

# The Impact of the Convergence Review

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# Overview of this Seminar

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## Martyn – the Convergence Review

- Context to the Convergence Review
- Overview of the Final Report and its recommendations



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## Nick – the practical impact of the Review

- Media ownership reforms
- Practical implications, including M&A opportunities
- Industry response



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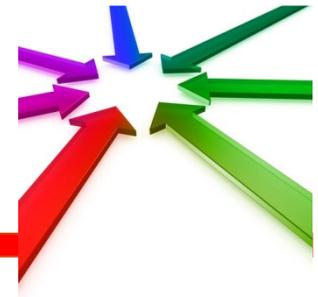
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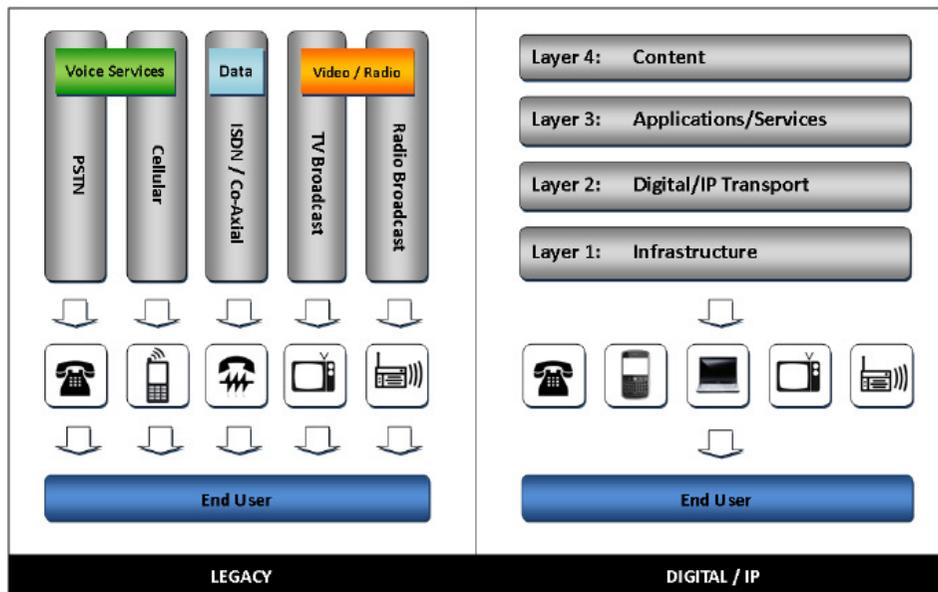
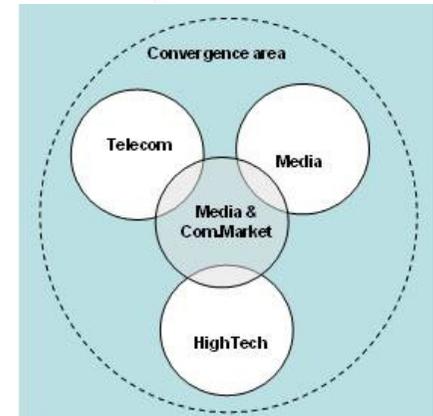
# Context to the Convergence Review

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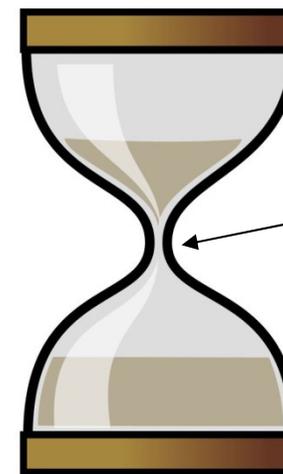
# What is convergence ?



- Digitisation of content, hence it can be easily replicated and communicated.
- Standardisation of carriage and delivery mechanisms via the Internet.
- Fantastically powerful computers in convenient and accessible devices.
- Vertically-integrated delivery mechanisms replaced by 'hourglass model'.
- Result: convergence of telecoms, IT, radio/TV broadcasting, print media



Rich array of content



Consumer receives rich interactive experience

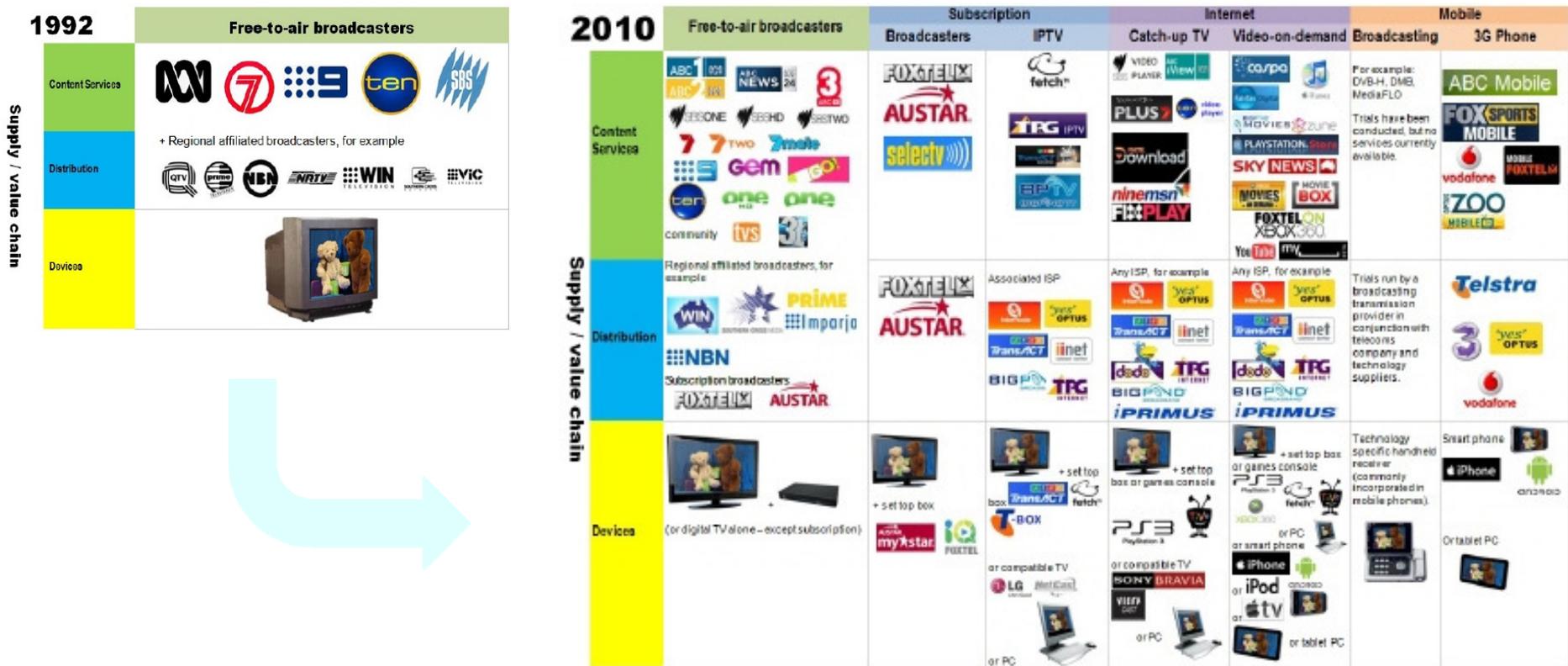
Any form of content can now be digitised, sent over the Internet, and accessed via a single interactive device.

