



Australian  
Competition &  
Consumer  
Commission

# **ACCC submission to the Convergence Review Framing Paper**

June 2011

**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION**  
**SUBMISSION TO THE CONVERGENCE REVIEW FRAMING PAPER**

**EXECUTIVE SUMMARY**

The ACCC supports the Convergence Review Committee's position that a thorough review of the existing policy framework applying to the media and communications industry is required. The need for review is driven by ongoing change within the industry, which is reducing both the relevance and effectiveness of the existing policy framework.

The media and communications industry continues to undergo considerable change, with emerging platforms and the online environment growing in significance. Media consumption habits are evolving as new services and applications are developed that take advantage of emerging platforms. These changes give rise to a significant opportunity to achieve a much greater degree of competition in the media and communications industry than has existed in the past. The ACCC recommends that the Convergence Review Committee conduct its review within this context.

The ACCC recognises that there are likely to be government social policy objectives consistent with the scope and terms of reference of the Convergence Review that are important in this industry. These include the social policy objectives proposed by the Convergence Review Committee in its eight 'guiding principles'.

Regulatory intervention may be required to meet these social policy objectives. However, the ACCC notes that open and competitive markets, which support greater choice and diversity for consumers, are also likely to go a long way to delivering outcomes consistent with these objectives.

The challenge is to ensure that any necessary regulatory interventions promote the specific policy goals with minimal detraction from the competitive environment. Consistent with good public policy practice, the ACCC recommends that consideration be given to identifying the precise outcomes that are sought. This will enable regulation to be designed in such a way as to minimise any negative impacts on competition and consumer choice. The effect of this approach will be to deliver a significant benefit to the Australian community as a whole.

The ACCC also recommends that the Convergence Review Committee carefully considers the regulatory framework it recommends in order to create an environment in which emerging platforms can flourish. Extending many of the regulations that apply to traditional commercial and subscription television broadcasters to emerging platforms could create significant new barriers to entry. This would stifle the potential for increased competition to deliver greater choice and efficiency benefits for consumers.

## **1. INTRODUCTION**

The ACCC welcomes the opportunity to provide its views to the Convergence Review Committee on the appropriate approach to the review as well as the Committee's suggested 'guiding principles' for the review.

The ACCC was established to enhance the welfare of the Australian community by fostering competitive, efficient, fair and informed markets. It seeks to promote competition and fair trade, based on the fundamental principle that this benefits consumers, businesses and the community.

Social policy objectives consistent with the scope and terms of reference of the Convergence Review Committee as well as the eight guiding principles proposed in the Framing Paper are likely to be important in this industry. The ACCC recognises that regulatory intervention may be required to meet these objectives. However, the ACCC notes that open and competitive markets are likely to go a long way to delivering outcomes consistent with social policy objectives as competition leads to increased choice for consumers, drives innovation and improves quality and efficiency.

This submission sets out how social policy objectives may be achieved within the context of a competitive media and communications industry.

## **2. THE EVOLVING MEDIA AND COMMUNICATIONS LANDSCAPE**

The media and communications industry continues to undergo significant change. In the decade since broadcasting and convergence reviews were conducted by the Productivity Commission<sup>1</sup> and the former Department of Communications, Information Technology and the Arts,<sup>2</sup> the online environment has become much more significant and new media and communications platforms continue to emerge.

The driving force for these changes has been investment in new technologies and infrastructure upgrades. These have progressively pushed up broadband data rates to the point where 42 per cent of internet connections provide an advertised peak data rate of 8 Mbps or greater.<sup>3</sup> The data rates and coverage of mobile networks have also improved significantly, supporting broadband connectivity for consumers on the move. Investment in the National Broadband Network (NBN) and next generation wireless networks means that consumers will be able to access even higher data rates in the future. Meanwhile, device manufacturers are developing highly functional smartphones, tablets, set-top boxes and now internet-enabled televisions.

