broadcasters

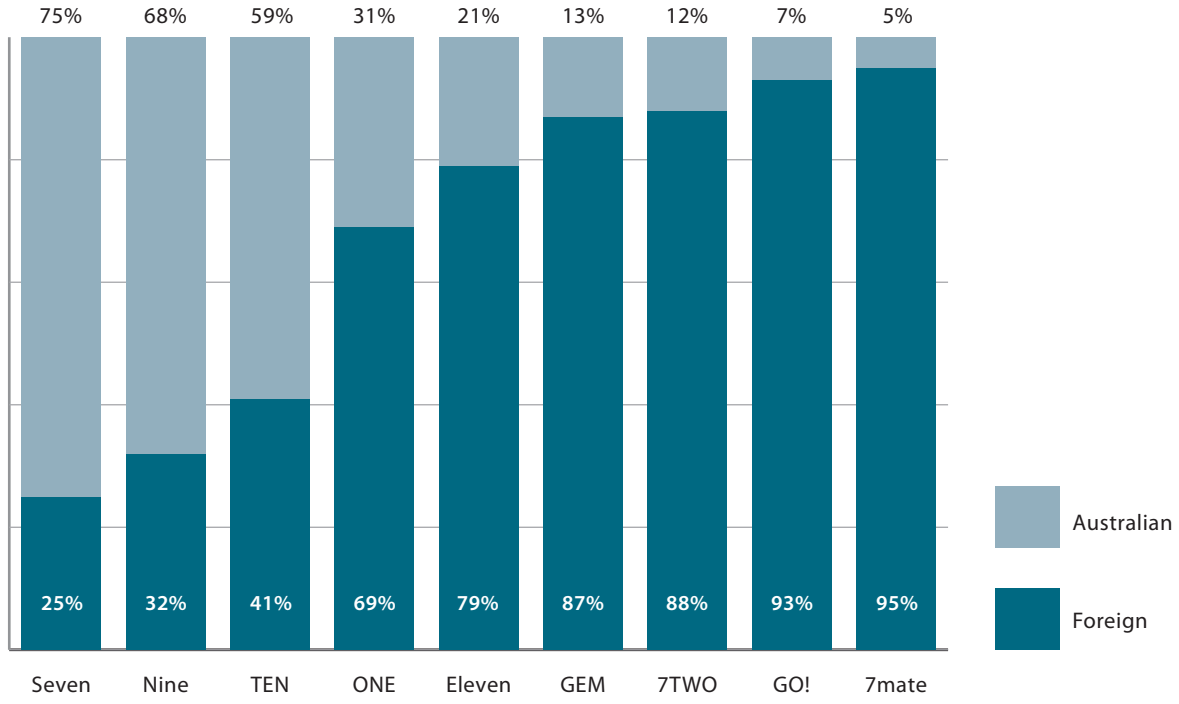
The existing Australian content standard rules, including the 55 per cent transmission quota and associated sub-quotas, only apply to the primary channel of each commercial free-to-air network.[22]

The increased choice offered by multichannels has reduced the proportion of Australian content shown on commercial free-to-air networks. This was noted by the Communications Law Centre in its submission:

> It is desirable to include new content platforms in the regulatory framework for Australian content, particularly broadcast like services. Currently, there are no Australian content requirements for digital multichannels. As a result, the total hours of foreign content across all free to air networks more than doubled between 2008 and 2011 (154%). This has led to a 'watering down' of local content across free-to-air programming.[23]

As can be seen in Figure 5.2, the evidence suggests that in the absence of Australian content requirements on the digital multichannels[24] the levels of Australian content are low. This is particularly apparent for Australian drama with its high production costs, although the shift of the program *Neighbours* from Ten to Eleven is apparent in Figure 5.3.

Figure 5.2: Australian versus foreign content—proportion of overall ratings by origin, 6 am to 12 am, 2011



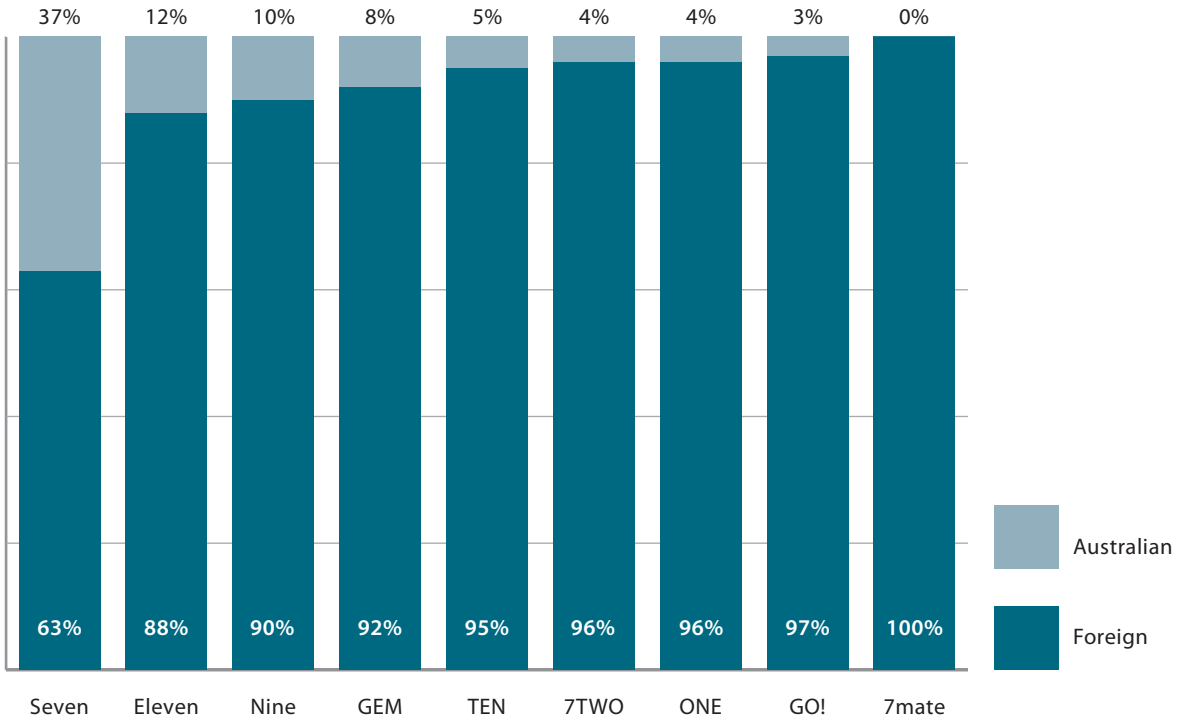
Source: Screen Australia analysis of OzTAM data.

22 Convergence Review, *Discussion Paper: Australian and Local Content*, September 2011.

23 Communications Law Centre, submission on discussion papers in response to open call, p. 7 (citing Screen Australia research).

24 GEM, GO!, 7TWO, 7mate, ONE and Eleven.

Figure 5.3: Australian versus foreign content—proportion of drama ratings by origin, 6 am to 12 am, 2011



Source: Screen Australia analysis of OzTAM data.

While noting that the digital multichannels are still developing commercially, the Review considers that an increase in the level of Australian content is warranted.

There are a range of factors that influence the level of the increase in sub-quotas recommended by the Review. It is clear that the three commercial free-to-air networks are the most influential and viewed services in Australia. With the introduction of the digital multichannels, it is also clear that less Australian content, as a proportion of overall viewing time, is being shown on Australian screens.

The Review recognises that the free-to-air sector has higher obligations to invest in Australian content than other sectors. However, it is clear that even if the government were to accept the recommendations in this report there would still be remaining regulatory concessions to the commercial free-to-air sector, including an ongoing option to access spectrum, access to the higher 40 per cent Producer Offset (see page 73), no full fourth commercial television broadcasting network (see page 95), and the protection of sports rights in the anti-siphoning list (see page 35).

In the light of these concessions, it remains appropriate to expect a greater contribution from free-to-air broadcasters than from other sectors during the transition period and until the regulatory concessions are reduced or removed.

The Review considers that a 50 per cent increase in sub-quotas is both warranted and affordable. In its submission to the Review, Screen Australia indicated that a 50 per cent increase in sub-quotas could result in approximately $40 million in additional investment in Australian content.[25]

25 Screen Australia, submission in response to open call, p. 17.

Increased flexibility

The Review recommends that broadcasters be provided with additional flexibility to meet their expanded sub-quota requirements. Broadcasters should be allowed to count drama, documentary and children's content shown on their digital multichannels towards meeting their sub-quota requirements on the primary channel. To be clear, the Review is not recommending that any quotas be applied to the digital multichannels, and the broadcaster could choose to fulfil the entire sub-quota on the main channel. However, the flexibility that the Review proposes will allow broadcasters to spread their sub-quota commitments across all of their multichannels, and may better allow broadcasters to develop the specific brands of the multichannels—for example, around Australian drama or children's content.

The Review's proposal for an increase in the sub-quotas for drama, documentary and children's content, and the associated proposal to allow applicable content shown on the digital multichannels to count towards the sub-quota on the primary channel, will result in a small increase in the amount of Australian content shown on the networks. This approach is less onerous and more flexible than applying a transmission and sub-quota to each of the digital multichannels.

55 per cent transmission quotas

The Review received submissions suggesting that the 55 per cent content quota should be extended to one of the digital multichannels.[26] Given that the Review has addressed the specific issue of sub-quotas above, by increasing the requirements for adult drama, documentary and children's content, the Review has concluded that extending the 55 per cent transmission quota to one or more of the digital multichannels is not required.

The Review has found that Australian content incentives should predominantly support content that would be under-produced in the absence of government support. These genres receive specific protection under the existing sub-quotas and will eventually be supported by the uniform content scheme. As indicated in Table 5.2, the transmission quota also supports the production of some news and light entertainment. However, retaining the transmission quota as part of the transitional arrangements will assist in maintaining Australian content levels in these genres.

Subscription television

Subscription television providers are currently required to allocate 10 per cent of their programming budget on television drama services to Australian content. A key principle underpinning the Review's recommendations for Australian content generally is that those content service enterprises that gain the most from their participation in the market should contribute to the public policy objectives set by government for the market, including the production and distribution of Australian content.

The Review recognises that today's subscription television industry is more developed than when the original 10 per cent minimum expenditure requirements were introduced. The revenue of subscription television providers is now on a similar scale to the free-to-air sector. It is now appropriate that the sector provide a greater contribution to Australian content.

While the Review is not proposing to increase the 10 per cent minimum expenditure requirement on drama channels, it is proposing to extend the requirement to qualifying children's and documentary channels consistent with the genres that attract sub-quotas in the commercial free-to-air sector.

Due to the lack of available data, the financial impact of the new expenditure requirement on the subscription television sector could not be modelled. However, it is expected that the resultant additional expenditure would be relatively minor and still substantially below that of the free-to-air sector. The additional Australian content obligations will place the subscription television sector in a better position to move to eventual equivalence with the free-to-air sector consistent with the uniform content scheme.

26 See, for example, submissions in response to open call from APRA/AMCOS and the Media, Entertainment and Arts Alliance.

Advertising quotas

There are good arguments to suggest that television advertising is valuable as a training ground for actors and content production professionals, and provides an important source of employment.[27]

For example, the State and Territory Screen Agency Forum noted:

> The television commercial (TVC) sector is a significant economic driver and an important training ground for creative and technical screen practitioners. It provides significant employment for cast and crew who work across TVC production, drama, children's, feature films and the post, digital, visual effects and animation sectors.[28]

The Media, Entertainment and Arts Alliance also noted that Australian advertising has cultural connections and value.[29] The Review accepts the value of advertising, particularly in providing important production work when gaps appear in the production slate for other television content and film content. It considers it important that there be a high level of Australian advertising on Australian screens.

While there is no compelling argument to extend the 80 per cent advertising quota to digital multichannels or to the subscription television sector, neither are there compelling arguments to remove the existing quota arrangements. The Review recommends that this issue be reconsidered when the uniform content scheme is implemented.

Proposals for reform—distribution measures

Converged content production fund

The proposed uniform content scheme represents a long-term vision for new distribution measures to replace quotas and minimum expenditure requirements. To complement these measures, the Review recommends the creation of a converged content production fund as the key production support measure.

Similar to the existing direct subsidy programs administered by Screen Australia, the converged content production fund would invest in content productions on a competitive basis.

The fund's mission would be to develop new and innovative content suitable for all platforms. In addition, the coverage of the fund would be broader than existing arrangements because it would support both audio and audiovisual content. The fund would also focus on innovation in service delivery in both of these sectors, with a special emphasis on regional and community content service providers. The fund's primary roles would be to support:

- the production of programs in key genres, including drama, documentary and children's content, by the independent production sector
- the production of programming for local and regional services
- new forms of content delivery and platform innovation, including the production of new media content such as interactive apps and webisodes
- contemporary music.

Funding the converged content production fund

The converged content production fund should have three sources of funding:

- contributions from eligible content service enterprises under the uniform content scheme
- direct appropriations from government
- spectrum fees paid by radio and television broadcasters.

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27 See, for example, Media, Entertainment and Arts Alliance, submission in response to open call, pp. 19–20.

28 State and Territory Screen Agency Forum, submission in response to open call, p. 10.

29 Media, Entertainment and Arts Alliance, submission in response to open call, p. 20.

The fund should receive contributions from eligible content service enterprises under the uniform content scheme and should incorporate the existing direct government funding.

Allocation of spectrum fees paid by radio and television broadcasters into the fund would provide a direct and transparent source of funding.

Implementation

Subject to making the necessary arrangements to redirect spectrum fees, the converged content production fund should be able to be implemented as soon as possible, and in advance of the uniform content scheme if necessary.

Producer Offset

Submissions to the Review indicated broad support for the Producer Offset but also called for a number of changes to rationalise the different levels of incentives offered to television productions when compared to film productions and to recognise newer forms of interactive entertainment, such as games and applications.

Increase in Producer Offset for high-end drama

Submissions received by the Review indicated significant support for raising the offset level for television from 20 per cent to 40 per cent consistent with the rate provided for feature films. Submissions noted that the offset should reflect the level of the investment made by the producer rather than where the content is first shown.

For example, the SBS supported lifting the TV Producer Offset to 40 per cent in order to reduce its reliance on direct government production investment.[30] There was similar support from range of other stakeholders, including Showtime, the Australian Directors Guild and the Screen Producers Association of Australia.[31]

In terms of overall economic benefit for the sector, there appears to be little difference in net terms between an Australian film costing $10 million to $15 million to make and a high-quality 10-part drama costing between $1 million and $1.5 million per episode.

Making television programs eligible for the higher 40 per cent offset rate is consistent with the principle of regulatory parity. The Review is aware that there will be a net additional funding requirement from its recommendation to increase the offset rate to 40 per cent for television.

The Review's interim report recommended that the 40 per cent offset rate for high-end television be directed towards the independent production sector. There is substantial precedent in the government's support for television to particularly focus on the independent production sector, including, for example, through higher points allocations under the Australian Content Standard and by restricting Screen Australia funding to independent production. This recognises:

- the economic challenges faced by the independent sector in securing a sustainable production slate
- the importance of the sector to Australian content production in general, including for feature films and advertisements
- the need to supply quality Australian content to broadcasters to complement in-house production.

The Review has received considerable feedback from the broadcasting sector that the proposal to direct the 40 per cent offset rate exclusively to the independent production sector potentially creates an unnecessary distinction between independent producers and broadcasters.

30 SBS, submission in response to open call, p. 8.

31 Showtime, submission in response to open call, p. 6; Australian Directors Guild, submission in response to open call, p. 6; Screen Producers Association of Australia, submission in response to open call, p. 8.

While the arguments for increasing the offset rate for television to 40 per cent are sound, the question of whether the higher rate should be directed solely to the independent production sector requires further consideration by government, potentially as part of the suggested review of terms of trade for independent producers (see below).

Recognition of new interactive entertainment

The Review notes that Australian content is not a static concept and acknowledges that other forms of content, such as interactive games, could be considered for support. Research indicates that the economic importance of interactive entertainment such as games and apps will continue to rise.[32] The growth of games as a form of entertainment and education in Australia demonstrates a shift in the way Australians are producing and consuming screen content, away from single-screen consumption towards an increasingly multiscreen world—television, cinema, tablets, PCs and mobiles. It is likely that the production boundaries between games and other screen formats such as film will become more blurred as the screen production sector diversifies and responds to consumer demand.

Interactive entertainment is increasingly becoming a more significant part of our cultural and creative production and will therefore play a more important role in expressing our cultural identity. The creative and technical expertise that the sector generates has the potential to make a significant contribution to Australia's innovation economy.

Submissions to the Review indicated significant support for recognising and promoting the production of interactive content, including both interactive content associated with film and television productions and stand-alone interactive content. For example, Screen Australia supported the introduction of an interactive entertainment offset for interactive components relating to drama or documentary shows (for example, games associated with movies). A second part of the offset would be for stand-alone projects. According to Screen Australia, the offset could be valued at 30 per cent for projects greater than $500 000 and 20 per cent for projects greater than $200 000.[33]

The State and Territory Screen Agency Forum also recommended that the Producer Offset be extended to digital interactive content and games, with a modified test for significant Australian content and thresholds and guidelines specific to the form.[34]

Given the economic contribution made by the interactive games industry, the Review recommends that the government establish an interactive entertainment offset to provide an incentive for the production of interactive content in Australia. The offset percentage, qualifying expenditure thresholds and eligibility matters should be determined by government following an examination of the economics and business practices of the industry.

The Review notes that the new national cultural policy, currently being developed, will explore ways the government can support Australia's creative industries to optimise their commercial capacity, pursue trade and investment opportunities and bring innovative content to new audiences.

32 See, for example, PricewaterhouseCoopers, *Australian Entertainment and Media Outlook 2011–2015*, 2011, pp. 112–13.

33 Screen Australia, submission in response to open call, p. 28.

34 State and Territory Screen Agency Forum, submission in response to open call, p. 9.

Independent producers—terms of trade

The existing policy framework provides targeted support to the independent production sector. This includes encouraging broadcasters to screen drama produced by the independent sector by awarding additional points under the Australian content standard,[35] and by preventing broadcasters from directly accessing Screen Australia television funding.[36]

The Review received a variety of submissions calling for more support for independent producers. A range of proposals and options were put forward, including:

- a quota to require broadcasters to license minimum levels of content from the independent production sector
- statutory copyright licensing arrangements to encourage the exploitation of back catalogue content
- mandated terms of trade between broadcasters and producers
- measures to prevent broadcasters from requiring independent producers to pass on the Producer Offset, including through reduced licence fees.

As the focus of the Review has been on media and communications regulation, not all issues presented to the Review have been able to be considered fully. This is the case with the issues relevant to independent producers set out above. However, the volume of representations and the range of issues presented to the Review indicate that there is merit in the government undertaking additional work to examine the business and legal conditions under which independent producers operate.

35 Broadcasting Services (Australian Content) Standard 2005, section 11(2).

36 Screen Australia, *Terms of Trade*, www.screenaustralia.gov.au/documents/SA_publications/Terms_of_trade.pdf.

6. Australian content: radio

During the consultation process, the Review heard from many stakeholders about the continuing need for music quotas on Australian radio. As with other issues discussed in this report, there were two distinct constituencies.

Many submissions from radio broadcasters suggested that the existing rules are expensive and inflexible. However, music performers and industry interests stressed that quotas are important for ensuring that Australian content gets a share of airplay.

Recommendations

19. Australian music quotas should continue to apply to analog commercial radio services offered by content service enterprises and be extended to digital-only radio services offered by content service enterprises.

20. Music quotas should not be applied to occasional or temporary digital radio services.

21. Given the evolving state of internet-based music services, quotas should not be applied at this time.

Commercial radio services

Analog commercial radio services are required to play minimum levels of Australian music under Code 4 of Commercial Radio Australia's Codes of Practice.[1]

The Codes of Practice are formulated by the industry and must be registered with the Australian Communications and Media Authority (ACMA). The ACMA periodically reviews the codes to ensure that they:

- adequately deal with the subject matter covered, provide appropriate community safeguards and accord with prevailing community standards
- are endorsed by the majority of commercial radio stations
- provide members of the public with adequate opportunity to comment on draft amendments to the codes.

The quotas range from a minimum of 5 per cent (54 minutes) to a maximum of 25 per cent (4 hours and 30 minutes) between 6 am and midnight, as shown in Table 6.1.

As can be seen in Table 6.1, formats A to C are also required to broadcast new Australian music.

Reviews of the Codes of Practice, most recently in 2010 and 2011, have reinforced the continuing value of Australian music content quotas.[2]

Australia is not the only country that promotes national identity, character and culture through national music quotas.

In 2006 the Canadian Government reviewed local music quotas and decided to maintain its 'Music, Artist, Performance, Lyrics' system. The system requires at least 35 per cent of the popular musical selections and at least 10 per cent of the special interest musical selections aired on commercial radio to be Canadian selections.

1 By extension, the obligations apply to digital services that simulcast analog services.

2 See, for example, ACMA, *Registration of Commercial Radio Code 4: Australian Music*, www.acma.gov.au/WEB/STANDARD/pc=PC_312220.

Table 6.1: Existing Australian music requirements for analog commercial broadcasters

Format category	Minimum proportion of total time broadcasting music that must be Australian	Minimum new Australian music as a proportion of total Australian music
A: Mainstream rock, album-oriented rock, contemporary hits, top 40, alternative	25%	25%
B: Hot/mainstream adult contemporary, country, classic rock	20%	20%
C: Soft adult-contemporary, hits and memories, gold (encompassing classic hits), hip-hop	15%	15%
D: Oldies, easy listening, easy gold, country gold	10%	–
E: Nostalgia, jazz, NAC (smooth jazz)	5%	–
F: All other formats of service (including programs that have mostly open-line, news, talk and sport content)	–	–

To protect Canadian selections from being relegated to times when relatively small audiences are tuned to radio, such as on weekday evenings and on weekends, the Canadian Radio-television and Telecommunications Commission made further provisions to ensure that the policy covers peak listening periods.

The Canadian Commission has indicated that licence renewal hearings will consider the impact of emerging and competitive services. It also intends to ask commercial broadcasters about their plans 'to employ new distribution platforms to the benefit of the Canadian broadcasting system'.[3]

France stipulates a minimum of 40 per cent of French language music on French radio, half of which must be new music.

Digital radio services

Australian music obligations do not apply to digital-only radio services, which began broadcasting in mainland capital cities in 2009. The decision to exempt these services from the quota requirements was based on the premise that

> [in the] early days of digital radio, licensees should be afforded the opportunity to experiment with programming formats, including the programming of niche services such as 'event channels'.[4]

The Review considers that, as audiences grow and digital services mature, Australian music obligations should be extended to cover digital-only radio services. Due to the short-term nature of some digital radio services, for example the service offered to support the tour by Pink, music quotas should not be applied.[5]

The ACMA, in registering the amended Australian Music Code in 2011, noted that it would look at the exemption for digital-only services during the next material review of the Commercial Radio Australia Codes of Practice, which is scheduled to begin in 2013. The timing for the introduction of music quotas for digital radio services should be considered as part of that process.

3 Canadian Radio-television and Telecommunications Commission, Broadcasting Public Notice CRTC 2006-158, 15 December 2006, para 31, www.crtc.gc.ca/eng/archive/2006/pb2006-158.htm.

4 ACMA, media release, 1 July 2010, www.acma.gov.au/WEB/STANDARD/pc=PC_312202.

5 See www.austereo.com.au/docs/PinkRadioRelease.pdf.

Internet music services

Streamed internet radio services allow users to access music from around the globe. Examples of streamed service types include Pandora, which offers an automated music recommendation service that tailors music streams to individual preferences, and Rdio, which offers unlimited access to a library of music for a monthly subscription.

Services such as Apple's iTunes Match charge an annual fee to allow users to mirror their entire music collections online, so that users can access their collections anywhere with an internet connection.

Table 6.2 provides some examples of the variety of internet-based delivery services for audio-only music.

Table 6.2: Examples of internet services that distribute audio-only music services

Example of service	Service
Simulcast of radio service that is also broadcast terrestrially in that area	SAFM in Adelaide
Simulcast of radio service that is not available terrestrially in that area	SAFM in Broome
Internet-only radio service	Radar, Spotify
User-directed internet radio service	Pandora
All-you-can-eat music service	Rdio
Purchased music	iTunes
Cloud music storage	iTunes Match

The internet-based services that are most similar to traditional radio services are most likely to be simulcast services of local terrestrial broadcast stations, which are already subject to the quota obligations.

The principle of regulatory parity suggests that radio-like services on the internet and terrestrial radio services should be treated in a similar manner. However, the diversity of audio formats and music delivery mechanisms on the internet would make it difficult—if not impossible—to consistently regulate non-simulcast internet-based services through a quota system. There are also different transactions on internet-based services (for example, purchasing music as opposed to listening to advertising-supported or subscription services, the user-directed nature of some services, and subscriber and purchase models). In light of these issues, there is no compelling reason to institute music quotas on internet-based services.

The Review is aware that the Australian Government is considering a range of measures to stimulate the contemporary music sector. The proposed converged content production fund will, if adopted by government, also play a role in promoting Australian music.

7. Local content: television and radio

A guiding principle for the Review has been that Australians should have access to news and information that is relevant to their local communities, including locally generated content. Existing regulation already requires regional commercial radio and television broadcasters to broadcast material of significance to their local areas. The importance of local content to communities was a strong and consistent theme in the Review's consultations, particularly in the public hearings conducted in August 2011. The recently released report of the Independent Media Inquiry also highlighted the issues facing the production of local news content.[1]

The provision of broadcast programs of local significance has been an enduring concern for governments of all persuasions for some decades.[2] Over the past decade, local content rules were considered by the House of Representatives Standing Committee on Communications, Transport and the Arts, by the former Department of Communications, Information Technology and the Arts and by the Productivity Commission.[3]

The policy justification for local content rules has two aspects. First, the continued provision of local content services is considered necessary on the basis of equity to ensure that people living in regional and rural Australia receive content that reflects their local identity and communities. Second, successive governments have taken the view that without regulatory support for local content, which can be expensive to produce for relatively small audiences, this type of content would be under-produced.

Recommendations

22. Commercial free-to-air television and radio broadcasters using spectrum should continue to devote a specified amount of programming to material of local significance.

23. A more flexible compliance and reporting regime for television and radio should be implemented for the obligations set out in recommendation 22.

24. The current radio 'trigger event' rules should be removed.

Existing rules for radio broadcasters

The local content and local presence requirements for regional commercial radio licensees were introduced as part of the Australian Government's media reform package in 2006. The provisions were designed to ensure that commercial radio services in regional areas continued to provide local content. They also required that a local presence be maintained in the event that control of a licence changed.

The local content licence condition requires all regional commercial radio licensees to broadcast minimum amounts of 'material of local significance' during daytime hours (5 am to 8 pm) on business days.[4]

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1 See the Hon R Finkelstein QC, R*eport of the Independent Inquiry into the Media and Media Regulation*, February 2012, paras 12.80–12.97, pp. 328–33, www.dbcde.gov.au/digital_economy/independent_media_inquiry.

2 Department of Communications, *Review of the Policy of Localism in Australian Broadcasting*, information paper, 1984, para 5.

3 See House of Representatives Standing Committee on Communications, Transport and the Arts, *Local Voices: An Inquiry into Regional Radio*, September 2001; Department of Communications, Information Technology and the Arts, *Meeting the Digital Challenge: Reforming Australia's Media in the Digital Age*, March 2006; Productivity Commission, *Annual Review of Regulatory Burdens*, 2009.

4 Broadcasting Services (Additional Regional Commercial Radio Licence Condition—Material of Local Significance) Notice, 19 December 2007. 'Material of local significance' is material that is hosted in, is produced in or relates to a regional commercial radio licensee's licence area, including advertisements (capped at 25 per cent).

Those minimum amounts are:

- 30 minutes for small commercial broadcasting licences[5]
- three hours for all other licences.[6]

Some regional commercial radio licensees are also required to meet local presence criteria and minimum service standards for local news and information. However, these requirements only come into effect following a 'trigger event'. A 'trigger event' is a transfer of a regional commercial radio licence; the formation of a new registrable media group that includes a regional commercial radio broadcasting licence; or a change of controller of a registrable media group that includes a regional commercial radio broadcasting licence.

When a licence is affected by a trigger event, the licensee is required to meet the minimum service standards for local news and information by broadcasting a minimum number of:

- eligible local news bulletins (five per week of at least 12.5 minutes per day)
- eligible local weather bulletins (five per week)
- local community service announcements (one per week)
- emergency warnings (as required).[7]

Licensees are also required to maintain for 24 months the existing level of local presence when a regional commercial radio broadcasting licence is affected by a trigger event. The existing level of local presence is defined in terms of staffing levels and the use of studios and other production facilities in the licence area in the three-month period leading up to the trigger event.[8]

The statutory local content requirements apply only to regional analog licensees, as there are currently no digital radio services in regional areas.

Existing rules for television broadcasters

Local content rules for television were first introduced in early 2004 following an investigation by the then Australian Broadcasting Authority. The investigation found that there had been significant declines in the amount of local information broadcast in some regional markets, and a decline in competing sources of news since the mid-1990s.[9]

The additional licence condition imposed in 2007 on specified regional commercial television broadcasting licensees in Queensland, New South Wales, Victoria and Tasmania requires them to broadcast minimum amounts of 'material of local significance' within their local broadcast areas.[10]

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5 Small licences are licences in licence areas with populations of fewer than 30 000 people.

6 Broadcasting (Hours of Local Content) Declaration No. 1 of 2007.

7 See Part 5, Division 5C of the *Broadcasting Services Act 1992*. News and weather bulletins and community service announcements are considered 'local' if they relate to the licensee's licence area. These local news and information requirements count towards the local content requirements under section 43C of the BSA.

8 Broadcasting Services (Additional Regional Commercial Radio Licence Condition—Local Presence) Notice, 22 March 2007.

9 The two reports (2002 and 2004) resulting from this investigation can be accessed from www.acma.gov.au/WEB/STANDARD/pc=PC_91817.

10 The condition was introduced in the Broadcasting Services (Additional Television Licence Condition) Notice, 8 November 2007. Regional commercial television broadcasters affected by the local content conditions include:

- Regional Queensland: Seven Queensland, Southern Cross and WIN TV
- Northern New South Wales: NBN Ltd, Prime Television and Southern Cross
- Southern New South Wales: Prime Television, Southern Cross and WIN TV
- Regional Victoria: Prime Television, Southern Cross and WIN TV
- Tasmania: Southern Cross, WIN and Tasmanian Digital Television.

'Material of local significance' is material that relates directly to the local area or the relevant licence area. The test of whether material is of local significance combines the subject and the way in which the subject is presented and generally includes material about people or organisations associated with the area and events that impact on, or issues that arise in, the area. Advertising and sponsorship material other than community service announcements is specifically excluded.

The minimum amounts are determined by a points system, which requires each affected licensee to broadcast:

- a minimum of 720 points per six-week period (which equates to approximately 360 minutes of local news or 720 minutes of other material of local significance)
- a minimum of 90 points per week (which equates to approximately 45 minutes of local news or 90 minutes of other material of local significance).[11]

The points system provides an incentive for licensees to give priority to local news, while recognising that other types of material of local significance may be of interest to local audiences.

Is there still a need for local content rules for radio?

