Submission by
Free TV Australia Limited

Department of Broadband,
Communications and the Digital Economy

Convergence Review – Interim Report

16 February 2012

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1 Executive Summary

- Free TV supports the Convergence Review's aim to "implement reduced, better targeted regulation" in a converged market.
- This submission will focus on four key issues which are highly relevant to the Committee's goals:
    - Licence fees and spectrum valuation;
    - Australian content obligations;
    - Retransmission; and
    - A public interest test for media mergers.
- Free TV agrees with the Committee that the existing spectrum/broadcast licensing pricing regime is out of date and does not reflect true market values.
    - International benchmarking analysis conducted by Venture Consulting indicates that broadcast licence fees for Australia should actually be set at 1.0% of gross revenues. In reaching its conclusions, the Venture report factors in the cost of meeting content obligations, both in Australia and comparable international markets.
- Free TV does not support abolishing content licences.
    - The current broadcasting licensing framework has ensured that Australians enjoy world's best free-to-air television and we question whether the changes contemplated by the Committee will deliver any additional benefits to the public that would justify the commercial impact of this change.
- Free TV shares the Committee's view that the continued production and promotion of Australian content is vital in a converged market. However, we are concerned that the adoption of a 'one size fits all' revenue or expenditure approach across all CSEs (including FTA) will actually result in a lower volume of quality local content being produced, promoted and consumed by Australians.
- Furthermore there is no strong case for increasing drama, documentary or children's sub-quota obligations when investment in quality Australian content is higher than ever and the digital channels are still emerging businesses. Free TV supports a 40% tax offset for the production of premium television content, which should include content produced in-house.
- The proliferation of emerging content services re-transmitting and re-selling free-to-air channels highlights the need for urgent reform of the Copyright Act to give broadcasters the right to negotiate with those seeking to make commercial use of FTA broadcast services.
- Free TV is opposed to the introduction of a Public Interest test specific to media transactions which would provide less certainty than the current arrangements and increase the administrative burden on industry.

2 Introduction

Free TV Australia (Free TV) represents all of Australia's commercial free-to-air television broadcasters. In 2011 commercial free-to-air television was 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.

We strongly support the Interim Report's statement that its "starting point is to encourage innovation and remove unnecessary regulation". The Interim Report has laid out a high level set of proposals and we look forward to the more detailed Final Report.

3 Overview

This submission sets out Free TV's responses to some key issues in the Interim Report. It should be read in conjunction with Free TV's earlier submissions.

The Interim Report recognises that existing broadcasting licence fees do not reflect the current "market" value of these licences, but provides no guidance on how these licences should be valued.

Independent analysis by Venture Consulting clearly demonstrates that the current Australian licensing regime is an outlier. Even after the current rebate, the licensing fees are significantly more expensive than comparable pricing in overseas markets. Reform of the broadcasting licence fee regime is urgently needed, as the current rebates expire at the end of June 2012.

The Interim Report proposes fundamental changes to the licensing and management of broadcasting spectrum. These arrangements have underpinned the sector for the last fifty years, have delivered consistency in policy and regulations, and have been carefully balanced with content obligations on broadcasters.

Therefore, Free TV has a number of concerns:

- Firstly, the wide ranging changes proposed to the management and licensing of broadcasting spectrum are not balanced with a similar approach to content regulation – a one-sided or asymmetric approach to deregulation will not create a more level playing field;
- Secondly, the rationale for abandoning broadcasting content licences with their presumption of renewal is unclear. Free TV questions whether the public policy benefits of a new regime are strong enough to warrant the change; and
- Finally, the Interim Report provides little guidance on how the proposed changes would work in practice, the transitional arrangements, and the recommended timeframe for implementation. Free TV is concerned that the cost and complexity involved to switch away from a system that is performing well may outweigh the expected benefits of such a change.

4 4. Spectrum Allocation and management and removal of content licences

The Interim Report proposes a number of changes to the licensing and management of broadcast spectrum, each of which has a significant impact:

- changes to the nature and valuation of broadcasting licences;
- the abolition of content licences; and
- increased flexibility for the use of spectrum.

