



**Submission by
Free TV Australia**

Australian Communications and Media
Authority

*Contemporary community safeguards
inquiry – Issues paper*

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TABLE OF CONTENTS

EXECUTIVE SUMMARY	2
Introduction	3
Part 1 – Context of the Inquiry	4
1. General comments	4
2. Regulatory framework.....	4
3. Universal principles	6
Part 2 – Matters addressed in the Issues Paper	8
1 Community values – Classification and Decency.....	8
2 Protection of children – time zones	11
3A Ethical standards – accuracy and fairness.....	14
3B Ethical standards – advertising	18
4A Protection of the public – privacy	23
4B Protection of the public – interventions about hatred and vilification	25
4C Protection of the public – emergency information	25
5 Access - captioning	25
7 Redress – methods of handling and responding to complaints	26

EXECUTIVE SUMMARY

- The Contemporary Community Safeguards Inquiry is a timely opportunity to consider community standards as they apply to broadcasting codes in the current converged digital environment.
- For more than 20 years the existing co-regulatory scheme, including the Commercial Television Industry Code of Practice, has operated effectively to ensure broadcasting services meet community standards and expectations.
- However, the sector-specific codes no longer reflect today's radically transformed media environment where connected TVs already integrate terrestrial and internet delivered content on one EPG or 'home screen'; content can be accessed across tablets, laptops, PCs and smartphones; and the family television set is an entertainment hub linking TV from a range of providers with music, social networks, apps, games and other content.
- In order to be effective and relevant in this converged media environment, the codes should be simplified and streamlined to ensure that guiding principles are high level and applicable regardless of the delivery platform.
- Free TV supports an approach which frames these issues around core high level principles supported by the minimum regulatory intervention required to achieve the desired outcome.
- A high level approach will ensure that the outcome does not perpetuate or reinforce the current regulatory disparity created by sector specific consumer safeguards.
- Free TV broadly agrees that the seven concepts identified by the Issues Paper provide a reasonable framework to consider contemporary broadcasting codes, provided that the starting point for the Inquiry is not an assumption that each of those concepts represents a harm requiring regulatory intervention.
- Consideration must also be given to countervailing community benefits such as freedom of speech and the other objects of the *Broadcasting Services Act 1992* (BSA) such as the availability of a diverse range of high quality and innovative programming and the need to promote regulation in a way that does not impose unnecessary burdens on broadcasters and accommodates technological change.
- The seven concepts addressed by the Issues Paper should be measured against their continuing relevance in a converged digital world. For example classification information is more important in an environment where viewers are accessing content across a range of platforms. But time zones are less relevant when viewers are accessing content when they want, where they want, and on the device of their choice - often without knowing which platform it is coming from.
- The relevance of all concepts should be measured against existing legislative obligations. For example, closed captioning requirements are now part of the BSA.
- Free TV supports the Inquiry's four key framing principles of flexibility, calibration, global engagement and shared responsibility.

Introduction

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. At no cost to the public, our members provide nine channels of content across a broad range of genres, as well as rich online and mobile offerings. The value of commercial free-to-air television to the Australian public remains high. On any given day, free-to-air television is watched by more than 14 million Australians.

The existing co-regulatory scheme, including the Commercial Television Industry Code of Practice (Code) has operated well to ensure that free-to-air television broadcasting services have met community standards and expectations, in line with the objectives of the *Broadcasting Services Act 1992* (BSA). The Code has been regularly subjected to public consultation, is well publicised and provides viewers with an easily accessible online complaints process.

Complaint levels remain low in comparison to the number of hours broadcast and in comparison to complaint levels in other industries such as telecommunications.

However, over its 20 years of operation, the Code has become more and more complex and has not been appropriately recalibrated to reflect the significant changes that have occurred in the media industry. As analogue television ceases in December 2013 the industry proposes to publicly consult on a new Code that is appropriate to meet viewer expectations in the current converged digital environment. The ACMA Contemporary Community Safeguards Inquiry (Inquiry) presents a timely opportunity to reconsider the Code from first principles and identify:

- the core matters of enduring significance to be covered by the Code; and
- the appropriate level of regulatory intervention necessary to achieve the relevant objective.

Free-to-air television is critical to delivering highly valued public goods including Australian content, news and current affairs and major sporting events to the Australian population for free. However, the industry's ability to continue to meet these needs into the future is dependent on having the right regulatory environment, which enables free-to-air television to compete with other new content services on a more level playing field.

Part 1 – Context of the Inquiry

1. General comments

Free TV Australia welcomes the opportunity to respond to the Inquiry Issues Paper.

This is a timely opportunity to consider how community standards are determined and reflected in broadcasting codes, in the current converged digital environment.

Internet connected TVs already integrate terrestrial and internet delivered content on one electronic program guide (EPG) or 'home screen' and content can be accessed across tablets, laptops, PCs, gaming consoles and smartphones. The family television set is now an entertainment hub linking TV from a range of providers with music, social networks, apps, games and other content.

In this environment platform specific regulation is increasingly ineffective, as the ACMA first identified in its 2011 *Broken Concepts* report¹ and most recently in its 2013 *Broken Concepts* update²:

*Sector-specific consumer safeguards struggle to reflect changing service use and expectations.*³

While the Inquiry is focused on broadcasting codes, it provides an important forum to consider the safeguards in the context of how all media (both regulated and unregulated) is actually being accessed today. As noted in the ACMA *Broken Concepts* paper, the emphasis on certain forms of media in the legislative framework can have the effect of skewing regulatory activity towards traditional media or communications activities, regardless of whether these remain the highest area of community concern. Therefore, it is essential that this Inquiry does not focus too narrowly or it will simply perpetuate the existing regulatory disparity.

2. Regulatory framework

Free TV supports the ACMA's stated approach to the Inquiry:

*...to produce guidance which is based on strong evidence and supportive of the minimum level of regulatory intervention necessary to achieve the desired aim.*⁴

In considering community safeguards and the "minimum level of regulatory intervention necessary", it is important to bear in mind the objects and the regulatory framework set out in the BSA, which includes:

- the provision of high quality and innovative programming⁵;
- the availability of a diverse range of television and radio services offering entertainment, education and information⁶;

¹ Australian Communications and Media Authority (2011) *Broken Concepts – The Australian communications legislative landscape*, August 2011

² Australian Communications and Media Authority (2013) *Broken Concepts – A 2013 update on the Australian communications legislative landscape*, June 2013; pp 7

³ ACMA, *Broken Concepts* 2011; pp 17

⁴ Issues Paper; p 6

⁵ BSA, subsection 3(1)

- the promotion of regulation in a way that does not impose unnecessary financial and administrative burdens on broadcasters and that readily accommodates technological change;⁷
- regulatory arrangements that are stable and predictable;⁸
- a regulatory environment that facilitates the development of a broadcasting industry that is efficient, competitive and responsive to audience needs;⁹
- minimum requirements for industry participants;¹⁰ and
- a flexible regime to enable responsiveness to changing circumstances.¹¹

It is essential that the guiding principles established by this Inquiry for “appropriate community safeguards” reflect these elements.

Free TV is concerned that the seven concepts identified in the Issues Paper are framed in way that focuses on harm interventions without reference to the context of:

- broader positive community standards, such as the principles of free speech and the rights of adults to see and hear what they choose; and
- the broader objects and regulatory policy as set out in the BSA, such as the development of a broadcasting industry that is efficient, competitive and responsive to audience needs.

Regulation involves a balance of concepts and principles which must be considered as a whole rather than in isolation, in order to determine appropriate community safeguards. Merely identifying that community concern exists in relation to a particular matter does not necessarily provide a sufficient basis for regulatory intervention. In some circumstances, the regulatory impost in addressing a particular concern may be excessive when considered against what may be a marginal benefit in ameliorating a minority community concern. All of the cost and benefits of regulation must be adequately considered.