It was apparent during the Review's consultation process that communities expect local terrestrial broadcasting services to provide content that is directly relevant to their area. While online services offer some diversity, radio broadcasting is still the most cost-effective means of receiving local content for many Australians. This was noted by the Communications Law Centre in its submission:

> Despite improvements in communications technology, the 'digital divide' between regional and metropolitan areas remains evident. Although the delivery mechanism may change, radio and television remain the most immediate (and hence effective) media to disseminate information in dispersed regional communities. Therefore, regulation must continue to support local content on radio and television (and radio and television like) services.[12]

The community has a reasonable expectation that the grant of a licence to use broadcast spectrum in a geographic area carries an obligation to provide a service that meets the needs of the local community. Broadcast services should include basic news and information relevant to community life, and content that provides local communities with a voice.

Producing local content can be more expensive than acquiring rights to syndicated content. However, the production of local content should be a core part of a broadcast service to an area. Rules and obligations setting out the nature and extent of local content are important measures that clarify the expectations the government and community have of broadcasting services that use publicly owned spectrum.

Compliance requirements

Some stakeholders raised the issue of reporting requirements for the existing obligations. For example, Southern Cross Austereo noted that:

> The current local content requirements do not contemplate, or allow, for additional local news broadcasts throughout a day. The provisions of the BSA are so strict that if a local news bulletin is broadcast for only 1 minute 58 seconds rather than 2 minutes, a licensee will be in breach, even if the following bulletin is 3 minutes, rather than 2 minutes in duration.[13]

Some procedural and compliance issues raised in relation to the existing local content rules for radio have been addressed in the *Broadcasting Services Amendment (Regional Commercial Radio) Act 2012*. However, the Review considers that a review of the local content regime should go further.

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11 Points are accumulated during the following eligible periods: between 6.30 am and midnight Monday to Friday; and between 8 am and midnight Saturday and Sunday. Tasmanian Digital Television is currently subject to a lower minimum quota (a minimum of 120 points per calendar year) because of low consumer take-up rates of digital receivers in Tasmania (see Broadcasting Services (Additional Television Licence Condition—Digital Mode Transmission) Notice, 8 November 2007).

12 Communications Law Centre, submission on discussion papers in response to open call, p. 9.

13 Southern Cross Austereo, submission in response to open call, p. 5.

Trigger events and local presence requirements

Different rules relating to trigger events, in particular local presence rules, create an unnecessary regulatory distortion by imposing greater obligations on some broadcasters than on their competitors. While having a local presence may assist broadcasters to produce local content, trigger event rules that freeze in time the level of local facilities and staff numbers are a blunt instrument that reduces management flexibility and efficiency.

The rules also place a substantial compliance burden on the industry and can have negative repercussions for existing broadcasters that may benefit from changes in control—for example, to attract new capital so they can offer better services. The potential for the rules to discourage collaboration and innovation in the delivery of local content was noted by the Productivity Commission in its 2009 *Annual Review of Regulatory Burdens on Business*:

> As convergence continues, uptake of new technologies is likely to foster greater media diversity while increasing the pressures on traditional media. Restrictions that prevent traditional media from utilising economies of size and scope—such as allowing a regional radio station, to combine and share resources with either another radio station, or a local newspaper or television station—could threaten the viability of regional media providers. By limiting the ability of traditional media to adapt to changes in the industry the trigger event provisions, and cross media ownership laws more generally, may have the perverse effect of reducing both diversity and the ability of broadcasters to deliver local content.[14]

Local content rules should be designed to minimise reporting requirements and increase broadcasters' flexibility. It is apparent that the trigger event rules represent an onerous burden for regional radio licences, and no evidence has been presented to the Review to suggest that they are more effective than pre-trigger event rules in delivering local content to communities.

How should local content standards be determined?

This Review has not detailed the local content requirements that should apply for regional radio broadcasters. Indeed, these requirements will vary considerably from region to region based on community needs and circumstances.

If broadcasting licences are removed, as recommended in Chapter 1, the Review considers that recipients of spectrum licences that have been earmarked for broadcasting services should be required to provide minimum levels of local content as a condition of their spectrum licence. The nature and quantum of local content obligations should be determined by the new communications regulator, in close consultation with the region and the licensees, and be reviewed periodically to ensure continued relevance.

Local content on television

As with radio, the Review considers that the community has a reasonable expectation that the grant of a licence to use broadcast spectrum in a specified geographic area means that the licensee will offer broadcast services of relevance to the served communities. In metropolitan areas that benefit from significant economies of scale, material of local significance is more likely to be produced in sufficient quantities to support viewer preferences.

The Review accepts that investing in local content is more constrained due to smaller, more dispersed populations, and that the financial revenues for advertising in regional areas will be correspondingly limited. However, the provision of a limited amount of local content, including news and community-related information, should be an essential element of the provision of these broadcasting services.

14 Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, 2009, p. 168.

Submissions from the broadcast sector, including Free TV Australia and Southern Cross Austereo, noted that the existing rules could be improved through less onerous compliance requirements, such as spot audits in the place of detailed recordkeeping, and less specificity in the local content rules.[15]

A guiding principle for the Review has been that, where regulation is required, it should be the minimum required to achieve a clear public purpose. This reflects the generally deregulatory approach of the Review. The Review therefore suggests that the communications regulator review the existing recordkeeping and compliance requirements for local content with the aim of minimising compliance costs and increasing flexibility for affected broadcasters.

In its submission to the Review, Southern Cross Austereo proposed to replace the existing detailed local content requirements with a broad licence condition:

> The licensee will provide a service or services that provide news, current affairs and community information which is of interest and relevance to audiences in the licence area and will report annually to the ACMA as to how the licensee has complied with this licence condition.[16]

The level and nature of local programming required in radio and television broadcasting and regional areas should be monitored by the regulator. The regulator should have default powers to specify how the local licence conditions are to be met, after close consultation with the spectrum licensee and the served community. This would allow the regulator to respond to any community concerns about the levels and nature of local content offered.

Developing innovative services

Representations on local content came from two broad constituencies. One was the industry, which wanted deregulation, including less prescriptive rules, and criticised elements of the existing scheme. The other was members of the general public and community interest groups, who strongly reiterated the importance of local content to communities and called for its continuing protection.

The Review is aware of the risks inherent in placing all of the responsibility for delivering local content on a small group of broadcasters, particularly given the increasing popularity of online services. It is likely that local content will be produced on non-broadcast platforms, for example internet protocol television (IPTV) and social media, particularly if local advertisers provide an adequate level of support. However, there is merit in the government actively encouraging new and existing broadcasters to develop new services. This could be expected to broaden the range of local content platforms and to reduce undue reliance on terrestrial broadcasting in the long term.

The Review has recommended that the government establish a converged content production fund to support the development of innovative services for media content (see Chapter 5). Local content services should be among the services supported by the fund. Producers and distributors of local content, including non-broadcast platforms, would be able to seek incentive funding to provide new and innovative local content services that have a strong business case and meet an identified need. These services could include both traditional and new broadcast platforms, such as IPTV and online applications. Over time, the emergence of new ways to provide local content may reduce the need for ongoing regulatory intervention.

15 See, for example, Free TV Australia, submission on the interim report, p. 16; Southern Cross Austereo, submission in response to open call, p. 5.

16 Southern Cross Austereo, submission in response to open call, p. 5.

8. Public and community broadcasting

One of the strongest features of the Australian media landscape is its sectoral diversity, including robust commercial, public and community broadcast sectors. The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS) are two of the nation's most important institutions. Both organisations have led the way in developing a number of new services. These have been embraced by Australians and they have extended the reach and impact of publicly funded programming. However, these activities are not referred to in their charters. The full text of the ABC and SBS charters is provided in Appendix J.

The development and broadcast of Australian screen and radio content is one of the important roles of the ABC and SBS. Unlike the commercial free-to-air television broadcasters, the two public broadcasters are not subject to minimum quotas on the number of hours of Australian content broadcast on their primary channel. The Review believes that this should change.

The Review also recognises the important role performed by the community broadcast sector in providing communities with the opportunity to participate in broadcast media, and in delivering services to meet the needs of those communities. Supporting community broadcasters through the provision of spectrum and the converged content production fund will help ensure the sustainability of the sector.

Recommendations

25. The charters of the ABC and the SBS should be updated to expressly reflect the range of existing services, including online activities.

26. While Australian content quota obligations continue for commercial free-to-air television broadcasters as a transitional measure, quotas should also apply to the public broadcasters.

    a. The primary ABC channel should have a 55 per cent Australian content quota consistent with the obligation on commercial free-to-air television broadcasters.

    b. Reflecting its multicultural charter obligations, the SBS should be required to target half this amount (27.5 per cent).

The charters of the ABC and the SBS

Both the ABC and the SBS make important contributions to the social, cultural and economic development of Australia. In line with the classic model of public broadcasting, which reflects that of the British Broadcasting Corporation, the primary mission of the ABC and the SBS is to inform, educate and entertain. Together they make vital contributions to the diversity of services available to Australians and provide a range of valuable programming that would not otherwise be delivered by the market.

Commercial broadcasters focus on programming that will deliver them the largest audiences. In contrast, the two public broadcasters are guided by their charters, which are set out in section 6 of the *Australian Broadcasting Corporation Act 1983* and section 6 of the *Special Broadcasting Service Act 1991*.

One of the key objectives of the two public broadcasters is to provide all Australians with broadcasting services, regardless of where they live. Traditionally, radio and then television carried out this function. Online delivery of content provides far greater convenience for users. It also allows for the development of local content that is more closely tailored to the needs of individual Australians. Significantly, online content can also provide Australians with opportunities for greater interaction with content and a forum to exchange views. The need for local content was a recurrent theme in the Reviews' consultations and ABC online services play an important role in this regard.

Both public broadcasters are leading the way in the development of innovative online and digital content. For example, the ABC noted in its submission to the Review that its:

> iview catch-up television service continues to rapidly grow in popularity. In 2011, iview recorded a monthly average of 2.9 million visits, an increase of 48% in one year.[1]

Neither of the public broadcasters' charters makes explicit reference to online delivery of services. This absence could limit the extent to which the ABC and the SBS can extend the delivery of their services to new platforms. The Review's interim report included a recommendation to update the two charters to expressly reflect the current range of existing services, including online activities. In response, the SBS suggested that its charter should be technology neutral.[2] The ABC noted the desirability of modernising its charter to reflect the scope of ABC activities and added that this could be simply achieved by amending the charter to make clear that the ABC's functions include broadcasting and 'digital media services'.[3] The Review received 320 submissions from members of the Friends of the ABC calling for the ABC charter to remain untouched.

Should the public broadcasters limit their activities where a commercial operation may be able to provide a service?

Submissions by the Australian Subscription Television and Radio Association (ASTRA) and Foxtel argued that it is not the role of either the ABC or the SBS to produce content that is already provided by and directly competes with the private sector. ASTRA noted:

> there is obviously little point in the Australian government dedicating the collective resources of its people via taxation towards services that are already provided by the marketplace.[4]

Similarly, Foxtel noted:

> notwithstanding this level of separation from the broad body of regulatory fabric which governs other participants in the broadcasting landscape/ecology, the national broadcasters are increasingly duplicating the services that can and are being produced by the private sector—crowding out the creativity of Australians working in the private sector.[5]

However, the ABC noted:

> the ABC has never been just a 'market failure' broadcaster: the Charter requires the Corporation to be 'innovative and comprehensive' and to provide a balance between broadcasting programs of wide appeal and specialised broadcasting programs.[6]

The charters of both public broadcasters include provisions that, in essence, require them to take into account the services offered by other broadcasters. However, both charters also refer to objectives that can be seen as targeting all Australians, not just niche audiences. As such, the value that stems from the ABC and the SBS providing popular entertainment content can be realised by attracting an audience that remains with the broadcaster and views or listens to other valuable content, such as news and current affairs.

The ABC news brand is highly trusted:

- ABC TV news and current affairs was the most trusted media source in a 2011 survey by Essential Media Communications.
- 72 per cent of respondents trust ABC TV news and current affairs (compared to 43 per cent for commercial television).

1 ABC, submission on interim report, p. 7.
2 SBS, submission on interim report, p. 4.
3 ABC, submission on interim report, p. 15.
4 ASTRA, submission in response to open call, p. 15.
5 Foxtel, submission on framing paper, p. 8.
6 ABC, submission in response to open call, p. 2.

> 67 per cent of respondents trust ABC radio news and current affairs (compared with 33 per cent for commercial radio talkback, and 52 per cent for local newspapers).[7]

The submission from APN News & Media highlighted the impact of the ABC's investment in regional online services on commercial operations that are already facing serious convergence-related threats to their business models. APN suggested that one solution would be to require the ABC to share local news content with commercial operators to redistribute through their own channels.[8] However, the Review believes that such an approach would reduce the diversity of local news sources available to the public.

Taking all of the above issues into consideration, the Review recommends updating the charters of the ABC and the SBS to make specific reference to the range of digital activities they currently perform. This will clarify the role of the two public broadcasters.

National Indigenous Television service

Participants at public consultations reaffirmed the value of Indigenous broadcasting and the Review recognises the unique nature of these services. The Review notes that the Australian Government's aim is to provide a national platform for free-to-air delivery of Australian Indigenous content. The Minister for Broadband, Communications and the Digital Economy has invited the National Indigenous Television service (NITV) and the SBS to begin discussions on the format and structure of a possible new Indigenous television service.[9]

NITV is a valuable service that provides a distinct voice for Indigenous interests. The Review broadly endorses the outcomes of the Indigenous Broadcasting Review undertaken in 2010.[10] The government should ensure that NITV is placed in a sustainable position to continue its services with appropriate transmission capacity and that Indigenous radio broadcasting continues to be supported.

Australian content quotas for public broadcasters

The telling of Australian stories is central to the purpose of the public broadcasters; the SBS is required by its charter to reflect multiculturalism to Australians. In its interim report the Review recommended that the public broadcasters meet Australian content quotas. This would bring them in line with the rules applying to the primary channels of the commercial free-to-air television broadcasters.

In its submission to the Review, the ABC argued that its level of investment in Australian content is not driven by quotas but by the availability of adequate funding. The ABC also noted that it could lift the Australian content quota on ABC2 with increased funding.[11] A number of organisations, such as the National Association for the Visual Arts and the Australian Major Performing Arts Group, supported the call for additional funding to enable the public broadcasters to meet the Australian content quotas if they were imposed.[12]

The ABC argued that applying quotas and sub-quotas to its service could impinge on its independence because this would mean in effect that Parliament was deciding what portion of its budget should be spent on different types of programming.[13] The ABC's current charter requirement to provide specialised programming, as well as programs of wide appeal, also has to be recognised.

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7 Essential Media Communications, *Essential Report: Trust in Various Australian Institutions,* September 2011; *Essential Report: Trust in Media*, December 2011.

8 APN News & Media, submission on diversity and local content in response to open call, p. 4.

9 Senator the Hon Stephen Conroy, media release, 1 September 2011, www.minister.dbcde.gov.au/media/media_releases/2011/245.

10 See www.dbcde.gov.au/radio/indigenous/indigenous_broadcasting_review_2010.

11 ABC, submission in response to open call, pp. 6, 7.

12 See submissions in response to open call from National Association for the Visual Arts and Australian Major Performing Arts Group. See also The Equity Foundation, media release, 16 December 2011, www.equityfoundation.org.au/newsbites/equity-welcomes-convergence-reviews-recognition-of-the-importance-of-australian-content.html.

13 ABC, submission in response to open call, p. 6.

However, the Review believes that, given the substantial taxpayer investment in the public broadcasters, it is appropriate that Australian content quotas be applied to them while these quotas remain in place for the commercial sector. This will formalise the important function of both public broadcasters in supporting Australian voices and the production of Australian content.

The Review therefore recommends that the primary ABC channel should be subject to a 55 per cent Australian content quota consistent with the obligation of commercial free-to-air television broadcasters. Reflecting its multicultural charter obligations, the SBS should be required to target half this amount (27.5 per cent).

The ABC has a commitment to specialist Australian programs for children and in the areas of science, the arts, religion and rural affairs. The SBS has a focus on multicultural and multilingual programming. The sub-quota requirements applying to free-to-air commercial television broadcasters are therefore not appropriate for the public broadcasters.

As both the ABC and SBS are currently in a position to meet these quota obligations, with relatively little additional investment, the new obligations should commence as soon as practicable.

Community broadcasting

Both community television and community radio add to the diversity of the Australian media. In particular, community radio has been one of the success stories in Australian broadcasting. Community radio is a vibrant, fertile source of innovative and independent content. It encourages participation and has made an important contribution in the area of local content.

The Review recommends that spectrum continue to be made available for community radio and that channel capacity on digital spectrum be allocated for existing community television services. This is in line with another of the Review's recommendations that a channel on the sixth multiplex be made available to carry community television (see Chapter 9).

While the regime for licensing broadcasting services will not be retained, eligibility criteria will still be required for the allocation and ongoing use of spectrum to community broadcasting organisations. This will ensure the continuation of these services for their communities.

Alternative forms of delivery that could extend community broadcasting services to broader audiences on new platforms would also reinforce the value of their services to Australians. To assist community broadcasters to develop these services the Review has recommended that access to the converged content production fund be provided for applicants that demonstrate a strong community demand for innovative content services (see Chapter 5).

9. Spectrum allocation and management

Radiofrequency spectrum is a valuable and limited public resource. Once spectrum is planned and allocated, most commercial non-broadcasting users of spectrum pay a fee (either up front or on an annual basis) that is determined by the value of the spectrum. Arrangements for the planning, allocation and licensing of broadcasting services band[1] spectrum have historically differed from the arrangements for other spectrum uses.

Commercial broadcasting services licences currently encompass more than access to spectrum. Licensees are subject to a range of obligations, which can include coverage, local content, classification requirements and the payment of an annual licence fee based on a percentage of revenue. Licensees also receive benefits, such as priority access to certain sports rights through the anti-siphoning scheme and a moratorium on a fourth commercial television network.

Each licensee currently pays a percentage of its annual gross earnings as a licence fee. The licence fees do not necessarily reflect the direct economic value of the spectrum used to deliver services; instead, they are a tax on revenues derived from broadcasting. This arrangement does not encourage the efficient use of broadcasting spectrum. There is a need for a new approach to spectrum management and allocation.

Recommendations

27. There should be a common approach to the planning, allocation and management of both broadcasting and non-broadcasting spectrum that includes:
    a. a market-based pricing approach for the use of spectrum, and one that provides greater transparency when spectrum may be used for public policy reasons
    b. spectrum planning mechanisms that explicitly take into account public interest factors, and social and cultural objectives currently reflected in the *Broadcasting Services Act 1992*
    c. ministerial powers to reserve and allocate spectrum to achieve policy objectives considered important by the government and the Australian community, including public and community broadcasting, which have contributed to the diversity of the Australian broadcasting system
    d. certainty for spectrum licence holders about licence renewal processes.
28. Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:
    a. as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcasting use
    b. commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.
29. The new communications regulator should allocate channel capacity on the sixth planned television multiplex (known as the 'sixth channel') to new and innovative services that will increase diversity. The use of capacity on the sixth multiplex for the distribution of community television services should continue. Existing commercial free-to-air television broadcasters and the ABC and the SBS should be precluded from obtaining capacity on the sixth multiplex.

1 The broadcasting services bands are parts of the spectrum designated by the minister as being primarily for broadcasting purposes.

Overview of current arrangements

In Australia, the regime for planning, licensing and managing broadcasting spectrum differs from that applied to the use of spectrum by other communications services.[2]

Historically, all commercial television and many radio broadcasting licences were awarded following a non-financial selection process, often referred to as a 'beauty contest'.[3] However, with the introduction of FM radio, most commercial radio licences became subject to a price-based allocation process.[4]

Commercial radio or television broadcasting licences that use the broadcasting services bands come with entitlement to spectrum through apparatus licences. Currently there is a moratorium on a fourth commercial television network. Legislation effectively prevents any additional commercial television broadcasting licences that use the broadcasting services bands being issued, beyond the three available in most metropolitan and regional areas.

Commercial television and radio broadcasters are subject to annual licence fees under the *Television Licence Fees Act 1964* and the *Radio Licence Fees Act 1964*.[5] The licence fees are calculated as a percentage of a licensee's gross earnings, with the percentage increasing as gross earnings increase to a maximum rate of 9 per cent for television and 3.25 per cent for radio.

In 2008–09, commercial television broadcasters paid $273.3 million in broadcasting licence fees. In February 2010, the Minister for Broadband, Communications and the Digital Economy announced a licence fee rebate of 33 per cent in 2010 and 50 per cent in 2011 for commercial television broadcasting licensees in recognition of the importance of the Australian Content Standard, the level of licence fees in Australia compared with some other countries, and the new technology and commercial challenges facing the sector, including the switchover to digital television.[6] The minister also indicated that the government was committed to reviewing the future role of broadcast licence fees in Australia as the media sector undergoes a period of significant change. Reflecting these rebates, television broadcast licence fees were $231.4 million in 2009–10 and $179.8 million in 2010–11. Radio broadcasting fees were $22.7 million in 2008–09, $21.4 million in 2009–10 and $24.5 million in 2010–11. These were not subject to any rebates.[7]

Spectrum management

Spectrum is a major public asset. All wireless devices communicate using spectrum. Australians depend on access to suitable spectrum for the provision of a range of services, including television and radio broadcasting, mobile telephony, delivery of multimedia and data, air traffic control, emergency services, defence, and management of power and water. The characteristics and physical properties of spectrum mean that the amount of 'usable' spectrum is limited. Technological developments have opened up the range of usable spectrum, but spectrum demand is increasing with the rapid growth in wireless applications and services. It is vital that spectrum licence holders are encouraged to use this scarce resource efficiently.

In a converged environment, where there are multiple platforms capable of delivering broadcasting content, the current regulatory distinction between spectrum allocated for broadcasting services and spectrum allocated for other purposes is no longer useful. A single regulatory framework for the management and allocation of all

2 This reflects a history where spectrum planning functions for broadcasting before 1997 were undertaken by a different regulatory authority to that responsible for spectrum planning generally.

3 A beauty contest is a comparative (merit-based) selection process. It allows for non-financial aspects and social objectives to be taken into account and usually involves the regulator being given a high degree of discretion in establishing the selection criteria and selecting the successful candidates.

4 Successful bidders for licences have included Hot Tomato, Daily Mail (UK) and DMG Radio. Examples of radio stations operated under the licences are NovaFM and StarFM.

5 *Television Licence Fees Act 1964*, section 5; *Radio Licence Fees Act 1964*, sections 5, 6.

6 Senator the Hon Stephen Conroy, media release, 7 February 2010, www.minister.dbcde.gov.au/media/media_releases/2010/007.

7 ACMA, unpublished data, 2012. The fees for commercial television are after rebates have been claimed. Licence fee amounts for 2010–11 for both television and radio are preliminary.

spectrum will offer increased efficiency of planning and regulatory processes for both the regulator and industry. A single framework will also be more responsive to evolving technologies and shifting spectrum demands.

A review of the spectrum arrangements for broadcasting is timely, judging by submissions to the Review. Broad support was given to the Review's guiding principle that 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.

Opinions diverged, however, about how this objective could best be achieved.

Optus stated:

> Past justifications for automatically linking a broadcast transmission licence with access to spectrum and guaranteeing this access is no longer warranted in a converged market that proposes to be governed by a principle of regulatory parity and has an objective to support competition and innovation. This Principle would be achieved by adopting a technology and service neutral spectrum licensing regime that would see broadcasting licences currently regulated under the *Broadcasting Services Act 1992* transferred to the *Radiocommunications Act 1992*. This transfer would achieve regulatory parity in allocation and management of spectrum in a converged market.[8]

Free TV Australia commented:

> As a unique form of one-to-many communications, broadcasting remains the most efficient way of transmitting high quality content to millions of people simultaneously ... The specialist objectives for the management of spectrum in the BSA remain the most effective reflection of the particular social and cultural benefits arising from free-to-air television services … The underlying rationale for specialist management of broadcasting spectrum remains valid, despite the rapidly changing media market.[9]

Commercial Radio Australia did not support the proposal in the Review's interim report to replace commercial radio broadcasting licences with spectrum licences. It contended that the proposal would undermine the current licence rights of broadcasting services band licence holders and potentially disrupt the existing business models of commercial radio broadcasters. However, it considered that the current approach to licensing requires reform to better reflect the evolving landscape for commercial broadcasters while also removing unnecessary regulatory costs.[10]

The Australian Communications and Media Authority (ACMA) has stated that the advent of new multicast content services makes the rationale for special regulation of broadcasting services through licence arrangements less certain. In its report *Broken Concepts*, the ACMA said that current regulatory concepts put a misplaced emphasis on the ACMA's planning and allocation activities in broadcasting compared with other innovative uses.[11]

The UK Government has stated that spectrum allocation should not be based on content:

> As digital technology facilitates convergence, rigid demarcations, such as between broadcasting and telecommunications, become less meaningful and relevant. The result is an erosion of boundaries between services such as broadcasting, voice communications and data transmission ... At the same time, point-to-multipoint fixed services are taking on many of the characteristics of mobile communications ... To reflect this convergence, spectrum allocations should, as far as possible, be based on spectrum management considerations, not content.[12]

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8 Optus, submission in response to open call, p. 6.

9 Free TV Australia, submission in response to open call, p. 34.

10 Commercial Radio Australia, submission on interim report, pp. 4, 8.

11 ACMA, *Broken Concepts: The Australian Communications Legislative Landscape*, August 2011, http://engage.acma.gov.au/broken-concepts.

12 UK Government Response to the Independent Review of Radio Spectrum Management, 15 October 2002, paras 2.1, 2.2, ofcom.org.uk/static/archive/ra/spectrum-review/index.htm. The UK Government was responding to M Cave, *Review of Radio Spectrum Management*, March 2002, a report prepared for the UK Department of Trade and Industry and Her Majesty's Treasury, www.ofcom.org.uk/static/archive/ra/spectrum-review/2002review/1_whole_job.pdf.

Adopting a new approach to spectrum management using market-based spectrum pricing will achieve a long-term balance between the efficient use of scarce and valuable spectrum and the promotion of universal access to a diverse range of broadcasting services.

Planning spectrum in the public interest and ministerial reservation powers

The ACMA has primary responsibility for planning and managing the overall use of the spectrum (under the *Radiocommunications Act 1992* and the *Broadcasting Services Act 1992*). It determines spectrum plans and frequency band plans, and licenses spectrum users.[13] The ACMA has adopted a 'total welfare standard' approach and has developed principles for spectrum management to add clarity and transparency when it is exercising regulatory discretion within the scope of the Acts to make decisions about spectrum management.[14]

Both the 'total welfare standard' approach and the principles for spectrum management recognise qualitative and quantitative factors in the ACMA's decisions on spectrum use. These acknowledge that the highest-value use of spectrum is that which 'maximises the value derived by licensees, economic assessment, consumer and broader public good or social benefit to Australia'.[15]

The minister is given power, under the Radiocommunications Act, to designate where spectrum can be allocated and to designate the broadcasting services bands.[16] Under the Broadcasting Services Act, the minister also has the specific power to reserve capacity within the broadcasting services bands for public and community broadcasting services.[17]

The ACMA has powers under the Broadcasting Services Act to take into account a range of public interest considerations in relation to spectrum planning.[18] The Review recommends that any new legislation include spectrum planning mechanisms that take into account public interest factors and social and cultural objectives of the kind currently reflected in the Broadcasting Services Act.

The submission from the Australia Council for the Arts was one of a number that noted that the minister's power to reserve capacity for public and community broadcasting has been a significant factor in maintaining diversity in broadcasting services and the national cultural infrastructure.[19] The Review recommends that the minister's power to reserve spectrum be reflected in any new spectrum management legislation.

Submissions from the Australian Mobile Telecommunications Association and Telstra were among those which acknowledged that ministerial powers to reserve spectrum may be necessary in certain circumstances to deliver specific government objectives where a market approach is not viable and a clear public benefit exists.[20] These objectives may include public safety and non-commercial broadcasting for public and community broadcasters or other non-commercial uses.

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13 The spectrum plan divides the Australian radiofrequency spectrum into a number of frequency bands and specifies the general purpose for which the bands may be used. The plan provides a basis for management of spectrum, informs users about the types of services that can be offered in each frequency band and conditions of use, and reflects Australia's obligations as a member of the International Telecommunication Union. Frequency band plans are legal instruments that specify the purposes for which bands may be used and may provide for the reservation of parts of the spectrum for public or community services.

14 The total welfare standard measures the impact of a regulatory proposal on the public interest based on the sum of the effects on consumers, producers and government and the broader social impacts on others in the community. The preferred regulatory approach is that which is expected to generate the greatest net benefits for the community. See ACMA, *Principles for Spectrum Management*, March 2009, www.acma.gov.au/WEB/STANDARD/pc=PC_311683.

15 ACMA, *Five-Year Spectrum Outlook 2010–2014*, March 2010, p. 15, www.acma.gov.au/WEB/STANDARD/pc=PC_312080.

16 *Radiocommunications Act 1992*, section 31.

17 *Broadcasting Services Act 1992*, section 31.

18 *Broadcasting Services Act 1992*, section 23. In planning the broadcasting services bands and promoting the economic and efficient use of spectrum, the ACMA is to have regard, for example, to demographics, social and economic characteristics within licence areas, the number of existing broadcasting services, the demand for new broadcasting services and technology developments.

19 Australia Council for the Arts, submission in response to open call, p. 6; see also SBS, submission on spectrum allocation and management in response to open call, p. 2.

20 Australian Mobile Telecommunications Association, submission in response to open call, p. 11; Telstra, consolidated submission in response to open call, p. 55.

The Australian Mobile Telecommunications Association also stated that the minister's powers to reserve spectrum should not be used as a proxy for subsidies. Any subsidy measures should form part of the budget planning process for public and community broadcasters.

Telstra argued that any such reservation of spectrum should still require the user to pay a market-based fee to ensure that the spectrum value and opportunity cost of such a reservation can be recognised and accounted for in government decision making.[21] Treasury suggested that 'institutional arrangements should be such that the value of the subsidy is estimated, disclosed and updated regularly'.[22]

The Review recognises that accurate costing is necessary for accountability and the effective assessment of socially beneficial investments. The new communications regulator should estimate and publish the value of spectrum reserved for public and community broadcasters on a regular basis. More broadly, the value of any spectrum, broadcasting or not, allocated for any non-commercial use should be estimated regularly and reported publicly.

Licensing

Broadcasting licences are used to regulate the number and categories of broadcasters and the content of broadcasts. The licences have no direct relationship to the associated entitlement and use of spectrum.

Breaking the current nexus between the licensing of broadcasting spectrum and the content-related obligations of broadcasters will lead to more efficient and innovative use of spectrum. It will also give entities more flexibility to deliver content on any platform. The important social and cultural obligations of broadcasters should be independent of the technical licensing of spectrum.

The Productivity Commission presented a similar view in its 2000 broadcasting report. The commission stated that:

> splitting broadcasting licences into licences granting access to spectrum and licences granting permission to broadcast would provide opportunities to improve significantly the efficiency of use of broadcasting spectrum. In particular, the split would create the preconditions necessary for more appropriate pricing of spectrum, which in turn would create incentives for more efficient use of spectrum. It would help drive the digital conversion process, freeing up spectrum for more and different services. It would facilitate the development of digital broadcasting multiplex operators that can provide a delivery mechanism for multiple services. In addition, it could improve regulatory efficiency, which is increasingly important as technological convergence increases the number of ways in which broadcasting services can be delivered.[23]

Although the Productivity Commission report is more than 10 years old, its conclusions remain sound today.