Consumers are changing their media consumption habits as new services and applications are developed that take advantage of the emerging platforms. When the Productivity Commission released its Broadcasting Inquiry Report in 2000, it noted

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<sup>1</sup> Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11, 3 March 2000.

<sup>2</sup> Department of Communications, Information Technology and the Arts, *Convergence Report*, May 2000.

<sup>3</sup> ABS, *Internet Activity – December 2010*, Catalogue 8153.0, April 2011.

that around one quarter of Australians used the internet each week.<sup>4</sup> This compares to 78 per cent in June 2010, with 55 per cent of Australians spending more than seven hours per week online.<sup>5</sup> In addition, the ACMA has reported that almost 40 per cent of respondents to an April 2010 survey had accessed the internet on their mobile device.<sup>6</sup>

Consumers are taking advantage of emerging platforms in various ways. Some activities involve accessing online versions of traditional forms of print, television and radio services. For example, approximately six million Australians access mainstream online news sites in any given month,<sup>7</sup> while 36 per cent of respondents to a June 2010 survey said they had accessed streamed video online.<sup>8</sup> However, consumers are also using emerging platforms for more innovative services. This includes posting videos online, reading blogs and accessing news and entertainment services from overseas providers.

These changes give rise to significant opportunities to achieve a much greater degree of competition and innovation in the media and communications industry than has existed in the past. The online environment provides relatively low cost opportunities for both traditional and emerging businesses to experiment with different types of services that might appeal more strongly to consumers. Clearly this creates the potential for traditional media businesses to face much stronger competition. However, traditional media businesses can also benefit from the changing environment. Indeed, many of these businesses have embraced these opportunities and now offer a range of innovative services on emerging platforms in addition to their traditional offerings.

The dynamic nature of the industry is placing pressure on existing regulatory settings. While in the past it may have been effective to apply specific regulatory obligations to a relatively small number of licensed operators providing services in particular geographic regions, this may no longer be the case in an environment where content is increasingly provided by a wide range of Australian and overseas providers (including individuals). Digital video recorders and the availability of catch-up programming online is reducing the relevance of regulations specifying when different types of content may be broadcast. Similarly, regulations preventing commercial television broadcasters from reaching more than 75 per cent of the population are challenged by the availability of content on emerging platforms that can be accessed anywhere in Australia.

The growing significance of emerging platforms is clear both in Australia and overseas. However, there is uncertainty as to how the industry will evolve in the future. Rapid change presents real challenges in designing an effective regulatory

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<sup>4</sup> Roy Morgan, cited in Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11, 3 March 2000, page 62.

<sup>5</sup> Roy Morgan Single Source, cited in ACMA, *Communications Report 2009-10 Series: Report 1—Australia in the digital economy: The shift to the online environment*, 11 November 2010, page 13.

<sup>6</sup> ACMA, *Mobile Network Broadband*, December 2010, page 20.

<sup>7</sup> Nielsen Online (June 2010), cited in ACMA, *Communications Report 2009-10 Series: Report 4—Changing business models in the Australian communications and media sectors: Challenges and response strategies*, January 2011, page 22.

<sup>8</sup> Roy Morgan Single Source, cited in ACMA, *Communications Report 2009-10 Series: Report 1—Australia in the digital economy: The shift to the online environment*, 11 November 2010, page 19.

framework. Highly prescriptive regulation is more likely to have unintended consequences than a less interventionist approach.

### **3. A COMPETITIVE MEDIA AND COMMUNICATIONS INDUSTRY BENEFITS CONSUMERS**

In considering the most appropriate regulatory settings for the media and communications industry, the ACCC recommends that the Convergence Review Committee favour an approach designed to promote an open and competitive environment. Open markets will deliver significant benefits to Australian consumers, including greater choice and diversity.