The starting point of the Inquiry if conducted from first principles should not involve a pre-supposition of harm, but should interrogate the existence, relevance and impact of any such harm.

The BSA also makes reference to regulation commensurate with the level of “influence” of a broadcasting service. The Issues Paper notes the conclusion of the Convergence Review that “influence remains a relevant criterion in the converged world”.

Free TV members do not agree that “influence” is a relevant concept in this context. If there are concepts identified as important community safeguards for regulation, then such concepts are important regardless of the level of perceived influence, or platform. The concept of influence is complex and difficult to apply across platforms as a whole. At the time the BSA was drafted, television was essentially the only

⁶ BSA, subsection 3(1)

⁷ BSA, subsection 4(2)

⁸ BSA, section 5

⁹ BSA, subsection 3(1)(b)

¹⁰ Explanatory Memorandum to the *Broadcasting Services Bill 1992*, as referenced in the Issues Paper; p 6

¹¹ Ibid

provider of audio-visual content to the home. There was no subscription television service, no universal internet access, no smartphones or tablet devices, and no integrated devices delivering regulated and unrelated content to the one screen in the home. However, in the current converged environment exactly the same content is often delivered across multiple different platforms, each of which is subject to a different level of regulation.

For example, if as a matter of principle it is important to protect children from inappropriate or harmful content, why are children watching subscription TV or YouTube less worthy of protection than children watching FTA TV.

The recent sale of digital dividend broadcasting spectrum to telecommunications companies, which will be used to deliver television-like content to mobile devices, highlights that the traditional concept of linking regulatory intervention to the 'influence' of a particular platform is no longer useful in relation to content regulation.

These new television-like services are not subject to the rules that apply to traditional broadcasting and datacasting services. There is no doubt however, that these are extremely large companies with significant reach and influence. Similarly, companies such as Google and Apple are providing television content not subject to broadcasting regulation, but with significant international and national reach and influence.

3. Universal principles

Community safeguards should not be platform-specific. In as much as there are common community standards, they should apply regardless of the delivery mechanism that the consumer/citizen is using to access content.

How the community safeguards are applied may of course be handled differently by each sector of the industry. The ACMA's recent paper on *Connected Citizens* highlights some of the different strategies available for rebalancing regulatory practice in the digital environment, including greater flexibility, and an increased emphasis on facilitation and communication strategies.¹² These are relevant to this Inquiry and need to be considered as part of it.

Broadcasting services cannot continue to be regulated in isolation, without reference to the wider media landscape. Many of the interventions that currently exist in broadcasting codes are now addressed more widely by external interventions, and the converged media environment has rendered a number of elements of the existing Codes irrelevant.

Free TV therefore welcomes the four key principles identified by the ACMA in framing the Inquiry:

- **Flexibility** – The need for any over-arching principles to be responsive to technological innovation;
- **Calibration** – In particular, Free TV agrees that parity and coherence is desirable, but does not necessarily equate to uniformity in application across platforms;
- **Global engagement** – The influence of media globalisation and its impact on Australians' media engagement is an essential consideration in future broadcasting interventions; and

¹² Australian Communications and Media Authority (2013) *Connected Citizens – A regulatory strategy for the networked society and information economy* June 2013, pp 19-22.

- **Shared responsibility** – The growing empowerment and ownership of media by consumers is changing the way content is accessed and managed.

The Issues Paper has identified seven enduring concepts, based on the ACMA's earlier work.¹³ In this submission Free TV will address the identified enduring concepts, and explore their impact and ongoing relevance in a converged media environment, with a particular focus on their application to commercial free-to-air television.

¹³ ACMA *Enduring concepts* 2011, pp 6-7

Part 2 – Matters addressed in the Issues Paper

1 Community values – Classification and Decency

Community values

In considering ‘community values’ it is important to bear in mind that the community does not have a unified set of principles, beliefs and value systems. Therefore, incorporating ‘community values’ into a regulatory framework necessarily involves balancing the competing priorities and interests of different individuals and groups, and a consensus viewpoint may not be reached.

While classification and decency have been identified by the ACMA as the interventions aligned to the concept of community values, it is important to recognise that the concept of community values includes benefits to be preserved as well as harms to be avoided. In particular, ‘community values’ should also include:

- freedom of speech;
- reporting on matters of public interest;
- the role of the media in the ‘4th estate’, and the benefit of this in preserving a healthy democracy;
- the availability of a diverse range of high quality, innovative and entertaining content; and
- the rights of adults to see and hear what they want (while providing appropriate protection to prevent children from viewing age inappropriate content).

It is this balanced framework that the Code needs to operate within.

Classification

Classification is a core information service for viewers. Audiences value knowing what to expect from a program and whether it will be suitable for themselves and children in their care, before deciding whether or not to view.

Research conducted by the ACMA confirms that the classification system as it applies to television programs is reflective of broad community standards.¹⁴ The *Digital Australians* Report also highlighted the importance and usefulness of the existing classification system in assisting people to make decisions about their own viewing, and viewing for children.¹⁵

Free TV’s own research had a similar finding, with 76% of respondents agreeing that TV classifications reflect today’s community standards and attitudes.¹⁶ Free TV research also indicates that there is an extraordinarily high awareness of the current

¹⁴ Australian Communications and Media Authority *Digital Australians – Expectations about media content in a converging media environment* October 2011, p 53

¹⁵ Op. cit., pp 53-54

¹⁶ Source: Research conducted by Nielsen for Free TV Australia, November 2011 Q: To what extent do you agree or disagree that TV classifications generally reflect community standards? (n=1532)

television classification system in Australia, with 98% of respondents being aware of TV program classifications.¹⁷

Platform-neutral principles administered by industry

Free TV supports the classification criteria and markings set out in the National Classification Scheme. Television content extends beyond film and the classification guidelines in the Code are in some instances more detailed than the National Classification Scheme.

This approach has worked well in providing clear classification advice to both viewers and television networks. The Australian Law Reform Commission Review *Classification – Content Regulation and Convergent Media* (ALRC Classification Review) has recommended a similar approach be taken more broadly in its ‘key features’ of a new classification scheme.

Overall Free TV broadly supports the approach to classification set out in the Final Report of the ALRC Classification Review, subject to certain issues outlined in our submissions to the ALRC. We urge the Inquiry to reflect the ALRC’s approach in its own findings.

The Code contains some anomalies such as the AV15+ category which should be removed as part of the next Code review. It is an example of industry specific regulation which causes consumer confusion and regulatory inconsistency.

The removal of the television-specific AV15+ category was also recommended by the ALRC.¹⁸

Content exempt from classification

Free TV supports the retention of existing categories of exempt content, as recommended by the ALRC Classification Review.¹⁹

Sports

Viewers want to watch sporting events on a live basis where possible, which often requires screening the event in a G or PG time zone. A number of sporting events contain content that is a PG level of intensity, particularly full-contact sports.

It is also relevant to recognise that sporting events on television are primarily viewed by adults. Children aged 5-17 make up less than 12% of the total viewing audience for any of the top 10 sporting events in 2012 (excluding Olympics).²⁰ Of those children who were watching the top 10 sporting events, the majority were co-viewing with an adult (around 8 in 10 for the 5-12 age group, and around 7 in 10 for the 13-17 age group).²¹

¹⁷ Source: Research conducted by Nielsen for Free TV Australia, November 2011 Q: Are you aware that there are TV program classifications in Australia? (n=1532)

¹⁸ Australian Law Reform Commission *Classification – Content Regulation and Convergent Media – Final Report*, Commonwealth of Australia; February 2012, p 207

¹⁹ Op. Cit, p 141

²⁰ Source: OzTAM, 5 city metro, 01 Jan - 31 Dec 2012, ranked by average audience for total ppl, commercial free-to-air channels, based on consolidated data.

