



FreeTV
Australia

**Submission by
Free TV Australia Limited**

Department of Broadband,
Communications and the Digital Economy

Convergence Review – Framing Paper

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1 Executive Summary

- Free TV welcomes the release of the Framing Paper as an important step forward in the Convergence Review.
- Free TV agrees that the identification of foundation principles is the necessary first step for the Review and we support the principles as outlined in the Framing Paper.
- Free TV has identified some additional principles which should also frame the Review's thinking about the Australian media environment and how it should be regulated in the future.
- These additional principles relate to consumers' rights to access information, the need for an even regulatory playing field and the sustainability of regulatory settings.
- In a converged environment where the same piece of content is available over many platforms, it is reasonable to expect that a single set of concepts or principles should apply to all content services.
- The release of the Framing Paper also provides the opportunity to raise the key issues arising from the proposed principles.
- For the commercial free-to-air television sector, the proposed principles give rise to a range of regulatory issues which are overdue for reform in light of recent market and structural changes in the media sector.
- Licence fees are a key element in the current regulatory settings for the commercial free-to-air industry and they provide a unambiguous example of regulation which is in need of urgent review.
- There is also justification for a reconsideration of how Australian and local content objectives are met. There is a need for more flexibility to enable broadcasters to meet their obligations in a way that does not disadvantage them against other platforms.
- The inconsistent regulatory treatment of access to content, classification, news and current affairs and advertising across delivery platforms highlights some of the inadequacies of the current regulatory framework.
- The objective of the Convergent Media Review must be to develop a consistent regulatory framework which continues to safeguard community standards and ensures public interest objectives are met but is flexible enough to be applied across an evolving media market.

2 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television is the most popular source of entertainment and information for Australians, with our members providing nine channels of content across a broad range of genres, as well as rich online and mobile offerings, all at no cost to the public.

Free TV welcomes the opportunity to comment on the Department of Broadband, Communications and the Digital Economy (DBCDE) Convergence Review Framing Paper.

Australia's broadcasting policy framework and spectrum management policy over the past 50 years have delivered the best free-to-air television services in the world. The importance of free-to-air television broadcasting services to the Australian public remains high and consumers expect high levels of quality Australian and local content, free access to news and current affairs and free coverage of major sporting events.

Free-to-air television remains the most important audio-visual platform for Australians. According to the Australian Bureau of Statistics, watching TV is Australia's most popular leisure activity and ratings figures continually demonstrate that the vast majority of TV viewing is spent watching Free TV. Free TV is in 99.7% of homes and on any given day, an average of more than 13.4 million Australians watch free-to-air terrestrial television. Free-to-air channels account for about 84% of all metropolitan and regional nightly viewing.¹

Free-to-air television is also the foundation of Australia's content creation industries. Every year, commercial free-to-air broadcasters produce more than 500 hours of original Australian drama and invest over \$950 million a year in original Australian programming including not only drama, but children's programs, documentaries, sport, news and current affairs.² Screen Australia's drama report for 2009-10 shows that as in previous years, the largest contribution to the combined TV drama slate came from the commercial free-to-air broadcasters. No other platform has contributed or is likely to contribute in the future to Australian content to this extent particularly given the content produced is made available to all Australians for free.

Free-to-air television also continues to be more heavily regulated than other communication platforms and successive governments have chosen to meet important public interest outcomes through regulation of the free-to-air platform. In the areas of advertising, children's content, Australian content, program scheduling and news and current affairs programming, to name only a few, regulatory restrictions and obligations apply to free-to-air that do not apply to its competitors and comparable platforms.

This is the result of a legacy regulatory policy which focuses on specific industries with vertically integrated structures (often referred to as 'silos'). Historically, the content and services provided by different media and communications platforms were clearly delineated. Television, radio, newspapers and telecommunications providers all provided distinct services with minimal overlap. New platforms and content offerings such as pay television, the internet and mobile services that have emerged over the last 30 years cut across these previously stable industry structures. However, the regulatory regime has continued to be based on the traditional silo model to the increasing detriment of commercial free-to-air television broadcasters and viewers.

¹ Think TV Year in Review 2009 - http://www.thinktv.com.au/media/Homepage/Year_In_Review_2009.pdf

² ACMA Broadcasting Financial Results 2007-08

Australia is not the only country facing challenges in its communications regulation. Many jurisdictions are considering whether their existing regulatory frameworks could or should be applied to new content services, or whether the distinction between broadcasting services and other communications services is breaking down to a point where a whole new approach is warranted. There are widespread concerns that legacy regulation will not adequately deal with the issues arising from new forms of content delivery and that consumers can easily bypass strict regulations on free-to-air services by accessing the same or similar content via another platform.

The need for the Convergent Media Review has been well established and we welcome the release of the Framing Paper as an important step forward in the Review process.

