



Queensland University of Technology
Brisbane Australia

This may be the author's version of a work that was submitted/accepted for publication in the following source:

Goldsmith, Ben & Thomas, Julian
(2012)

The Convergence Review and the future of Australian content regulation.
Australian Journal of Telecommunications and the Digital Economy, 62(3),
44.1-44.12.

This file was downloaded from: <https://eprints.qut.edu.au/53713/>

© Copyright 2012 Swinburne University of Technology

This is the author's version of the work. The definitive version of the work as certified and accepted after peer review has been published in the Telecommunications Journal of Australia [62,(3), 2012] and is available from the TJA website at <http://tja.org.au.ezp01.library.qut.edu.au/>.

Notice: *Please note that this document may not be the Version of Record (i.e. published version) of the work. Author manuscript versions (as Submitted for peer review or as Accepted for publication after peer review) can be identified by an absence of publisher branding and/or typeset appearance. If there is any doubt, please refer to the published source.*

<http://tja.org.au/index.php/tja>



THE CONVERGENCE REVIEW AND THE FUTURE OF AUSTRALIAN CONTENT REGULATION

Ben Goldsmith (1st author)

Queensland University of Technology

Julian Thomas

Swinburne University of Technology

This article examines the place of Australian and local content regulation in the new media policy framework proposed by the Convergence Review. It outlines the history of Australian content regulation and the existing policy framework, before going on to detail some of the debates around Australian content during the Review. The final section analyses the relevant recommendations in the Convergence Review Final Report, and highlights some issues and problems that may arise in the new framework.

INTRODUCTION

Almost every aspect of the contemporary media landscape appears to underline the limitations of current Australian policies for media content and communications services. The broadband internet; the mobile internet; new patterns of consumer behaviour; new global media businesses; new national digital strategies; cloud-based media; the rise of user-generated content: all of these represent new and complex challenges to the once-familiar world of the *Broadcasting Services Act 1992* (BSA), and its many accretions. It was therefore a positive step when, in late 2010, the Australian Government commissioned the Convergence Review. The Review's brief was to examine the current policy framework and regulatory objectives, recommend a new framework and advise on the principles that will underpin it. This would involve analysis, condensation and revision of the most relevant pieces of legislation, the BSA, the *Telecommunications Act 1997* (TCA), the *Radiocommunications Act 1992* (RCA), the *Australian Broadcasting Corporation Act 1983* (the ABC Act), and the *Special Broadcasting Service Act 1991* (the SBS Act). Although not made explicit in the Review until the release of the Emerging Issues paper in July 2011, one of the motivations behind the process was the desire to ensure that 'legacy policy frameworks should not hamper convergence, investment and choice in the marketplace' (OECD 2008, 2). The implication here that 'legacy policy frameworks' might not only need to be amended, but scaled back in order to encourage innovation and competition was directly incorporated in the first of the principles established by the Review committee to guide its work. This principle states: 'Citizens and organizations should be able to communicate freely, and where regulation is required, it should be the minimum needed to achieve a clear public purpose' (Convergence Review 2011b, 8). The Review's deregulatory brief was reinforced by the publication of two reports by the Australian Communications and Media Authority. The first, entitled *Broken Concepts: The Australian Communications Legislative Landscape*, discussed the relevance

and utility of 55 legislative concepts deemed to ‘form the building blocks of current communications and media regulatory arrangements’ (ACMA 2011a, 5). The companion report released in November 2011 entitled *Enduring Concepts: Communications and Media in Australia* (ACMA 2011c) sought to identify the concepts that would underpin relevant regulation in the emerging convergent media environment. In its Final Report (Convergence Review 2012), the Review acknowledged that there remain areas in which government intervention in the public interest is justified and necessary. Three areas in particular were nominated for ongoing oversight and action: media ownership and control; content standards; and Australian content production and distribution. The last of these is our concern in this essay.

Australian content regulations and mechanisms to support production and distribution have been core components of media policy for many years. With the advent of media convergence and digitisation, access to the means of production and distribution is now more widely available. These factors have reduced production costs for some if not all content, [1] and at the same time they have expanded the venues and modes of cultural production, blurring the distinctions between amateur and professional content producers/distributors upon which much support and regulation has traditionally been based. This new configuration requires policymakers to face two questions. First, should the existing mechanisms and frameworks be amended or replaced in order to achieve the cultural objectives that have traditionally underpinned content regulation? And second, are the forms of Australian content that traditionally have been the beneficiaries of media policy and regulation on the basis that they make significant contributions to Australian national and cultural identity – principally long-form drama, documentary, children’s programming, and news and current affairs – the only forms that should be supported in the digital environment, or should other forms including games and non-professional media content (forms of user-generated content), also benefit from content regulations, subsidies and incentives? In part, the answers to these questions depend on the extent to which intervention is intended to support and maintain the accessibility of professionally produced Australian content. If the objective is merely to provide broad access to such forms of Australian content, then attention will focus on regulations or incentives to support or enable its widespread production and distribution. If, however, the principle acknowledges that a broad variety of forms of content can contribute to the development of national and cultural identity, then the objective must be to acknowledge and facilitate widespread participation in content production and distribution. Before exploring how these questions were discussed during the Review, and then analysing how the Final Report answers them, it may be useful to recount briefly the evolution of the regulation of Australian content in broadcasting.

