



**Submission to the Department of Broadband, Communications and the
Digital Economy Convergence Review Framing Paper**

10 June 2011

INTRODUCTION

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Convergence Review Framing Paper.

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 Annexure 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 markets. 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.

GENERAL COMMENTS

ASTRA submits that optimal consumer outcomes should be the paramount objective of the Review, and believes that maximising outcomes for consumers will only be achieved through enabling a communications environment which is competitive in nature and not impacted by unnecessary and overly burdensome regulation across platforms.

As the Productivity Commission argued in 2000, the highly prescriptive nature of broadcasting regulation in Australia reflects:

...a history of political, technical industrial, economic and social compromises. This legacy of *quid pro quo* has created a policy framework that is inward looking, anti-competitive and restrictive. As boundaries between media dissolve and the old concept of broadcasting becomes obsolete, this regulatory framework is eroding and being circumvented.¹

In the light of convergence and in the context of this Review, the Commission's conclusions have as much relevance today as they had 11 years ago. The Commission further argued that:

If we fail to grasp these opportunities to develop a convergent policy framework, Australian media and communications industries will not realise their potential. They will continue to be distorted and stunted by regulatory impediments, with adverse implications for the community and the economy generally.²

¹ Productivity Commission, *Broadcasting*, Inquiry Report, Report No.11, 3 March 2000, p.6.

² *ibid*, p.6.

Maximising consumer benefit through increased competition

Convergence is enabled by technological development, but the benefits of convergence will be driven by the market and competition. It is imperative that the future regulatory framework for media and communications achieves a balance between promoting the introduction of new and innovative technologies, the equitable delivery of content across different infrastructure, and the protection of copyright as it is impacted by technological convergence. ASTRA argues that competition through balanced regulation is more likely to maximise consumer outcomes through increased content diversity and new communications services. Conversely, regulation that distorts competition is likely to hinder new content production and the development of new services.

Clear rationale for regulatory intervention

ASTRA firmly believes that the Convergence Review should be guided by the general principle that regulatory intervention should be a “last resort” and not 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 a compelling public interest rationale for some level of differentiated regulatory benefits and burdens on different parts of the media and communications sector. Free to air broadcasters, for example, occupy a distinct place in the Australian communications environment. The existing regulatory framework confers a range of specific protections and privileges on these broadcasters with associated obligations relating to content and community standards. Community expectations regarding the role of free-to-air broadcasters mean that public policy rationales for specific content requirements on free to air television broadcasters will continue, however this should not necessarily mean a continuation of the regulatory protections and privileges that these broadcasters currently receive. Regulation that inhibits or restricts competition should be contemplated only where there is compelling evidence that there is no alternative to achieve the intended public policy outcome.

COMMENTS IN RESPONSE TO THE REVIEW COMMITTEE’S PROPOSED PRINCIPLES OF MEDIA AND COMMUNICATIONS REGULATION

Diversity and competition

Principle 1: Australians should have access to a diversity of voices, views and information

ASTRA supports this principle, however we believe there may need to be distinction drawn between diversity in terms of access to a diversity of voices, views and opinion, and the availability of the broadest range of content and services that better reflect individual needs and circumstances. There are different public policy rationales for the desirability of these outcomes, although ASTRA would argue that regulation is unlikely to achieve either public policy goal more effectively than a truly competitive media and communications market.

The Framing Paper states that a diverse media sector has the advantage of providing “greater potential for competitive tension and innovation”.³ ASTRA submits that this would be better framed to state that competition is more likely to lead to greater diversity and innovation. A regulatory

³ DBCDE, Convergence Review Framing Paper, p.10

framework that encourages competition and innovation is more likely to encourage increased representation of a diversity of news, information and opinion. Australians have increasing access to a wide range of local, national and global sources of news and information (driven largely by competition and innovation in national and international media and communications markets). 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. 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 content and services.

Principle 2: The communications and media market should be innovative and competitive, while still ensuring outcomes in the interest of the Australian public

ASTRA agrees with this principle in part, although as currently drafted this principle would suggest that innovation and competition do not necessarily lead to "outcomes in the interest of the Australian public". True diversity can only be achieved when there is innovation and competition, so it is unlikely that the interests of Australians would be harmed by settings which maximise those principles.

It is submitted a free and open media market would deliver on most of the Government's public policy objectives. In the limited circumstances where it may not, ASTRA believes that the Committee must focus, in the first instance, on delivering non-regulatory policy options for the achievement of public policy goals. Regulation should be considered only where particular policy outcomes are not otherwise achievable, or where regulatory settings are necessary to enhance competition across all parts of the communications sector by maximising the opportunities for different media and communications business models to grow.

Regulatory issues of convergence extend beyond inconsistencies in content regulation across different delivery platforms. While content regulation and the future of Australian content production are critical considerations for the Review Committee, the fundamental barriers to competition and innovation across the media and communications market – barriers which hinder the development of more quality content and better services for consumers – must be a central focus of the Review.