We understand the purpose of the Framing Paper is to seek comment on a proposed set of principles which will form the basis of the Review's consideration of specific issues. Internationally, governments regulate broadcasting and media services with reference to a set of key benefits or social harms. Free TV agrees that the identification of the principles underpinning future media regulation is the necessary first step in formulating the appropriate regulatory settings for convergent media.

Any system of content regulation needs to be based on clear public interest principles or concepts, to determine what is regulated and to what end. In a converged environment where the same piece of content is available over many platforms, it is reasonable to expect that a single set of concepts or principles should apply to all content services.

Accordingly, the starting point for the Review must be the identification of the public goods to be protected and the harms to be prevented. The task then is to ensure consistent application of those principles across content delivery platforms so the objectives are not undermined. The challenge is to shift the policy focus away from industry-specific interventions and arrive at a technology-agnostic regulatory framework which can weather to the best possible extent future developments in delivery technologies and business models.

This submission addresses the principles set out in the Framing Paper and also addresses some additional principles which should be incorporated into the Convergence Review. It also provides a brief overview of the issues that will be key to informing these principles over the course of the review. In this submission Free TV makes broad observations noting that the opportunity for more detailed submissions will arise as the Review progresses. Free TV is, however, willing to provide additional evidence in support of this submission if requested by the Review panel.

3 Framing paper – general response

Free TV is generally supportive of the approach to the review taken in the Framing Paper. The paper plays a valuable role in setting the basic tenets, guidelines and principles for the review going forward.

Free TV's response to each of the specific Principles articulated in the Paper is below. However, at this point Free TV would like to draw particular attention to, and provide support for, a number of the matters that the Committee raises in the paper's general discussion, which are not specifically stated as part of the principles per se:

- the need to make appropriate use of self-, co- and non-regulatory models - too often it is assumed that complex and often punitive government regulation is the best or only way to achieve desired public interest outcomes. Free TV supports the Committee's

statement that “there are a number of ways in which the government can achieve its objectives” and its focus on “policy frameworks” rather than regulatory or non-regulatory frameworks per se.

- the role of incentives/rewards systems – similarly, Free TV welcomes the Committee’s recognition of the important role incentives-based regulatory mechanisms can play alongside more traditional ‘stick’ regulation.
- the important role consumer information and choice plays in the new media environment – as media services expand and diversify, consumers demand more choice and control, and technologies challenge existing regulatory models. As such it is increasingly inappropriate or impractical for regulation to occur in a top-down environment. In the converged media environment, the final judge of what is appropriate must be the consumer, although this will occur within certain community standards. Free TV therefore supports the Committee’s emphasis on ensuring consumers have the information and tools they need to make their own decisions in a converged media environment.
- the vital importance of media freedom – whenever regulation of media and communication services is considered, it is vital to ensure that the central role of free speech and freedom of the press to the maintenance and health of a democratic society is not overlooked. Free TV therefore welcome’s the Committee’s support for a free and diverse media and communications industry as a fundamental and important part of Australian society.
- the importance of best practice regulation – consistency, clarity and efficiency should be central aims of all regulation. Australia’s current communications regulation, and in particular the Broadcasting Services Act, has over time been amended, supplemented and reworked to the point that it is complex, convoluted and burdensome. In the forthcoming review, minimising the regulatory burden on all sectors should be adopted as a central goal, essential to achieving such aims as innovation, competition and diversity in the sector. At the same time, keeping regulations simple and consistent increases their transparency and efficacy for members of the public.

Free TV also supports the Committee’s questioning of the appropriateness of the current “degree of influence” approach that treats broadcasting differently from other services. As is discussed at 5.1 below, the most important and central tenet of the convergence review should be the goal of moving away from an outdated and inappropriate regulatory approach that treats the same content differently based on the platform over which it is distributed.

4 Proposed principles of media and communications regulation

Free TV supports the principles identified in the Framing Paper and offers specific comment as follows.

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

Commercial free-to-air television is an important source of diversity with an average of over 60 hours of news and current affairs sources each week.

Free TV supports this principle and notes that the current regulatory framework does not recognise the true diversity of information, sources and ‘voices’ in the media marketplace.

Regulatory and non-regulatory proposals which seek to promote this principle should take a broad view of the industry and the content and information offerings currently available in the marketplace.

For example, existing media ownership and control restrictions only recognise the traditional entertainment and information sources of terrestrial free-to-air television, radio and news print. The prevalence of alternative entertainment and information sources brings the relevance of this approach into question.

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

Free TV supports this principle and notes the importance of getting the broader regulatory framework right if this principle is to be fulfilled.

The extent to which communications and media industries can be innovative and competitive will be determined by the balance of regulation across a variety of subject matter.

For example, sector-specific regulation imposing classification timezones only on free-to-air television broadcasters limits the industry's ability to develop competitive and innovative scheduling strategies. In section 6.5 below, we argue that there are more effective ways of meeting appropriate community safeguards which reflects how content is being accessed today and how it will be accessed in the future by using a combination of information and new technological tools.