²¹ Source: OzTAM, 5 city metro, 01 Jan - 31 Dec 2012, 6am – midnight, commercial free-to-air channels, based on live data, co-viewing with a person 18+, based on sports genre.

It is therefore appropriate to retain the classification exemption for sporting events.

News

Free TV supports the current exemption for news and current affairs on the grounds that it is critically important for media content providers on all platforms to be able to accurately report news events in a timely and informative manner. In doing so, it will sometimes be necessary to deal with issues that will not satisfy a G or PG classification. Timing for breaking news is critical in the current 24-hour news environment, and the evening news bulletins on commercial television are relied on by millions of Australians to keep informed about the day's events.

News and current affairs programs are not directed towards children but regard is had to the likely viewing audience, including the presence of children. It is acknowledged that certain news and current affairs segments may have a distressing effect on viewers, including small children. Free TV members currently take steps to limit any such impact. For example, the Code contains an obligation for 'special care' when broadcasting news material in 'G' time zones, as well as requirements for warnings before distressing news material. Restrictions also exist for material likely to distress or offend viewers and certain material is deemed 'not suitable' for television.

These provisions demonstrate that appropriate safeguards for the community are in place as part of the industry codes process, while still ensuring the adequate and appropriate provision of news and current affairs at a convenient time for viewers.

Promotions for material with a higher classification

While classification is an important intervention, the existing rules regarding placement of program promotions are overly complex and unnecessary. While the general requirement is that the content of program promotions must comply with the classification requirements of the time zone in which it is broadcast, there are a range of additional prescriptive requirements including special content and scheduling restrictions. These do not apply to the ABC, SBS or Pay TV.

Free TV members must invest in complicated traffic systems to ensure compliance with these provisions, and there are also opportunity costs as a result of these restrictions, as some programs are unable to attract a significant audience because they are too difficult to promote.

In addition, Free TV members are required to make a large number of different versions of the same program promotion, so that a program can be promoted at various different times throughout the day. There are no comparable rules in any other broadcasting code, or on any other media platform. In the interests of regulatory parity, inequitable rules that apply only to one platform must be carefully examined for ongoing relevance in the current converged media environment.

As noted in Part 1 of this submission, Free TV supports the ACMA's focus on the minimum level of regulatory intervention necessary to achieve the desired aims.²² The current Code provisions concerning placement of promotions and other non-program matter must therefore be simplified. This is in line with the "Shared Responsibility" principle identified at page 9 of the Issues Paper.

²² ACMA Issues Paper, pp 8

Free TV recommends that these program promotion placement rules be abolished in favour of a general care or intended audience principle. Alternatively, a simple principle could be applied allowing any material to be screened if it is consistent with the relevant classification time zone.

2 Protection of children – time zones

In the Issues Paper, the ACMA has identified “protection of children” as an enduring concept that is relevant to the time zone interventions which apply to free-to-air television. Traditionally, time zones were seen as an essential tool in protecting children from inappropriate content on free-to-air television.

While the ‘protection of children’ remains a relevant enduring concept, in recent years the proliferation of much more effective tools to protect children has rendered the concept of time zones irrelevant. There are a myriad of options now available to parents and carers in managing children’s consumption of content.

Parents can now use parental locks, information contained in EPGs and on-screen i-plates available at the touch of a button, DVDs, on-demand content from providers such as iTunes, Foxtel Go and ABC iView as well as dedicated government funded and subscription children’s channels to ensure their children do not see inappropriate content.

Conversely, time zones are no longer a relevant or practical way of limiting children’s access to unsuitable content. Free TV agrees with the ACMA that time zones are “under strain” as a regulatory tool. This was also recognised by the ALRC Classification Report, which stated that:

Converging media environments...may suggest that time-zone restrictions on free-to-air television are becoming less relevant. Content at the MA15+ level may, in practice, now be watched at any time of day in any Australian home with subscription television, an internet connection, a recording device, or a DVD.²³

Free TV recommends the removal of time zone restrictions for commercial free-to-air television broadcasters, on a staged basis if necessary. The requirement to only show certain content at certain times of the day is out-dated and puts commercial free-to-air broadcasters at a competitive disadvantage in terms of their scheduling strategies. Removal of time zones would address the current regulatory imbalance across content provider platforms and allow free to air broadcasters to compete on a more even regulatory playing field.

Parental locks

This deregulation is supported by the widespread availability of parental locks as a means of protecting children from potentially harmful material. Technology (in the form of parental locks) allows us to consider new ways of meeting community standards.

Following digital switchover at the end of the year, the availability of the parental lock features will be almost ubiquitous. This justifies a significant shift away from the paternalistic approach to television classification and time zones that has characterised this area of regulation to date.

²³ ALRC, Op cit; pp 193

In discussing time zones, the ALRC Classification Report stated that:

Industry and the Regulator should therefore plan for the gradual phasing out these restrictions, perhaps by implementing a public education campaign about how to use parental locks effectively.²⁴

Free TV recently ran an on-air campaign advising viewers of the availability and use of parental locks, and the Free TV website provides a link to parental lock information on the front page. The ACMA has also provided useful viewer information on its website about parental locks, including an instructional video.

Free TV research shows that these initiatives have been very effective, with 94% of parents surveyed in November 2011 stating that they were aware of the parental lock function on their television.²⁵ Other useful strategies to educate viewers about parental locks may include requiring manufacturers to include parental lock information on the short form instructions or “quick start” guides that accompany new televisions or set top boxes.

Dedicated free-to-air spaces for kids

The provision of two advertisement-free, dedicated, government funded children’s channels (ABC2 and ABC3) significantly reduces the need for interventions on the commercial free-to-air channels directed towards protecting children. These ABC services were not available in 2009 when the Free TV Code was last subject to review. They provide ad-free spaces for all Australians where children are guaranteed protection from age-inappropriate or harmful content.

When children are viewing television throughout the day, more of them are watching ABC2 and ABC3 than any other free-to-air station. More kids aged 0-12 are watching ABC2 than total Free TV channels combined.²⁶ Such figures demonstrate that parents and carers are accessing these channels as alternative tools to regulate and control their children’s viewing.

Increased choice is impacting children’s viewing habits

These figures are consistent with data indicating the child audience for commercial free-to-air television is in decline. The Australian Multiscreen Report highlights that children are increasing their time watching playback TV, using the internet and watching video. Their overall time spent watching TV in the home is declining.²⁷

Average child audiences for commercial free-to-air television in the 10 years to 2013 have declined by 38.2 per cent for children aged 0-17.²⁸

²⁴ ALRC Classification Report, page 196

²⁵ Source: Research conducted by Nielsen for Free TV Australia, November 2011 Q: Have you ever used the ‘parental lock function’ on your TV? (n=486)

²⁶ Source: OzTAM, 5 city metro, based on consolidated data for 01 Jan – 30 June 2013, 6am – 7pm, Kids 0-4, 5-12 and 0-12. ABC2 & ABC3, Total Free TV includes all primary & digital channels.

²⁷ Source: OzTAM and RegionalTAM, Multi-Screen Report Q4 2012 v 2011, TAM data defines Kids as 0-12 and Nielsen Netview defines kids as 2-12. Watching Video on the Internet Q4 2012 is sourced Nielsen Video Census.

²⁸ Source: OzTAM, 5 city metro, January - June 2003 to 2013, 6am to 9pm, average audiences increases & decreases in percentage, consolidated data from 2010.

Less than 3 per cent of children are watching commercial free-to-air television during the 9am to 3pm timeslot, and their viewing over this period averages less than 10 minutes.²⁹

Audience expectations and use of alternative access to content

The effectiveness of time zones as a means to protect audiences is also questionable given that content which is comparable to that on free-to-air television is readily available on alternative platforms which are not subject to any time zone restrictions (such as pay TV and on-demand services such as Apple iTunes).