HISTORY OF AUSTRALIAN CONTENT REGULATION

Kim Dalton, currently Head of Television at the ABC, observed in 2007 that the history of Australian content in broadcasting has been a history of regulation (Dalton 2007). As the Productivity Commission noted in its Broadcasting Inquiry Report (2000, 379), the objectives of such content regulation ‘are cultural and social rather than economic’. And yet the regulation of Australian content in broadcasting has historically had significant economic implications for broadcasters, for producers and for the Australian government. Indeed it can be argued that the imposition of Australian content regulations on commercial broadcasters

has been a response to those broadcasters' economic imperatives, with intervention justified in terms of 'market failure'. That is, the fact that much Australian content costs more to produce and distribute than the cost of licencing imported content is a disincentive to investment by commercial broadcasters.[2] But since Australian content is considered to serve important social and cultural functions, market distortion in the form of broadcast quotas and production subsidies has been deemed reasonable.

The first such measure was introduced in the *Broadcasting Act* 1942, when a 2.5% quota for Australian-composed music was imposed on commercial radio broadcasters. The quota was increased in 1956 to 5%, and in 1973 a 10% quota for Australian-performed music was added to the mix. Three years later, this quota was increased to 20%. Under the terms of the Australia-US Free Trade Agreement (2005), the Australian music quota was capped at 25% although quota levels vary for different music genres. In 2010, despite music industry protests, the Australian government waived content quotas for digital-only radio stations for three years.

Content quotas were first imposed on Australian commercial television broadcasters in 1961 in response to what the government considered to be unacceptably low levels of Australian programming. Television stations that had been established for at least three years were required to screen Australian programs for 40% of total transmission time, and to screen at least one hour per week of Australian programming in prime time (which at that time was deemed to be 7.30-9.30pm). The following year, the prime time quota was increased to two hours per week. In 1964, UK programs were permitted to fill 5% of the total quota, which was increased to 45% of transmission time. It was raised again in 1965 to 50%. In 1967 the prime time quota was lifted to twelve hours every twenty-eight days (including two hours of drama), with children's programs included for the first time. Two years later the prime time quota rose to eighteen hours per twenty-eight days, and was amended again in 1971 to 45% of programming between 6 and 10pm, including at least six hours of first release Australian drama per twenty-eight days. The following year, 1972, the prime time quota was raised again to 50% of broadcasts between 6pm and midnight, before the overall quota was replaced in 1973 with a points system based on program type, cost, employment and length. Following a public inquiry in 1990, the Australian Broadcasting Tribunal introduced an overall quota of 35% of total transmission time for Australian programs, with the level increasing by 5% per year until 1993. Points systems for first release drama and six 'diversity' program categories were introduced in 1990 before being overhauled in 1996 when a new definition of 'Australian content' was applied and a quota was introduced for first release Australian documentaries of ten hours per year in prime time. In 1998 the overall quota increased to 55% of transmission time between 6am and midnight. That next year, following a High Court judgment that Australian content standards were inconsistent with Australia's Closer Economic Relations agreement with New Zealand, programs made in New Zealand were made eligible as Australian for content purposes [Blue Sky v Australian Broadcasting Authority [1998] HCA 28].

The subscription television sector also has local content obligations. Since 1999 — and before that on a voluntary basis — certain designated drama channel providers have been required to spend at least 10 per cent of their total programming expenditure on new Australian drama productions, which could be feature films or television programs. According to ACMA, in the 2010-11 reporting period, the subscription television industry spent \$33.5 million on Australian and New Zealand drama programs in meeting its obligations under this scheme.