4.1 Setting an appropriate value for broadcasting licence fees

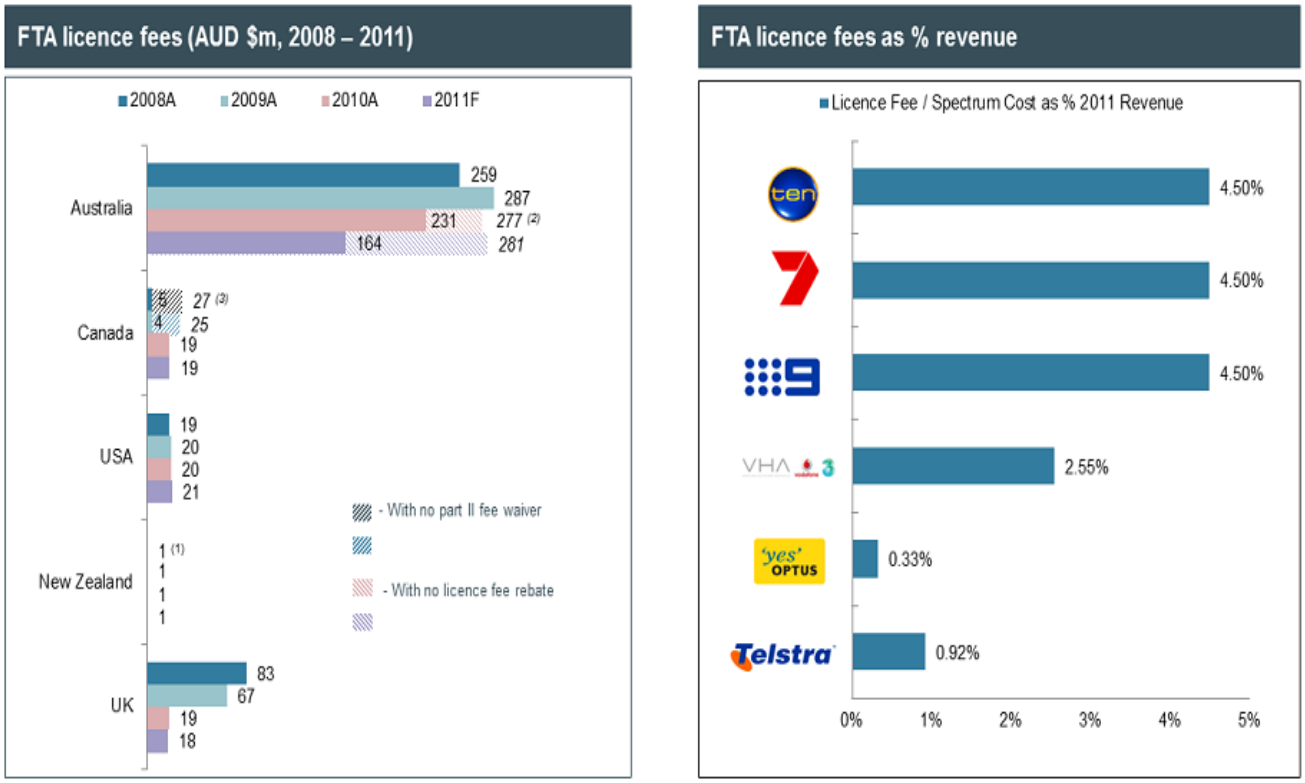
Free TV welcomes the Convergence Review Committee's recognition that licence fees currently paid by commercial free-to-air broadcasters do not reflect the value of the spectrum used.

Venture Consulting has undertaken a review of the appropriate settings for broadcasting licence fees, entitled *Placing a value on free to air broadcasting spectrum in Australia*. In compiling this report, Venture has undertaken a comprehensive benchmarking exercise of global broadcasting licence costs similar to that recently undertaken for the Department of Broadband, Communications and the Digital Economy in its valuation of the 800 MHz licence renewals.

The report analyses and compares broadcasting licence costs across jurisdictions and compares the level of content obligations placed on free-to-air broadcasters in different markets. Based on this analysis, the report recommends that an appropriate broadcasting licence fee is 1.0% of revenues. This valuation is based on a requirement that the spectrum be used solely for broadcast services and recognises the reduced amount of spectrum available to broadcasters after restack is completed. This Report is at Appendix 1.

Broadcasting licence fees in Australia are excessive when measured against broadcasting licence and spectrum fees used in other countries, and also on a percentage of revenue basis, exceed the price of spectrum used for telecommunications purposes in Australia.

Despite the temporary relief, fees for FTA remain expensive in comparison to other markets and even recently auctioned spectrum licences



Note: Exchange rate: 1 AUD =1USD = 1CAD, 1GBP = 1.7AUD, 1NZD = 0.8AUD. Data is for the relevant financial years in each market
(1) In the last major auctions of NZ broadcasting spectrum in 1995, a price was set at 1.5% of annual revenue. The government gave the broadcasters the option of capitalising this amount by paying it upfront for a 20 year licence, based on a multiple of 4.87, representing just 7.3% of 1991's annual revenue.
(2) The rebate was set at a 33% and 50% refund for calendar years 2010 and 2011, respectively. Because the actual rebate is claimed on a financial year basis, the rebate rates are 16.5%, 41.5% and 25% for FY10,11 and 12, respectively
(3) Part II fees reinstated – but aggregated broadcasting industry fee is capped at C$100m. Pre-dispute liabilities cancelled
Source: Venture Consulting, ACMA, CRTC, Ofcom, BSA, FCC, WB, RBS, JPM

(Appendix 3)

We note that ASTRA has cited a Deloitte Access Economics (DAE) estimate of the valuation of broadcasting spectrum of $0.89/MHz/pop on the basis of spectrum auctions for mobile service in the US, Sweden, Germany, Spain and Italy.
When the licence periods (varying between 10 years in the US to 25 years in Sweden) are taken into account, the $/MHz/pop/pa valuation of this spectrum is circa $0.069/MHz/pop/year. This figure is far lower than the amount being paid by the commercial free-to-air broadcasters today, even after the current rebate.

4.2 Abolition of content licences

Free TV does not support the Committee's interim recommendation to abolish broadcasters' content licences. Such a radical and highly disruptive change to a system that has worked very effectively for over fifty years is only justified if clear public policy benefits are realised as a result. Free TV is not convinced that any public benefits will materialise as a result of the proposed change or in fact what objectives the Committee is seeking to achieve.

Free TV broadcasters currently required to hold both a commercial television broadcasting (content) licence and a licence to use BSB spectrum.

The Interim Report proposes abolishing content licences and the associated licence fees paid by broadcasters, and instead charging a market based fee for the spectrum used by broadcasters under a spectrum licence.

It remains our view that abolishing the commercial television broadcasting licences, as proposed in the Interim Report, creates significant legal and commercial issues for both broadcasters and the Commonwealth Government and for no clear public benefit.

Section 9.2.1 of our October 2011 submission set out some of the legal issues which arise as a result of abolishing commercial television broadcasting licences.

In particular these licences fall within the definition of "property" under section 51(xxxi) of the *Constitution*, which gives them a certain level of protection. The commercial television broadcasting licence in this context is distinguished from the spectrum used to deliver the service authorised by that licence.

As the Committee recognised in its Interim Report, "certainty about future arrangements" is essential for broadcasters and at the core of this certainty is the current presumption of renewal of broadcasting licences.

Although this was not a matter addressed in the Interim Report, the renewal process for any spectrum licence is critical to Free TV broadcasters. Specifically, there should be a presumption of renewal of any spectrum licence which has the same effect as the existing presumption of renewal for broadcast licences. Any change which has the effect of removing certainty from the licensing regime will seriously compromise the existing property rights of Free TV members and will jeopardise FTA services.