Commercial free-to-air television will be seen alongside internet content which is not subject to any time zone restrictions at all. Consumers already have access to content that is regulated differently on the same EPG, or the same “home” screen or hub on their television:



Audiences also have an expectation that content will be available at a time of their choosing, without restrictions such as time zones. As Professor Terry Flew noted at the ACMA’s Citizen Conversation on Classification:

...If you applied the television rules to the Internet, it would be censorship.

Time zones can also be seen as contrary to the strong trend in media consumption towards viewers accessing what they want, when they want. On-demand and time-shifted viewing is increasing rapidly. According to the latest Nielsen multiscreen report:

- 98% of households have a digital television;
- 53% have a Personal Video Recorder (PVR);
- 80% have an internet connection;
- 21% have televisions that are connected to the internet;
- 61% have smartphones; and
- 31% have a tablet device – this has more than doubled in one year.³⁰

The ability to time-shift programming and the growing prevalence of ‘on demand’ content services undermines the rationale for a time-of-day approach to regulating content. The growing popularity of Connected TVs and the introduction of the NBN

²⁹ Source: OzTAM, 5 city metro, consolidated data for weeks 1-18 2013, children 0-4, 5-12 and 5-15, 9am to 3pm.

³⁰ Nielsen *Multi-Screen Report: Trends in Video Viewership beyond Conventional Television Sets* – Q1 2013 27 June 2013, p 3: <http://www.nielsen.com/content/dam/corporate/au/en/reports/2013/multi-screen-report-Q1-2013-final.pdf>

with its “hundreds” of channels will increase the existing capacity of audiences to view regulated and unregulated content on a single screen.

Free TV research from November 2011 indicates that 68% of people think that time zones are no longer relevant,³¹ and almost 80% of those surveyed thought that it was appropriate to screen PG classified content throughout the day.³² Since that time, usage of on-demand and pre-recorded viewing has increased.³³

Multi-channel time zone changes successful

It should be noted that incremental change to time zones has already been successfully implemented on the digital multi-channels, with relatively low level of complaint.

For programs on multi-channels, a simplified time zone system has been implemented under which programs up to a PG classification may be shown between 5am and 9pm. The existing time zones for M, MA and AV remain in place. The net effect is that during the day PG programs may be shown at any time.

This has not resulted in high numbers of complaints, or any evidence that children are being exposed to inappropriate content as a result.

Removal of time zones

If a complete deregulation of the classification time zones is not seen as desirable in the short term, Free TV proposes extending the digital channel time zones (which extend PG time zones throughout the day) to the main channels.

Free TV would also recommend that any material rated M be allowed from 7.30pm, and any material rated MA15+ be allowed from 8.30 pm.

Under either approach, legislative amendment to subsection 123(3A) of the BSA will be required.

3A Ethical standards – accuracy and fairness

Australian viewers want credible sources of news and information that they can trust. Consumers of news and current affairs seeking accuracy and integrity will seek out news providers who maintain and demonstrate high standards in accordance with these general principles. This provides sufficient incentive for news and current affairs providers in Australia to uphold these standards, regardless of the relevant platform.

³¹ Source: Research conducted by Nielsen for Free TV Australia, November 2011 Q: To what extent do you agree/disagree with the following statement. Restricting certain types of programs by time of day is not relevant anymore due to recorded TV and on-demand TV like that found on the internet (n=1532)

³² Source: Research conducted by Nielsen for Free TV Australia, November 2011, Q: To what extent do you agree/disagree with the following statement: It is appropriate to air PG programming throughout the day. (n=1532)

³³ Nielsen *Multi-Screen Report: Trends in Video Viewership beyond Conventional Television Sets* – Q1 2013 27 June 2013, p 10: <http://www.nielsen.com/content/dam/corporate/au/en/reports/2013/multi-screen-report-Q1-2013-final.pdf>

Social media provides a new and immediate way for viewers to discuss and critique news and information services. The voice of the consumer is louder and more powerful than ever before.

Each industry should have the autonomy to administer these consistent ethical principles in a way that is effective and appropriate for the relevant platform.

Materiality

Free TV supports the basic proposition that factual material presented in news and current affairs programs should be accurate. However in a regulatory context, the principle of accuracy in news and current affairs reporting should apply to significant material facts only. While news and current affairs programs strive to be accurate even in relation to non-substantial matters, where regulatory consequences may attach to a finding, this should be overlaid by a test of materiality.

The provisions in the current Code, which do not confine the accuracy obligation to material facts, have resulted in investigations dealing with trivial and immaterial matters, resulting in an inefficient use of resources for both the ACMA and the broadcaster. For example, the ACMA investigated the accuracy of statements regarding the size of a snake which featured in a news story about a “large snake”, where a complainant felt that the snake was really only “a medium-sized pit viper”.³⁴ This is not a criticism of the ACMA, which is obliged to investigate all complaints pursuant to the provisions of the BSA. However, it does serve to demonstrate that any principle regarding accuracy in news and current affairs must contain appropriate boundaries on the kinds of facts to which it will apply to. All errors are not equal. Some are immaterial or have no significant bearing on the overall information conveyed in a news segment.

Principles regarding accuracy should be concerned with material errors only which fundamentally alter the meaning of the news that is provided. We note there appeared to be some consensus regarding this position at the ACMA’s Citizen Conversation on Accuracy.

Materiality should be assessed from the perspective of the viewer, so that an item would only be in breach of the accuracy obligation if the error would fundamentally alter an ordinary viewer’s understanding of key facts being reported in a serious or significant way.

Accuracy requirements should apply to both news and current affairs – but not other genres

News and current affairs are a particular genre of programming, where viewers reasonably expect certain journalistic standards in fairness and accuracy. The current provisions of the Code reflect these differences and provide appropriate levels of regulation to distinguish between them.

These provisions are not relevant or appropriate for other programming genres. It may also be impractical or inappropriate to expand accuracy obligations to some programs even if they are factual. For example, if a contestant on *My Kitchen Rules* or *The Block*, or a lifeguard on *Bondi Rescue* was to say something that is factually incorrect, it does not seem necessary to impose the same level of regulatory

³⁴ ACMA Investigation Report 1955 – Seven News broadcast by SAS on 25 July 2007: http://www.acma.gov.au/webwr/_assets/main/lib310623/sas_report_1955.pdf

consequence to such a program as a news program where the viewer has an entirely different expectation of the reliability of the information being provided. The provisions would be even more difficult to administer in relation to many programs produced overseas and broadcast by licensees.

In our view the different purposes and viewer expectations of these different program genres should inform the ACMA's thinking in this area. Principles regarding accuracy and fairness should be limited to news and current affairs, rather than to other genres of programming such as dramas or reality television which are designed primarily to entertain. There is no evidence of a problem or market failure requiring an extension of the accuracy obligation to other genres of content.

It is worth noting that the majority of concerns about the content of these non-news and current affairs programs could be expected to come from persons featured in these programs. As such, it seems more appropriate to deal with potential issues through individually tailored contractual relationships and not through broad brush regulatory mechanisms. In addition, all content is subject to the various legal protections, such as defamation, breach of confidence and other State and Commonwealth legislation.

Accuracy

As the ACMA identified in the Issues Paper, accuracy requirements for news and current affairs are different in each of the broadcasting Codes. However, each Code recognises accuracy as a general principle applicable to news and current affairs. Free TV is not persuaded that an objective "reasonable steps" formulation that applies to material as it is broadcast, as appears in some other broadcasting Codes, is a more appropriate measure of accuracy. What is reasonable is open to speculation and subjective judgments about what a journalist should or should not have done and directs attention to the methods used in the collection of the report rather than the material that was actually communicated to the public.