One of the initial objectives of both radio and television content regulation was to nurture the Australian music, film and television production industries. A requirement introduced in the 1956 *Broadcasting and Television Act* that Australians be employed in the production and presentation of television programs remained in force until 1995. In advertising, the Australian quota for commercial television introduced in 1960 was explicitly intended to nurture the development of a domestic production industry. In its 2000 Broadcasting Inquiry, the Productivity Commission took the view that while support for the production industry was a consequence of the content regulation system outlined in the *Broadcasting Services Act* (1992), this was not its principal purpose. The Inquiry's report noted that 'The stated rationale for Australian content policy is the promotion of social and cultural objectives, not assistance to the local production industry' (Productivity Commission 2000, 384). Over a decade later, in a changed media environment, the Convergence Review took a different approach. Reinforcing the guiding principle first outlined in the Framing Paper published in February 2011, the Review's *Emerging Issues* paper not only affirmed the importance of Australians having access to Australian content, but added a new principle which stated that this content 'should be sourced from a dynamic domestic content production industry' (Convergence Review 2011b, 9). The subsequent *Discussion Paper on Australian and Local Content* conceded that '[m]aintaining a particular level of activity for the content production industry is not a stated objective of the current regulation', but went on to note that 'it is generally accepted that if production activity is not maintained at a level that supports professional employment then the cultural and social objectives of Australian content regulation cannot be achieved' (Convergence Review 2011, 6). There are two problems with this reasoning. First, it leads to the view that it is the current production industry, with all its particular strengths and weaknesses, that is necessary to the social and cultural objectives, although of course this is not so, especially in a period of rapid change. Second, the fact that one cannot have local content without local production should not mean that local production becomes, by default, the policy priority. If it does, there is a clear risk that, where they diverge, the social and cultural objectives will take second place to industry support. In our view, this is what has occurred in the Convergence Review.

DEBATING AUSTRALIAN CONTENT REGULATION IN THE REVIEW

At an early stage, the Review outlined its view that existing regulation built around industry 'silos' and addressed to the particularities of different platforms and networks has been rendered obsolete by new technologies, market structures, business practices and audience/user behaviour. In place of the unique policy frameworks governing broadcasting, telecommunications and radiocommunications, the Review suggested an approach previously described by ACMA (ACMA 2011a, 6). This approach would 'recognise new market structures as a series of "layers" created by convergence, including the underlying infrastructure which transports the content, the network which manages and directs the content, the specific content or application and the device upon which the content is assessed' (Convergence Review 2011b, 12). Following from this, and informed by the concepts of fair competition and technology neutrality, the Review indicated that its subsequent work and ultimate recommendations would be guided by the concept of 'regulatory parity', or equal treatment of content and services. Although many submissions supported this general approach, many also pointed out that for various reasons 'regulatory parity' might not best

serve the objective of ensuring the production, distribution and availability of Australian content.

Australian content regulations have been imposed on broadcasters and not on other media and content providers in large part because of the principle that the type and weight of regulation applying to a service should be proportional to that service's degree of influence over community opinion and outlook. Without much in the way of empirical analysis, television broadcasting has historically been considered the most influential medium, and has therefore borne the heaviest burden in terms of content regulation. Free to air television broadcasters are more heavily regulated than subscription television broadcasters, principally because of the former's larger audience reach. The public service broadcasters, ABC and SBS, are not currently subject to the same regulations as their commercial counterparts, much to the latter's dismay. And at present, television-like services on the Internet, via catch-up services run by broadcasters both in Australia and internationally, internet protocol television (IPTV), and file-sharing networks, are not subject to any of these regulations or codes of practice.

Many submissions to the Review, particularly from industry, argued strongly against the extension of Australian content rules to convergent platforms on the grounds that the imposition of content rules in order to achieve some kind of regulatory parity could potentially have a chilling effect on innovation and competition.[3] At the same time, however, recent research by the ACMA shows high levels of public support for Australian content rules for Internet services. ACMA's *Digital Australians* online survey found that 84% of respondents agreed that it was somewhat/quite/very important for the Australian government to put in place rules to ensure that high-quality Australian content is available on the Internet (ACMA 2011b, 62-3). This is lower than the equivalent figure for television (92%) (ACMA 2011b, 62). But importantly the demographic registering the highest level of agreement with the proposition that it is important for rules to be put in place to support the availability of Australian content on the Internet is the 18-29 group. This is the demographic that recorded the highest levels of online video content consumption, the highest level of catch-up television viewing over the Internet, the highest level of offline and online viewing, and the highest level of online-only viewing (ACMA 2011b, 12-13).[4] That is to say, the group that is most engaged with online content is also the group that is most supportive of regulatory intervention to ensure the availability of Australian content on convergent platforms. It is, however, by no means clear that what this group wants would be the kind of content favoured by the Convergence Review — focus groups conducted by ACMA as part of the same research appear to have emphasised the importance for them of Australian information online, rather than content resembling traditional television.

