



## Final submission to the Convergence Review

4 November 2011

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AUSTRALIAN SUBSCRIPTION TELEVISION & RADIO ASSOCIATION



## Executive Summary

- In its Emerging Issues Paper, the Convergence Review Committee expressed the view that it is likely that revolutionary change to the existing policy framework will be needed to respond to convergence. ASTRA would agree that a transition to a fully converged regulatory environment for media and communications will require a significant realignment of some of the underlying regulatory principles and rationales, particularly those that have underpinned broadcasting in Australia.
- Convergence is enabled by technological development, but the benefits of convergence will be driven by the market and competition. An increasingly competitive media and communications environment will encourage the development of a more diverse range of new content and innovative services for consumers.
- ASTRA submits 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.

## Subscription TV in Australia

- Australia has one of the most heavily regulated broadcast sectors in the world with subscription TV (STV) operating in an increasingly competitive environment. Without the regulatory benefits of commercial free-to-air (FTA) broadcasters, STV subscriptions have had solid growth over the last 6 years. Growth has recently been adversely affected by the rise in competition from Freeview's multichannels and other sources of competition, as well as real, on-going consumer caution.
- 7.2 million individual Australians or 34% of the Australian population have access to STV.
- Since its inception in 1995, STV has invested strongly in technological innovation, infrastructure and production, with ASTRA members providing viewer services such as video On-Demand, Australia's most comprehensive high definition offering, 3D television, standardised parental lock technology, and online and mobile television.
- The direct economic contribution of STV to the Australian economy in 2009-10 is estimated at approximately \$700 million, and over \$5 billion since its inception. In 2010, the STV sector employed 7,410 people (including platform outsourcing).
- In 2010, STV platforms and channels invested \$578.4 million into Australian content, an increase from \$541.4 million in 2009. This investment contributed an estimated \$223 million to the Australian economy.

## Layers, Licensing and Regulation

- ASTRA supports a starting principle of regulatory consistency across services and platforms, where economic and/or competitive protections afforded to particular sectors of the industry should be removed unless a clear public policy objective in maintaining these protections can be identified.
- However, where a particular type of service is given specific regulatory and other privileges then those privileges should come with specific social and cultural obligations beyond what might apply to other service providers. Similarly, where the nature of a service, and its near universal reach (through privileged access to scarce public spectrum), means that it is likely to have ongoing influence beyond that of other services, there is a case for it to be subject to regulatory obligations that are commensurate with its influence. ASTRA therefore recognises that there is likely to be a continuing compelling public interest rationale for some level of differentiated regulatory obligations on different parts of the broadcast media and communications industry.

### *Government support of FTA services*

- Commercial FTA broadcasters occupy a 'special' place in the Australian media landscape, enjoying a continuing significant degree of influence through universal penetration into Australian homes, and a regulatory framework that provides guaranteed access to public spectrum, exclusive access to sports content, and protection from competition from new commercial FTA networks.
- Commercial FTA broadcasters receive substantial support from government to provide their services. Deloitte Access Economics (DAE) estimates that \$792 million in net government support was provided to the commercial FTA television sector in 2010-11. This exceeds the level of funding for the Australian Research Council in 2010-11 (\$747.8 million) or the level of drought assistance provided to rural areas in 2009-10 (\$751.7 million).
- Overall, DAE estimates that just over \$2.7 billion in net government support will be provided to the commercial FTA broadcasters over the period 2011-12 to 2014-15 which, together with funding for national and community broadcasting of \$5.1 billion over the same period, means a total of \$7.8 billion will be provided by government to support FTA broadcasting over the next four years.

### *Regulatory forbearance*

- Markets are effective in encouraging the development of content and services that consumers want, and only where the public interest clearly cannot be achieved

through the market should regulatory measures be contemplated. Where regulation may be required, primarily reliance should be on co-regulatory approaches.

### *Layers*

- It is only with significant reform to broadcasting policy that a layered approach to regulation could be effective. While ASTRA supports competitive neutrality in the application of regulation across like services and platforms, a layered approach would need to address regulatory imbalances at more than the content level alone.

### *Licensing*

- ASTRA would agree that there will continue to be activities in the media and communications environment that will require regulatory intervention. Licensing will continue to be an appropriate and effective regulatory tool for certain achieving public policy outcomes such as management of spectrum access and use.

### **Media diversity, competition and market structure**

- 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. However, 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 existing regulatory barriers to competition (such as the protection of the FTA networks) are removed to provide a balanced and consistent regulatory framework.
- The anti-siphoning scheme has long been recognised as anti-competitive. The efficacy of the scheme should be measured against clear criteria that demonstrate its benefits to consumers against the loss to consumers through reducing competition and choice.
- ASTRA agrees with the Committee that the moratorium on new commercial television broadcasting licences limits media diversity and submits that the moratorium is inconsistent with the principle of promoting competition and removing existing competitive barriers. Commercial FTA television and radio broadcasters occupy the only commercial sectors of the media and communications industry with legislated barriers to new entrants. There are no equivalent legislative barriers to entry for other content provider using platforms other than the broadcasting services bands (including new STV services).

*Media diversity*

- A regulatory framework that encourages competition and innovation is more likely to encourage increased diversity in the representation of news, information and opinion. The growing number of news and information sources available online would suggest that regulatory intervention to ensure a diverse media is becoming increasingly unnecessary.
- ASTRA submits that existing competition law provisions are sufficient to regulate potential issues of market power in the media and communications environment, including regulation of mergers and acquisitions.

*Exclusive content rights*

- ASTRA submits that there is currently no problem with exclusive rights contracts in Australia because (other than for sport under the anti-siphoning regime) the market for acquisition of content is highly competitive, and is likely only to become more competitive in the future. Should concerns with exclusive content arise, they would be effectively addressed under existing Australian competition laws.

*'Must-carry' and FTA retransmission*

- There is no public policy justification for the introduction of a 'must-carry' regime in Australia for the retransmission of FTA services by STV providers. In jurisdictions where cable or other non-terrestrial broadcast platforms are the primary or only means by which consumers can receive FTA services, such schemes exist to ensure that consumers are able to access FTA services and to ensure commercial FTA services are available to all potential viewers in their advertising market.
- In Australia, the public policy imperative of ensuring universal access to FTA services does not apply. Successive Australian Governments have allocated a total of \$1.2 billion to ensure universal access to the full suite of FTA digital television services.
- The retransmission of FTV broadcasts on STV has, to this point, been successfully achieved through commercial negotiation between STV platforms and FTA broadcasters, and works effectively in the interests of the consumer.

**Spectrum Allocation and Management**

- ASTRA supports the Australian Communication and Media Authority's (ACMA) five spectrum management principles, and firmly believes that spectrum for commercial activities should be subject to price-based allocation processes and, in particular, spectrum allocation should not preference a particular sector of the media and communications industry to the detriment of its competitors.

### *Pricing broadcasting spectrum*

- Spectrum allocated to commercial FTA broadcasters is not subject to a competitive process, but is rather provided to broadcasters as part of a broader arrangement tied to regulatory obligations and protection from the allocation of new commercial television broadcasting licences.
- As such, licence fees for commercial FTA broadcasters, calculated from gross revenue, do not reflect the full market value of the spectrum they use. DAE estimates that access to spectrum for the commercial FTA broadcasters is worth a total of approximately \$505 million per year. In comparison, the net amount paid by commercial FTA broadcasters in 2009-10 was \$231.4 million.<sup>1</sup>
- ASTRA submits that the costs that may be incurred by commercial FTA broadcasters to comply with existing regulatory obligations must be balanced against the benefits received from other regulatory privileges and, as such, there should not be any permanent reduction in licence fees without also addressing these imbalances.

### *Broadcasting spectrum and convergence*

- ASTRA recognises that sufficient spectrum capacity must be reserved for public interest requirements such as defence, emergency and essential services, and for scientific and metrological purposes. Spectrum allocation policy also needs to reflect international agreements on uses for particular frequencies and technical requirements for interference management.
- Beyond these public interest requirements, price-based allocation of spectrum for commercial use is more likely to encourage the most efficient use of spectrum to provide the media and communications services that consumers want.
- ASTRA submits that consideration could be given to limiting the ACMA's broadcasting spectrum planning requirements to technical and transmission issues, at least to the extent that they relate to commercial and national FTA broadcasters. The extent to which there is a 'demand' for additional services in a particular geographic location is best left for the market to determine.

### *Separation of carriage and content licences for terrestrial broadcasting*

- ASTRA submits that consideration should be given to the separation of broadcasting (content) licences from apparatus (carriage) licences. As the Productivity

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<sup>1</sup> In the 2010-11 financial year, \$281.2 million in licence fees were collected from commercial FTA broadcasters. Subtracting the rebates given to regional broadcasters under the Regional Equalisation Plan, and the \$45.7 million in rebates (or 41.5% of the licence fees for 2010-11) as per the announcement by the Minister for Broadband, Communications and the Digital Economy on 7 February 2010, the net amount paid was \$231.4 million.

Commission has previously argued, this would create the preconditions for more efficient use of spectrum by broadcasters and, as noted by the Australian Competition and Consumer Commission, ensure Australian taxpayers receive a fair return for the provision of a scarce public resource.

- The separation of carriage and content licences for commercial FTA broadcasters would create a new market for spectrum for commercial FTA or other services that may want to make use of the spectrum that incumbent commercial FTA broadcasters do not require for their digital services.
- The potential of new digital transmission and compression technologies (e.g. MPEG-4/DVB-T2) would enable even greater spectrum use efficiencies and potentially release more spectrum for new services.

#### *Sixth digital television channel*

- ASTRA would welcome further competition in the media and communications industry, including from new players who may want to access the 'spare' block of broadcasting spectrum that will remain after reallocation of spectrum for the digital dividend.
- ASTRA does not believe that FTA broadcasters require additional spectrum to support future technical migrations of terrestrial digital television services. Existing spectrum allocated for terrestrial digital television broadcasting could be used far more efficiently by incumbent FTA broadcasters.

#### **Australian and local content**

- ASTRA agrees that Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity.
- As the Convergence Review Discussion Paper notes, requirements for the provision of Australian content by commercial FTA broadcasters have traditionally been connected to the regulatory benefits provided to these broadcasters. This quid pro quo continues to give commercial FTA broadcasters a competitive advantage against other sectors in the media and communications industry.
- ASTRA submits that any significant reform to the regulatory framework for Australian content must be considered in the broader regulatory context. Commercial FTA broadcasters should continue to have differential Australian content obligations while they continue to enjoy additional regulatory privileges.



*Australian content production in a converged environment*

- The continuing growth of alternative domestic and international sources of content would suggest that the amount of Australian content consumed by Australians, as a proportion of the total content available to them, may fall as the content pool grows. ASTRA submits that the important long-term objective should be that Australian content continue to be made, and be made attractive to both local and international audiences.
- Analysis by Deloitte Access Economics suggests that maintaining a sustainable Australian content production industry is likely to require greater emphasis on generating sufficient funds for investment in new content over the longer term.

*Policy options*

- Those sectors that enjoy continued regulatory benefits should continue to be subject to more comprehensive social and cultural policy obligations. However, given the rise of the digital economy and changing consumption patterns, a number of reforms could be considered to add greater focus, flexibility and transparency to the current content regime and assist in the move towards a more balanced regulatory framework, including:
  - tradeable Australian content transmission quotas for commercial FTA broadcasters;
  - ensuring the national broadcasters have clear accountabilities regarding Australian content for the funding they receive;
  - more flexibility in the funding processes of Screen Australia to better accommodate different content production business models; and
  - an increase in the Producer Offset for television programs to the same level as film.

**Community standards**

- ASTRA is supportive of the National Classification Scheme as the common framework for the classification of content, to provide consumers with guidance to make informed choices about the content they want to view.
- ASTRA believes the current classifications are appropriate and well understood by the community, and would oppose adding any additional complexity to the current classification system.
- ASTRA supports consistency of classification of the same content delivered on different platforms or by different services, however there may be different

community expectations regarding how the access or use of content should be regulated depending on how that content is delivered.

- ASTRA submits that the existing framework for regulating content on STV works effectively in reflecting community standards and protecting children from harm while enabling subscribers to see the content they want when they want. The current co-regulatory model for STV is an example of industry-based content regulation that works well for both consumers and broadcasters.
- ASTRA would recommend that timezone restrictions remain on FTA broadcasters. Continued regulatory privilege of commercial FTA broadcasters, and community expectations regarding how content should be regulated on FTA television, together with the likely time lag before the government could be confident of universal penetration of reliable parental lock features for terrestrial receivers, means that timezone-based classification for FTA broadcasters remains essential.

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## About ASTRA

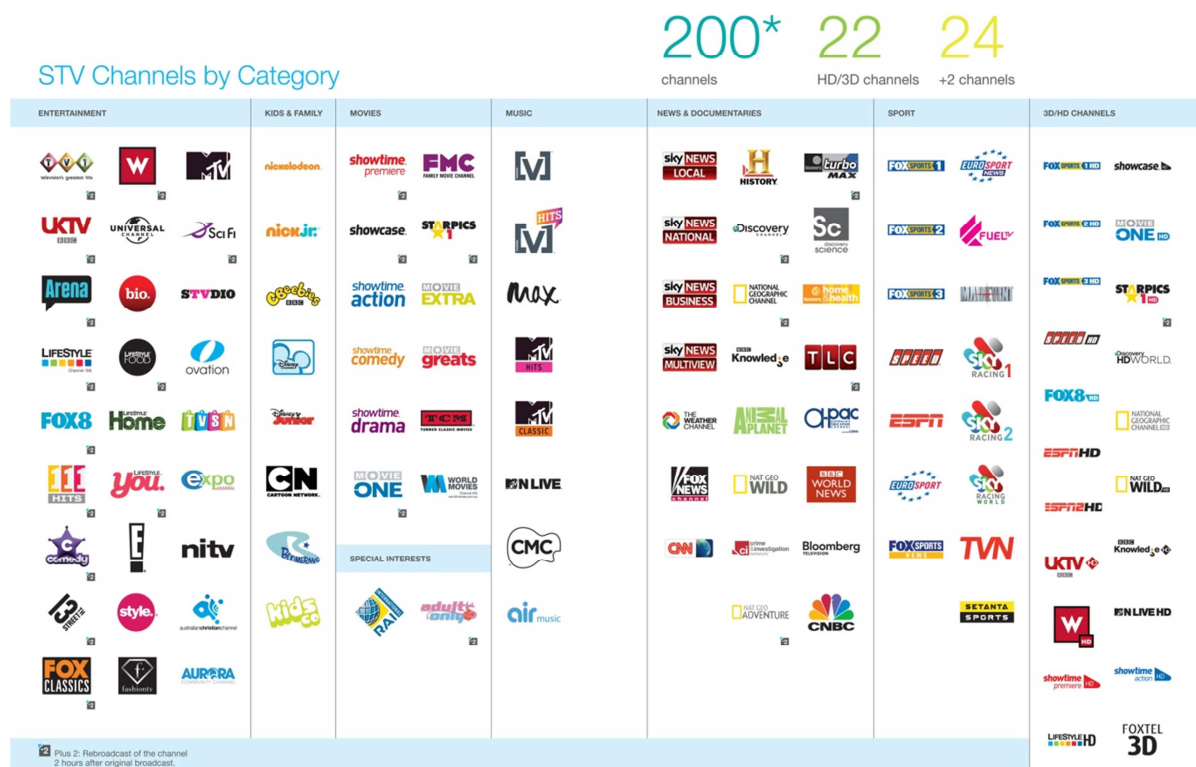
The Australian Subscription Television and Radio Association (ASTRA) is the peak industry body for subscription television in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers 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 at Appendix B.

To discuss any of the issues raised in this submission, please contact Petra Buchanan, Chief Executive Officer, or Simon Curtis, Policy and Regulatory Affairs Manager, on (02) 9776 2685.

# 1. Overview of the subscription television sector

Operating in a highly competitive media environment with a multitude of new devices and services increasingly available to Australians, the broadcast sector is experiencing unprecedented changes in how consumers engage with, and what they expect from, their television experience.

With over 200 channels owned by over 30 different media companies, the breadth, range and diversity of STV programming remains unsurpassed in the Australian broadcasting environment.

