Content Regulation in Australia - Plus ça Change?

Richard Pascoe takes a look at the recommendations in the Convergence Review final report which affect the regulation of content in a converged media environment.

Issues regarding content take up five of the 10 chapters of the Convergence Review: Final Report publicly released on 30 April 2012 (the ***Review***). Fair enough, perhaps, after all content is a (the?) key element in any debate about convergence. Still, regulation of content seems at times to verge on being an obsession in Australia.

In some respects it always has been — one need only look at the detailed, formulaic, and endlessly bickered-over local content and children's content requirements for television, and similarly prescriptive requirements for radio.

Add to this the reality that the technological basis for the current rules is fast disappearing, that generational change is happening in the way in which people consume and use content, and that content itself is now readily and sometimes preferably available from just about anywhere in the world instantaneously (or near enough). It is enough to give even the most even-tempered of policy makers, a migraine.

So perhaps it is no wonder that the analysis of, and recommendations regarding, content in the Final Report look like they do — an attempt to find a middle path through all of the above.

Content Standards

The Review was asked to look at content standards broadly, and to consider within that, the findings of the Australian Law Reform Commission (***ALRC***) review of the National Classification Scheme, and also the Independent Inquiry into Media and Media Regulation (***Finkelstein Inquiry***).

Out of this, the Review recommended that a new communications regulator be responsible for 'all compliance matters related to media content standards, except for news and commentary.'[1] In doing so, the Review has shied away from including news and commentary within the remit of the new regulator, preferring instead to focus on matters arising from news and commentary to be dealt with by an industry 'self-regulatory news standards body operating across all media ... to enforce a media code aimed at promoting fairness, accuracy and transparency in professional news and commentary.'[2] Interestingly, the Review did not endorse the Finkelstein Inquiry's recommendation to establish a statutory authority to regulate news and commentary, and regards such an approach as 'an option of last resort available to government.'[3] The Review instead 'is recommending an industry-led approach that is more likely to produce immediate results and a better long-term solution.'[4]

Content Service Providers

The Review then ties content regulation back to its concept of content services enterprises (***CSEs***). In particular, the Review recommended that:

> a regulatory framework built around the scale and type of service provided by an enterprise rather than the platform of delivery is best suited to this environment. The Review has developed the concept of a 'content service enterprise' to identify significant enterprises that have the most influence on Australians.[5]

The criteria that the Review sets out for determining whether a content provider is a CSE are:

- they have *control* over the content supplied
- there are a large number of Australian *users* of that content
- they receive a high level of *revenue* from supplying that content to Australians.[6]

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In relation to control over content the Review recommended:

> that where regulation is necessary, it should focus on enterprises that control professional content and should explicitly exclude user-generated content. User-generated content is typically short-form amateur video published on social media sites where the only control open to the platform provider is the ability to take down the content.[7]

A note of warning from the Review, however, was included: user generated content providers and aggregators may, depending on their development, become CSEs, particularly as they enter into arrangements with professional content providers.[8]

The Review then recommended in relation to the thresholds that should apply to the other two criteria: the relevant revenue threshold should be around $50 million a year of Australian-sourced content service revenue and the audience reach threshold should be set at audience/users of 500 000 per month.[9]

All of which leads to the table that has already been the subject of much comment and sets out those enterprises that the Review considers should, initially, be considered as CSEs:[10]

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1 Commonwealth of Australia, *Convergence Review Final Report,* (March 2012) xvii.