In August 2011, the Review released a set of discussion papers, including one on Australian and Local Content. This paper canvassed a range of issues, including the underlying rationale for supporting Australian content production and distribution, support for new content forms, and options for future content regulation. The paper made explicit the link between the 'significant cultural benefits' flowing from Australian media content – principally 'a stronger sense of national identity, the promotion of social cohesion, and cultural diversity' – and the need for government support to ensure that such content would not be 'under-produced' (Convergence Review 2011a, 7). The 'special place in the content ecosystem' of drama, documentary and children's content was foregrounded, with the former in particular framed as 'arguably the most artistically rich content [with] the greatest capacity to tell complex stories and convey important social, cultural and political messages' (Convergence Review

2011a, 7). Despite the suggestion that a case could be mounted against the elevated status of drama, at no point did the Review research or explore this question, or provide detailed reasons for its position. When the Final Report appeared in April 2012, the qualification ‘arguably’ had disappeared; it is asserted as self-evident, without justification or equivocation, that ‘Drama contains the most artistically rich content and has the greatest capacity to tell complex stories and convey social and cultural messages’ (Convergence Review 2012, 59). The ultimate rationale for government intervention came down to the cost of producing these genres, and the reluctance of commercial broadcasters to fund and screen them without specific requirements.

The Review acknowledged in the Discussion Paper, albeit again prefaced as an arguable proposition, that the cultural objectives of Australian content policy ‘could also be supported by Australians participating in social media or interactive environments such as virtual worlds or games’ (Convergence Review 2011a, 10). Participants were invited to comment on whether policy measures should be implemented to promote these newer forms of content. It was clear, however, from the limited discussion of these newer forms in the Discussion Paper that the Review did not consider them on a par with the traditional genres of drama, documentary and children’s content. This would be reflected in the recommendations contained in the Final Report.

With the benefit of hindsight, it is possible to identify the Review’s preferences and ultimate recommendations in the questions posed in the Discussion Paper around particular content forms and types of regulation. The final recommendation to phase out the commercial television content quotas (albeit after a transitional period in which they would be increased and also imposed upon the public service broadcasters), and institute a minimum expenditure model to all media platforms along the lines of that applying to subscription television, can be projected from the ways in which the questions are framed in the Discussion Paper. And, as would become more obvious in the Final Report, the Review was clearly taking a lead from the October 2011 submission by Screen Australia (2011), which outlined most of the options for Australian content that appear in the Final Report’s recommendations.

In December 2011 the Review released its Interim Report (Convergence Review 2011c), which outlined the key areas for legislative and regulatory reform. These broadly followed the areas covered in the five Discussion Papers: media diversity, competition and market structure; layering, licensing and regulation; spectrum allocation and management; community standards; and Australian and local content. In the subsequent round of submissions, the Interim Report was criticised by many participants for the lack of detail in its recommendations. Many of these submissions also took issue with specific proposals outlined in the Interim Report, although when the Final Report was made public at the end of April 2012 – a month after its presentation to the Minister for Broadband, Communications and the Digital Economy – almost all of the recommendations remained intact.

THE FINAL REPORT AND RECOMMENDATIONS

Fourteen of the Final Report’s thirty recommendations relate directly to the regulation of Australian and local content on screen and radio, by commercial, community and public service enterprises. Several of the sixteen remaining recommendations also have the potential

to affect the regulation of Australian and local content, and we will turn to these first.

The proposal to create a new regulator to replace the existing Australian Communications and Media Authority has a number of implications, not least in its powers to ‘apply, amend or remove regulatory measures as circumstances require’ (Convergence Review 2012, xvi). These regulatory measures will obviously include those governing the production and supply of Australian and local content. The new regulator will also potentially impact Australian content regulation via its responsibilities to address changes in industry structure and to oversee the new content and communications regulatory policy framework.

This framework is built around the concept of a ‘Content Service Enterprise’ (CSE), a new term to cover those entities ‘involved in supplying content services’ (Convergence Review 2011c, 5) including, potentially not only broadcasters and print media companies based in Australia, but also those based overseas if they supply into the Australian market. The new framework is focused on regulating ‘significant’ enterprises, with significance determined by their ‘potential to influence’ (Convergence Review 2012, 7), as well as on the services they provide. This is a significant departure from the present system of media and communications regulation, which is organised around the level of influence of the particular delivery platforms on which those services are delivered.

In the new system, an enterprise’s ‘potential to influence’ will be determined by the new regulator, with particular attention paid to its reach in terms of the number of users of the content it controls across all platforms and services, and by the size of the revenue it draws from the Australian market. Through a series of measures including time spent with different media, advertising revenue for different media by market share, main sources of news, and online news sites accessed in Australia, the Review concludes that ‘traditional media remains [sic] dominant’ with television in particular considered the ‘most significant content service’ (Convergence Review 2012, 8). These findings, coupled with the high thresholds of users per month (500,000) and revenue (\$50m p.a. of ‘Australian-sourced content service revenue’ (Convergence Review 2012, 12)), mean that only a limited number of very large media companies appear likely to qualify as CSEs and therefore become subject to media diversity and Australian and local content regulations.

