Communications Law Centre, UTS

Submission to Convergence Review Discussion Papers

31/10/2011
Executive Summary

- In a converging environment, the regulatory and policy framework for media and communications should apply consistently across platforms and services. We believe that normative, technology-neutral regulation is desirable, but recognise that in practice some regulation will need to be tailored to deliver specific outcomes.

- Regulation is required to protect consumer interests and to promote and provide innovation while genuinely protecting the interests of the public. Although platforms and services are being reconfigured, these concepts continue to be universally important.

- It is likely that there will be a need for regulation of content, service providers and infrastructure. There are particular public interest obligations attached to content regulation.

- Regulatory parity should be observed between similarly situated operators.

- Entities that perform specialised functions, or use public resources, should require licenses to ensure that they serve the public interest. We recognise that licensing may need to extend to broadcast like services.

- Normative regulation in the public interest will continue to be the foundation for regulation as communications and media services evolve. Some content and services should continue to be regulated more than others according to the degree of influence principle.

- Co-operation between government, regulatory bodies, industry and the public is vital in a converging environment. Roles for international standards, mutual assistance and education are envisaged to complement regulation.

- Co-regulation is preferable, in most circumstances, to direct regulation. Where direct regulation is required, principles-based regulation should be used.

- It may be the case that in a network digital communications environment that there are so many disparate sources of content of uncertain provenance, authority and quality that citizens will come to rely more on mainstream branded media which may come to be seen as more authoritative. Consequently media ownership measures would continue to be important.

- The CLC submits that there is a strong case, in the medium to long term, for broadening the scope of media ownership regulation as concepts of influence and reach change. A public interest test should be introduced for flexibility, with the public interest at its core.

- Australian content should continue to be produced in a converging environment. Subsidies would provide greater incentives for the production of Australian content.

- Extending local content from radio and television to emerging media platforms should be encouraged where possible. However, local content rules for radio and television should not be abolished at this time.

- Enforcement of the Codes of Practice must be strengthened. For the Codes to be effective, there must be Code monitoring, assessments of compliance and sanctions for non compliance.

- The establishment of a National Content Network (NCN) or registry as a platform for content and rights transactions would provide a user friendly way for consumers to access content lawfully online.
Layering

The CLC recognises that a network layer model provides a sound conceptual framework for regulation in a converging environment. However, it is likely that there will be a need for regulation of content, service providers and infrastructure. There are particular public interest obligations attached to content regulation. The content/carriage delineation can be expressed as a two-layer model. The MIC model, reproduced in ACMA (2011) is instructive. The delineation does not revert to a simple distinction between, say, ‘broadcasting’ and ‘telecommunications’. When applying the model, regulators should assess what a service actually provides, rather than referring to its legacy status. For example, online radio does not yet fall under the purview of the Broadcasting Services Act (BSA), because Internet streaming is expressly excluded from the definition of a broadcasting service. However, if the Internet becomes the primary mode of delivery for radio services in the future, online radio stations will be regulated as content providers. The flexibility of the two-layer content/carriage model in a converged environment does not rely on sector specific service definitions or discrete technologies, but requires a functional assessment of what a service provides.

The ECRF (EU Communications Regulatory Framework) is a content/carriage model that defines ‘electronic communications network’, ‘electronic communications service’ and ‘information society service’ within the ambit of carriage regulation. Content is regulated at the national level. Rather than apply regulation based on specific service definitions, the ECRF establishes a process, based on market analysis, for determining whether to apply (or remove) regulation. Where content and carriage are intertwined, the Framework Directive takes such links into account without prejudice to the model, particularly with respect to media diversity, cultural diversity and consumer protection.

Regulatory parity should be observed between similar situated operators. Parity is technology-neutral in the two-layer model. For example, if an IPTV service and a traditional television service both provide childrens’ content; they can be regulated on the same content layer as it is the fundamental service which matters.

The content/carriage model is somewhat less complex than a multi-layered network layer model, and is an established concept in broadcasting and telecommunications regulation. As Noam (2008) puts it, ‘Institutions cannot change at the rate of Moore’s law for semiconductor technology’.