Putting a price on licence fees for broadcasters

Submissions from News Limited, the Communications Alliance and the Australian Competition and Consumer Commission were among a number that supported the adoption of market-based pricing of all spectrum.[24] They contended that letting market forces operate freely, in conjunction with issuing technology-neutral spectrum licences, is the best way to allocate scarce spectrum that is subject to commercial demand. Submissions suggested that the market value for broadcasting spectrum should be either the price paid in an auction or a fee reflecting a fair market price for spectrum.

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21 Telstra, submission on interim report, p. 24.

22 Treasury, submission in response to open call, p. 10.

23 Productivity Commission, *Broadcasting*, report no. 11, 2000, p. 192, www.pc.gov.au/projects/inquiry/broadcasting/docs/finalreport.

24 See submissions on interim report from News Limited, p. 1; Communications Alliance, p. 7; Australian Competition and Consumer Commission, p. 6.

Free TV Australia stated that the objective of broadcast spectrum pricing should be to maximise the economic benefit delivered. It suggested a regime that allows broadcasters to maximise the amount they can spend on content. It also contended that price-based mechanisms are ill-equipped to measure the extent to which spectrum-reliant services deliver cultural and social objectives.[25]

Free TV Australia advocated a review of broadcast licence fees, contending that market changes have led to significant increases in content costs while their share of revenue is declining. It recommended a permanent reduction in licence fees of at least 50 per cent. Free TV Australia also proposed a graduated transition in the medium term to an administrative pricing regime where fees would be set at a level based on an appropriate contribution by the sector towards the costs of running the communications regulator.[26]

Free TV Australia submitted an international benchmarking report by Venture Consulting, which suggested that broadcast licence fees for Australia should be set at 1 per cent of gross revenues. The report factors in the cost of meeting content obligations, both in Australia and in comparable international markets.[27]

In stark contrast, the Australian Subscription Television and Radio Association (ASTRA) submitted analysis by Deloitte Access Economics that valued broadcast spectrum access for the commercial free-to-air networks at $505 million in 2010–11. This was part of the $793 million in net government support that Deloitte Access Economics estimated was provided to the commercial free-to-air television sector in 2010–11, including protection of sports rights through the anti-siphoning regime.[28] ASTRA stated that further analysis based on the value of spectrum in the 800 MHz and 2.3 GHz bands (for use by mobile telephony and wireless broadband) determined by the minister on 10 February 2012 puts the estimate of the annual value of spectrum allocated to commercial free-to-air broadcasters at $612 million.[29]

Commercial Radio Australia stated that the annual licence fees paid by commercial radio broadcasters do not reflect the changes to the industry that convergence has brought about, including increasing levels of competition from online and other streamed audio services. It noted that annual licence fees paid by commercial radio broadcasters have not been reviewed for 20 years, nor have they been subject to the adjustments and rebates made available to commercial television broadcasters in recent years. It cited a benchmarking study by Venture Consulting, which found that stated annual licence fees paid by commercial radio broadcasters as a percentage of revenue are between three and five times higher than those that apply to broadcasters in comparable jurisdictions.[30] Commercial Radio Australia also contended that the calculation of licence fees should be based on revenue earned from the use of spectrum, rather than based on the value of spectrum used.[31]

Radio stations on the AM band in Australia were generally awarded following a 'beauty contest' rather than a market-based allocation process. When spectrum was made available for commercial FM radio in the 1980s and in subsequent years, most licences for new commercial radio services were awarded through spectrum auctions. For many years, these commercial radio services have been paying annual broadcast licence fees to government in addition to amounts paid for their licence at an auction-determined market price. These factors will need to be considered in spectrum licence fees when the new communications regulator determines a market-based spectrum price for these radio services.

25 Free TV Australia, submission in response to open call, p. 33.

26 Free TV Australia, submission in response to open call, pp. 14, 16.

27 Free TV Australia, submission on interim report, p. 3.

28 ASTRA, supplementary submission in response to open call, p. ii.

29 ASTRA, submission on interim report, p. 4.

30 Commercial Radio Australia, submission in response to open call, pp. 40–41 (citing Venture Consulting, *Australian Commercial Radio Licence Fees: International Comparison Study*, 2011).

31 Commercial Radio Australia, submission on interim report, p. 10.

The Treasury suggested that spectrum prices should 'cover the opportunity cost of the spectrum as well as any upfront and ongoing administration costs incurred by the Government in administering sales and regulating spectrum use', and argued that such a pricing combination will result in spectrum being allocated to its highest value use.[32]

The International Telecommunication Union has observed a clear shift globally from administrative assignment of spectrum towards market-based mechanisms. The dynamic nature of technological and market change has rendered centralised administrative assignment of spectrum slow to react, inefficient and biased towards the status quo and incumbent interests.[33]

The UK communications regulator (Ofcom) will introduce administered incentive pricing for spectrum used for digital terrestrial broadcasting of television and radio from 2014.[34] An administered incentive pricing scheme involves charging annual fees that reflect the opportunity cost of holding spectrum, thereby providing a pricing incentive to use spectrum efficiently.[35] Ofcom has committed to an open and transparent process to derive the opportunity costs of spectrum.

The Review considers that market-based pricing of broadcasting spectrum is the most objective and effective way to resolve competing spectrum demands, to ensure efficient spectrum use and to accommodate changing technology and consumer demands.

New arrangements for pricing broadcasting spectrum should be planned by the communications regulator in consultation with existing broadcasters. The regulator will need to develop methods to undertake the complex task of valuing relevant spectrum and deriving an appropriate licence fee. Similar exercises are under way in other countries such as the United Kingdom and learning from international experience in pricing will be invaluable.[36] This matter is discussed further in the implementation section at the end of this chapter.

Potential uses for additional spectrum

Sixth multiplex

Broadcasting spectrum has been planned to allow for what was historically referred to as a 'sixth channel' for television services to be allocated at some stage in the future in addition to the three commercial networks, the ABC and the SBS. 'Sixth channel', however, is a misleading term—rather than a single channel, it is now a 7 MHz multiplex capable of supporting a number of channels.

A number of restrictions apply to the use of the sixth multiplex under existing legislation.[37]

Some capacity in the sixth multiplex has been temporarily allocated since late 2009 for use by community television broadcasters in mainland state capital cities to deliver their services digitally. The government has not yet made any policy announcements on the future of community digital television services beyond 31 December 2013. The government has also deferred its review of the moratorium on a fourth commercial television licence, which could be carried on the sixth multiplex, to January 2013 so it can consider the findings of the Convergence Review.[38]

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32 Treasury, submission in response to open call, p. 11.

33 International Telecommunication Union, *Radio Spectrum Management for a Converging World*, 2004.

34 Ofcom, *Future Pricing of Spectrum Used for Terrestrial Broadcasting: A Statement*, 19 June 2007, http://stakeholders.ofcom.org.uk/binaries/consultations/futurepricing/statement/statement.pdf.

35 Opportunity cost represents the value of spectrum in the highest-value alternative use that is forgone by granting access to one party rather than another.

36 Ofcom, *Future Pricing of Spectrum Used for Terrestrial Broadcasting*.

37 See, for example, *Broadcasting Services Act 1992*, section 35B and *Radiocommunications Act 1992*, section 98A.

38 *Broadcasting Services Amendment (Review of Future Uses of Broadcasting Services Band Spectrum) Act 2011*.

Free TV Australia and the SBS recommended that a portion of the sixth multiplex could be used for community television, with remaining spectrum set aside as an innovation space for development and testing of new technologies such as MPEG-4 and DVB-T2.[39] Free TV Australia opposed the allocation of spectrum for additional commercial television licences, arguing that a new entrant would have a detrimental impact on the revenues of existing broadcasters and on the quality and diversity of existing services.[40]

The Melbourne Community Television Consortium recommended that 'sufficient bandwidth be made available on the free-to-air broadcasting platform as part of the sixth channel, or on some other carrier to maintain the current standard definition community television services'.[41]

Broadcast Australia recommended that the sixth multiplex be allocated to provide new innovative free-to-air television services in at least the five metropolitan markets and the major regional television centres of Australia.[42]

The submissions from News Limited, Direct Group and ASTRA were among several that called for the removal of limitations on new broadcasting entrants.[43] Foxtel stated that the moratorium prohibiting the allocation of a new commercial television licence should be lifted, and that current unallocated spectrum should be given to new services such as a terrestrial broadcasting network, community and information channels or new wireless broadband services.[44]

ASTRA and several individual subscription television operators, including Movie Network Channels, Aurora Community Channel and the Australian Christian Channel, argued that free-to-air broadcasters do not require additional spectrum for future technology migrations or new services and supported further competition in the terrestrial broadcasting sector.[45] These submissions also suggested that wireless broadband or a range of not-for-profit services could be deployed in the spectrum.

Leaving spectrum idle or underutilised for a prolonged period is inconsistent with the Review's guiding principle 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.

The Review has concluded that the sixth multiplex should not be allocated to create a full fourth commercial television network operated by a single enterprise. The Review considers that allocating individual channel capacity to a range of providers will maximise diversity. The Review considers that this is a unique opportunity to encourage and promote innovative services on the sixth multiplex, which will give consumers new content and contribute to competition and diversity.

The new communications regulator would be responsible for determining appropriate eligibility criteria for use of the available capacity on the sixth multiplex and would administer a pre-selection process to determine the best candidates for the new services. New services should aim to increase the diversity of Australian television services. The eligibility criteria should be framed so that they do not limit the innovative nature of potential channels. Proposals for new services on the sixth multiplex should have some of the following characteristics:

> The services offered would not simply replicate services provided by the three existing commercial free-to-air television networks.

> Services would be original and distinctive and add to the creative diversity of the broadcasting sector.

39 Free TV Australia, submission in response to open call, p. 37; SBS, submission on spectrum allocation and management discussion paper in response to open call, p. 4.

40 Free TV Australia, submission in response to open call, p. 20.

41 Melbourne Community Television Consortium, submission in response to open call, p. 9.

42 Broadcast Australia, consolidated submission in response to open call, p. 8.

43 News Limited, submission on interim report, p. 8; Direct Group, submission in response to open call, p. 5; ASTRA, final submission in response to open call, p. 29.

44 Foxtel, submission in response to open call, p. 3.

45 ASTRA, submission in response to open call on key policy and regulatory issues for the Review, p. 14; Movie Network Channels, submission in response to open call, p. 5; Aurora Community Channel, submission in response to open call, p. 6; Australian Christian Channel, submission in response to open call, pp. 5, 6.

- The content could be focused and thematic, presenting programming on, for example, history, science, arts, comedy, education, sport, documentaries, current affairs or drama.
- Business models could include advertising, sponsorship or subscriptions.

Applicants would have to demonstrate a sustainable business model. Once programming preconditions had been satisfied, allocation would be price based, such as through an auction.

To promote diversity of ownership and content, existing commercial free-to-air television broadcasters, and the ABC and the SBS, should be excluded from seeking access to channel capacity on the sixth multiplex. The regulator would need to ensure that channel capacity is awarded to multiple new enterprises to maximise diversity.

The new communications regulator should develop appropriate measures to monitor and enforce compliance with performance promises regarding the type of new services on the sixth multiplex. The regulatory obligations on sixth multiplex services should be clearly articulated. If an organisation met the relevant content service enterprise thresholds, it would be subject to the obligations.

The sixth multiplex could be operated by a consortium consisting of the successful individual multichannel owners and the relevant community television service provider. Similar arrangements already operate for digital radio services under the Radiocommunications Act.

The new communications regulator could consider requiring new services operating on the multiplex to be transmitted from the outset in MPEG-4 format. Using the MPEG-4 format would almost double the number of multichannels available and enable more efficient use of spectrum.

The Review recognises that there is not yet total penetration of MPEG-4 capable devices in Australian households and the presence of a significant number of legacy receivers would mean that at launch some households would not be able to access the new services transmitted on the multiplex. Retail sales figures, however, suggest that the large majority of televisions in use should be MPEG-4 capable relatively soon. In the period from July 2004 to June 2011, 63.9 per cent of the integrated digital televisions and high-definition set-top boxes sold were already MPEG-4 capable, and in the month of July 2011, 90.7 per cent of units sold were MPEG-4 capable.[46]

A requirement for MPEG-4 format would also provide a stimulus to commercial free-to-air and public television broadcasters to upgrade their transmission services from existing technologies.[47] Existing community television broadcasters on the sixth channel would be expected to upgrade to the MPEG-4 standard on a timetable agreed with the regulator. Although community television and new providers may face some additional initial costs to transmit in MPEG-4, these would be offset by the broader stimulus provided to the sector for the future by maximising the productivity of free-to-air television spectrum. The ACMA has sought industry and community comment on the post-digital switchover, post-restack technical evolution of digital terrestrial television broadcasting, including the drivers and pathways for implementing change.[48]

Australia is currently making the transition to digital broadcasting. Current broadcasters' spectrum will be 'restacked' following the switch-off of analog television. Planning for the use of the sixth multiplex could start on the commencement of the new communications regulator. Delivery of new services on the sixth multiplex should begin when practicable after the digital switchover is complete. The significant benefits of additional diversity on Australia's free-to-air television broadcasting platform should also be factored into timing decisions.

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46 Broadcast Australia, supplementary submission in response to open call, p. 9 (citing research by GfK).

47 MPEG-2 and MPEG-4 can be broadcast together on the same multiplex.

48 ACMA, *Beyond Switchover: The Future Technical Evolution of Digital Terrestrial Television in Australia*, discussion paper, January 2012, http://engage.acma.gov.au/beyond-switchover-the-future-technical-evolution-of-digital-terrestrial-television-in-australia.

Digital radio

Digital radio was launched in Australia in 2009 in Adelaide, Brisbane, Melbourne, Perth and Sydney to supplement, but not replace, analog radio services (AM and FM). Trial broadcasts of digital radio services are also being conducted in the Canberra and Darwin regional licence areas. The Australian Government has provided funding to public and community broadcasters to assist with the rollout of digital radio in metropolitan markets.

Digital radio has a number of advantages over analog, including clearer sound quality, more listening choices, tuning by station name, display of song title and artist, pause and rewind of live radio and the broadcast of still and video images on some devices.

Australia uses the Digital Audio Broadcasting (DAB+) standard, which uses VHF band III spectrum, the same spectrum currently used to deliver both analog and digital television services. Access to digital radio in Australia requires a DAB+ receiver.

The rollout of digital radio services beyond the current metropolitan licence areas and into regional areas depends on policy and technology decisions that are still to be made by government.

In July 2010, the minister issued a direction to facilitate the future rollout of digital radio to regional Australia. The direction advised the ACMA that following analog television switchoff, 14 MHz of spectrum in VHF band III should be made available in each metropolitan licence area to avoid potential interference issues in DAB+ rollout in nearby and densely populated regional areas.[49]

While this direction to facilitate digital radio in regional Australia was broadly welcomed, there is a view in the industry that 21 MHz of spectrum should be set aside to optimise adequate planning of DAB+ in regional areas. Although it would be possible to roll out DAB+ with 14 MHz, in some regions it would require commercial and public broadcasters to share a single multiplex and would restrict the localisation of their services.

In submissions to the Review, the Indigenous Remote Communications Association and Broadcast Australia expressed support for the allocation of a third 7 MHz multiplex for digital radio so that 21 MHz of spectrum could be set aside in metropolitan areas to facilitate additional regional services.[50] Broadcast Australia, for example, recommended that a third 7 MHz VHF band III multiplex be made available for digital radio to enable its comprehensive expansion to regional Australia. It suggested that such an outcome could be achieved if the minister were to amend his directive so that only the five existing (not six) channels were planned for VHF in metropolitan areas and UHF Channel 27 were to be used for broadcasting purposes. Broadcast Australia claimed that this could be done without affecting the government's 126 MHz digital dividend.

The ABC also supported the allocation of more VHF spectrum for DAB+ radio, stating that as a matter of equity, it believes it must deliver the same suite of services to regional audiences as it provides to metropolitan listeners, including new services only made possible by DAB+.[51]

The recent review of technologies for digital radio in regional Australia found that there is a preference for DAB+ as the primary digital radio technology in Australia.[52] It also found that achieving coverage in some regional areas is likely to require supplementation by an alternative to DAB+, such as Digital Radio Mondiale.

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49 Commonwealth of Australia, *Australian Communications and Media Authority (Realising the Digital Dividend) Direction 2010*, 9 July 2010, Direction 5(d), www.comlaw.gov.au/Series/F2010L01990.

50 Indigenous Remote Communications Association, submission in response to open call, p. 24; Broadcast Australia, consolidated submission in response to open call, p. 5.

51 ABC, submission in response to open call, p. 20.

52 Department of Broadband, Communications and the Digital Economy, *Review of Technologies for Digital Radio in Regional Australia*, October 2011, www.dbcde.gov.au/radio/digital_radio/review_of_digital_radio_technologies_for_regional_australia.

Submissions to the technology review, however, indicated little support for turning to Digital Radio Mondiale or any other technology to provide such coverage until it is clear which particular areas cannot be covered using DAB+.[53]

A number of submissions to the Convergence Review called for a comprehensive government-funded expansion of digital radio to the regional areas of Australia.[54] The Remote Area Planning and Development Board stated that local radio is a vital part of life in remote areas.[55] Commercial Radio Australia argued strongly for the introduction of DAB+ radio services into regional areas as soon as possible, but recommended against the awarding of new radio licences, either analog or digital.[56]

The Indigenous Remote Communications Association emphasised that future digital radio services to remote areas need to be broadcast—not limited to household services provided through direct-to-home satellite delivery—because most radio access in remote areas is received in vehicles or on portable receivers.[57]

The availability of a wide range of affordable consumer devices will be critical to the success of any digital radio rollout. Commercial Radio Australia continues to work with the car industry to have DAB+ digital radios factory-fitted in all cars, and a small number of manufacturers recently announced that DAB+ digital radio will be available in some new models.[58] A range of aftermarket DAB+ radios that can be self-installed or professionally fitted are also available for vehicles.

The government is scheduled to undertake a further review of the state of development and implementation of digital radio technologies by January 2014.

Participants at the Review's public meetings called for adequate spectrum to be made available to enable current analog radio services to be replicated in digital mode in regional Australia. The Review believes that regional Australians should not be denied services available to city audiences, including access to the enhanced features and additional content that digital radio services provide.

The Review believes the government should consider reviewing its proposed spectrum arrangements for the post-analog television switch-off period to see if maximum diversity for the provision of digital radio services in regional Australia can be achieved while also providing an appropriate plan of spectrum use for digital television into the future.

Implementation

The transition of free-to-air broadcasters to the new spectrum allocation and management arrangements should be achieved through a clear pathway involving:

- the replacement of apparatus licences with spectrum licences
- introduction of market-based pricing
- spectrum licence reissue.

The transition will require changes to legislation and associated regulations.

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53 Commercial Radio Australia, submission to review of digital radio technologies for regional Australia, 24 December 2010, p. 2, www.dbcde.gov.au/__data/assets/pdf_file/0010/132877/Commercial_Radio_Australia.pdf; Community Broadcasting Association of Australia, submission to review of digital radio technologies for regional Australia, 24 December 2010, www.dbcde.gov.au/__data/assets/pdf_file/0003/132879/Community_Broadcasting_Association_of_Australia.pdf.

54 See, for example, Southern Cross Austereo, submission in response to open call, p. 8.

55 Remote Area Planning and Development Board, submission in response to open call.

56 Commercial Radio Australia, submission in response to open call, p. 34.

57 Indigenous Remote Communications Association, submission in response to open call, p. 6.

58 Commercial Radio Australia, Digital Website News, www.digitalradioplus.com.au.

Replacement of apparatus licences with spectrum licences

Commercial broadcasting services are currently delivered through apparatus-licensed transmitters. Apparatus licences are issued on an individual basis and authorise the operation of a specific device or service at a particular location and with specified output characteristics. The licences are generally purchased for a fixed fee for five years. Public broadcasters are subject to separate, individual transmitter licensing arrangements.

Spectrum licensing was introduced under the Radiocommunications Act and offers a technology-flexible, market-oriented approach to managing the radiofrequency spectrum. Spectrum licensees can change their service over time in response to commercial circumstances and respond more quickly to technological innovation without having to seek the regulator's approval. Spectrum licences are fully tradeable in the open market and can be amalgamated, divided or reassigned subject to ongoing compliance with the interference management framework established by the ACMA. They offer tenure of up to 15 years and can be reissued to the same licence holder under certain conditions.[59]

The Review recommends that existing holders of commercial broadcasting licences have their broadcasting apparatus licences converted to spectrum licences with 15 years' tenure.

As a transitional measure, an initial condition should be placed on the spectrum licence given to an existing licensed television broadcaster that the licence must be used to continue to provide digital television on one or more channels. Aside from this, there would be no restrictions on the kind of services which could be supplied using that spectrum.

Currently, free-to-air television broadcasters are operating their multiplexes at or near maximum capacity. At the end of the simulcast period and after the switchover to digital television has been completed, some of the current regulatory settings that influence the range of services offered by broadcasters will lapse—notably the quota on high-definition programming and restrictions on the number of multichannels commercial broadcasters are permitted to operate.[60]

Commercial free-to-air broadcasters will have greater freedom to decide the number and picture quality of television services they wish to provide on a 7 MHz allocation. The number of channels will be limited only by the amount of available spectrum, or the financial and technical capacity of a broadcaster to provide them. Public broadcasters have been able to provide as many multichannels (initially with some genre restrictions) as spectrum capacity allows.

In digital mode, a 7 MHz block of spectrum can support up to five standard-definition digital linear programming streams, or multichannels. With upgraded transmission standards, eight to ten or more standard-definition multichannels could be supported.

A commercial television broadcaster that has a spectrum licence should be free to lease or sell any multichannels that it does not need (or indeed sell one or more of its existing multichannels) to a new content service provider.

The new communications regulator should regularly review the spectrum requirements of television broadcasters to determine where there may be excess multichannel capacity and to identify opportunities for potential secondary trading and enhanced efficiency of spectrum use. This is also a trend in other countries. The US Federal Communications Commission, for example, has been exploring measures such as voluntary channel sharing and incentive auctions of broadcast television band spectrum.[61]

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59 Further information on spectrum licensing can be found on the ACMA website at www.acma.gov.au/WEB/STANDARD/pc=PC_300172. The ACMA can reissue spectrum licences to the same licensee if it is satisfied that special public interest circumstances exist (Radiocommunications Act, section 82(1)). The minister may issue a determination to the ACMA specifying a class of services for which reissuing spectrum licences to the same licensee would be in the public interest (Radiocommunications Act, section 82(3)).

60 High-definition television quotas will cease at the end of the simulcast or simulcast-equivalent period in each licence area. Quotas are specified in Part 4 of Schedule 4 of the Broadcasting Services Act.

61 US Federal Communications Commission, media release, 30 November 2010, http://transition.fcc.gov/Daily_Releases/Daily_Business/2010/db1130/DOC-303095A1.txt.

If the regulator found that voluntary measures did not result in effective use of spectrum, it should have the power to introduce a statutory access regime that would give new content providers access to unused capacity on reasonable terms and conditions.[62]

Pricing

The new communications regulator should set annual spectrum access fees derived from the value of spectrum as planned for broadcasting use.

Putting a value on spectrum is complex. Key stakeholders such as Free TV Australia and ASTRA presented to the Review widely varying estimates of the potential value of broadcasting services bands spectrum and the annual fees that ought to be applied.[63] Given the different approaches and factors considered in deriving their estimates, these analyses are not comparable and it is therefore difficult to draw any firm conclusions from these submissions as to the possible quantum of future spectrum access fees.

The regulator will need to have comprehensive financial modelling available to develop annual spectrum licence fees. This process should be open and transparent. This work would need to take into account the implications of the potential costs and benefits of the regulatory environment when establishing the appropriate charge. Valuing such regulatory impacts will require significant analysis.

In submissions to the Review and other research, the costs and benefits of existing broadcasting arrangements were estimated quite differently. Not surprisingly, the varying estimates corresponded to the varying commercial interests. PricewaterhouseCoopers has suggested that the cost to commercial free-to-air television networks for meeting their Australian content obligations is $269 million.[64] Free TV Australia stated that its total spending on Australian content in 2010–11 was $1.23 billion.[65] On the other hand, Deloitte Access Economics in its work for ASTRA suggested a net benefit to the commercial free-to-air television networks of $688 million in 2010–11, which was primarily due to the anti-siphoning scheme and access to spectrum.[66] For radio, the regulator will need to take into account that a significant number of current FM radio broadcasting licences were allocated through a market-based auction process.

In addition, there is a widely held view in spectrum management policy that in setting actual spectrum charges relative to estimated values it is best to err on the conservative (low) side.[67] It is generally argued that the consequences of overpricing spectrum and potentially having some spectrum not fully deployed is more inefficient and costly than underpricing where the resource will be used and contribute to economic welfare. It would be open for the regulator, or the government, to use public policy reasons to place a conservative estimate on spectrum value.

As part of its consideration of spectrum values, the Review commissioned specialist consultants to undertake an initial assessment of spectrum values. Informed by this analysis, the Review then took into account some of the policy considerations discussed above. This was a high-level estimate using current market indicators.

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62 The National Third Party Access Regime was established under Part IIIA of the *Competition and Consumer Act 2010*. At various times it has been applied to monopoly infrastructure services such as rail tracks, airports, grain handling facilities at ports, water and wastewater reticulation pipes, port terminals and natural gas pipelines. Part XIC of the Act includes a specialist telecommunications access regime.

63 Free TV Australia, submission on interim report, p. 3; ASTRA, supplementary submission in response to open call, pp. 12–32.

64 PricewaterhouseCoopers, *How Do Local Content Requirements Impact Australian Productions? Review and Analysis of Broadcast Sector Minimum Content Requirements*, report prepared for the Department of Broadband, Communications and the Digital Economy, May 2011, p. 49.

65 Free TV, submission on interim report, p. 7.

66 ASTRA, supplementary submission in response to open call, p. ii.

67 Ofcom, *SRSP: The Revised Framework for Spectrum Pricing—Proposals Following a Review of Our Policy and Practice of Setting Spectrum Fees*, 29 March 2010, para 3.113, http://stakeholders.ofcom.org.uk/binaries/consultations/srsp/summary/srsp_condoc.pdf; ACMA, *The ACMA Response to Public Submissions: Opportunity Cost Pricing of Spectrum*, January 2010, www.acma.gov.au/WEB/STANDARD/pc=PC_311707; Dr Chris Doyle, Apex Economics, *The Need for a Conservative Approach to the Pricing of Radio Spectrum and the Renewal of Radio Licences*, 14 December 2010, www.apexeconomics.com.

Without pre-empting the outcome of a full financial, market and policy analysis, the Review's estimates suggest that under the new spectrum licensing regime, commercial free-to-air broadcasters may well pay less than the amount the industry actually paid in broadcast licence fees in 2010–11 under the current broadcast licence rebate arrangements.

Spectrum licence reissue

Existing broadcasters have emphasised the requirement for certainty of access to spectrum for business planning and investment purposes and to enable service continuity.

To address such concerns, the Review has concluded that, at the end of the 15-year licence period, licensees should be offered licence renewal at a market-based price determined by the regulator after consultation with the licensees. If, however, a licensee elects not to renew its spectrum licence, the licence would be reallocated, probably by auction.

It is anticipated that licensees would normally have their spectrum licences renewed unless a serious breach of a licence condition had occurred, there had been a realignment of international spectrum planning, a fundamental reallocation of all relevant spectrum was required, or there was an overriding public policy reason to reallocate the spectrum.

10. Implementing the new approach

The previous chapters of this report have detailed the measures needed to implement the Review's recommendations. Given their far-reaching nature and the substantial legislative changes proposed, the Review recommends a staged approach to implementation.

Key transitional arrangements flowing from the abolition of content service licensing and the introduction of the regulatory framework for content service enterprises will need to be planned in further detail. The planning process should include further consultation with industry and closely involve the new communications regulator once it is established.

Recommendations

30. The Review's recommendations should be implemented in three distinct stages:
    a. Stage 1: Stand-alone changes that can be achieved in the short term should be made to policies, programs and legislation, including the public interest test that will apply to changes in control of content service enterprises.
    b. Stage 2: New content services legislation should replace the *Broadcasting Services Act 1992* and existing classification legislation.
    c. Stage 3: The reform of communications legislation should be completed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.

31. The new communications regulator should be established in time to implement the new regulatory arrangements recommended for stage 1, and assume the remaining functions of the Australian Communications and Media Authority at the conclusion of stage 2 of the implementation process outlined in recommendation 30.

Priority areas for reform

Priorities for reform should focus on the three areas of high importance identified by the Review: diversity of media ownership, content standards and Australian content. In particular, early attention should be given to:

> setting up the process for administering the public interest test for changes in ownership of content service enterprises of national significance

> encouraging the establishment of the new industry-led independent news standards body that will be the centre of the self-regulatory scheme for news and commentary across all media platforms

> increasing Australian content quotas for broadcasters as a transitional measure.

Key transitional arrangements

The new regulator

The new regulator should be established in a timely manner. Initially its role would be confined to planning and implementing the stage 1 changes. During this period, the Australian Communications and Media Authority (ACMA) would continue with its operational responsibilities.[1]

1 The ACMA's current functions are specified in *Australian Communications and Media Authority Act 2005*, Part 2, Division 2.

Early tasks for the regulator would be to:

> investigate Australian-sourced revenue and users of professional content supplied by media groups and establish the register of content service enterprises

> administer the public interest test for content service enterprises of national significance

> determine local media markets for the purposes of establishing the new 'minimum number of owners' rule.

As stated above, the ACMA would continue in operation until the stage 2 changes have been implemented (in particular, abolition of the broadcasting licensing regime and reformed spectrum planning arrangements). At that time the remaining functions of the ACMA would be taken over by the regulator.

In Australia, previous practice when establishing a new regulatory authority for a communications sector has been to transfer functions, staff, assets and liabilities from its predecessor on a single date. This was done, for example, when the Australian Communications Authority and the Australian Broadcasting Authority merged to form the Australian Communications and Media Authority.[2]

However, the Review recommends a new regulatory framework that should be implemented in distinct stages. The Review sees benefit in establishing the new regulator to undertake the new functions, with the transfer of ongoing regulatory functions to it taking place at a later stage.

In the United Kingdom, Ofcom was established approximately 18 months before it took over the functions of the existing regulators. This allowed Ofcom to undertake valuable strategic planning and make other preparations before the transfer. From the outset, it also enabled the new body to focus on its immediate priorities.[3]

Media ownership

The key changes to media ownership regulation are:

> introducing a public interest test for changes in control of content service enterprises of national significance

> revising the 'minimum number of owners' rule for local markets to apply to content service enterprises and other media operators as determined by the regulator

> removing the old platform-specific media ownership rules once the new rules are fully operational.

Legislation will be necessary to:

> establish the new regulator

> create the framework for the regulator to:

  – identify content service enterprises of national significance and media operators covered by the 'minimum number of owners' rule for a local market

  – define local markets and determine the minimum number of owners in new metropolitan and regional markets

  – make decisions where required on the public interest test and the 'minimum number of owners' rule

> remove the platform-specific ownership rules at a later date.