Device can accept all forms of digital content and deliver to consumer

# Impact of convergence on regulation

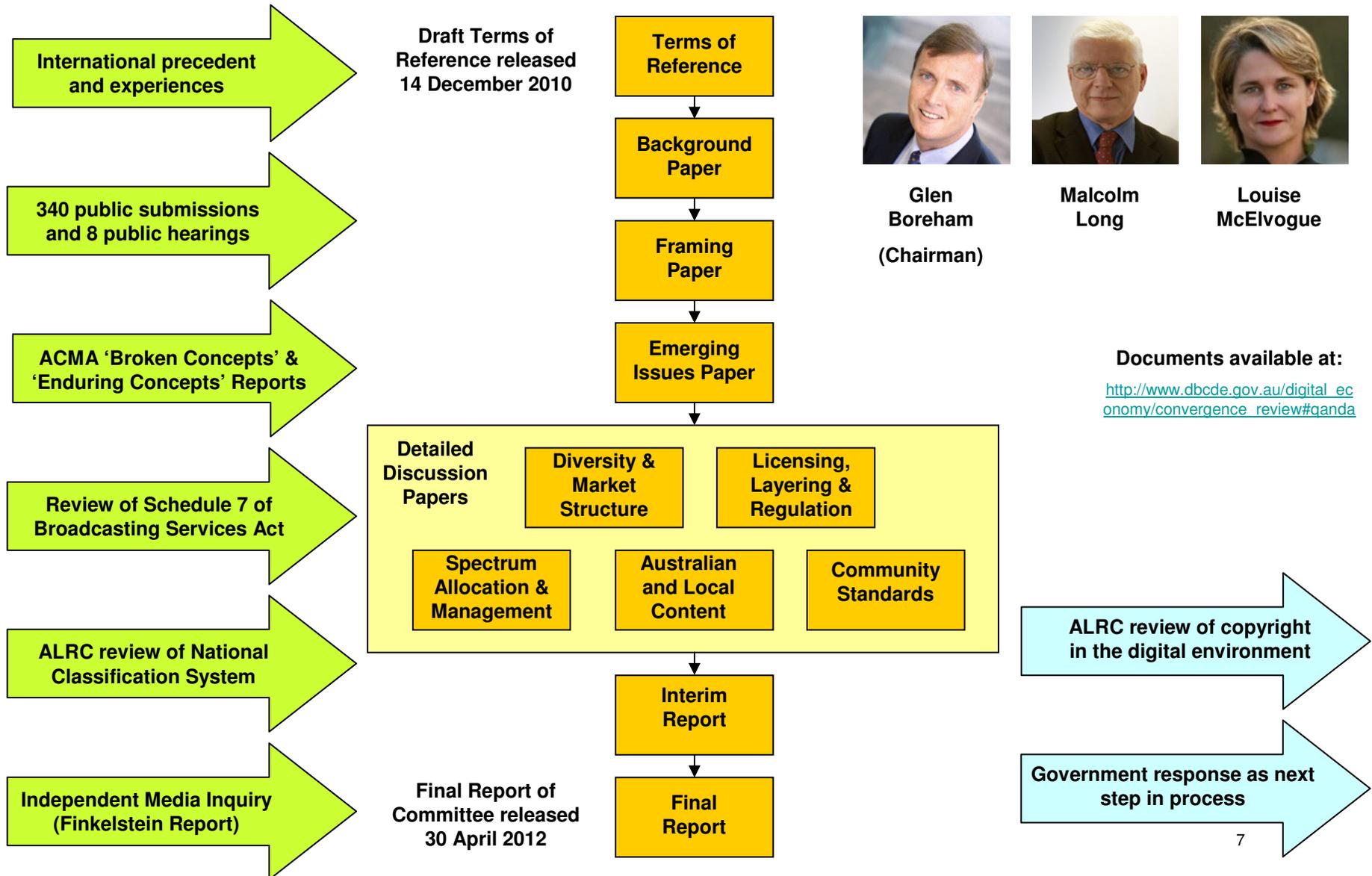


- Conflation of platforms, challenging traditional business models. Volume and variety of content has exponentially increased. Business models have rapidly evolved.
- Convergence has caused market entry, plus existing players offering new services over new platforms.
- Regulatory structures have not kept pace with these changes, creating a regulatory mismatch.