Any renewal process should therefore comprise a provision with the same mechanism and effect as the existing section 47 of the *Broadcasting Services Act 1992* (BSA). The requirement to renew (except in the event that the licensee is unsuitable) will provide appropriate security of tenure to the existing licensees.
Broadcasting licences are a significant asset on the balance sheets of all commercial broadcasters. Their abolition combined with recommendations for other significant changes such as potential for new entrants has the potential to significantly impact the financial status and shareholder value of these companies.

4.3 Flexibility of use

The Interim Report asserts that new arrangements for the BSB spectrum will allow more flexibility and "greater opportunities for innovation, trading and new entry". Free TV does not agree that greater innovation or efficiency can be achieved through open spectrum trading and questions what identifiable public interest the Committee is seeking to achieve. Australian free-to-air broadcasters are licensed to use 7MHz of spectrum. All television broadcast reception equipment is based on 7MHz channels and each broadcaster is responsible for the management of what is effectively a multiplex of 7MHz of spectrum.

Broadcasters are already able to "trade" their 7MHz of spectrum (via a transfer of the licence) and a number of licences have changed hands in recent years.

Under the existing regulations broadcasters can enter into joint ventures for part of their spectrum to deliver, for example, content on a digital channel. However, the primary responsibility for management of that licence and the obligations that apply to it remain with the licensee.

The Interim Report does not make clear what it is trying to achieve with "increased flexibility", but appears to be contemplating the trading of part of broadcasters' current 7MHz allocation to enable new entrants.

It is impractical to suggest that parts of the 7MHz allocation could be carved off and sold in this fashion because the spectrum would still need to be managed as a 7MHz multiplex by some form of licence holder. Broadcast spectrum is not analogous to telecommunications spectrum which can be freely fragmented and sold off to different market participants.

Free TV remains opposed to the introduction of new entrants. As detailed in our submission in October, a new entrant in the commercial television broadcasting market is likely to have a detrimental impact from a public policy perspective. A new entrant is unlikely to create additional diversity and may even lead to a reduction in Australian content, as additional competition for content and viewers place pressure on an already vulnerable market.
Successive governments have taken the view that the introduction of a new entrant is a public policy decision that should be made by the government, not unilaterally by individual commercial broadcasters. Allowing open spectrum trading in the way the Committee seems to be recommending would undermine that policy and place the decision in the hands of existing spectrum licensees, making it subject to individual commercial pressures on any one company.

Current spectrum management arrangements facilitate a viable and competitive market for commercial television broadcasting licences. Importantly, they operate to ensure the spectrum associated with the licence remains as a bloc and services are delivered via a multiplex, which is the most efficient service delivery mechanism for multiple services and ensures maximum ease of access to services by consumers.

A system that is working effectively to deliver desired public policy objectives for viewers should not be altered unless there is an identifiable and quantifiable public interest in doing so and that is not present in this case.

4.4 Payment arrangements

Commercial free-to-air broadcasters currently pay their licence fees on a yearly basis. Over the 15 years to 2009[1] broadcasters have paid $3.8 billion (CPI adjusted) in licence fees. These fees attach to licences that have significant restrictions and obligations imposed upon them (in comparison to the 15 year spectrum licences attaching to telecommunications services).

In considering any changes to licensing, the method of payment should not change. Whether it remains a broadcasting licence fee or becomes a spectrum licence, Free TV opposes any up front lump sum payment as such a requirement would have a significant detrimental impact on the business operations of the networks.

5 Promoting Australian Content

5.1 New uniform scheme

As the Interim Report states, Australian content remains important to our society and the current regulatory regime is heavily focused on the commercial free-to-air broadcasters. However, Free TV does not support a new uniform scheme based on expenditure or revenue which is likely to result in less Australian content being available to Australian viewers.

The Australian Content Standard (ACS) was introduced to address a clear instance of market failure which was resulting in a lack of Australian content on free-to-air television, at that time the sole platform delivering content to mass audiences. There was a clearly identified problem in

[1] Broadcasters have received a 33% licence fee rebate in CY 2010 and a 50% licence fee rebate in 2011.

that commercial broadcasters were not showing much Australian programming and the content quotas were devised to deliver a targeted solution to this problem.

The system of commercial free-to-air quotas and sub-quotas introduced to address this market failure has been highly successful in ensuring Australians have free access to a diverse range of high quality Australian content across a range genres including expensive and high risk content such as high end drama. In particular, requirements to produce particular numbers of hours for documentaries or particular points for adult drama has delivered innovation and efficiency in the programs commissioned and made by commercial broadcasters because they are linked to material seen on screen and not to dollars spent.

The result has been that each broadcaster has chosen its own unique way of meeting its quota obligations – some focussing on high end short form drama such as telemovies and mini-series and others investing in long running nightly drama programs. This diversity has been one of the great strengths of the Australian production industry.

The system has been successful in delivering Australian content to large audiences because the broadcasters have a strong commercial incentive to make content that viewers want to see. This has in turn supported the growth of a vibrant local production sector

In 2010-11 Free TV broadcasters invested $1.23 billion in Australian content representing 72% of total programming expenditure. There were over 25,650 hours of Australian content broadcast in 2010 and over 15,000 people employed either directly or indirectly by broadcasters (see Appendix 2).

Commercial free-to-air broadcasters continue to be the major underwriters of the independent production sector with over 70 independent producers contracted to provide content to Free TV broadcasters in 2011.

According to the ACMA, all commercial free-to-air broadcasters comfortably met their ACS obligations and exceeded them in some cases.[2]

As evidenced above there is clearly no market failure in relation to the production of Australian content. With the ABC funded to do more Australian drama and the pay TV industry reporting increases in their Australian content spend, investment in Australian content has never been stronger.

