



## **Communications Law Centre, UTS**

Submission to Convergence Review- Framing Paper

10<sup>th</sup> June 2011

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## Communications Law Centre, UTS

### Executive Summary

1. The regulatory and policy framework for media and communications should apply consistently across platforms and services.
2. Principles based regulation should be high level and technologically neutral, allowing for greater flexibility in policy making.
3. Regulation to ensure diversity of media ownership and content will continue to be important.
4. Regulation must continue to serve the public interest.
5. There is a need to foster the ongoing production and distribution of local and Australian content to foster national and local identities.
6. It is incumbent upon media and communications services to reflect prevailing community standards and values.
7. The public should have access to the broadest range of content possible, subject to set community standards.
8. Greater transparency is needed to ensure that consumers can make informed decisions in their interests.
9. Spectrum management policy should regularly be reviewed in accordance with the Total Welfare Standard.

### 1. Introduction

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- 1.1 The Communications Law Centre, UTS (CLC) is an independent, non-profit, public interest centre specialising in communications, media and online law and policy. We appreciate this opportunity to respond to the Department's request for submissions responding to the Convergence Review-Framing Paper.
- 1.2 The CLC is pleased that the Review has begun from first principles.
- 1.3 In a converging environment, the regulatory and policy framework for media and communications should apply consistently across platforms and services. We believe that normative regulation is desirable, but recognise that in practice, regulation will need to be tailored to deliver specific outcomes. Change is likely to happen quickly in the new environment. We contend that principles-based regulation, rather than rules-based regulation, is desirable.

### 2. We broadly support the principles as outlined

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- 2.1 The principles are high level and technologically neutral, allowing for greater flexibility in policy making. That is vital in a rapidly changing communications environment.

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

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- 3.1 The Review refers to diversity in terms of ‘voices, views and information’.<sup>1</sup> This is constructive as it goes beyond ‘diversity of content’ or ‘diversity of services’, which, while they are necessary objects, they are not sufficient for regulation in the public interest. The notion of ‘public’ goes beyond consumer interests and extends to the citizen.<sup>2</sup>
- 3.2 Exposure to a range of voices and perspectives is critical for informed decision making, particularly (but not exclusively) in the political arena. A well informed public is essential for a well functioning democracy, giving citizens the ability to acquit their duty to vote in an informed way.<sup>3</sup>
- 3.3 There is little doubt that the public has access to a wider variety of content than ever before. No longer does geography pose a restriction on the accessibility of content and services. A person in a remote region of Australia, for example, can access many of the same media services as someone in a capital city, using the Internet as the delivery medium. This was not possible 20 years ago, when the Broadcasting Services Act (BSA)<sup>4</sup> was enacted. These new delivery channels also offer easier access to content. Consider the *TuneIn Radio* application available for Apple’s *iPhone*, which can access thousands of streaming radio stations worldwide for a one time nominal fee.<sup>5</sup> The development of the National Broadband Network (NBN) is likely to make these new media services even more attractive to the consumer, as download speeds and data limits increase.
- 3.4 It should not automatically be assumed that an increased diversity of content equates to a proportional increase in diversity of voices, views and information. Indeed, as providers choose to distribute their content and services over various platforms, this can give rise to pools of homogeneity in the online environment. Consumers may repurpose online content. For example, a programme may be aired on terrestrial AM/FM radio station, repackaged into a podcast, then portions of the transcript posted on a blog. Although this content may be edited or modified at each stage, it often echoes the views of the original radio broadcast.

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<sup>1</sup> Department of Broadband, Communications and the Digital Economy, Convergence Framing Paper, p 12. (Also at para. 5(a) Terms of Reference).

<sup>2</sup> See, for example, Hitchens, L.P. 2007, ‘Australian Media Reform - Discerning the Policy’, *The University of New South Wales Law Journal*, vol. 13, no. 1, pp. 246-257 and Livingstone, Sonia and Lunt, Peter and Miller, Laura (2007), *Citizens, consumers and the citizen-consumer: articulating the interests at stake in media and communications regulation. Discourse and communication*, 1 (1). pp. 85-111. ISSN 1750-4821. OFCOM has developed the notion of a ‘citizen-consumer’, who has both individual and collective needs.