The regulator will need to do some preparatory work before the new ownership rules can come into operation. This includes:

> identifying content service enterprises

> identifying content service enterprises of national significance subject to the public interest test

2 *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005*, Schedule 4.

3 See Ofcom, *A Case Study on Public Sector Mergers and Regulatory Structures*, www.ofcom.org.uk/about/what-is-ofcom/a-case-study-on-public-sector-mergers-and-regulatory-structures.

- issuing guidelines on the operation of the public interest test under the framework provided by the legislation
- identifying content service enterprises and any other media operators covered by the 'minimum number of owners' rule for a local market
- defining local markets and determining the minimum number of owners in new metropolitan and regional markets for the purposes of the 'minimum number of owners' rule.

Commercial broadcasting using the broadcasting services bands

A managed pathway will enable commercial free-to-air broadcasters to make the transition to the new spectrum allocation and management arrangements. This will involve:

- the conversion of apparatus licences to spectrum licences
- allocation of multiplex rights and trading provisions
- pricing of spectrum licences
- arrangements for the reissue of spectrum licences.

As a transitional arrangement, holders of commercial television or radio broadcasting licences using the broadcasting services bands will be issued with 15-year spectrum licences for use of spectrum planned for broadcasting purposes. The regulator should set annual spectrum access fees derived from the value of spectrum as planned for broadcasting use. The holder of the spectrum licence will be free to sell some or all of its channel capacity or could choose to sell the spectrum licence itself.[4] As a transitional measure, there will be a requirement that the relevant licence be used to continue to provide digital television on one or more channels. Aside from this, there would be no restrictions on the kind of services that could be supplied using that spectrum (see Chapter 9).

At the end of the 15-year licence period, licensees should be offered licence renewal at a market-based price determined by the regulator after consultation with the licensees. If, however, a licensee elects not to renew its spectrum licence, the licence would be reallocated, probably by auction.

The new legislative framework

This report has focused on issues relating to the regulation of content services. In its submission to the Review, the Communications Alliance, among others, noted the need for reform in telecommunications regulation as well:

> Communications Alliance believes it is important that telecommunications regulation—both newly created and legacy—also be examined and considered for removal if it imposes ongoing burdens on the telecommunications sector without generating equivalent benefits. In some cases such regulation will make it more difficult for telecommunications players to maintain the agility and innovation-focus that will be necessary to fully reap the benefits of convergence and the growth of the digital economy.
>
> Many examples of redundant regulations in the telecommunications arena have their origins in a PSTN [public switched telephone network]-dominated, monopolistic environment of 20 or 30 years ago.
>
> The emergence of a mature and highly competitive telecommunications sector, coupled with the advent of the National Broadband Network (NBN) as a universal non-discriminatory access provider, means that the environment changes fundamentally, and some of the existing regulation becomes less relevant, less effective or anachronistic.
>
> …

4 Trading of spectrum licences is expressly authorised by the *Radiocommunications Act 1992*, section 85.

> The Australian regulatory regime continues to be based around regulating a 'standard telephone service'. In many instances it assumes a one-to-one relationship between infrastructure and service delivery. This is a thing of the past.[5]

The Review recognises the need for reform in this area. But it is beyond the scope of this report to make detailed recommendations on appropriate reform to the regulation of communications infrastructure and platform services.

Nevertheless, it is clear there is general support for the existing suite of legislation to be replaced with new legislation that better reflects the convergence of formerly disparate content communications industries. The new legislation should encompass all communications infrastructure, platforms, devices and services.

In its submission to the Review, Macquarie Telecom strongly supported this objective:

> Macquarie submits that the existing three part legislative framework, i.e., the *Radiocommunications Act 1992*, the *Broadcasting Services Act 1992* and the *Telecommunications Act 1997*, provide an effective and entrenched barrier to achieving convergence. As long as this legislation exists, 'telecommunications' and 'broadcasting' will continue to be considered distinct from a regulatory perspective even though the market place has evolved beyond these constructs. As such, Macquarie believes that the repeal of this legislation and replacing it with a single piece of over-arching 'communications' legislation is necessary for convergence to be ultimately achieved.[6]

The new legislation might be in the form of a single Communications Act or in two or more separate Acts—for example, one Act dealing with content issues and another Act dealing with infrastructure and platform issues. The important thing is that the legislation all forms part of an integrated scheme.

A possible 'road map'

A road map for the staged implementation of the recommendations in this report is sketched out below. The Review recognises that many of these measures will require further consultation and decisions by government to confirm the details.

Stage 1: Stand-alone changes to legislation

The following changes all represent stand-alone measures that do not require a major rewrite of the existing regulatory regime:

- increase Australian content transmission sub-quotas and minimum expenditure requirements
- update public broadcasters' charters to reflect online functions and Australian content obligations
- rationalise local content rules, including removal of trigger event rules for radio
- establish the new communications regulator, initially to perform the new regulatory functions proposed in the report in the short term with the ACMA to remain in place at this stage. The regulator could immediately take on all the following functions relating to content service enterprises and media ownership:
  - investigate Australian-sourced revenue and users of professional content supplied by media groups and establish a register of content service enterprises
  - administer the public interest test for content service enterprises of national significance
  - inquire into local media markets for the purpose of establishing the new 'minimum number of owners' rule
  - if required, inquire into the need to make rules encouraging competition in content markets

5 Communications Alliance, submission on the interim report, pp. 8–9.

6 Macquarie Telecom, submission on interim report, p. 5.

- measures to support the establishment of the new industry-led news standards body:
  - introduce requirement for content service enterprises to be members of the news standards body
  - when the news standards body is fully operational and the regulator is satisfied that it adequately administers standards for news and commentary for broadcasting, remove news and news commentary from the scope of current statutory broadcasting standards
- start the process for allocating channel capacity on the television sixth multiplex ('sixth channel') by:
  - legislating to remove restrictions on use of sixth multiplex based on categories of broadcasting service (see Chapter 9)
  - commencing planning, through the regulator, for use of television sixth multiplex, including the process of inviting bids for channels.

It would be appropriate for new non-legislative initiatives relating to consumer education in the converged environment to be given initially to the ACMA. The ACMA already performs research and public education activities of this kind. It would not be an effective use of resources to have the regulator perform functions that overlap in this way with those of the ACMA. These functions of the ACMA would be transferred to the regulator during stage 2.

Stage 2: New content services legislation

The following measures will need to be implemented as an integrated package:

- repeal of the *Broadcasting Services Act 1992*, related provisions of the *Radiocommunications Act 1992* that regulate use of spectrum by specific categories of broadcasting and datacasting services, and provisions of the *Telecommunications Act 1997* relating to regulation of content service providers
- enactment of new legislation providing for regulation of content by the new communications regulator in accordance with the Review's recommendations, including:
  - regulation of content service enterprises and self-regulatory and co-regulatory arrangements for other content service providers
  - classification of content and related enforcement measures along the lines of the Australian Law Reform Commission recommendations
- revision of the radiocommunications legislation to reflect the recommended arrangements for an integrated spectrum planning and licensing regime
- abolition of the ACMA and transfer of all its ongoing functions to the new regulator (including non-regulatory functions such as research and public education)
- allocation by the new regulator of spectrum licences to commercial broadcasters under the transitional arrangements described above.

Stage 3: Broader reform of communications legislation

Stage 3 replaces remaining platform-specific legislation with new legislation that encompasses all communications infrastructure, platforms, devices and services.[7]

As noted above, the new legislation ultimately might result in a single Communications Act or in two or more separate Acts. In any case it will need to address in some manner the different 'layers' involved in delivering communications—starting with the physical infrastructure used to carry information, through various layers that deal with how the information is transported and organised, to the final content delivered to the consumer.[8] Decisions about the final format of the legislation can be made at the time in light of the latest information about how the structure of the industry has developed.

The Communications Alliance submission quoted above notes that the existing telecommunications legislation is based on some assumptions relating to vertical integration and delivery of voice services through outdated technology. However, within that legislation there is the skeleton of a technologically neutral framework for regulation based on broad 'layers' of communications service delivery ('carriers', 'carriage service providers' and 'content service providers').[9] Further, the telecommunications legislation provides an example of a scheme of regulation without licensing under which a regulator may make 'service provider rules' that can apply to different classes of service provider.[10] Some of these fundamental concepts can be adapted for new legislation for the converged world.

Integrated communications legislation—a possible model

An integrated package of legislation could be based on the following elements.

Content

The definition of 'content' would include content in any form (such as images, sounds, text and data).[11] To allow for consistent coverage of content across all platforms, the definition would include content supplied in print form or screened in cinemas as well as content supplied by means of electromagnetic energy.[12]

A limited range of regulatory provisions relating to the supply of illegal content will apply to any entity that supplies content (content service provider).

Additional regulation will apply to enterprises supplying professional content that reach the thresholds of scale and scope—as determined by the regulator from time to time—necessary to be classified as a content service enterprise. Professional content would include all media content, such as text-based news and commentary, video and audio, that is aggregated and/or distributed by the enterprise to the consumer. It would not include content that is merely accessed using the enterprises' systems (for example, user-generated content where the only control the aggregator and/or distributer has is the ability to take it down).

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7 This would involve replacement of the *Telecommunications Act 1997*, the *Telecommunications (Consumer Protection and Service Standards) Act 1999* and the *Radiocommunications Act 1992*.

8 See Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, pp. 6–14.

9 Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, pp. 8–9.

10 See *Telecommunications Act 1997*, section 99.

11 See the definition of 'content' at *Broadcasting Services Act 1992*, Schedule 7, clause 2.

12 The Australian Law Reform Commission examined the scope to legislate for all forms on content in its report: Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media*, February 2012, pp. 344–49.

Platforms, networks and devices

There will be a place for a concept similar in scope to the current concept of a 'carriage service' used in telecommunications legislation—'a service for carrying communications by means of guided or unguided electromagnetic energy'.[13] This would cover the activity of delivering content over a communications network. Current examples of such services are the voice telephony and internet connectivity services provided by carriers and carriage service providers under the *Telecommunications Act 1997*. The platform services provided by the operator of a broadcasting multiplex (see Chapter 9) would also fall within this category. This category of service provider might be described as a 'network service provider' or a 'platform service provider'.

Over these communications networks there will be a range of applications and services that might be selected by a user to communicate: voice over internet protocol (VOIP), email, instant messaging, and social networks. At one end of a continuum, some of these services have characteristics of a platform, while at the other end—apps—they have more of the characteristics of a content service.

Various kinds of device, including mobile phone handsets, set-top boxes, television or radio receivers, tablets or PCs, might be connected to a network to receive a service. The regulator will need to have power to specify standards for devices in relation to some matters (for example, standards for parental locks) if self-regulatory and co-regulatory schemes are not effective.

Infrastructure

At present, carriers licensed under the Telecommunications Act have powers to enter onto land and install and maintain certain types of telecommunications facility without the consent of the owner and without needing to comply with state or territory planning and land-use laws.[14] The Review has noted that there is no clear rationale for requiring an owner of infrastructure used to supply a carriage service to hold a carrier licence. Construction of telecommunications facilities could be undertaken subject to the general laws relating to construction applicable in the location where the facility is to be built. However, where an entity proposes to rely on the powers and immunities conferred by Commonwealth legislation, it seems appropriate to require it first to be registered with the regulator and subject to rules similar to those applicable under the current licensing regime for carriers. A person who registers to take the benefits and the burdens of those rules might be termed a 'facility provider'.

Service provider rules

The goal with the new legislation will be to provide a policy framework that gives an independent regulator the flexibility to make new rules and abolish old rules when circumstances require.

Current communications legislation contains a range of instruments under which the ACMA may impose obligations on participants in various sectors of the communications industry. These include licence conditions, 'class licence' conditions, 'service provider rules', and standards. There are significant differences in the procedures for making these differing kinds of instruments and in the powers of the regulator to enforce compliance.

Legal obligations imposed on different sectors within the communications industry could operate in the form of service provider rules, with a range of powers given to the new regulator to require compliance with the rules. These powers will replace the disparate arrangements for rule making and enforcement found in the existing legislation.

13 *Telecommunications Act 1997*, section 7, definition of 'carriage service'.

14 *Telecommunications Act 1997*, Schedule 3.

Service provider rules could be applied in three different ways:

- requirements specified in the relevant Act
- requirements specified in an industry code of practice that has been registered by the new regulator in accordance with the Act
- requirements specified by the regulator in a legislative instrument made in accordance with the Act.[15]

The regulator should be given the full regulatory toolkit to encourage compliance with the rules. The list below draws on powers provided for enforcement of various kinds of rules under current legislation:

- publishing public reports on breaches of service provider rules or other undesirable conduct[16]
- directing action to be taken for compliance with service provider rules[17]
- accepting enforceable undertakings[18]
- issuing infringement notices for breaches of service provider rules[19]
- bringing civil penalty proceedings for breaches of service provider rules[20]
- obtaining injunctions prohibiting specific conduct connected with breaches of a rule[21]
- obtaining orders prohibiting a person from providing a service for a period.[22]

15 See *Telecommunications Act 1997*, section 99.
16 See, for example, *Telecommunications Act 1997*, Part 26.
17 See, for example, *Telecommunications Act 1997*, section 102.
18 See, for example, *Telecommunications Act 1997*, Part 31A.
19 See, for example, *Telecommunications Act 1997*, Part 31B.
20 See, for example, *Telecommunications Act 1997*, Part 31A.
21 See, for example, *Telecommunications Act 1997*, Part 30.
22 See *Corporations Act 2001*, sections 206C, 206D, 206E, 206EAA: a court may order that a person be disqualified from managing a company.

Appendix A: Terms of reference

1. In light of convergence, the Committee is to review the current policy framework for the production and delivery of media content and communications services. The Committee is to:
   a. develop advice for the government on the appropriate policy framework for a converged environment;
   b. advise on ways of achieving it, including implementation options and timeframes where appropriate; and
   c. advise on the potential impact of reform options on industry, consumers and the community.
2. In doing so, the Committee shall have regard to all legislation and regulatory frameworks relevant to these terms of reference and, where necessary, advise the government on issues outside the purview of the Minister's portfolio responsibilities.
3. In undertaking 1. above, the Committee is to inquire into and advise on the following matters.
   a. whether the existing regulatory objectives remain appropriate in a converging environment; and
   b. if so, whether the regulatory approach embodied in the current policy framework remains the most effective and efficient, and
   c. in light of a. and b. above, the Committee's preferred alternative regulatory or non-regulatory measures to form a new framework.
4. In light of its views on a preferred policy framework for a converged environment the Committee is to advise on the principles that will underpin any new framework.
5. Without limiting its scope, in conducting the review the Committee is to take into account the following policy parameters:
   a. the development and maintenance of a diverse, innovative, efficient and effective communications and media market that operates within an appropriately competitive environment and in the best interest of the Australian public;
   b. ensuring the ongoing production and distribution of local and Australian content that reflects and contributes to the development of national and cultural identity;
   c. the impact of policy settings on industry and government revenue;
   d. appropriate ways to treat content, and the services and applications used to deliver content, which are cross-border in nature;
   e. appropriate policy settings to:
      i. ensure the adequate reflection of community standards and the views and expectations of the Australian public; and
      ii. maximise transparency, choice and access for consumers to the broadest range of content across platforms, and services used to deliver content;
   f. the appropriate processes by which to manage spectrum allocation; and
   g. international responses to convergence, and Australia's international commitments.

Appendix B: Review process

In December 2010, the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, announced the Convergence Review. The Review was initiated to examine the policy and regulatory frameworks that apply to the communications and media landscape in Australia, and to propose an alternative structure that would encourage continued innovation and protect citizens' interests in an age of convergent communication.

The terms of reference for the review were announced in March 2011, and an experienced committee, comprising Glen Boreham as Chair, Malcolm Long and Louise McElvogue, was finalised in April 2011.

To develop and refine their views on the new policy framework and ensure that the final report would be as comprehensive as possible, the Convergence Review Committee undertook an extensive consultation process between April 2011 and February 2012. The Review received submissions on the issues raised on the draft terms of reference. The Committee released the following papers prior to this final report:

- background paper
- framing paper
- emerging issues paper
- five detailed discussion papers, covering the following issues:
  - media diversity, competition and market structures
  - layering, licensing and regulation
  - spectrum allocation and management
  - Australian and local content
  - community standards
- interim report.

These papers are available at www.dbcde.gov.au/digital_economy/convergence_review.

In total, the Review considered more than 340 submissions from individuals and organisations and over 28 000 comments.

The Committee held individual meetings with leaders of media organisations, industry associations and community interest groups. In addition, the Committee held public forums in Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Alice Springs and Bendigo, and took into account the public views expressed through new media platforms such as twitter and the Review's online discussion pages.

In arriving at the final recommendations presented in this report, the Review has carefully considered the wide range of views expressed throughout the consultation process, together with commissioned research and analysis.

Appendix C: List of submissions

The individuals and organisations listed below contributed to the Convergence Review by making written submissions. All non-confidential submissions to the Review are available at www.dbcde.gov.au/digital_economy/convergence_review.

Individuals

Andrew, Dr Alan
Barr, Michael
Bilney, Bruce
Brenan, John
Carr, Bob, the Hon
Carstairs, Peter
Coates, Douglas J
Cook, Matthew
Cronin, Garren
Cunningham, Michael
Damian, Oliver
Debrett, Dr Mary, La Trobe University
Dwyer, Dr Tim; Goggin Professor and Gerard Martin, Dr Fiona, University of Sydney
Edwards, Simon
Eldridge, Cameron
Fitzgerald, Professor Brian and Pappalardo, Kylie, QUT School of Law
Fothergill, Kevin
Grainger, Pat
Green, Professor Lelia, Edith Cowan University
Henselin, David
Hitchens, Lesley
Hilvert, John
Hyde, John
Jolley, William
Laffin, John and Tehan, Mary
Lockrey, Michael
Makkitura, Yaitya
McCredie, John
Méra, Susan E
Mummery, Malcolm
Newton, Mark
O'Rourke, Kerry and Sward, Graeme
Pederick, Frank

Peter, Ian
Preston, Blake
Roberts, G
Roberts, Luke
Ryan, Adelaide
Selvadurai, Dr Niloufer
Shomos, Jim
Williams, Ivor
Worcester, John

A total of 27 823 submissions were received from individuals in support of an Avaaz campaign.

A total of 320 submissions were received from individuals in support of a Friends of the ABC campaign.

Organisations

Adam Internet
Advertising Standards Bureau
Alcatel-Lucent Australia
APN News and Media
ARC Centre of Excellence for Creative Industries and Innovation
Association of Public-Safety Communications Officials Australia New Zealand
Aurora Community Channel
Australasian Mechanical Copyright Owners' Society
Australasian Music Publishers Association Ltd
Australasian Performing Right Association
Australia Council for the Arts
Australian Association of National Advertisers
Australian Broadcasting Corporation
Australian Children's Television Foundation
Australian Christian Channel
Australian Christian Lobby
Australian Coalition for Cultural Diversity
Australian Communications Consumer Action Network
Australian Community Television Alliance
Australian Competition and Consumer Commission
Australian Content Industry Group
Australian Copyright Council
Australian Council on Children and the Media
Australian Digital Alliance
Australian Direct Marketing Association
Australian Directors Guild
Australian Federation Against Copyright Theft

Australian Home Entertainment Distributors Association
Australian Industry Group
Australian Information Industry Association
Australian Interactive Media Industry Association
Australian Libraries Copyright Committee
Australian Library and Information Association
Australian Major Performing Arts Group
Australian Mobile Telecommunications Association
Australian Music Industry Network
Australian Press Council
Australian Publishers Association
Australian Recording Industry Association
Australian Subscription Television and Radio Association
Australian Writers Guild
Avaaz
Blind Citizens Australia
Broadcast Australia
Children's Content Producers
Christian Media Australia
Commercial Radio Australia
Communications Alliance
The Communications Council
Communications Law Centre
Community Broadcasting Association of Australia
Community Broadcasting Foundation
Community Relations Commission
The ©ontent Business
Copyright Advisory Group to the Ministerial Council on Education, Early Childhood Development and Youth Affairs, NSW
Copyright Agency Limited
Cricket Australia
DigEcon Research
Direct Group
DMG Radio
eBay
Ericsson
Evolution Media Group
Evolutionary Tension
Facebook
Fairfax Media Limited
FamilyVoice Australia

Foxtel
Free TV Australia
Friends of the ABC
Game Developers' Association of Australia
Google
iiNet
Indigenous Remote Communications Association
Institute for a Broadband-Enabled Society
Interactive Games and Entertainment Association
Internet Industry Association
Internet Society of Australia
Internode
Juno Interactive
Macquarie Telecom
Maranoa Regional Council
Media Access Australia
Media Classifiers' Association of Australia
Media, Entertainment and Arts Alliance
Media Wave
Melbourne Community Television Consortium Ltd
Mindframe National Media Initiative
Motion Picture Association
Motion Picture Distributors Association of Australia
Motorola
Music Council of Australia
National Association for the Visual Arts
National Association of Cinema Operators—Australasia
National Ethnic and Multicultural Broadcasters Council
National Film and Sound Archive
National Rugby League
Netball Australia
Network Ten
News Limited
Newspaper Publishers' Association
ninemsn
Northern Territory Department of Natural Resources, Environment, The Arts and Sport
Office of the Australian Information Commissioner
Optus
Paul Budde Communication
Premium Movie Partnership
Primus Telecommunications

Qualcomm
Remote Area Planning and Development Board
Research in Motion Australia
Royal Society for the Blind of SA
RPH Australia
Screen Australia
Screen Producers Association of Australia
Screenrights
ScreenWest Inc
Seven West Media
Showtime
Sky Racing
Skype
Southern Cross Austereo
Special Broadcasting Service
Standards Australia
State and Territory Screen Agency Forum
Swinburne University of Technology
Telecommunications Consumer Group SA Inc
Telecommunications Industry Ombudsman
Telephone Information Services Standards Council
Telstra
Time Warner
TransACT Communications
Treasury
TV1 General Entertainment Partnership
Universities Australia
University of Sydney
'Vulnerability and the news media' Research Team
Western Australian Screen Industry
XYZ Networks
Yahoo!7

Appendix D: Establishing the new communications regulator

This appendix examines the arrangements for the new communications regulator recommended in the report, including:

- the appropriate governance structure, including the regulator's relationship with government, organisation and accountability
- the regulatory toolbox
- implementation—setting up the new regulator.

Governance

Relationship with government

Statutory authorities have historically been established in Australia under legislation that either does not mention ministerial direction or provides for direction only on a few specified subjects.[1] It has been common practice for recent Commonwealth legislation establishing a statutory authority to confer upon the responsible minister a broad power to give directions to the authority. In some cases, the ministerial power of direction is confined to 'general directions'.[2]

Commonwealth statutory corporations are usually required to comply with the general policies of the Australian Government if ordered to do so by the Finance Minister and to supply requested information to the portfolio minister or the Finance Minister.[3]

In cases where there is a perceived need for independence, the legislation can provide that the authority is not subject to direction, except as expressly provided. The Australian Broadcasting Corporation provides a well-known example of this.[4]

In the case of the Australian Communications and Media Authority (ACMA), the minister can only issue directions 'of a general nature' in relation to the ACMA's broadcasting and online content functions (except as otherwise specified in the *Broadcasting Services Act 1992*), but has an unfettered power to give directions in respect of the ACMA's other functions and powers.[5] This distinction reflects the differing arrangements for the ACMA's two predecessors: the power to direct the Australian Broadcasting Authority, except as otherwise specified in the Broadcasting Services Act, was confined to directions 'of a general nature', while the power to direct the Australian Communications Authority was not confined in that way.[6]

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1 The trend in legislative provisions over the 1960s, 1970s and 1980s can be observed in the disparate arrangements for collecting institutions provided by the *National Library Act 1960* (no provision for the minister to direct the National Library of Australia), the *National Gallery Act 1975*, section 33 (no provision for the minister to direct the National Gallery of Australia except power to give directions in connection with employment of staff) and the *National Museum of Australia Act 1980*, section 12 (Council of the National Museum of Australia to perform functions and exercise powers in accordance with any written directions of the minister).

2 See, for example, *Aboriginal and Torres Strait Islander Commission Act 1989*, section 12, considered in *Aboriginal Legal Services v Herron* [1996] FCA 826.

3 See *Commonwealth Authorities and Companies Act 1997*, sections 48A, 16(1)(b), 16(1)(c).

4 See *Australian Broadcasting Corporation Act 1983*, section 78(6).

5 *Australian Communications and Media Authority Act 2005*, section 14.

6 See *Broadcasting Services Act 1992*, section 162 and *Australian Communications Authority Act 1997*, section 12, as in force until 30 June 2005.

For the new regulator to be independent and perceived as such, there should be no general power for the minister to give directions to the regulator. Moreover, careful consideration needs to be given as to the circumstances, if any, where the regulator might be subject to direction from the minister in the performance of its regulatory functions.

The principles of responsible government necessitate that ministers be kept informed about the activities of Commonwealth agencies in their portfolios, subject only to specific secrecy requirements set out in legislation.

The responsible minister can have the usual powers to require information without the independence of the regulator being affected. It is clearly consistent with the role of the independent regulator that the responsible minister be able to require the regulator to inquire into and report on any matter relating to its functions.[7]

In the regulation of media and communications, it is preferable that ministerial control over the scope of regulatory discretion be exercised by means of legislative instruments rather than directions. This allows for greater parliamentary scrutiny.[8]

Organisation

Commonwealth regulatory authorities, including the ACMA and its two predecessors, are usually established as statutory corporations that perform their regulatory functions through a board and delegates of that board. A statutory corporation managed by a board remains the appropriate model for the new regulator.

Given the importance of the regulator being, and being seen to be, independent of political control, the Review considers the appropriate organisational model is a governing board that has collective responsibility for the performance of the organisation, including the management of resources. In other words, the regulator should be governed by a board that has full power to act within the constraints of the law.[9]

It may be contended that this board model for governance should apply only to statutory authorities whose major activities are commercial in nature. However, such a view is based on the assumption that, for Commonwealth authorities that have predominantly non-commercial activities, 'government typically retains, and is expected to retain, control of policy and approval of strategy'.[10]

Such an assumption is questionable in relation to a regulatory authority in a sensitive area such as media and communications where a high degree of regulatory independence and even-handedness is important in a democracy for regulatory credibility and effectiveness.

A number of factors here favour the use of a board with full power to act:

- a high level of independence from ministerial direction, together with strong regulatory powers, increases the importance of independent oversight and scrutiny[11]
- a board comprising independent (that is, non-executive) directors can provide this kind of oversight and scrutiny[12]
- it will be easier to attract and retain qualified people from the private sector to serve on a board that has full power to act.[13]

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7 There is currently such a power to require the ACMA to conduct any inquiry (see *Broadcasting Services Act 1992*, section 171).

8 Under the *Legislative Instruments Act 2003*, section 44, item 41, a minister's directions to any person or body are exempted from being subject to parliamentary disallowance (although directions 'of a legislative character' are still subject to parliamentary tabling requirements).

9 See J Uhrig, *Review of Corporate Governance of Statutory Authorities and Office Holders*, 2003, pp. 4–12, www.finance.gov.au/financial-framework/governance/docs/Uhrig-Report.pdf.

10 Uhrig, *Review of Corporate Governance*, pp. 8–9; see also pp. 66–67.

11 Uhrig, *Review of Corporate Governance*, pp. 35–36.

12 Uhrig, *Review of Corporate Governance*, pp. 36, 54. In the absence of such a board, an inspector-general of regulation is required to complete the governance arrangements for regulatory agencies (Uhrig, pp. 67–68). The government did not create the office recommended by Uhrig (see the then Minister for Finance and Administration Senator the Hon Nick Minchin, media release, 8 December 2004, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/Y8GD6/upload_binary/y8gd62.pdf;fileType=application%2Fpdf#search=%22media/pressrel/Y8GD6%22).

13 Uhrig, *Review of Corporate Governance*, p. 43.

The need in the communications and media sector for the regulator to be able to take decisive action quickly also weighs in favour of the governance model of a board with full power to act.

The regulator should be established as an entity that holds money on its own account.[14] The board, rather than government, should be responsible for the appointment of the chief executive officer.[15]

There are three main options for the constitution of the board. It could have:

> a part-time chair, deputy chair and non-executive directors; and a chief executive officer and possibly one or two other senior executives (company model)

> a full-time chair, deputy chair and up to six other full-time members (Australian Competition and Consumer Commission (ACCC) model), or

> a full-time chair and deputy chair, with the other members predominantly part-time (Reserve Bank and ACMA models).

Each model has strengths and weaknesses. Taking into account the points outlined above, the Review considers the company model is preferable because of the enhanced scrutiny over regulatory functions offered by a board predominantly comprising independent directors. Qualified people from the private sector are also more likely to accept board appointments and be confident in the understanding of their role where the board is constituted under the common Australian corporate governance model.

The practice of cross-appointments on a part-time basis between the boards of the communications regulator and the ACCC should continue.

The new communications regulator should be responsible for administering the new national classification scheme, as well as other communications and media regulation. A new classification board (which would be responsible for making classification decisions and approving industry classifiers) should be located within the regulator. However, the new classification board should be independent of the regulator in performing its statutory functions (see Chapter 4).

As detailed in Chapter 4, the Review proposes that the government test the effectiveness of a self-regulatory arrangement for providers of news and commentary across all platforms. Under this approach, content service enterprises would be required to join an independent industry body, which would develop standards for news and commentary and adjudicate complaints. As these arrangements would be implemented in stages, the regulator would continue to have responsibility for administering the co-regulatory broadcasting codes relating to news and commentary until it is satisfied that the new arrangements are working effectively.

The Review recommended in its interim report that the regulator should have secure funding. The need for reasonable certainty of funding of the regulator has been recognised internationally:

> An effective regulator should be independent from those it regulates, protected from political pressure, and given the full ability to regulate the market by making policy and enforcement decisions. The regulator should have the authority and jurisdiction to carry out its regulatory and enforcement functions effectively and unambiguously. And the regulator must be adequately funded from reliable and predictable revenue sources.[16]

14 On that basis, the authority will be a Commonwealth authority within the meaning of the *Commonwealth Authorities and Companies Act 1997*.

15 See Uhrig, *Review of Corporate Governance*, pp. 65–71.

16 US Federal Communications Commission, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, http://transition.fcc.gov/connectglobe/sec1.html.

Accountability

Accountability arrangements for the regulator will be very important, given its broad discretionary powers and independence from ministerial direction.

The objectives of regulation should be clearly stated in legislation, so they can guide the regulator in exercising its discretionary powers and guide the courts in applying and interpreting the legislation.[17]

The Review has proposed a new regulator with broad powers to make rules subject to ministerial direction in only limited cases. However, this would not mean that the new regulator's powers would be unfettered. Any contentious decision made by a statutory regulator will be subject to a very high degree of scrutiny under the Australian legal system. Decisions may also be challenged by aggrieved parties in ways that are not possible where regulatory measures are imposed directly by Act of Parliament.

The regulator will be held accountable for the exercise of its powers through the suite of parliamentary, judicial and administrative arrangements:

- oversight of the regulator's rule-making powers through the usual process for parliamentary scrutiny and for potential disallowance of legislative instruments by either House of Parliament[18]
- merits review by the Administrative Appeals Tribunal (or similar tribunal) of administrative decisions of the regulator[19]
- the legal requirement to observe procedural fairness[20]
- rights to judicial review of decisions that are entrenched under the Constitution[21]
- access to documents in the regulator's possession under the *Freedom of Information Act 1982* and through discovery in court or tribunal proceedings
- scrutiny of and reporting on the conduct of the regulator by the Commonwealth Ombudsman, the Auditor-General, and Senate Estimates and other parliamentary committees.