Similarly, rigid rules around how free-to-air broadcasters meet Australian content obligations, including children's content, are currently acting as a barrier to innovation and competitiveness by restricting when and where this programming can be scheduled.

As a further example, Government decisions regarding access to broadcasting spectrum will determine the extent to which the commercial free-to-air sector can migrate to new technologies and standards such as 3DTV, DVB-T2 and MPEG-4. These constraints will not apply to competing platforms.

Hence, in applying Principle 2, the Review must consider the overall impact of the full range of regulatory settings and the extent to which they encourage or stifle innovation.

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

The ongoing production and distribution of Australian content will clearly be a focus of the review and Free TV supports this important public interest principle as stated in the Framing Paper.

As addressed in more detail below (section 5.3), a key part of fulfilling this principle will be the extent to which the broader regulatory framework encourages a vibrant, sustainable and robust free-to-air television industry which can continue to make a substantial contribution to the production and broadcast of quality Australian content.

This was the approach recently taken by the UK regulator Ofcom when considering the ability of the UK's public service commercial broadcasters to continue to deliver public service outcomes, such as the delivery of local content.

Ofcom's broad ranging review recognised that the viability of maintaining significant public service broadcasting obligations was reducing over time and concluded that the current model of commercial public service broadcasting is "clearly no longer sustainable." As a result of this review, Ofcom significantly reduced licence fees for channel 3 and channel 5 broadcasters in an attempt to rebalance licensee obligations on a sustainable basis.

In section 5.3 below, Free TV suggests that the need to ensure a vibrant, robust and sustainable free-to-air industry should be included as an additional framing principle in the Convergence Review, given its importance to the fulfilment of a range of public interest policy priorities.

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

Free TV supports this principle but wishes to note that the way in which this objective is achieved into the future will need to be carefully considered by the Committee.

At present, regulatory measures relating to local news and information are concentrated on the regional commercial broadcasting sector and carry with them onerous and burdensome record-keeping and reporting obligations.

The Review should also consider the extent to which market incentives could deliver on this objective, thereby avoiding the need for administratively burdensome regulation. The existing regulations pre-date the development of many online news and information sources.

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

Commercial free-to-air broadcasters are arguably the most accountable media sector as regards community standards and Free TV supports Principle 5 as a key public interest objective for any new regulatory framework.

Free TV broadcasters take very seriously their responsibility to ensure that programming and the way that it is promoted and delivered accords with community standards. There are important public interest safeguards built into the regulatory framework for free-to-air commercial television. The Commercial Television Industry Code of Practice includes review and complaints mechanisms to ensure the regime remains responsive to community views. The regular reviews include significant rounds of public consultation and the ACMA is required to be satisfied that the Code meets prevailing community standards on a range of important subjects before it can register a Code. The ACMA also has standards-making powers which may be used in the event a Code is deemed to have failed this test.

However, an important associated principle should be incorporated into the review – that is, regulatory measures to ensure community standards are met should apply evenly across platforms. Likewise, they should be drafted in a manner that ensures transparency and equity in application, and minimises the burden on the sector.

This is necessary to ensure the equity and efficiency of any regulatory measures as experience to date suggests that if more stringent controls apply to a particular media platform, content (and viewers) will simply migrate to other, lesser regulated platforms.

In reflecting community standards, the primary focus should be on the protection of children from harmful material.

4.6 Principle 6 and Principle 7

Free TV Australian supports Principles 6 and 7 as stated in the Framing Paper.

4.7 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

Free TV supports this principle but seeks further clarification as to how it would be applied in practice.

The concept of 'overall public benefit' has featured in previous regulatory discussions regarding spectrum and it is important to establish at the outset what is meant by this term.

For example, the ACMA has developed and published Spectrum Management Principles which include reference to maximising overall public benefit and this principle also appears in the objects of the *Radiocommunications Act 1992*.

In its submission to ACMA on its Spectrum Management Principles, and in other fora, Free TV has consistently noted the importance of taking a broad interpretation of 'public benefit'. This is because purely market-based approaches to spectrum management have the potential to overlook the full range of non-market based values derived from spectrum use.

This is particularly important as regards spectrum used for broadcasting purposes because the provision of free-to-air broadcasting services provides public interest outcomes that are not always properly quantified in purely market-based assessments.

This underlines the need for the Review to take a holistic view when considering specific spectrum management issues. To focus on just one part of the free-to-air television service (spectrum) and to not take into account the consequential effects on the other parts of the service (being the content delivered to viewers), risks compromising important public policy objectives and community expectations.

5 Additional Principles

Free TV proposes the following additional principles be incorporated into the Convergence Review Framing Principles.

5.1 Consistent treatment of content across platforms

An important matter acknowledged in the Framing Paper but not raised to the level of principle is the importance of consistency, in particular that the same content should be treated consistently across delivery platforms.