Since the findings of the Hilmer Review were delivered in 1993 and the Council of Australian Governments adopted the National Competition Policy (NCP) in 1995, there has been widespread acceptance that promoting competition is key to improving the overall welfare of the Australian community. Indeed, in its 2005 report on the outcomes of the NCP, the Productivity Commission found that NCP reforms had delivered considerable benefits to Australian businesses and consumers. The Productivity Commission further noted that these benefits would be larger still should pro-competitive reforms be extended to areas of the economy, including the broadcasting sector, where they had not yet been embraced as strongly.<sup>9</sup>

There are a number of reasons why pro-competitive reform of the media and communications regulatory settings will deliver real benefits to consumers.

Competition is not valuable for its own sake but because of the impact it has on how businesses operate to meet the demands of consumers. Industries characterised by robust competition between businesses are much more likely to deliver the products and services consumers want at the lowest possible prices. In a competitive market, each business must try to ensure it offers exactly what its consumers want or it risks losing them to another business offering a better product, higher quality service or lower price. Without competition, businesses are more likely to take consumers for granted, knowing it is harder for them to shop around for a better deal. A competitive industry is also more likely to provide the full range of products and services consumers want by encouraging businesses to put resources to their highest value use.

In addition, competition will be particularly beneficial in industries characterised by significant and rapid change. The media and communications industry has experienced continuous advances in technology and improvements in infrastructure, which make it possible for businesses not only to enhance their existing offerings but also to innovate to provide radically new types of services. Competition encourages businesses to actively seek out these opportunities, even if it means fundamentally changing the way in which things have been done in the past. Without rigorous competition, business has little incentive to make difficult decisions. This is likely to delay the introduction of new services that could benefit consumers.

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<sup>9</sup> Productivity Commission, *Review of National Competition Policy Reforms*, 28 February 2005, pages XXIX-XXXI.

In an increasingly global media and communications environment, the ability of Australian consumers to access the services they want, legally or otherwise, from overseas sources is likely to increase. Promoting a vigorously competitive domestic industry will help place Australian businesses on an efficient and sustainable footing. This will improve the industry's capability to provide the Australian stories and content consumers value as efficiently as possible into the future.

The general competition law provisions contained in the *Competition and Consumer Act 2010* (the CCA) apply to the communications and media industry as they do across the economy. However, the existing competition law framework is limited in its ability to address all of the ways that businesses may dominate a market, such as by controlling desirable content.

For example, provisions under section 50 of the CCA can be used to prevent acquisitions if they are likely to lead to a substantial lessening of competition. However, a single acquisition may not result in a substantial lessening of competition on its own. Furthermore, the competition law provisions are limited in being able to respond to a business once it has established substantial market power. Section 46 can only be applied in situations where a business with substantial market power has taken advantage of its power for a purpose proscribed in the legislation.<sup>10</sup> This would generally involve an abuse of its market power rather than merely the use of its position for legitimate business purposes. In contrast to other jurisdictions, Australia does not have a general competition law provision that can be used to deal with the maintenance of monopoly power as such.

Increasing competition in the media and communications industry will deliver tangible benefits to consumers and improve overall welfare for the Australian community as a whole. However, the ACCC recognises that achieving important social policy objectives identified by government is likely to require regulatory intervention, which may necessarily reduce the degree of competition possible in the industry.

In light of this potential tension, the ACCC sets out below a possible approach to achieving social policy objectives while maximising the benefits of promoting a competitive media and communications industry.

#### **4. RECOMMENDED APPROACH TO THE CONVERGENCE REVIEW**

In developing appropriate regulatory settings for the media and communications industry, consideration will need to be given to important government social policy objectives, such as those consistent with the scope and terms of reference of the Convergence Review and the eight guiding principles proposed by the Convergence Review Committee.

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<sup>10</sup> The proscribed purposes are:

- a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market
- b) preventing the entry of a person into that or any other market or
- c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

The ACCC considers that open and competitive markets are likely to go a long way to delivering outcomes consistent with government's social policy objectives. Therefore, the ACCC is of the view that regulatory settings will maximise overall social welfare for the Australian community as a whole if the regulatory settings:

- promote robust competition in the industry, including by maximising opportunities for efficient businesses to enter; and
- are targeted at the specific outcomes that are identified as important under the government's social policy objectives and are designed to otherwise minimise unavoidable restrictions on competition and consumer choice.