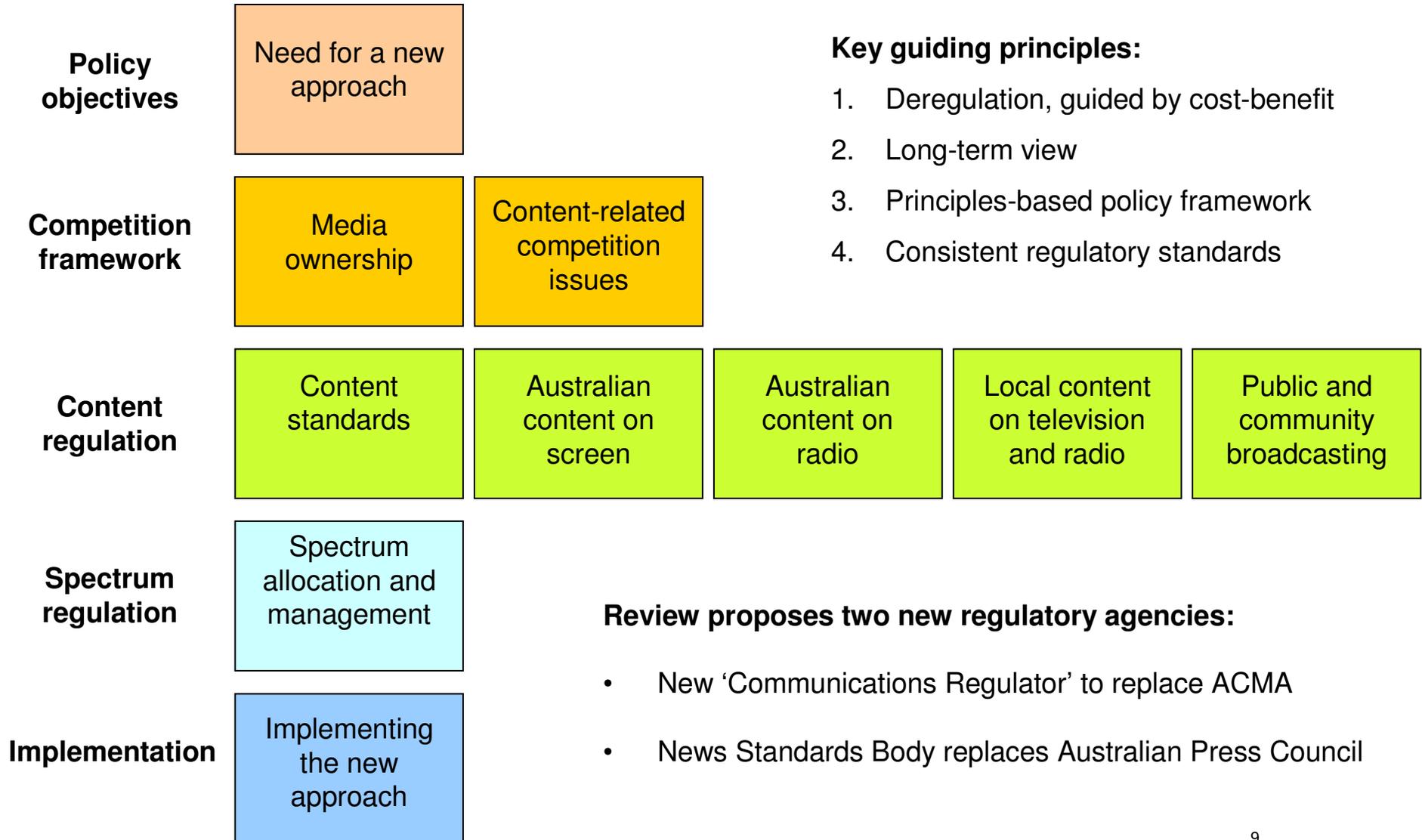
# Review by the Convergence Committee



# **Overview of the Final Report and its recommendations**

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# Structure of report and general approach



# New Communications Regulator

Policy objectives

## New Communications Regulator (NCR) established 'as soon as possible':

- NCR would replace ACMA. Phased handover of functions from NCR to ACMA.
- Regulates media mergers, sets content rules and standards, but would not regulate news and commentary (except serious breaches of industry code)
- Independent statutory corporation with Board (as with ACMA) that adopts a 'company model': part-time chair, deputy, non-exec & exec directors.
- Cross-appointments between ACCC and new CR would continue.
- Intended to have a high degree of political independence Ministerial directives subject to Parliamentary scrutiny (as with ACCC).

## Why not simply rebadge ACMA (with more powers and a wider mandate)?

- Possibly (?), NCR intended to be new body that has its own distinct culture.
- Arguably (?), changes do not involve simple transfer of functions, but creation of new functions and powers within new regulatory framework.

**We assume that the NCR would inherit ACMA staff and assets.**



### Australian Communications & Media Authority

Chris Chapman is chairman

8 Board members meeting twice a month

Rod Sims (ACCC) is cross-appointed to Board

ACMA has >600 staff

Offices located in Canberra, Melbourne, Sydney

Six key structural divisions:

- Digital transition
- Comms infrastructure
- Digital economy
- Content & consumer
- Corporate services
- Legal services