The Committee makes passing reference to this tenet in its discussion of Principle 2 regarding competition and innovation, saying "as far as possible, the policy framework

should apply consistently to like services regardless of the platform or technology used to deliver the service.” However, this issue is central to the Convergence Review’s purpose and deserves to be recognised as a fundamental principle in itself. Consistent regulation across different platforms is essential if laws are applied to the convergent environment and are expected to remain relevant as the market continues to evolve.

Under the current framework, the same piece of content is subject to different regulatory requirements depending on the platform over which it is delivered. However for the viewer, the delivery platform is generally irrelevant to their experience of the content. This is particularly the case when different delivery platforms merge into a single device, such as the Telstra T-Box which incorporates the delivery of free-to-air content, pay TV content, IPTV content, YouTube and video-on-demand content. Connected TVs also look to deliver a seamless content experience for the viewer, who can switch between terrestrial broadcasts and Internet delivered content at the touch of a single remote control.

Under the current, fragmented regulatory regime if you chose to watch a program on free-to-air commercial television, it would be subject to:

- Pre-classification requirements
- Time-zone restrictions
- Advertising amount restrictions
- Time-zone restrictions on the type of advertising and promotions
- A range of other Code requirements (eg, animal cruelty rules, presentation of participants in reality television programming, etc)

The same content on pay TV:

- Is subject to classification guidelines
- Is not subject to time zones
- Does not have restrictions on the amount of advertising, and
- The type of advertising has minimal or no restriction.

The same content on IPTV is currently not regarded as broadcasting at all, due to the application of Minister Alston’s 2000 determination that ‘streaming is not broadcasting’.

Not only is this an inequitable regulatory environment, it is also an inefficient one. If we take as an example the existing regulatory objective to protect children from material which may be harmful to them, inconsistent treatment of the same content across platforms undermines this objective and does not serve the public interest in protecting vulnerable members of the community.

While free-to-air television is subject to strict requirements regarding classification timezones, advertising restrictions and program content designed to protect children from inappropriate content, few if any of these restrictions apply to other competing platforms. Yet a child is not going to be any less impacted by harmful content if they access it via free-to-air TV, pay TV, IPTV, the internet or even time-shifted TV. And as more than one of these services can be viewed on a single device, consumers are now creating their own schedules for content consumption without even being aware that they are moving between platforms, let alone regulatory environments. As at May 2011, PVR penetration in Australia was 42%³ - timeshifting increasingly makes timezones irrelevant.

³ Source: OzTAM <http://oztam.com.au/Documents/2011/PercentageOfHouseholdEstimates2011p5.pdf>

Not only is technology enabling greater diversity and choice of media content, it is also enabling new ways of achieving public policy outcomes. For example, the parental lock feature on digital set top boxes allows greater parental control over content and allows us to reconsider how we meet community safeguards.

We urgently need a more effective regulatory regime which covers all forms of media in a more equitable manner. The BSA and associated Codes and Standards impose a disproportionate level of regulation on linear content platforms (broadcasters) compared to platforms which deliver content over the Internet or by mobile telephony. This in turn subjects linear content delivery businesses to significant legal, financial, administrative and resourcing constraints when compared with other, competing platforms.

The argument that the Review should have as a central aim the creation of a technology-agnostic regulatory framework which can accommodate divergent delivery platforms has significant stakeholder support. In forums surrounding the review and public responses that have already been released, industry, government and academic sources alike emphasise the importance of this approach. Indeed, it is arguably the most discussed aspect of the upcoming review.

Research undertaken by the University of NSW's Journalism and Media Research Centre, released as the report, *The Adaptive Moment: a fresh approach to convergent media in Australia*, finds that:

The inconsistencies of the current media regulation system need to be remedied. We can no longer think of media forms vertically: existing in individual silos such as television networks, radio, newspapers, film and so forth. Rather, we need to think across the shared horizontal levels across convergent media: networks, platforms and content. Content can be accessed on a multitude of devices, from mobile phones to tablets to laptops and internet-enabled games consoles and televisions. Policies need to be 'technology neutral' in order to adapt and remain useful.⁴

Meanwhile telecommunications leader Ericsson is circulating a report, *Multi-screen TV – Single Regulatory Framework*, which takes as its central tenet the idea that "Media policy regulation should be technology-neutral and platform-independent: in other words, regulation of audiovisual media services should function irrespective of the underlying platform or means of distribution."⁵

And in his speech to the Communication and Media Law Association on 30 May 2011, the ACMA's Chairman, Chris Chapman, argued that "a common denominator across all of these is an evident need for much greater consistency in approach to definitions, concepts, regulatory policy, structures and approaches as well as compliance measures, available enforcement powers and actions" and that "regulation constructed on the premise that content could be controlled by how it is delivered has increasingly lost its force, both in logic and in practice."⁶

5.2 Additional principle – right to information

The rights of consumers should be given paramount consideration in any regulatory reform, and particularly in relation to reform which covers such an important consumer issue as communications policy.