2 Ibid 38.

3 Ibid 37.

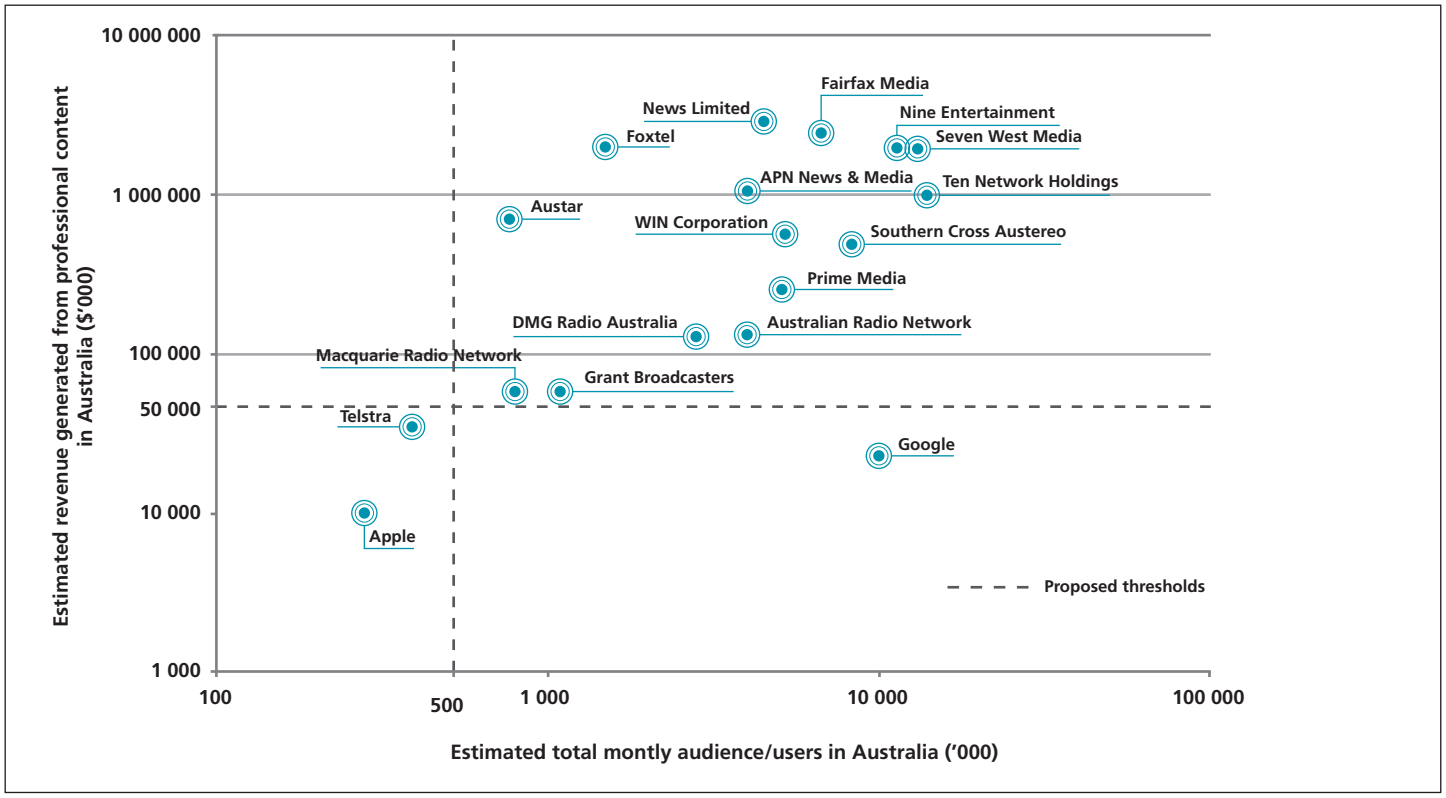
4 Ibid.

5 Ibid 7.

6 Ibid 10 (emphasis in original).

7 Ibid 11.

8 Ibid.



Source: Commonwealth of Australia, *Convergence Review Final Report,* 12; Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise* (March 2012).

And so, the new enterprises that will be CSEs, and thus will require content regulation will be — the same group of enterprises that are currently the subject of content regulation.

This recommendation reflects the difficulties the Review faced, and that ongoing regulation faces. In effect, the Review has said well, yes, things are changing, but the proposed CSEs still have the most influence and we do not see that changing in the near term, so you guys are still it when it comes to content regulation. The Review has declined to spar with the likes of Google, Facebook, Apple, etc. It is apparently not necessary at the moment. It is the regulatory version of kicking the can down the road.

A National Classification Scheme

The Review recommends that the new regulator have 'responsibility for administering the new national classification scheme proposed by the recent Australian Law Reform Commission review.'[11] The Review additionally recommends that within the new regulator, an independent classification board be established '*to undertake specific classification functions*.'[12]

In addition to this, the Review recommends that CSEs be subject to:

- children's television content standards, where appropriate [and]
- other content standards made by the communications regulator where there is a case for regulatory intervention, with the starting point being the matters covered by the existing co-regulatory codes made under the *Broadcasting Services Act 1992*.[13]

But in a sign that other content providers remain on the radar, the Review also recommends that:

> Content providers that are not of sufficient scale and scope to be classified as a content service enterprise should be encouraged to opt in to content standards applying to content service enterprises, or to develop their own codes.[14]

How the likes of Google, Apple and Facebook will respond to such an invitation will be interesting to see.