# Need for a new approach

Policy objectives

## Do we need still content regulation and, if so, what form should it take ?

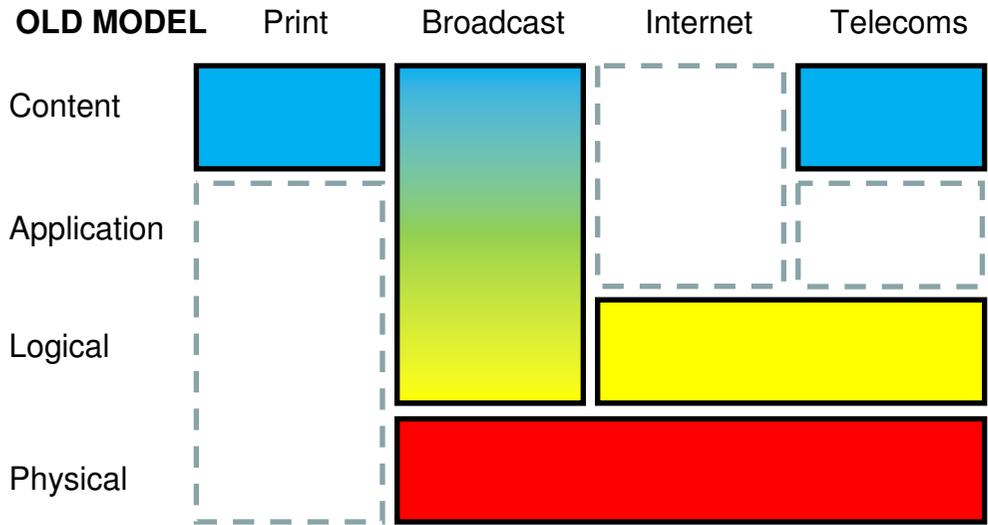
- Outdated legislative concepts may stifle innovation and impose excessive costs.
- While media landscape has changed, key policy principles largely endure.
- Report identifies that regulation is still necessary to address three key issues:
  - excessive concentration of media ownership
  - media content standards across all platforms
  - promotion of Australian and local content (84% public support)
- Broadcasting licensing and platform-specific regulation should be removed.
- Regulation should address generic content delivery across all platforms.
- Regulation should be focussed at '*significant enterprises that provide professional content to Australians*'.



**In essence, the Report proposes that Government should only regulate the most substantial and influential entities that deliver content. Any other entities only need be subject to industry and voluntary self-regulation.**

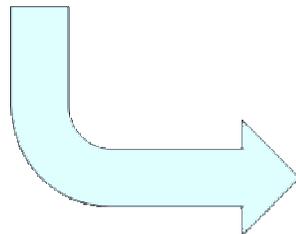
# Need for a new approach

Policy objectives

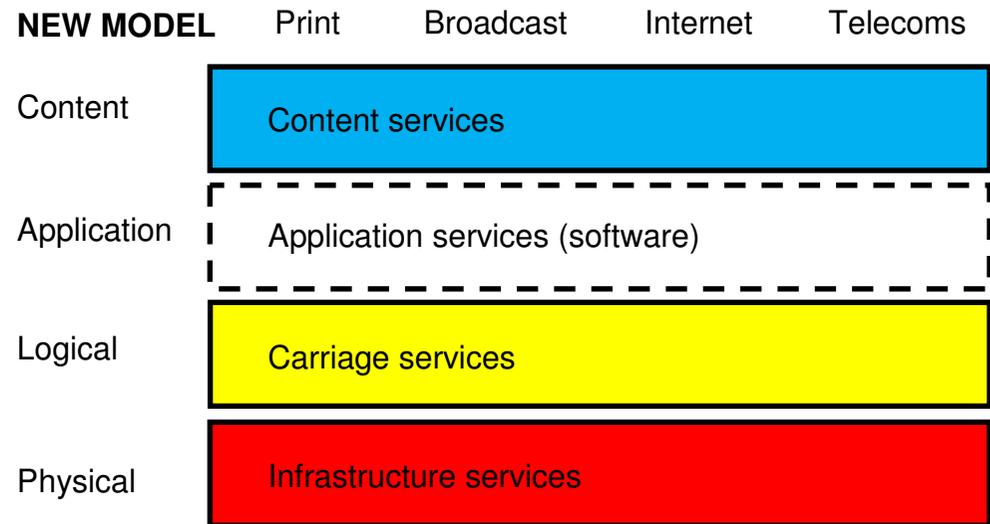


The philosophy driving the reforms – ensure a consistent approach to regulation across each horizontal layer of the value chain

**Current model:** Disjointed regulatory structure involving vertical silos and some gaps



**New model:** Horizontal regulatory structure with harmonised regulation at each layer



# Need for a new approach

Policy objectives

## Key recommendations:

- New policy framework should adopt technology-neutral approach.
  - No licensing for the supply of content or communications, except where necessary to manage finite resources (e.g.. radiofrequency spectrum).
  - Accordingly, broadcasting licences would no longer be required.
- Regulation should apply to ‘large enterprises that provide professional content services to significant numbers of Australians’:

- must control the **professional content** they deliver
- must meet a specified **Australian user threshold**
- must meet a **revenue threshold** based on revenue derived from supplying that professional content to those Australians

- Substantive thresholds to be subject to periodic review by regulator with a view to regulating only the most substantial and influential entities.

Thresholds not set in report, only some indication given as to level...