These two elements are discussed in turn below.

### **Reform regulatory settings to promote competition**

There are a number of ways in which the current regulatory environment restricts competition in the communications and media industry. New entry into commercial television broadcasting is tightly regulated by the licensing regime that applies to the use of Broadcasting Services Band (BSB) spectrum. The degree of competition faced by commercial television broadcasters is also constrained by a range of regulatory restrictions including, for example, the extensive anti-siphoning regime, which limits the amount of premium sport that can be shown by alternative providers. Regulation also imposes significant obligations on commercial and subscription television broadcasters in relation to Australian and local content expenditure, which may further raise the costs of entry and inhibit innovation and efficiency.

Opportunities for pro-competitive reforms in the broadcasting sector have been highlighted by a number of reviews, including by the Productivity Commission in 2000 and 2005. Some gains have been made since these reviews, including commitments to end regulatory restrictions applying to the use of the commercial television broadcasters' multi-channels in 2013 as well as mandating the switch off of analog television broadcasting signals at the end of 2013. This has been accompanied by a commitment to make the resulting 'digital dividend' available for higher value uses. Nonetheless, additional reforms could reduce or remove the barriers to entry and innovation that remain.

In addition to considering reforms to promote competition among traditional media businesses within the media and communications industry, it is important that the Convergence Review Committee also considers appropriate regulatory settings that will support vibrant competition on emerging platforms.

As noted above, as the technology and infrastructure that underpin emerging services and platforms continue to evolve, developments to date suggest significant potential to deliver a wide range of new services to consumers. These services can often be delivered at a lower price than that of similar services provided in the past. In recent years, for example, consumers have been able to purchase a range of movies and television content from online providers for lower prices than those charged for traditional subscription television packages. Similarly, consumers now have access to a variety of print news sources online for free, often supplemented by additional audio and video content not available offline.

Emerging platforms also offer opportunities for a range of businesses to enter the industry. In striving to meet consumer demand, these businesses will place increasing competitive pressure on established incumbents. However, emerging platforms also offer real opportunities for traditional media businesses to innovate to improve their offerings. This phenomenon is already apparent. In this way, vibrant competition on emerging platforms can be expected to deliver tangible benefits to consumers not only of emerging media services but also of traditional media services.

Clearly, some businesses will prosper in a more competitive environment while others less well-equipped to embrace change may cease operations. However, competition offers long term benefits to the community that outweigh the short term difficulties that may be experienced by individual businesses through this process of renewal.

Whether emerging platforms will be able to deliver these benefits will largely depend on the regulatory framework that is applied. Given this, the ACCC suggests that the Convergence Review Committee carefully considers the regulatory framework it recommends in order to create an environment in which emerging platforms can flourish. Extending many of the regulations that apply to traditional commercial and subscription television broadcasters to emerging platforms could create significant new barriers to entry. This could stifle the potential for increased competition to deliver greater choice and efficiency benefits for consumers.

### **Ensure regulation necessary for social policy objectives is targeted at the specific outcomes identified and minimises harm to competition and choice**

The ACCC recognises that successive governments have sought to ensure the communications and media industry supports a number of social policy objectives. The Convergence Review Framing Paper sets out eight guiding principles that could underpin reform, several of which are based on concepts related to social policy objectives consistent with the scope and terms of reference of the Convergence Review. These include access to diverse voices, views and information, access to local and Australian content and the reflection of community standards and expectations in communications and media services. The ACCC acknowledges the value attached to achieving social policy objectives considered important by government and the Australian community and recognises that these objectives are likely to require regulatory intervention.