In addition, the new regulator could be made accountable to a statutory parliamentary joint committee. A joint parliamentary committee is one on which both senators and members of the House of Representatives serve. Joint statutory committees are established by Act of Parliament.

A precedent for dedicated parliamentary supervision of an industry regulator is the Parliamentary Joint Committee on Corporations and Financial Services. This committee scrutinises the operations of the Australian Securities and Investment Commission (ASIC) and a number of other authorities concerned with corporate regulation. The committee has been in operation for more than two decades.[22] Its functions include:

- to inquire into, and report to both Houses on:
  - activities of ASIC, or matters connected with such activities, to which, in the committee's opinion, the Parliament's attention should be directed, or

17 See Chapter 1 under the heading 'Regulatory principles for new communications legislation'.

18 Note the role performed by the Senate Standing Committee on Regulations and Ordinances in scrutinising disallowable legislation (see www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm).

19 The Senate Scrutiny of Bills Committee examines all bills that come before the Parliament and reports to the Senate whether such bills, among other things, 'make rights, liberties or obligations unduly dependent upon non-reviewable decisions' (see www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=scrutiny/cominfo.htm).

20 The requirement to observe procedural fairness is the requirement for a decision maker to hear a person before making a decision affecting the interests of that person and for the decision maker to be disqualified where circumstances raise a doubt as to the decision maker's impartiality (see M Aronsen, B Dyer and M Groves 2004, *Judicial Review of Administrative Action*, 3rd edn, 2004, p. 370).

21 See, for example, *Kirk v Industrial Relations Commission* [2010] HCA 1; (2010) 239 CLR 531, cited in The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, p. 274 at footnote 27; see also para 11.79, p. 299.

22 The committee was established under the name Parliamentary Committee on Corporations and Securities by section 241 of the *Australian Securities Commission Act 1989*.

  - the operation of the *Corporations Act 2001* and the *Australian Securities and Investments Commission Act 2001*, or of any other law that appears to the committee to affect significantly the operation of that legislation
- to examine the ASIC annual report and to report to both Houses on matters to which, in the committee's opinion, the Parliament's attention should be directed
- to inquire into any question in connection with its duties that is referred to it by either House, and to report to that House on that question.[23]

It would be consistent with the governance model recommended by the Review for a new joint parliamentary committee to be established with a similar role in inquiring into and reporting on the activities of the new regulator and the operation of the proposed communications legislation.

The regulatory toolbox

The regulatory toolbox available to the new communications regulator should include the full range of options to deal with the challenges of appropriate regulation of media and communications content arising from convergence.[24] These include:

- international cooperation
- education
  - encouraging digital literacy
  - accreditation/endorsement (for example, 'safe zones')
  - 'naming and shaming'
- self-regulation (for example, industry codes of practice)[25]
- co-regulation (for example, industry codes of practice enforceable by the regulator)[26]
- direct regulation
  - delegated legislation—conditions or standards imposed by the regulator
  - administrative powers of regulator—approvals, powers of direction, enforceable undertakings and so on[27]
- incentives—grants or protections and benefits of a non-financial kind.

A degree of regulatory certainty for industry is also important. This can be achieved by the regulator issuing guidelines concerning the exercise of its powers and by related strategies.

The regulator's funding should take into account its need to be able to enforce the law against well-resourced corporations in media and communications. The regulator needs to be perceived as a body that is sufficiently well resourced to bring proceedings where necessary.[28]

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23 See *Australian Securities and Investments Commission Act 2001*, section 243.

24 See Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, September 2011, pp. 21–22.

25 See ACMA, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, September 2011, p. 4, www.acma.gov.au/scripts/nc.dll?WEB/STANDARD/1001/pc=PC_410165.

26 ACMA, *Optimal Conditions for Effective Self- and Co-regulatory Arrangements*, pp. 4–5.

27 The operation of the existing enforcement powers of the ACMA in relation to media content issues are summarised in Finkelstein, *Report of the Independent Inquiry into the Media and Media Regulation*, paras 6.36–6.40, pp. 170–72.

28 It should be noted that the legal expenses of the ACMA ($4.2 million in 2010–11) are quite low compared to those of many other Commonwealth regulatory agencies. For example, in 2010–11 legal expenses were $72.6 million for ASIC, $34.9 million for the ACCC, $9.4 million for the Office of the Australian Building and Construction Commissioner and $7.2 million for the Australian Prudential Regulatory Authority (see Attorney-General's Department, *Legal Services Expenditure Report 2010–2011*, pp. 12–13, www.ag.gov.au/Commonwealthlegalservicesexpenditure/Pages/default.aspx).

Implementation—the process of setting up the new regulator

In due course, the new communications regulator should take over all the regulatory functions relating to media and communications identified in the policy and regulatory framework recommended in this report. The ACMA would be replaced by the new regulator.

The new regulator should be established as soon as possible and be given the capacity to begin to undertake the new functions recommended by this Review. Unlike, for example, the 2005 merger of the Australian Broadcasting Authority and the Australian Communications Authority to form the ACMA, the changes recommended by this Review do not simply involve a transfer of functions from one or more regulatory bodies to a successor body. Here there is to be a new regulatory framework.

The ACMA would continue in existence as a separate entity until the broadcasting licensing regime has been abolished and the reformed spectrum planning arrangements have been implemented. At that time, the remaining functions of the ACMA would be taken over by the new regulator (see Chapter 10).

A precedent for a phased handover of functions to the new regulator can be found in the establishment of Ofcom in the United Kingdom. It commenced operation before taking over the functions of the existing regulatory authorities. This enabled it to undertake crucial strategic planning and assisted in giving the new body its own distinct culture attuned to contemporary communications issues.[29]

29 Ofcom, *A Case Study on Public Sector Mergers and Regulatory Structures*, 2006, www.ofcom.org.uk/about/what-is-ofcom/a-case-study-on-public-sector-mergers-and-regulatory-structures.

Appendix E: Competition regulation in communications markets: international approaches

The Review has examined a range of regulatory models that have been adopted internationally to inform the development of its recommendations on content-related competition issues. In particular, the analysis has focused on the regulatory approaches adopted in jurisdictions with advanced digital content markets.

Australia has both a sector-specific regulator (the Australian Communications and Media Authority) and a general competition regulator with a specific mandate over competition issues in the telecommunications market (the Australian Competition and Consumer Commission). The Review has examined advanced digital content markets that have different approaches to Australia's, including those in the United Kingdom, the United States and Canada. In each of these countries a sector-specific regulator has some responsibility for particular competition issues, although the nature and extent of the regulator's responsibilities varies between countries.

Powers to address competition issues by regulators in these three countries include:

- the power to impose conditions on broadcasting services to ensure fair and effective competition in the provision of those services (United Kingdom)[1]
- the power to make rules, including where a problem such as an industry behaviour that adversely affects consumers is identified (United States)[2]
- the power to forbear (refrain) from applying regulation (Canada).[3]

A common characteristic of these countries is the advanced state of their digital content market. These markets have a range of services available that are not operating in Australia. For example, in the United States emerging providers such as Netflix and Hulu provide online video content services that are genuine competitors to subscription television providers. In the United Kingdom, new services such as LoveFilm, Netflix, and the soon-to-be-released YouView, and cross-platform offerings such as Sky Go, are redefining the content landscape.[4]

In a speech to the Screen Producers Association of Australia in November 2011, former UK communications minister Lord Stephen Carter argued that a similar regulatory framework is essential for Australia in the convergent environment, suggesting that the communications industry is so important to modern economics that 'it requires its own muscular framework, its own policy framework and its own competition framework'.[5]

In addition to fostering dynamic digital content markets, there are a range of benefits from having a sector-specific regulator with competition powers. These include the regulator having detailed knowledge, skills and experience relevant to the sector, and being better placed to identify emerging issues in the market.

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1 This power is available to the UK communications regulator, Ofcom, under sections 316 and 317 of the Communications Act 2003 (UK).

2 This rule-making power is available to the US communications regulator, the Federal Communications Commission (see *Rulemaking Process at the FCC*, www.fcc.gov/encyclopedia/rulemaking-process-fcc).

3 Canadian Radio-television and Telecommunications Commission, *CRTC/Competition Bureau Interface*, 8 October 1999, www.crtc.gc.ca/eng/publications/reports/crtc_com.htm#a3.

4 T Conlon, 'BSkyB to take on Netflix and YouView with internet TV service', *Guardian*, 31 January 2012, www.guardian.co.uk/media/2012/jan/31/bskyb-netflix-internet-tv-service.

5 See N Apostolou, 'Converge or be damned—Lord Carter's new world order', *Register*, 15 November 2011, www.theregister.co.uk/2011/11/15/carters_digital_aus_blueprint. Audio of the speech is accessible from http://conference.spaa.org.au/displaycommon.fm?an=1&subarticlenbr=566.

The following sections provide an overview of the regulatory agencies operating in other countries. Each section outlines the regulator's powers and inter-agency cooperation in place to support the effective use of those powers. The purpose of the analysis is to provide insight into how other countries are dealing with competition issues in communications markets. However, it should be noted that the three countries are characterised by differing issues, industry structure and market conditions than those of the Australian market.

United Kingdom

The key agencies with competition responsibilities in the UK communications market are Ofcom, the Office of Fair Trading, and the Competition Commission. Ofcom is the independent communications regulator, charged with enforcing competition law in the sectors within its jurisdiction and with imposing ex ante regulation where a need has been identified. The Office of Fair Trading is the agency responsible for enforcing general competition law, while the Competition Commission is an independent public body that conducts in-depth inquiries into mergers, markets and the regulation of major industries, such as communications.

In certain regulated industries, sector regulators have concurrent powers to apply and enforce competition law.[6] Ofcom is the regulator for communications, and has concurrent powers with the Office of Fair Trading. These powers include:

- Powers to make market investigation references: Under the Enterprise Act 2002, Ofcom is able to refer competition issues that it believes may be of concern to the Competition Commission, if the issue relates to commercial activities connected with communications matters.[7] A recent example is where concerns were expressed by stakeholders about the extent of competition in the subscription television market and its effective operation.[8] Additionally, Ofcom has enforcement powers whereby it can accept undertakings to take appropriate action in lieu of making a reference.[9]
- Powers to investigate particular infringements (such as certain anti-competitive agreements, abuse of market power): Sectoral regulators have the same powers in relation to breaches of relevant provisions in individual cases as the Office of Fair Trading has in all cases. Regulators are empowered to investigate breaches, impose interim remedies and impose financial penalties in relation to infringements where appropriate.
- Powers to carry out market studies: The Office of Fair Trading has general powers to carry out such studies in relation to any market. Sectoral regulators in effect have similar powers in the sectors they regulate as part of their general regulatory powers.

Where the Office of Fair Trading and a sector regulator have concurrent jurisdiction, that regulator and the Office of Fair Trading consult before acting on a Competition Act 1998 case. The general principle is that a case will be dealt with by whichever regulator is best placed to do so, taking into account particular factors including:

- sectoral knowledge of the regulator
- whether the case affects more than one regulated sector
- any previous contact between the parties or complainants with the sector regulator or with the Office of Fair Trading

6 See Office of Fair Trading, Competition Act 1998, www.oft.gov.uk/about-the-oft/legal-powers/legal/competition-act-1998.

7 Enterprise Act 2002 (UK), section 131. Ofcom is obliged to consider whether sectoral regulation or competition law may be more appropriate for dealing with an issue—a reference to the Commission by Ofcom is more likely in instances where issues cross over individual communication markets. See Ofcom, supplementary memorandum, 18 December 2007, www.parliament.uk/documents/upload/ofcom-supplementary.pdf.

8 See Ofcom, *Pay TV Market Investigation*, http://stakeholders.ofcom.org.uk/consultations/market_invest_paytv/summary.

9 Enterprise Act 2002 (UK), section 154, www.legislation.gov.uk/ukpga/2002/40/section/154.

> any recent experience in dealing with the undertakings or similar issues that may be involved in the proceedings.[10]

The concurrency arrangements are primarily designed to ensure that only one authority will launch a formal investigation into the same conduct, and require agreement on which body will investigate before an investigation starts. Neither the Office of Fair Trading nor the relevant sector regulator will formally investigate a case or make a decision until the case has been allocated to one of them through the existing mechanisms. Once a case is allocated, a single regulator retains responsibility until a decision is reached—there is formally no scope for the Office of Fair Trading and Ofcom to undertake a joint investigation under the Competition Act. Interaction between Ofcom and the Office of Fair Trading in relation to the concurrency arrangements is managed by an understanding between the two agencies as set out in a 2003 letter from the Office of Fair Trading to Ofcom.[11]

The concurrency arrangements do not extend to merger regulation—responsibility for this rests with the Office of Fair Trading and the Competition Commission, subject to any intervention by the Secretary of State on public interest grounds. However, regulators are typically consulted by the Office of Fair Trading and the Competition Commission on merger cases relating to their sector.

United States

The main regulatory agencies dealing with competition issues in the US communications market are:

> the Federal Trade Commission (FTC): The FTC's Bureau of Competition deals with competition issues, including anti-competitive conduct, and merger and acquisition review. It also promotes competition in industries where consumer impact is high (for example, technology and consumer goods), and shares responsibility for enforcing US antitrust laws with the Antitrust Division of the Department of Justice.

> the Department of Justice: As noted above, responsibility for enforcing antitrust laws is shared with the FTC. The two agencies consult before opening any investigation. The Antitrust Division handles all criminal antitrust enforcement.

> the Federal Communications Commission (FCC): The FCC is an independent regulator in charge of overseeing interstate and international communications in the United States. In matters involving competition issues, the FCC must coordinate with the agencies that have primary responsibility for such issues—the FTC and the Department of Justice. The FCC has a somewhat wider perspective on the public interest when considering competition issues in the communications market. It is also concerned with other public interest goals, such as accelerating the deployment of telecommunications services and ensuring that a diversity of news and commentary is available to the public.

To prevent regulatory overlap between the agencies in the review of a transaction, the law requires one agency to give the other investigative clearance to conduct the review. The FTC and the Department of Justice entered into a memorandum of agreement in 2002, whereby respective areas of responsibility in reviewing mergers and enforcing antitrust laws were allocated.[12]

The Department of Justice and the FCC cooperate on an informal basis to minimise the possibility that respective analyses of the competitive effects of the transaction will lead to inconsistent results. Although FCC rules generally require it to disclose any meetings with outsiders, the rules contain an exception for meetings with the antitrust authorities. Consequently, the agencies are able to share non-confidential industry information and discuss the appropriate relevant market parameters, potential competitive harm and proposed remedies.

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10 See Department for Business Innovation and Skills, *A Competition Regime for Growth: Consultation on Options for Reform*, March 2011, www.bis.gov.uk/assets/biscore/consumer-issues/docs/c/11-657-competition-regime-for-growth-consultation.pdf.

11 See www.ofcom.org.uk/about/organisations-we-work-with/letter-from-the-office-of-fair-trading.

12 Federal Trade Commission, *Memorandum of Agreement between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for Investigations*, 2002, www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf.

Antitrust law in the United States gives the FCC concurrent authority, with the Department of Justice, to review and block mergers where the acquisition of certain common telecommunications carriers would result in a lessening of competition or create a monopoly. The Department of Justice and the FTC focus purely on competition issues when reviewing mergers or other antitrust actions, basing their decisions on whether a particular transaction will result in an accumulation of market power that would reduce competition and affect consumers. While the FCC may also engage in competition analysis, it uses a broader sector-oriented approach, focusing primarily on whether the transaction would benefit or harm the public interest, convenience, and necessity. In some cases, the FCC can approve a merger, but may place conditions on the merger after consultations with the Department of Justice on competition issues.

Canada

The key agencies with competition and communications responsibilities in Canada are the Canadian Radio-television and Telecommunications Commission (CRTC) and the Competition Bureau.

The CRTC is Canada's independent communications regulator, with oversight of the country's broadcasting and telecommunications sectors. It reports to Parliament through the Minister of Canadian Heritage. The CRTC's policy decisions are guided by the 1991 Broadcasting Act and the 1993 Telecommunications Act. Its stated vision is to 'promote competition, innovation, consumer choice and Canadian reflection in order to foster a world-class communications system benefitting all Canadians'.[13]

The CRTC regulates access to telecommunications services under the Telecommunications Act. It is also empowered to deal with certain competition issues by imposing conditions on telecommunications and cable service licensees.

The Competition Bureau is an independent law enforcement agency, which aims to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace. Among its responsibilities are the administration and enforcement of the 1985 Competition Act.[14]

The *CRTC/Competition Bureau Interface*, an agreement published in 1999, sets out the authority of the CRTC under the Telecommunications Act and the Competition Act and the authority of the Competition Bureau regarding the telecommunications and broadcasting sectors. The document sets out the respective parallel, concurrent and exclusive jurisdictions in which these regulators operate.[15]

As set out in the agreement, the two agencies each have some degree of responsibility in relation to merger reviews and to market practices (for example, 'slamming'—a practice whereby a long-distance telephone customer is switched from one provider to another without the customer's permission).[16] In relation to market practices, different aspects of a particular issue may be dealt with by different regulators. The CRTC tends to exercise authority exclusively in relation to interconnection and access issues, while the Competition Bureau is the primary authority for dealing with anti-competitive practices such as price fixing and price maintenance under the Competition Act.

13 Canadian Radio-television and Telecommunications Commission, *About the CRTC*, www.crtc.gc.ca/eng/backgrnd/brochures/b29903.htm.

14 See Competition Bureau, *Our Organisation*, www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00125.html.

15 Canadian Radio-television and Telecommunications Commission, *CRTC/Competition Bureau Interface*, www.crtc.gc.ca/eng/publications/reports/crtc_com.htm.

16 Canadian Radio-television and Telecommunications Commission, *Frequently Asked Questions*, www.crtc.gc.ca/eng/faqs.htm.

Review of merger activity is the area in the communications sector that is most likely to see involvement by both the CRTC and the Competition Bureau. In the *CRTC/Competition Bureau Interface*, the CRTC has summarised the key characteristics of the regulatory framework as follows:

> There is parallel jurisdiction between the CRTC and the Competition Bureau.

> A transaction must comply with the legislation administered by both organisations.

> The merger and related pre-notification requirements of the Competition Act (administered and enforced by the Competition Bureau) apply to telecommunications and broadcasting mergers.[17]

17 Canadian Radio-television and Telecommunications Commission, *CRTC/Competition Bureau Interface*, www.crtc.gc.ca/eng/publications/reports/crtc_com.htm.

Appendix F: Executive summary of the ALRC National Classification Scheme review

This appendix is an extract from the Australian Law Reform Commission report *Classification—Content Regulation and Convergent Media* (ALRC report 118). The full report is available at www.alrc.gov.au.

Background

This is the first comprehensive review of censorship and classification since the ALRC report, *Censorship Procedure*, published in 1991 (ALRC Report 55). That report recommended a legislative framework that would enable the Commonwealth, states and territories to take a national approach to classification. Its recommendations formed the basis of the *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (*Classification Act*), and what is commonly referred to as the National Classification Scheme.

Censorship Procedure advanced classification policy in Australia by recommending a cooperative scheme between the Commonwealth, states and territories, and identified the important role to be played by an independent Classification Board and Classification Review Board. However, it was developed in a 'pre-internet' environment, when the wider implications of media convergence for content regulation generally were not yet understood.

In the context of ever greater convergence of media technologies, platforms and services, and more media being accessed from the home through high-speed broadband networks, the need for a comprehensive review of classification laws and regulations became apparent. In providing the reference for this Inquiry to the ALRC, the Attorney-General had regard to the rapid pace of technological change in media available to, and consumed by, the Australian community, and the needs of the community in this evolving technological environment.

The major principles that have informed media classification in Australia—such as adults being free to make their own informed media choices and children being protected from material that may cause harm—continue to be relevant and important. While a convergent media environment presents major new challenges, there continues to be a community expectation that certain media content will be accompanied by classification information based on decisions that reflect community standards.

Inquiry in context

This Inquiry was one of a number of related inquiries taking place in Australia. The Convergence Review was established through the Department of Broadband, Communications and the Digital Economy (DBCDE) in 2011 to review Australia's media and communications legislation in the context of media convergence, due to report in the first quarter of 2012.

Other significant inquiries and reviews relevant to this Inquiry included: public consultation on the introduction of an R 18+ classification for computer games; a review of measures to increase accountability and transparency for internet service provider (ISP) filtering of Refused Classification (RC) material; a Senate Committee review of Australia's classification system; inquiries into cyber-safety and outdoor advertising; the Independent Media Inquiry into newspapers and online news publications; and a proposed national cultural policy.

Problems with the current framework

A strong underlying theme of many submissions to this Inquiry was that the current classification scheme does not deal adequately with the challenges of media convergence and the volume of media content now available to Australians. The *Classification Act* was described as 'an analogue piece of legislation in a digital world', and there were difficulties identified in how the *Classification Act* interfaces with the *Broadcasting Services Act 1992* (Cth), which covers broadcast and online media.

Respondents drew attention to aspects of the classification and content regulation framework that are failing to meet intended goals, and that create confusion for media content industries and the wider community. Among the problems identified were:

- inadequate regulatory response to changes in technology and community expectations;
- lack of clarity about whether films and computer games distributed online must be classified;
- 'double handling' of media content, with films and television programs being classified twice for different formats (eg, 2D and 3D) and different platforms (eg, broadcast television and DVD);
- concerns that the scope of the RC category is too broad and that too much content is prohibited online, including some content that may not be prohibited in other formats, such as magazines;
- inconsistent state and territory laws concerning restrictions and prohibitions on the sale of certain media content, such as sexually explicit films and magazines;
- low compliance with classification laws in some industries, particularly the adult industry, and correspondingly low enforcement; and
- the need to clarify the responsibilities of the Classification Board and the Australian Communications and Media Authority (the ACMA) and other Australian Government agencies and departments involved with classification and media content regulation.

The context of media convergence

This Inquiry provided the opportunity to reform Australia's classification laws to meet the challenges of a convergent media environment. Developments associated with media convergence include:

- increased household and business access to high-speed broadband internet;
- the digitisation of media products and services, as seen with the rise of YouTube, Apple iTunes and other global digital media platforms;
- the convergence of media platforms and services, for both established and new media;
- the globalisation of media platforms, content and services, making nationally-based regulations more difficult to apply;
- the acceleration of innovation, characteristic of a more knowledge-based economy;
- the rise of user-created content, and a shift in the nature of media users from audiences to participants;
- greater media user empowerment, due to greater diversity of choices of media content and platforms and the increased ability to personalise media; and
- the blurring of lines between public and private media consumption, as well as the ability to apply age-based access restrictions, as more media is accessed from the home through converged media platforms.

Piecemeal regulatory responses to changes in technologies, markets and consumer behaviour have created uncertainty for both consumers and industry, and raise questions about where responsibilities lie for driving change. Current legislation is characterised by what the ACMA has described as 'broken concepts': laws built upon platform-based media regulation, that become less and less effective in a convergent media environment.

A new National Classification Scheme

Guiding principles for reform

The ALRC identified eight guiding principles for reform directed to providing an effective framework for the classification and regulation of media content in Australia. These principles underpin the 57 recommendations for reform in this Report. The ALRC considers that these principles should inform the development of a new National Classification Scheme that can more effectively meet community needs and expectations, while being more responsive to the challenges of technological change.

The eight guiding principles are that:

(1) Australians should be able to read, hear, see and participate in media of their choice;

(2) communications and media services available to Australians should broadly reflect community standards, while recognising a diversity of views, cultures and ideas in the community;

(3) children should be protected from material likely to harm or disturb them;

(4) consumers should be provided with information about media content in a timely and clear manner, and with a responsive and effective means of addressing their concerns, including through complaints;

(5) the classification regulatory framework needs to be responsive to technological change and adaptive to new technologies, platforms and services;

(6) the classification regulatory framework should not impede competition and innovation, and not disadvantage Australian media content and service providers in international markets;

(7) classification regulation should be kept to the minimum needed to achieve a clear public purpose; and

(8) classification regulation should be focused upon content rather than platform or means of delivery.

Key features

In this Report, the ALRC recommends a new classification scheme for a new convergent media landscape. The key features of the ALRC's model are:

> Platform-neutral regulation—one legislative regime establishing obligations to classify or restrict access to content across media platforms.

> Clear scope of what must be classified—that is feature films, television programs and certain computer games that are both made and distributed on a commercial basis and have a significant Australian audience.

> A shift in regulatory focus to restricting access to adult content—imposing new obligations on content providers to take reasonable steps to restrict access to adult content and to promote cyber-safety.

> Co-regulation and industry classification—more industry classification of content and industry development of classification codes, subject to regulatory oversight.

> Classification Board benchmarking and community standards—a clear role for the Classification Board in making independent classification decisions using classification categories and criteria that reflect community standards.

> An Australian Government scheme—replacing the current classification cooperative scheme with enforcement of classification laws under Commonwealth law.

> A single regulator—with primary responsibility for regulating the new scheme.

Platform-neutral regulation

A new Classification of Media Content Act should be enacted incorporating all classification obligations applying to media content, including:

- publications, films and computer games currently subject to the *Classification Act* and state and territory classification enforcement legislation;
- online and mobile content currently subject to the regulatory regime under schs 5 and 7 of the *Broadcasting Services Act*; and
- broadcast and subscription television content currently regulated under the *Broadcasting Services Act*.

Traditional distinctions based on how content is accessed or delivered are becoming less relevant. Accordingly, the three key statutory obligations recommended in this Report are 'platform-neutral'—that is, they apply to certain media content, whether the content is screened in cinemas, broadcast on television, sold in retail outlets, provided online, or otherwise distributed to the Australian public. The Report recommends platform-neutral laws for what media content must be classified, platform-neutral laws for what media content must be restricted to adults, and platform-neutral laws for what media content is prohibited.

The intention is to avoid inconsistencies manifest under the current scheme, and enable a new classification framework to be more adaptive to changes in technologies, products and services arising out of media convergence. This would also eliminate costly 'double handling' or 'double classification' of similar content on different media platforms. Further, all media content that is required to be classified would be classified according to a single set of classification categories and criteria.

Clear scope of what must be classified

The volume of media content available to Australians has grown exponentially. There are over one trillion web sites, hundreds of thousands of 'apps' available for download to mobile phones and other devices, and every minute over 60 hours of video content is uploaded to YouTube (one hour of content per second). As it is impractical to expect all media content to be classified in Australia, the scope of what must be classified should be confined to feature films, television programs and higher-level computer games.

A classification obligation that applies to content must be focused on material for which Australians most need and demand classification information. Therefore, importantly, feature films, television programs and computer games should only be required to be classified if they are both made and distributed on a commercial basis and likely to have a significant Australian audience.

Laws that stipulate what media content must be classified, and who undertakes classification activities, are currently platform-based and historic. The need to classify should be based upon the nature of the content itself—including its likely audience reach—rather than being based primarily upon the platform from which it is delivered and accessed.

Obligations to classify content would not generally apply to persons uploading online content on a non-commercial basis. Internet intermediaries, including application service providers, host providers and internet access providers, would also generally be excluded from classification-related obligations other than those concerning Prohibited content.

A shift in regulatory focus to restricting access to adult content

Content providers should be required to take reasonable steps to restrict access to all adult content that is sold, screened, provided online, or otherwise distributed to the Australian public. Adult content refers to media content that has been, or if classified would be, classified R 18+ or X 18+.

This approach to adult content recognises that formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to the minimum needed to achieve a clear public purpose.

The new Act should provide for essential requirements for restricting access. The various 'reasonable steps' that different types of content provider might be expected to take should be prescribed in industry codes and Regulator standards, approved and enforced by the Regulator.

What steps are reasonable to take to restrict access will be based upon what is appropriate for delivery platforms. Restricting access offline may be straightforward in some instances, such as the packaging of certain content in plastic, or requiring proof of age on purchase.

While the challenges are clearly greater with online content, content providers will still be expected take reasonable steps to restrict access. Some content providers may be able to issue warnings and use age-verification systems. Others may be expected to promote self-regulatory initiatives to assist consumers to manage their own access to media content, and protect children and others in their care.

Measures to restrict access to adult content are complementary to other Government and industry cyber-safety initiatives. Measures to assist parents and guardians in particular may include:

> public education about the use of parental locks and other technical means to protect children from exposure to inappropriate media content;
> digital literacy and education programs;
> use of personal computer-based dynamic content filters; and
> user reporting—or 'flagging'—of inappropriate content.

Co-regulation and industry classification

A greater role for industry in classification can allow the Government to focus on the content that generates the most concern in terms of community standards and the protection of children. The new scheme would introduce additional elements of co-regulation into the classification system.

The scheme provides for innovative and efficient classification decision-making mechanisms. Most content that must be classified under the new scheme may be classified by authorised industry classifiers, but subject to regulatory oversight and review.

The Regulator should also have the power to approve other rigorous and transparent classification decision-making systems, perhaps developed in other jurisdictions or by digital and online content distributors. Classification decisions made under an approved system could be deemed to have an equivalent Australian classification. This would facilitate the provision of Australian classification information in a media environment characterised by vast volumes of content. New classification decision-making instruments, such as comprehensive online questionnaires that incorporate Australian classification criteria, should also be developed.

The new scheme also provides for the development and operation of industry classification codes. The intention is that such industry codes will provide flexibility for different industries to comply with regulatory requirements in a manner that is suited to their particular business models and is responsive to their particular audience and consumers. Industry codes would include details on matters such as the application of classification markings, display requirements for restricted content, reasonable steps for restricting access and complaints handling.

Industry classification and the extended use of codes will assist classification regulation to be responsive to technological change and adaptive to new technologies, platforms and services. It also provides the basis for greater 'buy-in' by industry players to the classification scheme, thereby allowing industry knowledge and expertise to be directly applied to addressing consumer issues.

The Regulator would provide a critical 'back stop' to the scheme by providing for safeguards and oversight to ensure that the scheme is operating effectively, that industry is complying with regulatory obligations and that consumer needs and concerns are being adequately met.

Classification Board benchmarking and community standards

The Classification Board will be retained as an independent statutory body responsible for making key classification decisions and reviewing decisions. The Board, whose members are intended to be broadly representative of the Australian community, is suited to a benchmarking role and there is a high level of public confidence in the Board's decisions.

Independent decisions that reflect community standards become more important under a system that allows for more content to be classified by industry. In this context, the role of the Classification Board is particularly important. The ALRC therefore recommends that films for cinema release and computer games likely to be classified MA 15+ or above continue to be classified by the Board. It is important that independent benchmarks are established across a range of media content and classification categories.

Classification categories should be harmonised and the criteria combined so that the same categories and criteria are applied in the classification of all media content—irrespective of its form and the platform by which it is delivered or accessed. Classification criteria should also be reviewed periodically, to ensure they continue to reflect prevailing community standards. This requires comprehensive research, including a mix of quantitative and qualitative research.

One classification category that may no longer align with community standards is the 'RC' category. This category should be renamed 'Prohibited', and its scope narrowed. The Australian Government should review current prohibitions in relation to the depiction of sexual fetishes in films, and 'detailed instruction in the use of proscribed drugs'. Further, the Government should also consider confining the prohibition on content that 'promotes, incites or instructs in matters of crime' to 'serious crime'.