**New concept of “Content Service Enterprise” (CSE)**

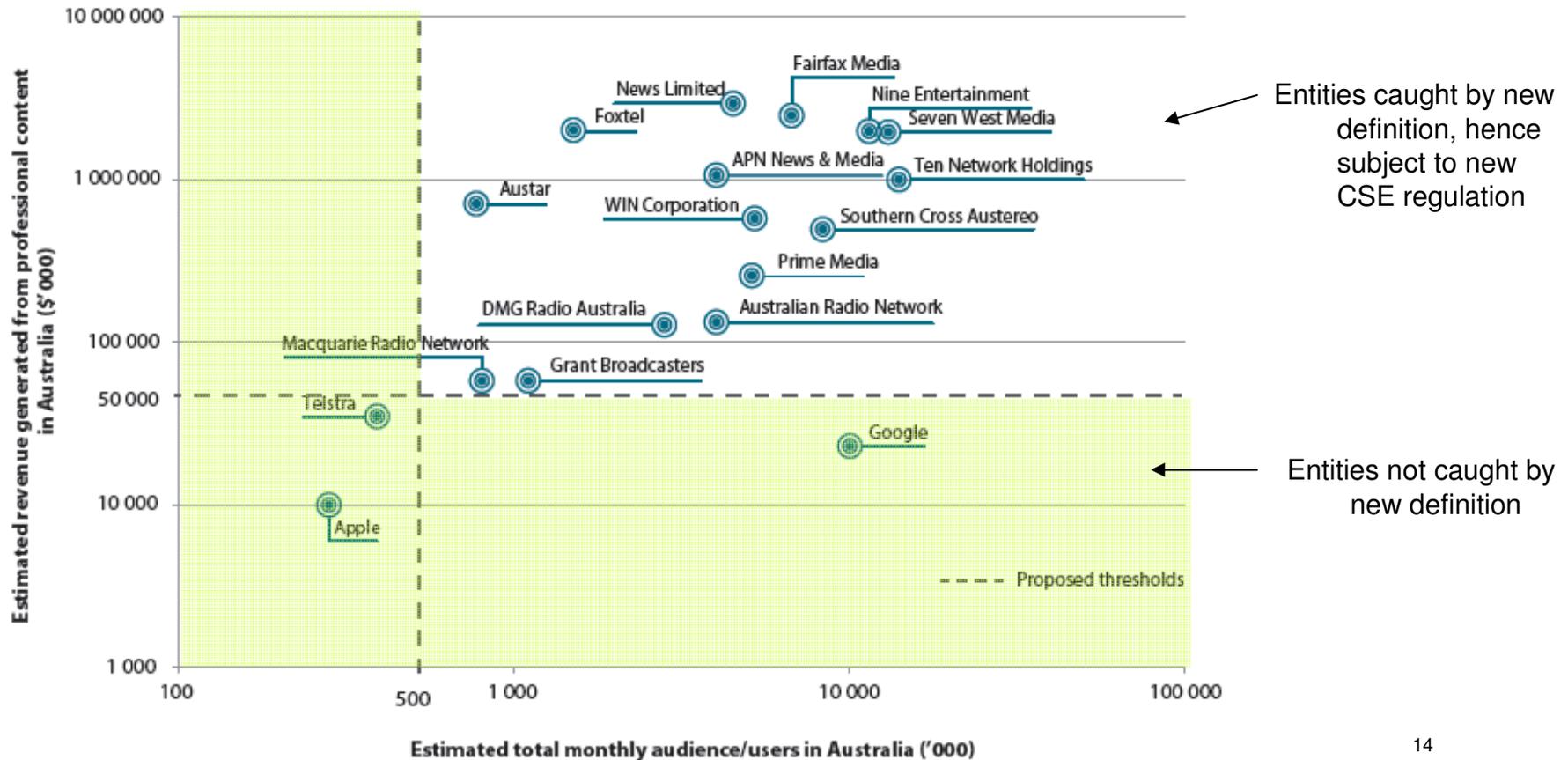
**Significant practical issues how these definitions will apply**

# Need for a new approach

**Policy objectives**

**Application of indicative thresholds will likely catch 15 entities as 'Content Service Enterprises'**

1. Australian users exceed 500,000 per month
2. \$50 million pa of Australian-sourced professional content revenue (excluding user-generated content)



# Content-related competition issues

## Concern that content ownership may be new bottleneck to competition:

- NCR would be empowered to conduct market investigations where content-related competition issues are identified (in parallel with ACCC).
- NBC would be granted statutory rule-making powers to promote fair and effective competition in content markets (complementing ACCC).

**New powers to make rules that regulate content arrangements that are 'unfair'**

## Why is this necessary or desirable? Can't the ACCC assume this role?

- Report considers ACCC powers are not broad enough to address content rights.
- Current ACCC powers are *ex post* (enforcement after conduct occurs), rather than *ex ante* (ability to make pre-emptive rules).



## How would the new powers be exercised ?

- Public inquiry following complaints, or on referral from ACCC or regulator
- Outcomes could include referral to ACCC, making rules, or education.

**NB. These conclusions are controversial. General approach in Australia has been to concentrate all competition functions in the ACCC for all sectors.**

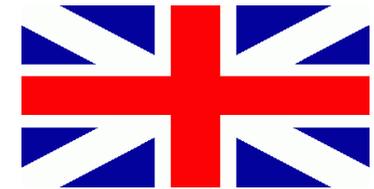
# Content-related competition issues

Competition  
framework

**International best practice does throw some weight behind concurrent jurisdiction, but the Report is (arguably) selective in its examples:**

## United Kingdom

- Ofcom (as communications regulator) has concurrent powers with the Office of Fair Trading (as competition regulator).
- Ofcom and OFT consult to determine which regulator can best run each case.



## United States

- The Federal Trade Commission (FTC), Department of Justice (DOJ) and Federal Communications Commission (FCC) each have concurrent powers.
- Some legislative demarcation, but primarily use memoranda of understanding.



## Canada

- The Canadian Competition Bureau (CCB) and the Canadian Radio-television and Telecommunications Commission (CRTC) have concurrent powers.
- The CCB and CRTC have entered into a co-ordination agreement.



# Content-related competition issues

## Competition framework

### Types of conduct that could be addressed by new rule-making powers:

- Third party access to exclusive premium content:
  - Eg PhoneCo obtains exclusive rights to AFL/NRL content over mobiles
- Bundling of premium content with other goods and services:
  - Eg PhoneCo requires brand phone to be acquired in order to get content
- Discriminatory conduct (raising so-called 'net neutrality' issues):
  - Eg PhoneCo gives mobile streamed content priority over mobile VoIP calls
- Metering of content:
  - Eg PhoneCo provides 'walled garden' of unmetered content to users



### Key concerns:

- **exclusivity**
- **bundling**
- **net neutrality**
- **metering**

### Other issues identified in report for further analysis...

- Whether retransmission should be regulated (e.g., must-carry of free-to-air television on subscription TV networks)
- A full review of the anti-siphoning scheme should occur within 5 years. (Anti-siphoning gives free-to-air preferential access to certain content and events)

# Content standards



**Report concludes that content regulation is necessary for two key forms of content. All relevant content should match community standards:**

- Inappropriate and offensive content (i.e., censorship requirements)
- Fairness and accuracy of journalistic content.