Despite the success of local content regulation to date the Interim Report asserts that the existing model "will not support Australian content objectives in the medium to long term" and proposes a new expenditure model to replace the existing Australian Content Standard. However it fails at any point to identify what problem it is trying to address, rather starting from an assumption that more regulation is unquestionably required and that there is a need for regulatory driven outcomes in emerging market sectors.

Free TV does not support a 'one size fits all' expenditure or revenue model because:

- The absence of any requirement to distribute the content means that it may be less accessible to the Australian community (if it is available at all).
- There are no incentives or requirements ensuring diversity of content, which may lead to a reduction in some types of content.
- The basic spend requirement does not guarantee that an adequate volume of content will be produced. Content Service Enterprises (CSEs) may for example produce a single, expensive piece of content.

[2] ACMA *Compliance with Australian Content Standard & Children's Television Standards – 2010*: http://www.acma.gov.au/webwr/aba/tv/content/requirements/australian/documents/2010_metropolitan_networks.pdf and http://www.acma.gov.au/webwr/aba/tv/content/requirements/australian/documents/2010_regional_stations.pdf

- An expenditure model penalises success and does nothing to encourage efficiency and innovation in production.
- Content produced under an expenditure or revenue model by subscription content providers will only be made available to subscribers of that particular content service.

Regulatory balance can be achieved by tailoring an Australian content regime which sets the same *level* of regulation for different platforms or delivery modes (even if the form of that regulation differs). An expenditure requirement or contribution to a production fund may, for example, be more suitable for services that provide most or all of their content on-demand.

Developing tailored solutions for emerging services and retaining the existing regime for commercial free-to-air television broadcasters means that Free TV can continue to invest in a diverse range of Australian productions and provide an accessible range of quality Australian content for free.

Given the clear demand and public policy interest in the delivery of Australian content we submit that the current rules should be maintained and that the Committee should recommend a separate review of Australian content production in 5 years, when the market structure in emerging sectors such as online will be more evident.

5.2 Increased sub-quota content obligations on digital channels

Free TV strongly opposes the Committee's recommendation to immediately impose new sub quota obligations on digital multi-channels. This is a surprising recommendation from a Committee charged with evening up the regulatory imbalances in the communications landscape, given the already heavy regulatory burdens on commercial broadcasters compared with any other comparable content provider.

There is no strong case for increasing drama, documentary or children's sub-quota obligations when investment in quality Australian content is higher than ever and the digital channels are still emerging niche businesses.

Free TV broadcasters are proud of their investment in Australian production. Free TV produces and distributes more Australian content than any other industry participant. According to *The Drama Report 2010/2011 (Screen Australia)* TV drama production was valued at $322 million up 12% on the previous year. The report states that Australian television drama accounted 65% of the overall drama slate in 2010/2011[3] "As usual the largest proportion of TV drama finance came from the commercial free-to-air broadcasters"[4].

As described in the previous section the current rules are working well and there is no demonstrated market failure.

The only justification that has been put forward for increasing the current content obligations is the so called "dilution" argument.

Commercial free-to-air television broadcasters strongly dispute the claim that the introduction of the digital channels has 'diluted' the amount of Australian content available to viewers.

The dilution argument is based on simple modeling that triples the number of hours broadcast and then divides the number of hours currently provided under the ACS to argue there has been "a dilution of Australian voice".

This argument fails to recognise that as an objective fact, more Australian content is being produced and screened than at any other time in our history.

[3] http://www.screenaustralia.gov.au/news_and_events/2011/mr_111024_dramareport.aspx
[4] The Drama Report 2010/2011, Screen Australia page 11

75% of Free TV viewing is still done on the primary channels, which carry the vast majority of Australian content. This proportion is even higher in prime time, when premium Australian content such as narrative drama is shown. Nor does the claim take into account the significant promotion of Australian programming by broadcasters which ensures the best possible audience for the program and therefore the sustainability of the production.

Apart from referring to this so-called 'dilution', the Interim Report does not outline a demonstrable problem or policy rationale for increasing the sub-quotas, neither does it undertake any assessment of the impact on commercial broadcasters. Rather than being recognized and rewarded for their undeniable contribution to the health of the Australian production sector and considering how that level of support could be maintained at a time of unprecedented strain on the industry, the Committee has instead chosen to single out the commercial television sector to be loaded with even greater obligations. And this despite the fact that the existing quota requirements are far and away the highest imposed on any media sector.

Digital multi-channels are new and emerging businesses that are yet to establish a clear and secure business model. They are niche services that together attract around 18% of the revenue of the main channels. The digital channels have primarily assisted in arresting FTA audience and revenue declines.

Unlike other new services (such as pay TV) the digital channels have been subject to an onerous regulatory burden since their inception, including a licence fee based on a percentage of gross revenue.

Increasing the sub-quotas for drama, documentary and children's programming is likely to mean that:

- More Australian programs will be screened simultaneously, leading to fragmentation of audiences for premium Australian content.
- There will be increased competition for the finite amount of Australian content produced, which will further increase programming costs.
- Increased costs and fragmented audiences will place unsustainable pressures on commercial free-to-air broadcasters resulting in less, not more, quality Australian programming
- The quality of Australian programming overall may suffer as broadcasters apply finite programming budgets across a wider range of content production.

Over the last five years commercial free-to-air broadcasters' revenues have increased below CPI, and revenues have only increased in only one year. The outlook for growth over the next five years is subdued with the recent *PwC Outlook: Australian Entertainment & Media* report predicting growth of just 2.3% on average over the next five years.[5]

Some analysts have further revised their figures[6] following the recent release of the half yearly revenue figures for July to December 2011 which showed a drop of 4.43% in advertising revenue across all markets.[7]

At the same time new services are emerging on different platforms, further fragmenting audiences. In this environment the challenge for broadcasters is to maintain what they currently do.