That said, it is also important that whether or not a breach of the Code has occurred is judged against the circumstances at the time of the broadcast. It would not be appropriate to assess accuracy against new material that was not available to the broadcaster at the time a report aired.

It should be acknowledged that what is 'fact' and what is 'accurate' is not always clear. It can be difficult for a regulator to make determinations of 'objective accuracy' in highly specialised, complex and contested factual scenarios. So while we consider that objective accuracy should be the standard applied, sensible carve outs should continue to apply for reasonable honest mistakes and reasonable reliance on information supplied by another person.

In addition, any guiding principles that are developed around accuracy must take into account modern news gathering and reporting practices, such as the 24 hour news cycle and the increasing use of social media by both journalists and the general public. The immediacy and urgency around news content was recognised by the ACMA in the Issues Paper.³⁵

Facts may also be corrected as part of breaking or progressive news coverage of a particular event.

³⁵ Issues Paper; pp 44

Fairness

Under the current Code a different “fairness” standard is applied to news than to current affairs. Both are required to “represent viewpoints fairly”, however news is subject to the additional requirement that it must be “impartial”. This distinction has traditionally been accepted as an acknowledgement that current affairs programs are of a different nature to news and may present a report from one particular perspective - they are not required to give equal weight to different opinions or to include all points of view.

However, in some recent ACMA investigations the requirement to “represent viewpoints fairly” in the current affairs context has been interpreted more broadly, as an implicit requirement to give competing views equal weight. Free TV is very concerned about the potential impact of applying such a broad ‘fairness’ obligation to current affairs programs.

In addition, while fairness may be a reasonable requirement in an ethical context, as a regulatory concept we are concerned that it is very unclear in its scope and may be subject to differing interpretations.

The concept of fairness in broadcasting of news and current affairs should be epitomised by a rule (or principle) that a broadcaster must not misrepresent a person’s viewpoint. Such a formulation of ‘fairness’ (combined with the accuracy requirement and the requirement for news to be unbiased), presents a simple test that will reduce subjective judgments while still maintaining an appropriate ethical obligation on news and current affairs programs not to unfairly edit or use material out of context in a way that distorts or falsely represents a person’s position on an issue.

Corrections

The Code already includes an obligation for broadcasters to make reasonable efforts to correct significant errors of fact at the earliest opportunity and broadcasters currently make factual corrections both on-air and online as appropriate to the circumstances. We do not believe that it would be appropriate to include more express requirements in relation to the manner in which a correction should be made.

The appropriate form of correction will clearly depend on a wide range of matters including:

- the significance of the error;
- the length of time between the error being broadcast and it being brought to the attention of the broadcaster;
- the nature of the program in which the error was made;
- whether the error is simple to explain or would require the information in the original broadcast to be repeated.

These are complicated judgements that are appropriately left to the relevant broadcaster to weigh up, in determining the best manner to make a correction.

Where it is relevant and pertinent to viewers, broadcasters can and do ensure that errors are corrected in a manner that is suitable for the circumstances. Broadcasters need autonomy to make these judgment calls in providing news and current affairs services to their viewers.

It is also worth noting that the Code provides a strong incentive to broadcasters to make corrections. In 2010 a new provision was added to the Code (section 4.3.11) which provides a failure to comply with the accuracy and fairness obligations will not

be a breach of the Code “if a correction, which is adequate and appropriate in all the circumstances, is made within 30 days of the licensee receiving a complaint”. In addition to this incentive, a broadcaster’s relationship of trust with its viewers benefits from corrections being made in a timely manner.

Where the ACMA makes a finding in relation to factual accuracy the ACMA has a range of tools at its disposal to publicise findings (including holding a media conference and publishing investigation reports). These findings are reported across a range of media. There is no need for an express obligation for findings by the ACMA to be reported.

Related matters

Broadcasters adhere to the existing Code provisions about the need to avoid simulating or presenting news in a manner that misleads, causes public panic, or causes alarm. This is a basic social responsibility. There is no evidence to suggest that comparable unregulated news services are simulating or presenting news in an alarming manner. Consideration should be given as to whether or not the retention of such an intervention in the Codes has continued relevance.

3B Ethical standards – advertising

The converged media environment is having a significant impact on the advertising landscape in a number of ways. As the Issues Paper recognises, advertising is the key source of revenue for commercial free-to-air broadcasters³⁶ – it is necessary in order to bring Australians valuable content such as Australian content, children’s programs, news and current affairs, access to premium sporting events, and popular international programs – all available ubiquitously and at no cost to the public.

Viewers understand the necessary compact that exists between access to free-to-air television and advertising. Many viewers also recognise and appreciate that advertisements on television can inform them of new products and services which they might not otherwise have heard about.

Consumers are becoming increasingly discerning. Screen Australia’s Deputy Chair, Deane Weir was recently quoted as saying:

“There is no doubt you have got massive pressure on the existing business model of the commercial networks. ... Their business model is based on attracting a mass audience and charging a premium to advertisers for that massive audience. Their ability to generate massive audiences across multiple programs is simply reducing.”³⁷

The advertising market is fragmenting. This has led to an increased online advertising spend, and in 2013 for the first time, online advertising revenue is forecast to eclipse commercial free-to-air advertising revenue.³⁸

The multi-channels have not significantly expanded the potential viewing audience for free to air television, or the advertising revenue available to fund the services. To

³⁶ Issues Paper; pp 51

³⁷ Australian Financial Review, 25 July 2013, “As mass audiences fall so will free-to-air TV profits: executive”

³⁸ PwC (2013) *Outlook: Australian Entertainment and Media 2013-2017*, pp 19

the extent that any additional advertising revenue is being generated by the new channels, this is needed by free to air broadcasters to help offset rising content costs.

At the same time, the increasing penetration of PVRs (which can fast forward advertisements) is an additional challenge to the traditional commercial free-to-air television model. Advertisers and broadcasters need to be able take advantage of new forms of advertising and promotion that are complementary to the traditional 30 second spot commercial.

The Issues Paper recognises the challenges faced by the commercial free-to-air sector in this environment. In relation to television advertising, free to air broadcasters face a far more restrictive and costly regulatory regime than their competitors, placing them at a commercial disadvantage to their competitors including subscription television, radio and internet. To date, despite the significant structural changes in the market, the amount of regulation of advertising on free-to-air television has been steadily increasing, rather than reducing.

Market conditions will dictate that in those circumstances advertising will shift away from heavily regulated sectors to those platforms with fewer regulations. Not only does this have a significant impact on the advertising revenue of regulated media – it is also ineffective, as it does not reduce the public's exposure to the relevant content.

It is therefore very timely for the ACMA to examine what high level community safeguards are appropriate in this area, and to apply those principles consistently across all platforms.

Extensive advertising regulation already exists

In taking a holistic view of community safeguards in relation to advertising, the ACMA should have regard to other, external interventions that currently exist in the marketplace. These range from Federal Government laws that apply to all forms of advertising (such as the *Competition and Consumer Act 2010*), to industry self-regulation and laws that apply only in one State or Territory (such as the rules that apply to gambling advertisements). This creates an increasingly complex environment for broadcasters as publishers, as well as for advertisers.

These include Federal laws, such as the:

- *Competition and Consumer Act 2010*
- *Corporations Act 2001 (in relation to advertising financial products and services)*
- *Therapeutic Goods Act 1989, Therapeutic Goods Advertising Code and Regulations;*
- *Health Practitioner Regulation National Law Act 2009;*
- *Mobile Premium Services Industry Code;*
- *Tobacco Advertising Prohibition Act 1992;* and
- *Interactive Gambling Act 2001.*

There are also a number of general State laws governing fair trading and representations about products and services.