**Current regulatory situation:**



- National Classification Scheme classifies offensive content (e.g., violence).
- Industry self-regulatory codes regulate journalistic content.

ALRC and Finkelstein, respectively, reviewed this situation and recommended reforms.

**Children's content would be subject to specific regulatory controls:**

- Review Committee received clear message that standards must be maintained to protect children from harmful and inappropriate content.
- Recommended that new Communications Regulator have discretion to set appropriate mandatory standards.



# Content standards



## Recommendations from ALRC review of National Classification Scheme:

- First comprehensive review of censorship and classification since 1991.
- National Classification Scheme (NCS) pre-dated widespread use of the Internet.
- NCS is 'analogue legislation in a digital world' (e.g. regulation of online games).
- Proposed a shift in regulatory focus to restricting access to adult content.



## Convergence review has now endorsed many ALRC recommendations:

- Regulation should apply to both online and offline environments on a technology-neutral basis where content is distributed to Australian public.
- Reform of NCS would occur and a new Classification Board would be created.
- New classification legislation is required which consolidates various regimes.
- The regulator should have the power to approve industry self-regulatory codes.
- Content providers should 'take reasonable steps' to restrict access to adult content (e.g., provide mechanism for consumer complaint and take-down on notice).

**Classification Board would be created within new regulator**

# Content standards

**Content regulation**

## Recommendations from Finkelstein’s Independent Media Inquiry:

- Self-regulatory approaches to industry regulation have not been successful in achieving the necessary level of accountability of Australian media.
- Government should intervene to regulate journalistic standards by creating new statutory body, the ‘News Media Council’ (NMC)
- NMC would set journalistic standards, handle complaints, and take enforcement action in relation to print, online, radio and television.

## Convergence Report accepted part (but not all) of these recommendations:

- News content should be regulated similarly, irrespective of delivery platform.
- Current system for regulating news media is not effective.
- A self-regulatory structure should be adopted by the industry on a platform-neutral basis in the form of a **‘News Standards Body’**.
- The ‘News Standards Body’ would replace the Australian Press Council.
- After a period of time, the Government will again assess whether the self-regulatory approach is working.
- Appointing an independent government body to oversee the media is a ‘measure of last resort’ if the self-regulatory approach is found not to work.



**Ray Finkelstein  
QC**

### **‘News Standards Body’**

Replaces Australian Press Council

Membership is mandatory for Content Service Enterprises

Membership is voluntary, but ‘encouraged’, for others

Enforces Media Code providing:  
- fairness  
- accuracy  
- transparency  
in professional news/commentary.

Funded primarily by members.

Government funds any shortfall.

Credible sanctions for breaches.

ABC and SBS not members (as regulated directly by Acts)

Phased implementation.

# Australian content on screen

Content  
regulation

**Convergence Report recognises social & cultural benefits of content that recognises Australian identity, character, and cultural diversity:**

- Australian drama, documentary and children's content require the most support.

**Continued support measures are necessary, but require reform:**

- Australian content is expensive, hence would be under-produced if not mandated.
  - Distribution measures currently require Australian content in free-to-air television time (55%) and advertising time (80%), plus 10% of drama expenditure for subscription TV.
  - Production measures currently include \$60 million direct subsidy via Screen Australia, and Produce Offset refundable tax offset.
- Burden should be borne by those larger enterprises that have the financial capability and that stand to gain the most.
- Scope of Australian content requirements should be broadened, otherwise amount of Australian content consumed will diminish as consumers move to other platforms.
  - Canada and EU are now regulating 'video on demand' services,



# Australian content on screen



## New 'Uniform Content Scheme' (UCS) as a form of mandated investment:

- UCS would apply to all Content Service Enterprises that meet the following criteria:
  - must offer 'professional television-like drama, documentary or children's content' ('relevant content');
  - revenue of at least \$200 million pa from professional video content;
  - monthly audience of at least 500,000 for professional video content.
- UCS would require Content Service Enterprises to either:
  - contribute to a 'converged content production fund' (like Screen Australia); or
  - invest a percentage of their Australian market revenue from relevant content.
- Most likely, 25% of the funding would be required to support children's content.



**Free-to-air receive the following *quid pro quo* benefits**

1. Receipt of new spectrum licence.
2. Access to higher 40% tax offset for Producer Offset.
3. No full fourth commercial TV broadcaster on sixth channel.
4. Protection of sports rights in anti-siphoning list for another 5 years.

## Transitional arrangements:

- The abolition of the quotas and minimum expenditure requirements would continue to apply for a transitional period.
- Greater interim burden borne by free-to-air as a *quid pro quo* for 'wider benefits'.

# Australian content on radio

Content  
regulation

## Convergence report recommendations:

- Australian music quotas should apply to analogue and digital radio services offered by Content Service Enterprises.
- Music quotas should not apply to temporary digital radio services.
- Quotas should not apply to Internet-based music services at this time.



## Basis for recommendations:

- Currently analogue radio is required to play minimum levels of Australian music under Commercial Radio Australia Code of Practice (between 5% and 25%).
- As audiences grow and digital radio services mature, the content requirements should also be applied to digital radio. (An exemption currently exists to permit experimentation with niche services as 'event channels').
- While regulatory parity suggests Internet should also be covered:
  - Internet radio is often simulcast with terrestrial, so already regulated
  - Diversity of audio formats and music delivery mechanisms would make it *'difficult – if not impossible – to consistently regulate'* the Internet.



# Local content on TV and radio



## Convergence report recommendations:

- Commercial free-to-air TV and radio broadcasters using spectrum should continue to devote a specified amount of programming to material of local significance.
- A more flexible compliance and reporting regime for TV and radio should apply.
- The current radio 'trigger event' rules should be removed.