Consistent with good public policy practice, the ACCC recommends that consideration is given to identifying the precise outcomes that are sought in line with these social policy objectives. This may be challenging as there is likely to be a range of views within different segments of the Australian community as to what the appropriate outcomes should be in relation to any particular social policy objective. Identifying the precise outcomes that are sought is an important issue for government and is essential to designing regulatory interventions that are both effective and benefit all consumers.

The ACCC is of the view that a competitive communications and media industry is likely to go a long way to delivering outcomes consistent with the guiding principles identified in the Framing Paper. This is because competitive markets generally create



incentives for business to meet the demands of consumers, whether this is for Australian or local content, a range of different news sources or content that meets particular standards and expectations. In addition, the ACCC notes that vibrant and competitive emerging platforms, which support additional opportunities for new businesses and new services to better meet consumer demand, may result in a communications and media industry that is better placed to meet a range of social policy objectives than has previously been the case. Given this, in considering whether regulation is required to deliver specific outcomes consistent with social policy objectives, it is important to identify the extent to which a competitive industry is likely to fall short in delivering these outcomes.

Regulatory interventions that have no, or minimal, impact on competition are generally preferable to interventions that will cause greater competitive harm. For example, if there are concerns that a competitive industry might produce too little Australian content, regulation that explicitly and transparently subsidises the production of Australian content is likely to be preferable to the imposition of Australian content quotas on particular businesses.

A proposed regulatory intervention should only be adopted if it can be shown that the benefits to the community as a whole will outweigh any harm, including harm to competition, which is likely to be caused by the regulation. Clearly, if the benefits to the community are likely to be less than any harm caused by the regulation, the community as a whole would be better off without the regulatory intervention. A rigorous and pragmatic approach is required in assessing the likely benefits and harm of specific regulatory interventions. While a proposed regulatory intervention may bring significant benefits to a particular group or set of businesses, this should be weighed up against any aggregate loss borne by the community as a whole, including any loss due to a weakening of competition.

This approach is consistent with that set out in the *Competition Principles Agreement* (CPA), adopted by the Council of Australian Governments in 1995, for achieving pro-competitive reform within the context of important social policy, or public interest, objectives.<sup>11</sup>

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<sup>11</sup> Council of Australian Governments, *Competition Principles Agreement—11 April 1995*. The CPA states in clause 5(1) that the guiding principle is that legislation should not restrict competition unless it can be demonstrated that the benefits of the restriction to the community as a whole outweigh the costs and the objectives of the legislation can only be achieved by restricting competition.

Clause 1(3) of the CPA lists a number of public interest considerations that may be taken into account in assessing the benefits of a particular policy or course of action against the costs. The list consists of:

- government legislation and policies relating to ecologically sustainable development
- social welfare and equity considerations, including community service obligations
- government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity
- economic and regional development, including employment and investment growth
- the interests of consumers generally or of a class of consumers
- the competitiveness of Australian businesses and
- the efficient allocation of resources.

COAG has since recommitted to the Competition Principles Agreement.

The ACCC suggests the Convergence Review Committee use this approach in developing recommendations for the optimal regulatory settings in an open and competitive media and communications industry, consistent with the government's social policy objectives.

## **5. RESPONSE TO THE PROPOSED GUIDING PRINCIPLES**

The Convergence Review Committee seeks feedback on a number of specific principles that it suggests could underpin a new legislative framework for the communications and media industry.

As noted above, the ACCC recognises that social policy objectives in the industry are likely to require regulatory intervention. Nonetheless, the ACCC is of the view that a vibrant and competitive industry is likely to go a long way in supporting many of the specific outcomes sought in relation to these objectives. Therefore, the ACCC recommends the Convergence Review Committee takes into account the benefits of competition in designing regulation to achieve the specific outcomes desired.

Comments on each of the Convergence Review Committee's proposed guiding principles are provided below on this basis.