An Australian Government scheme

The new scheme based upon the Classification of Media Content Act should be enacted pursuant to the legislative powers of the Parliament of Australia and not as part of any new cooperative scheme. This conclusion is dictated by the need for classification law to respond effectively to media convergence and the desirability of consistent classification laws, decision making and enforcement.

At present, under the classification cooperative scheme, the enforcement of classification laws is primarily the responsibility of states and territories. These arrangements contribute to problems of inconsistency in offence and penalty provisions and low compliance with classification laws in some industries.

An important part of the rationale for replacing the existing classification scheme is to avoid such inconsistencies. The Australian Government should be responsible for the enforcement of classification laws and a regime of offences and penalties. The new Act should express an intention that it is to cover the field.

It is envisaged that consultation with the states and territories on classification matters, including enforcement, will continue to be an important element of the new National Classification Scheme.

A single regulator

A single regulator would have primary responsibility for regulating the new scheme. The Regulator would be responsible for a range of functions similar to some of those currently performed by the Classification Branch of the Australian Government Attorney-General's Department; the Director of the Classification Board; the DBCDE; and the ACMA.

The ALRC has identified advantages in having one regulator responsible for all forms of content regulation, including classification matters. These advantages are likely to increase significantly in the context of media convergence.

The Regulator's functions should include:

- encouraging, monitoring and enforcing compliance with classification laws;
- handling complaints about the classification of media content;
- authorising industry classifiers and providing and approving classification training;
- facilitating the development of industry classification codes and approving and maintaining a register of such codes;
- liaising with relevant Australian and overseas media content regulators, classification bodies and law enforcement agencies; and
- educating the public about the new National Classification Scheme and promoting media literacy more generally.

In addition, the Regulator's functions may also include:

- providing administrative support to the Classification Board;
- maintaining a database of classification decisions;
- assisting with the development of classification policy and legislation; and
- conducting or commissioning research relevant to classification.

Net effect of the recommendations

The net effect of the ALRC's recommendations in this Report would be the establishment of a new National Classification Scheme that:

- applies consistent rules to content that are sufficiently flexible to be adaptive to technological change;
- places a regulatory focus on restricting access to adult content, helping to promote cyber-safety and protect children from inappropriate content across media platforms;
- retains the Classification Board as an independent classification decision maker with an essential role in setting benchmarks;
- promotes industry co-regulation, encouraging greater industry content classification, with government regulation more directly focused on content of higher community concern;
- provides for pragmatic regulatory oversight, to meet community expectations and safeguard community standards;
- reduces the overall regulatory burden on media content industries while ensuring that content obligations are focused on what Australians most expect to be classified; and
- harmonises classification laws across Australia, for the benefit of consumers and content providers.

Appendix G: Report on review of Schedule 7 of the Broadcasting Services Act

Schedule 7 of the *Broadcasting Services Act 1992* establishes a co-regulatory scheme for the regulation of offensive prohibited or potentially prohibited online and mobile content hosted in or provided from Australia.

Clause 118 of Schedule 7 provides for the Minister to cause to be conducted a review of the operation of the Schedule, including whether it should be amended or repealed. It also provides that a report of the review be prepared and tabled in Parliament within 15 sitting days after the report's completion.

This statutory review has been conducted as part of the Convergence Review.

This report has been completed in the light of the publication of the Australian Law Reform Commission (ALRC) report *Classification—Content Regulation and Convergent Media* (ALRC report 118). The ALRC report proposes the establishment of a new national classification scheme covering all media content. As discussed below, implementation of the ALRC recommendations could result in significant changes to the operation of Schedule 7 and the future regulation of online content.

Recommendations

1. Consistent with the Convergence Review and ALRC recommendations, Schedule 7 of the *Broadcasting Services Act 1992* should be replaced as part of a new national classification scheme, taking into account the operational issues with Schedule 7 that are discussed in this report.

2. If the Convergence Review and ALRC recommendations are not implemented or are delayed in implementation, consideration should be given to amending Schedule 7 to incorporate the interim measures outlined at the conclusion of this report.

Scope of issues

In reviewing Schedule 7 within the context of the Convergence Review and the ALRC recommendations, the following specific issues have been addressed:

- whether Schedule 7 has been effective in meeting its objectives
- whether the current Restricted Access System requirements in Schedule 7 result in inconsistent regulatory treatment between delivery platforms
- the effectiveness and efficiency of complaints handling
- other operational and definitional issues with the current scheme.

While this review focuses on the operation of Schedule 7, it has taken into account the interaction of Schedule 7 with other regulation:

- Schedule 5 of the *Broadcasting Services Act 1992* (BSA), which deals with content hosted outside Australia
- the *Classification (Publication, Films and Computer Games) Act 1995* (Classification Act) and the current National Classification Scheme.

In considering whether Schedule 7 should be amended or repealed, this report examines:

- the future role of Schedule 7 if the government were to accept the recommendations of the ALRC report on the National Classification Scheme and the recommendations of the Convergence Review
- possible short-term amendments that could be made to Schedule 7 in any interim period before implementation of the ALRC report and Convergence Review recommendations.

The review of Schedule 7 has taken into account the views of the Australian Communications and Media Authority (ACMA) on the operation of Schedule 7, as well as the conclusions of the ALRC report.

Overview of Schedule 7

The primary objective of Schedule 7 is to provide a framework for regulating illegal and offensive content provided online and via convergent devices, such as mobile phones. Schedule 7 also plays an important role in facilitating the referral to Australian law enforcement authorities of illegal content, such as material that promotes, incites or instructs in crime or violence and child abuse material.

Schedule 7 regulates Australian 'content service providers', which it defines in clause 2 as providers of a service that 'delivers content to persons having equipment appropriate for receiving that content, where the delivery of the service is by means of a carriage service'. The schedule is intended to apply equally to content hosted online and content provided to mobile phones. Content service providers are divided into three categories for the purpose of the schedule:

- hosting services, which host stored content in Australia
- live content services, which provide live content to the public from Australia
- links service providers, which provide links to content to the public.

The online content co-regulatory scheme established in Schedule 7 is a complaints-based mechanism whereby Australian residents or companies carrying on a business in Australia may complain about content they consider may be prohibited or potentially prohibited. The definition of prohibited content under Schedule 7 is underpinned by the classification categories established under the National Classification Scheme. Specifically, Schedule 7 sets out:

- what qualifies as prohibited and potential prohibited content online, and whether types of online content should be classified as a film, computer game or eligible electronic publication
- what constitutes a content service, and three sub-categories of 'hosting', 'live-content' and 'links' services
- the powers of the ACMA to refer content for classification and to deal with prohibited and potential prohibited content through take-down, service-cessation and link-deletion notices
- the ACMA's responsibility to create a legislative instrument defining and requiring a restricted access system for MA15+ and R18+ content
- the process for making and registering industry codes by the internet industry and the power for the ACMA to make a mandatory industry standard if an industry code is not made
- the operation, enforceability and penalties related to 'content/service provider rules', which consist of ACMA notices (e.g. take-down notices), industry codes and standards
- the ACMA's responsibilities concerning the referral of prohibited and potential prohibited content of a sufficiently serious nature to law enforcement agencies.

Operation of Schedule 7

Interaction with Schedule 5 of the Broadcasting Services Act

Schedules 5 and 7 of the BSA provide the framework for online content regulation in Australia.

Schedule 5 became part of the BSA in 1999 and extended the responsibilities of the ACMA to internet service providers and internet content hosts. The schedule established the Online Content Co-regulatory Scheme, which covers

- the duties of the ACMA in regulating the internet industry, in particular how complaints are made and investigated
- the actions the ACMA should take against prohibited content depending on whether it is hosted inside or outside Australia
- the making and registration of industry codes by the internet industry and the power for the ACMA to make a mandatory industry standard if an industry code is not made
- the operation, enforceability and penalties related to online provider rules, which consist of formal access prevention notices, industry codes and standards.

Schedule 7 was added to the BSA in 2007 to extend and clarify the Online Content Co-regulatory Scheme, particularly with regard to online content and content delivered over convergent devices, such as mobile handsets.

Both schedules operate through a complaints-based mechanism that is administered by the ACMA in cooperation with industry bodies. Both aim to limit the availability of 'prohibited content' and 'potential prohibited content'. Under both schedules, the ACMA assesses online content with reference to the National Classification Scheme.

The Restricted Access Systems Declaration 2007 is a declaration made by the ACMA under Schedule 7. The declaration requires that content provided by a content service be subject to a restricted access system where the content is:

- MA15+ and:
  - is provided commercially (other than a news or current affairs service), *and*
  - consists of material other than text and/or still images, *and*
  - is not an ancillary subscription television service or a mobile premium service for a fee
- R18+ content.

Content Services Code

Schedule 7 provides for the registration and enforcement of industry codes developed by the internet service provider (ISP) and mobile telephony industries to regulate the content provided over their platforms.

Schedule 7 requires Australian commercial content service providers—services that operate for profit and charge a fee—to make codes that address the following issues:

- the engagement of trained content assessors by service providers to classify content
- ensuring that content that is not classified by the Classification Board is not shown unless it has no reasonable likelihood of being prohibited content or has been assessed by a trained content assessor.

The current commercial content service provider code is the Internet Industry Association Content Services Code.[1] This code provides guidance to designated content and hosting service providers on how to comply with the legal obligations imposed by Schedule 7 and the Restricted Access Systems Declaration. It covers:

- assessment of content and classification (Part B)
- handling complaints (Part C)
- take-down notice procedures (Part D)
- promoting online safety for Australian families (Part E)
- implementing restricted access systems for some content services (Part F)
- regulating certain chat services (Part G).

Regulation of content

Schedule 7 regulates content with regard to the classification categories of the National Classification Scheme (G, PG, M, MA 15+, R18+, X18+ and RC). Under the schedule, powers are provided to the ACMA to regulate two categories of content, 'prohibited content' and 'potential prohibited content'.

Prohibited content

Prohibited content is defined in clause 20 of the schedule. Specifically, prohibited content is content (other than an eligible electronic publication[2]) that has been classified as one of the following by the National Classification Board:

- Refused Classification (RC)
- X18+
- R18+, *and* to which access is *not* subject to a restricted access system
- MA15+, *and*
  - is provided by a commercial service or mobile premium service (other than a news or current affairs service) for a fee
  - consists of material other than text and/or still images
  - to which access is not subject to a restricted access system
  - is not an ancillary subscription television service.

Potential prohibited content

Potential prohibited content is content that has not been classified by the National Classification Board, and where there is a substantial likelihood that the content would be prohibited content if it was classified. This decision is made by trained content assessors within the ACMA.

Table G.1 shows how online content rates against the National Classification Scheme.

1 Internet Industry Code of Practice: Content Services Code, at www.iia.net.au/images/resources/pdf/content_services_code_registration_version_1.0.pdf.

2 An eligible electronic publication is a book, magazine or newspaper that has been made available online; this may be in a visual and/or an audio format.

Table G.1: Online content rated against National Classification Scheme categories

Classification category	Is content subject to a Restricted Access System	Content classified by the Classification Board	Content not classified by the Classification Board
RC	N/A	Prohibited	Potential prohibited
X18+	N/A	Prohibited	Potential prohibited
R18+	Yes	Not prohibited	Not potential prohibited
	No	Prohibited	Potential prohibited
MA15+	Yes	Not prohibited	Not potential prohibited
> *not composed of text and/or still images; and* > *provided on payment of a fee; and* > *provided for a profit; or* > *provided by a mobile premium service*	No	Prohibited	Potential prohibited
MA15+ (all other)	N/A	Not prohibited	Not potential prohibited

Source: Australian Communications and Media Authority.

Complaints

Schedule 7 establishes a complaints-based mechanism whereby a person who has reason to believe that end users in Australia can access prohibited or potential prohibited content provided by a content service may make a complaint to the ACMA about the matter. A person may also make a complaint about the hosting of or linking to prohibited content or potential prohibited content.

For a complaint to be investigated by the ACMA it must:

> identify the content
> set out how to access the content (for example, provide relevant URLs, passwords, and so on)
> state why it is believed that the content is prohibited or potential prohibited content
> set out such other information (if any) as the ACMA requires
> be in writing
> be made by an Australian resident, by a body corporate with activities in Australia, or by the Commonwealth, or a state or territory.

Schedule 7 stipulates that the ACMA must investigate all valid complaints and notify the complainant of the result. It may, however, choose not to investigate a complaint if it is satisfied that:

> it is frivolous, vexatious or not made in good faith
> it was made for the purpose of frustrating or undermining the content regulation scheme
> the making of a recording would cause the complainant to contravene a law, or
> it has been, or could have been, made under an industry code or standard registered under the schedule.

The ACMA may also initiate its own investigations into prohibited or potential prohibited content under clause 44 of Schedule 7.

Clause 46 provides protection against civil proceedings for any person who makes a complaint or statement to the ACMA, or provides documentation to the ACMA for the purposes of an investigation.

Investigation of content

The ACMA investigates content at a specific location to ensure that any action taken is restricted, so far as possible, to prohibited or potential prohibited content. As such, the ACMA requires the specific location of content from complainants and investigates content at specific URLs, images or files, not whole websites. The ACMA does not take action with regard to entire domains.

Under the BSA, the ACMA must investigate all valid complaints about content where a person believes the content to be prohibited or potential prohibited.

Where a complaint is about live content, the complainant may provide a copy of the content to the ACMA or provide the date and approximate time when an incident occurred. Live complaints must be made within 60 days after the occurrence of the incident.

The provisions throughout Schedule 7 relate to hosting services and live content services and links services with an Australian connection.[3]

Under Part 3, Division 6 of Schedule 7, the ACMA is obliged to refer content to law enforcement agencies if, during the course of an investigation, it is satisfied that content is prohibited or potential prohibited content and is of a sufficiently serious nature.

The ACMA may defer action in relation to hosting services, live content services and links services if it is satisfied by a member of an Australian police force that the action should be deferred for a particular period in order to avoid prejudicing a criminal investigation (see clauses 70, 71 and 72 of Schedule 7).

Remedies and enforcement

The ACMA is provided with a number of possible regulatory actions under Schedule 7. The action available is determined by the nature of the service being regulated, as set out in Table G.2.

Table G.2: Regulatory actions available to the ACMA

Category of service provider	Action available
Hosting service	Issue a take-down notice
Live content service	Issue a service-cessation notice
Links service	Issue a link-deletion notice

Source: Australian Communications and Media Authority.

If the ACMA finds that prohibited content is being made available online by an Australian hosting or content service provider, it may issue the provider with a notice of the type appropriate to that service provider. All types of notice require the provider to remove the content or, in the case of content classified R18+ or certain content classified MA15+, to put it behind a restricted access system. Service providers must comply with such a notice by 6 pm on the next business day after it is given. Failure to comply with a notice is an offence under the BSA and financial penalties may apply.

3 An Australian connection is established if one or more of the following situations exists:
(a) any of the content provided by the content service is hosted in Australia
(b) any live content provided by the content service originates in Australia
(c) in the case of a content service supplied by way of a voice call or video call using a carriage service, any of the participants in the call, other than an end user of the service, are physically present in Australia.

If the ACMA finds that an Australian service provider is hosting or providing potential prohibited content, it may issue the provider with an interim version of the appropriate notice requiring the provider to remove the content until it is classified by the National Classification Board.

If the ACMA is satisfied that the service provider is hosting, or intending to host, material that is the same as, or substantially similar to, prohibited content it may proactively issue a special take-down notice (see clause 52 of Schedule 7). Such notices must be complied with as soon as practicable, or by 6 pm on the next business day after the notice is given to the service provider (see clause 53 of Schedule 7).

If the above measures fail to prevent a contravention, then the ACMA may apply to the Federal Court for an order that the person cease providing the contravening content or hosting service (see clause 110).

The schedule also provides certain protections from civil and criminal proceedings for hosting service providers, live service providers or links service providers if they are complying with take-down, service-cessation or link-deletion notices (see clause 111). In addition, clause 112 provides protection from criminal proceedings to certain categories of people operating on behalf of the ACMA.

Some of the ACMA's decisions under the schedule may be reviewed by the Administrative Appeals Tribunal. Reviewable decisions include decisions in relation to take-down notices, service-cessation notices and link-deletion notices. Applications for review may be made by relevant content or hosting service providers.

Interaction with law enforcement agencies

Where the ACMA is satisfied that content is prohibited or potential prohibited, and the content is of a 'sufficiently serious' nature to warrant referral to a law enforcement agency, the ACMA is required to notify law enforcement agencies (see Part 3, Division 6). Specifically, the AMCA must notify a member of an Australian police force or another body where there is an agreement with the chief of an Australian police force that it is appropriate to notify to this other body (clause 69).

Child abuse material, content that advocates a terrorist act, and content that promotes, incites or instructs in a matter of crime or violence are among categories of content that the ACMA considers to be 'sufficiently serious'.

The ACMA has memorandums of understanding in place with Australian law enforcement agencies that facilitate the swift reporting of sufficiently serious content (usually within two working days of the ACMA receiving a complaint).

In the case of child abuse material hosted overseas, such content is reported through the International Association of Internet Hotlines (INHOPE) when that content is hosted in an INHOPE member country. Member countries then refer the content to appropriate enforcement agencies within their jurisdiction. This referral process allows for child abuse material to be further referred to international law enforcement bodies within two to four days.

Since July 2011, three ISPs (Telstra, Optus and CyberOne) have been voluntarily blocking a list of child abuse material managed by Interpol under an arrangement with the Australian Federal Police. The Interpol 'worst of' list comprises domain names that contain the most severe child sexual abuse material based on referrals from law enforcement agencies from around the world.

For a particular domain to be included on the Interpol list, the relevant material on it must be reviewed by two independent Interpol member agencies and found to meet the Interpol criteria for the most severe sexual abuse material. The Interpol scheme provides a 'stop page' for ISPs to use, which details procedures for making complaints about the blocking of a domain.

In the case of material that advocates a terrorist act, or that promotes, incites or instructs in crime or violence, or is child abuse material that is not hosted in a country with an INHOPE member hotline, the ACMA refers the content to the Australian Federal Police for action via relevant local and international agency connections.

In the case of Australian-hosted content (and some limited overseas-hosted content), the ACMA investigations are suspended pending advice from the appropriate enforcement agency that it is able to proceed without compromising an enforcement investigation.

Overall assessment

Schedule 7 has been broadly successful at regulating prohibited and potential prohibited content that is hosted in Australia and provided online and via mobile phones. Under Schedule 7 the ACMA has made the Restricted Access Systems Declaration 2007, which sets out minimum access-control requirements for MA15+ and R18+ content and has registered the Content Services Code that was developed by the Internet Industry Association.

The scheme established under Schedule 7 has enabled and/or facilitated:

- the ACMA's receipt and investigation of complaints about content
- the taking down of Australian-hosted prohibited and potential prohibited content pursuant to notices issued by the ACMA
- the referral of sufficiently serious prohibited and potential prohibited content to Australian law enforcement agencies for investigation
- the timely removal, through international cooperation, of online content comprising child abuse material provided overseas
- the engagement of trained content assessors by service providers to advise on potential prohibited content and live content and help prevent its distribution.

By operating in these various ways, the scheme has served to:

- provide a mechanism for Australian citizens to report illegal and offensive content online
- support the investigation by Australian law enforcement agencies of illegal conduct
- protect abused children from revictimisation (through the removal of the evidence of their abuse online)
- protect families and children from exposure to illegal or offensive content
- reduce the amount of prohibited and potential prohibited content that is hosted in Australia.

The Review considers there is a continued need for a scheme like the one created by Schedule 7. Consideration of the ALRC review's recommendations and input from the ACMA, however, raises the following issues for the future maintenance of such a scheme:

- Do the requirements of Schedule 7 and particularly the Restricted Access Systems Declaration 2007 create inconsistencies between the regulation of content across different platforms and media?
- How effective and efficient is the handling of complaints?
- How will the operational and definitional issues that have been observed in the current scheme be addressed in future?

Consistency of regulation on content

There is consensus among stakeholders, endorsed by the ALRC review, that it is important to retain regulatory arrangements that prohibit illegal and offensive content in the online and offline environments, along with particular additional protections for children. There is, however, an increasing overall expectation that this regulation should be consistent across all platforms:

> regardless of platform, content should be regulated in a consistent fashion. Community standards and protecting the best interests of children are paramount considerations which go across all types of media.[4]

4 Australian Christian Lobby, submission in response to open call, p. 2.

MA15+ content

Schedule 7 requires certain commercially provided or mobile content classified or likely to be classified MA15+ to be behind a restricted access system. This approach is inconsistent with other platforms; for example, the Commercial Television Code of Practice allows the free-to-air broadcast of MA15+ and equivalently rated material, albeit within prescribed time zones.

This issue was considered at length in the ALRC report. MA15+ content is currently recognised as a 'restricted' category under the Classification Act. The ALRC report recommended a harmonisation of categories and regulation, the effect of which would remove legally enforceable access restrictions for MA15+ classified content.[5]

R18+ and X18+ content

Under the National Classification Scheme, R18+ and X18+ are classification categories restricted to adults.

Material classified X18+ is currently prohibited for exhibition and sale in all parts of Australia except the Northern Territory and the Australian Capital Territory. The effectiveness and appropriateness of this regulation is considered at length in the ALRC review, which concludes that:

> licensing schemes and classification requirements appear somewhat anachronistic in light of the volume of this content that is now available in most Australian homes through the internet. Unless ISPs are required to block pornography, prohibitions on the sale of pornography in retail outlets may be largely symbolic, and have little practical effect.
>
> The ALRC therefore considers that it is most appropriate and more effective to focus regulatory efforts on restricting the access of minors to this content, by encouraging parental supervision, by promoting—and requiring content providers to promote—the use and understanding of parental locks, internet filters, and other devices, and requiring content providers to take other reasonable steps to restrict access to the content. This is a more achievable regulatory outcome than the formal classification of all pornography, and providers of adult content may be more likely to comply with an obligation to take reasonable steps to restrict access, than with laws that entirely prohibit the distribution of their content.[6]

The recommendation of the ALRC is that the regulator for content be provided with powers to require restricted access for adult content, defined as material classified R18+ and X18+. The most significant effect of this recommendation would be to make it legal for Australian-based service providers to provide X18+ content, albeit behind a restricted access system.

Restricted access systems

An Administrative Appeals Tribunal hearing in early 2010 highlighted the difficulty of practically applying the restricted age system requirements to links services (see below).[7] However, more generally, existing restricted access system (RAS) requirements are considered likely to:

- impose an onerous burden on content providers in relation to information gathering, particularly in relation to links services and sites that enable the provision of user-generated content
- create issues in relation to equity of access for consumers—for example, for adults accessing adult content who do not possess a credit card
- be contrary to the National Privacy Principles in the collection of personal or financial information other than that specifically required for the service and increasing the opportunity for identity theft.

5 ALRC report, p. 208.

6 ALRC report, pp. 242–43.

7 *Re Sublime IP Pty Ltd and Australian Communications and Media Authority* [2010] AATA 353 (13 May 2010).

The ACMA has provided information to the effect that where content is investigated and classified or likely to be classified R18+, it is unlikely to be subject to an access restriction system as the majority of this content is hosted overseas. As such, the RAS provisions are rarely tested and the effectiveness of the RAS on MA15+ and R18+ content is questionable. On the rare occasions when the RAS provisions are tested, identifying how and whether the service meets the requirements of the RAS can be cumbersome and administratively onerous. This difficulty is increased further when the content is hosted overseas.

Industry feedback to the ACMA suggests that the current system is largely unworkable in the context of online business models, particularly those that do not collect fees for services or content and/or provide user-generated content.

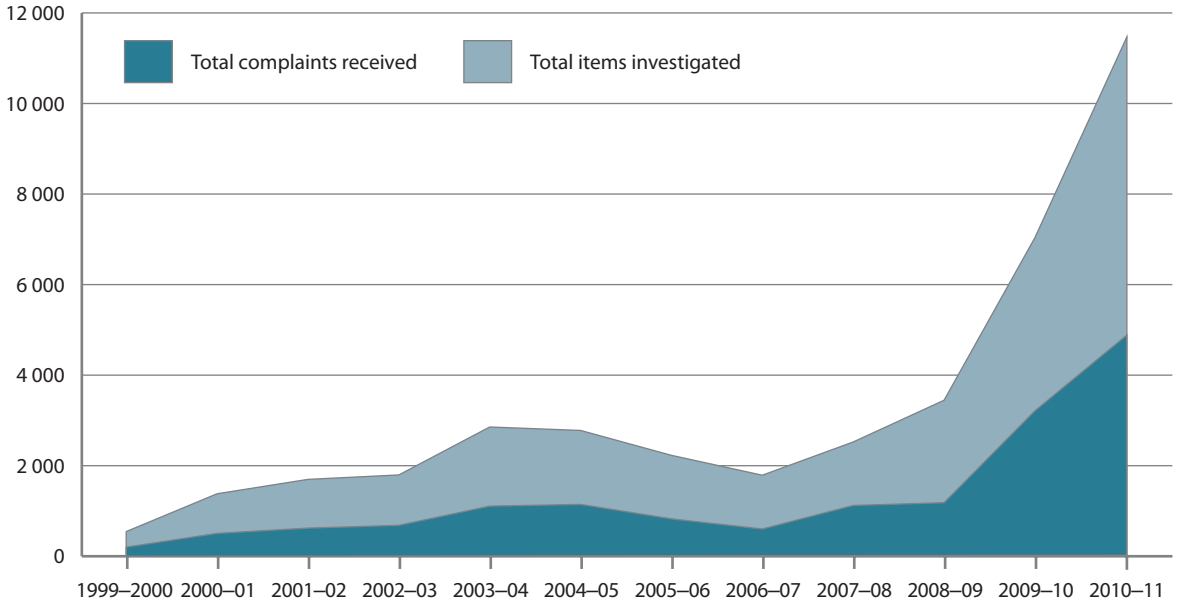
Requirements of a restricted access system for social networking and other user-generated content sites would require constant monitoring and assessment of content against the classification guidelines. This type of monitoring and assessment is beyond that which could reasonably be expected due to the volume and fluidity of content.

The ALRC report noted that restricting access to adult content should not be prohibitively costly or burdensome, or unnecessarily compromise people's privacy.[8] It recommends that methods of restricting access should, however, be appropriate to and adjusted for different types of content providers and that the obligation to restrict access should generally not apply to persons uploading content, other than on a commercial basis, to a website owned and managed by others.[9]

Complaints

The ACMA has experienced a sustained trend of increased complaints year on year since the start of 2006–07, resulting in an increased number of investigations into items of content (see Figure G.1).

Figure G.1: Complaints received and investigated by the ACMA, 1999–2000 to 2010–11



Note: A complaint may trigger one or more investigations. Investigations are conducted into single items of content identified at a single URL.

Source: Australian Communications and Media Authority.

8 ALRC report, p. 232.

9 ALRC report, p. 236.

Under existing legislation, the ACMA must investigate all valid complaints unless it is satisfied that the complaint is frivolous, vexatious or not made in good faith, or has reason to believe that the complaint was made for the purpose of frustrating or undermining the effective administration of the scheme.[10]

The ALRC report highlighted the ACMA's submitted comments about its investigation obligations:

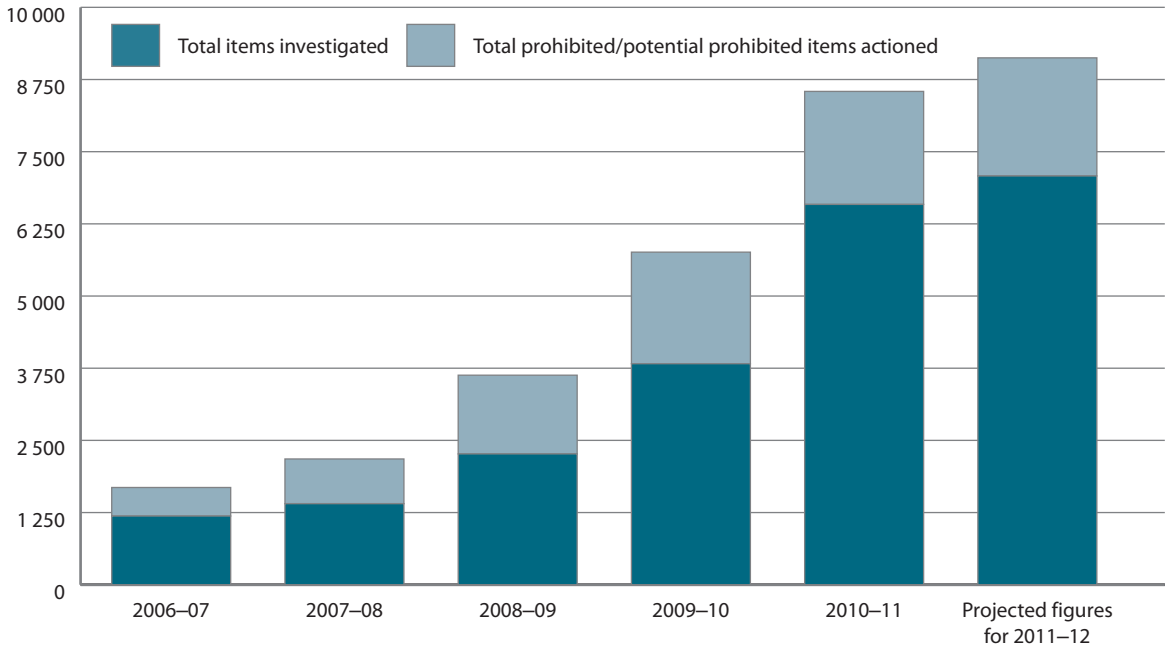
> It is unusual for the ACMA to decide not to investigate a complaint on these grounds and determining whether a matter is frivolous, vexatious or not made in good faith can be resource-intensive in itself. The ACMA does not have any other discretion not to investigate a valid complaint.[11]

Specific problems that have been identified include the following:

- The current framing of the legislation does not allow for discretion where the same content is complained about more than once or complainants provide multiple URLs that all resolve to similar content.
- Where the ACMA receives multiple complaints about the same content at the same URL, it must conduct an investigation for each complaint.
- Where the ACMA receives a complaint that contains multiple URLs (sometimes more than 100) stated by the complainant to contain similar content, and the ACMA investigates a reasonable number and they are all not prohibited, the ACMA must still investigate each of the remaining URLs.
- Where the ACMA receives multiple complaints about the same content from a single complainant, the ACMA must investigate each complaint.
- Where the ACMA knows that an investigation will not result in any effective action to be taken (such as the issuing of a take-down notice or referral to Family Friendly Filters), the ACMA must still investigate.

Figure G.2 shows action taken on items investigated by the ACMA.

Figure G.2: Action taken on items investigated by the ACMA since the inception of Schedule 7, 2006–07 to 2011–12 (projected)



Source: Australian Communications and Media Authority.

10 See BSA, Schedule 7, clause 43.

11 ALRC report, p. 335.

Other operational and definitional issues

Links services

In early 2010 an Administrative Appeals Tribunal hearing highlighted the difficulty of practically applying restricted access system requirements to links services. Since the introduction of links services under Schedule 7 to the BSA in January 2008, the ACMA has received approximately 52 complaints and taken action with regard to six of those by issuing link-deletion notices.