## Basis for recommendations:

- Licence conditions currently require commercial free-to-air TV and radio broadcasters to broadcast minimum amounts of material of local significance.
- Community has reasonable expectation that content meets their local needs, so local content requirements should be maintained.
- Some issues with existing obligations being too inflexible regarding compliance.
- Trigger event rules are too onerous (these require reporting to ACMA with local content plan if various events occur, such as a change in control).
- Once broadcasting licences are removed, the relevant licence conditions should be incorporated into spectrum licences.



# Public & community broadcasting

Content  
regulation

## Convergence report recommendations:

- The charters of the ABC and SBS should be updated to expressly reflect the range of existing services, including online activities.
- To the extent that Australian content quota obligations continue on a transitional basis, they should also apply to the ABC (55%) and SBS (27.5%).

## Basis for recommendations on charter:

- The ABC and SBS make important contributions to the social, cultural and economic development of Australia.
- Charters of ABC and SBS require them to recognise existing services of other operators, so extending their charter to include online services is acceptable.
- Charters should be updated to reflect the range of digital activities they perform.

## Basis for recommendations on quotas:

- Given the substantial taxpayer investment in the public broadcasters, it is appropriate that Australian content quotas be applied to them.
- Content quotas will only remain for an interim period in any event given reforms



# Spectrum allocation & management

Spectrum  
regulation

## Historically, broadcasting spectrum treated differently to other spectrum:

- Minister has designated some spectrum as broadcasting spectrum.
- 'Beauty contest' allocation for TV. Financial selection for commercial FM radio.
- Entitlement to use broadcasting spectrum linked to broadcasting licence.
- Use of apparatus licensed-transmitters based on fixed fee 5 year licence.
- Moratorium on fourth commercial television network.
- Annual licence fees as percentage of gross earnings (up to 9% TV, 3.25% radio).



## Convergence Review recommends a common approach to all spectrum :

- Spectrum licence for 15 year term, not linked to apparatus or any other licences.
- Market-based price allocation, usually by auction. Licence can be traded/leased.
- Minister would have powers to reserve spectrum to achieve policy objectives (such as public and community broadcasting).
- Spectrum planning process should be required to take into account public interest considerations, including recognition of social and cultural diversity.

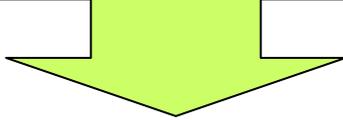
# Implementing the new approach

3 stage approach...

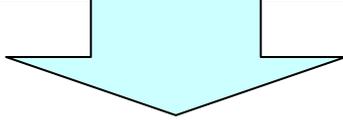
**Stage 1**  
**Stand-alone priority changes to policies, programs and legislation**



**Stage 2**  
**New content services legislation to replace Broadcasting Services Act**



**Stage 3**  
**Reform of communications legislation to ensure technological neutrality**



1. Establish Communications Regulator
2. Update ABC and SBS charters
3. Rationalise local content rules
4. Media ownership regulation reforms
5. Establish 'News Standards Body'

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1. Repeal Broadcasting Services Act
  2. Enact content regulation legislation
  3. Migrate ACMA functions to new regulator
  4. Abolish ACMA
  5. Allocate new spectrum licences

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1. Repeal Telecommunications Act
  2. Repeal Radiocommunications Act
  3. Repeal content regulation legislation
  4. Repeal associated regulatory instruments
  5. Enact integrated Communications Act



# Media ownership reforms

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# Current media ownership rules

The current media ownership rules aim for diversity and include numeric rules related to radio licence areas such as:

- **“4/5” rule (minimum number of voices)** – no less than five independent and separately controlled media operators or groups in a metropolitan commercial radio licence area, and no less than four in a regional area
- **“2 out of 3” rule** – cannot control more than two out of three specified media platforms (commercial TV, radio or an associated newspaper) in a commercial radio licence area
- **“One-to-a-market” rule** – cannot control more than one commercial TV broadcasting licence in a licence area, with limited statutory exceptions
- **“Two-to-a-market” rule** – cannot control more than two commercial radio broadcasting licences in the same licence area, with limited statutory exceptions
- **“75% audience reach” rule** – cannot control commercial TV broadcasting licences if the combined licence area exceeds 75% of the Australian population

# Recommendation to abolish ownership rules

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- No review of impact of mergers at national level
- Subscription TV considered not relevant to diversity
- 75% reach rule somewhat limited as regional TV affiliates often carry exactly same programming as metro broadcasters
- National newspapers are not considered

# Recommendation to abolish ownership rules

## Recommendations:

- Drop radio licence area concept & move to local areas (determined by regulator)
- Regulate based on influence not platform – so newspapers, subscription TV & internet content providers are covered
- Have a minimum number of media groups (determined by regulator) per local area – probably keep 4/5 rule but regulator can allow mergers that breach the test if “public benefit”
- Large scale mergers assessed on a “public interest” test basis
- Drop 75%, 2 out of 3, 1 to a market (TV) & 2 to a market (radio)
- The onus to show that the outcome of a proposed deal is not in the public interest should be on the regulator

# **Practical implications of the Final Report**

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# Issues with changes to broadcasting licensing regime

## Recommendations:

- Existing holders of commercial broadcasting licences would, in effect, have these licences replaced with spectrum licences (via the conversion of apparatus licences to spectrum licences),
- The new Communications Regulator would set an annual access fee based on the value of the spectrum as planned for broadcasting use (as licence fees will be abolished)
- Spectrum licensees would be able to trade channel capacity within their spectrum
- Spectrum capacity on the sixth planned TV multiplex (“sixth channel”) would be used to maximise diversity, hence no new full fourth commercial free-to-air operator would enter the market. Rather, criteria would promote specific genre channels as with pay TV.