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

Protecting media diversity has been a long-standing policy objective of successive Australian governments. In the Framing Paper, the Convergence Review Committee notes that a diverse media sector is better able to offer a range of services to meet individual needs and a range of voices and perspectives that reflect a more 'comprehensive and balanced range of news, opinions and entertainment'.

Competition is often stronger when there are a larger number of businesses providing services to consumers. Businesses in a competitive market will work harder to meet the individual preferences of consumers, including for media services that meet consumers' individual needs and present perspectives of interest to them. The development of vibrant and competitive emerging platforms is likely to assist in this regard. For example, there are likely to be increased opportunities in the future for smaller scale businesses operating on these platforms to deliver news and information of interest to local communities on a more cost effective basis than has previously been possible. At the same time, these platforms are also enabling consumers to access a wider range of national and international sources of news, opinion and entertainment than were previously available.

Removing existing barriers to entry into the communications and media industry to the extent possible and minimising any new barriers to entry imposed on the emerging platforms will assist in encouraging a more competitive industry. In addition, existing competition law, including the prohibition under section 50 of the CCA on mergers or acquisitions that may result in a substantial lessening of competition, will assist to some extent in protecting media diversity. However, the application of competition law will not always prevent mergers or acquisitions that would otherwise breach rules

regarding the specific number or type of voices that should exist and, therefore, should not be relied on to achieve particular levels of diversity.

In determining whether regulation is required to ensure diversity, the ACCC recommends that consideration is given to the specific diversity outcomes that are sought. If the government considers that certain minimum levels of diversity are necessary, specific regulation is likely to be required. The ACCC recommends that regulation to achieve specific diversity outcomes be designed to minimise any negative impact on competition and efficiency. Further, such regulations should only be adopted if government is satisfied that the benefits of such regulation for the overall community outweigh any resulting harm, including to competition.

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

The ACCC considers that competition is likely to produce outcomes in the interests of Australian consumers because competitive markets are best placed to provide the products and services consumers want on an efficient basis, thereby increasing overall social welfare.

Competitive markets are also more likely to be innovative, as businesses seek to gain an advantage over their rivals by offering better products and services and lower prices. Creating a regulatory framework that promotes competition will support these outcomes. Given the rapid pace of change on emerging platforms, regulation that stifles competition in this sector is likely to have a particularly detrimental affect on innovation and the competitiveness of the communications and media industry as a whole.

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

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

It is important that consumers are able to access the types of content that they value. Competitive markets can be expected to meet this demand on an efficient basis. Where consumers are able to choose freely from a wide range of media sources, there will be a strong discipline on businesses to offer the type of content consumers want in order to maximise sales to consumers and advertising revenue. Even if lower cost programming or content is available, businesses are still likely to provide Australian or local content if it is valued highly by consumers.

The degree to which consumers value Australian content and stories is apparent from television ratings data. In 2010, the highest rating television program was *Masterchef Australia – Winner Announced*.<sup>12</sup> The forty highest rating programs in 2010 all

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<sup>12</sup> Free TV Australia, *2010: Year In Review*, Free TV Australia, Mosman, January 2011, viewed 19 May 2011,

consisted of Australian sports broadcasts or Australian reality or drama shows.<sup>13</sup> Australian dramas such as *Packed to the Rafters* and *Underbelly* also featured in the top twenty highest rating programs in 2010, demonstrating that quality Australian drama productions can achieve commercial success. Similarly, reporting of Australian news and cultural issues dominates the content available in the major newspapers as well as online news sites, even though these are not subject to Australian content quota requirements.

Many consumers also want to access content of relevance to their local community while local businesses are often attracted to advertising opportunities in media products targeted to a local audience. Given this, a competitive market can be expected to provide local content, particularly as lower cost delivery options become increasingly available on emerging media platforms.