State and Territory laws also apply to advertisements for particular products and services, such as:

- Competitions and lotteries;
- Gambling services;
- Building services;
- Real estate; and

- Legal services.

These laws are not always consistent.

In addition to recognising existing laws and regulations, any development of principles concerning advertising on broadcasting platforms must also consider moves by relevant industries to implement community safeguards through technology-neutral industry Codes.

The Australian Association of National Advertisers (AANA) administers a number of these Codes, which have the objective of ensuring all advertising is ethical, and prepared with a proper sense of obligation to consumers and fairness to competitors. Importantly, they apply to advertising across all platforms, including user-generated content on social media. This ensures consistency across the converged media environment.

The key AANA Codes are:

- *Code of Ethics*;
- *Code for Marketing and Advertising Communications to Children*;
- *AANA Food & Beverages Advertising & Marketing Communications Code*;
- and
- *Environmental Claims in Advertising and Marketing Code*.

The self-regulatory system is administered by the Advertising Standards Bureau (ASB). Complaints are assessed by the Advertising Standards Board (Board), which is comprised of 20 people from a broad range of age groups and backgrounds and is gender balanced – representative of the diversity of Australian society. The ASB conducts regular reviews and research to ensure that the decisions of the Board reflect community standards.³⁹ Free TV supports this form of regulation by removing classification for television advertisements that are found to be in breach of the AANA Codes.

There are also self-regulatory instruments that apply to specific industries, including the Responsible Children's Marketing Initiative and the Quick Service Restaurant Initiative, administered by the Australian Food and Grocery Council, and the Alcohol Beverages Advertising Code Scheme. These initiatives apply across platforms.

The development of any guiding principles to provide community safeguards about the content of advertising must take these external interventions into account.

It is also relevant to note that many of the rules in the Free TV Code overlap with existing legislation or industry initiatives. For example, clauses 2.1 and 2.2 of the AANA Code for Marketing and Advertising Communications to Children are identical to clause 6.23 of the Free TV Code.

Another example of overlap is in relation to therapeutic goods. Commercial free-to-air broadcasters are subject to a licence condition at clause 6 of Schedule 2 to the BSA that they must not broadcast a commercial that requires approval under the *Therapeutic Goods Act 1989* (TGA) unless it has been so approved. Clause 6.5.2 of the Code requires television commercials for therapeutic goods to be approved by the Australian Self-Medication Industry (ASMI). These requirements are in addition to section 42C of the TGA, which makes it an offence to publish an advertisement that requires approval but has not been so approved. This duplication is unnecessary and confusing for all stakeholders.

³⁹ <http://www.adstandards.com.au/publications/factsandfigures>

In this context, the continuing relevance of many of the broadcasting Code interventions concerning advertising content and placement is questionable, given the extensive community safeguards that already exist.

Placement

Section 6 of the current Free TV Code sets out a number of complex rules about the placement and content of advertisements on commercial free-to-air television. For example there are restrictions on when particular types of products can be advertised, including condoms, films, DVD and computer games and premium charge phone services. In addition, while the general rule is that commercials must comply with the classification requirements of the time zone in which they are broadcast, there are also a number of complex special requirements for placement in:

- Programs directed to children;
- G programs generally;
- G programs between 7.00pm and 8.30pm;
- G or PG programs (or sport) starting at or before 8.30.

These rules, developed over the past 20 years, are more far more complex and prescriptive than on any other platform. Not only does this mean that free-to-air broadcasters have to invest considerable resources to ensure compliance, it also means that broadcasters are at a significant commercial disadvantage to their competitors to attract and retain advertisers.

In contrast, the Subscription Broadcasting Television Industry Code of Practice takes a more flexible and practical approach, requiring that in scheduling certain types of advertisements, the licensee must take into account the intellectual and emotional maturity of its intended audience.

The existing placement restrictions for Free TV broadcasters should be simplified to a basic obligation that the content of the advertisement must be suitable to the time zone in which the advertisement is broadcast (other than for gambling and alcohol). Broadcasters take their responsibilities to the public very seriously. If the actions of broadcasters do not align with community standards, they will lose viewers and receive feedback immediately in a range of ways, including through social media. It is not in the interests of broadcasters or advertisers to place advertisements for adults in programs that are directed to children.

Advertising limits

The Issues Paper also explores the issue of the amount of broadcasting time devoted to advertising, noting that the BSA specifies it as a matter that may be covered by the Codes.⁴⁰

Advertising plays a critical role in the provision of commercial free-to-air television broadcasting services. Revenue from advertising enables the provision of competitive services and innovative content to Australians for free. For Free TV members, section 5 of the Code sets out specific rules about advertising limits on the primary channel, including highly complex requirements regarding the average to be maintained, maximum minutes per hour and the number of hours permitted to have the maximum minutes, and then differences between prime time and non-prime time,

⁴⁰ BSA, subsection 123(2)(f)

election periods and C and P periods. Compliance with such complicated rules is very resource intensive and complex. In contrast, there are no advertising restrictions on pay TV, or new users of the digital dividend spectrum.

While broadcasters recognise that there are community expectations that an appropriate balance between program matter and advertising is maintained, the existing requirements are overly complicated. Simplified and more streamlined advertising time limits have been rolled out successfully for the multi-channels with no significant community concern.

As noted in the Issues Paper, the BSA envisages that the amount of broadcasting time devoted to advertising is sufficiently important to be considered for inclusion in the Codes. However, any guiding principle regarding advertising restrictions must be set at a high level and capable of application in a simplified and practical framework. Broadcasters are best placed to determine the detail of such requirements in their Codes - to ensure they reflect viewer expectations and accommodate established commercial program lengths and scheduling constraints.

In-program advertising

Transparency around in-program and integrated advertising is raised in both the Issues Paper and the Convergence Review.

Despite recent attention, integrated advertising is not a new phenomenon. It first appeared in Lumiere films in Europe in the late 1800s,⁴¹ and has appeared in films, and later television throughout the 1900s and into the current era, even influencing the name of a particular entertainment genre – the “soap” opera. Integrated advertising allows advertisers and broadcasters to consider new and innovative ways of demonstrating products and informing viewers of their benefits.

Free TV is not aware of any significant consumer concerns regarding integrated advertising, or any indications that the existing disclosure rules in the Code are inadequate.

As noted in the Issues Paper, the Code already contains clear provisions requiring disclosure of commercial arrangements relating to program material. These obligations are heavily weighted to factual programming. In our view, there is a fundamental difference in viewer expectations between factual programming and other types of programming. Where a consumer may be provided with factual information on which they might base significant financial, health or other purchasing decisions, they should be aware that the information may be influenced by the existence of a commercial arrangement. However, in light entertainment or drama programs the issues are less significant. The Free TV Code already provides some level of viewer information in these cases. We believe this provides appropriate community safeguards in relation to in-program advertising. Some modernisation of these provisions may be appropriate, for example through website disclosure of commercial arrangements.

Free TV does not support a model that would require intrusive program material such as a UK style “P” symbol. Broadcasters receive very few complaints or viewer feedback relating to integrated advertising material. There is also a greater level of

⁴¹ Williams, Kaylene, Petrosky, Alfred, Hernandez, Edward & Page Jnr, Robert “Product Placement Effectiveness: Revisited and Renewed” *Journal of Management and Marketing Research* Volume 7, April 2011; pp2 Retrieved from: <http://www.aabri.com/manuscripts/10712.pdf>

viewer sophistication in these areas, with advertising techniques forming part of the school curriculum for some years.

The absence of consumer concern reflects the level of comfort and familiarity that viewers have with integrated advertising. It is an accepted and established means of promoting a product and there is no demonstrated need for additional community safeguards in this area.