# Issues with changes to broadcast licensing regime

- Broadcasting licences are currently used to regulate the quantity and types of broadcasters and the content of broadcasts – not directly related to the associated rights to spectrum
- Moving away from this regime to a market-based model of spectrum licensing may potentially lead to:
  - more efficient and innovative use of spectrum
  - flexibility to deliver content on any platform
  - more appropriate pricing of spectrum
  - helping to drive the conversion process
  - facilitating the development of digital broadcasting multiplex operators (to provide a delivery mechanism for multiple services)
  - improved regulatory efficiency
- Commercial Radio Australia does not support the proposal to replace commercial radio broadcasting licences with spectrum licences – argues that it would undermine the current licence rights of broadcasting services band licence holders and disrupt existing business models of commercial radio broadcasters
- News Limited, the Communications Alliance and the ACCC generally supported the adopting of market-based pricing of spectrum for efficiency reasons

# 'Content Service Enterprise'

- Recommendation that regulation should apply to 'large enterprises that provide professional content services to significant numbers of Australians':
  - must control the **professional content** they deliver
  - must meet a specified **Australian user threshold** (>500,000 Australian users per month)
  - must meet a **revenue threshold** (\$50m revenue per annum derived from supplying that professional content to those Australians)
- **Key issue:** What is "professional" content?
  - e.g. YouTube video bloggers
  - The Final Report indicates that the proposed definition of CSE is targeted at large media enterprises
- **Key issue:** What are the appropriate user and revenue thresholds?
  - Arbitrary – estimated revenue threshold currently excludes Telstra, Google, Apple from the definition

## Industry comments:

- Some have argued that the Report focuses more on existing traditional media content providers, than some of the 'new age' media providers.
- Some have argued that the major players of tomorrow's media landscape – such as Google, YouTube, Apple – may not be effectively covered by the recommendations.
- These media giants include international brands which are becoming more like TV networks (Google TV, Apple TV, YouTube "channels" etc) – how should these be regulated?
- Online content and internet TV services driven by exponential increases in online advertising spends – by 2015, an estimated 31% of all advertising will be online, 26% TV and 22% newspapers (4 May 2012, *Sydney Morning Herald*)

# M&A opportunities

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- Media analysts predict that the abolition of media-ownership restrictions recommended by the Review is unlikely to lead to a flood of M&A activity. Unlike 2006 – CVC/Nine, KKR/Seven and Seven/WAN
- Analysts also believe that most M&A activity could be in the radio market, primarily due to the abolition of the “two-to-a-market” ownership test
- Buyers may target smaller operators such as Melbourne's Pacific Star Network (owner of SEN and MyMP) and Bill Caralis's Supernetwork (Sydney's 2SM)
- James Packer's alleged intention to offload his stake in Consolidated Media, including its part share in Foxtel and Fox Sports, will be watched closely. News is interested (back to 50% of Foxtel)
- Stokes's Seven West Media - Prime (LM out)
- Nine – CVC?
- Ten – EYE, DMG Radio (LM) & Southern Cross
- No consolidation of TV in metros even if 1 in a market rule dropped

# Industry response

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## Free TV Australia:

- Free TV Australia (represents all Australian commercial free-to-air television broadcasters) generally supports removal of the current numeric ownership rules, including the 75% reach rule
- FTVA is concerned that the Review's approach to content regulation is not as comprehensive as the proposed changes to the management and licensing of spectrum
- FTVA questions whether the public policy benefits of a new regime are strong enough to warrant the costs and complexity of implementing the changes

## Foxtel:

“Foxtel is concerned that overall the Review recommends needless new regulation that will stifle competition and innovation and does not recognise market reality ...

In particular, the recommendation for a new regulator with broad powers to rule on media ownership and content competition in addition to the powers of the ACCC would create uncertainty and cost-wasteful red tape for both government and industry.”

(1 May 2012, *Mediaweek*)

## News Limited:

- Generally rejects the basis for the proposed new regulatory framework
- The Final Report suffers from 4 serious flaws:
  - It recommends more heavy-handed regulation
  - The proposed regulations are too subjective and imprecisely defined
  - It recommends increasing regulation on traditional media companies with additional ownership rules, content competition rules, Australian content rules and press complaint rules
  - It excludes from regulation some powerful companies who compete against traditional media companies today

## Network Ten:

- Disappointed in the recommendations contained in the Final Report as it claims the document places more burdens on the already over-regulated free-to-air television industry
- Believes the proposed higher content quotas and creation of a new media regulator is unnecessary and arbitrary

(1 May 2012, *Mediaweek*)

# Summary of key take away points

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# Key points (report)

1. New **convergent approach** to broadcasting, media and content regulation.
2. Broadcasting licences replaced by wider generic concept of '**Content Service Enterprise**' that is defined based on a user and revenue threshold.
3. Establishment of a **new Communications Regulator** to replace ACMA, with broad powers and functions, including concurrent jurisdiction with the ACCC.
4. **Media ownership reforms** (Nick will discuss these in detail)
5. Updating of **National Classification Scheme**.
6. Creation of '**News Standards Body**' to replace News Media Council, coupled with threat to create a statutory body if industry self-regulation does not work.
7. Replacement of Australian screen content quotas with **Uniform Content Scheme** requiring financial contributions by Content Service Enterprises to local content.
8. **Update** of Australian radio content quotas, local content quotas and ABC/SBS charters.
9. Replacement of broadcasting apparatus licensing with 15 year **spectrum licensing**.
10. **Three stage approach** to implementation.



# Key points (practical application)

1. Proposal to replace the current media ownership rules with a “minimum number of owners” rule and a public interest test
2. Market-based approach to pricing spectrum recommended to replace broadcasting licence fees
3. Issues with proposed meaning of “Content Service Enterprise” being tied to arbitrary benchmarks, including 500,000 users and \$50 million revenue.
4. Analysts predict the Review will not result in an upsurge of M&A activity due to major players’ lack of capacity to buy
5. The recommendations do not significantly impact major international players which are looking to offer online services similar to traditional TV network services
6. Although industry consensus was achieved on matters of general principle, industry opinion diverged on the details of how to best achieve maximisation of public benefit from spectrum allocation
7. When will it get to be law? Government has not committed to a date for its response.



# The Impact of the Convergence Review

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