[5] PwC Outlook: Australian Entertainment & Media 2011-2015, pp 102-103
[6] See, for example: Deutsche Bank Media – 2012 Outlook: below trend ad growth 6 February 2012, and CLSA Asia-Pacific Markets Australian FTV Sector outlook – On track for consensus downgrades 3 February 2012.
[7] Free TV *Advertising revenue for commercial television networks – July to December 2011* - http://www.freetv.com.au/Media/News-Media_Release/Revenue_figures_July_to_December_2011.pdf

Placing additional sub-quota content restrictions on commercial free-to-air television broadcasters "in the short to medium term" represents a significantly increased regulatory burden for just one group of industry participants, particularly in an environment where it is increasingly difficult to monetise content. This proposition is clearly at odds with the Committee's stated preference for "better targeted regulation".

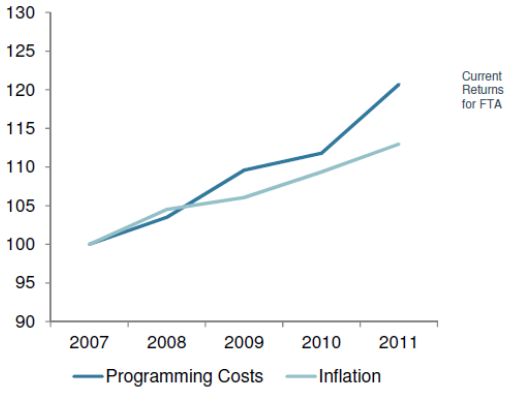
Free TV opposes any additional obligations, particularly as no other service provider will be subject to additional content or expenditure requirements over this period. It is also unclear how long these transitional arrangements are likely to last, the amount and scope of the increase in sub quotas, or what the "additional flexibility" will involve.

5.3 Cost implications of sub-quota increases

Screen Australia in its October submission included a simplistic economic analysis of the likely cost of increasing the relevant sub-quotas which suggested that the cost to broadcasters is simply a matter of multiplying existing costs. This analysis does not take into account the rising costs of programming, as well as the opportunity costs associated with replacing existing content with more expensive regulated content. For example, broadcasters' expenditure on television drama rose 12% in 2010/11, however this represented only a 3% increase in the number of hours produced.[8]

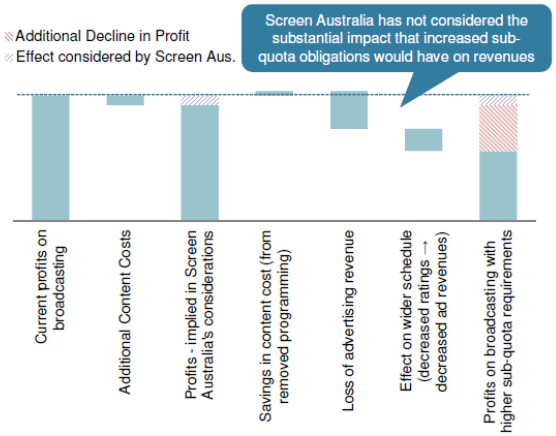
The Screen Australia analysis significantly underestimates the impact of increased sub-quotas, ignoring both the revenue impact and cost inflation

Metro FTA programming costs vs. Inflation (2007=100)



- Programming costs CAGR 2007-11 = 4.8%
- This was more than 50% higher than inflation at 3.1%

Effect of additional sub-quota regulations on returns for broadcasters



Note: Effect of additional sub-quota regulations on returns for broadcasters are conceptual and do not represent actual values
Source: Information supplied by the metro FTAs and aggregated by Venture Consulting, Reserve Bank of Australia

[8] Screen Australia *The Drama Report 2010/11*, p 8

5.4 Tax offset

Free TV supports the recommendation to extend the 40% tax offset (which currently applies to feature film production) to premium television content.

However, we do not support limiting this extension to content that is produced independently. There is no justification for restricting the availability of the offset to the independent production sector. Such a recommendation is also at odds with moves to apply content obligations more evenly.

In-house productions make the same contributions to public policy objectives and industry development. Indeed given the large numbers of multinational owned independent production companies that benefit from the offset scheme it could be argued that the benefit to the Australian economy overall is greater in the case of in-house productions than in the case of some independent entities. Broadcasters employ large numbers of Australians on in-house productions, in many cases providing valuable training that is used later throughout the industry and importantly providing ongoing opportunities in a notoriously casualised sector.

Further, there is no evidence that broadcasters' ability to access the offset has led to an increase in in-house production demonstrated by the fact that as at 2011 Free TV members have arrangements with 70 different independent producers.

Commercial free-to-air television broadcasters employ a substantial number of people as part of their in-house content production, providing training, development and secure employment in a generally volatile industry. The premium Australian television content produced in-house at the commercial free-to-air networks is equally valuable to viewers, and contributes to a vibrant and successful production sector in the same measure as independently produced content. The proposed offset extension should be applicable to all premium Australian television content, regardless of who produces it.

6 Retransmission

A retransmission right for broadcasters is a matter that should be addressed as a priority given the rapid developments in the market and the proliferation of services retransmitting commercial free-to-air television signals as part of their product offering. Free TV submitted extensively on the issue of retransmission in June and October. A technology-neutral must-carry/retransmission consent regime should be implemented in Australia, so that it applies regardless of the technical means chosen for the delivery of television and television-like services in the future.

Free TV members currently have no control over how, or on what terms their services are retransmitted. Businesses including telecommunications carriers and IPTV providers are currently providing commercial free-to-air television services as part of their product offerings without reference to broadcasters.[9] While not directly related to retransmission of free-to-air broadcasts the recent Federal Court proceedings concerning the Optus TV now service[10] illustrates the commercial value associated with retransmission of commercial free-to-air broadcasts on these emerging services.

