Submission to the Convergence Review Committee: Key policy and regulatory issues for the Review

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Contents

EXECUTIVE SUMMARY

- The convergence of media and communications technologies, markets and industries offers opportunities for regulatory reform to encourage competition and innovation that would deliver a more diverse range of content and services to consumers.

- ASTRA supports a starting principle of regulatory consistency across services and platforms, where economic and/or competitive protections afforded to particular sections of the industry should be removed unless a clear public policy objective in maintaining these protections can be identified.

- Where regulation is inherently anti-competitive, ASTRA believes the Convergence Review Committee must consider the effectiveness of that regulation to achieve the intended public policy outcome.

- However, recognises there is likely to be a continuing compelling public interest rationale for some level of differentiated regulatory benefits and burdens on different parts of the media and communications sector, particularly where such settings enhance competition across the media and communications environment as a whole.

- For example, free-to-air broadcasters occupy a distinct or "special" place in the Australian media sector with guaranteed access to public spectrum and universal penetration into Australian homes ensuring a continuing significant degree of influence. If access to public spectrum gifted to these broadcasters continues and is justified on the basis of public policy objectives (such as provision of Australian content) then corresponding obligations to deliver those public policy objectives must be maintained.

- ASTRA supports reliance on self-regulatory and co-regulatory measures to deliver public policy objectives for the media and communications sector, and submits that the Review should be guided by the general principle that regulatory intervention should not be the default option to achieve public policy objectives.

- Only where the public interest clearly cannot be achieved through the market or self-regulation should regulatory measures be contemplated, and only then when the effectiveness of regulation in achieving the public interest objective clearly outweighs the detrimental impact to competition and innovation in the wider media and communications sector.

- There is no public policy justification in Australia for a must-carry regime for the retransmission of free-to-air television services by subscription television broadcasters. The Government has ensured universal access to free-to-air television services through the allocation of hundreds of millions of dollars towards digital switchover and transmission infrastructure for free-to-air television services.

1. INTRODUCTION

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to inform the development of detailed policy proposals by the Convergence Review Committee (the Committee).

About ASTRA

ASTRA is the peak industry body for subscription television in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription television operators, as well as channels that provide programming to these platforms. A list of members is attached at Attachment A.

The subscription TV industry is the undisputed leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, it is received nationally by 34% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues.

Since its inception, over $9 billion dollars has been invested in infrastructure, capital, facilities, productions, programs and services in order to establish and develop the subscription TV industry. ASTRA's members are responsible for the bulk of this investment which has been distributed throughout metropolitan, regional and remote areas. Consequently, the sector has created an enormous number of jobs, investment, infrastructure and production content throughout Australia. In 2009 the subscription television industry invested $541.4 million in Australian content. In addition, the sector directly employed 4,643 people. The industry continues to invest heavily in its own growth and the growth of the Australian film and television broadcast sectors including the continuing investment in television programming and production.

Overview

ASTRA welcomes the range of issues raised in the Committee's Emerging Issues Paper, and is sympathetic with the Committee's view that "it is likely that revolutionary change to the existing policy framework will be needed to respond to convergence".[1]

ASTRA also welcomes the Committee's confirmation of the principles that will guide the review and the amendments to these principles. In particular, ASTRA supports the inclusion of the new Principle 1 "*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*". As ASTRA has previously argued, a clear rationale for regulatory intervention must be a key objective of this review to ensure that competition and innovation in the wider media and communications sector is not compromised.

"Convergence" in media and communications can be identified on a number of levels:

[1] Convergence Review, *Emerging Issues Paper*, July 2011, p.11.

- structural – the distinctions between once discrete industry sectors (telecommunications, broadcasting, internet, mobile) are being increasingly blurred;
- technological – where digitization is enabling greater substitutability of different content delivery platforms;
- market – increased technological convergence means that once discretely identified market boundaries are dissolving as media and communications businesses develop new applications and content services that can operate across multiple delivery platforms;
- regulatory – as a result, the efficacy of platform or industry-specific regulation is increasingly under question.

The transition to a convergent media and communications environment is, however, complicated by a legacy of imbalanced platform-specific regulation. As such, platform-specific policy and regulatory measures are likely to remain appropriate in some circumstances to encourage competition across the media and communications environment as a whole, including where such settings balance appropriate public policy obligations against regulatory privileges for particular sectors.

The purpose of this submission is to help inform the Committee's thinking in the development of the detailed discussion papers to be released later in the review process. ASTRA welcomes the opportunity to give its perspective on those areas where we believe regulatory reform is critical to enable a competitive, innovative and increasingly diverse media and communications environment to emerge and grow.

Section 2 outlines the specific policy and regulatory issues whose examination ASTRA considers crucial for reform of the existing framework for media and communications policy.

Section 3 provides comments on issues relevant to the subscription television sector that have been raised by either the Committee or other industry stakeholders.

ASTRA is currently developing detailed policy responses in relation to these issues, to be provided to the Committee in the context of the detailed discussion papers to be released later in the review process. The intention of this submission is to highlight those issues ASTRA considers critical to the future of media and communications regulation and policy, and which ASTRA believes should be the subject of detailed policy proposals from the Committee going forward.

2. KEY AREAS OF REGULATORY AND POLICY REFORM

2.1 Regulatory policy

The Committee's paper considers the key policies underlying the existing *Broadcasting Services Act 1992* (BSA) including the degree of influence principle; the approach to licensing including regulation by business model; and the regulatory measures employed.

Regulatory consistency

Convergence is increasingly bringing into question the traditional regulatory frameworks for media and communications policy. In ASTRA's view the starting principle for any regulatory framework is that of regulatory consistency across services and platforms, such that economic and/or competitive protections afforded to particular sections of the industry should be removed unless a clear public policy objective in maintaining these protections can be identified.