Of the fifteen companies that qualify as CSEs under the thresholds proposed in the Final Report, two are principally print and news media providers (Fairfax Media and APN News and Media), four are principally radio broadcasters (DMG Radio Australia, Australian Radio Network, Macquarie Radio Network, and Grant Broadcasters), one is a radio and television broadcaster (Southern Cross Austereo), one is the local subsidiary of a global media behemoth (News Limited), and seven are principally television broadcasters (Foxtel, Austar, [5] WIN Corporation, Ten Network Holdings, Prime Media, Seven West Media, Nine Entertainment). This indicative list of companies is drawn from research commissioned by the Review from PricewaterhouseCoopers that has not been made public. The Final Report contains a graphic (Convergence Review 2012, 12) illustrating the proposed thresholds and the relative positions of the aforementioned companies, together with three that narrowly failed to qualify. While Google comfortably surpasses the threshold for estimated total monthly audience/users in Australia, it appears to fail by some distance to reach the revenue threshold. Telstra is closer to the revenue threshold, but still below it, while also falling some distance below the threshold of users. The third of the also-rans, Apple, appears on this evidence to be well short of both thresholds.

The Final Report does not explain how the thresholds were determined, or provide details on actual figures or information on how data on revenue and use for the companies concerned was gathered. The Review anticipates that the new communications regulator will determine the initial threshold levels of revenue and users, and will periodically review them. The reporting requirements for likely CSEs and for those that might become CSEs in the future are not specified. In this case at least, the Review provides no real guidance as to how ‘principles-based regulation’ might be translated into the dreary business of collecting public revenue and ensuring compliance. Given the complexity and trans-national character of the new media industries, this promises to be a time-consuming, contested, and complicated research and assessment task for the new regulator.

The requirement that an enterprise ‘have control over the content supplied’ (Convergence Review 2012, 10) permits internet service and telecommunications providers to avoid classification as a CSE except where they have direct interests in (ie. control over) content provision as distinct from simply providing access to a service. The Final Report also places heavy emphasis on the production and control of ‘professional content’ as a determinant of CSE status. The explicit exclusion of user-generated content from regulation also excludes those enterprises whose principal business is hosting such content, although it is suggested that the growing practice of partnerships between enterprises like YouTube and ‘professional content providers’ means that in the future these enterprises might qualify as CSEs should their revenues and reach meet the thresholds set by the regulator.

One immediate problem here is that the distinction between ‘professional’ and ‘user-generated’ content provider is often not nearly as clear-cut as the Final Report seems to imply. Much will depend on the definition of ‘professional content’ adopted by the regulator. The Final Report is not enormously helpful in this regard, with the only attempt at a definition coming in a lengthy quotation from the ACMA’s report *Digital Australians* (ACMA 2011b), the nub of which is that ‘Content produced by traditional media organisations – whether for print or broadcast, and whether offline or online – was seen [by most research participants] as professional content, produced for broad audiences’ (quoted in Convergence Review 2012, 5). That is to say, one of the core determinants of a company’s status as a CSE, and therefore one of the core determinants of regulation intended, amongst other things, to secure the future production and supply of a broad range of Australian and local content, is whether an enterprise is a traditional media organisation that produces traditional media content. It is difficult to see how this could meet the Review’s brief to create a future-proof regulatory framework.

One other proposal that will likely have significant implications for Australian and local content production and supply is Recommendation 29 that the new communications regulator allocate channel capacity on the sixth planned digital television multiplex (commonly known as the ‘sixth channel’) to new and innovative services, and to community broadcasters. The Final Report also recommends that existing commercial free-to-air and public service broadcasters not be permitted to obtain any of this spectrum, which in concert with Recommendations 2 and 28 [6] would effectively ends the long-standing moratorium on new commercial broadcasting services entering the free-to-air market.

Among a series of recommendations specifically relating to Australian content regulation, the Final Report proposes a short-term increase in the quotas and minimum expenditure

obligations for drama, documentary and children's content applying to free-to-air and subscription broadcasters before they are ultimately phased out and replaced with an expenditure levy. Qualifying CSEs will be required to invest a percentage of total revenue earned from 'professional television-like content' (with a level of 3-4% suggested) either directly in the production of Australian drama, documentary or children's content, or as a contribution to a new Converged Content Production Fund (Convergence Review 2012, 68). This fund will be supplemented by direct appropriations from government, and spectrum fees paid by radio and television broadcasters. The likely amounts of these appropriations and fees are uncertain, and it is also unclear who will administer the fund. While the most obvious candidate is Screen Australia, a number of submissions to the Review registered concerns about the agency's transparency and allocation of existing funds.