Advertising revenue streams that are complementary to the traditional 30 second spot will become increasingly important to the ability of Free TV broadcasters to deliver the social benefits viewers expect such as quality Australian news, sport and drama. The current Code provisions strike an appropriate balance between broadcaster and viewer interests.

4A Protection of the public – privacy

Free-to-air television broadcasters provide a wide range of high-quality news, information and current affairs programming and take community and legal standards regarding the privacy of individuals very seriously.

There are already a wide range of privacy protections which apply to commercial free-to-air television broadcasters and there are serious sanctions which apply to a breach of those protections.

In addition to existing Code provisions, there are a broad range of State and Commonwealth statutes which protect against inappropriate or unfair means of gathering or disclosing personal information and images.

In Free TV's view, the media privacy regime currently in place provides effective safeguards for the protection of private rights and interests. It strikes an appropriate balance between these rights and the fundamental rights of freedom of expression and the need for free flow of information on matters of public concern. Levels of complaints about privacy are very low, and there is no demonstrated failure in the current system. In the four years to March 2013, only 3.2% of complaints received by broadcasters related to privacy issues.⁴²

The already high level of regulation in this area including in relation to the identification of individuals in certain proceedings, as well as the use of listening or optical surveillance devices, demonstrates that the State and Commonwealth Parliaments have given these matters appropriate consideration and have enacted laws which suitably balance the relevant interests.

Free TV does not support any further regulation of privacy in the media space or any moves to restrain the media's vital role in upholding freedom of speech and the free flow of information. Indeed, the discussion at the *Citizen Conversation – Privacy* indicated that privacy is being dealt with effectively by Free TV members compared to other platforms.

Expectations of privacy are changing

In the digital age, individuals' expectations of privacy are changing. Australians are more willing now than they used to be to make their "private affairs" public. For example, some Australians are now happy to talk publicly about issues they may

⁴² Source: Free TV Code complaints database – Q1 2009 to Q1 2013.

have not so long ago considered inappropriate or embarrassing (e.g. the breakdown of a relationship, drug or alcohol abuse, or sexual abuse).

This change in societal norms has led to people being increasingly willing to make their private information public, such as on the internet (on social networking sites and video-sharing sites) and on television (on reality TV programs, Oprah-style talk shows, current affairs programs and similar programs), where individuals regularly and willingly share their “private affairs” with the public. The popularity of these types of online sites and TV programs demonstrates Australians’ acceptance of this type of behaviour. Material that an individual posts on social media without restrictions can no longer be considered “private”, even if it relates to an individual’s personal affairs.

As societal norms change and individuals become increasingly familiar with the widespread dissemination of private information, their reasonable expectation of privacy will also change (both in relation to their own privacy, and the privacy they expect for other people).

The Inquiry must consider these societal shifts in developing any guiding principles concerning privacy.

Expansion inappropriate

The ACMA Issues Paper queries whether it may be appropriate to expand the privacy provisions of the Code beyond news and current affairs to other forms of factual programming, such as observational documentaries, reality television programs, or dramality programs. It is neither necessary nor appropriate for these programs to be covered by the privacy provisions that relate to news and current affairs. News and current affairs programs often deal with people who have not chosen to be in the public eye.

In contrast, participants in observational or reality programs generally volunteer to participate and provide informed consent for the broadcast of material, usually in the context of a formal legal agreement, or they are in a public place. Similarly, viewers and the general public have differing expectations about how an individual’s privacy must be treated, depending on the particular genre. As noted above, expectations of privacy are evolving, and viewers expect that a person appearing voluntarily in a program is willing to forgo a certain amount of their privacy. The nature and likely content of such programs is often well understood and familiar to both participants and viewers, particularly for long-running programs. Nonetheless the Code still does have specific protections for participants in reality TV programs under Clause 1.9.7 which has two elements of protection, one for demeaning content and the other for exploitative content.

It is also relevant to note that actions such as in nuisance, trespass, defamation, breach of confidence, malicious falsehood, contempt and actions based on surveillance and listening device legislation, do provide additional protection in circumstances where an individual has a reasonable expectation of privacy and is not covered by the existing Code provisions.

While the ACMA notes the increase of observational documentaries, it does not cite any evidence of a problem requiring a code intervention. Any principle which seeks to expand the existing privacy protections beyond news and current affairs is inappropriate and opposed by Free TV.

4B Protection of the public – interventions about hatred and vilification

The Issues Paper recognises that, in addition to the existing Codes, there are a number of Federal and State/Territory laws which regulate anti-discrimination and vilification.

Both the legislative and Code interventions negotiate the delicate balance required between ensuring freedom of expression, and protecting groups and individuals from vilification or matter that is likely to incite hatred. This is a duplicate provision between the Code protections and the legislative requirements which serves as a sufficient method of protection of the public in this area.

Any guiding principles identified by the ACMA must acknowledge this tension.

4C Protection of the public – emergency information

Commercial free to air television broadcasters play a vital role in the dissemination of critical emergency information – a role they take very seriously which is highly valued by local communities and local emergency management services.

Emergency broadcasts are dealt with in the BSA, as well as the Code. It is a condition of broadcasters' licences that they will, upon written notification from the Minister that an emergency has arisen which makes it important in the public interest that persons authorised by the Minister have control over the content on that broadcaster's facilities, allow those persons access to and control over those facilities. There are also rules at section 130ZZB of the BSA to ensure that emergency services messages are broadcast in a way that is accessible to hearing impaired viewers.

At a practical level, commercial broadcasters have very close working relationships with local emergency services and have established efficient processes for the rapid receipt and broadcast of emergency information. This covers storm warnings, cyclone alerts, fire danger information, fire and flood alerts and many other kinds of ad-hoc warning messages. Free TV has also supported the development of the National Guidelines for the Request and Broadcast of Emergency Warnings by the Federal Government.

Hence such matters are already adequately addressed.

5 Access - captioning

Part 9D of the BSA, which commenced on 29 June 2012, sets out a range of captioning obligations that apply to commercial free-to-air broadcasters.

These extensive obligations cover captioning requirements on primary and multi-channels, as well as requiring broadcasters to comply with the *Broadcasting Services (Television Captioning) Standard*, regarding the quality of captioning services.

Broadcasters also have extensive reporting and record keeping obligations under Part 9D, and a requirement to caption all emergency services information.

The publication of information about captioned programs in printed television guides is an intervention that is no longer relevant. With the transition to digital television, all viewers will have access to an EPG. While broadcasters may provide this information, it is not within their control whether all digital television EPGs will display this information. Online program guides are also available with caption information. By July 2014, all programs on the primary channels will be captioned between 6 am

and midnight, so viewers can tune in and be guaranteed access to captioned programming across the entire day.

The new and comprehensive legislative obligations mean there is no longer any need to include access and captioning matters in the broadcasting Codes.

7 Redress – methods of handling and responding to complaints

The concept of redress should not be included as a guiding core principle. Redress is defined as the setting right of what is wrong, relief from wrong or injury.⁴³ It implies that the viewer has suffered a particular wrong that needs correcting and presupposes the existence and materiality of that wrong. This is usually not the case in relation to complaints made about television programming where the vast majority of complaints under the Code are not upheld by the broadcaster or subsequently by the ACMA. It also implies a transactional relationship between the viewer and broadcaster involving personal injury or loss which is generally not applicable (although it may apply to certain matters which directly affect a particular individual, such as privacy).

Complaint-handling is broader than this concept. The key principles that underpin an effective complaints handling system are accountability and transparency. In examining the community safeguards that are relevant to complaints, the Inquiry must distinguish complaints processes from complaints outcomes. It will not always be possible or reasonable for a broadcaster to “resolve” a complaint to the satisfaction of the complainant. The BSA recognises this by enabling such complaints to be escalated to the ACMA.⁴⁴ Community safeguards for consumers should instead focus on the provision of access to a robust, responsive and genuine complaints process.