Notwithstanding this view, we recognise that there are circumstances where wider public policy objectives and/or community expectations will still require differentiated regulation for certain issues where there is a compelling public interest rationale for doing so. For example, as we have previously submitted, the free-to-air broadcasters occupy a distinct or "special" place in the Australian media sector due to their:

- access to public spectrum;
- universal penetration into Australian homes and
- continuing high "degree of influence" in Australian society.[2]

In return for regulatory privilege, free-to-air commercial broadcasters are subject to certain public policy obligations such as Australian and children's content quotas and more stringent content regulation requirements. If access to public assets, such as the spectrum gifted to the free-to-air broadcasters, continues and is justified on the basis of public policy objectives then corresponding obligations to deliver those public policy objectives must also be maintained.

Regulatory forbearance

As ASTRA stated in its submission to the Framing Paper, the Convergence Review should be guided by the general principle that regulatory intervention should not be the default option to achieve public policy objectives. Only where the public interest clearly cannot be achieved through the market or self-regulation should regulatory measures be contemplated, and only then when the effectiveness of regulation in achieving the public interest objective clearly outweighs the detrimental impact to competition and innovation in the wider media and communications sector.

ASTRA supports reliance on self-regulatory and co-regulatory measures to deliver public policy objectives for the media and communications sector. ASTRA submits that the Subscription Television Broadcasting and Narrowcasting Codes of Practice have worked well for subscription television consumers. The Codes provide appropriate consumer protection measures that encourage subscription broadcasters to be responsive to consumer needs and address consumer concerns as they arise, without the need for heavy-handed regulatory intervention.

[2] Television reach into Australian households has remained consistent with approximately 89% of Australian households watching television every day. Terrestrial television is by far the primary source for Australian TV viewers with approximately 86% of all Australian households (including STV households) watching television every day (OzTAM, All Metro Homes, 5 City Metro, All Households, 0200-0200, Weeks 1-52/3, 2005-2010 and Weeks 1-26, 2011).

2.2 Regulatory barriers to competition

Convergence will drive an increasingly competitive media and communications environment that encourages the development of a more diverse range of new content and innovative services for consumers. The subscription television industry faces strong and increasing competition from multi-channel commercial and national broadcasters, IPTV and various online content services, and DVD rentals and sales.

In ASTRA's view, developing regulatory options for a converged environment requires more than merely an examination of how content is regulated on competing platforms. It is essential that the Committee critically review existing regulatory barriers to competition so that the emerging regulatory framework provides for balanced and consistent regulation that encourages competition and innovation in the media and communications sector. As such, ASTRA have identified examples of regulatory barriers to competition for which the public policy justification should be considered as part of this Review.

Anti-siphoning

The anti-siphoning scheme has long been identified as anti-competitive and a clear example of regulatory imbalance:[3]

- The anti-siphoning provisions directly limit competition between free-to-air broadcasters and subscription television for premium sports content, shifting the balance of negotiating power in favour of free-to-air networks.[4] The proposal to extend the anti-siphoning regime to other delivery platforms maintains the regulatory advantage afforded free-to-air networks in an increasingly converged environment;
- The anti-siphoning scheme has a negative impact on the ability of sporting organisations to maximize the value of their rights, through a substantial reduction in competition during negotiations. This adversely impacts the sporting organisations, the funding for their key participants, the costs of events and other downstream impacts such as grass-roots and junior bodies;[5]
- There are a number of factors that support an examination of the breadth and scope of the anti-siphoning scheme. Sports organisations will continue to seek exposure of free-to-air television given its universal reach (e.g Netball) and free-to-air broadcasters will continue to bid for the rights to major sporting events given their ratings success and advertising revenue potential.[6] Free-to-air broadcasters are already in a strong negotiation position in relation to their direct competitors without regulatory protection.

ASTRA welcomes the reforms to the anti-siphoning scheme announced at the end of 2010 as a result of its review of sport on television. In particular, ASTRA supports the removal of events from the anti-siphoning list that are not broadcast by free-to-air broadcasters, and the

[3] In 2000, the Productivity Commission concluded that " the anti-siphoning rules are anti-competitive and that the costs of the current scheme to sporting organisations, the broadcasting industry and the community as a whole, exceed their benefits" Productivity Commission, *Broadcasting*, Inquiry Report, No.11, 3 March 2000, p.449
[4] Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services,* August 2009, p. 157.
[5] ibid, p.158.
[6] ibid, p.167.

requirement on free-to-air broadcasters to broadcast anti-siphoning events to which they have the rights, or else be required to on-sell those rights for a minimal fee. ASTRA looks forward to working with the Government as these changes are implemented.

Notwithstanding these welcome reforms, ASTRA submits that the long-term public policy objectives of the anti-siphoning scheme – and the effectiveness of the scheme in achieving those objectives – still requires examination by the Committee. After the proposed reforms are introduced, subscription television broadcasters (and other players in the media and communications environment) will remain at a competitive disadvantage with free-to-air broadcasters in relation to access to premium audiovisual content, while the sporting codes will continue to be limited with regard to whom they can sell their rights. The efficacy of the anti-siphoning regime – a regulatory regime devised in the analog era - should be measured against clear criteria that demonstrate its benefits to consumers as against the loss to consumers through reducing competition and innovation.