Specifically in relation to content standards, the Review makes the very sensible observation that for current content standards regulation 'content-specific, platform-specific and provider-specific rules are inconsistent, confusing and inflexible.'[15]

The Review also acknowledges that '[c]onvergence is putting increasing pressure on the current platform-specific approaches to content standards.'[16]

In the end, the Review recommends:

> The proposed new national classification scheme, administered by the new communications regulator, should regulate the classification of content across all media platforms.
>
> Two additional obligations should apply to content service enterprises:
>
> - Content service enterprises that provide news and commentary should be required to participate in a self-regula-

9 Ibid 12.

10 Ibid.

11 Ibid 38.

12 Ibid (emphasis added).

13 Ibid 38.

14 Ibid.

15 Ibid 40.

16 Ibid.

tory media industry scheme intended to ensure standards of fairness, accuracy and transparency of that content.

- Content service enterprises should also be subject to other content standards set by the regulator, where there is a clear case for legislative intervention (for example, in relation to children's television content).[17]

In particular, the Review adopts the recommendations of the ALRC review in relation to the National Classification Scheme:

> A new classification board responsible for making classification decisions and approving industry classifiers should be located within the new communications regulator. However, the new classification board should be independent of the regulator in performing its statutory functions.
>
> This would ensure that there is a single convergent regulator, while maintaining the independence of the classification board for specific functions.
>
> The Review also endorses other key features of the national classification scheme proposed by the ALRC. These include:
>
> - obligations to classify and restrict content that are technology neutral and apply to content providers that distribute content to the Australian public
> - an obligation to classify feature films, television programs and computer games before content providers sell, screen, provide online or otherwise distribute them to the Australian public
> - new classification legislation that incorporates all [Commonwealth and state] classification obligations currently applying to media content …
> - powers for the regulator to approve industry codes setting out how providers will comply with the scheme …
> - a requirement for content providers to 'take reasonable steps' to restrict access to adult content (that is or is likely to be 18+ or X18+), where that content is sold, screened, provided online or otherwise distributed to the Australian public
> - broad discretion for the regulator whether to investigate complaints
> - measures to restrict access that are complementary to other measures such as cybersafety education and use of parental controls on devices.[18]

It is important to note that the above scheme would apply to all content across all platforms (including both standalone and online games). This part of the proposed content regulatory package is not restricted to CSEs.

In particular, the Review adopts the approach of the ALRC report in relation to adult content. There will be a shift in emphasis from trying to classify this material in each instance, to restricting access to the material, regardless of its actual classification. The Review quotes from the ALRC Report:

> Formal classification is not the only response to concerns about media content, including concerns about protecting children from material likely to harm or disturb them. The sheer volume of adult content on the internet suggests that the focus should be on restricting access to this content, rather than having it formally classified by Australian classifiers. This approach also accords with the principle that classification regulation should be kept to a minimum needed to achieve a clear public purpose.[19]

The Review then notes that such an approach would replace schedules 5 and 7 of the *Broadcasting Services Act 1992* (Cth), but that this new approach would be technology neutral in relation to regulating prohibited or restricted content.[20]

In addition, it would mean that MA15+ material no longer requires a restricted access system and that X18+ material would no longer be prohibited, and could be provided, if there is a restricted access system in place.[21]

The main practical changes from the current arrangements would be that there could be an R18+ category of games (as long as there is a restricted access system in place) and that online content providers would no longer be required to block access to X18+ content (again, as long as there is a restricted access system in place).

And so, the new enterprises that will be CSEs, and thus will require content regulation will be — the same group of enterprises that are currently the subject of content regulation.

The Review's adoption of the ALRC's recommendations make sense — a lot of work went into the ALRC's review and they represent a genuine attempt to balance (or at least find a path through) the competing and noisy interests regarding content standards. Those recommendations are platform technology neutral and, accepting that some regulation of content is necessary, at least attempt to minimise that regulation and allow end users the ability to choose what content they want to view, while putting in place mechanisms to prevent access to harmful or inappropriate content by children.

Australian Content requirements

The Review then deals with Australian content. It divides this into screen and radio content. Australian content has been a perennial issue. The Review acknowledges this and sets the scene for its recommendations:

> The ongoing production and distribution of Australian content is a key issue for the Review. Since the inception of television broadcasting, governments of all persuasions have sought to ensure that Australian professional content is shown on our screens. Support for Australian content is based on the social and cultural benefits that come from programs that recognise Australian identity, character and cultural diversity. The Review received many submissions supporting the value of Australian content and the continuing need to promote its production in a converged media environment.[22]

The Review also warns that 'the emergence of new online services, digital multichannels and on-demand programming makes the current support measures unsustainable in the longer term.'[23]

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17 Ibid 41 (emphasis added).