Broadcasters have established mechanisms that give viewers the opportunity to complain about matters covered by the Code.

Unlike some other industries, the level of complaint for commercial free-to-air broadcasters remains very low, especially when put in context of 69 broadcast licences providing three services each, broadcasting every hour of the day, every day of the year, to over 14 million people each day.

Under the system adopted by the commercial broadcasters the overwhelming majority of complaints are resolved in the first instance between the broadcast and the complainant. A small number of complaints are pursued through the ACMA processes and an even smaller number are upheld.

In 2011-12, the ACMA reported that it had received a total of 2273 written complaints and enquiries about broadcasting services, 98.5% of which were resolved within seven days.⁴⁵ Over the same period, the ACMA received more than 5000 complaints about online content, almost 22,000 complaints about telephone and fax marketing⁴⁶,

⁴³ Macquarie Dictionary 4th edition.

⁴⁴ BSA, section 148,

⁴⁵ Australian Communications and Media Authority (2012) *Annual Report 2011-12* ; pp 98 – Figure for all television and radio broadcasting services including commercial, community, national and subscription broadcasters.

⁴⁶ Op. cit.; pp 24

and over 225,000 contacts from the public about Spam.⁴⁷ Likewise, the Telecommunications Industry Ombudsman received more than 190,000 complaints about telecommunications providers. The Financial Ombudsman Service received 36,099 disputes in that period. These figures demonstrate that complaints about broadcasting are comparatively very low, especially considering the reach and volume of broadcasting services.

There are a number of possible explanations for these low figures:

- Broadcasters are providing services that are in line with community standards, so the level of community concern is low;
- Viewers of commercial free-to-air television services do not usually suffer any direct financial or personal detriment as a result of broadcast content;
- Audiences have access to a range of mechanisms to express their displeasure about television content, including social media.

Community standards regarding broadcasting complaints must be seen in perspective. Viewers may articulate concerns about broadcasting services when specifically asked, however the complaints figures indicate that community concerns about broadcasting are low when compared to other matters such as telecommunications, or direct marketing.

Therefore, given the reasoning above, the term 'redress' is not an appropriate term as this terminology is misleading and assumes that the resolution of a Code complaint involves the broadcaster conceding a mistake or error on their part to satisfy the complainant even when no such mistake or error has been made.

Like many other areas of the Inquiry, the consideration of Code complaints handling mechanisms must also encompass the changing media behaviour of content consumers and audiences, including in relation to social media usage. The Code complaints process is no longer the only avenue available to people who want to complain about material that has been broadcast. Citizens are more empowered than ever to take action or voice their dissatisfaction in a range of ways, including via online petitions and social media campaigns that encourage the boycotting of advertisers.

Formal Requirements

Under the BSA, broadcasters are required to comply with the Code, and there are serious consequences in the event of a breach. It is therefore essential that complaints of this nature have a degree of formality attached to them. The Free TV Code currently implements this principle by requiring Code complaints to be in writing (including via a centralised online lodgement system), contain certain information, and be lodged within a certain time frame after the broadcast.

Some complaints are very complex and highly contested. The issues raised may have serious consequences for licensees or individuals, and may involve both legal and regulatory matters. A key concern for broadcasters is the use of the ACMA and Code processes as a means to gather information for the purposes of other legal actions.

It is therefore necessary for broadcasters, in determining their Codes, to retain the capacity to set certain boundaries and limitations around what constitutes a valid

⁴⁷ Op. cit.; pp 94

Code complaint, and to identify certain types of complaints where a substantive response is not required.

That is not to say the broadcasters disregard feedback provided in our ways such as by telephone or social media forums. Those comments are passed on to the relevant business areas and are a very effective means of receiving and responding to the concerns and attitudes of our audiences. However a Code complaint is a formal process (with potentially serious consequences) that should be commenced in a formal manner.

Standing

The standing of a person to make a Code complaint is a key issue for broadcasters. It has become an increasingly complex issue due to propagation of television-like content online (both authorised and unauthorised) and the availability of that same content on DVD, or on-demand.

It is well established that the same piece of content will be subject to vastly different regulatory regimes depending on how it is delivered to the consumer. This is a key “broken concept” identified by the ACMA, which is of direct relevance to the issue of complaints. What if a person has downloaded an episode of a free-to-air program (such as *A Place to Call Home*, *Underbelly*, or *Offspring*) from the Apple iTunes store and wants to complain about something in that episode? Should they be entitled to make a Code complaint to the relevant network, even though they did not view the program on a broadcasting service? Should they complain instead to Apple? What if they saw the relevant episode on a DVD? What if they did not see the actual episode at all, but were offended about its content when told by a friend or colleague?

These are the inherent tensions that exist in the current complaints regime. It is logical and reasonable that Code complaints should be limited to the platform they are designed to regulate, being the relevant terrestrial or subscription broadcasting service. Extending those complaints mechanisms to certain online and DVD content simply because the original publisher happens to be a commercial television broadcasting licensee creates inconsistency and is fundamentally unfair.

Similarly, it is reasonable to require a complainant to have seen the relevant content on television in their licence area in order to make a complaint. Campaign complaints that are initiated via social media, community groups or programs such as *Media Watch* should not be captured as part of the Code complaints process if the complainant has not seen the relevant broadcast. The Advertising Standards Bureau requires this threshold in its complaints mechanisms and Free TV supports the inclusion of such a principle in the ACMA’s consideration of complaints handling.

In particular, complaints from organisations or individuals outside of Australia, who clearly did not view the material as part of an Australian broadcasting service, should be recognised as outside of the jurisdiction of the ACMA and therefore outside the complaints and investigation requirements. At present complainants do not even have to reside in Australia to lodge a Code complaint.

Accessibility

Following the 2009 Code Review, Free TV established a centralised online lodgement system for Code complaints. Since the introduction of the online

complaints portal, Code complaints have increased by around 210%.⁴⁸ The online portal has made the complaints process easier and more accessible for viewers.

The online lodgement system is set up to ensure that complaints made online are directed to the correct staff at each network in a timely manner. These designated staff are in a position to action complaints and respond appropriately. It is an accountable and efficient system which can reliably track and audit complaints.

Any person with internet access is in a position to use the electronic form on the Free TV website. Broadcasters provide a link and details of the Free TV e-lodgement process on each of their websites. The use of an online complaints form (as opposed to email) is used by government organisations such as the Commonwealth Ombudsman and the ABC, and other regulated corporate entities such as Telstra.

Conversely, email is an unreliable mechanism for making a complaint. Broadcasters do not currently accept Code complaints by email, due to the difficulties in tracking and monitoring email traffic throughout the organisation. Many email programs automatically identify and quarantine emails as Spam or Junk mail. These messages may never actually reach the intended recipient or be seen by any person in an organisation.

It is also in the interests of complainants to make sure that their complaints will be promptly sent to the right person. Complainants will not be assisted if their complaint is unable to be actioned because it is emailed to someone who is absent, has left the company, or is diverted to a Spam inbox.

Telephone advice requirements

Finally, Free TV has some concerns about the operation of the telephone complaints provisions in the current Code, in particular the obligation on all employees of a broadcaster to provide specific information about the formal complaints process to a complainant on the telephone.

In determining community safeguards with a view to minimal intervention, it is timely to consider whether such prescriptive and onerous rules remain appropriate. Such obligations may be appropriate in relation to switchboard staff, but not every employee of a licensee should be required to treat all callers as prospective complainants and therefore provide advice to callers about code complaint procedures.

⁴⁸ Since 2008/9. Source: Free TV Code complaints database. Despite the increase in the total number of complaints this has facilitated, the number of upheld complaints has remained steady.