The intention of including links services under Schedule 7 is to capture links made available within Australian-hosted content that, when accessed, connect to overseas-hosted prohibited or potential prohibited content. The ACMA has no jurisdiction to take enforcement action on overseas-hosted content, and therefore enforcement action is limited to the removal of the link itself, or placement of the link itself behind a restricted access system. Neither action has a meaningful effect on the actual prohibited or potential prohibited content found at the location connected by the link and hosted overseas. Both actions are of minor benefit considering the continuing availability of the content by other means. This raises concerns that the resources required to take enforcement action in relation to links services are disproportionately high compared to the results derived from the action.

Commercial content services

Schedule 7 currently limits the definition of commercial content services to those that provide content to the public on the payment of a fee. This excludes services that are advertising-supported and hence do not require a fee for service.

Schedule 7 requires fee-based services to employ qualified content assessors, adhere to the industry code and keep programming classified as MA15+ behind a restricted access system. Advertising-supported content providers, such as the network-owned catch-up services, are not subject to any of these positive obligations.

Australian connection

There is strong evidence to suggest that the existing definition of 'Australian connection' has been beneficial in ensuring the removal of prohibited content hosted in and provided from Australia. For example, the ACMA has experienced 100 per cent compliance with enforcement notices issued for the removal or restriction of content since the online content co-regulatory scheme's inception.

However, Schedule 7 regulates content service providers with an Australian connection, using a definition based on the physical location of content, or the location from which content is provided in the case of live content services. This is becoming increasingly irrelevant with the emergence of international cloud-based services for the hosting of content.

Security measures for notification of content

A significant outcome from the ACMA's administration of the complaints-based mechanism for online content is the distribution of a URL notification list to Family Friendly Filters in accordance with the code of practice in place under Schedule 5 of the BSA. As all these complaints are received and investigations conducted under Schedule 7 regardless of the schedule under which action may be taken, it is relevant to consider it here.

Given the nature of the content to which URLs contained on the ACMA's notification lists connect, the security of such lists is paramount as the URL itself provides direct access to illegal and offensive content such as child abuse material.

In light of this, it is important that action the ACMA may take to ensure the secure transmission and management of a URL notification list not be limited in any way. Schedule 5 does not currently provide for or enable actions by the ACMA in relation to list security and as such may inadvertently limit the action it may take.

Use of reputable URL lists

The *Australian Communications and Media Authority Act 2005* (section 8) and the *Telecommunications Act 1997* (section 312) contain provisions enabling the ACMA to take certain actions to assist the telecommunications industry and prevent a carriage service from being used in the commission of a serious offence. In this context, the ACMA may notify URLs resolving to child abuse material collated by reputable international agencies, in particular to ISPs engaging in voluntary blocking of child abuse material.

The Review considers that the enabling of reputable international lists of child abuse material to be notified to accredited filter providers may also be of benefit to the existing online co-regulatory scheme and the community protections inherent within it. Such action could be enabled in a range of ways, including through amendment to the existing legislation or subordinate instruments.

Exemption for personal communications

New communication methods available online have expanded the potential for personal communications beyond traditional email, text and voice.

Current legislation appears to consider only traditional means of personal communications, such as the exemptions for personal-type communications under Schedule 7.

Consideration should be given to extending the current exemption of personal messages across the full breadth of available personal communications.

Inconsistent definitions

'Internet content' and 'content service'

Schedule 5 provisions require the ACMA to take action about content hosted outside Australia that is prohibited and potential prohibited 'internet content', whereas Schedule 7 requires the ACMA to take action where content hosted or provided from Australia is provided by a 'content service' or 'hosting service'.

The differing definitions result in inconsistencies with regard to the action that can be taken on prohibited content depending on the host location or from where it is being provided. For example, an Australian-hosted search engine service containing prohibited content is an exempt content service under Schedule 7 and so the ACMA cannot take action. However, the same prohibited content provided by an overseas-hosted search engine can attract action by the ACMA as it meets the definition of 'internet content' under Schedule 5.

'Live content'

Under Schedule 7 'live content' as defined 'does not include stored content'. This definition is ambiguous where content contains a mixture of stored and live content. A website that contains a combination of static content and live content (for example, a website that contains a live webcam feed and static images) might not fall within the definition of live content given that a live service 'does not include stored content'.

This ambiguity then extends to consideration of the provision under which a complaint may be made. In other words, can a complaint be made about content that contains live content, or just the live content itself?

Further, there is a disconnect between schedules 5 and 7, whereby valid complaints about live content and links services must be investigated under Schedule 7 but no action can be taken under Schedule 5 as they do not meet the definition of 'internet content'.

It is also unclear as to whether a complaint made about live content that relates to a past incident can be investigated.

Implications of implementing ALRC and Convergence Review recommendations

Submissions to both the Convergence Review and the ALRC review strongly supported the need for a new national classification scheme, administered by a single regulator, and covering media content on all platforms. The single regulator proposal is consistent with the regulatory principles adopted in Chapter 1 of this report.

The ALRC proposes that a new classification of media content Act incorporate all classification obligations currently applying to media content—including publications, films and computer games subject to the current Classification Act and state and territory classification enforcement legislation; online and mobile content currently subject to the regulatory regime under schedules 5 and 7 of the BSA; and broadcasting and subscription television content currently regulated under the BSA.[12] The Convergence Review broadly supports the ALRC recommendations.

The ALRC proposes that relevant media content, whether online or offline, be subject to the recommended national classification scheme. The ALRC also recommends that all content providers be required to 'take reasonable steps' to restrict access to adult content that is sold, screened, provided online or otherwise distributed to the Australian public.[13] What is 'reasonable' would depend on the delivery platform (and could be addressed in relevant industry codes). The regulator would be able to respond to complaints and issue restricted access notices to enforce these requirements. According to the ALRC:

> This approach to adult content recognises that formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to a minimum needed to achieve a clear public purpose.[14]

If implemented, the net effect of these ALRC recommendations would be that the functions of Schedule 7 would be part of a technology-neutral scheme for regulating adult content by a single new regulator. The Review agrees in principle with this outcome. It notes that the proposed arrangements in relation to adult content would be broadly similar to the current operation of Schedule 7, and could encompass the current capacity of the regulator (ACMA) to issue take-down directions in response to complaints.

However, there would be changes in the regulation and availability of currently restricted online and mobile content. MA15+ content would no longer require a restricted access system, while X18+ content, currently prohibited, would be able to be provided behind a restricted access system.

12 ALRC report, p. 25.
13 ALRC report, p. 26.
14 ALRC report, p. 26.

Interim measures

This section outlines a range of legislative amendments that could be considered to improve the practical operation of Schedule 7.

If the government accepts the Convergence Review and ALRC review recommendations, it is recommended that Schedule 7 of the BSA be replaced by new content classification legislation reflecting the ALRC review recommendations. If the recommendations of those reviews are not accepted, or are delayed in their implementation, the following amendments could be considered to improve the operation of Schedule 7:

a) Remove the restricted access system requirements at clause 14 of Schedule 7 for MA15+ content to align with other content regulatory schemes such as those for free-to-air commercial broadcasting services.

b) Amend clause 14 of Schedule 7 to effect the treatment of R18+ and X18+ content as content to be restricted to adults.

c) Amend clause 14 of Schedule 7 in consideration of the limitations of stakeholders to comply with RAS requirements and reflect concerns relating to cost, administrative burden and privacy.

d) Amend regulatory provisions to remedy the asymmetry of obligations between commercial and non-commercial content service providers.

e) Amend clause 43 of Schedule 7 to afford the ACMA discretion as to whether or not to investigate complaints about online content, which will allow the ACMA greater flexibility to prioritise its resources.

f) Amend legislation to allow for refocusing of investigations and enforcement action directly onto the hosting services that provide the prohibited content.

g) Amend the definition of 'Australian connection' to prevent deliberate circumvention by hosting material offshore while being mindful of the technical difficulties and inaccuracies apparent in attempting to identify locally based companies.

h) Provide for the ACMA to take measures to ensure the security, management and distribution of prohibited and potentially prohibited URLs.

i) Extend the exemption for personal communications across the full breadth of technologies available. Provisions that are technology neutral and allow for regulation to be consistently applied across both schedules 5 and 7 would be appropriate.

j) Amend clause 2 of Schedule 7 and associated clauses such as those defining live content services to provider clearer, more consistent definitions to facilitate transparency and enable consistent action to be taken under the legislative framework.

Appendix H: Executive summary of the Independent Inquiry into the Media and Media Regulation

This appendix is an extract from the 'Executive Summary—conclusions and recommendations' section of the *Report of the Independent Inquiry into the Media and Media Regulation*. The full report is available at www.dbcde.gov.au/digital_economy/independent_media_inquiry.

Media codes of ethics and accountability

1. There is common ground among all those who think seriously about the role of the news media and about journalistic ethics that:
   - a free press plays an essential role in a democratic society, and no regulation should endanger that role
   - a free press has a responsibility to be fair and accurate in its reporting of the news
   - a free press is a powerful institution which can, and does, affect the political process, sometimes in quite dramatic ways
   - a free press can cause harm—sometimes unwarranted—to individuals and organisations
   - a free press should be publicly accountable for its performance
   - codes of ethics regarding accuracy, fairness, impartiality, integrity and independence should guide journalists and news organisations.
2. There is less consensus on how this accountability should be enforced.
3. In Australia for newspapers there are several existing mechanisms of self-regulation:
   - the adoption of ethical codes or standards which at a minimum impose obligations of fairness and accuracy
   - the appointment by some newspapers of an ombudsman or readers' representative to handle complaints from the public
   - the establishment by the newspaper industry of the Australian Press Council (APC) to handle complaints from the public and monitor professional standards.
4. Broadcasters (radio and television) have additional regulation. They are required to observe standards both approved and overseen by the Australian Communications and Media Authority (ACMA).
5. There is, however, external regulation which applies to all news media. They must operate within the laws of the land, most importantly for the media, the laws of defamation and contempt.
6. I have come to the conclusion that these mechanisms are not sufficient to achieve the degree of accountability desirable in a democracy:
   - Of the existing self-regulation measures, only one or two newspapers have appointed an ombudsman or readers' representative.
   - Online news publications are not covered.

- The most important institution, the APC, suffers from serious structural constraints. It does not have the necessary powers or the required funds to carry out its designated functions. Publishers can withdraw when they wish and alter their funding as they see fit.
- ACMA's processes are cumbersome and slow.
- If legal proceedings against the media are called for, they are protracted, expensive and adversarial, and offer redress only for legal wrongs, not for the more frequent complaints about inaccuracy or unfairness.

7. The problems with both the external and self-regulatory mechanisms are inherent, and cannot be easily remedied by piecemeal measures.

8. I therefore recommend that a new body, a News Media Council, be established to set journalistic standards for the news media in consultation with the industry, and handle complaints made by the public when those standards are breached. Those standards will likely be substantially the same as those that presently apply and which all profess to embrace.

9. Moreover, I recommend that the News Media Council have those roles in respect of news and current affairs coverage on all platforms, that is, print, online, radio and television. It will thus explicitly cover online news for the first time, and will involve transferring ACMA functions for standards and complaints concerning news and current affairs. It will replace the voluntary APC with a statutory entity. In an era of media convergence, the mandate of regulatory agencies should be defined by function rather than by medium. Where many publishers transmit the same story on different platforms it is logical that there be one regulatory regime covering them all.

10. The News Media Council should have secure funding from government and its decisions made binding, but beyond that government should have no role. The establishment of a council is not about increasing the power of government or about imposing some form of censorship. It is about making the news media more accountable to those covered in the news, and to the public generally.

11. A guiding principle behind the design of the News Media Council is that it will provide redress in ways that are consistent with the nature of journalism and its democratic role. Like the APC, its members should be comprised of community, industry and professional representatives. It should adopt complaint-handling procedures which are timely, efficient and inexpensive. In the first instance it should seek to resolve a complaint by conciliation and do so within two or three days. If a complaint must go to adjudication it should be resolved within weeks, not months.

12. An important change to the status quo is that, in appropriate cases, the News Media Council should have power to require a news media outlet to publish an apology, correction or retraction, or afford a person a right to reply. This is in line with the ideals contained in existing ethical codes but in practice often difficult to obtain.

13. If these recommendations are adopted, both the public and news media organisations should be confident that the News Media Council will carry out its functions independently and effectively. There will be a single, properly-funded regulator with the power to enforce news standards across all news media outlets.

14. Although I recommend that these steps be taken to make the news media properly accountable, there is another side to the media that ought to be acknowledged. Despite the volume of complaints and criticisms, what also became apparent to me during the course of the Inquiry is the news media's many achievements, and just how strongly many people, both inside and outside the media, care about the health of news and journalism. Australia's newspapers employ many dedicated professionals, performing their roles skilfully and diligently. The process of accountability proposed here recognises the realities and difficulties of journalism, emphasising immediate exchange and correction rather than financial or legal punitiveness. Equally it is consistent with the ideals guiding journalism by emphasising transparency and recognising the public interest in how a major institution of our democracy performs.

15. These proposals are made at a time when polls consistently reveal low levels of trust in the media, when there is declining newspaper circulation, and when there are frequent controversies about media performance. Many of the criticisms are self-interested or expedient; much of the public cynicism is misdirected. Yet a news media visibly living up to its own standards and enforcing its own high ideals is likely to increase rather than undermine public confidence and acceptance.

Changing business models and quality journalism

16. New technology, particularly the internet, has revolutionised access to the news. The result has been a reduction in the circulation of newspapers and a reduction in revenue from classified advertising. The advertising expenditure is now spread across platforms. Main news organisations are recovering only a small proportion of these revenues by moving to online publishing.

17. These changes have been greeted with dramatic rhetoric: Who killed the newspaper? asked The Economist magazine in 2006 . In the United States, the crisis has been felt by the news media much more acutely, and there has been considerable pessimism about the news media being able to continue their traditional democratic roles.

18. It is too early to reach such conclusions in Australia. We are in the midst of changes whose future direction can only dimly be discerned. Moreover there are many positive as well as negative changes with the increasing importance of the internet. Low barriers to entry will facilitate new ventures, and so may lead to more democratic diversity, given the concentrated ownership of Australian newspapers.

19. I have reached the conclusion that at this stage there is not a case for government support.

20. Nevertheless, the situation is changing rapidly, and requires careful and continuous monitoring. Therefore, I recommend that one function of a News Media Council should be to chart trends in the industry, and particularly to see whether there will be a serious decline in the production and delivery of quality journalism.

21. In addition, I recommend that within the next two years or so the Productivity Commission be issued with a reference to conduct an inquiry into the health of the news industry and make recommendations on whether there is a need for government support to sustain that role. It should also consider the policy principles by which any government support should be given to ensure effectiveness, as well as eliminating any chance of political patronage or censorship.

22. Apart from reviewing those issues on a national scale, one area that requires especially careful monitoring is the adequacy of news services in regional areas. There is some evidence that both regional radio and television stations and newspapers have cut back substantially on their news gathering, leaving some communities poorly served for local news. This may require particular support in the immediate future, and I recommend that this issue be investigated by the government as a matter of some urgency.

Appendix I: Independent Media Inquiry and Convergence Review approaches to news standards

On 14 September 2011, the Australian Government established the Independent Inquiry into the Media and Media Regulation (Independent Media Inquiry). The inquiry was led by a former justice of the Federal Court of Australia, the Hon Ray Finkelstein QC. The inquiry reported to government on 28 February 2012.[1]

The Independent Media Inquiry recommended that a new statutory body (referred to as the News Media Council) be established to set journalistic standards for the news media in consultation with the industry and to handle complaints made by the public when the standards are breached. It proposed that the News Media Council have regulatory jurisdiction over all platforms (print, online, radio and television). The council would be fully funded by the Australian Government, with statutory rules governing the appointment of members, and would have powers to require a media outlet to publish an apology, correction or retraction, or afford a person a right of reply.[2] The executive summary of the Independent Media Inquiry report is at Appendix H.

The Convergence Review was asked by the Minister for Broadband, Communications and the Digital Economy to consider the recommendations of the Independent Media Inquiry.[3] While agreeing with much of the analysis and some of the findings of the Independent Media Inquiry, the Convergence Review recommends an approach based on an industry-led body for news standards. This appendix outlines the approach recommended by the Convergence Review and highlights key areas where it differs from that recommended by the Independent Media Inquiry.

Convergence Review approach

The Convergence Review proposes that the industry establish an independent news standards body, operating across all media platforms.

The news standards body would administer a self-regulatory media code aimed at promoting standards, adjudicating complaints, and providing timely remedies. Having the news standard body operate across all media platforms is consistent with the Convergence Review's fundamental principle of platform neutrality.

News standards body

An effective news standards body would be expected to have the following features.

Membership

The news standards body would be open to membership by all professional providers of news and commentary regardless of the delivery platform (print, online, radio and television).

It would be established to administer a media code for news and commentary, including specific requirements for fairness and accuracy.

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1 The Hon R Finkelstein QC, *Report of the Independent Inquiry into the Media and Media Regulation*, February 2012, www.dbcde.gov.au/digital_economy/independent_media_inquiry.

2 Independent Media Inquiry report, paras 8–12, pp. 8–9.

3 Media release from Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 14 September 2011, 'Government announces Independent Media Inquiry'.

The ABC and SBS would not be expected to participate in the news standards body.

Funding

The news standards body would be adequately resourced and funded primarily by industry with some government contribution (for example, to cover shortfalls in funding or to provide project funding).

Governance

The majority of the directors of the body would be independent from the members.

Complaints and enforcement

The news standards body would have in place:

- efficient, effective and timely complaints procedures
- a flexible and effective range of remedies and sanctions, including the mandatory and prominent publication of its findings
- arrangements for transparent reporting of its complaint handling.

The news standards body would have discretion to determine the most effective mechanisms for dealing with complaints, including:

- whether complaints should in the first instance be lodged with the provider
- time limits for investigating complaints
- the extent to which complaints are responded to on an individual basis.

Content service enterprises

The Convergence Review proposes that content service enterprises should be the key focus for regulatory obligations (see Chapter 1 of this report). Consistent with this approach, legislation would require that all content service enterprises that provide news and commentary be members of a qualifying news standards body. There would be no capacity for these qualifying content service enterprises to opt out of the self-regulatory scheme.

News providers that are not of sufficient scale and scope to qualify as content service enterprises would be able to voluntarily become members of the news standards body and to participate in the scheme. The Review believes such membership would give greater authority to their news reporting.

Certain privileges that are currently available to professional providers of news and commentary (in particular exemptions from the *Competition and Consumer Act 2010* and the *Privacy Act 1988*) could be available only to members of the news standards body.

While not required to join the news standards body, the ABC and SBS would be required to take into account the standards and complaints procedures determined by the news standards body in developing their own codes and procedures.

The news standards body would be able to refer matters to the new communications regulator in cases where there have been significant or persistent breaches or a member has refused to comply. The regulator would also be able to request the news standards body to investigate an issue.

Implementation

There would be a phased and managed process for the establishment, operation and review of the news standards body.

Prior to the establishment of the news standards body, the Australian Press Council would continue in its current role and would expand its coverage to include online news providers. The current co-regulatory broadcasting codes registered by the Australian Communications and Media Authority (ACMA) in relation to news and commentary would also continue to apply during this interim period.

Once established, the news standards body would cover all platforms and would undertake the functions currently performed by the Australian Press Council and the ACMA.

The operation of current co-regulatory codes for news standards in broadcasting would remain until the news standards body can adequately address complaints across all platforms. At this time, these codes would be set aside. Arrangements would need to be in place for a managed handover to the news standards body, in order to avoid two bodies investigating complaints in parallel. After three years, the new communications regulator would conduct an inquiry into whether the new arrangements are effective. As an outcome of the inquiry, the regulator could find that:

- the news standards body is working effectively and no changes are required
- legislative requirements for content service enterprises' membership of the body should be adjusted
- the co-regulatory codes for broadcasting services should be reinstated
- the body should be dissolved on the grounds that it has been ineffective, and that there should be direct statutory measures.

Key differences from Independent Media Inquiry approach

The Convergence Review approach is consistent with the Independent Media Inquiry approach to the extent that it proposes that an all-media body be established to promote standards for news and commentary, adjudicate complaints, and provide timely remedies.

The Convergence Review differs from the Independent Media Inquiry approach in the key areas outlined below.

- The news standards body proposed by the Convergence Review would not be a statutory authority.[4] Instead, content service enterprises would be required to join an industry self-regulatory body. The Review considers that an industry-led approach could be implemented more effectively, with more immediate results, and with the potential for better long-term outcomes.
- In the Convergence Review approach, the news standards body would cover only content service enterprises as defined in this report, rather than the much lower threshold for news providers as recommended by the Independent Media Inquiry.[5] The Review has recommended that media enterprises should be subject to content standards where they have control of the professional content they provide, have a large number of Australian users of that content, and have a high level of revenue derived from supplying that content to Australians (see Chapter 1 of this report).
- In the Convergence Review approach, the news standards body would be majority funded by its members, rather than being fully funded by the government.[6] As it is in the public interest that the news standards body be adequately funded, there would be provision for the government to make a funding contribution.

4 Independent Media Inquiry report, para 9, p. 8.

5 The Independent Media Inquiry report proposes that regulated news media standards be applied to news media publishers that distribute more than 3000 copies of print per issue or a news internet site that has a minimum of 15 000 hits a year (para 11.67, p. 295).

6 Independent Media Inquiry report, para 10, p. 9.

This would provide flexibility in determining how and to what extent government support is required. For example, funding could be provided to meet a shortfall in operational funding or to contribute to an agreed project.

- For clarity, in the Convergence Review approach the ABC and SBS should be able to operate effectively under their own statutory charters and should not be subject to the rules of the news standards body.[7]
- In the Convergence Review approach, the news standards body would be expected to have an effective range of remedies and sanctions which would be contractual. In contrast, the Independent Media Inquiry proposed legislative complaints procedures and enforcement mechanisms.[8]
- In the Convergence Review approach, there would be no requirement to give up other legal remedies as a condition of having a complaint investigated.[9] The Convergence Review is concerned that a requirement of this kind would place unfair pressure on complainants who might not be in a position to make an informed decision on whether to take separate legal action at the time the complaint is made.
- The Convergence Review approach provides for direct statutory mechanisms to be considered only after the industry has been given the full opportunity to develop and enforce an effective, cross-platform self-regulatory scheme.

7 Footnote 18 on page 296 of the Independent Media Inquiry report states: 'In the case of the ABC and SBS, the News Media Council would have jurisdiction over them only for complaints about standards of reporting news and current affairs (which is currently overseen by ACMA)'.

8 Independent Media Inquiry report, para 11.70, p. 296.

9 Independent Media Inquiry report, para 11.70, p. 296.

Appendix J: ABC and SBS charters

ABC charter

(1) The functions of the Corporation are:

(a) to provide within Australia innovative and comprehensive broadcasting and television services of a high standard as part of the Australian broadcasting and television system consisting of national, commercial and public sectors and, without limiting the generality of the foregoing, to provide:

(i) broadcasting programs and television programs that contribute to a sense of national identity and inform and entertain, and reflect the cultural diversity of, the Australian community; and

(ii) broadcasting programs and television programs of an educational nature;

(b) to transmit to countries outside Australia broadcasting programs and television programs of news, current affairs, entertainment and cultural enrichment that will:

(i) encourage awareness of Australia and an international understanding of Australian attitudes on world affairs; and

(ii) enable Australian citizens living or travelling outside Australia to obtain information about Australian affairs and Australian attitudes on world affairs; and

(c) to encourage and promote the musical, dramatic and other performing arts in Australia.

(2) In the provision by the Corporation of its broadcasting and television services within Australia:

(a) the Corporation shall take account of:

(i) the broadcasting and television services provided by the commercial and public sectors of the Australian broadcasting and television system;

(ii) the standards from time to time approved by the ACMA in respect of broadcasting and television services;

(iii) the responsibility of the Corporation as the provider of an independent national broadcasting and television service to provide a balance between broadcasting programs and television programs of wide appeal and specialized broadcasting programs and television programs;

(iv) the multicultural character of the Australian community; and

(v) in connection with the provision of broadcasting programs and television programs of an educational nature-the responsibilities of the States in relation to education; and

(b) the Corporation shall take all such measures, being measures consistent with the obligations of the Corporation under paragraph (a), as, in the opinion of the Board, will be conducive to the full development by the Corporation of suitable broadcasting programs and television programs.[1]

1 *Australian Broadcasting Corporation Act 1983*, sections 6(1), 6(2).

SBS charter

(1) The principal function of the SBS is to provide multilingual and multicultural radio and television services that inform, educate and entertain all Australians, and, in doing so, reflect Australia's multicultural society.

(2) The SBS, in performing its principal function, must:

(a) contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities; and

(b) increase awareness of the contribution of a diversity of cultures to the continuing development of Australian society; and

(c) promote understanding and acceptance of the cultural, linguistic and ethnic diversity of the Australian people; and

(d) contribute to the retention and continuing development of language and other cultural skills; and

(e) as far as practicable, inform, educate and entertain Australians in their preferred languages; and

(f) make use of Australia's diverse creative resources; and

(g) contribute to the overall diversity of Australian television and radio services, particularly taking into account the contribution of the Australian Broadcasting Corporation and the community broadcasting sector; and

(h) contribute to extending the range of Australian television and radio services, and reflect the changing nature of Australian society, by presenting many points of view and using innovative forms of expression.[2]

2 *Special Broadcasting Service Act 1991*, sections 6(1), 6(2).

Appendix K: Redundant regulation

Measures to be abolished

In the body of this report, the Review has recommended that a number of regulations be removed in relation to broadcasting licences, media diversity and content standards.

The abolition of the requirement to hold a licence to provide a broadcasting service and the shift to a uniform system of planning and licensing of spectrum will remove a large amount of complex regulation currently found in the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992*.

These changes will also remove the link in the current regulatory regime that requires suppliers of content services using terrestrial broadcast spectrum to be both platform providers and channel providers. Existing holders of commercial broadcasting licences that use the broadcasting services bands will be able to continue with their current business structure, but will have the flexibility to adopt a different model if they choose (see Chapter 9).

While licensing of broadcasting services will disappear, eligibility criteria will still be required for allocation and ongoing use of spectrum to community broadcasting organisations to provide these services (see chapters 8 and 9).[1]

The changes to legislation will also reduce obligations currently contained in industry codes and standards and reporting obligations for industry.

Where there is a public policy reason to impose obligations on participants in the content and communications industries, this can be done in a manner similar to making service provider rules under the *Telecommunications Act 1997* (see Chapter 10). A legislative framework based around service provider rules will allow the flexibility to make arrangements for different kinds of content services if required in a particular case.

Table K.1 summarises the measures that the Review proposes be abolished.

1 Existing eligibility criteria for a broadcasting services bands community broadcasting licence are set out in section 84 of the *Broadcasting Services Act 1992*.

Table K.1: Measures to be abolished

Measure	Notes
Broadcasting and datacasting licensing **Separate planning and management of spectrum for broadcasting**	With increasing availability of broadband services, content services of these kinds can be provided by the internet throughout Australia and anywhere in the world. It is no longer efficient or appropriate for the regulator to plan for the categories of broadcasting service for different areas and issue licences to provide those services. Administrative and legal costs for government and business associated with planning and issuing licences and classifying categories of broadcasting services will disappear entirely. The Review's recommendations separate the right to use the finite resource of radiofrequency spectrum—for which a licence still will be needed—from the right to communicate—for which no licence will be needed. Separating the right to provide a content service from the right operate the platform on which those services are provided will offer choices to existing participants in the broadcasting industry. They can continue their current vertically integrated structures but they can move to different business models where opportunities arise.
1. Requirement to hold a licence to provide a broadcasting service	The current requirement only applies to services that are characterised as 'broadcasting' services (services of general appeal) as opposed to 'narrowcasting' services (services of limited appeal, targeted to special interest groups, etc.).
2. Requirement to hold a licence to provide a datacasting service (*Broadcasting Services Act 1992*, Schedule 6)	'Datacasting' is an artificial concept created by the *Broadcasting Services Act 1992*. It is subject to complex rules prohibiting the transmission of many program genres. There has been only very limited use of the opportunity to provide 'datacasting' services.
3. Prohibition on supplying broadcasting service outside specified licence area	Use of radiocommunications spectrum will continue to be regulated to avoid interference issues.
4. Licence area planning in broadcasting services bands	General spectrum planning rules will apply and be modified as needed to allow for additional public interest considerations in spectrum planning.
5. Rules for allocating additional broadcasting service licences in licence area	Use of spectrum will be governed by common spectrum planning considerations.
6. Different kinds of apparatus licences for specific categories of broadcasting service or datacasting service, which limit alternative or additional uses (*Radiocommunications Act 1992*, Part 3.3)	Piecemeal amendments to the Radiocommunications Act to deal with specific broadcasting issues have created a tangle of apparatus licence categories and conditions with no coherent rationale.
7. Broadcast licence fees (*Television Licence Fees Act 1964*, *Radio Licence Fees Act 1964*)	These fees will be replaced by charges for the use of spectrum, based on an objective measure of value rather than on the licence tax amount set by government.
Media diversity ownership rules for specific media platforms	These measures impose specific restrictions on particular kinds of media platforms. In the current environment where many services are provided online, there is no continuing reason for such platform-specific rules. A minimum 'number of owners rule' will apply for local and regional markets and changes in ownership of content service enterprises of national significance will require regulatory approval on public interest grounds.

Measure	Notes
1. Prohibition on control of commercial television licences whose combined licence area populations exceed 75 per cent of the population of Australia (75 per cent reach rule)	In practice, this prohibition does little to ensure diversity of content because most programs originate with metropolitan broadcasters and are networked through regional affiliates that share some channel branding. Competition issues raised by any takeover can be addressed under the *Competition and Consumer Act 2010*.
2. Prohibition on control of more than two commercial radio broadcasting licences in the same licence area (two-to-a-market rule)	An increase beyond two radio services in an area can be expected to raise competition issues that would need to be addressed under the *Competition and Consumer Act 2010*. No specific rule dealing with a particular platform is needed.
3. Prohibition on control of more than one commercial television licence in the same licence area (one-to-one rule)	Acquisition of a controlling interest in an additional commercial television service in an area can be expected to raise competition issues that would need to be addressed under the *Competition and Consumer Act 2010*. No specific rule dealing with a particular platform is needed.
4. Prohibition on control of any more than two out of a commercial radio broadcasting licence and a commercial television broadcasting licence or newspaper associated with the commercial radio broadcasting licence area (2 out of 3 rule)	This rule prevents a person from controlling in a local area more than two out of the three traditional media (television, radio and the local newspaper). It serves no obvious purpose in the current environment where all three entities are likely to have a significant online service.
Local content rules	The Review found that it was a reasonable expectation that commercial free-to-air broadcasters using spectrum should continue to devote a minimum amount of programming to material of local significance. However a more flexible reporting regime should be implemented.
1. Special local content requirements and local presence requirements that apply upon occurrence of a transfer or change in control of a commercial radio broadcasting licence (sometimes known as the 'trigger event rule') (*Broadcasting Services Act 1992*, Part 5 Division 5C and section 43B)	There is no public policy rationale for imposing significant local content requirements only when there is a change in control. Where local content obligations are to be imposed, they should be justified by a demonstrated need, rather than imposed on occurrence of a change in control.
2. Comprehensive reporting to regulator of all output by broadcasters	This measure will be replaced by a compliance model focused on spot audits of current output.
Community standards	The Review recommends a flexible and technology-neutral approach to content regulation that reflects and applies community standards. The Review accepts the recommendations of the Australian Law Reform Commission's report *Classification—Content Regulation and Convergent Media* that a National Classification Scheme apply to media content on all platforms.
1. Eliminate costly 'double handling' or 'double classification' of similar content on different media platforms	The need to classify would be based on the nature of the content itself—including its likely audience reach—rather than being based primarily on the platform from which it is delivered and accessed. All media content that is required to be classified would be classified according to a single set of classification categories and criteria.
2. Requirement that the regulator investigate every complaint relating to online content	The current lack of discretion means that this activity is resource-intensive and inefficient. The regulator should have discretion to focus on the most serious, harmful and systemic issues.