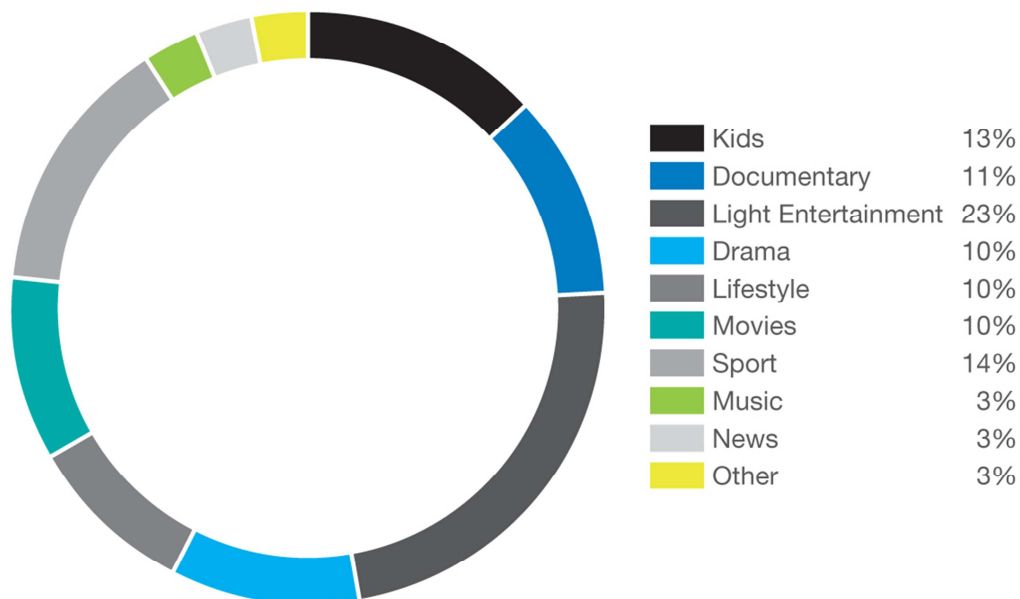


\*Some logos represent multiple channels including air music (30 audio channels), SKY NEWS Multiview and SKY NEWS Local.

STV gives Australians access to quality, exclusive, live, original and award-winning international and Australian programming across many genres, including movies, news, children's, documentary/current events, light entertainment, lifestyle and drama, live, local and international sport, music, ethnic language, local weather and pay per view events. The following graph shows the current share of viewing by genre on STV platforms.

## Share of Viewing by Genre

Source: OzTAM, NatSTV, 0200-2559, Consolidated, Weeks 1-43 2011



STV channels are broadcast to one in three Australians on FOXTEL, AUSTAR and Optus, as well as channel packages offered through Xbox 360 and the Telstra T-Box, mobile platforms, in-flight services and programs on-demand.<sup>2</sup> Fueling STV is a dynamic and creative content engine that invests heavily in Australian content, supports local employment, and fosters innovation and a commitment to pushing the boundaries in an increasingly converged and changing media and communications environment.

### Growth of subscription television in Australia

The introduction of STV in Australia was first contemplated in the early 1970s, however it was not until 1995 that the first STV services commenced transmission in Australia (despite numerous government inquiries in the intervening period recommending its introduction).<sup>3</sup>

Australia has one of the most heavily regulated broadcast sectors in the world with STV operating in an increasingly competitive environment. STV faces competition from commercial and national free-to-air (FTA) broadcasters and their digital multi-channels, new IPTV and on-line content providers streaming services over broadband networks, online movie rental and download services, and DVD rental and sales.

<sup>2</sup> For example, Mobile FOXTEL, Live2Air (FOXTEL/AUSTAR available on Virgin), AUSTAR Featured, FOXTEL On-Demand, AUSTAR AnyWhere, FOXTEL Downloads.

<sup>3</sup> See Pearce, M., "Structured action in Australian broadcasting policy: pay TV", (2000) 22 *Media, Culture and Society* 347-354. Attempts to introduce STV in Australia were blocked by successive governments concerned about its effect on commercial FTA television services: Neville, A., "Politicians, Media Moguls and Pay-TV: Pay-TV Policy-making in Australia 1977-1995" (2000) 59(2) *Australian Journal of Public Administration* 63.

Operating in this competitive environment, and without the regulatory benefits of the commercial FTA broadcasters, STV subscriptions have had solid growth over the last 6 years. Growth has recently been adversely affected by the rise in competition from Freeview's multichannels and other sources of competition, as well as real, on-going consumer caution.

7.2 million individual Australians or 34% of the Australian population have access to STV. In addition, over 4,000 licensed venues around Australia offer over 1 million individuals access to live content on STV channels such as FOX SPORTS and SKY NEWS. STV commands an average of 56% total share of viewing in STV homes across Australia.<sup>4</sup>

### Investment in the digital economy

The rise of the digital economy has significantly changed the Australian media and communications landscape in terms of investment, revenue streams and consumer choice and expectation. The STV industry is investing strongly in technical innovation, infrastructure and production to keep pace with the growing demands of audiences in the age of digital media. With a first to market approach underpinned by ongoing industry development, STV provides new viewer services such as video On-Demand, Australia's most comprehensive high definition offering, 3D television, standardised parental lock technology, state of the art integrated personal video recorders, interactive technology, online and mobile television.

#### Innovation at its Core

It's hard to imagine television today without the innovations brought by the STV sector. As STV moved with pace out of the analogue era, the transformation of the industry brought with it more content, more choice and more convenience.

For STV, innovation lies at the heart of industry development and consumer empowerment and it continues to influence and drive the industry to develop new and exciting products and services that stand above those offered by other traditional media and communication participants.

- First dedicated 3D channel
- Fastest digital conversion in the world
- First PVR offering with FOXTEL's iQ and iQ2 and AUSTAR's MyStar and MyStar HD
- Most comprehensive HD offer in Australia
- Most comprehensive mobile TV offering
- Most extensive programming choice, offering over 200 channels
- One of the first in the world to provide STV via XBox 360 console
- Simple and easy to use Electronic Program Guides (EPGs) with online, mobile and iPad apps allow users to search through the TV guide for program listings, set program reminders, and remotely record shows
- Interactive technology including 'red and green buttons'
- Depth of On-Demand and online streaming services offered via FOXTEL Download and AUSTAR Anywhere
- Parental lock technology
- First to develop a self-regulatory code to improve energy efficiency and voluntarily minimise energy consumption in set top boxes

<sup>4</sup> Year to date STV share of viewing in STV Homes for 2011 is 56.4%, 2am-2am, with the remainder shared between the five FTA networks, including multi-channels (Source: Source: OzTAM NatSTV as of Week 44 2011).

## The Economic Contribution of STV

The STV sector contributes to the Australian economy in a variety of ways, both directly (in terms of the value it adds to national GDP and employment) and indirectly through providing greater product innovation and consumer choice. The direct economic contribution of STV in 2009-10 is estimated at \$700 million, and over \$5 billion since the inception of STV.<sup>5</sup> In 2010 the Australian STV industry directly employed 7,410 people (including platform outsourcing), a growth of 6% from 2009.



## Australian Content on STV

In addition, the contribution of the STV sector also extends downstream through the commissioning and purchase of Australian content from the production sector. The STV industry is committed to producing and providing high quality and diverse Australian content across a variety of genres.

The investment into Australian content by STV platforms and channels increased from \$541.4 million in 2009 to \$578.4 million in 2010, an increase of 7%. This investment ranged from concept development through to production, programming and broadcasting and included all STV genres, from news, sport, drama and light entertainment to movies, lifestyle, documentaries, music and children's programming. As a result of this investment there has been increased support for Australian talent, content creators, jobs and local culture, adding an estimated \$223 million to the GDP of Australian economy in 2010.<sup>6</sup>

## The STV Business Model

Rather than deriving its main source of revenue from advertising or public funds, the majority of STV revenue is acquired through subscriptions. In 2010-11 subscription services accounted for 93% of total revenue for AUSTAR and over 90% for FOXTEL.

<sup>5</sup> Deloitte Access Economics Report (DAE Report), p.i.

<sup>6</sup> DAE Report, p.i.



## 2. Layers, Licensing and Regulation

### 2.1 Regulation

#### *General approach to regulation*

ASTRA supports, as a starting principle, regulatory consistency across services and platforms. Economic and/or competitive protections afforded to particular sections of the media and communications industry should be removed unless a clear public policy objective in maintaining these protections can be identified. Where regulation is inherently anti-competitive, consideration must be given to the effectiveness of that regulation to achieve the intended public policy outcome, and whether the benefits of such regulation outweigh the costs.

However, ASTRA recognises there is likely to be a continuing public interest rationale for some level of differentiated regulatory benefits and burdens on different parts of the media and communications sector. For example, commercial FTA broadcasters occupy a distinct or “special” place in the Australian media sector, enjoying a continuing significant degree of influence through universal penetration into Australian homes. The existing regulatory framework gives commercial FTA broadcasters guaranteed access to public spectrum, including additional spectrum for digital switchover at no additional cost, exclusive access to sports content; and protection from competition from new commercial FTA broadcasters.

Commercial FTA broadcasters receive substantial financial government support to provide their services. Deloitte Access Economics (DAE) estimates that \$793 million in net government support was provided to the commercial FTA broadcasters in 2010-11 (after subtracting the net licence fees paid by these broadcasters). This exceeds the level of funding for the Australian Research Council in 2010-11 (\$747.8 million) or to the level of drought assistance provided to rural areas in 2009-10 (\$751.7 million).<sup>7</sup>

#### COMPARISON OF GOVERNMENT SUPPORT TO COMMERCIAL FTA TV BROADCASTERS



<sup>7</sup> DAE Report, p.i.

Overall, DAE estimates that just over \$2.7 billion in net government support will be provided to the commercial FTA broadcasters over the period 2011-12 to 2014-15.<sup>8</sup>

DAE calculated government support for national and community broadcasters to be \$1.3 billion in 2010-11, and estimated to be \$5.1 billion over the period 2011-12 to 2014-15.

#### GOVERNMENT SUPPORT TO FTA TV BROADCASTERS

	2010-11 Financial year	Forward estimates from 2011/12 to 2014/15
<b>Commercial broadcasters</b>		
Additional funding associated with the digital switchover	104.3	496.3
Access to spectrum	505	1,615.6
Net licence fees and apparatus licence fees paid	-231.8	-960.8 <sup>^</sup>
Anti-siphoning scheme	415.1	1,561.4
<b>Total</b>	<b>792.6</b>	<b>2,712.5</b>
<b>National and community broadcasters</b>		
ABC Assistance with digital transmission	86.6	368.6
ABC Television Programming	599.8	2,357.6
SBS Assistance with digital transmission	65.8	264.7
SBS Television Programming	190.6	800.7
Community broadcasters	12.6	57.2
Indigenous broadcasters including NITV	30	119.8
Access to spectrum	352.4	1,144.1
Apparatus licence fees	-0.1	-0.3
<b>Total</b>	<b>1,337.7</b>	<b>5,112.4</b>
<b>Grand Total</b>	<b>\$2,130.3</b>	<b>\$7,824.9</b>

Source: Deloitte Access Economics

The 'special place' of FTA broadcasting is also demonstrated by significant government investment in transmission infrastructure and subsidised reception equipment to ensure that all Australian households have access to the full range of commercial and national FTA digital television services. The total allocation of government funds to achieve digital terrestrial television switchover (historical and proposed) is approximately \$1.2 billion.<sup>9</sup> Such a significant public investment in one particular sector of the media and communications industry would strongly suggest that FTA broadcasters should be expected to shoulder greater responsibility and regulatory obligations to enable the Government to achieve its social and cultural policy objectives.

#### ***What needs to be regulated?***

An effective starting point for considering a revised regulatory framework for a converged communications environment may be to determine:

<sup>8</sup> DAE Report, p.i.

<sup>9</sup> DAE Report, p.10.

- which aspects of the functions, operations and activities of the media and communications industry need regulation to address public policy concerns that arise; and
- whether there needs to be media/communications specific regulation beyond general regulatory provisions to address these concerns.

For example it could be argued that the following issues would continue to require some form of media/communications specific regulation:

- *Classification and content standards*: it is unlikely that Governments or the public could be certain that the market alone could effectively regulate access to and use of content in a way that adequately reflects minimum community standards.
- *Spectrum allocation*: spectrum is a scarce public resource that requires an overarching regulatory framework to ensure certain public policy outcomes – such as sufficient spectrum capacity for defence, emergency and essential services, scientific and metrological activities; effective management of interference issues; and to comply with internationally agreed uses for certain frequency bands – while at the same time allowing a competitive, market-based approach to spectrum allocation for commercial spectrum use to ensure the most efficient and effective use of spectrum.
- *Technical/infrastructure standards*: certain minimum technical standards are likely to remain necessary to ensure consistent and reliable access to content and services for consumers, and for the safe installation and operation of communications infrastructure.

A number of other issues relevant to the media and communications environment may well be adequately dealt with under existing general legislative and regulatory regimes, including:

- Competition issues (including access and ownership issues)
- Defamation;
- Privacy (with public interest exceptions for news gathering);
- Copyright (noting that copyright legislation is format and platform specific).

There are also a range of social, cultural and consumer protection public policy objectives that it may be considered necessary to continue some form of communications-specific regulation or self-regulation, including:

- Australian content;
- Local content;
- Minimum consumer protection/service standards;
- Media access (captioning, audio description etc).

### ***Basis for regulation***

As a starting principle, ASTRA submits that regulation should not be dependent on the type of platform used to deliver a particular service or the business model used to provide that service. However where a particular type of service is given specific

regulatory privileges, those privileges should come with specific social and cultural obligations beyond what might apply to other service providers.

As such, ASTRA is disappointed that the discussion papers seem to have understated the delicate balance of regulatory privilege and obligation in relation to broadcasting. Regulatory ‘parity’ with respect to social and cultural policy objectives cannot be considered in isolation from the regulatory and policy barriers to competition in the broadcasting environment – they are intrinsically linked.

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 a balanced and consistent regulatory framework emerges to encourage competition and innovation in the media and communications sector.

### ***Regulatory forbearance***

As noted in the Australian Government *Best Practice Regulation Handbook*:

While regulations are essential for the proper functioning of society and the economy, the challenge for government is to deliver effective and efficient regulation – regulation that is effective in addressing an identified problem and efficient in terms of maximising the benefits to the community, taking account of the costs.

Determining whether regulation meets the dual goals of effectiveness and efficiency requires a structured approach to policy development that systematically evaluates costs and benefits.<sup>10</sup>

Markets are effective in encouraging the development of content and services that consumers want, and only where the public interest clearly cannot be achieved through the market 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.

Where regulation may be required, ASTRA supports primary reliance on co-regulatory measures to deliver public policy objectives for the media and communications sector. Regulatory intervention should not be the default option to achieve public policy objectives. As noted in a recent paper by the Australian Communications and Media Authority (ACMA):

self-regulation and co-regulation can offer a number of advantages over traditional command and control regulation including:

- greater flexibility and adaptability
- potentially lower compliance and administrative costs

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<sup>10</sup> Australian Government, *Best Practice Regulation Handbook*, June 2010, p.4.

- an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly
- quick and low-cost complaints-handling and dispute resolution mechanisms.<sup>11</sup>

### **Copyright enforcement**

ASTRA reiterates its belief, as detailed in our response to the Convergence Review Emerging Issues Paper, that enforcement of intellectual property rights should be considered as part of this review:

- 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, businesses and Australian jobs.
- Enhanced regulatory and enforcement measures for the protection of intellectual property rights are essential to achieve public policy outcomes related to the production and availability of Australian content. Industry is much 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.

## **2.2 Layers**

The Review raises an important question of whether a “layering” approach to regulation would be effective for the broadcasting and communications sector. In simple terms, ASTRA has understood this approach to mean regulating horizontal layers of services or platforms as opposed to regulating on the basis of vertical silos driven by technological delivery or business model.

The Review recognises that there are a number of different ways to classify these layers. In addition, the question of what is regulated at each layer and how it is regulated can then be approached in different ways. ASTRA has not commented in any detail in this section on how issues could be regulated at the layers. As previously stated, ASTRA supports reliance on self-regulatory and co-regulatory measures to the greatest extent possible. However, we recognise that certain issues might still require licensing, for example use of public spectrum.

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<sup>11</sup> ACMA, *Optimal conditions for effective self- and co-regulatory arrangements*, September 2011, p.5.

ASTRA has not sought to define the layers, although conceptually, this should, in our view, be a relatively simple concept. A content; platform; and network layer would in our view suffice. The content layer would govern the production and display of media content to the public. The platform layer would govern the service delivery of media content via a delivery platform. The network layer would govern the underlying infrastructure or carriage used to deliver media content.

As previously advocated, ASTRA is a firm supporter of competitive neutrality in the application of regulation across like services and platforms. Conceptually therefore, a layering model of regulation is an attractive solution to enable like for like services to be treated equally. In theory, ASTRA would therefore support consideration of a layered approach. In practice however, ASTRA does not believe that current broadcasting policy and content regulation can be simply addressed at a defined number of layers (however classified). This is due not to the inherent nature of content regulation but to the existing media and communications landscape:

1. A specific subset of the sector's participants has a number of regulatory advantages and protections. The FTA broadcasters have subsidised access to spectrum, preferential access to sports content via operation of the anti-siphoning list, substantial financial support from Government including for digital switchover, and maintain a considerable degree of influence.
2. Access to the market is not equal – for example, the FTA broadcasters enjoy regulatory protection from new entrants.
3. Certain policies by their definition require differential regulation across platforms – for example, the anti-siphoning scheme which specifically prohibits certain platforms from access to defined sports content.
4. Community expectations – there is a greater expectation of control over content delivered via “traditional” media than via the Internet.<sup>12</sup> A significant shift in community attitudes is necessary to enable parity of regulation.