⁴ <http://www.unsw.edu.au/images/pad/2011/May/Convergentmedia.pdf>

⁵ <http://www.ericsson.com/campaign/televisionary/content/pdf/regulation/6039509f-67f9-4a50-b5f8-d79e672efd7c.pdf>

⁶ http://www.acma.gov.au/WEB/STANDARD/pc=PC_91724

The Committee recognises this in the Framing Paper by its inclusion of a section on Consumer and Citizen Rights, which includes:

- Principle 6, which states that Australians should have access to the broadest range of content across platforms and services as possible and appears to focus primarily on the issue of ensuring diversity of content and content services in the Australian market; and
- Principle 7, which focuses on transparency in terms and conditions provided to consumers.

While Free TV supports these principles, we would argue that the review should incorporate a higher-level right to information intended to enshrine the consideration of the full range of consumer and citizen rights in communications regulation in Australia.

The European Union's Audiovisual Media Services Directive (AVMSD) contains as one of its major defining principles the right to information for citizens.⁷ This principle, which is included as a public interest that should be safeguarded, is used to support such regulatory initiatives as anti-siphoning laws and copyright exceptions for news reporting.

Free TV would argue that a similar but broader right to information is not only in the public interest, it is already a fundamental part of the current regulatory system. In addition to the areas covered by the European right and those dealt with by the current Principles 6 and 7, an overarching right to information can be seen in regulation relating to universal service obligations, captioning, Australian and local content, and classification, as well as in the Household Assistance Scheme of the Government's digital transition framework.

A right to information principle would provide a 'place' for the proper recognition of important public interest issues such as freedom of speech and media freedom. It would also provide a valuable tool in the consideration of issues such as the consumer's right of choice, and the role this should take in communications regulation in a converged environment.

A primary consideration for converged media regulation must be how best to provide consumers with the tools and the information they need to make their own decisions as to what is appropriate content for them and their family. The converged media environment, with new technologies such as digital video recorders, growing use of non-linear platforms such as IPTV, and diversification of consumer views, is increasingly consumer-driven. In this 'bottom up' communications environment, consumer empowerment mechanisms such as classification, electronic program guides and parental locks take the fore, replacing heavy handed and 'top down' regulatory mechanisms such as programming time zones designed for the mass audience models of previous decades.

Free TV therefore argues that a right to information and the ability to implement that right should be included as a fundamental principle of Australia's future communications regulation. Furthermore, we hold that this right has emerged not just as a regulatory imperative, but as a fundamental part of the converged media environment itself, and the principle benefit provided by the new environment for consumers which should be facilitated and encouraged.

⁷ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:095:0001:0024:EN:PDF>

5.3 Additional principle – sustainable regulation of media industries

The framing principles should include reference to the impact of current and proposed regulatory settings on the sustainability of media and communications industries.

Sustainability as a concept overlays, and is fundamental to, a number of the public interest principles already adopted by the Committee – diversity, equity, access to information, competition, innovation, local and Australian content. Without sustainable local industries none of these goals are achievable. Yet the impact of policy settings on “industry and government revenue” is relegated to the list of ‘other policy considerations’ at the end of the framing paper. The need to ensure that any regulatory interventions are as least-cost and efficient as possible (ie, sustainable) must be recognised as a central part of the Review, rather than being sidelined as an afterthought.

Sustainable regulation is particularly important where Government relies on a media sector, such as free-to-air commercial television, to deliver important public interest outcomes. Taking Australian content as an example, successive governments have to date chosen the advertiser-funded model of commercial free-to-air television as the primary means for achieving local content objectives. A transmission quota of 55% applies to main channel content between 6 am and midnight, as do sub-quotas for drama, children’s programming and documentaries. This results in over 500 hours of Australian drama delivered to the broadest possible audience and in 2009/10 Free TV broadcasters spent over \$300 million on adult and children’s drama and documentaries.

This dwarfs the modest regulations which apply to pay TV and contrasts strongly with the lack of any local content requirements for audio-visual services delivered over the Internet or IP networks.

Given the ongoing popularity and reach of free-to-air television, it is likely that it will continue to play a leading role in the production and dissemination of local stories and local voices. However this will only be possible if the right regulatory settings are in place to ensure a vibrant, innovative and robust free-to-air commercial television platform. Consideration of issues such as ownership, spectrum allocation, advertising regulation and licensing fees should all be considered in this light.

An uneven application of regulatory measures which unduly burdens commercial free-to-air television would have real implications for the ongoing sustainability and competitiveness of the sector. If the sector continues to be weighed down by a highly restrictive regulatory regime, it will be prevented from responding to and competing efficiently with emerging content services which are not subject to similar levels of legal and financial constraint. With competition from overseas-based content services expected to grow, a regulatory regime which inhibits the local free-to-air sector would be akin to imposing a tariff on the local industry to the benefit of imported services.