In a convergent media environment, where consumers will increasingly be able to access content from a whole range of sources on different platforms in ways of their choosing, it makes increasingly little sense from either a competition or public policy perspective that certain types of premium content is reserved by law for one particular industry sector using one particular delivery platform. ASTRA notes the Government has previously stated that while the Review "will consider issues relating to the carriage of sporting and other cultural events across media platforms", the Government "does not propose to explicitly consider further changes to the anti-siphoning list in the context of the Convergence Review."⁴ ASTRA submits that it will be impossible for the Review Committee to make appropriate recommendations to encourage innovation and competition in the media and communications market without a comprehensive examination of the rationale and effectiveness of the anti-siphoning regime.

Similarly, there is little sense in a convergent environment for regulatory settings that preclude new entrants from entering the media and communications market using a particular delivery platform. The mass media market in Australia has remained remarkably stable with ownership to existing participants being the main source of change, rather than new entrants. New entrants in Australia's media have tended to arrive via new delivery platforms only, for example FM radio, subscription television, or online.

⁴ DBCDE, Convergence Questions and Answers
<http://www.dbcde.gov.au/digital_economy/convergence_review/questions_and_answers>

Convergence provides the opportunity to reconsider regulated barriers to entry. It is consumers, rather than the Government, who should be the ultimate arbiters of what content they want to watch and how they want to receive it, and the Committee should focus on recommending a framework that allows different business models utilising different content delivery platforms to compete equally to deliver services and content.

ASTRA further submits that the role of the national broadcasters should be examined in the context of this principle, including the appropriateness of Government-funded media organisations acting in direct competition to media and communications businesses in both the 'traditional' broadcast and online/new media markets.

Local and Australian content

Principle 3: Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity

ASTRA would agree that access to Australian content is important for the development of national and cultural identity, and 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.

The *Broadcasting Services Act 1992* prescribes that subscription TV licensees that broadcast drama channels, and drama channel package providers, are required to invest at least 10% of their total program expenditure on new Australian drama. As noted above, in 2009 subscription television platforms and channels invested \$541.4m in Australian content. Subscription television consistently produces hundreds of thousands of hours of Australian content each year across all genres, not just drama. As a result, its investment in local production far exceeds this regulatory requirement.

ASTRA believes that the Committee should take a 'clean slate' approach when examining measures to encourage Australian content, including an investigation of international approaches to promoting local content production, and should avoid approaches that attempt to extend existing regulatory mechanisms that may no longer be appropriate or feasible in a converging media environment. ASTRA further argues that the public policy objective of encouraging Australian content production should not be used as the basis for legitimising regulatory protection of free to air broadcasters or any other part of the media and communications industry. These protections may not be necessary if the objectives of diversity and competition and innovation remain at the core of this review.

Principle 4: Australians should have access to news and information of relevance to their local community

ASTRA agrees with the principle that Australians should have access to news and information of relevance to their local community. The important question for the Committee will be to identify the most appropriate paths to enable continued and increasing access to local news and information.

As argued above, ASTRA believes that the emphasis should be on non-regulatory measures, including an examination of the local news and information already available to local communities across all media and communications platforms. The growth of the internet is providing an increasing viable platform for the development of localised news and information services. Regulatory measures should only be considered where adequate local news and information is not otherwise delivered across the range of media and communications platforms available to consumers.

In addition, the role of existing barriers to entry on local content (for example, scarcity of television and radio broadcasting licences) are relevant considerations for consumer access and choice.

Community standards

Principle 5: Communications and media services available to Australians should reflect community standards and the views and expectations of the Australian public

ASTRA agrees that this is an important principle for this Review. ASTRA believes that the classification of all content made available to Australian consumers should be consistent with the National Classification Scheme. Content on subscription television is classified in accordance with the Scheme and the Classification Guidelines, a system that ASTRA believes works well to reflect community standards and protect children from harm, while retaining the capacity for consumers to view the content they want when they want.

Convergence enables greater substitutability of platform delivery for the same content, and ASTRA agrees that the relevance of platform-specific regulatory requirements for viewing and accessing content should be examined. ASTRA believes the Committee should start from the principle that the same content delivered on any platform should be treated the same, in the context of prevailing community views and expectations.

However, ASTRA cautions that the Review should consider whether there are different community expectations as to how content should be able to be accessed and used, depending on the type of service or application that is delivering that content. Consumers may still distinguish between services which deliver openly accessible programming to mass audiences, as opposed to those where consumers actively seek out content to satisfy more niche or specialised interests, and may have particular expectations about how content delivered by different services is regulated.

Consumer and citizen rights

Principle 6: Australians should have access to the broadest range of content across platforms and services as possible

ASTRA agrees with this principle and endorses the comment in the Framing Paper that “regulation should be flexible and adaptable to changing market and technological circumstances, and constructed with a view to enhancing audiences and consumer choice”. As argued above, ASTRA believes that the most effective driver of increased content and services is meaningful competition across the media and communications environment. The Committee should examine the barriers to competition in existing regulatory frameworks which hinder the development of new and innovative content and services.