These are just some of the existing aspects of the sector that any regulatory reform must take into account – layered or otherwise. The limitation of a layering approach to regulation is the fact that these characteristics demand certain platform specific regulation within layers. Alternatively, if these characteristics are ignored in the layering model, a level playing field of regulation across like for like services is not achieved.

The following examples clearly demonstrate the issue:

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<sup>12</sup> See ACMA, *Digital Australians – Expectations about media content in a converging media environment*, October 2011, pp.52-53. The research found that content that was produced commercially for mass consumption by the broader community was expected to reflect broad community standards, while niche or user-generated content distributed online should reflect the principle of individual expression and consumption.

- **Australian content:** Existing rules around the provision of Australian content have largely focussed on the FTA and STV sectors with the FTA sector incurring the greatest obligations to date. This regulatory burden on the FTAs, however, has been imposed as a quid pro quo for certain regulatory concessions granted to the FTA sector and due to the influence and reach of the FTA broadcasters with universal coverage into every Australian home. If Australian content rules were harmonised across a platform layer such that equal Australian content regulation applied across FTA, STV and online, and yet the regulatory advantages enjoyed by FTA remained, it would not deliver a level playing field.
- **Classification:** The layering model could adopt a uniform approach to classification across the content layer such that all audio-visual content provided to the public on a commercial basis by large and recognisable providers over any platform (terrestrial, cable, satellite or online) is classified in accordance with a national classification scheme. However, uniformity in the application of other community safeguard regulations may mean that the framework fails to provide appropriate community safeguards for certain services—for example, classification time zones for FTA could be lost and this would be inconsistent with audience expectations. It is arguable that how content is accessed and used defines a user's expectations of the level of control over that content. Content that is continuously pushed universally via FTA television is perceived differently from content which a user must seek out, even if that content is accessible via the same device, such as a SmartTV.
- **Anti-siphoning:** The scheme by its very nature regulates access to certain content by platform. It specifically reserves sports content for the FTA platform at the expense of STV and in the future other platforms. Any form of anti-siphoning regulation will therefore require the imposition of vertical silos by delivery model at the platform layer and therefore undermine the objective of consistent regulation at this layer.

It is only with significant reform to broadcasting policy that a layered approach to regulation could be effective. If holistic reform was achieved including wholesale reform of the advantages and regulatory concessions enjoyed by commercial FTA broadcasters, ASTRA would support a layered approach. However, a piecemeal approach to the model would be ineffective and fail to achieve the ultimate objective of regulatory parity across like services.

## 2.3 Licensing

ASTRA notes and agrees with the statements in the discussion paper that “where regulation is required it should be the minimum needed to achieve a clear public purpose”. We would also agree that “there should be a clear and significant public purpose achieved in requiring any kind of licence to engage in media and communications activities”.



As discussed above, ASTRA would agree that there will continue to be activities in the media and communications environment that will require regulation. Licensing would remain an effective regulatory tool for certain achieving public policy outcomes such as management of spectrum access and use. It would be appropriate for example, that there continue to be a system of licensing access to and use of spectrum given that spectrum is a scarce and valuable public resource, and the need for effective management of interference for spectrum users.

However, the necessity to licence activities in the media and communications environment beyond access to and use of spectrum may require further examination. As the discussion paper notes, while some form of broadcasting services currently require individual licences, others do not, while other content delivery platforms, including those that provide broadcasting-like services, have no licensing requirements. That said ASTRA is not in favour of extending licensing for media services broadly.

Licenses for commercial, community, subscription and datacasting services provide an effective mechanism to impose certain conditions and obligations on these classes of content services. Where particular types of services continue to be expected to comply with specific obligations to achieve cultural and social policy objectives, then a licensing system may remain the most appropriate mechanism for regulating those services. The extent to which cultural and social policy objectives can be applied consistently across platforms may determine the extent to which licensing of broadcasting services will remain necessary. These issues are discussed further in the following sections.



### 3. Media Diversity, Competition and Market Structure

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. 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, and it can be clearly demonstrated that the benefits of these protections outweigh the costs. Where regulation is inherently anti-competitive, consideration must be given to the effectiveness of that regulation to achieve the intended public policy outcome.

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 in the media and communications sector.

#### 3.1 Anti-siphoning scheme

ASTRA acknowledges the Committee's statement that the Convergence Review "will not revisit the detail of the operation of the [anti-siphoning] list but will consider the long-term effectiveness of an anti-siphoning mechanism in a converging environment." As the Committee would be aware, the anti-siphoning scheme has long been regarded as anti-competitive and not in the overall interests of any key stakeholders – including sports organisations but particularly sports viewers – other than the incumbent FTA broadcasters.

##### *Anti-competitive*

The anti-siphoning provisions directly limit competition between FTA broadcasters and STV for a very wide range of sports content, shifting the balance of negotiating power in favour of FTA networks.<sup>13</sup> The proposal to extend the anti-siphoning regime to other delivery platforms maintains the regulatory advantage afforded FTA networks in an increasingly converged environment, and is a clear example of continued regulatory imbalance.

##### *Impact on sporting organisations*

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, even for those events that the FTA networks will not broadcast. This

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<sup>13</sup> Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, August 2009, p.157.

adversely impacts the sporting organisations, the funding for their key participants, the costs of events and other downstream impacts such as grassroots and junior bodies.<sup>14</sup> In 2009, Access Economics examined the economic impact of moving to a strict 'use it or lose it' scenario and found that there would be a net increase in revenue to sporting bodies and the STV industry of \$415 million (in 2011 dollars), equivalent to \$1.6 billion over the period 2011-2015.<sup>15</sup>

### IMPACT OF 'USE IT OR LOSE IT'

	2011 Dollar Value	2011/12 to 2014/15
Net Increase in Revenue to Sporting Bodies and STV	\$415 Million	\$1.6 Billion

Source: Deloitte Access Economics

#### *Many sports likely to remain on FTA television*

FTA broadcasters are already in a strong negotiation position in relation to their direct competitors without additional regulatory protection. Even if the scope of the anti-siphoning list was reduced, sports organisations would continue to seek exposure of FTA television given its universal reach (for example, the Ten Network secured exclusive rights to the Australian Netball Championships – an event not on the anti-siphoning list – in 2009 after it had previously been broadcast on STV). FTA broadcasters will continue to bid for the rights to major sporting events, even where the event is removed from the list, given their ratings success and advertising revenue potential.<sup>16</sup>

#### ***Continuing rationale for the anti-siphoning scheme***

ASTRA welcomed the reforms to the anti-siphoning scheme announced by the Government at the end of 2010 as a result of its review of sport on television, including the removal of events from the anti-siphoning list that are not broadcast by FTA broadcasters, and the requirement on FTA broadcasters to broadcast anti-siphoning events to which they have the rights, or else be required to on-sell those rights to other broadcasters. The STV sector is working with the Government to implement the reforms as announced in November 2010.

Despite these reforms, ASTRA submits that convergence brings into question the rationale for the anti-siphoning scheme in the longer term. Convergence is giving consumers an ever-increasing choice in platforms, services and providers through which they can access and view content. In such an environment, there would appear to be

<sup>14</sup> *ibid.*, p.158.

<sup>15</sup> The scenario assumed a requirement on FTA broadcasters to broadcast events within one hour of commencement. Access undertook this exercise in 2008, with values converted to 2011 dollars for the Convergence Review submission. See DAE Report p.32.

<sup>16</sup> Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services*, August 2009, p.167.

diminishing public policy justification and little logic in continuing to reserve preferential access to major sporting events to just one of those sources of content.

STV broadcasters (and other players in the media and communications environment) will continue to remain at a competitive disadvantage with FTA broadcasters in relation to access to sports content, while the sporting codes will continue to be limited with regard to whom they can sell their rights. The long-term 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 choice.

### MAJOR PROPOSED CHANGES TO THE ANTI-SIPHONING SCHEME

Obligation	Current scheme	New scheme
Use of multi-channels	FTA broadcasters cannot premiere ASL events on their digital multi-channels.	FTA broadcasters permitted to premiere Tier B events on their digital only channels.
Coverage obligations	No requirements to televise listed events whose rights the broadcaster has obtained.	Tier A events must be televised live in full on a FTA primary channel. Tier B events must be televised on any FTA channel in full and commence within 4 hours.
Must-offer rules	No requirement for broadcasting rights to anti-siphoning listed events to be used.	Must-offer requirements will mean that FTA broadcasters must use the rights they acquire to ASL events or offer those rights to other broadcasters.
Extension to automatic delisting period	ASL events may be acquired by STV broadcasters if FTA rights not acquired by a FTA broadcaster 12 weeks prior to the event.	ASL events may be acquired by STV broadcasters if FTA rights not acquired by a FTA broadcaster either 26 weeks prior to the event or 52 weeks prior to the start of a multi-round competitions such as the AFL or NRL.

Source: Deloitte Access Economics

## 3.2 Regulatory barriers to entry

As ASTRA noted in its submission to the Convergence Review Emerging Issues Paper, successive governments have, through various mechanisms, prevented the allocation of new commercial television broadcasting licences. As stated in the Discussion Paper, the current moratorium “prevents an additional voice competing in the media market in this way”. ASTRA agrees with the Committee that the moratorium limits media diversity, and submits that the moratorium is inconsistent with the principle of promoting competition and removing existing competitive barriers. Commercial FTA television and radio broadcasters are the only commercial sectors of the media and communications industry

with legislated barriers to new entrants.<sup>17</sup> There are no equivalent legislative barriers to entry for any other content provider using platforms other than the broadcasting services bands (including new STV services).

While ASTRA acknowledges that the Convergence Review is not undertaking the statutory review of commercial television broadcasting licences as required under the *Broadcasting Services Act 1992* (Cth) (BSA), this should not prevent the Committee from examining the broader issue of regulatory barriers to competition in the media and communications environment. As the Australian Competition and Consumer Commission (ACCC) has previously argued, the presence of additional commercial FTA television services is likely to enhance consumer welfare, and less restriction on entry would provide an opportunity for the most efficient producers of broadcast services.<sup>18</sup> ASTRA further notes that commercial FTA television broadcasters received support from the Government to an estimated value of \$792 million in 2010-11.

### 3.3 Media diversity

ASTRA submits that a regulatory framework that encourages competition and innovation in the media and communications environment 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 becoming increasingly unnecessary.

Current cross-media ownership regulation is based on the ownership of commercial television services, commercial radio services and newspapers within a particular licence area. As the Discussion Paper notes, consumers now have access to a wide array of news and information services from local, national and international sources. Broadening cross-media regulation to include other services such as STV, online media or telecommunications companies is likely to stifle innovation and investment in areas that were not previously subject to the cross-media rules. ASTRA submits that attempts to 'impose' diversity by regulation may actually have the effect of hindering the development of new and differentiated content.

Consolidation of media and communications companies does not necessarily mean there will be an impact on media diversity. 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

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<sup>17</sup> Under the *Broadcasting Services Act 1992* (Cth) (BSA), the ACMA cannot allocate a new commercial television broadcasting licence under section 36 unless the ACMA is directed to do so by the Minister under subsection 35B(1). Under section 35C, there is a moratorium on new commercial radio broadcasting licences for six years from the commencement of digital radio transmissions.

<sup>18</sup> ACCC, *Emerging market structures in the communications sector*, June 2003, p.69.

services, while smaller, less diversified media organisations may well need to pursue ‘mainstream’ or ‘populist’ lines in order to achieve commercially viable audiences.<sup>19</sup>

ASTRA submits that existing general competition law provisions, including the *Competition and Consumer Act 2010* (Cth), are sufficient to regulate potential issues of market power in the media and communications environment, including the regulation of mergers and acquisitions involving media and communications companies.

### **Public interest test**

The discussion paper raises the possibility of a “public interest test” that could operate in conjunction with existing or modified cross-media rules, or where cross-media rules are abolished.

ASTRA would not support the introduction of a public interest test. An objective and practicable measure of ‘diversity’ would be difficult to devise. Such difficulties have been experienced in applying the public interest test in the United Kingdom, which (with respect to broadcasting) requires consideration of whether there is “sufficient plurality” of persons with control of the media enterprises serving every different audience or in a particular area or locality. The UK Court of Appeal described the meaning of ‘sufficient plurality’ as ambiguous, making its application difficult and leaving the Court with a ‘stark choice’ of competing interpretations with the legislation providing little guidance of the standard to employ when assessing ‘sufficient plurality’.<sup>20</sup>

Alternatively, a more prescriptive public interest test with detailed criteria or obligations on media organisations is likely to prove administratively burdensome for both regulators and the industry, and may lack the flexibility necessary to encompass the variety of existing content services and media organisations, or to be able to adequately include new and emerging forms of content delivery.

## **3.4 Exclusive content rights**

ASTRA submits that there is currently no problem with exclusive rights contracts in Australia because, other than for sport (where the anti-siphoning regime substantially restricts fair competition), the market for acquisition of content is highly competitive, and is likely only to become more competitive in the future.

Competition for rights has increased as:

- the FTA broadcasters have launched digital multi-channels, which means they require far more content than ever before (and they are likely to launch additional multi-channels after digital switchover); and

<sup>19</sup> See Albon, R. & F Papandrea, *Media Regulation in Australia and the Public Interest*, Institute of Public Affairs, November 1998, p. 64; and Doyle, G., *Media Ownership. The economics and politics of convergence and concentration in the UK and European media*, SAGE Publications, London, 2002, p.13.

<sup>20</sup> *British Sky Broadcasting Group plc v Competition Commission* [2010] 2 All ER 907.

- numerous new media players and platforms have entered the market including:
  - IPTV providers (e.g. Fetch TV);<sup>21</sup>
  - mobile providers and a growing range of mobile devices (e.g. smartphones, tablets etc.);
  - local and international online download stores offering content to buy and rent;<sup>22</sup> and
  - manufacturers of internet-enabled televisions and gaming consoles.

Competition has significantly increased for both first- and second-run rights, shifting bargaining power in favour of suppliers. ASTRA's members have also noted that, as a result of increased competition, suppliers are offering shorter windows of exclusivity and are now allowing some windows to run concurrently (for example, on-demand rights for new release movies are now non-exclusive and some suppliers allow windows to run concurrently).

The Committee has asked about the effects on diversity of exclusive rights contracts that cover a number of platforms for a sole provider, but also notes in its Discussion Paper that content rights can be split across platforms. In the experience of ASTRA members, rights are frequently offered on a platform-specific basis, rather than in bundles. ASTRA strongly submits that there is no case for regulation given consumers are clearly benefiting from increased choice of providers and content.

Finally, in ASTRA's view, should concerns with exclusive content arise, existing Australian competition laws already provide an effective regulatory framework to deal with such issues.

### 3.5 'Must carry' and FTA retransmission

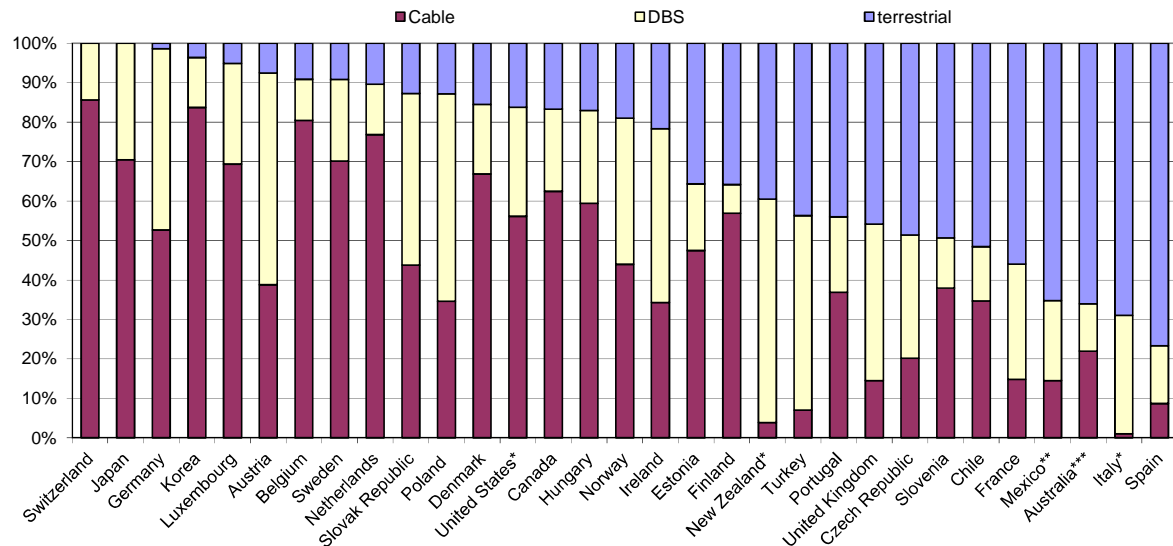
ASTRA reiterates its position, as detailed in its response to the Convergence Review Emerging Issues Paper, that there is no justification for a 'must carry' regime in Australia for the retransmission of FTA television services by STV providers. In summary:

- The broadcasting environment in Australia is significantly different to those that exist in Europe or the United States. In many of these jurisdictions, cable or other non-terrestrial broadcast distribution platforms are the primary or only means by which households can reliably receive terrestrial television services.<sup>23</sup> As the following chart demonstrates, Australia relies heavily on terrestrial broadcasting for the delivery of television services, compared to most countries in the OECD.