18 Ibid 44–5 (citations omitted).

19 Ibid 46, quoting Australian Law Reform Commission, *Classification—Content Regulation and Convergent Media,* Report No 118 (2012) 26.

20 Ibid.

21 Ibid 47.

22 Ibid 59.

23 Ibid.

Despite the fact that we all want it, we all like it and there is and is going to be an ongoing need for Australian-made content, the key issue is, who is going to pay for it? The Review's answer is apparently simple:

> content service enterprises that earn significant revenues from providing professional 'television-like' content to large audiences will be required to invest in the production of Australian content.[24]

But how is this actually going to be implemented? The Review recommends that:

> The quotas and minimum expenditure obligations applying to the free-to-air and subscription television sectors should be repealed and replaced with the uniform content scheme set out in recommendations 14 and 15.[25]

All of this demonstrates the problems that arise once you take the decision to regulate the production of content. This is not to say that regulation of content production in Australia is not necessary or desirable, but it becomes difficult and costly to implement.

Recommendations 14 and 15 propose that:

- Content service enterprises that meet defined service and scale thresholds should be required to invest a percentage of their total revenue from professional television-like content in the production of Australian drama, documentary or children's content or, where this is not practicable, contribute to a new converged content production fund.
- The government should create and partly fund a new converged content production fund to support the production of Australian content.[26]

The Review also recommends that:

- Premium television content exceeding a qualifying threshold should attract the 40 per cent offset available under the Producer Offset scheme. This will bring premium television content in line with the current rate of offset available for feature film production.
- Interactive entertainment, such as games and other applications, should be supported by an offset scheme and the converged content production fund.[27]

In effect, this is a play-or-pay scheme for CSEs. Either make and pay for it yourself, or contribute to a fund which will be set up by and subsidised by the Government.

So who are the CSEs that earn significant revenues from providing 'professional "television-like" content to large audiences?'[28] Well, interestingly, they turn out to be a subset of the CSEs already identified by the Review. After much analysis and discussion, the Review determined that entities above the thresholds in the chart below would be the subject of this regulation:[29]

Again, the larger online content providers find themselves happily below the recommended thresholds. But this may change, says the Review:

> Given that the broadcasters that exceed the revenue and audience thresholds in [the chart above] (see dashed lines) have demonstrated their capacity to contribute to Australian content outcomes over a significant period of time, a revenue threshold of $200 million and an audience threshold of 500 000 is consistent with sustainable investment in Australian content at this time. In the future it is realistic to expect that this group of services will be joined by non-broadcast services as those services continue to expand in line with shifts in consumer preferences.[30]

The message here is again, things are changing, and we will keep an eye on this, but no material changes yet. More interesting discussions await.

A converged content production fund

In the meantime, the Review notes that the new regulator would need to set the amount of contribution to the new fund. It noted that the actual level of contribution will depend on the actual number of CSEs and their latest revenue figures at the relevant time. The Review did observe that for Australian content to be maintained at its current level, the 'traditional broadcasters would need to invest 3 to 4 per cent of their revenue on Australian drama, documentary and children's programs if the scheme were implemented now.'[31]