The existing retransmission provision at section 212 of the BSA was designed to facilitate self-help sites to address reception and coverage issues in regional areas[11] - it was not intended to

[9] See, for example, the Optus TV Now service: https://www.optus.com.au/home/digital-life/tv-now/ and the Fetch TV service: http://www.fetchtv.com.au/TV#bbcworldnews
[10] Singtel Optus Pty Ltd v National Rugby League Investments Pty Ltd (No 2) [2012] FCA 34
[11] Explanatory Memorandum to the Broadcasting Services Bill 1992, clause 212

facilitate free and unlimited retransmission for the benefit of third party businesses. Similarly, the provisions of the *Copyright Act 1968* (Cth) (Copyright Act) regarding retransmission of free-to-air broadcasts do not contemplate new commercial uses. The roll out of the National Broadband Network (NBN) means that this issue is now time critical for commercial free-to-air broadcasters.

As noted in our earlier submission, Free TV favours a US model for retransmission. This allows broadcasters to either negotiate for provision of their broadcast signal or elect to participate in a 'must carry' scheme. With the advent of the NBN, broadband will become an important connection to the home and broadcasters should not be prevented from accessing homes where IPTV may become the primary means of access.

Under a US-style scheme, free-to-air services must be carried on a cable provider's system if the free-to-air broadcaster requests this ('must-carry'). Alternatively, the free-to-air services have the option to negotiate a fee or other compensation for their programming ('retransmission consent').

A simple system such as the one proposed by Free TV and operating in the United States will ensure that the transition to NBN is seamless for consumers, as well as being clear and efficient for affected businesses. Government businesses such as the ABC and SBS will also benefit from such a scheme.

Reform to the Copyright Act and the BSA to deal with retransmission should be pursued in 2012 as a priority.

7 Public Interest test

Free TV is concerned about the uncertainty and subjectivity of the public interest test proposed for mergers and acquisitions of CSEs.

7.1 Uncertainty

A move from transparent, objective rules that can be clearly applied to particular transactions, to a subjective public interest test would introduce significant doubt as to how questions relating to:

a) identification of Content Service Enterprises of "national significance"; and
b) application of the public interest itself, would be determined in any given instance.

Convergence in the Australian media environment will increasingly complicate determinations of this kind.

Measuring the relative influence of different mediums and different content services in a converging market is a challenge confronting policy makers around the world.

In the United Kingdom, the *Enterprise Act 2002* provides only limited guidance as to how the UK public interest test is to be applied. It leaves the detailed interpretation of the legislative requirement to the various government bodies responsible for its implementation and, ultimately, to the courts. It has been observed in the UK that there is a lack of clarity and objective standards by which the public interest test criteria are assessed.[12] As the criteria applied are extremely subjective and heavily dependent on the interpretation given to them by the Secretary of State of the day, this leads to uncertainty for industry.[13]

[12] N. Fenton (2011), p 9.
[13] G. Young & M. Myers (2004), p 2.

This uncertainty has led to problematic results. For example, in the case of *British Sky Broadcasting Group plc v Competition Commission and another* [2010] EWCA Civ 2, the Court of Appeal criticised the wording of a part of the public interest test which, in the circumstances, had given rise to conflicting interpretations by the Competition Commission and the Competition Appeal Tribunal. It has also been suggested that the Secretary of State's judgement in that case indicated clear failings in the public interest test as well as the process.[14]

Similarly, in Canada, it has been observed that the public interest is notoriously difficult to define, partly due to the fact that "cultural concerns" set out in the test are qualitative. Although quantification of these types of issues is possible, this can be problematic and not always meaningful.[15] Another commentator observed that there are so many, general and varied, objectives in the *Canadian Broadcasting Act* to be applied to assessments of media mergers that it is difficult to discern how these objectives translate into decision criteria.[16]
In Spain, the formulation of criteria for the public interest test has been complicated because of the shifting meanings in the concept of what is in the public interest in different contexts and at different times.[17]

7.2 Adverse effect on industry

The uncertainty and subjectivity of a public interest test is likely to introduce a significant degree of complexity as well as an increased likelihood of contested results.

The experience in other jurisdictions has shown that this can result in lengthy proceedings and significant costs for the parties concerned. For example in the UK, consideration of the BSkyB/ITV case took more than three years to resolve, including references to both the Competition Appeal Tribunal and Court of Appeal.[18] It has been observed that one of the problems with the public interest test in the UK is that too much discretion is given to regulators, which leads to contested decisions. Again, this leads to uncertainty for industry.[19]

In the Interim Report, the Committee notes criticisms of the existing regime, including that "many of the existing rules were onerous and expensive to comply with". Free TV is concerned that the introduction of a public interest test would merely replace an existing framework that is clear and transparent with one that is, itself, onerous and expensive for industry to comply with.

The uncertainty and increased administrative burden likely to accompany a public interest test may lead to other adverse effects for the media industry. It was submitted to the Productivity Commission and reported in the Commission's *Broadcasting Inquiry Report* in 2000 that a public interest test would have an adverse effect on the speed, cost and confidentiality of commercial transactions, which will in turn impede investment and innovation in Australian media. This may prevent mergers taking place, including those that would otherwise be in a public interest[20]. Similarly, it was submitted to the Commission that the public interest test would discourage mergers from proceeding because delays were likely in reaching a resolution and because there would be a 'diminished ability to maintain confidentiality'[21].
Similar adverse effects on industry are also likely to arise from concern that the public interest criteria will be applied in a discriminatory manner.

[14] Guardian Media Group (2011), p 6.
[15] S. Brinton (2001), p 13.
[16] P. Townley (2003), p 3.
[17] N. Serroatore (2004), p 208.
[18] Competition Commission Website (accessed 6 February 2012)
[19] N. Fenton (2001), p 9.
[20] Productivity Commission Broadcasting Inquiry Report (2000), p.8. The argument cited was made by the Federation of Australian Radio Broadcasters.
[21] Productivity Commission Broadcasting Inquiry Report, p. 362. This argument was made by PBL.