6 Key issues

The Review’s Framing Paper seeks not only to identify the principles that should guide regulation, but also seeks to “provide stakeholders with the opportunity to raise the key issues arising from the principles.” This section of the submission highlights those issues Free TV sees as arising from the principles in the Framing Paper and those additional principles suggested by Free TV. Some issues are a direct result of the current silo approach to regulation that is no longer appropriate in an environment where people are accessing content where they want,

when they want of the device of their choice and where the devices are carrying more than platform.

6.1 Licence fees

It is clear from the Terms of Reference and the proposed Framing Principles that the licence fees applying to free-to-air commercial television will be a central issue for the review.

Licence fees are a key component in the current regulatory settings for the commercial free-to-air industry and they provide an unambiguous example of regulation which is overdue for review in light of recent market and structural changes in the media sector. This issue also arises in relation to the several of the proposed principles in the Framing Paper and the additional principles suggested by Free TV in this submission.

In 2010 the Government announced a temporary licence fee rebate for two years. Free TV is seeking a permanent reduction in licence fees to reflect long-term structural changes in the media market and to bring them into line with international best practice.

Australian free-to-air broadcasters pay higher licence fees than their peers in any comparable market. Overseas Governments have regularly reviewed their free-to-air licence regimes in light of the evolving market environment.

For example, in the UK the regulator, Ofcom, has conducted 3 major reviews into the role of free-to-air television in a digital world since 2004 in light of long-term and irreversible changes to the market. Each time, Ofcom has concluded that free-to-air television is vulnerable in the new era and has adjusted licence fees and regulation to meet the changing market.

In the UK it is widely accepted that structural change has threatened the viability of the free-to-air sector and licence fees have been reduced year on year from ~£220m in 2004 to £36 million in 2009 and reducing to zero by 2012 (revenue component). Ofcom acknowledged that legacy licence fees were based on the historical scarcity value of broadcast spectrum and given the rapidly expanding media sector today has reviewed and reduced payments accordingly. Local content obligations have also been greatly reduced.

In Canada, where there is a similar market structure to Australia (high vertical integration, strong public service obligations), free-to-air is under threat from pay TV with pay operators gaining revenue and advertising share. As a result of recent litigation, there will be a review of licence fees with caps in future years.

In contrast, the Australian regime has not been reviewed since its inception in 1964. The last change to the revenue bracket thresholds was in 1987 – over 23 years ago. This is despite the introduction of pay TV, the emergence of the internet and the arrival of IPTV. The media market in 2011 is unrecognisable to that which was in place in 1987, yet these same licence fee settings continue to apply. Many licensees now pay the maximum 9% licence fee, due to ‘bracket creep’ (the revenue thresholds have never been CPI-adjusted).

The proliferation of media choice, fragmenting audiences and reduced access to spectrum have fundamentally changed the media industry. The changes have completely undermined the rationale for the licence fees set down in the analogue world.

Licence fees are tied to revenue but revenue growth has flattened whilst costs continue to rise, particularly since the introduction of multi-channels and the need to respond to competition from additional pay TV channels and new IPTV services.

Without temporary rebates, free-to-air licensees pay over \$260 million each year (in addition to normal taxes) – this has grown from \$44 million 25 years ago. For a 15-year

licence fee equivalent (based on the last 15 years), free-to-air licensees have paid \$3.8 billion (CPI adjusted).

At the same time, Australian free-to-air licensees retain significant other regulatory obligations:

- \$950 million spent on Australian programming in 2008/09
- \$154.6 million spent on adult drama and children's programming in 2008/09
- Multi-million dollar captioning obligations for each broadcaster each year
- Up to 2 hours of local news/information in regional areas required each week
- Up to \$1 billion spent on digital television roll-out and conversion
- A \$100 million marketing commitment to drive digital take-up through Freeview.

These obligations are borne only by commercial free-to-air licensees.

Reform of the licence fee system is justified by international precedent and local conditions:

- The level of broadcasting platform competition continues to increase rapidly
- Overseas jurisdictions that had legacy licence fees based on the historical scarcity value of broadcast spectrum have acknowledged the change in the media market and have reviewed and reduced payments
- Australian free-to-air licensees now pay multiples of their international peer group
- Digital switchover, restacking and the NBN means structural adjustment to the existing free-to-air television model. Free to air broadcasters are handing back almost half their spectrum to be auctioned for use by competing services.

The commercial television industry's ability to continue to provide public interest outcomes is fundamentally premised on its ongoing viability and competitiveness, which in turn is vitally affected by the financial impact of regulatory settings.

The future of licence fees will be a critical issue in the Convergence Review.