Additional commercial television broadcasting licensees

Successive governments have, through various mechanisms, prevented the allocation of new commercial television licences:

- Legislation passed in 1998 for the transition from analog to digital broadcasting included a moratorium on new commercial television broadcasting licences until 31 December 2006, to coincide with the then date for the completion of digital television switchover - the policy rationale for the moratorium was to address concerns that any dilution of advertising arising from the introduction of another free-to-air commercial broadcaster would lessen the incentive for existing commercial broadcasters to invest in digital transmission infrastructure;[7]
- By 2006, the then Government had already indicated that no new commercial television broadcasting licences would be allocated at the end of the moratorium, arguing that the public interest would be best served by "encouraging the emergence of new and different digital services…that do not mirror existing FTA television services";[8]
- The legislated moratorium was subsequently replaced with a requirement for the Minister to undertake a review "before the earliest digital switchover day" (later amended to the end of 2011) while commercially unviable content restrictions meant the 'new and different digital services' never eventuated;
- The review relating to additional commercial television broadcasting services has now been incorporated into this Review, however the Government has reportedly already indicated that no new commercial television broadcasting licences are to be allocated.[9]

An increasingly converging media and communications environment means increasing competition between content providers operating on different platforms. Commercial television broadcasters have themselves noted increasing competition from subscription television and other emerging media distribution platforms.[10]

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[7] See ACCC, *Emerging market structures in the communications sector*, June 2003, p. 68.
[8] DCITA, *Meeting the Digital Challenge: Reforming Australia's media in the digital age*, March 2006, p.20
[9] G. Elliot, "Fourth commercial TV channel 'off agenda'" *The Australian*, 21 September 2009.
[10] Free TV argued in its response to the Convergence Review Framing Paper that the regulatory obligations that apply to free-to-air broadcasters "do not apply to its competitors and comparable platforms", limiting the ability of

In such an environment, preventing the entry of new players would appear increasingly difficult to justify on public policy grounds, particularly as incumbent broadcasters are able to expand their offerings through the addition of further digital channels. The main argument for restrictions to entry has been that the revenue streams for commercial television broadcasters need to be protected to be able to fulfill Australian and children's content obligations. Since 1998 the costs associated with the transition to digital television have also been cited.[11]

However, as the Productivity Commission argued in 2000:

> all industries must meet the requirements of various codes, standards and regulations, such as environmental standards and occupational, health and safety regulations. It is not clear why the broadcasting industry is marked for special treatment and compensated for meeting its obligations. Higher costs do not justify restrictions on entry.[12]

It may well be that the introduction of a fourth commercial network would disrupt the status quo for existing broadcasters. It may also be that the removal of restrictions on a fourth commercial network will not necessarily lead to any overall increase in the number of free-to-air TV networks in the longer term.[13] However, as previously noted by both the Productivity Commission (2000) and the ACCC (2003), less restriction on entry will provide an opportunity for the most efficient providers of broadcast services to thrive.

The current regulatory regime protects incumbent firms rather than allowing competitive forces to determine which operators survive.[14] Removing the restrictions on a fourth network or allowing the use of the spectrum for other digital media services is likely to increase competition, which would be welcomed by the subscription television sector.

The prohibition on a fourth network has placed limitations on other industry players taking advantage of the value and use of broadcast spectrum that is otherwise reserved for the broadcasters, limiting competition in the use of a valuable and scarce public resource. Improving access to scarce public broadcast spectrum could lead to more dynamic competition that would encourage efficiency and innovation and the development of content and services to the benefit of consumers. It would also likely benefit media diversity for Australians (Principle 2 in the Emerging Issues Paper).

2.3 Policy and regulatory settings to encourage Australian content production

As acknowledged by the Committee in the Emerging Issues Paper, and by a significant number of submissions to both the Framing Paper and the Terms of Reference, future policy and regulatory settings to encourage the production and distribution of Australian content are central to this review. ASTRA agrees with Principles 4 and 5 underpinning the Review – that Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity, sourced from a dynamic domestic content production industry.

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commercial broadcasters "to develop competitive and innovative scheduling strategies" and acting as a "barrier to innovation and competitiveness" in comparison to "competing platforms" (pp. 1, 4).

[11] See, for example, Free TV submission to the Meeting the Digital Challenge discussion paper, May 2006.

[12] Productivity Commission, *Broadcasting*, p.319.

[13] ibid, p.1.

[14] ibid, p.1.

As stated in our response to the Framing Paper, ASTRA encourages the Committee to examine existing regulation for Australian content to determine whether there are more appropriate regulatory or non-regulatory measures to encourage Australian content production. ASTRA is currently examining potential policy alternatives for the production and distribution of Australian content, in particular whether approaches other than regulation may be more effective in delivering sustainable investment in Australian content production to maintain or increase levels of new Australian content on Australian television, which we will detail at a later stage in the Review process.

As the Emerging Issues Paper notes, Australian content is highly valued by Australian television audiences, reflected in the increasing investment by the subscription television industry in high quality Australian content such as *Cloudstreet*, *Sprited*, *Love My Way, Slide, Tangle* and *Satisfaction*. In 2009 the subscription television industry invested $541.4 million in Australian content across all genres. ASTRA's intention is to present potential policy alternatives that achieve cultural policy objectives in more effective and sustainable ways.