<sup>21</sup> On 24 October 2011, Optus launched its MeTV service in partnership with FetchTV.

<sup>22</sup> For example, Quickflix has recently launched an on-demand movie service offering unlimited streamed movies for a fixed price (*The Australian*, 27 October 2011).

<sup>23</sup> In the United States in 2009, 84% of the population received television by cable or satellite means (OECD, *Communications Outlook 2011*). 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 Van den Broeck & Pierson, *Digital Television in Europe*, ASP/Vupress, 2008, p.2).



Source: OECD Communications Outlook 2011.

Notes : (\*) Data for 2008 instead of 2009; (\*\*) Data for 2005 instead of 2009; (\*\*\*) Australia was not included in the original OECD chart. Data for Australia estimated by ASTRA based on STV penetration for cable and satellite services, and households reliant on DTH satellite for FTA television services.

- The primary public policy objective of ‘must-carry’ regimes in jurisdictions where such schemes exist is to ensure consumers are able to access FTA television services, and to ensure the viability of commercial FTA television broadcasters through their services being available to all potential viewers in their advertising market.<sup>24</sup>
- In Australia, the public policy imperative of ensuring universal access to FTA television services across platforms does not apply. Since 2001, successive Australian Governments have invested many hundreds of millions of dollars to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible. Total Government funding allocated for the digital switchover (both historical and proposed) amounts to approximately \$1.2 billion.<sup>25</sup> As the Minister for Broadband, Communications and the Digital Economy stated in June 2010, the introduction of the Government-funded VAST satellite service, combined with further Government funding to upgrade terrestrial 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*”.<sup>26</sup> (emphasis added).
- Consumers do not pay for STV to watch FTA television – they pay for program diversity and choice. Research commissioned by ASTRA found that, for the majority

<sup>24</sup> See ASTRA’s submission in response to the Emerging Issues Paper for further detail.

<sup>25</sup> DAE Report, p.10. The \$1.2 billion does not include the significant reduction in licence fees for commercial television broadcasters announced in 2010 which was justified in part by costs associated with digital switchover for commercial television broadcasters. The Minister, in announcing the licence fee rebate, stated that as well as to “...protect Australian content...” the licence fee rebate “...is also in recognition of ...the new technology and commercial challenges facing the sector, including the switch to digital television.” (Minister for Broadband, Communications and the Digital Economy, “Government to protect Australian content on commercial television”, Media Release, 7 February 2010).

<sup>26</sup> Minister for Broadband, Communications and the Digital Economy, “Digital switchover legislation passed”, Media Release, 25 June 2010.



of STV users, content diversity and exclusive programming are the primary reasons for subscribing.<sup>27</sup> The majority of viewing in STV homes is STV programming.<sup>28</sup>

- The retransmission of FTA services on STV gives subscribers the convenience of not needing to move from one platform to another. Consumers who view FTA services via their STV provider can access these services terrestrially (or via satellite) if they choose to do so. FTA broadcasters may lose viewers in STV households to STV services, however losing viewers to a competing television service is no justification for financial compensation.
- The retransmission of FTA services by STV platforms has no impact on the advertising revenue of commercial FTA broadcasters. Under the BSA, “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”.<sup>29</sup> Commercial FTA television services retransmitted on STV platforms consist of the same programs with the same advertisements as those services transmitted terrestrially within the relevant licence area.<sup>30</sup> Commercial FTA broadcasters are effectively seeking an additional revenue stream from STV 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.
- A service provided by a commercial FTA broadcaster is only permitted to be retransmitted subject to the payment of equitable remuneration to the underlying rights holders under Part VC of the *Copyright Act 1968* (Cth).<sup>31</sup> As Screenrights notes in its response to the Emerging Issues Paper, the FTA broadcasters are significant owners of underlying rights themselves and currently receive a substantial proportion of the payments made under Part VC.<sup>32</sup>
- A must carry scheme would place additional and unnecessary regulatory burdens on STV 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.

ASTRA submits that existing retransmission arrangements operate effectively and raise no diversity or competition issues. As stated above, retransmission of FTA services on STV (or any other platform) consistent with existing legislative provisions does no more than make these services available, unaltered, to the audiences that are meant to receive them.

<sup>27</sup> ASTRA commissioned survey of STV viewers conducted by MRA Research in January 2011.

<sup>28</sup> Year to date STV share of viewing in STV Homes for 2011 is 56.4%, 2am-2am, with the remainder shared between the five FTA networks, including multi-channels (Source: OzTAM NatSTV as of Week 44 2011).

<sup>29</sup> BSA, s 14.

<sup>30</sup> 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.

<sup>31</sup> BSA, s 212.

<sup>32</sup> Screenrights response to the Emerging Issues Paper, 12 August 2011, p.5. Screenrights collected \$5.85 million under the Part VC remuneration scheme in 2010-11 (*Screenrights Annual Report 2010-11*, p.15).



The retransmission of FTA broadcasts on STV has, up to this point, been successfully achieved through commercial negotiation between STV platform providers and commercial and national FTA broadcasters. There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer.

## 4. Spectrum Allocation and Management

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.

### 4.1 Competitive imbalances in current spectrum allocation

ASTRA supports the ACMA's five spectrum management principles, and firmly believes that spectrum for commercial activities should be subject to price-based allocation processes, particularly where commercial entities that use spectrum for the delivery of their services are in direct competition. Spectrum allocation should not preference a particular sector of the media and communications industry to the detriment of other participants.

ASTRA recognises that the Committee is focusing on broad policy ideas and options rather than on where specific decisions might be made in any new spectrum management policy and management process.<sup>33</sup> However, two current examples demonstrate imbalances in spectrum management processes that specifically benefit commercial FTA broadcasters to the detriment of other players in the media and communications environment.

#### ***Television broadcast spectrum***

Currently, a commercial FTA broadcaster automatically gains exclusive access to 7 MHz spectrum for a licence area on allocation of a commercial television broadcasting licence. An additional 7 MHz of spectrum has been loaned (at no cost) to each licensee 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. The national broadcasters similarly have two 7MHz channels each in each coverage area until the end of the simulcast period. Overall, until switchover, FTA broadcasters have access to 399 MHz of broadcast spectrum.<sup>34</sup>

Australian Governments past and present have implemented policies that protect and support the provision of terrestrial television and radio FTA services via broadcast spectrum. In relation to FTA television in particular, approximately \$800 million in net government support was provided to commercial FTA broadcasters in 2010-11, with another \$1.3 billion for the provision of national and community broadcasting services.<sup>35</sup>

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<sup>33</sup> Convergence Review Spectrum Allocation and Management Discussion Paper, p.7.

<sup>34</sup> DAE Report, p.13.

<sup>35</sup> DAE Report, p.i.

Total Government funding allocated to digital switchover (both historical and proposed) amounts to approximately \$1.2 billion.<sup>36</sup>

Spectrum allocated to commercial FTA 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. The current prohibition on additional commercial television broadcasting licences means that commercial FTA broadcasters are protected from competition in the broadcasting services bands. Combined with other regulatory benefits, spectrum allocation processes for commercial FTA broadcasters place them at a distinct commercial advantage to the their direct competitors, including STV providers.

### ***Spectrum for outside broadcast operations***

Access to spectrum is vital for electronic news gathering (ENG), television outside broadcasts (TVOB) and electronic field production (EFP) broadcast activities. Currently, the commercial FTA broadcasters and the ABC have licensed access to spectrum in the 2.5GHz band. The STV sector, with significant ENG, TVOB, and EFP requirements, do not have the opportunity to apply for licensed access to this spectrum, and must rely on third party arrangements with the incumbent licensees for their operational spectrum needs.

A significant part of the 2.5GHz band is to be auctioned as part of the digital dividend, with a small portion of spectrum (the 'mid-band gap') reserved for broadcast ENG requirements. The ACMA's proposal for long-term arrangements for ENG, TVOB and EFP requirements would not allow for direct licensed access to the 'mid-band gap' for those ENG, EFP or TVOB users other than the commercial and national FTA broadcasters. The ACMA has further suggested that FTA broadcasters be able to gain exclusive access to alternative additional ENG spectrum<sup>37</sup>, with the effect of increasing the amount of spectrum exclusively licensed to FTA broadcasters.

For other media and communications entities, including the STV sector, the ACMA has suggested access to spectrum in bands to be shared on a non-exclusive short term basis and which are also being considered for future mobile broadband services<sup>38</sup> – with other alternatives being spectrum largely unsuitable for outside broadcast needs. In ASTRA's view, if these proposals were put in place it would see commercial FTA broadcasters given a significant advantage over direct commercial competitors through continued secure access to spectrum optimal for outside broadcast operations. While ASTRA acknowledges the Government has committed to "ensure the adequate provision for a long-term home for ENG",<sup>39</sup> this should not lead to future spectrum allocations that privilege one industry sector to the significant detriment of its direct competitors.

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<sup>36</sup> DAE Report, p.10.

<sup>37</sup> In the 2010-2110 MHz and 2200-2300 MHz bands.

<sup>38</sup> In the 1980-2010 MHz and 2170-2200 MHz bands.

<sup>39</sup> Speech by the Minister for Broadband, Communications and the Digital Economy to the ACMA Radcomms Conference, 30 April 2008.

## 4.2 Pricing broadcasting spectrum

As the Productivity Commission noted in 2000, very different planning processes apply for the broadcasting services bands compared to the rest of the radiofrequency spectrum. Whereas the ACMA has actively pursued market-based approaches for spectrum allocated under the *Radiocommunications Act 1992* (Radcomms Act), the ACMA has different planning requirements under the BSA in relation to the allocation of spectrum for broadcasting services:

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.<sup>40</sup>

As previously stated, ASTRA believes that, in principle, the most effective means for broadcast spectrum management is through market-based mechanisms. However, where a particular sector of the industry is guaranteed access to public spectrum, as well as the recipient of a range of regulatory privileges and other benefits (including protection from competition), then these privileges should be reflected in the cost of using that spectrum.

### ***Licence fees for commercial FTA broadcasters***

Licence fees for commercial FTA broadcasters, calculated from gross revenue, do not reflect the full market value of the spectrum that they use:

Because licence fees are not directly related to the amount of spectrum used, they do not reflect the opportunity cost to the community of broadcasters holding spectrum, nor do they provide any incentive for operators to pursue more efficient ways of delivering their services. As licence fees are based on revenues, different commercial broadcasters pay different amounts for the same access to spectrum in the same licence area (that is, for an equivalent resource).<sup>41</sup>

DAE estimate that access to spectrum for the commercial FTA broadcasters is worth approximately \$505 million per year, with the value of access to spectrum for national FTA broadcasters a further \$352.4 million.<sup>42</sup>

The ACMA reported that licence fees paid by commercial FTA broadcasters in 2009-10 was \$282 million.<sup>43</sup> In March 2010 the Government announced a reduction in television licence fees for commercial FTA broadcasters of 33% in 2010 and 50% in 2011,

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<sup>40</sup> Productivity Commission Broadcasting Report, pp.184-185.

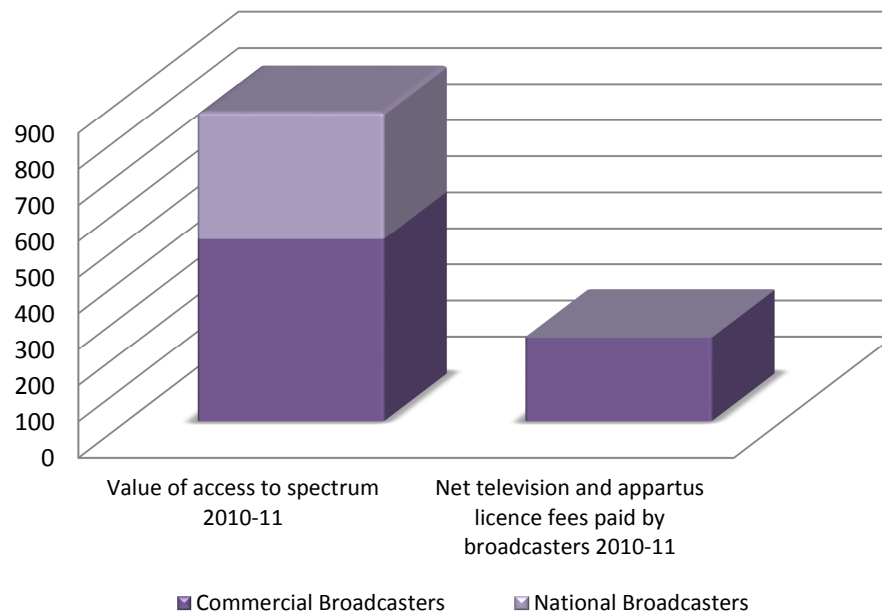
<sup>41</sup> Productivity Commission, Broadcasting Report, p.187.

<sup>42</sup> DAE Report, p.27.

<sup>43</sup> DAE Report, p.27.

dependent on those licensees complying with existing Australian content obligations. ASTRA notes that no additional Australian content obligations were placed on commercial FTA broadcasters in return for these licence fee reductions, only confirmation that these broadcasters continued to comply with existing, long-standing Australian content obligations. Subtracting the rebates, the net amount paid in licence fees by commercial FTA broadcasters in 2010-11 was \$231.4 million.<sup>44</sup>

#### VALUE OF ACCESS TO SPECTRUM AND LICENCE FEES PAID BY FTA BROADCASTERS IN 2010-11



Commercial FTA broadcasters have argued for a permanent reduction in licence fees as an outcome of the Convergence Review on the basis of international precedent, increased competition and local conditions that include the requirement to 'hand back' almost half their allocated spectrum.<sup>45</sup>

ASTRA would agree that competition in the media and communications environment generally is increasing through the proliferation of new content delivery platforms, devices and services. However:

- The current regulatory framework for broadcasting provides commercial FTA broadcasters with a distinct competitive advantage compared to other providers of audiovisual content.
- In overseas markets where licence fees have been reviewed and reduced, commercial FTA broadcasters receive far less regulatory privilege and protection – for example, the Australian anti-siphoning regime is more comprehensive and restrictive than any other comparable scheme in any other jurisdiction.

<sup>44</sup> DAE Report, p.27.

<sup>45</sup> Free TV submission to the Convergence Review Emerging Issues Paper.

- FTA broadcasters are not ‘handing back almost half their spectrum’ – spectrum allocated for the transition to digital television to enable an analog-digital simulcast was explicitly provided on temporary basis (and without cost) solely for the purpose of digital switchover. Once analog switch off is complete commercial FTA broadcasters, as intended by Parliament, will have access to the same amount of broadcast spectrum they had before the commencement of digital switchover.<sup>46</sup>

ASTRA recognises that existing regulatory burdens impose some financial cost on commercial FTA broadcasters (although these costs are significantly lower than the value of the regulatory benefits these broadcasters enjoy). However, as stated above, the costs incurred from these obligations must be balanced against the benefit received from other regulatory privileges, and there should not be any permanent reduction in licence fees without also addressing these imbalances.

### 4.3 Broadcasting spectrum and convergence

ASTRA submits that competition in and between sectors in the media and communications environment will drive the development of innovative new services and compelling content, to the ultimate benefit of consumers. Achieving a more competitive environment requires reform of the regulatory barriers to competition that currently exist. The management of spectrum for terrestrial broadcasting represents one of the more significant barriers to competition between different sectors of the media and communications industry.

#### ***Spectrum management and the public interest***

Spectrum is a scarce public resource, and ASTRA recognises the need for sufficient spectrum capacity to be reserved for public interest requirements, such as defence, emergency and essential services, scientific and meteorological use. Spectrum allocation policy also needs to reflect international agreements on technical standards and uses for particular frequencies, particularly given international moves toward spectrum use harmonisation may impact on the certainty required for long-term infrastructure investment.

ASTRA submits that, beyond these public interest requirements, market-based pricing of spectrum for commercial use is more likely to encourage the most efficient use of spectrum to provide the services that consumers of media and communications services want.

ASTRA submits that consideration could be given limiting the ACMA's broadcasting spectrum planning powers to technical and transmission issues, at least to the extent it

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<sup>46</sup> The Explanatory Memorandum for the bill that became the *Television Broadcasting Services (Digital Conversion) Act 1998* states that: “The digital conversion scheme in the Television Broadcasting Services (Digital Conversion) Bill will provide for the return of ‘loaned’ spectrum to the Commonwealth at the end of the simulcast period, which could then be allocated for specified purposes in accordance with a price-based allocation system.”

relates to commercial and national FTA broadcasters. ASTRA acknowledges that, where there are government policy objectives for the terrestrial provision national broadcasting and other non-commercial broadcasting services, the ACMA's planning powers may continue to need to make specific provision for spectrum required for these services. However, ASTRA questions the continuing need for the ACMA to have regard to matters such as the social, economic and demographic characteristics of a particular geographically defined market, or the "demand for new services" in a particular market, in its broadcasting planning processes, as is currently required under section 23 of the BSA, in relation to commercially-based services. ASTRA submits that the extent to which there is a "demand" for additional services in a particular geographic location is best left for the market to determine. While there would be a continuing role for the ACMA to minimise interference between services and to ensure adequate reception for consumers, the nature of the services themselves should be left the market (and ultimately the consumer) to decide.