6.2 Australian content

Australians' continued access to quality Australian content forms the basis of Principle 3 in the Review's Framing Paper and hence will be of key importance as the review progresses.

Commercial free-to-air broadcasters invest over \$950 million a year in original Australian programming including drama, children's programs, documentaries, sport, news and current affairs and local content (2008-09 ACMA Broadcasting Financial Results).

Figures released by Screen Australia confirm that Australia's commercial free-to-air broadcasters continue to be the major underwriters of Australian content. Screen Australia's Drama Report shows that in 2009-10, as in previous years, the largest contribution to the combined TV drama slate came from the commercial free-to-air broadcasters.

Total Australian TV drama spend was \$286 million, with 564 hours of Australian TV drama produced. The Australian film/TV industry provided the majority of investment for the 2009-2010 TV drama slate (76 per cent), contributing \$234 million to 36 productions. 2010

was a bumper year for drama on free-to-air television, with big audiences for such quality productions as *Underbelly – The Golden Mile*, *Packed to the Rafters*, and *Offspring*.

Australian children's drama spend was \$53 million in 2009-2010. Australian Children's drama like *Lockie Leonard* and *H2O – Just Add Water* are recognised programs locally and internationally for their high quality.

Governments have traditionally relied on the advertiser-funded model to deliver Australian content to as many Australians as possible. No other platform has made or is likely to make a similar public interest contribution to that provided by the commercial free-to-air broadcasters. Not even the publicly funded broadcaster (ABC) carries a similar level of obligation.⁸

For these reasons, a robust, sustainable and competitive free-to-air industry is vital to the ongoing production and development of Australian content. It is therefore important that the impact and efficiency of cultural obligations are carefully considered to ensure they reflect current market conditions and business practices.

For example, since the Australian Content Standard was last reviewed, free-to-air commercial broadcasters have launched an additional 6 multi-channels. However, the existing obligations do not recognise this and broadcasters are not able to count multi-channel Australian content towards their overall quota obligations.

The original rationale for this was to ensure that in the early stages of digital conversion, audiences did not miss out on Australian content if they had not completed the switch to digital television. With Australia transitioning to a fully digital environment by the end of 2013, this kind of regulatory distinction becomes irrelevant and there is scope to consider additional flexibility in how broadcasters meet cultural objectives.

Free TV looks forward to a robust debate regarding the best way to ensure cultural objectives are met in the modern communications environment. We need to debate how we can provide more flexibility to enable broadcasters to serve the public interest in a way that does not put us at a competitive disadvantage in comparison to other platforms or delivery mechanisms.

6.3 Children's content

Children's programming regulation is also one of the key examples of inequity in regulation between commercial free-to-air broadcasters and competitors such as pay television and IPTV. In this area, the logic of the current regulatory approach is particularly called into question by consumer driven changes in content delivery and access.

Commercial free-to-air television broadcasters are required as a licence condition to broadcast at least 260 hours annually of children's programs (with sub-quotas for first-release and drama) and 130 hours of preschool programs.

This C and P programming must comply with the Children's Television Standards (CTS), which impose restrictions across a broad range of categories, including advertising, scheduling, displacement of children's programming, program promotions and news flashes. To qualify towards the quota, all content must be assessed by the ACMA as being C or P appropriate before broadcast, and must be shown during the C Band time zones, namely 7:00am-8:30am and 4:00pm-8:30pm Monday to Friday, and 7:30am-8:00pm on weekends.

⁸ The Australian Content Standard does not apply to the ABC.

In addition, as of 4 February 2011, all equipment designed to receive digital television must include a Parental Lock, enabling parents to limit the content their children can access based on its classification. Broadcasters support this mechanism by including accurate and detailed classification information in their broadcast signals and electronic program guides.

The restrictions placed by the CTS are highly complex and extremely prescriptive. The original logic behind the quotas and CTS system was to ensure that appropriate programming was available during the times children watch television. This argument no longer exists in the digital environment. Parents now have a range of sources of 'safe' content for their children accessible 24 hours a day, including DVDs, pay television, video on demand and ABC2 and ABC3 (which provide ad-free children's programming 6am-9pm). In addition, tools such as parental locks and digital video recorders allow parents to control the material their children can access.

A key task for the Review will be to identify what the relevant regulatory objectives for children's content are in the modern communications environment and how these objectives can be met in a way which is equal across platforms and which is not overly burdensome.

6.4 News and Current Affairs

Commercial free-to-air television broadcasters are subject to extensive and prescriptive Code of Practice requirements relating to fairness and accuracy, privacy, warnings, impartiality, warnings before distressing material, identification of murder/accident victims, public panic, simulation of news events, images of dead or wounded, images/interviews with bereaved relatives or wounded people/survivors, identification of individuals when commenting on a group, reporting of suicide, portraying certain groups in a negative light, correction of errors, commentary and representation of viewpoints in news programs and in promos.