<sup>3</sup> See, for example, Australian Press Council response to Australian government discussion paper ‘*Meeting the Digital Challenge: Reforming Australia’s media in the digital age*’ (2006), p 2. Available at [http://www.presscouncil.org.au/pcsites/fop/fop\\_subs/cross06.html](http://www.presscouncil.org.au/pcsites/fop/fop_subs/cross06.html).

<sup>4</sup> *Broadcasting Services Act 1992* (Cth.).

<sup>5</sup> <http://www.tunein.com/>.

3.5 Clearly, there is potential for greater diversity in voices, views and information in a converging environment. The impacts are already being felt, for example the rise of citizen-based journalism on *Twitter*, which has been a vehicle for the promotion of discussion and debate in emerging democracies.<sup>6</sup> However, the influence of established content providers is still significant because of their control over popular distribution channels. Television, radio and newspapers are still the most ubiquitous media. Furthermore, new media outlets in many cases lack the resources and professionalism of established providers.

3.6 The CLC considers that regulation to ensure diversity of media ownership and content will continue to be important.

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

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4.1 Regulation must continue to serve the public interest.

4.2 A good policy framework which delivers on this principle would be one which restrains the development of over-concentration and monopolies, achieving competitive market outcomes.

4.3 In broadcasting and media since the 1990s, Australia has seen deregulation deliver concentration in the media, with the “restraining” policies being the only force preserving competition and protecting the public against the emergence of media monopolies. This historical experience should to be remembered in developing a new regulatory and policy framework for the convergent era.

4.4 Regulation is required to ensure that creativity, innovation and competition are promoted while genuinely protecting the interests of the public.

#### **5. Local and Australian content**

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5.1 The discussion below addresses **Principle 3**: Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity and **Principle 4**: Australians should have access to news and information of relevance to their local community.

5.2 The CLC considers that there is a need to support the ongoing production and distribution of local and Australian content. Concerns regarding the availability of local content have occupied communications regulators since the inception of the BSA. These are likely to be magnified in a converging environment, where global content is more readily available than ever before.

5.3 The *Background Paper* notes that Australians are consuming online content at an ever increasing rate. A significant proportion of this traffic is directed to international content farms. For example, *Youtube* is the third most visited site in Australia (2010).<sup>7</sup> In these content farms, non-local and local content sit side by side. There are no localism requirements in the online space.

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<sup>6</sup> See, for example, the impact in Egypt: ‘Egypt, Twitter and the rise of the watchdog crowd’, 11/2/2011, available at [http://news.cnet.com/8301-13577\\_3-20031600-36.html](http://news.cnet.com/8301-13577_3-20031600-36.html).

<sup>7</sup> DBCDE, Convergence Review- Background Paper, Dec 2010 at p 14.

- 5.4 Globalisation has brought into question the notion of local identity. Citizens are increasingly disconnected from their local communities, as they connect with the global community and form communities of interest. Culturally, we have seen a marked shift to a uniformed identity, dictated by global information flows and international commerce. Media companies have responded in turn by:
- encouraging foreign investment;
  - centralising operations to take advantage of economies of scale;
  - diversifying across borders and across media due to audience fragmentation.
- 5.5 As noted by the Review, there is little financial incentive to produce local content when programs can be outsourced.<sup>8</sup> This applies equally to Australian entertainment content as well as local news and information, which require significant investment, such as production houses and news bureaux. In their submissions to the *Regional Radio Review* (April 2010), commercial radio licensees continued to emphasise the impact of local content obligations on profitability.<sup>9</sup>
- 5.6 The CLC submits that, in spite of these challenges, there is definite value in support for local content to foster national and local identities. The global citizen equally engages in local, national and global issues. The nature of localism, by extension, has moved beyond the geographic, but does not exclude it. Policy should continue to encourage Australian content and local news and information.
- 5.7 The CLC supports the ongoing review of such policies such as Australian content requirements for commercial television and local content provisions for regional radio. A detailed analysis of the operation of these policies is outside the scope of this submission.
- 5.8 New media has the potential to enhance local content by offering extended coverage of local news events or hosting unique content. In this way, convergence has a positive effect on local identity. For example, the ABC's *iView* platform offers all of its locally produced programming online, together with exclusive content, or extended versions of its programmes.

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

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- 6.1 CLC considers that it is important to ensure that regulation plays a role in maintaining community standards and values.
- 6.2 Global content is widely available to Australian audiences through the Internet. This content is likely to influence the Australian public. S 4(1) of the BSA states that different levels of regulatory control be applied according to the degree of influence that services are able to exert in shaping community

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<sup>8</sup> Framing Paper at p 14.