7.3 Role of the regulator

The proposal places responsibility for considering the public interest of relevant media transactions on the new content and communications regulator, in a complementary role to that of the Australian Competition and Consumer Commission (ACCC) which would continue in its current role. This means that certain media transactions would need the approval of both the new content and communications regulator and the ACCC.

While it is true that the traditional competition analysis undertaken by the ACCC has a different purpose from the public interest analysis proposed for the content and communications regulator, it is likely that a range of issues would be relevant to both investigations. For example, some characteristics of a highly concentrated media market may raise concerns from both a competition perspective as well as raising media diversity and plurality concerns. This leaves open the possibility of inconsistencies in approach on similar issues between regulators, as well as an increased administrative burden for parties.

This issue has also been commented on in other jurisdictions.

- For example, in a press release issued in 2009 by the UK Office of Fair Trading, the Office noted that applying public interest considerations to a potential merger, in a manner that effectively overrides consideration of the potentially anti-competitive effect of the merger, should only be done sparingly in the interests of maintaining the independence of the competitive regime.[22]
- A commentator in Canada observed that that there is a basic conflict between the objectives of the *Canadian Broadcasting Act* and the *Canadian Competition Act* and that this, in some cases, produces circumstances where decisions made under these two Acts conflict and cannot be resolved.[23]
- Further, in an article analysing the approaches taken by competition authorities in Europe and the US relating to media mergers, it was observed that the approach taken by the US has led to the imposition of conditions on those mergers that satisfy general policy objectives, rather than addressing specific competition concerns. It was argued that this has led to poorer outcomes, particularly because the focus on those extraneous objectives increases the risk of efficient mergers being blocked and anti-competitive mergers being let through.[24]

Given the necessary subjectivity of public interest criteria, another effect may be that in order to properly apply the criteria, it may be necessary for (unelected) regulators to and judges to “fill in the gaps” under tight timeframes.[25] In Free TV's view, this means there is scope for policy, and potentially political, factors to influence how the criteria are applied.

This concern has been raised previously in Australia and in other jurisdictions. It was submitted to the Productivity Commission in 2000 that a public interest test would be subjective and open to abuse and political interference.[26] Similarly, one of the criticisms of the public interest test in the UK is that it is open to political influence and, therefore, raises the potential for conflict of interest.[27]

[22] Office of Fair Trading press release 71/07 (2009), p. 8.
[23] Townley (2003), p. 3.
[24] P. Reynolds, P. Muysert, B. Veronese, S. McSkimming (2008), p 24.
[25] S. Hornsby (2011), pp. 1-2.
[26] Productivity Commission Broadcasting Inquiry Report, p. 362. This argument was made by the Australian Key Centre for Culture and Media Policy.
[27] N. Fenton (2011), p. 5.

7.4 Introduction of public interest test is unnecessary

It is important to ensure that the objectives of a public interest test are clearly identified at the outset to ensure the outcomes are suitable and proportionate.[28]

Given the wide ranging changes proposed to the regulation of the media and communications industry, now is not an appropriate time to replace the existing media diversity rules with a new and untested framework. It is widely acknowledged that the nature of media itself is changing rapidly, particularly due to the growth of online content and the effects of convergence. Given this changing media landscape, the existing media diversity rules may not continue under a new landscape, or at least may not apply in the same way.

As noted above, Free TV does not support the introduction of a public interest test for media transactions. However, if the proposal for a public interest test does proceed, detailed public consultation would be necessary on each of the issues mentioned above and, in addition, on the formulation of key elements of the regulatory framework, including:

- how the threshold requirements for determining whether a CSE is of "national significance" will be formulated;
- what public interest considerations are of relevance to the test and how different considerations will be weighed against each other;
- whether a single public interest test will apply to all media, or whether different criteria should be formulated for different types of media;
- which party will bear the burden of proof in determining whether the transaction is, or is not, in the public interest;
- the procedure, including confidentiality protections, that will be followed by the new regulator and how this will interrelate with the role of the ACCC; and
- what sort of scrutiny will the regulator be subject to.

These details should be formulated and fully interrogated before a public interest is implemented.

Instead of a new public interest test, Free TV supports the existing quantitative tests (with some changes to the "voices" rule) for ensuring an appropriate level of diversity as these tests provide clarity and certainty for industry in considering investment decisions.

8 Diversity

Existing regulation of media ownership imposes particular burdens on the regional media sector, stifling growth and denying regional media consumers access to the benefits of investment in the regional media industry.

The "voices" rule in its present form, in particular, is a significant impediment. In a number of cases, long-held and under-developed regional media assets have been consigned to a state of limbo – unattractive to major metropolitan investors, and locked away from potential regional media investors.

It is arguable the "voices" regime, ostensibly enacted to protect diversity and preserve localism, could in fact have the opposite effect.

[28] I. Nitsche (2003), p 2.

We accept that the promotion of diversity of views is important, however the present regime completely disregards the reality that consumers can access a variety of information and opinion through online and other outlets. The 2 out of 3 and minimum voices tests operate only to deliver an additional hurdle to media transactions as all must be scrutinised by the ACCC in any event. This inefficiency could be addressed by removing these rules and simply allowing competition principles to apply. Free TV supports the removal of these cross media rules and the 75% reach rule which is increasingly anomalous in a borderless media environment

At the very least the definition of "voices" should be significantly broadened to better capture the true diversity of views available to Australians, and to properly acknowledge the changes to the media landscape, that now includes pay television and internet content providers.

In the context of media diversity, "voices" should include:

- National as well as local newspapers and journals, whether published daily or not. For example, there are major towns in Australia with several local papers, each published a couple of days a week, but which do not singly or collectively qualify as "voices" under present definitions.
- Commercial and national radio and free-to-air television services, where received.
- Pay television services.
- Significant information services available on-line in any particular licence area whether local, regional or national.