The Converged Content Production Fund is one of three measures intended to support innovative and interactive content, along with Recommendation 17, to create an interactive entertainment tax offset similar to the existing Producer Offset scheme, and Recommendation 29, to open up the sixth channel for new and innovative services. However, the Final Report proposes that the Fund's primary roles will also be to support the production by the independent production sector of drama, documentary and children's content, the production of local and regional programming, and contemporary music. Coupled with the reasonable expectation that most CSEs will choose to invest in content production themselves rather than contribute to the Fund (in order to acquire intellectual property rights and therefore potentially benefit from future exploitation of that content), and the much-reduced spectrum access fee, the Converged Content Production Fund may not only have to spread its investment across a broad range of content types and genres, but also will have extremely limited funds to invest overall.

As a transitional measure, the Final Report recommends (Recommendation 18) that the existing 55% transmission quota for free-to-air commercial broadcasters be retained and supplemented with a 50% increase in the sub-quota obligations for drama, documentary and children's content. While a free-to-air broadcaster could choose to fulfill all of its new obligations on its main channel, the increase in the sub-quotas is a direct response to the limited volume of Australian content on the two additional channels operated by each free-to-air commercial broadcaster. The 10% minimum expenditure requirement for drama on subscription television is also to be retained in the interim, with the addition of a new 10% minimum expenditure requirement for documentary and children's channels on subscription services. Under Recommendation 26, the ABC will also be subject to the 55% overall Australian content quota on its primary television channel ABC1, with the other public service broadcaster, SBS, required to broadcast 22.5% Australian content. These requirements and Recommendation 25 (to update the ABC and SBS charters) have long been demanded by the commercial broadcasters, and could be considered to be preparatory measures in anticipation of the imposition of the 'uniform content scheme'. In reality, however, the 'uniform content scheme' is nothing of the sort, since it only applies to those CSEs with both 'significant revenues from television-like content' and interests in drama, documentary or children's content (Convergence Review 2012, xi). It is unclear whether or not the ABC and SBS will be treated as CSEs for Australian content purposes in the future.

Drama, documentary and children's content are the only specifically protected program genres, due to the expectation that they 'will continue to be the most significant forms of programming in the short to medium term' (Convergence Review 2012, 59). No evidence is

offered to justify this claim. Regulatory protections for these genres will also be maintained on the grounds of 'market failure'; that is, without such support, these genres would be 'under-produced' as commercial providers would simply look to program low cost/high return content, much of which would be likely to be sourced from overseas.

The emphasis placed in the Final Report on conventional genres, coupled with the adoption, virtually in toto, of Screen Australia's proposals for future Australian content regulation in its October 2011 submission, suggest that the Review's principal concern is not to maintain or adapt the social and cultural objectives of the previous framework to the convergent media environment. Instead, the Review is concerned with extending the model built around commercial television broadcasting, in order to ensure the sustainability of the traditional content production industry. The concerns of one well-established, highly articulate quarter of the digital media production sector may well be legitimate, worthy and defensible. They are also inevitably self-interested, and should invite careful scrutiny. Here they have prevailed, without extended analysis or investigation of the alternatives, or the consequences. The risk is that this will be at the expense of a flexible system that can respond rapidly to industry change and properly account for and nurture the dynamism emerging in the games, interactive, informal or semi-professional production sectors.

The interests of audiences and users of Australian content have also been left behind by the proposed framework. The eventual repeal of the overall transmission quota on free-to-air television not only removes the incentive for breadth and diversity of content, it also abolishes the requirement that certain kinds of Australian content be screened in prime time, or children's time, or indeed at any time. That is to say, the repeal of the quotas abandons the distribution guarantee inherent in the previous system, and opens up the possibility for Australian content to be marginalised in the schedule or on the menu. The proposal is essentially an extrapolation to the whole system of the pay television production quota, which, for all the problems it has raised as a somewhat arbitrary quid pro quo, nevertheless possessed some logic in terms of the repetitive programming practices of pay TV channels. In the free to view environment, it is very hard to see how this model can be presented as cultural or social policy. It is not sufficient to argue in response that the availability of catch-up services on the internet renders the concept of prime time redundant, or that audiences will be able to watch Australian content at their leisure. These are insufficient arguments because there is no certainty that broadcasters will maintain freely accessible internet-based catch-up services, or that all content on those services will be available to all Australians. On this question of distribution and availability, the review's industry support focus diverges from the longstanding cultural and social objectives of broadcasting policy.

In radio, after avoiding the issue of Australian music quotas until the Final Report, the Review ultimately recommends that the quotas will continue to apply to analog radio services, and be extended to digital-only radio services, as long as these services are offered by a content service enterprise (Recommendation 19). Music quotas will not be applied to occasional or temporary digital radio services (Recommendation 20), or internet-based music services (Recommendation 21). The continuation of music quotas will be welcomed by the Australian music industry, but the proposal as it stands will potentially reduce the overall amount of Australian music played on radio across the country. This is because radio stations owned by groups or entities that do not qualify as CSEs will no longer be subject to the Australian music quotas. While the requirement may ensure that stations owned by CSEs will likely maintain their share of Australian music, it is reasonable to assume that the absence of

equivalent requirements for smaller stations will result in an overall drop in the total volume of Australian music.