<sup>9</sup> See Commercial Radio Australia: Submission to Local Content Requirements for Regional Commercial Radio, available at [http://www.dbcde.gov.au/data/assets/pdf\\_file/0007/127789/Commercial\\_Radio\\_Australia\\_CRA\\_March\\_2010.pdf](http://www.dbcde.gov.au/data/assets/pdf_file/0007/127789/Commercial_Radio_Australia_CRA_March_2010.pdf).

views in Australia.<sup>10</sup> Regulation should be directed at both traditional and new communications and media services.

- 6.3 Global content may not reflect the prevalent community standards, views and expectations in Australia, posing challenges for regulators.
  - 6.4 Copyright law is not consistent across jurisdictions. There has been an increase in piracy online, some sites such as *thepiratebay.org* are hosted in 'pirate friendly' countries but allow global access. The problem is compounded further by a market failure in online access to content. Legitimate content channels such as *iTunes* provide less content than illegitimate channels in many cases.<sup>11</sup> Protection of copyright is the economic basis for Australian creative industries and innovation.
  - 6.5 Innovative policies are needed to ensure that copyright law and practice functions effectively in a networked telecommunications environment to protect creativity and ensure access to content.
  - 6.6 Regulation should also be responsive to changing community standards, views and expectations and adaptable to new media platforms.
  - 6.7 It is important that regulation, including classification of content, is at arms' length from government and technology neutral, applying consistently across media and platforms.
- 7. Principle 6: Australians should have access to the broadest range of content across platforms and services as possible**
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- 7.1 Generally, providing access to a wide variety of content that is available through multiple distribution channels is in the public interest. This is important in ensuring a diversity of voices, views and information, as discussed above at Principle 1. It is also important for a well functioning communications market.

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

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- 8.1 The Review notes that transparency will become vital in the converging media environment as consumers are able to access content and services on a variety of platforms and devices.<sup>12</sup> With choice comes complexity. There is an evident shift towards the bundling of telecommunications services, for example Internet and wireline telephony. A multi-tiered price structure is required to discriminate between consumers who subscribe to both services and those who do not. More complex pricing structures are likely under the NBN, where services are delivered via a common architecture.<sup>13</sup>

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<sup>10</sup> *Broadcasting Services Act 1992* (Cth.) s 4(1).

<sup>11</sup> Many new movies, for example, are distributed illegally before or immediately after release.

<sup>12</sup> Framing Paper, p 17.

<sup>13</sup> The NBN could carry Internet, telephony and broadcasting services, particularly if bandwidth is increased to 1 Gbps.

8.2 Consumers will need to be provided with clear information so that they can make choices in their interests. Stakeholders should continue to work together to develop sound regulatory principles in this area. Standards should be developed to ensure consumers are treated fairly.

8.3 The CLC welcomes the approach taken by the ACMA's *Reconnecting the Customer* inquiry, which seeks to examine the causes of consumer dissatisfaction with telecommunications providers.<sup>14</sup> The inquiry found that the level of dissatisfaction amongst consumers is high, notably:

*Respondents complained that they often received contrary and inconsistent advice about services. The large number of plans and products available, and the confusing way in which they are promoted, makes it hard for consumers to understand the service they are buying.*<sup>15</sup>

8.4 Consumers cannot make informed decisions in such an environment. The knowledge gap between service providers and consumers can be further exploited in the absence of well defined terms and conditions. For example, phenomena such as 'bill shock' arise if consumers do not understand the charging arrangements for their services, and if consumers do not receive timely information. If information is transparent, sources of confusion are minimised and the knowledge gap is closed.

8.5 As the Framing Paper identifies, transparency is important for a well-functioning market.<sup>16</sup> When consumers are able to make informed decisions, they are empowered. Regulation that seeks to ensure maximum transparency serves the public interest.

**9. 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**

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9.1 The CLC supports the broad approach taken to spectrum management proposed by this principle. By emphasising overall public benefit, policy makers must explicitly take into account the public interest as well as economic value, as noted by the Framing Paper.<sup>17</sup> Ideally, spectrum should be allocated to its highest value use; this ensures an efficient allocation as is required by section 3 (a) of the Radiocommunications Act.<sup>18</sup> Public interest theories of spectrum management are consistent with this regulatory object as 'efficiency' relates to economic efficiency and welfare efficiency. The ACMA

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<sup>14</sup> ACMA, *Reconnecting the Customer*, information available at [http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD..PC/1001/pc=PC\\_312222](http://www.acma.gov.au/scripts/nc.dll?WEB/STANDARD..PC/1001/pc=PC_312222).