Licensing

The CLC agrees with the stated principle that there should be a clear and significant public purpose for requiring a licence to communicate. Entities that perform specialised functions, or use public resources, should require

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5 Ibid p. 17.
6 Ibid p. 19.
licenses to ensure that they serve the public interest. Examples include telecommunications carriers and broadcasting services.

We recognise that licensing may need to extend to broadcast like services. For example, IPTV providers currently do not require a licence; anybody can start up an IPTV service. However, suppose some television services migrated to IPTV through the NBN. In this scenario, IPTV providers become (in a sense) broadcasters, and should attract greater regulation because of the power and responsibility that comes with being a broadcaster or broadcast like service. More generally, licensing categories (such as a broadcasting category of service) are likely to become less technologically defined.

Geographic license areas should be retained in some form to allow for the provision of local content, particularly with respect to regional commercial broadcast and broadcast like licences. In the short to medium term, licence areas are likely to remain critical to media ownership regulation. A public interest test for media ownership or control may be more effective when dealing with media services with no defined geographic boundary. Licence areas can be adapted to suit the various requirements of different media services, including designating an Australia wide licence area, as has been done for certain broadcasting services in the past. Such arrangements are likely to be suitable for emerging media services.

**Regulation**

Normative regulation in the public interest will continue to be the foundation for regulation as communications and media services evolve.

We do not support the principle that regulation should only be applied where a case for action exists; if that means that there is no room for a priori normative standards and values in the public interest.

Although normative, technology-neutral regulation is desirable, some content and services should continue to be regulated more than others according to the degree of influence principle, BSA s 4(1).

Co-operation between government, regulatory bodies, industry and the public is vital in a converging environment. As Crawford and Lumby (2011) suggest, reliance on one stakeholder group is insufficient due to the interconnectedness of the new media environment. Stakeholders must be aware of each others’ place in the regulatory sphere.

User generated content, for example, has traditionally fallen outside the bounds of traditional media regulation. However, as this content becomes more influential it is likely to attract more regulation. In introducing regulation to new content and services, the government must not unduly restrict the publics’ freedom of expression and freedom to communicate. Ensuring online content meets community standards is a desirable regulatory goal but policies must be drafted so that they do not unduly limit communications.

**Standards**

International instruments, standards, interoperability standards and co-operation will become more important in a borderless network communications environment operating across jurisdictions.

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5 Some s. 40 (BSA) licences are Australia-wide. These services are delivered by satellite.

6 ACMA Optimal conditions for effective self and co-regulatory arrangements (June 2010) as cited in Discussion Paper No. 1 at p. 19.

Mutual assistance

Mutual assistance arrangements and cooperative schemes, such as those contained in the Convention on Cybercrime\(^\text{12}\) are valuable.

Geo Blocking

Geo blocking is a negative response to consumer demand in a global e-commerce market. However licensing which facilitates access, including geographic differential pricing should be supported.

Education

Education plays an important role in informing and lifting the policy debate among stakeholders. Well drafted (non-enforceable) guidelines can also prevent breaches from occurring, and they can play an important role in communicating regulatory goals to industry and the public.\(^\text{13}\) This in turn reduces regulatory burden; important in a converging environment where stakeholders may be physically remote from one another. However, education is no substitute for active regulatory intervention in some areas. "Name and shame" initiatives have failed to address breaches of copyright online, as much of the public sees this behaviour as normal.

Co-regulation

Co-regulation is preferable, in most circumstances, to direct regulation or self regulation. The spectrum scarcity rationale for interventionist (direct) regulation is diminishing as new media services develop. Since regulatory responsibility falls on numerous stakeholders, it follows that each stakeholder should participate in the regulatory process.

There are however some cases where either direct regulation or pure self regulation may be more appropriate. For example, the Commercial Radio Inquiry\(^\text{14}\) exposed fundamental shortcomings in enforcing the Commercial Radio Codes of Practice (the Codes) in dealing with sponsorship and advertising on commercial talkback radio programs. Where self regulation or co-regulation is demonstrably ineffective then considerations must be given to direct regulation.

Unequivocally, regulation must serve the public interest, which should continue to be the main point of reference for decision making.