In determining whether regulation is required to promote Australian and local content, the ACCC recommends that consideration be given to the specific outcomes that are sought. If it is considered that regulation is necessary to achieve these outcomes, there may be merit in considering options based on direct, explicit and transparent subsidies to support Australian or local content production, rather than imposing quotas on certain providers. In comparison to well-targeted and explicit subsidies, quotas are likely to lead to greater distortions to competition, including higher barriers to entry. The ACCC also notes that imposing Australian or local content obligations on businesses that operate on emerging platforms may be particularly detrimental to the development of the sector and may be counterproductive.

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

The ACCC recognises that the government may seek to ensure that communications and media services available to Australians reflect community standards, views and expectations. However, changes in the way that content services are distributed and consumed are creating greater challenges to achieving this. The industry is becoming less characterised by consumers receiving content chosen by a handful of media companies and more by consumers actively obtaining content that meets their individual preferences and is sourced from a wide range of providers around the world.

In determining whether regulation is required to ensure particular standards are maintained, the ACCC recommends that consideration be given to the specific outcomes that are sought. For example, the ACCC recognises that the government may determine that it is appropriate to ban access to certain types of content (such as content that would be refused classification). However, the government may decide that outside of these narrow categories, it may be appropriate to ensure consumers

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<http://www.thinktv.com.au/media/Stats & Graphs/Year In Review/Television Report - 2010 Year in Review.pdf>

<sup>13</sup> Free TV Australia, *2010: Year In Review*, Free TV Australia, Mosman, January 2011, viewed 19 May 2011,

<http://www.thinktv.com.au/media/Stats & Graphs/Year In Review/Television Report - 2010 Year in Review.pdf>

have sufficient information about the characteristics of content services to make their own informed decisions about what to access. An effective and consistent classification system is one possible tool to achieve this. The availability of adequate information for consumers to make informed choices is an important characteristic of a competitive industry.

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

The ACCC agrees that the communications and media services available to consumers should reflect the broad range of content across platforms and services that consumers want to access. A competitive media and communications industry will be well placed to achieve this objective. Minimising regulatory barriers to entry and unnecessary distortions to competition, particularly on emerging platforms, will help foster this outcome.

Emerging platforms are likely to provide the basis for delivering new types of content, applications and services to consumers in the future. The relatively low cost of delivery over broadband networks has seen considerable growth in the range of services available, including access to international content, blogs, social networking, online forums, catch-up programming, user-generated content and on-demand paid content. Additional services are likely to emerge in the future as higher data rates become more ubiquitous.

For the potential of the emerging platforms to be fully realised, it is important that new providers are not hindered by an overly stringent regulatory regime.

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

The availability of adequate information about the characteristics of the services on offer is an essential feature of competitive markets that support consumer choice. Transparency about the characteristics of a service enables consumers to find the service that best suits their needs. This enables consumers to confidently assess and choose between competing offers. Consumers are more likely to be satisfied with their service and those businesses that best meet their needs are likely to thrive.

The increasingly complex nature of communications and media products means that consumers need clear, concise and accurate up-front information if they are to make an informed choice about suitability. However, some businesses may have incentives not to disclose extensive information about their products.

The CCA empowers the ACCC to take action against providers in all industries that mislead or deceive consumers in the provision of information about their products. However, despite a number of enforcement actions in recent years, the ACCC continues to receive complaints about misleading and deceptive conduct. This is also true in relation to marketing and information provision in the telecommunications industry, which suggests the industry is failing to provide sufficiently clear and transparent information to consumers.

Current reviews of the communications and media industry also indicate that there is a need for greater transparency and that additional regulation may be required to achieve this. The ACMA published its *Reconnecting the Customer* draft public inquiry report on 1 June 2011, which set out proposals for improving the customer service and complaints handling procedures of Australian telecommunications providers. The proposals include improving product disclosure information with an emphasis on better information for consumers and introducing transparent customer care reporting information. The ACMA sees this report as providing guidance to the industry review of the *Telecommunications Consumer Protection Code*.