### ***Impact of digitisation on broadcast spectrum policy***

The existing regulatory framework for allocating broadcast spectrum may have been appropriate in the analog era 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 broadcast spectrum allocation policy. Use of spectrum for the terrestrial transmission of digital television is currently highly inefficient – the current allocation of 35MHz of spectrum per licence area for commercial and national digital services is not required to carry all of the services permitted to be provided.<sup>47</sup>

Successive governments have made significant financial investment in the terrestrial transmission of FTA television, particularly in relation to FTA digital switchover, suggesting that government policy will continue to require spectrum to be reserved for terrestrial transmission of broadcasting services. However, ASTRA believes there is significant scope for regulatory change to enable the more efficient use of broadcast spectrum, encourage new services, and for the Australian Government (and thus the Australian taxpayer) to receive a financial return based on true market valuation for broadcast spectrum used for commercial purposes.

## **4.4 Separation of carriage and content licences for terrestrial broadcasting**

ASTRA submits that consideration should be given to the separation of content and carriage rights for commercial television broadcasting licences. Currently, a commercial television broadcasting licensee is automatically issued with an apparatus licence under the Radcomms Act authorising the use of spectrum.

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<sup>47</sup> Currently, commercial television broadcasters are permitted to provide two SD and one HD digital service. After switchover is complete, they will be permitted to provide any combination of SD and HD services within their allocated 7MHz of spectrum. National broadcasters have no limitations on the number of services they can provide, however they must provide at least one HD service.

In 2000, the Productivity Commission proposed the separation of licences for use of spectrum from licences to provide a broadcasting service. The Commission argued that:

The current licensing system has not encouraged the efficient use of broadcasting spectrum. The system tries to regulate broadcasters' behaviour and manage spectrum simultaneously. Benefits (such as privileged access to spectrum and limits on competition) are set against obligations (such as Australian content requirements) through a series of quid pro quos, rather than through direct pursuit of each objective. The true costs and benefits of these quid pro quos, especially their effects on the community, are difficult to identify. One of the major effects has been on spectrum use. More spectrum than necessary has been allocated to deliver particular services, and there has been little scope for reallocating spectrum from less to more valuable uses.<sup>48</sup>

The ACCC, in its submission to the Convergence Review Framing Paper, similarly noted that:

A competitive process is generally the best means for allocating spectrum to its highest value use. Bidders for the spectrum determine their maximum bids based on the monetary value that consumers will place on the retail service for which the spectrum will be used to deliver. It follows that it is generally the firm that provides a highly desirable service in an efficient manner that secures the spectrum. Such a competitive process also has the advantage of ensuring that Australian taxpayers receive a fair return for the provision of a scarce public resource.<sup>49</sup>

The Productivity Commission further argued that:

Harnessing market forces for the allocation of spectrum for commercial broadcasting could improve the efficiency with which spectrum is used in Australia. Splitting the current broadcasting licence into a licence to broadcast and a separate licence to use spectrum would create the preconditions for more efficient use of spectrum. Making the licence to use spectrum divisible and transferable would give broadcasters an incentive to review the amount of spectrum they hold and encourage more efficient use of it. This could involve either handing spectrum back to the spectrum manager for reconfiguration and reallocation, or trading spectrum on a secondary market.<sup>50</sup>

ASTRA submits that these arguments are even more pertinent now as we approach the end of digital switchover, and in the light of convergence. With the regulatory framework for the transition to digital television ensuring broadcast spectrum remains with incumbent broadcasters, and with very limited scope for the introduction of new, commercially viable digital terrestrial services, the opportunity to exploit the potential of digital terrestrial broadcasting to deliver new services to consumers has been largely ignored since its introduction.<sup>51</sup>

<sup>48</sup> Productivity Commission Broadcasting Report, pp.178-9.

<sup>49</sup> ACCC submission to the Convergence Review Framing Paper, p.14.

<sup>50</sup> Productivity Commission Broadcasting Report, p.189.

<sup>51</sup> See Papandrea, F. "Digital Television Policy: A Squandered Opportunity" (2001) 8(1) *Agenda* 65-78 at 69.



As noted above, licence fees currently paid by commercial FTA broadcasters do not reflect the value of the spectrum they occupy. Spectrum allocation and use for commercial FTA television broadcasting does not therefore reflect the amount of spectrum 'required' for these broadcasters to provide their services. A certain proportion of spectrum allocated for commercial television broadcasting remains underused, and may well continue to be underused after switchover when commercial FTA broadcasters are no longer required to provide HD services. The spectrum efficiencies that would come from a future migration to MPEG-4 transmissions invite further questions on the need for a commercial FTA broadcaster to be allocated a full 7MHz spectrum channel to provide all its digital television services.

The separation of the broadcasting licence from the apparatus licence would:

- place a true market value on the spectrum used by commercial FTA broadcasters;
- create a new market in spectrum for commercial FTA broadcasting or other services that may want to make use of spectrum that commercial FTA broadcasters do not require for their digital services; and
- mean that commercial FTA broadcasters only pay for the spectrum they use (but pay the market value for that spectrum).

Commercial FTA broadcasters (or any other potential service provider) could negotiate for carriage with apparatus licence holders under a multiplex arrangement. Incumbent commercial FTA broadcasters could, of course, purchase access at market evaluation and continue to be apparatus licence holders if they choose to do, and even 'lease out' some of their spectrum capacity to other broadcasting service providers.

Such a reform would bring the management of spectrum for commercial FTA broadcasting more in line with the ACMA's management of spectrum for commercial use generally. Separation of content and carriage licences could bring increased competition and more efficient use of broadcast spectrum, with the potential for the emergence of new services or the reallocation of spectrum for higher value uses.

#### **4.5 Sixth digital television channel**

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.

There would be a number of considerations if the Government decided that, for example, NITV, community television and other public-interest style services (e.g. A-PAC) should be provided on a FTA basis. If such services were provided under a multiplex arrangement, there would need to be the capacity for the multiplex owner to obtain a commercial return (for example, by enabling the provision of one or more commercially viable services alongside public interest services).

ASTRA does not believe that FTA broadcasters require additional spectrum to support possible future technical migrations of terrestrial digital television services (such as to DVB-T2 or MPEG-4) or new services such as 3D and additional HD. As discussed above, existing spectrum allocated for terrestrial digital television broadcasting could be used far more efficiently by incumbent commercial and national FTA broadcasters using multiplex arrangements, negating the need for additional capacity to implement a transition to new transmission platforms. Even where commercial FTA broadcasters maintained their automatic access to spectrum, an MPEG-4/DVB-T2 migration could be accommodated using existing spectrum allocations through a coordinated and cooperative approach by incumbent broadcasters.

## 5. Australian and local content

### 5.1 Rationale for Australian content regulation

ASTRA agrees 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. ASTRA recognises the underlying rationale for regulation to support production and consumption of Australian content as being based on “the long-standing and widely accepted rationale that there are significant cultural benefits associated with consumption of Australian content, but without government support it would be under-produced.” In particular, the Discussion Paper notes that drama has “held a special place in the content ecosystem” and that without specific requirements to provide Australian content of the types that are currently regulated “it is unlikely that commercial broadcasters would be willing to fund and broadcast these forms of content to the extent that are currently being provided.”<sup>52</sup>

#### *Regulatory quid pro quo*

As the Discussion paper notes, requirements for the provision of Australian content by commercial FTA broadcasters have “traditionally been connected to the benefits provided to the licence holders via their use of spectrum and favourable market settings that have controlled levels of competition.”<sup>53</sup> Similarly, Professor Terry Flew has observed that regulatory obligations on commercial FTA services to achieve cultural and social objectives have:

...been consistent with the policy settlement for Australian broadcasting, as the highly profitable ownership structure that emerged out of laws governing networking and barriers to entry has raised the question of whether the monopoly profits that subsequently accrued to broadcasters should be directed towards programming of high cultural or social value, such as Australian drama production... This has in turn created a quid pro quo approach to broadcasting policy, whereby entry restrictions for potential new competitors are a de facto political trade-off for meeting these programming obligations.<sup>54</sup>

This quid pro quo of regulatory privilege and obligation has been the cornerstone of Australian broadcasting policy for the past forty years, and continues to give commercial FTA broadcasters a competitive advantage against other sectors of the media and communications industry. ASTRA submits that any significant reform to the regulatory framework for Australian content must be considered in this broader regulatory context. Commercial FTA broadcasters should continue to have more comprehensive Australian content obligations while they continue to enjoy their ‘special’ regulatory status which provides access to public spectrum, protection from competition and other regulatory concessions such as the anti-siphoning rules and licence fee rebates, as well as Government financial support for digital switchover.

<sup>52</sup> Convergence Review Australian and Local Content Discussion Paper, p.7.

<sup>53</sup> *ibid.*, p.14.

<sup>54</sup> Flew, T., “The Social Contract and Beyond in Broadcast Media Policy” (2006) 7(3) *Television & New Media* 282-305 at 292.

## FORMS OF GOVERNMENT SUPPORT TO FTA TV BROADCASTERS

1. assistance with the digital switchover
2. the provision of access to spectrum and additional digital channels to those who hold a broadcast licence
3. barriers to entry for new commercial broadcasters
4. the anti-siphoning scheme which reserves the rights for certain sporting events for first acquisition by FTA
5. direct funding for national and community broadcasters

Source: Deloitte Access Economics

## 5.2 Australian content production in a converged environment

The discussion paper suggests that “unless there is an effective policy response, it is likely that the amount of Australian content consumed as a proportion of all content will fall”.<sup>55</sup> ASTRA suggests that the continuing growth of alternative international sources of content could mean that a fall in the proportion of Australian content consumed by Australians may well be inevitable. As the ACMA notes in its *Digital Australians* Report, online content is viewed in addition to more traditional forms of media.<sup>56</sup>

ASTRA submits that the important long-term objective should be that high quality Australian content continues to be made, that could be attractive to both domestic and international audiences. As the Economist recently observed, STV internationally has become the standard bearer for high-quality television programming, with most of the great television dramas that are watched in America and around the world (such as *The Sopranos*, *Six Feet Under*, *The Wire*, *Mad Men*, and *Boardwalk Empire*) appearing first on STV.<sup>57</sup> This is also increasingly the case in Australia, with quality drama productions such as *Love My Way*, *Spirited*, *Tangle*, *Killing Time* and *Cloudstreet* premiering on STV in Australia. Jason Stephens, Creative Director at FremantleMedia (producer of *Killing Time*) recently commented that:

From a producer’s point of view, subscription TV is a great place to make TV. It has to do with the executives who are in charge of drama at those networks, and a relationship of trust. It feels to me that’s the way of the future.<sup>58</sup>

<sup>55</sup> Convergence Review Australian and Local Content Discussion Paper, p.7.

<sup>56</sup> ACMA, *Digital Australians*, p.2.

<sup>57</sup> “Breaking the box” *The Economist*, 20 August 2011.

<sup>58</sup> Quoted in “Pay-TV drama, way of the future for FremantleMedia” *Encore*, 26 February 2010 <<http://www.encoremagazine.com.au/subscription-tv-drama-is-the-way-of-the-future-1369>>.

DAE examined policy options to promote Australian content production in a converged media environment. As noted by DAE:

it is unclear what the costs of meeting Australian content obligations for free-to-air broadcasters actually are and what level and type of Australian content would be provided in the absence of content regulation.<sup>59</sup>

The available evidence suggests that a reasonable level of Australian content may still be provided by broadcasters in the absence of content quotas, though expenditure may be focused on sport and light entertainment rather than drama, documentaries and children's programming. ASTRA notes that STV investment in Australian content production is already well beyond regulatory requirements, and is geared towards producing compelling, original content that consumers are willing to pay for.

### 5.3 Policy options

ASTRA submits that those sectors of the industry that enjoy privileged access to scarce public spectrum and other regulatory benefits and protections should be subject to more comprehensive obligations to achieve Government social and cultural policy objectives. However, ASTRA believes that the rise of the digital economy, new media and distribution platforms, and rapidly changing media consumption patterns mean we should examine more flexible, focused and transparent ways of ensuring Australian content on our screens.

DAE identified a range of policy options to maintain and encourage the production of Australian content in a converging media environment:

- a tradeable quota system for commercial FTA broadcasters;
- greater funding for the national broadcasters;
- increased and more contestable direct subsidies;
- greater indirect subsidies (e.g. increasing the Producer Offset).

In the longer term, DAE concludes the Government will need to rely more on subsidies than other tools used today to ensure Australian content on our screens.

#### ***Tradeable quotas***

DAE suggests that a tradeable quota system would build greater flexibility into the way FTA broadcasters meet their content obligations during a period of transition to a platform-neutral regulatory framework, and could be redesigned to focus more closely on delivery of quality Australian content that would not otherwise be provided by the market. DAE concludes that the main benefits would be "to improve the efficiency with which Australian content is produced and to provide greater information to policy makers about the true costs of meeting Australian content obligations".<sup>60</sup> ASTRA notes that previous

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<sup>59</sup> DAE Report, p.54.

<sup>60</sup> DAE Report, p.58.

considerations of tradeable quota systems raised concerns that such systems may lead to less diversified content, or that there would be no trades because of the relatively small number of players in the market and the difficulty of bringing in other media and communications platforms.<sup>61</sup>

### ***Funding national broadcasters***

ASTRA recognises the role that the national broadcasters play in producing Australian content that may not be commercially viable but fulfils important cultural and social policy objectives. However, ASTRA submits that it should not be the role of the national broadcasters to produce content that is already provided by, and directly competes with, the private sector. As ASTRA argued in its response to the Convergence Review Emerging Issues Paper, 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 failure' 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.

However, ASTRA does submit that Australian content requirements on national broadcasters should be made explicit, and the national broadcasters fully accountable against those requirements under their current funding levels. Further, ASTRA believes that if there were to be any additional funds proposed for the production of Australian content (including to the national broadcasters) these funds should be fully contestable.

### ***Direct subsidies – Screen Australia***

ASTRA would support reforms to the funding allocation process of Screen Australia (SA) to enable greater contestability and recognition of the different business models that exist between different content providers. ASTRA notes the view of the Committee that:

As an investor with a mandate that goes beyond maximising financial returns on its own investment, Screen Australia can also have an effect on the nature of the commercial transactions that drive the industry...<sup>62</sup>

ASTRA recognises that Screen Australia, in its role as an investor, has statutory obligations that go beyond merely maximising financial returns on its investment, including to support the development of a commercial sustainable production industry and Australian programs, as well as the provision of access to Australian programs.<sup>63</sup> ASTRA notes it has previously expressed concerns that the minimum benchmarks set by Screen Australia for commercial arrangements between producers and broadcasters tend to reflect the business model for commercial FTA television and may lack the flexibility to accommodate existing content production business models in other

<sup>61</sup> See, for example, Allens Consulting, *Trading the Regulatory Obligations of Broadcasters*, Report for the ABA, October 2003; Goldsmith et al, *The Future of Local Content? Options for Emerging Technologies*, CMP/ABA, June 2001.

<sup>62</sup> Convergence Review Australian and Local Content Discussion Paper.

<sup>63</sup> *Screen Australia Act 2008* (Cth), s 6(1).

sectors.<sup>64</sup> In a converging media and communications environment, there will be an increasing 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 from different sectors to invest in Australian content.

ASTRA also notes that the current regulatory regime can at times distort the operation of the production sector by discouraging co-investments by STV content producers, by effectively requiring that a co-produced FTA/STV drama series must run first on FTA and then second on STV (in order that it may satisfy both the FTA quota obligation that includes Australian drama, and the STV new eligible Australian drama expenditure rules).<sup>65</sup> This regulation provides a significant, if not absolute, disincentive, for STV to seek co-funding with FTA as it will always require STV to cede first run broadcast rights to a FTA broadcaster.

### ***Indirect subsidies – Producer Offset***

As noted above, the STV sector is an increasingly significant driver of high quality, innovative and engaging drama content both internationally and domestically. Improved investment conditions would enhance the capacity for the STV sector to deliver more quality Australian productions to Australian audiences. ASTRA would therefore support an increase in the Producer Offset such that television program production receives a level of support comparable to film.