Where direct regulation is required, principles-based regulation should be used (in the majority of situations) for the sake of flexibility. Retaining a wide range of enforcement options is critical for principles-based regulation. Regulatory precedents will be important for subsequent decision making, particularly with respect to new media services which have been untested under current regulatory frameworks.

The CLC stresses the importance of an appropriate scheme of enforcement for the Codes of Practice in particular.

“Black-letter law” should only be used where specific standards of behaviour (such as quantitative limits) are necessary to achieve regulatory goals. A pertinent example are local content requirements for commercial radio, which require a set number of hours of local content/week to ensure that sufficient local content is produced. Vulnerable citizens such as children will continue to require carefully targeted regulatory solutions, such as the Children’s Television Standards and the National Classification Scheme. Areas such as media ownership, which


\(^{13}\) ACMA’s Privacy Guidelines for Broadcasters are an example of an education initiative directed at the broadcasting industry. If broadcasters are familiar with the guidelines, they are less likely to breach the Codes of Practice, resulting in less intervention.

have historically been regulated by specific regulation, may benefit from the increased flexibility that principles-based regulation brings. For instance, certain mergers may be better assessed using a public interest test based on developed principles. A case for a public-interest test is presented later in our submission.

**Paper 2: Media Diversity, Competition and Market Structure**

**Anti-Siphoning**

The CLC believes that an anti-siphoning regime will continue to play a meaningful role in ensuring equitable access to sport and other events of national significance. However, regulation in this area must ensure it keeps pace with technological developments. For example, up until 2011, commercial television networks were unable to premiere listed events on their digital multichannels, which had the effect of restricting coverage in certain situations.  

We note that the proposed changes to the anti-siphoning regime address this problem.

**Addressing media diversity**

The appropriate policy response is one that promotes a diversity of ‘voices’ or opinion. Without this diversity of opinion, participatory democracy is significantly hindered.

Media ownership regulation has been criticised as a poor proxy for diversity of opinion, yet it probably remains the most effective regulatory tool. We should not, for example, appoint a regulator to examine each program, as the media must remain independent, free to produce its own output. A less extreme articulation of this approach was seen in the US Fairness Doctrine (ultimately repealed on freedom of speech grounds).

The CLC reiterates its position in its submission to the Framing Paper. The influence of traditional content providers is still significant because of their control over popular, mainstream distribution channels. We therefore consider measures to ensure diversity of media ownership important. We also recognise the need to review media ownership regulation as new media increases its influence. Geographical reach (and indeed use) is a poor proxy for influence in the new media environment.

It may be the case that in a network digital communications environment that there are so many disparate sources of content of uncertain provenance, authority and quality that citizens will come to rely more on mainstream branded media which may come to be seen as more authoritative. Consequently media ownership measures would continue to be important.

**Preferred regulatory approach**

The CLC submits that there is a strong case, in the medium to long term, for broadening the scope of media ownership regulation as concepts of influence and reach change. New regulations would measure influence across all media. Special attention needs to be given, in the short to medium term, to traditional distribution channels and content providers. Media ownership regulation framework should be retained in the short term. The new media market is not yet mature. Any new regulation should be introduced progressively to these new services so as not to stifle innovation. As new media services become more authoritative and influential they too should come under media ownership regulation.

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15 For example, a network may wish to show an AFL game at the same time as an NRL game. Since both codes are on the anti-siphoning list, only one can be shown live on the main channel. Temporary exemptions were given for the 2011 NRL/AFL Finals.
16 See, for example, ‘Content, Consolidation And Clout: How will regional Australia be affected by media ownership changes?’, Communications Law Centre, 2006, UNSW Press at pp 19-21.
17 See, for example, 26 Hastings L.J. 659 (1974-1975) Fairness Doctrine: A Double Standard for Electronic and Print Media, The; Barrow, Roscoe L.
18 Communications Law Centre, Submission no. 63, Convergence Review Framing Paper June 2011.
19 Particularly with respect to IPTV and streaming media, there are still barriers to entry in the Australian market such as download caps. In addition, providers of IPTV must compete with established content providers.
Quantitative measures such as the number of voices test should be retained where appropriate, however referencing a licence area becomes increasingly irrelevant once new media is considered. As the Discussion Paper notes, current numeric tests are being challenged and potentially bypassed by online delivery.\(^\text{20}\)

A public interest test should be included as a means of introducing flexibility. Rules-based regulation is likely to be ill suited to the converging media environment. Media ownership regulation is, at its heart, a public interest issue. The public interest should be the primary criterion for regulation. The public interest test should go beyond an assessment of anti-competitive behaviour, taking into account all likely impacts of ownership on access to diversity of opinion.