The ACCC recommends that the Convergence Review Committee consider whether current regulatory and self-regulatory requirements are adequate to ensure that consumers receive clear and accurate pre-sale information about telecommunications products and services, taking into account their increasing complexity.<sup>14</sup>

**Principle 8 The government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services**

The ACCC supports the principle that the government should seek to maximise the overall public benefit derived from the use of spectrum. As stated in the Framing Paper, this principle is consistent with the regulatory objective in section 3(a) of the *Radiocommunications Act 1992* (Radiocommunications Act):

‘maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum’

Maximising the overall public benefit requires that the spectrum be allocated to its highest value use. This is consistent with the spectrum management principles used by the ACMA. The principles include (1) allocating spectrum to the higher value use or uses and (2) enable and encourage spectrum to move to its highest value use or uses.<sup>15</sup> The ACMA states that this means that the process allocates spectrum to the use that maximises the value derived from the spectrum by licensees, consumers and the wider community.

A competitive process is generally the best means for allocating spectrum to its highest value use.<sup>16</sup> 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.

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<sup>14</sup> The ACCC notes that the ACMA’s *Reconnecting the Customer* public inquiry has considered the issue of the role of pre-sale information in consumer decision making.

<sup>15</sup> ACMA, *Principles for spectrum management*, March 2009, page 2.

<sup>16</sup> In some situations it may be warranted to restrict access to spectrum for competition purposes, such as preventing a dominant carrier from hoarding spectrum and preventing efficient competitors from providing services.

Adopting a competitive process for allocating spectrum is consistent with another objective of the Radiocommunications Act:

‘provide an efficient, equitable and transparent system of charging for the use of spectrum, taking account of the value of both commercial and non-commercial use of spectrum.’<sup>17</sup>

Spectrum allocated to the free-to-air broadcasters is not subject to a competitive process. Rather, the spectrum is provided to broadcasters as part of a broader arrangement that is tied to licence fees determined by the Minister and more extensive regulatory obligations than those faced by other content providers. The ACCC recommends that the Convergence Review Committee consider whether such an arrangement is consistent with the objectives of the Radiocommunications Act, ensures spectrum is allocated to its most efficient use and produces a fair return on the use of a scarce public resource. Such consideration is particularly relevant at this time where some of the traditional regulatory obligations placed on free-to-air broadcasters may no longer be as effective as in the past. The Productivity Commission has previously recommended that access to spectrum should be separated from broadcasting licences.<sup>18</sup>

Finally, it is the ACCC’s view that management of the broadcasting services bands should be consistent with appropriate international technical standards, as this will facilitate competition.

## **6. OTHERS MATTERS RAISED BY THE FRAMING PAPER**

The Convergence Review Framing Paper also sought views on:

- whether there are any other principles that should be considered and
- the policy issues that the principles raise in relation to the evolving media and communications environment.

The ACCC does not propose any other guiding principles to inform the review.

The ACCC has set out a number of policy issues associated with the evolving nature of the media and communications environment – in particular the emergence of new platforms – in its responses above.

## **7. CONCLUSION**

The ACCC recognises that there are likely to be government social policy objectives of importance to the media and communications industry, consistent with the scope and terms of reference of the Convergence Review and the social policy objectives proposed by the Convergence Review Committee in its guiding principles. These objectives are likely to require regulatory intervention.

The ACCC is of the view that open and competitive markets may go a long way to support social policy objectives in this industry. Competitive pressure will drive

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<sup>17</sup> Radiocommunications Act, section 3(e)

<sup>18</sup> Productivity Commission, *Broadcasting Inquiry Report*, Report No. 11, 3 March 2000, page 2.

businesses to fully understand the demands of consumers, offer greater choice and deliver services efficiently.

Consistent with good public policy practice, the ACCC recommends that consideration is given to identifying the precise outcomes that are sought in line with government's social policy objectives. This will enable regulation to be designed in such a way as to minimise any negative impacts on competition and consumer choice. The effect of this approach will be to deliver a significant benefit to the Australian community as a whole.