## **5.4 The future of Australian content production**

Analysis undertaken by DAE suggests that in a converged world, broadcasters are likely to face strong competition from IPTV and content delivered over the internet. This means that there will be less scope to promote Australian content through restrictions on choice given the greater number of channels and platforms that are available. As a result, future policy will need to be increasingly directed towards developing high quality Australian content that viewers want to watch if it is to be effective. DAE concluded that policy makers will need to gradually move from relying on content quotas to relying more and more on production subsidies over the longer term, with regulatory frameworks that:

- promote competitive neutrality across delivery platforms – by ensuring that content obligations do not disadvantage existing broadcasters relative to new delivery platforms and that any regulatory advantages provided to commercial FTA broadcasters are removed;

<sup>64</sup> ASTRA submission to Screen Australia's *Funding Australian Content on Small Screens: A Draft Blueprint*, Jan 2011.

<sup>65</sup> Under the *Broadcasting Services (Australian Content) Standard 2005*, an Australian program broadcast by a commercial television broadcasting licensee (except for a telemovie or feature film) is a **first release** Australian program (and is thus counted towards the Australian drama requirement for a commercial broadcaster) if it is first broadcast by the commercial broadcasting licensee in the licence area. In the case of a commercial FTA/STV co-production, while expenditure by STV on the program would be counted towards the STV expenditure requirement (BSA, Part 7, Div 2A), the program would not count as a first release program for the purposes of the Australian Content Standard if it is first broadcast by STV.



- encourage the development of higher quality Australian content – by relying more on production subsidies, allocated on a competitive basis in ways that encourage producers to invest in higher quality productions;
- promote greater contestability in relation to government funding to ensure that funds are allocated on a competitive basis to producers who are most likely to invest in high quality productions; and
- reduce the level of reliance on quotas to promote Australian content – while there may be some scope for using quotas in the long term, any quotas will need to be smaller and focus on areas that would be significantly undersupplied by the market such as drama, children's programming and documentaries.<sup>66</sup>

DAE undertook economic modelling to examine whether policy options such as production subsidies or minimum expenditure increase the incentive to produce higher quality production relative to a time-based quota. DAE concluded that:

a production subsidy which is set at a rate which is proportional to the level of overall expenditure (similar to the current production offsets) will result in a higher level of quality being chosen than a time based quota. This finding is based on appropriate assumptions about the nature of a broadcaster's costs and revenue. This occurs because a production subsidy essentially reduces the cost to broadcasters of investing in quality since part of the cost of further increases in quality will be offset through the subsidy.<sup>67</sup>

The modelling also demonstrated that:

a minimum expenditure requirement will lead to a level of quality being chosen by producers which is at least as high as under a time based quota. The key intuition here is that, to meet a minimum expenditure quota, a broadcaster could choose to produce fewer productions but spend more on each production, particularly if the fixed costs associated with creating a new production are relatively high. Whether a minimum expenditure requirement will lead to a higher level of quality being chosen than a production subsidy is not clear from the model and will depend on the size of the production subsidy and the extent to which a particular minimum expenditure requirement changes a broadcaster's behaviour.<sup>68</sup>

### ***Limitations of the Australia-United States Free Trade Agreement***

As the Discussion Paper notes, the Australia-United States Free Trade Agreement (AUSFTA) is likely to limit the scope of changes to Australian content regulation that could be implemented by the Australian Government. The AUSFTA would appear to preclude transmission quotas on STV, but not necessarily preclude the application of expenditure obligations on commercial FTA broadcasters or other services that deliver content. Subsidies and grants for Australian content production are expressly permitted under the AUSFTA.

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<sup>66</sup> DAE Report, p.51.

<sup>67</sup> DAE Report, p.57.

<sup>68</sup> DAE Report, p.57.



## 6. Community Standards

ASTRA is supportive of the principle that ‘communications and media services available should reflect community standards; views and expectations of the Australian public’.

### 6.1 Identifying and Agreeing Community Standards

Different sections of the community will have different views about community standards; for example what content is considered offensive. The National Classification Scheme (the Scheme) provides a common framework which informs consumers as to what they can expect and, in doing so, provides consumers with the ability to protect the most vulnerable community members, e.g. children. It is reasonable that while some material may be confronting or even offensive to some people, this should not necessarily prevent that material being available to others who wish to view it, provided appropriate guidance is provided and children are adequately protected.

ASTRA is supportive of the continued use of a common framework – the Scheme – to classify content which provides consumers with guidance to make informed choices about the content they want to view. Classification also empowers parents to be confident when making decisions regarding the content they allow their children to see. It is important that the way content is assessed and classified is consistent. That is, a piece of content that is classified MA15+ should be so whether it is viewed in a cinema, on television, on a computer or in a computer game.

A consistent framework for classification is also important in an era in which consumers view and interact with increasing amounts of user generated content which is regulated solely by users, if at all. It is vital that the public can rely upon classifications, when accessing some content, to ensure that vulnerable members of the community can continue to be protected in a converged media era.

ASTRA notes that the Senate Legal and Constitutional Affairs References Committee (the Committee), in its report *Review of the National Classification Scheme: Achieving the Right Balance*, concluded the National Classification Scheme (the Scheme) is “flawed, and cannot be sustained in its current form” due to inconsistencies in classification across different platforms.<sup>69</sup> While 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.

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<sup>69</sup> Senate Legal and Constitutional Affairs References Committee, *Review of the National Classification Scheme: Achieving the Right Balance* (2011), p.23.

## 6.2 Appropriateness of existing classifications

ASTRA is of the view that the current classifications are appropriate and well understood by the community. The current classifications allow viewing decisions to be made with reference to age appropriateness as well as providing guidance with regard to the type of content (eg violent content).

### ***The Australian Law Reform Commission Review***

ASTRA notes the Australian Law Reform Commission (ALRC) in its current inquiry into the Scheme proposes a new “*Classification of Media Content Act*” that would prescribe that the following content must be classified before it is sold, hired, screened or distributed in Australia:

- Feature length films produced on a commercial basis;
- Television programs produced on a commercial basis;
- Computer games produced on a commercial basis and likely to be MA15+ or higher;
- All media content likely to be X18+;
- All media content that is RC.

The ALRC proposes that the Classification Board should continue to classify: feature length films; computer games; and content that may be refused classification. Apart from this media content, the ALRC proposes that all other media content may be classified by industry classifiers.

ASTRA is currently considering its position in relation to the ALRC proposal, and will respond in detail to the ALRC discussion paper. However, in general ASTRA would support mechanisms that place the primary obligation on industry to classify and control access to content.

The ALRC also proposes to include additional classifications in a revised National Classification Framework: C, G, PG8+, T13+, MA15+, R18+, X18+ and RC. ASTRA is opposed to adding any additional complexity to the current classification system. ASTRA believes that the existing classification categories are well recognised in the community and generally well understood, as reflected in research undertaken by regulators in 2004 and 2005.<sup>70</sup> While this research did conclude some level of uncertainty in relation to some specific aspects of classification categories, ASTRA does not consider this to be a failing of the framework. ASTRA believes that recognition and understanding of the categories is likely to have increased since those studies were undertaken, and will continue to improve through ongoing education.

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<sup>70</sup> See ABA/OFLC, *Community Attitudes Towards Media Classification and Consumer Advice*, March 2004; and, OFLC, *Classification Study*, June 2005.

### 6.3 Regulation of Community Standards

#### ***Current self- and co-regulatory arrangements***

Television classification is the responsibility of broadcasters and the STV industry has developed the Subscription Broadcast Television Codes of Practice (the Codes) which incorporate the National Classification Scheme. STV broadcasting licensees receive very few complaints in relation to classification.

ASTRA submits that the existing framework for regulating content on STV 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 STV is an example of industry-based content classification regulation that works well both for consumers and broadcasters.

An industry-based regulatory framework for content regulation provides more flexibility and allows content providers to be more responsive to changes in community expectations about the suitability of content. Industry is best placed to assess – and resolve – complaints in the first instance. ASTRA is of the view that the handling and resolution of complaints should remain the responsibility of industry and would be opposed to any unnecessary increase on the burden on Government dealing with vexatious complaints.

Furthermore, from an STV perspective it is an issue of customer relationship management. In this context, the content provider has an existing commercial relationship with its customer and, as in any commercial setting, it is imperative that the business is the first point of contact regarding customer concerns. This allows the business an opportunity to resolve complaints and, ultimately, retain its customers.

The STV industry takes complaints seriously and contends that broadcasters must be provided adequate timeframes to investigate and resolve complaints. The Codes provide a timeframe within which complaints must be addressed. In ASTRA's view, these timeframes are appropriate.

The ACMA monitors compliance with the Codes and can investigate complaints and take action where breaches occur. In ASTRA's view, the ACMA has appropriate powers under the BSA to investigate and enforce the Codes. ASTRA contends that the current range of sanctions available to the regulator is adequate. This is evidenced by the fact that number of breaches of the Codes is relatively small.

#### ***Application of community standards***

The Codes include by annexure the Guidelines for the Classification of Films and Computer Games. The Guidelines, produced under the National Classification Code, are a tool for classifying films which help explain the different classification categories, and the scope and limits of material suitable for each category.

The Codes, like other codes of practice for broadcasting services under the BSA, are subject to regular review with extensive public consultation to ensure that they continue to reflect prevailing community attitudes applicable to the broadcasting operations of each sector of the broadcasting industry, and must take into account any relevant research conducted by the ACMA. In order for the Codes to be registered, the ACMA must be satisfied, among other things, that appropriate community protections are in place.

#### 6.4 Content regulation in a converged world

There is no doubt that convergence is challenging traditional, industry or platform-specific mechanisms for regulating content. The ACMA notes, for example, that:

program standards and codes of practice developed [for broadcasting services under the BSA] do not cover content delivered using the internet or on-demand programs. Different codes and standards may apply to broadcasters and online content providers, even though the actual content and the devices on which it is being viewed may be identical.<sup>71</sup>

##### Case Study

Currently, the same piece of content – an episode of Gossip Girl – may be viewed via a number of platforms – on FTA, STV, online, by video on demand and via mobile television. However, depending on the way it is accessed, it may or may not be subject to classification requirements, time zone restrictions and closed captioning obligations.



<sup>71</sup> ACMA, *Broken concepts. The Australian communications legislative landscape*, August 2011, p.26.

The Discussion Paper notes arguments for regulatory parity in relation to content regulation, but also that there may be good reason for different treatment of content because of the nature of the platform and its relative accessibility or influence. As previously argued, regulatory parity for content regulation cannot be considered in isolation from other regulatory imbalances that protect certain media business models and hinder effective competition across different media sectors. Commercial FTA broadcasters continue to enjoy both regulatory privileges and a higher degree of influence that justify the continuation of more stringent content regulation. Further, as the Committee noted in its Emerging Issues Paper:

...regulatory parity (in a technology or platform sense) 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.<sup>72</sup>

### ***Time Zone Restrictions***

As the Discussion Paper states, the restriction of the availability of content by time zones was developed in an era where broadcasting was distributed via linear 'push' delivery:

existing content standards have been designed for a transmission system where content is programmed for a specific time of day. This is sometimes described as 'push delivery'<sup>73</sup>

In ASTRA's view, it would be both difficult and counterproductive to apply regulation which was developed for 'linear' models of media distribution to new media. Platforms such as the internet allow content to be viewed at any time of the day ('pull delivery') and any attempt to adapt dated regulation to capture new media platforms would be overly burdensome and contrary to the aim of improving the regulatory framework.

However, as the Discussion Paper notes, many consumers will continue to expect the broadcast environment to be a safe place for young people based on time zones and/or access controls. In the ACMA's research into community expectations regarding digital media, it was found that Australians continued to have an expectation regarding time zone restrictions on FTA television:

Most participants saw an ongoing role for current policy mechanisms (time zoning, ratings, classifications, and consumer advice and content warnings) for protecting children from unsuitable content broadcast on free-to-air television.<sup>74</sup>

<sup>72</sup> Convergence Review Emerging Issues Paper, p.13.

<sup>73</sup> Convergence Review Community Standards Discussion Paper, p.15.

<sup>74</sup> ACMA, *Digital Australians – Expectations about media content in a converging media environment: qualitative and quantitative research report*, October 2011, p.4.

FTA broadcasters, with their near universal reach, continue to enjoy a significantly higher degree of influence than any other media platform, and it is clear that there is a continuing expectation by Australians that these timezone protections are kept in place.

Unlike commercial FTA broadcasters, STV 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 STV as opposed to FTA broadcasting – STV 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. This is similar to the way in which a consumer may rent a DVD or purchase a ticket to the cinema. In such circumstances, the consumer makes a choice regarding when the content is viewed.

ASTRA notes that from February 2011, any new model terrestrial digital television receiver must include a parental lock function.<sup>75</sup> While most digital television receivers available from retail outlets will now have parental lock functions, and many existing models have such features, there is likely to be a transition period over a number of years before all terrestrial digital receivers in all homes include a parental lock function.

STV platform operators including FOXTEL and AUSTAR have invested heavily over the years developing parental lock system which provide subscribers with a greater degree of control over the programs they and their children watch. The parental lock system enables subscribers to block programs (based on their classification) utilising a PIN. Applying this viewing restriction enables viewers to select the classification category they wish to restrict (from PG, M, MA15+ and R18+) and access to programming with that classification requires a PIN. FOXTEL's parental lock system also allows its subscribers to block entire channels and AUSTAR is currently working on the implementation of channel blocking as an additional feature of its parental lock system for its MyStar and MyStar HD set top boxes.

In addition, FOXTEL has a remote control - the 'Mini Mote' - specifically designed for children. The 'Mini Mote' provides an additional tool for parents to manage their children's television viewing through restricted channel availability.

In ASTRA's view, continued regulatory privilege of commercial FTA broadcasters and community expectations regarding how content should be regulated on FTA television, together with the likely time lag before the Government could be confident of universal penetration of parental lock features on terrestrial digital television receivers, means that continued time zone-based classification on FTA broadcasters is essential.

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<sup>75</sup> Broadcasting and Datacasting Services (Parental Lock) Technical Standard 2010.



## 6.5 Internet and mobile content

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, consistency should be the starting principle for content regulation across platforms. Differential content regulation should only be maintained where it would remain more appropriate to achieve specific public policy objectives and/or where other regulatory imbalances remain.

ASTRA notes the difficulties of imposing regulatory obligations on content hosted in, or industry participants operating in, overseas jurisdictions. However, the role of the Internet in delivering content in a converged environment cannot be ignored in this Review because of these difficulties. Where content is being targeted and sold to an Australian audience, then its delivery should need to comply with the Australian regulatory framework. That is, all of industry should be responsible for ensuring that vulnerable members of the community are protected. If not, incumbents will be disadvantaged through additional regulatory obligations.

Additionally, if this content is available to consumers without protections that are appropriate to the relevant platform/device and that will achieve comparable levels of protection as those provided by incumbent operators, then it may serve to undermine the social policy objectives of the protections themselves.

## 6.6 Role of consumers

ASTRA strongly supports initiatives that provide consumers with sufficient information to protect themselves from content they may find offensive or inappropriate. Under the Codes of Practice for STV, programs are classified consistent with the National Classification Scheme, with consumer advice given at the commencement of a program in a style consistent with relevant aspects of the Classification Guidelines. STV offers additional access to classification information and consumer advice before, and during, the broadcast of a program through its electronic program guide. Given the capacity for STV subscribers to effectively monitor and restrict access to content that may be harmful, consideration could be given to relaxing some of the regulatory burdens on STV in relation to content.

It is clear that consumers are now actively engaging in self- and peer regulation through social media sites such as Facebook and YouTube. These social media sites allow for community users to monitor and report the activity of other users. Crawford and Lumby note that the role of 'user':

...goes far beyond simply joining up with services, accessing data and then commenting on whether it is suitable or offensive. Through their participation, they create normative language and behaviours, thus determining what will become the acceptable uses of an online space. Everything, from bonding and discussion, to fights, criticising and 'trolling', to creating content, downloading, and simply 'listening' to other users, create a current of activity that eventually shapes online engagement for other participants.<sup>76</sup>

While this does not absolve industry of its responsibility to monitor and regulate content, it is now becoming an increasingly legitimate way in which community standards are reflected in the content that is being accessed and used. ASTRA would support further research and consideration on the potential for effective user-based participation mechanisms in the management of content, as an alternative or supplement to more formal regulatory and co-regulatory approaches.

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<sup>76</sup> Crawford, K & C. Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia*, UNSW Journalism and Media Research Centre, 2011, p.43.



## **7. Conclusion: towards balanced regulation in a converged environment**

In its Emerging Issues Paper, the Convergence Review Committee expressed the view that “it is likely that revolutionary change to the existing policy framework will be needed to respond to convergence”.<sup>77</sup> ASTRA would agree that a transition to a fully converged regulatory environment for media and communications will require a significant realignment of some of the underlying regulatory principles and rationales, particularly those that have underpinned broadcasting in Australia.

Convergence is enabled by technological development, but the benefits of convergence will be driven by the market and competition. An increasingly competitive media and communications environment will encourage the development of a more diverse range of new content and innovative services for consumers. The subscription television sector has been a leader in developing new consumer-focused services and delivering compelling content in response to strong and increasing competition from multi-channel commercial and national broadcasters, IPTV and various online content services, and DVD rentals and sales.