The test should operate in conjunction with quantitative rules when required. As stated, existing numerical tests may be impractical for new media. A qualitative public interest test may be the only way to assess the impact of these mergers and acquisitions.

The test should apply when significant public interest issues arise as in the UK. In advocating this principle the CLC recognises the importance of avoiding unnecessary regulatory burdens in this area.

Public interest criteria should include all relevant objectives, with the preservation of diversity at its core. Criteria such as commercial viability and potential for innovation should also be considered where appropriate. We note that the general public interest criteria used in the UK (section 58 of the Enterprise Act)\(^\text{21}\) are similar to some of the objects of the BSA.\(^\text{22}\) The objects in the BSA operate as high level guidelines only; they are not rules. Regulation should not get caught up in defining terms such as “plurality” or “diversity”; rather it should continue to refer to the regulatory goals.

The likely impact on diversity should be assessed according to general guidelines developed by the ACMA. Key factors may include content, audience, platform, control and future developments, as used by Ofcom.\(^\text{23}\)

It is important that the test itself is assessed by an independent body. The decision to apply the public interest test must be free from political interference.

**Audience reach rule**

The CLC submits that the audience reach rule will continue to remain important for protecting diversity of ownership with respect to commercial television services. Media ownership regulation continues to be important. Any policy that is likely to lead to a decrease in diversity of ownership should be discouraged, particularly given Australia’s high level of media concentration. Given that commercial television remains a primary source of news and information in the community, removing the rule would not be in the public interest. The Discussion Paper notes that there could be a resistance to providing local content as owners of television stations consolidate, despite the local content rules.\(^\text{24}\) The impact may be similar to aggregation, where local content was substantially reduced.\(^\text{25}\)

General competition laws are insufficient to address media diversity concerns. A pure competition analysis is likely to overlook important non-economic criteria when assessing media mergers.\(^\text{26}\)

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\(^{21}\) Enterprise Act 2002 (UK).

\(^{22}\) E.g. s 3 (c) - to encourage diversity in control of the more influential broadcasting services.

\(^{23}\) Ofcom, Invitation to comment for public interest test on the anticipated acquisition of British Sky Broadcasting plc by News Corporation, 5 November 2010, as cited in Discussion Paper 2, p. 32.

\(^{24}\) Discussion Paper 2 at p. 21.

\(^{25}\) See Communications Law Centre (2006) at p. 46.

\(^{26}\) Discussion Paper 2 at p. 21.
**NBN and content diversity**

Download caps represent an artificial constraint on consumption, particularly with respect to high definition television services streamed over the Internet. Many ISPs do not charge excess fees, but rather slow down or “shape” connection speed, when the download cap is exceeded by a customer.\(^{27}\) However, this is still undesirable as a slower connection speed (less than 1 Mb/s) renders streaming television content unwatchable.\(^{28}\) A practical example is given in CLC (2009) with respect to streaming sports coverage.\(^{29}\)

Given that connection speeds of up to 100 Mb/s are possible under the NBN, there will be ample scope for high definition television services. All content should be treated neutrally so that consumers are not excluded from new services. Artificial constraints such as download caps will severely limit the effectiveness of the NBN in delivering diverse content.

**Paper 4: Australian and Local Content**

The CLC considers that there is a need to support the ongoing production and distribution of local and Australian content. This policy objective takes on increasing importance in a converging environment, where global content is more readily available than ever before. We also recognise the potential for new media platforms to enhance local content production.\(^{30}\)

**Australian content quotas**

As the Discussion Paper notes\(^{31}\), new content forms, particularly social media, present new opportunities for local content production. The risks in producing local content online are much lower than that for film, television and radio. Furthermore, anyone can create content that is universally accessible.