Existing legislation

Currently, the three Commonwealth Acts that provide the framework for communications regulation in Australia reflect historic industry 'silos'.

The *Radiocommunications Act 1992* deals with the management of the radiofrequency spectrum. It focuses on the management and allocation of radio frequency spectrum using technology- and service-specific licensing arrangements. By its very nature it is platform-specific. The Act contains a number of licensing measures specific to terrestrial free-to-air broadcasting.

The *Broadcasting Services Act 1992* (BSA) regulates broadcasting services and some online services. The BSA represents an early attempt to deal with content services delivered on any platform. However, in practice most of its regulatory focus is on the delivery of services through traditional broadcasting.

The *Telecommunications Act 1997* provides a technology-neutral framework for regulation based on broad layers and a broad conceptual framework that covers all forms of electronic communication, with the capacity to separately regulate carriers (network and infrastructure providers), carriage service providers and content service providers. It includes a mechanism for regulating communications content services providers. However, it is primarily focused on carriers and carriage service providers operating in the traditional telecommunications industry. The Act's potential to serve as a vehicle for regulating content has been exploited to only a limited extent.[2] Various new applications and services have emerged online that are not always easy to classify within the Act's defined layers of 'carriage service provider' and 'content service provider'.[3]

Current focus of BSA on broadcast platform

The conceptual framework for the BSA as initially enacted envisaged regulation to be applied to linear content services delivered on any platform. The general definition of 'broadcasting service' in the BSA covers any linear service that delivers 'television' or 'radio' programs by means of any platform or combination of platforms.[4] The definition excludes 'on-demand' services and services that provide no more than data or text. It also excludes 'a service or a class of services' that the minister by instrument determines is not to fall within the definition. In 2000, such an instrument removed from the scope of 'broadcasting services' regulated under the BSA 'a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands'.[5]

That determination remains in force today.

The regulatory focus of the BSA is therefore on the delivery of services using the traditional broadcast platform, with separate regulation of subscription television and online services. Additional regulation applies to broadcasting services that use the broadcasting services bands compared to broadcasting services delivered only by frequencies outside the broadcasting services bands or by cable transmission.

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2 See Convergence Review, *Discussion Paper: Layering, Licensing and Regulation*, 2011, p. 9.

3 See ACMA, *Broken Concepts: The Australian Communications Legislative Landscape*, August 2011, p. 54, http://engage.acma.gov.au/broken-concepts.

4 The BSA at section 6(1) defines 'broadcasting service' as follows:

> broadcasting service means a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:
>
> (a) a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images); or
>
> (b) a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
>
> (c) a service, or a class of services, that the Minister determines, by notice in the *Gazette*, not to fall within this definition.

Note that as the definition of 'program' (BSA section 6(1)) only applies to a service that delivers 'television' or 'radio' programs, its potential application to audiovisual content more generally is open to question (see ACMA, *Broken concepts*, p. 44).

5 Determination under paragraph (c) of the definition of 'broadcasting service' (No. 1 of 2000) 12 September 2000.

Licensing of content services under the BSA

Licensing is a key device for applying regulatory obligations in the current environment: controlling market entry, administering ownership and control rules, and regulation of programming content.

The current BSA regulatory scheme licenses commercial broadcasting services and includes separate licensing, ownership and content rules for subscription television broadcasting services, a separate licensing scheme for community (not-for-profit) broadcasters and some regulation of niche (narrowcasting) services. Public broadcasting (ABC and SBS) services are governed by their own legislation.[6]

Licensing under the BSA involves considerable administrative complexity, including often-contentious questions as to whether a particular kind of broadcasting service falls within a category that requires a licence. The licensing scheme in the BSA is made more complex by a legislative structure that requires a licence for particular categories of service ('broadcasting' as opposed to 'narrowcasting' services) and provides legislative definitions that blur the boundaries between these service categories. Some categories require a licence to provide a broadcasting service, while the remainder do not (see Table K.2).

Table K.2: Licence requirement by category of service

Category of service	Licence required?
National broadcasting service (ABC and SBS)	No
Commercial broadcasting service	Yes
Community broadcasting service	Yes
Subscription broadcasting service	Yes
Subscription narrowcasting service	No
Open narrowcasting service	No

Source: *Broadcasting Services Act 1992*, Part 2. This list does not include the category of international broadcasting services (BSA, section 18A), which also belong to another category of broadcasting service (BSA, section 11A).

The fundamental legislative distinction between a 'broadcasting' service and a 'narrowcasting' service is whether the programs provided by the service 'appear to be intended to appeal to the general public'[7] (broadcasting) as opposed to whether the service is 'targeted to special interest groups' or 'of limited appeal' (narrowcasting).[8] This creates a test that is not simple to apply. Judgments by the regulator about the breadth of appeal of a service need to be made before the service has even begun operating—because a licence may be required before a service can commence.[9]

The holder of a commercial broadcasting service licence or a community broadcasting service licence that uses the broadcasting services bands spectrum (a 'broadcasting services bands licence'[10]) has a right to be issued with a licence that gives access to terrestrial broadcasting spectrum.

A licence to provide a commercial broadcasting service or a community broadcasting service authorises that service only for a specified licence area.[11] The licensed service is not to be provided outside the licence area, subject to limited exceptions, essentially where the overspill is inadvertent or unavoidable or authorised

6 *Australian Broadcasting Corporation Act 1983*, *Special Broadcasting Service Act 1991*.
7 BSA, sections 14(1)(a), 16(a).
8 BSA, sections 17(a)(i) and (iv), 18(1)(a)(i) and (iv).
9 The ACMA is able to give binding opinions on which category a service falls into (BSA, section 21).
10 BSA, section 6(1).
11 BSA, sections 29(1), 40(2), 80(2).

by the Australian Communications and Media Authority.[12] The prohibitions on supplying services outside the licence area apply irrespective of whether the licence uses broadcasting services bands spectrum or is delivered in other ways.

Spectrum management

Use of the radiofrequency spectrum in Australia is primarily regulated under the Radiocommunications Act. In general, the Act provides that the operation of a radio communications device must be authorised by a licence. There are three licensing systems:

- spectrum licensing, which provides for exclusive use of a specified frequency band in a defined geographic area for a period of time
- apparatus licensing, which provides for the use of individual devices, such as transmitters, usually on a site-specific basis for a period of time
- 'class licensing', which provides broad access arrangements for spectrum for devices such as cordless microphones. As users of these devices are not required to obtain an individual 'licence', the 'class licence' is not a 'licence' in the sense in which the term is generally used in this report.

The Radiocommunications Act gives the Australian Communications and Media Authority (ACMA) powers to plan overall use of spectrum, by determining spectrum plans and frequency band plans, and to license particular users. The minister is also given various powers under the Act. Among the most important are the powers to designate where spectrum licences can be allocated and to designate the broadcasting services bands (BSBs).

The minister also has a range of powers under the BSA, including reserving capacity within the BSBs for public and community broadcasting services.[13]

The BSBs are parts of spectrum designated by the minister for broadcasting purposes. BSBs provide the mechanism for a planning and licence allocation scheme for spectrum traditionally best able to deliver electronic media.

Designating parts of the spectrum as BSBs has several effects:

- The BSBs must be planned by the ACMA according to the priorities and process set out in the BSA.[14] These require the ACMA to have regard to a number of factors not included in the spectrum objects of the Radiocommunications Act,[15] such as demographics and the social and economic characteristics of licence areas.
- A specific authorisation process must be followed before BSB spectrum can be allocated for use for purposes other than commercial, public or community broadcasting services.[16]
- There are currently special constraints on allocating new licences for certain kinds of services that use BSB spectrum. The ACMA cannot allocate a new commercial television broadcasting licence in an area where there are already three commercial television broadcasting licences unless directed to do so by the minister, after a review has been conducted.[17] Generally, the ACMA cannot allocate new digital commercial radio licences within six years of the commencement of digital radio services in an area.[18] The allocation of new analog commercial radio broadcasting services that use BSB spectrum is limited by the availability of suitable spectrum in a particular area.

12 BSA, Schedule 2, clauses 7(2A), 8(3), 9(2A).

13 The minister also has powers to direct the ACMA in formulating or varying the commercial and national television digital conversions schemes (BSA, Schedule 4, clauses 15, 29). The minister may also give the ACMA directions of a general nature in relation to the planning and use of the BSBs (*Australian Communications and Media Authority Act 2005*, section 14).

14 BSA, Part 3.

15 *Radiocommunications Act 1992*, section 3.

16 BSA, section 34.

17 BSA, sections 35A,35B.

18 BSA, section 35C.

Another important feature of the BSBs is the relationship between content service licenses and transmitter ('apparatus') licences. Broadcasters other than public broadcasters are required to hold both types of licence, but broadcasting licences are issued under the BSA and transmitter licences are issued under the Radiocommunications Act.[19] Where the BSBs are used as a means of delivery, commercial licensees and most community broadcasting licensees are automatically entitled to transmitter licences authorising them to operate in the BSBs.[20] Other broadcasters, including those broadcasters that use radiofrequency spectrum that is not within the BSBs, are not automatically entitled to transmitter licences.

Table K.3 at the end of this appendix provides a comparison of the significant differences in broadcasting and radio communications licensing. It illustrates the different treatment of spectrum under these separate but interrelated legislative regimes. The existence of these two different regimes creates considerable complexity.

Ownership and control rules

Media ownership and control rules have been an issue for successive governments in Australia, mainly because of the implications of media concentration on access to diverse opinion, information, news and commentary. The ownership and control rules are set out in the BSA, and are administered by the ACMA.

Media ownership rules apply to commercial television, radio and newspapers, which have traditionally been considered the most influential services. The BSA sets out restrictions on cross-media mergers that seek to prevent over-concentration and protect media diversity in Australia.

A key aim of the cross-media ownership rules is to limit the extent of influence and media concentration, and to ensure 'diversity of voices' in the media market. The rules try to ensure that consumers have access to a minimum number of different 'voices' in defined areas by ensuring a range of owners of various platforms.

The media ownership and control rules were most recently amended in 2006. Part 5 of the BSA provides for the control of commercial broadcasting licences, including by reference to control of commercial radio licences and newspapers. Schedule 1 to the BSA contains an extensive definition of 'control' in applying these media diversity rules. (See Table 2.1 in Chapter 2 for a summary of the media ownership and control rules in Australia as they currently stand for commercial television, radio and newspapers.)

What is wrong with the existing rules?

The current system outlined above, which treats content services differently depending on the platform used, does not provide a sustainable basis for promoting diversity in Australian media.

The current broadcast planning system provides for allocation of spectrum by issuing licences for a specified category of broadcasting service in a particular geographic area. A range of government policies, such as the media control and diversity rules described above, are linked to broadcast licence areas. This framework is already under pressure from satellite broadcasting, and is coming under more pressure from services available through internet delivery.

In 2011 the ACMA issued a paper examining how 'the process of convergence has broken, or significantly strained, the legislative concepts that form the building blocks of current communications and media regulatory arrangements'.[21]

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19 National broadcasters require transmitter licences but not content service licences because their services are authorised under their own legislation: the *Australian Broadcasting Corporation Act 1983 and the Special Broadcasting Services Act 1991*.

20 *Radiocommunications Act 1992*, section 102.

21 ACMA, *Broken Concepts*, p. 5.

The ACMA identified as 'broken concepts' all of the rules or definitions that form the basis of the existing system of broadcasting licensing:

- broadcasting services bands licensing
- licence area plans
- broadcasting service
- program
- commercial broadcasting service
- subscription broadcasting service
- community broadcasting service
- narrowcasting service
- datacasting service.[22]

The difficulties in administering the system based on categories of broadcasting service have been noted above.

The remainder of this appendix focuses on three key elements of the current BSA licensing scheme that in the converged environment can no longer operate as originally intended and do not appear to serve any ongoing public purpose.

These three elements are:

- the 'broadcasting service' that is licensed
- the geographic limitations on licensed broadcasting services (licence areas)
- the bundling of rights to spectrum with the right to provide a broadcasting service.

The concept of a 'broadcasting service'

The first issue to note here is that amendments to the BSA to deal with digital broadcasting have created inconsistencies in the Act's treatment of the concept of a 'broadcasting service':

- A 'service' in the BSA as enacted usually referred to the output of a single broadcast 'channel'.[23] The licence issued therefore only authorised the broadcast of a single stream of programming.
- Subsequent changes to the BSA arising out of the introduction of digital television now authorise a holder of a commercial television broadcasting licence to broadcast multiple streams of programming known as 'multichannels'.
  - The BSA's current rules restricting each commercial broadcasting licensee to three multichannels cease as digital switchover is completed in each area in Australia.[24]
  - Accordingly, in the case of commercial television broadcasting, a licensed service now includes multiple discrete streams of programming. With current technology, this would enable each licensed broadcaster to provide five channels using existing spectrum. With a technology upgrade to the MPEG-4 standard, each licensee could provide up to 10 channels using its existing spectrum.[25]

22 ACMA, *Broken Concepts*, pp. 23, 26, 44–46, 48–51.

23 The Federal Court confirmed that a 'service' generally could be equated with a single stream of programming in *Amalgamated Television Services v Foxtel Digital Cable Television* (1995) 60 FCR 483 at 488–489; *Amalgamated Television Services v Foxtel Digital Cable Television* (1996) 66 FCR 75 at 77–79. An exception to the 'one channel per licence' rule existed for the three satellite subscription television licences initially provided for in the BSA. Two of the licences permitted four 'services', while the third licence permitted two 'services' (BSA, section 93 (repealed 2005)).

24 BSA, sections 41B, 41C. The new commercial television broadcasting licences allocated under BSA section 38C that use a satellite to provide services where terrestrial broadcasting is unavailable are also able to offer multiple channels under a single licence. Subscription broadcasting licensees hold a separate licence for each broadcast channel.

25 See Convergence Review, *Discussion Paper: Spectrum Allocation and Management*, September 2011, pp. 13–15.

The second issue to note here is that there are unresolved questions as to how the BSA concept of a broadcasting service may apply to television-like online content. Two examples illustrate the problems that can arise.

- There is scope for dispute as to the breadth of the current ministerial determination that excludes services made available 'using the Internet'. In particular it has been questioned whether or not the exclusion applies to a service supplied using internet protocols but not freely available to any person browsing the internet (for example, a subscription IPTV service).[26]
- Further, even if the ministerial determination excluding 'Internet' services did not exist, there would be difficulties in extending the current definition to online services. The definition of broadcasting service excludes a 'service' that makes programs available on demand. However, a single website might offer both live and on-demand programs. Should that website be regarded as a single 'service' (and therefore excluded) or as two separate services?

Restrictions on providing a broadcasting service outside a licence area

The focus of much of the current legislation is on specifying the circumstances in which a person is authorised to provide a content service in a particular part of Australia.[27] In particular, the BSA requires the ACMA to prepare licence area plans that determine the number and characteristics of services that are to be broadcast in specific areas of Australia.[28]

The reality is that most television content is provided by the major networks. Online catch-up television services are provided Australia-wide by metropolitan broadcasters. Viewers in regional areas may identify the local brand that is attached to the network, without any notion of the local licence area (particularly in the case of the aggregated television licence areas). It may come as a surprise to most viewers that there are complex rules as to who is and who is not allowed to provide a service in that area when so much of the content is common across the country.

Moreover, the delivery of similar content on the internet makes the utility of issuing broadcasting licences based on geographic areas increasingly difficult to defend.

Commercial broadcasting and community broadcasting licensees are prohibited from providing their services outside the licence area, irrespective of whether the overspill occurs because of transmission using the broadcasting services bands.

However, the ministerial determination, which excludes a service that delivers programs over the internet from the definition of a broadcasting service, enables an internet-only broadcaster to stream radio programs without regard to the licensing regime of the BSA.

A licensed broadcaster may be in a different position. In its recent decision in *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Limited*, the Federal Court accepted the argument put by Commercial Radio Australia that a licensed broadcasting service can include the same stream of programming provided over multiple platforms. In particular, the court held that a service that is simultaneously transmitted by broadcasting over the broadcasting service bands and over the internet is one and the same broadcasting service within the meaning of the BSA. The 2000 ministerial determination would not apply to exempt the service as it remains a 'service that delivers … programs using the broadcasting services bands'.[29]

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26 See Senate Environment, Communications, Information Technology and the Arts Committee, *Hansard*, 23 May 2006, pp. 27–35.

27 BSA, Parts 2, 3, 4, 5, 6, 6A, 8A, 9C, Schedule 4; *Radiocommunications Act 1992*, Part 3.3.

28 BSA, Part 3.

29 [2012] FCA 93 (15 February 2012), www.austlii.edu.au/au/cases/cth/FCA/2012/93.html.

Bundling of spectrum with a content licence

The current framework combines measures relating to spectrum management (where a scarce resource must be managed) with measures aimed at limiting the number of content services of a particular kind that can be provided in a particular area.

In analog broadcasting, a particular broadcast frequency is used to supply a single stream of programs. However, digital broadcasting enables many 'channels' of programs to be supplied over the same broadcast frequency. The providers of digital channels will increasingly be able to deliver their channels on other platforms.

Conclusions

The Review believes that the difficulties in current regulation, some of which are outlined above, clearly demonstrates that a new approach to regulation of the kind recommended in this report is required. This approach provides the opportunity to remove much redundant regulation.

Table K.3: Current relationship between licences under the Broadcasting Services Act and rights to use spectrum

	RADIO COMMUNICATIONS LICENCES			BROADCAST LICENCES					
	Class	**Apparatus**	**Spectrum**	**Commercial**	**Community**	**International broadcasting**	**Subscription**	**Narrowcasting**	**Datacasting**
Access to spectrum?	Yes	Yes	Yes	Yes if BSB licences, no if not	Yes if BSB licences, no if not	No	No	No	No
Technology neutral?	Yes	Yes	Yes	No	No	No	Yes	Yes	No: all other means other than satellite
It authorises …	General access to spectrum on a shared basis	Exclusive access for a particular frequency at a particular location	Operation of devices within a space defined by bandwidth, geographic area and time	Operation of three services during the simulcast period in a licence area on 7 MHz in the BSBs After the end of the simulcast period, the licence authorises the provision of one or more digital multichannels in SD or HD modes Commercial licences that are not BSB licences only authorise a single broadcasting service	Operation of a community broadcasting service in the relevant licence area (radio rules are slightly different) on a 7 MHz block of spectrum in the BSBs Community broadcasters are not authorised to use BSB spectrum for multichannelling	Operation of an international broadcasting service to audiences outside Australia where the delivery involves a radio communications transmitter in Australia	One service (single, discrete programming stream) that is made available only upon payment of a subscription fee	Any operator to enter the market and provide a narrowcasting service, as long as they have access to service delivery capacity and abide by the conditions of category of class licence	Transmission of content in the form of text, data, speech, music or other sounds or visual images (animated or otherwise), or in any combination of forms to persons having equipment to receive that service.
Duration	No term. May be revoked by the ACMA	Up to five years	15 years	Five years (except for a commercial TV licence allocated under section 38C of the BSA, which has a term of 10 years)	Five years (except for temporary community broadcasting licences, which have a term of up to 12 months) The related transmitter licence for community TV broadcasting licences that use the BSBs are set to expire on 31 December 2013	No term—lapses if a service is not provided within two years An apparatus licence is needed to operate a service	No term—need access to technology to provide a service, so duration of the services is affected by availability of or access to a delivery platform	No term—need access to technology to provide a service, so duration of the services is affected by availability of or access to a delivery platform	Transmitter licences authorising the operation of datacasting services are issued for ten years, with the option of a once only renewal for five years. Licensees must commence transmission of a datacasting service within 1 year

	RADIO COMMUNICATIONS LICENCES			BROADCAST LICENCES					
	Class	**Apparatus**	**Spectrum**	**Commercial**	**Community**	**International broadcasting**	**Subscription**	**Narrowcasting**	**Datacasting**
Allocation method	Not applicable	Over the counter but may be auctioned if there is competing demand	Price-based system, which may include auction, tender, negotiated price	ACMA to determine a price-based system (s36 BSA), which will usually be conducted publicly. The related transmitter licence is not allocated on a price basis Section 40 licences are allocated over the counter for a price	ACMA will call for applications and have regard to public interest criteria. Temporary community broadcaster licences, and non-BSBs licences are allocated over the counter, upon application. The ACMA has the discretion to not issue such a licence	By application to the ACMA. If the ACMA decides that the applicant is suitable the application is referred to the minister, who directs ACMA to either reject the application or indicates that the minister has no objection to the application.	Over the counter	Not applicable	In practice can only be allocated to an existing broadcaster
Cost	No cost	Administratively determined pricing	Price-based at allocation	Price-based at allocation and then licence fee for commercial broadcasting licence based on revenue	No cost to licensees	Application fee $3198	Application fee ($1020)	No cost	$385
Transferrable	Not applicable	Upon application to the ACMA.	Yes	Yes, a commercial broadcasting licence can be transferred A BSB transmitter licence that is stapled to the BSB commercial broadcasting licence can only be transferred with the related broadcasting licence	Subject to the ACMA's approval, but an associated BSB transmitter licence can only be transferred together with the related broadcasting licence	Yes	Yes	Not applicable	BSA datacasting licences may only be transferred to another qualified entity Datacasting transmitter licences cannot be transferred if the ACMA is satisfied that the transferee will breach the BSA control rules

	RADIO COMMUNICATIONS LICENCES			BROADCAST LICENCES					
	Class	**Apparatus**	**Spectrum**	**Commercial**	**Community**	**International broadcasting**	**Subscription**	**Narrowcasting**	**Datacasting**
Any constraints on allocation/ reissue (ministerial powers etc.)	No	The minister has wide-ranging powers to direct the ACMA about its management of these licences	Generally applicable ministerial power of direction plus specific ministerial powers to direct the ACMA to impose competition limits; ministerial discretion to re-issue in the public interest	Minister can block allocation if determines against the public interest Subject to control rules Moratorium on additional BSB-reliant commercial TV licences Qualified moratorium on additional digital commercial radio licences BSB transmitter licence held by the BSB commercial TV broadcasting licensee cannot be used to transmit (in digital mode) commercial radio, subscription radio, subscription television or narrowcasting services	The minister may give directions to the ACMA to give priority to a particular community interest/s	Broadcasting licensee must be an Australian-registered company unless a nominated broadcaster declaration is in force. If a declaration is in force, the related transmitter licence must be held by an Australian-registered company The Foreign Minister can direct the ACMA to not issue an international broadcasting licence to the applicant and notify the ACMA to cancel the licence (linked to national interest test)	Needs prior approval from ACCC Use of BSBs as a delivery means is subject to availability of spectrum	Use of BSBs as a delivery means is subject to availability of spectrum Subject to control rules	Licensee must be a qualified entity, and is subject to control rules
How renewed/ re-issued?	Not applicable	Presumption of renewal	May be reissued in limited circumstances	Presumption in favour of renewal	Applicant must reapply prior to expiry		Not applicable	Not applicable	

	RADIO COMMUNICATIONS LICENCES			BROADCAST LICENCES					
	Class	**Apparatus**	**Spectrum**	**Commercial**	**Community**	**International broadcasting**	**Subscription**	**Narrowcasting**	**Datacasting**
Geographic constraints?	Not applicable	Yes	Yes, confined to licence area	Yes, confined to licence area	Yes, confined to licence area	Not applicable. Licensee indicates area it intends to broadcast in	No. Coverage area is a business decision, including availability of particular delivery means	No, only geographic limits are those that result from technical conditions relating to the delivery means	

Source: Convergence Review, *Discussion Paper: Spectrum Allocation and Management*, September 2011, Appendix B.

Abbreviations and acronyms

ABC	Australian Broadcasting Corporation
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
AFL	Australian Football League
ALRC	Australian Law Reform Commission
AMCOS	Australasian Mechanical Copyright Owners Society
APRA	Australasian Performing Right Association
ASIC	Australian Securities and Investments Commission
ASTRA	Australian Subscription Television and Radio Association
BSA	*Broadcasting Services Act 1992*
BSB	broadcasting services bands
CCA	*Competition and Consumer Act 2010*
CRTC	Canadian Radio-television Telecommunications Commission
DAB	Digital Audio Broadcasting
FCC	Federal Communications Commission (US)
GHz	gigahertz
IPTV	internet protocol television
MHz	megahertz
NBN	National Broadband Network
NITV	National Indigenous Television
NRL	National Rugby League
Ofcom	Office of Communications (UK)
PC	personal computer
QAPE	qualifying Australian production expenditure
RAS	restricted access scheme
SBS	Special Broadcasting Service
UHF	ultra high frequency
VHF	very high frequency

Glossary

Note: Terms in the definitions that are presented in italic are also defined in the glossary.

adult content	Content that is intended for an adult-only audience.
anti-siphoning scheme	A scheme that operates under the *Broadcasting Services Act 1992* under which the minister may specify events that should be able to be televised free to air to the Australian public. There are restrictions imposed on subscription television broadcasters acquiring broadcast rights for these specified events.
Australian Content Standard	The Broadcasting Services (Australian Content) Standard 2005, which is a standard determined by the Australian Communications and Media Authority that sets out requirements for commercial television broadcasting licensees to broadcast minimum levels of Australian programs and specific types of Australian content such as drama, documentary and children's content.
broadcasting services bands	That part of the radiofrequency spectrum that has been set aside by determination made by the minister under section 31 of the *Radiocommunications Act 1992* to be used primarily for broadcasting purposes.
bundled services	A set of services that are offered exclusively or at a discount when they are sold as a package. Examples include internet and phone services sold as a discounted bundle, or a set of television channels that are only offered as a bundle.
charter (for ABC and SBS)	Sections of the *Australian Broadcasting Corporation Act 1983* and the *Special Broadcasting Services Act 1991* that establish the functions and duties that the Parliament has given to the ABC and SBS.
content service enterprises	A proposed category of significant media enterprises that meet a specified revenue and user (audience) threshold for professional content delivered to Australians. Content services enterprises would be potentially subject to media ownership, content standards and Australian content requirements.
content service enterprises of national significance	Content service enterprises that are subject to the proposed *public interest test*.
converged content production fund	A proposed new fund to support the development of traditional and innovative content for distribution across a range of *platforms*.
convergence	The coming together of the major communications *platforms* (broadcasting, telecommunications and online) so that their once separate functions now overlap. Video content, for example, that used to be available only on television can now be viewed easily over the internet.
digital dividend	The radiofrequency spectrum in the *broadcasting services bands*, currently used for television, that will be freed up by the switchover from analog to digital-only television.
digital economy	The global network of economic and social activities that are enabled by information and communications technologies, such as the internet and mobile networks.

digital switchover	The national transition from analog broadcasting of television signals to digital. The digital switchover program will conclude by the end of 2013.
Family Friendly Filter	A program operated by the Internet Industry Association, in conjunction with the Australian Communications and Media Authority, aimed at ensuring that accredited filters comply with Australian standards.
free-to-air television	Television broadcasts that are free to view.
internet content host	Defined for the purposes of Schedule 7 of the *Broadcasting Services Act 1992* as a service provider that hosts internet content in Australia.
internet protocol television (IPTV)	A system through which television services are delivered using internet protocol, over either public or private networks instead of being delivered through traditional *terrestrial*, satellite signal or cable television formats.
linear content	Content that is delivered according to a schedule, and which cannot be directly controlled by the consumer. An example is *free-to-air television*.
local content	News and information that is of direct relevance to a local community.
material of local significance	Radio: Material that is hosted in, is produced in or relates to a regional commercial radio licensee's licence area, including advertisements (capped at 25 per cent). Television: Material that relates directly to the local area or the relevant licence area. The test of whether material is of local significance combines the subject and the way in which the subject is presented, and generally includes material about people or organisations associated with the area and events that impact on, or issues that arise in, the area. Advertising and sponsorship material other than community service announcements is specifically excluded.
multiplex	A method for combining discrete digital television or radio signals into one signal for broadcast.
multichannels	The additional digital channels of the *free-to-air television* networks (for example, GO!, 7Two and Eleven).
network neutrality	The principle that networks should not discriminate against or prioritise specific services, applications or content delivered over the internet.
non-linear content	Content that is provided at the direction of the viewer, such as video-on-demand.
narrowcasting	A category of broadcasting service specified in section 18 of the *Broadcasting Services Act 1992*. Generally, it is a broadcasting service whose reception is limited for some reason (such as being targeted to special interest groups or being intended only for limited locations), or which is provided during a limited period, or which provides programs of limited appeal.
platform	The means by which content is delivered—for example, the technical means of transmission such as terrestrial *broadcasting*, satellite signal, wireless broadband or fixed broadband. It can also be used in a wider sense to refer to an application or online service supplied by an enterprise through which content may be delivered– for example a social media website.
primary channel	A broadcaster's original analog channel, as distinct from its digital *multichannels*.

producer offset	A refundable tax offset (rebate) for producers of Australian feature films, television and other products.
public broadcasters	The Australian Broadcasting Corporation (ABC) and the Special Broadcasting Service (SBS). Also commonly referred to as national broadcasters.
public interest test	A regulatory measure governing changes in ownership of *content services enterprises* of national significance that allows the regulator to consider a wide range of factors relating to the public interest in determining whether a transaction can proceed.
quota	The minimum level set by the government relating to the broadcast of content.
sectoral regulator	Regulator for a specific sector of the economy.
sixth channel	Broadcasting spectrum that has been planned to allow for what was historically referred to as a television 'sixth channel'—now a *multiplex* capable of supporting a number of channels—to be allocated at some stage in the future in addition to the three commercial networks, the ABC and the SBS.
spectrum	The radiofrequency spectrum used to transmit wireless signals for internet, mobile telephony, television, radio and other communications devices. The *broadcasting services bands* are a subsection of the full radiofrequency spectrum.
sub-quota	The minimum amount of Australian drama, documentary and children's programs that must be broadcast by commercial free-to-air broadcasters.
technology-neutral	A concept or rule that does not discriminate on the basis of the technology used to deliver content.
terrestrial broadcasting	Transmission of television and radio signals through fixed transmitters using radiofrequency spectrum, as distinct from cable or satellite broadcasting.
trigger event	A change of control of a regional commercial radio broadcasting licence, which triggers special obligations regarding local presence and local content (see *Broadcasting Services Act 1992*, Part 5, Division 5C, and sections 43B and 43C).
uniform content scheme	A proposal to ensure that qualifying *content service enterprises* contribute in a consistent way to the production and distribution of Australian content regardless of their platform or content delivery model.
unmetered content	Internet content not included in a download cap by an internet service provider.
user-generated content	Content produced by a member of the public and posted on an online platform. In this report, user-generated content generally refers to content posted on the *platform* without prior vetting of the content by the platform provider.

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