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 submits 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.

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 existing regulatory barriers to competition are critically examined to enable an emerging regulatory framework that provides for balanced and consistent regulation that encourages competition and innovation across the media and communications sector.

ASTRA’s submission, including the economic and policy analysis undertaken by Deloitte Access Economics, has demonstrated the extent and impact of regulatory and other government support for commercial FTA broadcasters. We have also demonstrated, in spite of a relatively hostile regulatory environment, the capacity of the STV industry to develop and grow through consumer-focused innovations in content service delivery to make a substantial contribution to the Australian economy.

ASTRA has recommended a number of policy reforms that would increase competition and content diversity in the media and communications environment, including:

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<sup>77</sup> Convergence Review Emerging Issues Paper, June 2011, p.11.

- a re-examination of the scope of the anti-siphoning scheme;
- removing the regulatory barriers that prevent additional commercial FTA television broadcasting services;
- the separation of broadcasting (content) licences from apparatus (carriage) licences to enable more efficient use of existing broadcasting spectrum, including for other services;
- more closely aligning broadcast spectrum planning and allocation to spectrum planning generally, including market-based pricing; and
- permitting the 'sixth' digital television channel to be used for new services; and
- new approaches to ensuring Australian content remains on our screens in the digital age.

ASTRA emphasises the effectiveness of market mechanisms in encouraging the development of content and services that consumers want. Only where public interest objectives clearly cannot be achieved through the market 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. Where regulation may be required, ASTRA supports primary reliance on co-regulatory measures to deliver public policy objectives for the media and communications sector – direct regulatory intervention should not be the default option to achieve public policy objectives.

ASTRA recognises that achieving social and cultural objectives will be increasingly challenging in a converging media and communications environment. However, the transition to a converged environment is complicated by the legacy of imbalanced, platform-specific regulation and the 'special' place that commercial FTA broadcasting currently occupies in the media landscape. These imbalances must be addressed with the introduction of any reforms that purport to harmonise regulatory obligations on different media and communications sectors.

## APPENDIX A: ANSWERS TO QUESTIONS RAISED IN THE DISCUSSION PAPERS

### A1. Layering, Licensing and Regulation

Layering	
How might a layered approach to media regulation be best used?	As a comparative / analytical tool to assess where regulatory parity should exist. Where regulatory parity is not possible, the reasons for disparity must be identified and justified.
What regulatory obligations and incentives might be appropriately placed at which layer?	<p><u>Content Layer:</u></p> <ul style="list-style-type: none"> <li>• Classification of content obligations;</li> <li>• Obligations to reflect community standards, for example prohibition on RC and X18+ content;</li> <li>• Obligation to meet basic community standards with regard to issues such as accuracy and fairness in reporting;</li> <li>• Advertising content to meet basic standards.</li> </ul> <p><u>Platform/Service Layer:</u></p> <ul style="list-style-type: none"> <li>• Australian Content obligations;</li> <li>• Obligations to enable display of classification ratings / implement RAS or parental lock;</li> <li>• Obligations to meet basic service delivery standards relating to customer management – faults; billing, privacy, complaints handling;</li> <li>• Advertising regulations;</li> <li>• Media diversity rules.</li> </ul> <p><u>Network Layer:</u></p> <ul style="list-style-type: none"> <li>• Technical standards for delivery and reception of content;</li> <li>• Licensing of public spectrum.</li> </ul>
What exceptions to regulatory parity principle are appropriate?	<p>As articulated in Part 2 of ASTRA's response, the existing media landscape includes a number of exceptions to the concept of regulatory parity. In summary, exceptions may need to be drawn on the following basis:</p> <ul style="list-style-type: none"> <li>• Regulatory obligations need to be balanced against regulatory privilege and Government support afforded some sectors of the industry;</li> <li>• Cultural and social objectives based on community expectation in relation to media services and with regard to the way content services are accessed e.g. push vs pull; linear vs non-linear.</li> </ul>
Should the principle that all content be treated the same regardless of manner of distribution underpin any new regulatory framework	<p>An underlying principle of equal treatment of content should apply across all distribution platforms however the principle can only be effectively achieved if:</p> <p>(a) a level regulatory playing field exists across the whole regulatory landscape, ie the regulatory privileges granted to the FTA sector are removed. The balance of regulatory privilege vs obligation must not be lost if adopting this principle.</p>

	<p>(b) There is a significant rebalancing of community expectations with regard to the different distribution platforms.</p> <p>See section 2.2 for more details.</p>
In what circumstances should such regulatory parity not apply?	See responses above.
Are some delivery mechanisms better than others at delivering particular objectives? If so, which ones?	Under existing regulatory conditions, social and cultural objectives should attach to those platforms granted regulatory protection and other benefits, such as the commercial FTA broadcasters.
Is there a case for different regulatory arrangements in any of the following examples: <ul style="list-style-type: none"><li>• Terrestrial broadcast radio v internet radio</li><li>• AV content on mobile v home-based devices</li><li>• Online newspaper sites v print editions</li></ul>	Nil comment.
Are there alternatives to layering? If so what form might they take	<p>A layering approach is appropriate if there is significant reform to the existing status quo.</p> <p>As indicated in ASTRA's response in section 2.2, in light of current Government policy, ASTRA believes the success of a layering approach would be limited.</p>
<b>Licensing</b>	
What entities/services/functions subject to regulatory obligations/incentives need to be licensed?	<p>The necessity to licence activities in the media and communications environment beyond access to and use of spectrum requires further consideration.</p> <p>Where particular types of services continue to be expected to comply with specific obligations to achieve cultural and social policy objectives, then a licensing system may remain the most appropriate mechanism for regulating those services. The extent to which cultural and social policy objectives can be applied consistently across platforms may determine the extent to which licensing of broadcasting services will remain necessary.</p> <p>See section 2.3 for more details.</p>
In what circumstances, if any, should it be a requirement to hold a licence in order to communicate?	
What future benefits are there in retaining the current system of licence areas? Are the benefits for radio greater than for television?	
Is licensing useful to distinguish business models?	
<b>Regulation</b>	
What kinds of service should attract a potentially greater degree of regulation? Could they be: <ul style="list-style-type: none"><li>• 'linear' or 'non-linear'?</li><li>• For profit or not for profit?</li><li>• Funded by advertising or requiring payment by user?</li></ul>	Levels of regulation should not be dependent on the how a particular business generates revenue. This would have the potential to skew media and communications markets, with the potential to favour particular business models that may otherwise become less commercially viable in a converged environment.

	However, regulation should take into account different community expectations regarding how content from particular services should be able to be accessed and used. For example, a subscriber to an STV service would expect to be able to view the content they want, when they want.
What practical scope is there to regulate a service supplied from abroad?	At a practical level, the most effective long-term approach to regulating services supplied from abroad would appear to be through increased international coordination and agreements.
How feasible is it to deal with problems using non-legislative means (e.g. international cooperation, education, official endorsement, naming and shaming, etc.)?	ASTRA would support policy measures designed to increase education of and information to consumers about content and services.
<p>What are the strengths and weaknesses of the following regulatory approaches:</p> <ul style="list-style-type: none"> <li>• education?</li> <li>• self-regulation?</li> <li>• co-regulation?</li> <li>• direct regulation: <ul style="list-style-type: none"> <li>○ primary legislation: licensing regimes, statutory conditions, criminal and civil penalties?</li> <li>○ delegated legislation: conditions or standards imposed by minister, ACMA, ACCC etc?</li> <li>○ administrative powers of regulator – approvals, authorisations, enforceable undertakings etc?</li> </ul> </li> <li>• Other incentives include: <ul style="list-style-type: none"> <li>○ industry levies and other taxes?</li> <li>○ tax rebates?</li> <li>○ subsidies and grants?</li> </ul> </li> </ul>	<p>ASTRA supports reliance on self-regulatory and co-regulatory measures to deliver public policy objectives for the media and communications sector.</p> <p>Markets are effective in encouraging the development of content and services that consumers want, and only where the public interest clearly cannot be achieved commercially via 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.</p> <p>Self-regulation and co-regulation can offer a number of advantages over traditional command and control regulation including: greater flexibility and adaptability; potentially lower compliance and administrative costs; an ability to harness industry knowledge and expertise to address industry-specific and consumer issues directly; and quick and low-cost complaints-handling and dispute resolution mechanisms.</p> <p>ASTRA supports an increase in the Producer Offset to encourage greater production of Australian television content. See section 2.1 for more detail.</p>
For what matters, and to what extent, should regulation aim for a principles-based approach rather than a prescriptive 'black letter law' approach?	<p>ASTRA would agree with a principles-based approach, but cautions that such an approach could not be comprehensively implemented while significant regulatory privileges remain for particular industry sectors.</p> <p>See section 2.1 for more detail.</p>
What factors are important in deciding on what matters are more appropriately dealt with by a regulatory body or by government policy?	ASTRA would support a strong media and communications regulator with sufficient independence from Government to make regulatory decisions based on principles to encourage increased competition and innovation.

## A2. Media Diversity, Competition and Market Structure

Media Diversity	
Is there merit in abolishing or extending the scope of the cross-media ownership and control rules?	<p>The variety of news and information sources now available would suggest that regulatory intervention to promote media diversity is both impractical and unnecessary.</p> <p>See section 3.3 for more details.</p>
<p>Should a public interest test for media mergers and acquisitions be introduced? If so:</p> <ul style="list-style-type: none"> <li>• What mergers and acquisitions should the test apply to?</li> <li>• What should be the objectives of the test, and criteria used in assessing the public interest?</li> <li>• What regulatory arrangements should apply?</li> <li>• In particular, should compliance with the test be a decision for an independent regulator or another authority/individual?</li> <li>• If a public interest test was implemented, who should administer it?</li> </ul>	<p>ASTRA does not support the introduction of a public interest test. A public interest test would be inherently subjective and, in a converging media and communications environment, increasingly difficult and complex to administer.</p> <p>See section 3.3 for more details.</p>
Is the 75 per cent audience reach still appropriate?	<p>The variety of news and information sources now available would suggest that regulatory intervention to promote media diversity is both impractical and unnecessary.</p> <p>General competition provisions under the <i>Competition and Consumer Act 2010</i> (CCA) should be sufficient to regulate any market power concerns in the media and communications environment.</p>
What could be the potential impact of removing the 75 per cent audience reach rule?	Nil comment.
How could the impact of removing the rule be mitigated?	Nil comment.
Would removal of the rule lead to unacceptable ownership concentration?	General competition provisions under the CCA should be sufficient to regulate market power in the media and communications environment.
If the rule was removed or changed, what other mechanisms could be employed to ensure diversity of ownership and voices?	Nil comment.
<p>To what extent are incremental acquisitions in the media sector a concern?</p> <p>Is there a compelling case for an amendment to the CCA merger</p>	ASTRA submits that existing provisions in the CCA are sufficient to address issues arising from mergers and acquisitions in the media sector.



test to address incremental acquisitions in the media sector?	
<b>Exclusive content rights</b>	
<p>In the context of media diversity, what are the effects of:</p> <ul style="list-style-type: none"> <li>• exclusive rights contracts that cover lengthy periods?</li> <li>• exclusive rights contracts that cover a number of platforms for a sole provider (or related providers)?</li> <li>• any other similar practices concerning content rights or windows?</li> </ul>	<p>The market for the acquisition of content is highly competitive. In the experience of ASTRA members, rights are frequently offered on a platform-specific basis, rather than in bundles. As suppliers' bargaining power increases this is likely to continue to be the case (given they can obtain greater value from the rights by splitting them). As such, there is no problem with multi-platform rights deals and certainly no need for regulation.</p> <p>See section 3.4 for more details.</p>
Is there a current problem with exclusive rights in Australia? If so, is this particular to a type of content – such as sports or first-release movies?	ASTRA submits that there is currently no problem with exclusive rights contracts in Australia because, other than for sport (where the anti-siphoning regime substantially restricts fair competition), the market for acquisition of content is highly competitive, and is likely only to become more competitive in the future. Concerns that may arise with exclusive content can be most effectively dealt with under existing Australian competition laws.
To what extent may exclusive content rights be an issue of concern in the future?	See section 3.4 for details.
To which extent are switching costs for access to premium content a concern in Australia? Is there a problem with consumers being locked into particular providers?	Content differentiation and exclusivity is a primary driver for all content service businesses, including FTA broadcasters, STV platforms and online content providers.
Are issues arising from vertical integration of media companies manifesting in competition concerns?	<p>Competition between different content providers means those providers are continually seeking out and investing in compelling new content, including in the production of new Australian content.</p> <p>Any competition concerns that may arise can be effectively dealt with under existing Australian competition laws.</p>
Is bundling of services a concern in Australia? How can we make judgements regarding whether bundling is efficient business practice, or anti-competitive conduct?	As the discussion paper notes, bundling can have significant benefits for consumers in terms of service delivery and price. Any competition concerns that may arise can be effectively dealt with under existing Australian competition laws.
To what extent can download caps impede a consumer's access to content?	Nil comment.
Is this situation likely to change over time; for example, as the NBN is rolled out, and the penetration of internet-connected televisions increases?	Nil comment.

<p>To what extent are arrangements for retransmission of free-to-air TV broadcast signals an issue for diversity and competition in Australian media?</p> <p>If it is an issue, what would be the best way to address the matter in the interests of fairness for the parties concerned and the promotion of diversity and competition in TV-like services?</p>	<p>Existing retransmission arrangements have no impact on media diversity or competition in Australia. The retransmission of FTA broadcasts on STV has been successfully achieved through commercial negotiation between STV platform providers and commercial and national FTA broadcasters. There is no public policy justification for regulatory intervention in a process which works effectively in the interests of the consumer.</p> <p>ASTRA would strongly oppose any proposal to introduce a 'must carry' retransmission scheme in Australia.</p> <p>See section 3.5 for details.</p>
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### A3. Spectrum Allocation and Management

Broadcasting spectrum and convergence	
How will major broadcasting policies best be dealt with?	<p>The significant financial investment in terrestrial FTA broadcasting by successive Governments, in particular to underpin the digital switchover of terrestrial television services – would suggest that Government policy will continue to require spectrum to be reserved for terrestrial broadcasting. However, ASTRA believes there is significant scope for regulatory change to enable the more efficient use of broadcast spectrum, encourage new services, and for the Australian Government (and thus the Australian taxpayer) to receive a financial return based on true market valuation for broadcast spectrum used for commercial purposes.</p> <p>As detailed in our submission, ASTRA proposes that consideration be given to separating regulation of content services from allocation of spectrum for their transmission. However, if FTA broadcasters are to continue to receive guaranteed access to spectrum at other than market valuation, and enjoy other regulatory privileges, then greater regulatory burdens to achieve cultural and social policy objectives should continue to apply to these broadcasters.</p> <p>See section 4.4 for details.</p>
Are the BSBs necessary to achieve particular spectrum policy outcomes?	
Are the BSBs necessary to maximise overall public benefit from spectrum assigned for the delivery of content and communications services?	
Are two separate legislative regimes governing spectrum planning required?	
Spectrum management and the public interest	
What approaches would best serve to achieve the outcome of maximising public benefit from use of the spectrum in the convergent environment?	<p>ASTRA recognises that spectrum needs to be reserved for public interest requirements (defence, emergency services, scientific research etc).</p> <p>Spectrum allocation should also reflect international agreements on uses for particular frequencies, particularly given long-term infrastructure investment is increasingly reliant on international spectrum use harmonisation.</p> <p>Price-based allocation of spectrum would encourage the most efficient use to provide services that consumers and business want.</p> <p>See section 4.3 for details.</p>
Would the objects and the planning criteria of the Broadcasting Services Act need to be taken into account under a technology and service-neutral planning process?	ASTRA believes there is merit in considering the continuing need for the ACMA to examine the social, economic and demographic characteristics of a licence area when planning for commercial broadcasting services. Determining whether there is a demand for a particular type of commercial service in a particular market should be left for the market to determine.
Would the ACMA's total welfare standard ensure that the public benefit uses of all spectrum planned under a converged system is adequately considered?	<p>ASTRA understands the ACMA's total welfare standard to be a measure of the impact of a regulatory proposal on the public interest as the sum of the effects on consumers, producers, government and the broader social impacts on others in the community, which requires that to the extent possible:</p> <ul style="list-style-type: none"><li>all significant benefits and costs arising from the regulatory proposal will be given the same weight</li></ul>