ASTRA has previously argued that some Government funding support programs distort the operation of the production sector by discouraging co-investments by subscription television content producers with Government bodies. In a converging media and communications environment, there is a need to recognise the differences in commercial structures of various players in the industry to ensure Government funding enhances, rather than hinders, the willingness of organisations to invest. For example:

- Screen Australia's excessive minimum licence fee requirements do not recognise the commercial realities of the subscription television industry which specialises in producing quality niche programming rather than programs necessarily created for mass audiences, and where audience numbers are measured cumulatively over a number of targeted viewing alternatives;
- The current regulatory regime requires that – if it receives funding from Screen Australia - a co-produced free-to-air/subscription TV drama series must run first on free-to-air and then second on subscription TV (in order that it may satisfy both the free-to-air quota obligation that includes Australian drama, and the subscription TV new eligible Australian drama expenditure rules). This regulation provides a significant, if not absolute, disincentive, for subscription television to seek co-funding with free-to-air networks on projects designated for Screen Australia funding, as it will always require subscription TV to cede first run broadcast rights to a free-to-air network;
- In relation to documentary funding, there is nothing inherent in Screen Australia's obligations to necessitate a pre-determined broadcaster-based funding split heavily skewed towards the national broadcasters, nor should there necessarily be an expectation by national broadcasters that they are to annually receive a certain proportion of Screen Australia documentary funding.[15]

ASTRA concurs with the Committee's view that any significant reform to the regulatory model for Australian content must be considered in the context of the broader regulatory paradigm – in

[15] SBS, for example, explicitly states that its commissioning budget is dependent on the guaranteed availability of 40% of the available documentary funding from Screen Australia (see SBS Submission to the Screen Australia Draft Funding Blueprint, January 2011).See also ASTRA submissions to Screen Australia's Review of Television Funding (2010), Draft Funding Blueprint (Jan 2011) and Draft Funding Guidelines (Mar 2011).

particular the existence of content obligations on the commercial broadcasters to balance their access to public spectrum and other regulatory concessions such as the anti-siphoning rules and, licence fee rebates, as well as Government financial support for digital switchover.

2.4 Regulation of content across different platforms – community standards and public expectations

As argued in our response to the Framing Paper, ASTRA supports consistency of *classification* of the same content delivered on different platforms. There may, however, be different community expectations regarding how the access or use of content should be regulated depending on how that content is delivered.

Consumers who are legally permitted to purchase content or subscribe to a content service would expect to be able to access and use that content when they want. However, for a platform such as free-to-air television, which is universally accessible and has traditionally been subject to more stringent content requirements to balance other regulatory privileges, there may be different community expectations as to how access and use of content provided by that platform is to be regulated.

Unlike commercial television broadcasting services, subscription television services do not have restrictions on the times at which material of a certain classification can be shown. This reflects the different model of content delivery for subscription television as opposed to free-to-air broadcasting – subscription television providers have a direct relationship with their subscribers, who expect to be able to see the material they want through the service they pay for at the time they wish to see it.

As the Committee noted in its Emerging Issues Paper:

> regulatory parity…may need to be informed by community expectations or wider public policy objectives. For example, consumers may still expect that certain types of content are restricted when delivered through free-to-air broadcasting but consider them acceptable on other devices which are used in different environments or circumstances.[16]

As such, maintaining a stricter regime to govern access to content on the free-to-air platform is likely to be justified.

Effectiveness of co-regulatory approaches to content regulation

ASTRA submits that the existing framework for regulating content on subscription television works effectively to maintain community standards and protect children from harm while enabling subscribers to view the content they want to see when they want to see it. The current co-regulatory model for subscription television is an example of industry-based content classification regulation that works well both for consumers and broadcasters. Under the current model, where a consumer has a classification concern or believes content has been inappropriately classified, the consumer first directs those concerns to the relevant subscription television broadcasting licensee. If the consumer is unsatisfied with the response from the licensee, the consumer may make a complaint to the ACMA.

[16] Emerging Issues Paper, p. 13.

Industry-based regulatory frameworks are likely to provide more flexibility and be more responsive to changes to community expectations about the suitability of content. The codes of practice in place for broadcasting under the BSA are subject to regular review with extensive public consultation to ensure that these codes continue to reflect prevailing community attitudes applicable to the broadcasting operations of each sector of the broadcasting industry. The development of codes of practice by industry groups (such as ASTRA) representing particular sectors of the broadcasting industry must take into account any relevant research conducted by the ACMA.

2.5 Protection of intellectual property rights

The Emerging Issues Paper acknowledges that a challenge for the Review is "how to ensure continued availability of Australian content in a converged environment".[17] Convergence has the potential to create synergies across once separate industries to drive innovation in the communications environment, however this potential cannot be realised if content producers and distributors are not able to effectively monetise the content they produce or acquire.

ASTRA submits that the ability for content producers and distributors to extract fair monetary returns for their investment in developing or acquiring content is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production. Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution.

ASTRA acknowledges the Government's recognition at the commencement of the Convergence Review that any discussion of the production and distribution of Australian content raises issues of copyright in the digital age, and that the Committee may offer views on copyright and the ongoing protection of content in a converged environment.[18] ASTRA also welcomed comments by the Committee at recent public consultations that copyright issues would be canvassed as part of the Review.

While ASTRA also recognises that the Government has signalled an intention to refer copyright to the Australian Law Reform Commission (ALRC) later in 2011, protection of copyright cannot be examined in isolation from the impact of convergence. Enhanced regulatory and enforcement measures for the protection of intellectual property rights is essential to achieve the public policy outcomes reflected in both Principle 4 (that Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity) and Principle 5 (that local and Australian content should be sourced from a dynamic domestic content production industry). Industry is less likely to invest in new content production if increasing copyright infringement threatens returns on that investment.

Copyright legislation in Australia and internationally is struggling to keep pace with rapid technological changes, such that current provisions in the *Copyright Act 1968* (Cth) do not cover key digital media platforms. For example, Part VAA of the Copyright Act, which relates to

[17] *Emerging Issues Paper*, p.18.
[18] DBCDE "Convergence questions and answers" (http://www.dbcde.gov.au/digital_economy/convergence_review/questions_and_answers)

unauthorized access to encoded broadcasts, protects only those transmissions made by subscription television broadcasters that are defined as a “broadcast” under the BSA. The 2000 Internet Determination[19] excludes from the definition of broadcasting radio and television programs delivered over the internet. While an IPTV service delivered through a ‘closed’ IP network is likely to be considered a ‘broadcasting service’,[20] a subscription television service delivered ‘over the top’ (such as FOXTEL delivered by the Microsoft Xbox) is likely to be excluded, meaning subscription television distributors are unable to take action in relation to unauthorised access to such transmissions or dealing in related unauthorised devices.