It is desirable to include new content platforms in the regulatory framework for Australian content, particularly broadcast like services. Currently, there are no Australian content requirements for digital multichannels. As a result, the total hours of foreign content across all free to air networks more than doubled between 2008 and 2011 (154%).\(^{32}\) This has led to a “watering down” of local content across free-to-air programming.\(^{33}\) Online video, too, is experiencing rapid growth, particularly “catch up” TV services\(^{34}\), long form commercial content, IPTV services and short form user generated content hosted on sites such as YouTube\(^{35}\) are popular. It is reasonable to expect that these media will become ever more influential as the NBN enables high definition streaming video to the home.

Quotas in a new communications environment produce unintended consequences. For example, broadcast and broadcast like services may not produce quality Australian content under the quota system as they merely look to meet their quota obligations. A subsidy scheme is more likely to provide an incentive to produce quality Australian content.

**Production of drama and children’s content**

Independent production and commercially riskier forms of drama should continue to be supported by regulation, with an increasing role for subsidies. A mix of initiatives may be used, such as the Producer Offset, direct funding and private equity investment. This approach involves all stakeholders in the regulatory sphere.

\(^{27}\) See, for example, iiNet, ‘All about quota and shaping’, [https://iihelp.iinet.net.au/All_about_quota_and_shaping](https://iihelp.iinet.net.au/All_about_quota_and_shaping).

\(^{28}\) ABC’s iView service requires a connection speed of at least 1.1 Mbps for stable viewing, see [http://www.abc.net.au/iview/](http://www.abc.net.au/iview/).

\(^{29}\) Communications Law Centre, Submission No. 77, Sport on Television Review, DBCDE, p. 1.

\(^{30}\) Communications Law Centre, Submission to Convergence Review Framing Paper at p. 4.

\(^{31}\) DBCDE, Discussion Paper 4: Australian and Local Content at p. 10.


\(^{33}\) Ibid.

\(^{34}\) Ibid at p. 56.

\(^{35}\) Ibid at p. 8.
Children represent a specialised subset of the public, thus they continue to require carefully tailored regulatory solutions. A quota for children’s content is still desirable, but can be a tradeable obligation as the number of media sources increases. Since children’s programming represents a specialist type of content, it may be best provided by specialist operators. There are already several television channels dedicated to children’s programming, such as ABC3 and the BBC’s “CBeebies”, which are complemented by online resources.36

**Local content on broadcasting services**

The CLC submits that radio, in particular, is important for local content production. Local commercial radio continues to have a profound influence on the lives of regional citizens, and proposals to ‘water down’ obligations have been met with resistance.37 Radio continues to be the most accessible medium for the regional public, who are often remote from centres of power. Despite improvements in communications technology, the ‘digital divide’ between regional and metropolitan areas remains evident. Although the delivery mechanism may change, radio and television remain the most immediate (and hence effective) media to disseminate information in dispersed regional communities. Therefore, regulation must continue to support local content on radio and television (and radio and television like) services. The CLC does not support the removal of local content rules at this time.

Extending local content from radio and television to emerging media platforms should be encouraged where possible. For example, some regional radio stations complement their local news coverage with additional bulletins online.38 These broadcasters should be rewarded for such efforts, perhaps by way of discounted licence fees or another appropriate incentive scheme. Such financial incentives will make compliance with the local content rules less burdensome for radio and television services. Cross platform collaboration initiatives, particularly schemes that involve regional citizens in the production of content, should also be included. Other user generated content should not be subject to local content rules.

Tradeable credits are an economically attractive incentive scheme for local content production. However, this approach faces a problem in the Australian context; there are not enough providers of local content to establish a market in credits. Many commercial regional radio markets, for example, are duopolies.39 Because the number of providers of local content in regional Australia is already limited, it would be unwise at this time to concentrate resources. Indeed, resource concentration already occurs without a system of tradeable credits.