	<p>regardless of the identity of the recipient; and</p> <ul style="list-style-type: none"> <li>the approach expected to generate the greatest net benefits is the preferred approach.</li> </ul> <p>In ASTRA's view, an approach that encourages competition and innovation and avoids discriminatory benefits for particular sectors of the media and communications industry are more likely to generate the greatest net benefits for consumers and the community generally. An approach which tends to favour particular industry sectors or delivery systems is likely to be less efficient and effective, and ultimately hinder or distort competition.</p> <p>ASTRA believes the ACMA should take an approach that prioritises the long-term interests of consumers.</p>
Are the minister's powers to reserve spectrum for national and community broadcasters important into the future? Should it be extended to other 'non-commercial' sectors? If so, how would public benefit then be defined?	<p>While terrestrial broadcasting remains the primary means by which Australians receive television and radio services, then may be justification to ensure that sufficient spectrum is available for the delivery of national broadcasting services.</p> <p>However, with the proliferation and increasing accessibility of alternative distribution platforms in a converging environment, the long-term future for the delivery of these and other terrestrial broadcasting services may be on platforms other than those that rely on scarce public spectrum.</p>
To what extent does the current licensing and pricing regime support research? Are the scientific licensing arrangements sufficient for this purpose? If not, why not?	Nil comment.
<b>Impact of digitisation on broadcast spectrum policy</b>	
What approach should be taken to the licensing of multiplexes and multichannels for digital television into the future?	<p>ASTRA believes that broadcast spectrum could be used far more effectively and efficiently. ASTRA argues that consideration should be given the separation of broadcasting (content) licences from apparatus (carriage) licences for commercial television broadcasting services, to enable a more efficient allocation of spectrum and to promote competition from new services that could gain access to excess spectrum currently issued to commercial television broadcasters.</p> <p>See sections 4.4 for details.</p>
What policies should determine how any excess capacity freed up by the efficiency gains delivered by digital television transmission should be managed and used?	
Who should benefit from these efficiency gains? What approach would lead to the maximum public benefit?	
Should television broadcasters be encouraged/required to provide services using high-definition or other service enhancements in the future?	The provision of high definition or standard definition services should be up to the individual broadcaster. The market is best placed to determine the demand for high definition programming and the platforms best suited to providing it.
Should television broadcasters be able to sell spectrum to other	Not before regulatory changes that mean commercial FTA broadcasters access spectrum at full market value no longer

providers of multichannels?	receive other regulatory privileges and benefits.
Should the introduction of MPEG-4 be encouraged?	A move to MPEG-4 would mean further spectrum capacity available for additional broadcasting or other communications services, and should be encouraged. ASTRA submits that the transition to MPEG-4 does not require additional spectrum if existing spectrum available to FTA for digital television services is used more efficiently.
Does the digital radio access regime offer ideas for managing digital television multiplex capacity into the future?	Nil comment.
<b>Pricing broadcasting spectrum</b>	
Should spectrum used for broadcasting be priced as an alternative to the current licence fee regime?	ASTRA would support a requirement for commercial FTA broadcasters to full market value for access to broadcast spectrum. However, while commercial FTA broadcasters are guaranteed access to public spectrum, and enjoy a range of regulatory and other benefits, then these privileges should be reflected in the cost of using that spectrum.
What should be the objective of pricing spectrum used for broadcasting? Why?	The primary objective of pricing broadcast spectrum should be to encourage the most efficient and effective use of that spectrum in the interests of consumers.
What is the best pricing model to apply to spectrum used for broadcasting? Does this fit the objectives you have identified?	ASTRA would support a requirement for commercial FTA broadcasters to full market value for access to broadcast spectrum. However, while commercial FTA broadcasters are guaranteed access to public spectrum, and enjoy a range of regulatory and other benefits, then these privileges should be reflected in the cost of using that spectrum.
Do you have comments on the advantages and disadvantages of each model? Are there other suitable models?	No further comment.
Current regulatory obligations could place restrictions on use of spectrum. Should these be recognised in spectrum charging or under an additional licensing mechanism that recognises other obligations?	Nil comment.
What are the reasons why non-commercial users might be included or excluded from pricing objectives?	Nil comment.
What are key transitional issues if the spectrum strategies discussed in this section were to be embraced?	A move to market-based pricing for broadcast spectrum would need to be undertaken as part of a broader reform of regulatory barriers to competition in the broadcasting sector.
<b>Digital radio</b>	
What public benefits does digital	Nil comment.

radio offer in a converged media environment?	
How is it different from alternative technologies, such as internet radio?	
How might the more widespread introduction of digital radio contribute to the principles developed by the Convergence Review? Which principles would be supported by digital radio developments?	
How does digital radio compare with other new technologies and platforms in its impact in expanding the quality and relevance of media content for Australians?	
<b>Sixth digital television channel</b>	
What are possible uses for sixth digital TV channel capacity?	ASTRA believes that the sixth channel should be made available on a commercial basis for the provision of new commercial television or other services. However, if additional commercial services continue to be ruled out, then ASTRA would support the spare channel for the provision of public interest services.  See section 4.5 for details.
Is an expression of interest process the best way to gauge interest?	Nil comment.
What parameters should be set for the use of the channel capacity?	There should be no limitations on the type of service that could be provided.
How should the licensing of the multichannels and multiplex be structured and allocated?	Nil comment.
Should spare sixth-channel capacity be left unallocated? If so, why?	There is no public policy justification for leaving spare broadcast spectrum capacity unallocated.

## A4. Australian and Local Content

Supporting new content forms	
Should a revised policy framework include policy measures to promote newer forms of content? <ul style="list-style-type: none"><li>If so, how would this work in practice?</li></ul>	Nil comment.
Convergent platforms	
Should Australian content rules be extended to convergent platforms?	As discussed in Section 5.1, regulatory 'parity' in relation to social and cultural objectives such as Australian content obligations cannot be considered in isolation from existing regulatory barriers to competition between different types of media and communications services.  While commercial FTA broadcasters continue to enjoy privileged regulatory status, they should also continue to be subject to more onerous content obligations.
What characteristics of a service should qualify it for inclusion in an Australian content regime?	
In a converging media environment, should the Australian Government move away from minimum content requirements on platforms towards a subsidy model?	
Options for content regulation	
Requiring a minimum transmission of hours of Australian content	
Should a percentage of hours of quota for commercial broadcasters be removed, leaving only the requirement to show particular types of content (traditionally these have been focused upon documentary, drama and children's content)?	As discussed in Section 5.1, regulatory 'parity' in relation to social and cultural objectives such as Australian content obligations cannot be considered in isolation from existing regulatory barriers to competition between different types of media and communications services.  ASTRA submits that greater competition would drive content providers to produce and commission more compelling content, including quality new Australian drama.
Should the regulation continue to promote the independent production sector and riskier forms of drama production?	
Should any obligations be tradeable?	
Are there particular considerations or options for support to be taken into account with regards to children's content?	
Should the arrangement be removed entirely?	ASTRA notes that a tradeable quota system could increase efficiency in Australian content production and demonstrate the true cost of producing Australian content, but that in the long term would likely play a complementary role in a fully converged environment.
The minimum expenditure model applying to subscription television	
What would be the costs and benefits of extending this form of regulation to other media platforms (including the multichannels) that deliver television or television-like	Nil comment.

content?	
Is the current percentage of expenditure set at an appropriate level? Should it be extended to other forms of content including children's or documentary programming?	STV broadcasters spent nearly \$580 million on Australian content in 2010, and comfortably exceed regulatory requirements for drama expenditure.  In ASTRA's view, the expenditure levy on STV is unnecessary.
Should the arrangement be removed entirely?	
<b>Requiring the provision of a minimum amount of Australian advertising</b>	
What are the costs and benefits of extending this form of regulation to other media platforms (including the multichannels) that deliver television or television like content?	While regulatory barriers to competition remain, no consideration should be given to extending regulation regarding Australian advertising content to other content delivery platforms.
Should the arrangement be removed entirely?	
<b>Minimum levels of Australian music</b>	
What are the costs and benefits of extending this form of regulation to other platforms that deliver radio-like services?	ASTRA would not support the extension of Australian music quotas to subscription narrowcast radio services. The viability of such small, niche-market services would be threatened were they to be subject to Australian content obligations.
Should the arrangement be removed entirely?	
<b>Options for direct investment in content</b>	
In a converged environment should the public broadcasters receive additional direct funding to invest in Australian content?	The role of the national broadcasters, particularly the ABC, should be to provide Australians access to content not likely to be provided by the private sector. Conversely, it should not be the role of the national broadcasters to replicate content that is already being produced and distributed commercially.  However, ASTRA submits that any additional government funding for Australian content should be fully contestable across all platforms and services, and not earmarked for particular broadcasters or particular sectors of the industry.
Should the public broadcasters be subject to Australian content quotas on their main or multichannels?	ASTRA would support more explicit Australian content requirements on the national broadcasters.
What is the appropriate level for Screen Australia to support investment in and production of Australian television content?	ASTRA submits that funding from Screen Australia should be fully contestable across all platforms and services, with funding criteria that recognise the different business models that may apply to different sectors of the industry.  See section 5.2 for more details.



<b>Indirect investment in direct content: the Producers Offset</b>	
Should the rebate level provided via the Producer Offset be varied?	ASTRA would support an increase in the Producer Offset for television production.  See section 5.2 for more details.
Should any currently ineligible form of content receive access to the Producer Offset?	Nil comment.
Should the Producer Offset be made more accessible to genres that are commercially vulnerable but culturally significant?	Nil comment.
<b>Local and regional content</b>	
What alternative ways are there to support production and access to local content in regional communities?	As the discussion paper notes, the growth in new media is enabling a range of non-traditional media sources for local and regional content. Regulatory reform that provides for greater competition in the media and communications sector is likely to encourage the development of new media services that cater to local and regional requirements.  While commercial FTA broadcasters remain protected from competition and continue to receive other regulatory privileges, obligations to provide local news and information content should remain.
Should local content rules seek to build critical mass by encouraging cross-platform collaboration, or by implementing a system of 'tradable quotas' to concentrate resources?	
Should regional broadcasters be encouraged to develop innovative ways of providing local content to the communities they service, including through non-broadcast services?	
Should the local presence requirements for radio be removed?	Nil comment.
Should the same local content requirements apply to all regional commercial broadcasters regardless of whether they have been subject to a trigger event or not?	Nil comment.
Could a points-based system of local content requirements, or some other system, provide useful flexibility for commercial broadcasters to better meet the needs of their audiences?	Nil comment.
Should the charters of the ABC or the SBS be updated to reflect existing activities and with a view to recognise a specific obligation to provide local content on their	ASTRA recognises that the ABC plays an important role in providing local news and information to regional and rural areas, and that this should remain one of its primary obligations.

radio or television services?	ASTRA would support consideration of specific reference in the ABC charter to provide local and regional radio and television content.
Should the public broadcasters be encouraged to extend even further their local content services?	
What should be the role of community broadcasters in producing and delivering local content?	Nil comment.



## A5. Community Standards

Current arrangements	
Are the current co-regulatory and self-regulatory measures effective in broadcasting?	<p>ASTRA submits that the current co-regulatory model for regulating content on STV 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.</p> <p>Industry-based regulatory frameworks provide more flexibility and allow content providers to be more responsive to changes in community expectations about the suitability of content. Industry is best placed to assess – and resolve – complaints in the first instance.</p> <p>See section 6.3 for details.</p>
Who is the appropriate first point of contact for complainants?	<p>ASTRA contends that the appropriate first point of contact for complaints is the content provider. Industry is best placed to assess – and resolve – complaints in the first instance.</p> <p>See section 6.3 for details.</p>
Are there issues regarding the complexity and timeliness of the investigation of complaints that need to be addressed?	<p>The STV industry takes complaints seriously and contends that broadcasters must be provided adequate timeframes to investigate and resolve complaints. The Codes provide a timeframe within which complaints must be addressed. In ASTRA's view, these timeframes are appropriate.</p>
Are there currently appropriate powers to enforce the codes of practice?	<p>The ACMA monitors compliance with the Codes and can investigate complaints and take action where breaches occur. In ASTRA's view, the ACMA has appropriate powers under the <i>Broadcasting Services Act 1992</i> to investigate and enforce the Codes.</p>
Do the provisions in the current broadcasting codes of practice adequately reflect community standards and expectations?	<p>The Subscription Television Codes refer directly to the National Classification Scheme for classification of content broadcast on STV. Codes of practice for broadcasting under the BSA are subject to regular review with extensive public consultation to ensure that they continue to reflect prevailing community attitudes applicable to the broadcasting operations of each sector of the broadcasting industry. Further, in order for the Codes to be registered, the ACMA must be satisfied that appropriate community protections are in place.</p>
Are there particular areas where the codes work well/badly?	<p>No specific comment, other than to reiterate our belief that the Codes for STV work well in the interests of both the consumer and the industry.</p>
Are there alternative ways of reflecting community standards in media content?	<p>Nil comment.</p>
Should there be more differences/similarity between media codes?	<p>ASTRA would support of the continued use of a common framework – the National Classification Code - to classify content which provides consumers with guidance to make informed choices about the content they want to view.</p>

Are rules for product placement adequate?	Nil comment.
Could arrangements for advertising regulation be improved?	ASTRA submits the Advertising Codes in the ASTRA Codes of Practice adequately and appropriately deal with issues relating to advertising on STV.
<b>Content regulation in a converged world</b>	
Are content time zones still necessary?	<p>In ASTRA's view, continued regulatory privilege of commercial FTA broadcasters and community expectations regarding how content should be regulated on FTA television, together with the likely time lag before the Government could be confident of universal penetration of parental lock features on terrestrial digital television receivers, means that continued time zone-based classification on commercial FTA broadcasters may continue to be appropriate. Recent ACMA research indicates that most people see a continuing role for time zone regulation to protect children from suitable content broadcast on FTA television.</p> <p>See section 6.4 for more details.</p>
Could principles of time zones be applied to new media platforms? What practical measures are available to cover like-product delivery options?	<p>In ASTRA's view, it would be both difficult and counterproductive to apply regulation which was developed for free-to-air television. Platforms such as the internet allow content to be viewed at any time of the day and reject traditional linear programming models, and any attempt to adapt dated regulation to capture new media platforms would be overly burdensome and contrary to the aim of improving the regulatory framework.</p> <p>See section 6.4 for details.</p>
Has Schedule 7 been effective in protecting community standards?	Nil comment.
How successful has schedule 5 been in regulating online content?	
How effective is the complaint-based system in capturing 'illegal' content?	
How effective are the regulator's powers in this area?	
Is the legislation sufficiently flexible to accommodate future developments?	
Should specific classifications be added or removed from the schemes?	
What kind of regulatory responses are appropriate for community	ASTRA submits that where two services are for all intents and purposes the same, except in their technological

standards? <ul style="list-style-type: none"> <li>Should these differ across platforms?</li> <li>Should more parental controls and opt-in mechanisms be adopted?</li> <li>Should age verification be standard for internet content regulation?</li> <li>How can these measures be enforced or encouraged?</li> </ul>	delivery mechanism, consistency should be starting principle for content regulation across platforms. However, differential content regulation should be maintained where it would remain more appropriate to achieve specific public policy objectives and/or reflects other continuing regulatory imbalances.
What kind of incentives might encourage industry participants to observe community standards in content regulation?	Nil comment.
To what extent is it appropriate to regulate community standards through: <ul style="list-style-type: none"> <li>Rules enacted by the Australian Government?</li> <li>Industry codes of practice?</li> <li>Conditions imposed by the regulator on a case by case basis?</li> </ul>	ASTRA submits that Industry-based regulatory frameworks have proven to be highly effective in responding to community standards and adapting when standards change. Self- and co-regulatory models give greater flexibility and allow content providers to be more responsive to changes in community expectations about the suitability of content.
Is the current range of sanctions available to the regulator adequate?	ASTRA contends that, with respect to content on STV the current range of sanctions available to the regulator is adequate. This is evidenced by the fact that number of breaches of the Codes is relatively small.
What kind of obligations should industry take to improve content regulation and access?	ASTRA submits that the co-regulatory model for the STV industry already provides a highly effective framework for regulating content to reflect community standards while enabling adults to view the content they want. STV services provide a reliable parental lock function to give parents the ability to prevent children from viewing inappropriate viewing material, with assistance to operate these features available from a dedicated call centre.
Should online content be subject to the same regulatory oversight as broadcast material? <ul style="list-style-type: none"> <li>Is co-regulation a good model for online content regulation or is there a need for more direct regulation?</li> <li>Is self-regulation an option?</li> </ul>	<p>While regulatory consistency should be starting principle for content regulation across platforms, ASTRA believes that differentiated content regulation is likely to remain appropriate: where it would reflect:</p> <ul style="list-style-type: none"> <li>community expectations regarding how content from different sources is accessed and used; and/or</li> <li>other continuing regulatory imbalances.</li> </ul> <p>As noted above, ASTRA submits that Industry-based regulatory frameworks have proven to be highly effective in responding to community standards and adapting when standards change.</p>
What is the role of consumers in protecting themselves from offensive and inappropriate content?	ASTRA strongly supports initiatives that provide consumers with sufficient information to protect themselves from content they may find offensive or inappropriate. Under the Code of Practice for STV, programs are classified consistent

	<p>with the National Classification Scheme, with consumer advice given at the commencement of a program in a style consistent with relevant aspects of the Classification Guidelines.</p> <p>See section 6.5 for details.</p>
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## **APPENDIX B: ASTRA MEMBERSHIP**

### **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