2.6 Spectrum allocation

ASTRA recognises that spectrum allocation policy needs to balance at times competing public policy objectives, ensuring sufficient spectrum capacity is available for the effective operation of essential services, defence and other public interest needs, while ensuring sufficient flexibility for the market to efficiently and effectively determine allocations appropriate to the evolving needs of a communications environment constantly developing new technologies and services.

The policy rationales for long-term allocation and future use of existing broadcast spectrum requires careful scrutiny by the Committee. ASTRA supports the ACMA’s Principles for Spectrum Management[21] released in March 2009, namely:

1. Allocate spectrum to the highest value use or uses.
2. Enable and encourage spectrum to move to its highest value use or uses.
3. Use the least cost and least restrictive approach to achieving policy objectives.
4. To the extent possible, promote both certainty and flexibility.
5. Balance the cost of interference and the benefits of greater spectrum utilization.

ASTRA would agree with the ACCC submission to the Convergence Review Framing Paper that “maximizing the overall public benefit requires that the spectrum be allocated to its highest value use” and that “a competitive process is generally the best means for allocating spectrum to its highest value use”.[22]

Spectrum allocation to free-to-air broadcasting services

Currently, free-to-air broadcasters automatically gain exclusive access to 7 MHz spectrum on allocation of a broadcasting services licence. An additional 7 MHz of spectrum has been loaned to free-to-air broadcasters for the duration of the digital-analog simulcast period, at the end of which spectrum capacity for analog transmission is returned as part of the digital dividend. Spectrum allocated to free-to-air broadcasters is not subject to a competitive process, but rather is provided to broadcasters as part of a broader arrangement that is tied to regulatory obligations and (indirectly) to licence fees for broadcasting licences.

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[19] Determination under paragraph (c) of the definition of "broadcasting service" (No. 1 of 2000), 12 September 2000.
[20] See D. Brennan (2010) ‘Is IPTV an Internet service under Australian broadcasting and copyright law?’. Telecommunications Journal of Australia. 60 (2): pp. 26.1 to 26.11
[21] Available on the ACMA website at: http://www.acma.gov.au/WEB/STANDARD/pc=PC_311683
[22] ACCC submission to the Convergence Review Framing Paper, p. 13.

The existing regulatory framework for allocating broadcast spectrum may have been appropriate in the analog era of the last quarter of a century where a 7 MHz channel was required to provide a single analog television service. However the post-analog era – when up to five SD television services can be provided in one 7 MHz channel of spectrum – provides an opportunity to re-examine the broadcast spectrum allocation policy.

As the Productivity Commission noted in 2000:

> Broadcasting licences are transferable, but for commercial television and radio, access to the spectrum cannot be transferred separately from the licence to broadcast. In addition, prices play no role in spectrum use — that is, the licence fees paid by broadcasters are not related to the amount of spectrum used (or the amount of spectrum they deny to other uses), but are based on gross revenue. These aspects of the spectrum management and licensing arrangements provide little incentive for broadcasters to use spectrum as efficiently as it could be. As well as affecting the current use of the broadcasting services bands, these aspects of the licensing arrangements affect Australia's chance of taking advantage of many opportunities presented by the digital revolution.[23]

As ASTRA has previously argued, additional spectrum allocation to terrestrial broadcasters is not required to support possible future technical migrations of digital television services (such as to DVB-2 or MPEG-4) or new services such as 3D and additional HD. Spectrum allocated for digital terrestrial television broadcasting could be used far more efficiently by incumbent commercial and national broadcasters.[24]

ASTRA would welcome further competition in the media and communications industry, including from new players who want access to the 'spare' block of broadcast spectrum that will remain after allocation of the Digital Dividend, whether they be new broadcasting licensees or other innovations such as a multiplex of community channels, or for the provision of communication services other than broadcasting.

2.7 Role of the national broadcasters

The national broadcasters (ABC and SBS) have a valuable role to play in providing Australians with a common and universally available media service, funded by all Australians through their taxes.

That role however does require careful examination in the current and evolving media landscape, where Australians are served by many and varied services, and should be critical in informing the Committee's examination of policy settings in relation to Principle 2 (that Australians should have access to and opportunities for participating in a diverse mix of services, voices, views and information) and Principle 3 (that the communications and media market should be innovative and competitive, while balancing outcomes in the interests of the Australian public).

In the current landscape it is important to consider what the focus of the national broadcasters should be. By way of example, when each of the ABC and SBS commenced broadcasting there were no subscription television (broadcast or narrowcast), open narrowcast or community

[23] Productivity Commission, *Broadcasting*, pp.184-185.
[24] ASTRA submission to the ACMA Clearing the Digital Dividend Discussion Paper, April 2011, p.3.

television services for Australians. Nor were there digital multi-channels provided by commercial free-to-air broadcasters with the potential for providing more specialised or targeted services.

Currently, the ABC must take account of the commercial and public (now referred to as community) sectors of the Australian broadcasting system in the provision of its services. The SBS must contribute to the overall diversity of Australian television and radio services by extending the range of these services.

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. For example:

- Subscription and commercial free-to-air television has the capacity to broadcast many of the internationally sourced programming on the national broadcasters, with national broadcaster participation in the marketplace serving only to drive up the costs of program acquisition;
- Sky News is already providing a comprehensive 24-hour Australian news service.