9 Promoting local and community content

Free TV supports the Committee's recommendations in the Interim Report concerning local and community content.

The recommendation to move to a spot audit system of compliance for local content requirements is particularly welcome, and will allow resources to be more appropriately directed to the provision of local news and current affairs.

Although the uneven regulatory obligations remain on the commercial free-to-air television broadcasters for the immediate future, Free TV agrees with the Committee's view that a longer term approach to local content provision should involve less reliance on spectrum based services and it is expected that the Final Report will contain timeframes for such a transition.

10 Content Service Enterprises

Free TV supports the Committee's commitment to platform neutrality in the application of certain regulatory obligations regarding the provision of content.

In developing the Final Report, we anticipate that the Committee will outline which businesses and content will be captured. For example, it notes that "emerging services" would be excluded, which may include digital multi-channels. There is also a suggestion that the commercial scale of the business may be used to determine whether an entity is a CSE. The Committee may wish to consider whether this will have the unintended impact of creating a disincentive for growth among some content providers.

In general however, Free TV is concerned that industry competitors (in particular, commercial content providers in other jurisdictions) will, in practice, be able to structure their businesses to avoid these obligations. In particular, CSEs delivering "hundreds and hundreds and hundreds"

of IPTV channels over the government-funded NBN[29] may be able to avoid such obligations because they are based overseas.[30] It will simply not be feasible to regulate all television-like content across each of these channels.

The proposed focus on the provision of "television-like" content is also problematic. In the convergent media environment, the traditional concept of "television" is quickly becoming inadequate. In a real-world sense, the only undisputed providers of "television like" services in Australia are the existing free-to-air television and pay TV providers. To restrict or limit regulation to content that is based on one traditional form unfairly targets these providers. Connected TVs and services such as YouTube are examples of where the lines around the concept of "television" are becoming increasingly blurred.

Free TV understands and supports the underlying rationale for applying these regulations across a platform neutral setting. However, the practical reality is that online content is nearly impossible to regulate, principally as a result of jurisdictional issues. Such an approach may lead to businesses with an existing Australian presence moving offshore to avoid such regulation. In practice, any regulation and enforcement of these obligations are likely to be applied only to identifiable organisations or individuals with a traceable Australian presence. A desirable theoretical framework will not be effective if it unfairly targets certain Australian businesses and is not practically enforceable. This may lead to a new regulatory imbalance.

11 A new regulator for the digital economy

Free TV supports the recommendation that any regulator for the digital economy should engage with industry in developing solutions to problems. A collaborative approach to regulatory challenges will tend to produce outcomes that are constructive, practical and take account of established practices.

The ability of the regulator to exercise discretion in "regulatory forbearance" is a proposal that is strongly supported by Free TV members. The inability of the ACMA to exercise discretion in relation to broadcasting complaints means that both public and industry resources are currently dedicated to resolving complaints of questionable importance (such as the "big snake" example referred to in Free TV's earlier submission). Discretion to allow the prioritisation and dismissal of certain complaints and regulatory issues will lead to more efficient and practical regulatory outcomes.

However, Free TV has some reservations about certain elements of the new regulator as proposed by the Interim Report. In particular, the level of autonomy and independence which is envisaged will mean that the new regulator will have unfettered powers, which may result in an increase in regulation, or more prescriptive and onerous regulation than currently exists. It would be preferable for the parameters and criteria for regulation by the new regulator to be set out in legislation by government. Parliament, which is directly accountable to the public, should determine the criteria which will specify whether direct, co- or self- regulation is appropriate. Similarly, the development of policy should remain the responsibility of elected representatives who are directly accountable to the community.

Other issues which would benefit from revision or clarification are:

[29] Senator Stephen Conroy, AIIA, June 2009 http://www.arnnet.com.au/article/310712/conroy_nbn_bring_hundreds_tv_channels_australia/

[30] Current regulations around online content, such as the prohibition of child sexual abuse material, are more effective because they utilise an existing network of international regulatory and law enforcement bodies. Such a network will not be available for the regulation of CSEs in the manner envisaged by the Interim Report.

- A clearer indication of the relationship between the proposed new regulator and the responsible Department in relation to policy development, and the ACCC in relation to competition issues.
- The proposal that the new regulator would not be subject to "unreasonable procedural requirements" should be clarified to guarantee that procedural fairness and the protections under the current section 180 of the BSA will still apply to decisions of the new regulator.

12 Legislative structure and implementation

Implementation of many of the Committee's proposals will require fundamental legislative change. Some can be implemented relatively quickly Any new legislation should contain a staged transition to enable businesses to plan and budget for implementation.

There are a number of matters at issue which should be dealt with promptly, and require only minimal legislative change. In particular there is an urgent need for action on licence fees, with the existing rebate due to expire in June 2012.

Clear directions on content obligations are also a priority to enable planning and to set a framework for digital only broadcasting.

The Commercial Television Industry Code of Practice is due to be reviewed at the end of 2012. In line with the Committee's stated preference for a more balanced regulatory environment, commercial free-to-air television broadcasters seek a clear statement from the Committee that future Codes should take a "first principles" approach to the various public harms and goods that are fundamental to the provision of a content service in a converged media environment. In particular the committee should note that where regulation contained in Codes of Practice is no longer effective because it can be easily bypassed by moving to another platform, then it should be repealed.

Retransmission is also an area that is in need of urgent reform, given the proliferation of services that are carrying the commercial free-to-air broadcasting signal without permission or compensation. This is dealt with in more detail at section 5 of this submission.

Changes to the commercial television broadcasting licence fee regime, retransmission rights, a less restrictive Code regime and the introduction of more flexibility in delivering Australian content are all matters which can and should be addressed while the development of the broader legislative framework is underway.