There are a number of these Code provisions relating to news and current affairs for which there is no equivalent in the regulation of news content on other platforms.

As a result the media regulator examine the accuracy of a story on a commercial television news program, down to the use of individual words, but if the same story is retransmitted on an online news service, that content is not subject to the same level of regulation or scrutiny. Yet a recent Nielsen study showed that after email and search engines, accessing news was the most popular online activity in Australia in 2010.⁹

This highlights the need for a first-principles rethink of regulation in this space to ensure that the key public interest objectives are identified and are applied equally across platforms.

6.5 Classification and timezones

In section 5.1 of this submission, Free TV has suggested an additional principle that there should be consistency of regulation across platforms. This suggested principle is highly relevant to the classification of content.

Content on commercial free-to-air television faces a range of classification and scheduling requirements which do not apply to the same content appearing on other platforms.

⁹ Nielsen 'The Australian Online Consumer Landscape' March 2011

Commercial free-to-air broadcasters are subject to extensive requirements for pre-classification of content, display of classification symbols and viewer guidance information.

There is an obligation for 'special care' when broadcasting news material in 'G' timezones and 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.

The Code of Practice includes strict requirements for when and how consumer advice is to be given, with requirements on precise wording and display of text-based advice. Brief written advice must also be provided after breaks for relevant programs.

The requirement for classification extends to all non-program matter.

In addition, the broadcast day is strictly divided into classification time zones, restricting the time at which different kinds of content can be shown. Different timezones apply for weekends/weekdays and during school holidays. This regulation is unique to free-to-air television.

The requirement to only show certain content at certain times of the day puts commercial free-to-air broadcasters at a competitive disadvantage in terms of their scheduling strategies.

The effectiveness of this approach as a means to protect audiences is also questionable given that content comparable to that on free-to-air television is readily available on alternative platforms which are not subject to the timezones or the same level of pre-classification. The increasingly on-demand nature of content delivery also undermines the rationale for timezones. Timezones can also be seen as contrary to the strong trend in media consumption towards viewers accessing what they want, when they want. The ability to time-shift programming and the growing prevalence of 'on demand' content services place real pressure on a time-of-day approach to regulating content. As noted above, technology (in the form of parental locks) allows us to consider new ways of meeting community standards.

As we have discussed above, consistent and well implemented classification standards are also central to Free TV's second suggested principle, a citizen's right to information. Classification standards are at their very core an information service for consumers, telling them about the content they will be viewing. It is this information that will assist consumers to control their own content consumption in the new information environment, whether it is on an ad hoc basis or through tools such as parental locks. Consumers must therefore be able to rely on classification standards to provide them with the information they need, regardless of the platform from which the material is sourced.

Free TV acknowledges the concurrent review of the National Classification Scheme being undertaken by the Australian Law Reform Commission (ALRC). However, the scope of the Convergence Review clearly includes a review of regulatory measures as they apply to content and converging content delivery platforms. Free TV submits that this must include a careful re-examination of the way classification rules apply to content across all relevant delivery platforms.

We need to make sure that the regulatory environment reflects all the ways in which consumers are accessing content and that it does so in a way which does not place an unjustifiably higher burden on some content platforms and not others.

6.6 Advertising regulation

In this submission Free TV has suggested an additional framing principle relating to the need to ensure consistent treatment of content across platforms.

The regulation of advertising in the Australian media provides a key example of the current regulatory inequity across platforms.

It also provides an illustration of how ineffective regulation can be when applied to only one part of the industry. Market dynamics dictate that when advertising is restricted on one medium, it merely redistributes to other, less regulated media. Thus regulation which applies to only select platforms has a disproportionate financial impact on those platforms without reducing the public's exposure to the content.

Whilst some regulations, such as the AANA Codes of Practice, apply to all advertising, the vast majority of restrictions apply only to commercial free-to-air broadcasters.

The amount and type of advertising that may be shown, and the time at which it can be shown, is highly regulated for commercial-free-to-air television.

Complex and difficult to calculate hourly ad-minute limits apply. Different limits apply at different times of day, during C and P periods and during election periods.

Commercials, community service announcements (CSAs), promos or paid material must be distinguishable from other program material. Commercials and CSAs must be classified at the same or a lower level than the programs in which they appear. Additional, complex requirements apply to ads shown during children's programming or directed at children.

Advertising content on free-to-air television must comply with detailed, prescriptive requirements drawn from a range of Acts, Codes and Standards. Different regulations apply in different states/territories, and there are multiple self-regulatory and co-regulatory industry codes.

Free TV expects the Review to raise important questions regarding the ongoing relevance of sector-specific advertising regulation in an environment where consumers are accessing content from a variety of platforms, often simultaneously. We expect the Review to consider the need for a streamlined system of regulation which is very clearly centred around a defined list of 'harms' to be prevented and which applies regardless of how that advertising is seen or heard.