There is instead a valid and valuable cultural contribution to be made by Government when market failure of one form or other has occurred. 'Market faliure' is a key rationale for public funding of much of the programming and operations of the national broadcasters such that without public funding certain services would not be provided by the market. In a digital environment other broadcasters, such as subscription broadcasters, are in a position to provide diverse and innovative content services. Already today we can also see numerous examples of such content being offered to consumers via sites such as YouTube or the many video podcasts available, much of it advertiser-supported rather than subscription based. The Government's national broadband network (NBN) initiative will extend the ease of access to such services to even more Australians.

The recent debate regarding cuts to ABC in-house production and the 'outsourcing' of ABC production puts into focus the future role and function of the national broadcasters. These changes were reportedly in response to "falling audiences for some programs, increasing financial pressures on ABC TV and a strategic commitment to focus its limited financial resources on prime-time programming" in the face of "an increasingly competitive broadcasting environment".[25]

As Margaret Meares has argued, national broadcasters should not view themselves "in competition" with commercial media, nor should that be their role:

> The public-good values that led to governments funding arts and cultural institutions due to their tendency towards "market failure" was the same ethos that led to the establishment of the great public broadcasters of Great Britain, Canada and Australia.
>
> This came with an understanding that education as well as entertainment was an essential part of the broadcaster's output. The value of the broadcaster was not only about ratings but also

[25] Email from ABC Director of Television, Kim Dalton to ABC staff, as reported in *The Australian*, 3 August 2011.

about impact on and for the community. And in some parts of the ABC, notably Radio National and Classic FM, these values still seem to be alive and well. But not, it seems, ABC TV.[26]

Furthermore, decisions as to whether Australian content production by national broadcasters is conducted "in-house" or as commissioned work undertaken by the independent screen production sector should be made based on the most efficient and effective means for a national broadcaster to have such content made – the maintenance of 'in-house' production resources should not be regarded as an end in itself.

3. OTHER ISSUES

3.1 Retransmission of free-to-air television services by subscription television services

In a supplementary submission to the Convergence Review Framing Paper, Free TV argued for the introduction of fees for the retransmission of free-to-air television services by subscription television broadcasters, through the introduction of a 'must-carry' regime similar to the regime that exists in the United States. Free TV previously raised this issue in response to the Department's *National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper*.[27]

Free TV argues that:

- Subscription television services in Australia have been "built on the back" of free-to-air television services, and have profited from the retransmission of free-to-air services;
- Free-to-air broadcasters should be able to negotiate for provision of their broadcast signal or elect to participate in a 'must-carry' scheme, similar to regulatory arrangements in the United States, to be able to "exploit the value of their services";
- 'must-carry' provisions have also been implemented in Europe under Article 31 of the European Commission Universal Service Directive.

ASTRA submits that none of these arguments are sustainable and are either unsupported by evidence or are irrelevant.

Australia is not comparable to the United States or Europe

ASTRA submits that Free TV's supplementary submission fails to acknowledge the significantly different television broadcasting environment that exists in Australia compared to the United States and Europe where various forms of 'must carry' regimes are in existence. The primary public policy objective of 'must-carry' regimes in the United States and Europe is to ensure consumers are able to access free-to-air television services, and to ensure the viability of free-to-air commercial television broadcasters through being able to reach all consumers in their advertising market.

For many households in the United States and Europe, cable or other non-terrestrial broadcast transmission platforms are the only means by which households can reliably receive free-to-air

[26] M. Meares, "Ratings chase is no pursuit for a public broadcaster" *The Australian*, 5 August 2011
[27] Free TV response to the National Broadband Network: Regulatory Reform for 21st Century Broadband Discussion Paper, 3 June 2009, pp. 9-10.

television services. Cable television began in the United States in the late 1940s as community-based services for the retransmission of free-to-air television in areas that could not receive adequate reception of those services from household antennas. Subscription services were later added to the retransmitted free-to-air services delivered by cable. By 1992, when Congress enacted the first must-carry legislation in the United States, a significant majority of US homes received free-to-air television by means other than "over the air" broadcasts.

The public policy rationale for must-carry rules in the US remains much the same today as they were when those rules were first introduced:

- to ensure all viewers can receive free-to-air television – there were concerns that, without must carry provisions, cable networks may decide not to carry local television stations;
- to ensure the viability of free-to-air television so that the minority of viewers who still rely on terrestrial transmissions (disproportionately low-income and/or rural households) can continue to receive television services; and
- to ensure the viability of local free-to-air television stations (that is, those not necessarily affiliated with the major US networks and/or those stations that provide local programming to supplement the general program offerings of the major networks).[28]

In 1998, the Federal Communications Commission noted the intentions of Congress while determining whether cable operators must carry both the analog and digital signals of a free-to-air broadcaster during the simulcast period:

> With regard to the mandatory cable carriage provisions, Congress believed that laws were required to ensure: (1) the continued availability of free over-the-air television broadcast service; (2) the benefits derived from the local origination of programming from television stations; and (3) as it relates to noncommercial television stations, the continued distribution of unique, noncommercial, educational programming services. Congress reasoned that without mandatory carriage provisions in place, the economic viability of local broadcast television and its ability to originate quality local programming would be jeopardized. Congress also believed that because cable systems and broadcast stations compete for local advertising revenue and because cable operators have an interest in favoring their affiliated programmers, cable operators have an incentive to delete, reposition, or refuse to carry local television broadcast stations. These conclusions, and the carriage provisions themselves, were premised on findings made by Congress at the beginning of this decade that most subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to an antenna reception system, or cannot otherwise receive broadcast television services.[29]