In terms of local content, the Final Report recommends that ‘commercial free-to-air television and radio broadcasters using spectrum should continue to devote a specified amount of programming to matters of local significance’ (Recommendation 22). Currently, television broadcasters must comply with a points system, which requires the broadcast of approximately six hours of local news or twelve hours of other locally significant material over a six-week period, with at least 45 minutes of local news or 90 minutes of other locally significant material broadcast every week. Radio broadcasters must broadcast minimum amounts of locally significant material, with the actual amount varying depending on the type of service and licence held. Some regional commercial radio broadcasters are also required to broadcast local news, weather, community service announcements and emergency warnings, albeit only after a ‘trigger event’ such as a takeover or merger. The Final Report does not specify the new requirements for regional radio broadcasters, except to note that it expects that ‘these requirements will vary considerably from region to region based on community needs and circumstances’ (Convergence Review 2012, 82). The requirements for holders of spectrum licences for television will also vary. The new regulator will set the ‘nature and quantum of local content obligations’ at some unspecified point in the future.

CONCLUSION

The Convergence Review has made a serious new attempt to address the digital media landscape. In the field of Australian content, proposals such as the plan for a production fund supporting innovation deserve serious consideration. However, in our opinion the Review suffers from an overly cautious approach to the problem of rapid change. Its focus on the immediate agenda of the established Australian production sector rather than the opportunities genuinely arising from new platforms and services represents a lost opportunity. In a period of disruption and volatility in all sectors of the digital economy, the claims of the local professional production industry, however worthy, should no longer serve as a proxy for a forward-looking cultural and social policy.

One further aspect of concern for professional and scholarly readers of the Review concerns its knowledge base. Unlike other inquiries in the field, including the recent Independent Media Inquiry and the ALRC Classification review, the Final Report of the Convergence Review, along with the various interim documents, is notably thin in terms of argument, evidence and analysis. There is a perfunctory tone to the exposition, as if the conclusions were manifestly inevitable and incontrovertible. Neither the draft nor final reports respond in detail to the substantial volume of submissions put to the review. Positions which have significant implications for the overall recommendations — such as the special valorisation of drama — are presented without consideration of alternative views, or any weighing of the evidence. Finally, it is worrying that relevant academic research and analysis, which was extensively drawn upon in the Finkelstein report, and somewhat less so in the ALRC report, is virtually invisible in the Convergence Review.

REFERENCES

ACCC. 2012. *Submission in response to Interim Report*. Accessed 29 May 2012. Available from:
http://www.dbcde.gov.au/__data/assets/pdf_file/0011/146279/Australian_Competition_and_Consumer_Commission.pdf.

ACMA. 2011a. *Broken Concepts: The Australian Communications Legislative Landscape*. Sydney: ACMA.

ACMA. 2011b. *Digital Australians: Expectations about Media Content in a Converging Media Environment*. Sydney: ACMA.

ACMA. 2011c. *Enduring Concepts: Communications and Media in Australia*. Sydney: ACMA.

AIMIA; Google; Telstra; Facebook; Yahoo!; ninemsn. 2012. *Submission in response to Interim Report*. Accessed 29 May 2012. Available from:
http://www.dbcde.gov.au/__data/assets/pdf_file/0005/146318/Australian_Interactive_Media_Industry_Association_joint_submission.pdf.

Australian Industry Group. 2012. *Submission in response to Interim Report*. Accessed 29 May 2012. Available from:
http://www.dbcde.gov.au/__data/assets/pdf_file/0005/146291/Australian_Industry_Group.pdf.

Convergence Review. 2011a. *Discussion Paper: Australian and Local Content*. Canberra: DBCDE.

Convergence Review. 2011b. *Emerging Issues Paper*. Canberra: DBCDE.

Convergence Review. 2011c. *Interim Report*. Canberra: DBCDE.

Convergence Review. 2012. *Final Report*. Canberra: DBCDE.

Dalton, Kim. 2007. 'Public Service Media' in *Record of the Communications Policy and Research Forum 2007*, compiled by Papandrea, F. and Armstrong, M: 81-86. Accessed 29 May 2012. Available from:
<http://www.networkinsight.org/verve/resources/CPRF07record.pdf>.

Ewing, Scott; Thomas, Julian, 2010. *The Internet in Australia, CCI Digital Futures 2010*, Melbourne: Swinburne University of Technology, May.

Foxtel. 2012. *Submission in Response to Interim Report*. Accessed 29 May 2012. Available from: http://www.dbcde.gov.au/__data/assets/pdf_file/0006/146274/FOXTEL.pdf.

iiNet; TransACT Communications; Internode; Adam Internet. 2012. *Submission in response to Interim Report*. Accessed 29 May 2012. Available from:
http://www.dbcde.gov.au/__data/assets/pdf_file/0003/146280/iiNet_joint_submission.pdf.