Principle 7: Service providers should provide the maximum transparency for consumers in how their service is delivered

As the basis of all subscription television broadcasting is dependent on a direct contractual relationship between the supplier and the consumer, ASTRA supports the principle of maximum practicable transparency in service delivery. Under the Subscription Television Codes of Practice, Licensees inform prospective subscribers about the nature of the service they are subscribing to, including service options, prices and program content. Subscription television licensees are conscious of the importance of being open and informative in their relationship with subscribers and the need to implement arrangements which ensure fairness in their dealings with subscribers.

Spectrum allocation

Principle 8: 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

ASTRA strongly agrees with this principle and submits that the Committee should develop recommendations for maximising the public benefit from spectrum allocation firmly within the context of reducing barriers to competition in the broadcasting and communications sectors. Increased competition will drive the development of new media and communications services and content for the benefit of consumers.

ASTRA has previously argued that the existing regulatory framework for allocating broadcast spectrum has led to the inefficient use of this spectrum, restricting the volume and diversity of broadcasting and other communications services that could be made available to the consumer. ASTRA suggests that, as a starting point, the Committee should revisit the recommendations of the Productivity Commission's Broadcasting Inquiry Report for more efficient allocation and use of broadcasting spectrum.

Other policy considerations

The impact of legislative and regulatory frameworks outside the Minister's portfolio which may impact on issues within the scope of the review

Copyright

As ASTRA argued in its submission to the draft Terms of Reference, protection against illegal use and distribution of digital content is already a very significant issue for the subscription television industry and content providers generally, and will only intensify in a converged media environment. Current provisions in the *Copyright Act 1968* do not cover key and emerging digital media platforms for the delivery of subscription television services and are ineffective for dealing with illegal distribution of digital content.

ASTRA acknowledges the Government has recognised that "any discussion of the production and distribution of Australian content raises issues of copyright in the digital age" and that "the Review Committee may offer views on copyright and the ongoing protection of content in a converged environment, noting that the Attorney-General will ultimately determine these matters."⁵ ASTRA also notes the Attorney-General has signaled that copyright issues will be referred to the Australian Law Reform Commission for review later in 2011. While ASTRA welcomes this commitment, it is vital that the Review Committee examine the ongoing effectiveness of copyright legislation in the context of convergence, to provide guidance to the ALRC.

Classification

ASTRA notes that there are several areas of potential overlap between the Convergence Review and the Australian Law Reform Commission's Review of the National Classification Scheme. The Government has indicated that the Committee may refer relevant issues to the ALRC Review and visa versa. Content classification under the Scheme, and the rules for accessing and using content under the BSA, are interconnected but also distinct issues. ASTRA expects that the Committee and the ALRC will work closely to avoid unnecessary overlaps and duplication.

⁵ Terms of Reference Preamble

The impact of policy settings on industry and government revenue

As ASTRA argued in its submission to the draft Terms of Reference, we do not believe that the potential impact of policy settings on industry and government revenue is relevant to this review. Such a focus could unnecessarily distort the review towards options designed to protect existing media business models that may not necessarily be suited to a converged media environment.

Policy and regulatory settings should be set to maximise competition between players across all communications sectors, including through reducing existing barriers to competition between commercial entities providing differentiated media and communication services. The review should also examine the appropriateness of Government intervention and involvement in the media and communications market (including through the national broadcasters and subsidies and rebates given to the commercial television broadcasting industry).

How particular commercial entities manage their compliance with regulatory and non-regulatory measures designed to achieve particular public policy objectives should be a matter for those entities that operate media and communications businesses. The Committee should, of course, examine how particular regulatory and non-regulatory options impact on the business operations of media and communications entities, but only the extent to which such options enhance competition and encourage innovation in the media and communications environment.

Appropriate ways to treat content sourced from outside Australia

ASTRA has no comment on this issue, other than any classification of content sourced from outside overseas, where this is possible, should be consistent with the National Classification Scheme.

International approaches and Australia's international obligations

International approaches

ASTRA supports the Committee examining approaches to convergent communications in other jurisdictions. Governments internationally face common issues arising from the convergence of media and communications, such as effective protection of copyright, regulation of content across platforms, encouragement of local content production, and maximizing the potential benefits to consumers through structural regulatory reform. ASTRA suggests the Committee should examine closely non-regulatory alternatives that have been successful overseas in achieving public policy objectives. Any comparisons would, of course, need to take into account the unique features of the Australian media and communications environment, including the extent to which existing regulatory settings have shaped that environment.

International obligations

ASTRA supports the comments made in the joint submission by AFACT/AHEDA/MPDAA to the draft Terms of Reference that Australia's obligations under the international intellectual property regulatory framework and intellectual property obligations under bilateral trade agreements such as the Australia-United States Free Trade Agreement should be taken into account in the Convergence Review.⁶

⁶ AFACT/AHEDA/MPDAA submission to the Convergence Review Terms of Reference, p.2.

ANNEXURE A: ASTRA MEMBERS

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
XYZ Networks 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