[28] See R. Frieden, "Analog and Digital Must-Carry Obligations of Cable and Satellite Television Operators in the United States" Working Paper Series, University of Pennsylvania, April 2005; J.H. Snider, "Multicast Must-Carry for Broadcasters" Spectrum Series Issues Brief 13, New America Foundation Spectrum Policy Program, Dec 2003.
[29] *Carriage of the Transmissions of Digital Television Broadcast Stations,* Notice of Proposed Rule-Making, FCC 98-120, 9 June 1998, para 5 <http://transition.fcc.gov/Bureaus/Cable/Notices/1998/fcc98153.pdf>

Similarly in Europe, there is a far greater reliance on non-terrestrial broadcast means to access free-to-air television than in Australia.[30] As a consequence, must-carry regimes of various forms have also been introduced in a number of European jurisdictions in response to the Must Carry provisions of the European Commission Universal Services Directive (the Directive). Article 31 of the Directive (the provision relating to "must carry" obligations) states:

> Member States may impose reasonable "must carry" obligations, for the transmission of specified radio and television broadcast channels and services, on undertakings under their jurisdiction providing electronic communications networks used for the distribution of radio or television broadcasts to the public *where a significant number of end-users of such networks use them as their principal means to receive radio and television broadcasts*. Such obligations shall only be imposed *where they are necessary to meet clearly defined general interest objectives and shall be proportionate and transparent*. The obligations shall be subject to periodical review. (emphasis added).[31]

The Directive clearly states that Member States may only impose these obligations on networks where end-users use them as the principal means to receive television. Indeed, it is instructive that the provision sits in the EU directive on Universal Service (that is, the directive relating to the minimum services that end users should receive) and not the Audiovisual or Media directives. Moreover, the Directive is clear that such obligations should be imposed only where they are necessary to meet "a clearly defined general interest objective". The primary purpose of the provision is to ensure that end-users have access to free-to-air television broadcasts.

In Australia, the public policy rationale of ensuring universal access to free-to-air television does not apply. Governments have invested many hundreds of millions of dollars since 2001 to ensure universal access to digital free-to-air television by terrestrial means, or by satellite where terrestrial reception is not feasible, including:

- licence fee rebates and direct grants for commercial television broadcasters in regional and remote areas for costs associated with the conversion from analog to digital transmission;[32]
- grants to commercial broadcasters in smaller regional and remote licence areas to ensure that they can provide the full suite of commercial digital television services;[33]
- the Household Assistance Scheme which supplies and installs free digital television HD set top boxes (and free antenna and cabling upgrades if required) to people on the maximum rate Age Pension, Disability Support Pension, Carer Payment, Veterans' Service Pension or Veterans' Income Support Supplement;

[30] A study of digital television homes in Europe in 2007 found that only 38% of homes received digital television terrestrially, with 42% via satellite, 16% via cable and 4% via IPTV (see W Van den Broeck & j Pierson, *Digital Television in Europe*, ASP/Vupress, 2008, p.2).
[31] Directive 2002/22/EC of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive), Art 31.
[32] Minister for Communications, Information Technology and the Arts, "Assistance for digital television in regional areas" Media release, 9 May 2000.
[33] Minister for Broadband, Communications and the Digital Economy", "Full digital TV service for regional and remote Australia", Media Release, 9 November 2010.

- the Viewer Access Satellite Television (VAST) service to provide the full suite of commercial and national free-to-air digital television channels to viewers with inadequate terrestrial reception; and
- The Satellite Subsidy Scheme to provide subsidised installation of satellite reception equipment for reception of the VAST service in households in terrestrial digital transmission black-spots.

As the Minister stated after the passage of legislation bringing the VAST service into being, the introduction of the Government-funded VAST service, combined with further Government funding to upgrade transmission infrastructure in regional and remote areas, means that commercial and national broadcasters "are able to deliver the full suite of free-to-air digital television services to *every viewer in Australia, wherever they live*".[34]

Further, the viability of commercial free-to-air television in Australia is ensured through a legislative framework that provides significant protections and privileges to commercial broadcasters including protection from competition from additional free-to-air services, guaranteed access to valuable broadcast spectrum (a scarce public resource) and preferential access to premium sports content.

People do not pay to watch free-to-air television services

There is no evidence that subscription television in Australia has been "built on the back" of free-to-air television services. Indeed, in regional areas, subscription television has never retransmitted free-to-air commercial television services. Rather, subscription television in Australia has been built on the back of billions of dollars invested in infrastructure and production to provide exclusive programming and innovative services that consumers want, without a cent of Government funding and without the significant statutory protections and privileges afforded to commercial broadcasters.

Consumers do not pay for subscription television services to watch free-to-air television – they pay for program diversity and choice. Research commissioned by ASTRA found that, for the majority of subscription television users, content diversity and exclusive programming are the primary reasons for subscribing.[35] The majority of viewing in subscription television homes is subscription television programming.[36]

Retransmission of free-to-air services by subscription television has no impact on advertising revenue

Free TV argues that a retransmission right should be introduced for commercial television broadcasters to "exploit the value of their services". ASTRA submits the existing regulatory framework for the retransmission of free-to-air television under the BSA and the Copyright Act works well for consumers.

[34] Minister for Broadband, Communications and the Digital Economy, "Digital switchover legislation passed", Media Release, 25 June 2010.
[35] ASTRA commissioned survey of STV viewers conducted by MRA Research in January 2011.
[36] Year to date STV share of viewing in STV Homes for 2011 is 55.9%, 2am-2am, with the remainder shared between the five FTA networks, including multi-channels (Source: Source: OzTAM NatSTV as of Week 32 2011).