OECD. 2008. *OECD Policy Guidance on Convergence and Next Generation Networks*, OECD Ministerial Meeting on the Future of the Internet Economy, Seoul, Korea, 17-18 June 2008.

Productivity Commission. 2000. *Broadcasting: Inquiry Report*. Melbourne: Productivity Commission.

Screen Australia. 2011. *Submission to Convergence Review*. Accessed 29 May 2012. Available from: http://www.dbcde.gov.au/__data/assets/pdf_file/0014/143240/Screen_Australia.pdf.

Ward, Susan; O'Regan, Tom; Goldsmith, Ben. 2010. 'From *Neighbours* to *Packed to the Rafters*: Accounting for longevity in the evolution of Aussie soaps'. *Media International Australia* 136: 162-176.

ENDNOTES

[1] Average production cost per hour (AUD\$ millions) for particular forms of Australian content:

Form	2000/01	2009/10
Drama series/serials	0.32	0.35
Miniseries	1.52	1.01
Telemovies	1.74	1.68
Children's Drama	0.67	0.66

Source: Screen Australia 'Australian TV drama hours produced and costs per hour by format, 2000/01–2009/10'. Accessed 29 May 2012. Available from:

<http://www.screenaustralia.gov.au/research/statistics/mptvdramahoursxformat.asp>

[2] Quoting figures collated by Screen Australia and reported in its October 2011 submission, the Review (2011a: 8) notes that the indicative production cost of one hour of new release American drama for free-to-air television ranges from AUD\$2.5 million to over AUD\$5 million, while the same figure for Australian adult drama series over the last three years is between AUD\$400,000 and AUD\$1.8 million. The indicative cost to Australian broadcasters to licence one hour of American drama is between AUD\$100,000-400,000, while the cost of licencing or investing in one hour of Australian drama is between AUD\$350,000-1.4 million.

[3] See for example the submissions in response to the Interim Report by Foxtel (2012); the joint submission by AIMIA, Google, Telstra, Facebook, Yahoo! and ninemsn (2012); the Australian Industry Group (2012); the Australian Competition and Consumer Commission (2012); and the joint submission by iiNet, TransACT Communications, Internode and Adam Internet (2012).

[4] These findings support those of the CCI Digital Futures 2010 report by Scott Ewing and Julian Thomas, which reported that over 59% of people aged 18-29 downloaded or watched online video content at least weekly in 2009 (Ewing and Thomas 2010, figure 4.25: 33).

[5] The Final Report was released prior to approval being granted by the Australian Consumer and Competition Commission for the takeover of Austar by Foxtel.

[6] Recommendation 2: ‘There should be no licensing or any similar barrier to market entry for the supply of content or communications services, except where necessary to manage use of a finite resource such as radiocommunications spectrum’.

Recommendation 28: ‘Existing holders of commercial broadcasting licences should have their apparatus licences replaced by spectrum licences to enable them to continue existing services. In addition:

- a) as broadcasting licence fees will be abolished with the removal of broadcasting licences, the regulator should set an annual spectrum access fee based on the value of the spectrum as planned for broadcast use;
- b) commercial broadcasting licensees should have the flexibility to trade channel capacity within their spectrum.’

Cite this article as: Goldsmith, Ben, and Thomas, Julian. 2012. ‘The Convergence Review and the Future of Australian Content Regulation’. *Telecommunications Journal of Australia* 62 (2): --.1---.8. Available from: <http://tja.org.au>.

Please fill in information for ‘About the authors’

1 st author name:	Ben Goldsmith
Organisation/affiliation:	ARC Centre of Excellence for Creative Industries and Innovation, Queensland University of Technology
Short bio:	Ben Goldsmith is Senior Research Fellow in the ARC Centre of Excellence for Creative Industries and Innovation (CCI), at Queensland University of Technology. He was the lead author of three submissions by the CCI to the Convergence Review
Email:	Ben.goldsmith@qut.edu.au
Display email address in ‘About the authors?’	Yes
Photo (at least 600x600pix)	Attach separately

2 nd author name:	Julian Thomas
Organisation/affiliation:	Swinburne Institute for Social Research, Swinburne University
Short bio:	Julian Thomas is Director of the Swinburne Institute for Social Research at Swinburne University, and a member of the ARC Centre of Excellence for Creative Industries and Innovation. He is the co-author with Megan Richardson of Fashioning Intellectual Property: Exhibition, Advertising

	and the Press 1789-1918 , Cambridge University Press, 2012.
Email:	jthomas@swin.edu.au
Display email address in 'About the authors?'	Yes
Photo (at least 600x600pix)	Attach separately