**Paper 5: Community Standards**

**Enforcement over the Codes must be strengthened**

Co-regulation cannot function effectively unless there are incentives to comply with the Codes. There must be Code monitoring, assessments of compliance and sanctions for non compliance. As noted in the Discussion Paper, broadcasters are the initial point of contact for complaints handling.40

A stronger system of compliance must be cultivated by the real threat of enforcement action. Ofcoms’ system of direct complaints handling provides a useful way forward. We note that if a code is breached ‘intentionally, repeatedly or in a serious manner’, direct statutory sanctions can be imposed.41 In a sense, the broadcaster then forfeits the right to co-regulation when they commit egregious breaches. They have a meaningful incentive to comply with their (industry developed)42 codes, rather than face the ‘full weight’ of black-letter law.

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36 See [http://www.bbc.co.uk/cbeebies/](http://www.bbc.co.uk/cbeebies/).
38 See [http://audioboo.fm/users/88118/’2EC’](http://audioboo.fm/users/88118/’2EC’) for an example. 2EC is a commercial radio station that serves the far south coast of NSW.
39 Two radio stations, both owned by the same company.
40 DBCDE, Discussion Paper 5: Community Standards at p. 8.
42 In consultation with the ACMA.
In the Australian context, the cash-for-comment issue represented a breach of the Code that would objectively satisfy the Ofcom test above. On February 2000 the Australian Broadcasting Authority (ABA) found that 2UE breached the Commercial Radio Codes of Practice no less than 90 occasions.  

The cash-for-comment issue was addressed by the imposition of the Commercial Radio Standards and licence conditions. It could have been resolved far more quickly if the initial complaint was taken directly to the ACMA and subject to a direct statutory sanction. The fact that the public relied on Media Watch to bring the issue to light in 1999 demonstrates the shortcomings of an indirect complaints system.

Direct statutory sanctions for serious Code breaches applied by the decisions of the Federal Court should operate alongside other less punitive enforcement options such as enforceable undertakings and remedial directions. These sanctions should operate under the BSA (or equivalent) and subject to civil penalty provisions.

Content of Codes of practice

Since the Codes are based on high-level principles, it follows that regulators have some leeway with interpretation and can adapt them as required to fit changing community expectations. The CLC submits that although the Codes are designed to prevailing community standards and expectations, there has been insufficient monitoring, compliance mechanisms and enforcement.

We have argued that content regulation should be tailored to deliver specific outcomes. Regulation should not look to homogenise codes between media for the sake of regulatory parity. Parity should apply between similarly situated operators as in the 2-layer model discussed in the CLC response to Discussion Paper 1.

The CLC has proposed an ex-ante system of regulation for product placement and integrated advertising. In the alternative, an enhanced system of disclosure should apply. Technological innovations will bring about new opportunities for covert advertising. It may be necessary to extend regulation to new media if these services become influential.

Regulatory system for community standards

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

Regulatory density should be determined according to the degree of influence principle(s 4(1) BSA). This is especially important when regulating to maintain community standards.

The Codes of Practice will become an increasingly important regulatory tool as systems of co-regulation become the dominant feature of the converged media environment. We have argued previously that co-regulation, rather than direct regulation, is better equipped to deal with convergence as it involves all stakeholders. The Codes should be built on principles-based regulation and must be interpreted according to prevailing community standards.

However, direct regulation is required in the public interest where vulnerable members of the public are concerned. The Children’s Television Standards, for example, should be maintained to ensure that commercial interests do not outweigh the interests of children.

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43 ABA Update March 2000: ‘ABA proposes licence conditions on 2UE Sydney p 3, as quoted in Submission of the Communications Law Centre, ACMA v Radio 2UE Sydney Pty Ltd (No 2) [2009] FCA 754) at p. 12.
44 Communications Law Centre 1999 ‘Are Listeners Entitled to Know?’ Communications Update, Issue 161, p.10.
45 s 205 V BSA.
46 s 141 BSA.
48 A good example is Google AdSense (www.google.com.au/adsense/) which delivers discrete targeted advertising while the user browses.
Incentive scheme for copyright regulation: the National Content Network

The establishment of a National Content Network (NCN) would provide a user friendly way for consumers to access content lawfully online. An NCN that operated as a works registry and a rights exchange for content which also gave access to content and rights across media would create a social infrastructure for sustainable lawful access to content online.

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