Commercial broadcasting services are services that provide programs that are "made available free to the general public" and that "are usually funded by advertising revenue".[37] The retransmission of free-to-air services by subscription television platforms has no impact on the advertising revenue of commercial television broadcasters, and ASTRA notes that Free TV did not provide any evidence in its submission regarding loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on subscription television platforms.

The BSA provides that a service provided by a commercial television broadcasting licensee is only permitted to be retransmitted within the licence area of the licensee.[38] Commercial television services retransmitted on subscription television platforms consist of the same programs with the same advertisements as those services transmitted terrestrially within the relevant licence area. Commercial broadcasters are effectively seeking an additional revenue stream from subscription television customers for television services that are required to be both freely available and funded solely by advertising, and where those customers can already receive those services without payment.

By contrast, a must carry scheme would place additional and unnecessary regulatory burdens on subscription television broadcasters. In particular, the retransmission of regional broadcasting services in a satellite environment would be commercially prohibitive due to the number of local licence area-based regional broadcasting services, a problem exacerbated by the technical difficulties that currently prevent carriage of the VAST free-to-air commercial television services by subscription television services delivered by satellite in regional areas (see below).

Consumers have the right to choose what they watch

Consumers have the right to choose what services they watch and how they want to receive them – they not obliged to watch free-to-air television services, nor receive them in a particular way. The retransmission of free-to-air services on subscription television gives subscribers the convenience of not needing to move from one platform to another. Consumers who view free-to-air services via their subscription television provider can access these services terrestrially (or via satellite) if they choose to do so. Free-to-air broadcasters may lose viewers in subscription television households to subscription television services, however losing viewers to a competing television service is no justification for financial compensation.

Further, due to technical restrictions in the set top box certification process for the Government-funded VAST free-to-air commercial television services, satellite subscription television platforms cannot currently certify their set top boxes in order to receive the VAST services, even if access to those services through the subscription platform is limited to only those households that would be eligible to receive the VAST service under the Conditional Access Scheme registered under Part 9C of the BSA. Carriage of these services by satellite subscription television services would mean that households in areas without adequate terrestrial reception would not need to go to the expense and inconvenience of having two satellite dishes installed and/or requiring two sets of decoder equipment if they choose to have subscription-based as well as free-to-air television.

[37] BSA, s 14.
[38] Subject to the payment of equitable remuneration to the underlying rights holders: BSA, s 212.

The retransmission of free-to-air broadcasts on subscription television has, up to this point, been successfully achieved through commercial negotiation between subscription television platform providers and commercial and national television broadcasters. There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer, and the underlying rights holders in accordance with Part VC of the Copyright Act.

3.2 Media ownership and diversity

As ASTRA noted in its submission to the Framing Paper, a regulatory framework that encourages competition and innovation is more likely to encourage increased representation of a diversity of news, information and opinion. The variety of news and information sources available on the internet and other new media and communications platforms would suggest that regulatory intervention to ensure a diverse media is unnecessary, while regulation that attempts to 'impose' diversity (for example, through artificial restrictions on ownership and control) may actually have the effect of hindering the development of new and differentiated content.

Larger media organisations providing multiple services and operating on different platforms may through economies of scale and scope be in a better position to encourage the production and distribution of differing views and opinions across their media offerings by providing more specialised or niche media services, while smaller, less diversified media organisations may well need to pursue 'mainstream' or 'populist' lines in order to achieve commercially viable audiences.

3.3 Internet/new media services

The policy challenge of regulating internet-based services due to cross-border and jurisdictional issues is well understood however the role of the Internet in delivering content in a converged environment cannot be ignored in this Review because of these difficulties. Internet, mobile and IP delivery of content continues to grow and compete significantly with other more traditional forms of broadcasting. They bring welcome innovation and competition to the media industry in Australia and allow the proliferation of user-generated content and social media. ASTRA does not advocate increased regulation of these services per se however where two services are for all intents and purposes the same except in their technological delivery mechanism, regulatory consistency dictates that these services be treated equally from a regulatory standpoint. In ASTRA's view unless there is some specific public policy objective to justify differential regulation, distinct sectoral regulation should be removed to ensure a level playing field and competitive neutrality for services.

4. CONCLUSION

Convergence offers opportunities for regulatory reform to encourage innovation and increased competition across media and communications platforms to deliver a more diverse range of content and services to consumers.

ASTRA supports a starting principle of regulatory consistency across services and platforms, where economic and/or competitive protections afforded to particular sections of the industry should be removed unless a clear public policy objective in maintaining these protections can be identified for parity to exist. However, ASTRA recognises there is likely to be a continuing compelling public interest rationale for some level of differentiated regulatory benefits and burdens on different parts of the media and communications sector.

ATTACHMENT A

Subscription Television Platforms
AUSTAR
FOXTEL
Optus Television
Telstra

Program Channel Providers
Aurora
Australian Christian Channel
Australian News Channel
BBC Worldwide Channels Australasia
Bloomberg Television
Discovery Networks
E! Entertainment
ESPN
Eurosport
Expo Networks
KidsCo
Movie Network
MTV Networks
National Geographic
NBC Universal
Nickelodeon
NITV
SBS Subscription TV
Premier Media Group
Premium Movie Partnership
Setanta Sports Australia
Sky Racing
Turner International (Australia)
TV1
TVN
TVSN
Walt Disney Company (Australia) Pty Ltd
XYZnetworks Pty Ltd

Communications Companies and Other Associate Members
Ai Media
Cath Ward Media Services
Ignite Media
Multi Channel Network
The Playroom Sydney/Omnilab

Affiliate Members
Baker and McKenzie
Minter Ellison