<sup>15</sup> ACMA, *Reconnecting the Customer*, Overview at p 1, available at [http://www.acma.gov.au/webwr/\\_assets/main/lib310013/reconnecting\\_the\\_customer-overview.pdf](http://www.acma.gov.au/webwr/_assets/main/lib310013/reconnecting_the_customer-overview.pdf).

<sup>16</sup> Framing Paper, p 16.

<sup>17</sup> Framing Paper, p 17.

<sup>18</sup> *Radiocommunications Act 1992* (Cth.) s 3 (a).



recognises this approach through the implementation of its 'Total Welfare Standard'.<sup>19</sup> The concept is broader than a consumer /producer welfare standard, allowing the broader public interest to be taken into account.

- 9.2 We note that the ACMA has engaged in extensive consultation with the public regarding the 'digital dividend' spectrum.<sup>20</sup> The inquiry has attracted submissions from a wide range of stakeholders across the telecommunications industry, broadcasters, public interest organisations and emergency services. It is likely that the 700 MHz allocation will be used for mobile telephony and/or and wireless broadband.<sup>21</sup> We recognise that this is, in part, due to the need to harmonise spectrum allocation in accordance with ITU standards. It is important, however, that no one group of stakeholders prevail over others. The overall public benefit, as expressed through the Total Welfare Standard, should be the sole determinant informing the allocation process.
- 9.3 A mix of allocation processes should continue to be used in accordance with likely outcomes. For example, if it is clear that the overall public benefit will be maximised by allocating a piece of spectrum to mobile broadband, then auctions are likely to result in the most efficient outcome, as telecommunications companies who can deliver these services compete on price. Conversely, different allocation procedures (such as first come, first served) are required for initiatives such as research and community services.
- 9.4 Assessing 'overall public benefit' is likely to be a movable feast, particularly in a converging environment. New products and services are being developed at an ever increasing rate, such is the progress of technological change. Consider a revolutionary medical device which must operate in a narrow frequency range. Regulators should ensure that spectrum be quickly reallocated to serve this important public interest. To this end, the ACMA should continue to review spectrum management policy in accordance with its annual *Five Year Spectrum Outlook*<sup>22</sup>, particularly emphasising the place of new and converging technologies. The CLC is also encouraged by the implementation of forward looking initiatives, such as the ACMA's '*Towards 2020: future spectrum requirements for mobile broadband*' inquiry.<sup>23</sup>

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<sup>19</sup> See '*Regulating In The Public Interest*: Speech by Rebecca Burdon, Principal Economist, ACMA ACE Telecommunications Summit, 27-28 August 2008, Sydney, available at <http://www.apo.org.au/research/regulating-public-interest-0>.

<sup>20</sup> The 700 MHz and 2.5 GHz bands.

<sup>21</sup> 'ACMA lays down timeline for 700 MHz and 2.5 GHz spectrum reallocation', 27/5/2011, available at [http://www.arnnet.com.au/article/388150/acma\\_lays\\_down\\_timeline\\_700mhz\\_2\\_5ghz\\_spectrum\\_reallocation/](http://www.arnnet.com.au/article/388150/acma_lays_down_timeline_700mhz_2_5ghz_spectrum_reallocation/).

<sup>22</sup> 'Five-year spectrum outlook', available at: [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_312466](http://www.acma.gov.au/WEB/STANDARD/pc=PC_312466).

<sup>23</sup> '*Towards 2020: future spectrum requirements for mobile broadband*' [http://www.acma.gov.au/WEB/STANDARD/pc=PC\\_312514](http://www.acma.gov.au/WEB/STANDARD/pc=PC_312514).

- 9.5 The CLC will not comment here on particular policy initiatives regarding spectrum management. It may be useful, however, to set aside an innovation reserve (such as that proposed by EU research)<sup>24</sup> to assist in procuring new technologies for future allocation.

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<sup>24</sup> *Exploiting the Digital Dividend- A European Approach*, Report for the European Commission, produced by Analysis Mason, August 2009, available at [http://www.analysismason.com/EC\\_digital\\_dividend\\_study](http://www.analysismason.com/EC_digital_dividend_study).



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