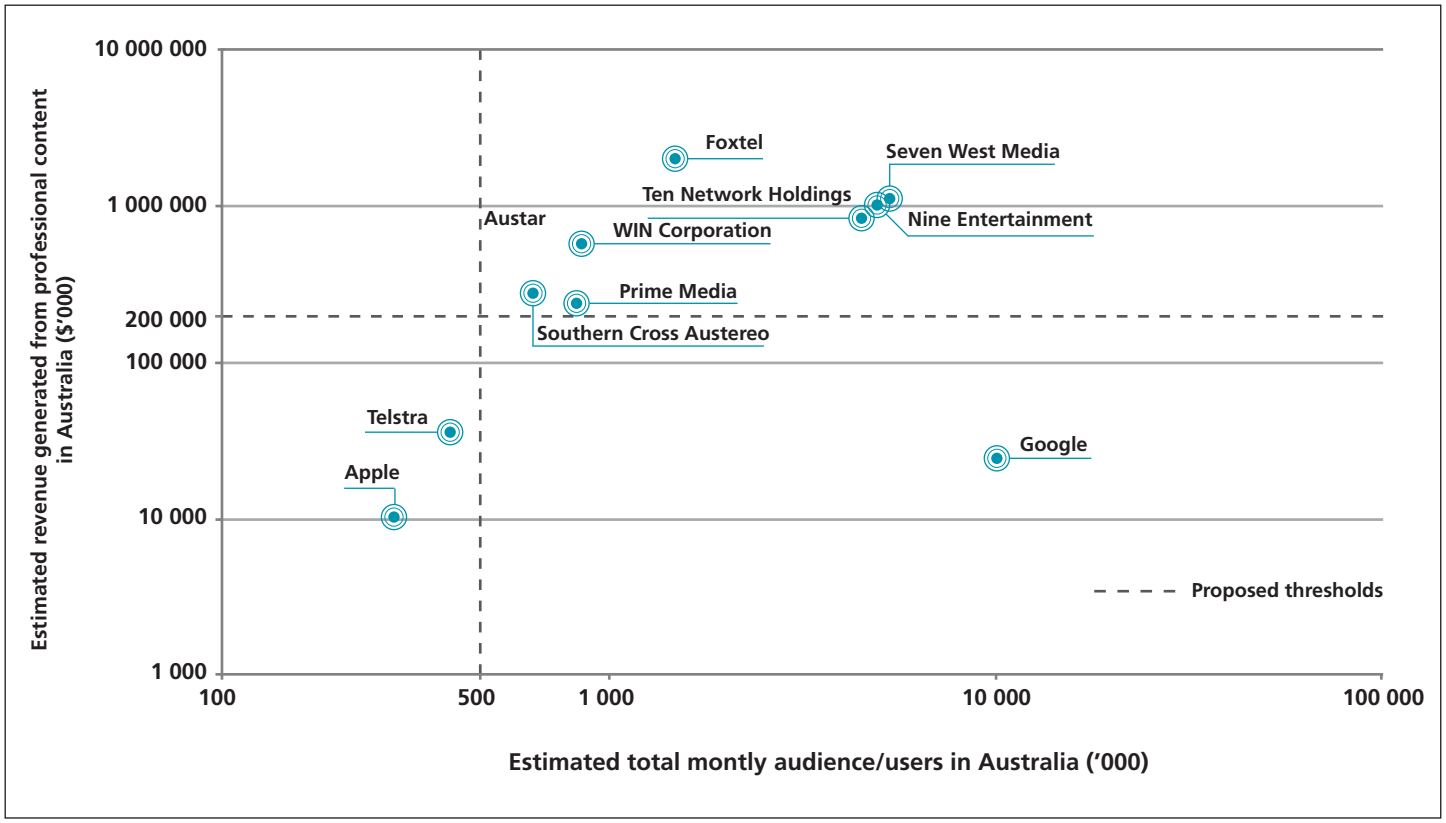
The actual converged content production fund's mission

> would be to develop new and innovative content suitable for all platforms. In addition, the coverage of the fund would be broader than existing arrangements because it would support both audio and audiovisual content. The fund would also focus on innovation in service delivery in both of these sectors, with a special emphasis on regional and community content service providers. The fund's primary roles would be to support:
>
> - the production of programs in key genres, including drama, documentary and children's content, by the independent production sector
> - the production of programming for local and regional services
> - new forms of content delivery and platform innovation, including the production of new media content such as interactive apps and webisodes
> - contemporary music.[32]

This is a broad remit and the Review does not go into any further detail regarding the operation of the fund, other than to note that it:

- 'would invest in content productions on a competitive basis';[33]
- would be funded by contributions from the uniform content scheme, Government appropriations, and 'spectrum fees paid by radio and television broadcasters';[34] and

24 Ibid.
25 Ibid (emphasis added).
26 Ibid (emphasis added).
27 Ibid (emphasis added).
28 Ibid.
29 Ibid 67.
30 Ibid (emphasis added).
31 Ibid 68.
32 Ibid 72.
33 Ibid.
34 Ibid 72–3.



Source: Commonwealth of Australia, *Convergence Review Final Report,* 67; Derived from PricewaterhouseCoopers, *Exploring the Concept of a Content Service Enterprise* (March 2012).

- 'should be able to be established as soon as possible, and in advance of the uniform content scheme if necessary.'[35]

All of this demonstrates the problems that arise once you take the decision to regulate the production of content. This is not to say that regulation of content production in Australia is not necessary or desirable, but it becomes difficult and costly to implement. As a nation, we all seem to say that we want and like well-made Australian content, but we have trouble trusting that this will translate into the appropriate natural market forces that would dictate that the content be produced and shown if there were no regulatory intervention. This has always been at the centre of the debate over Australian content.

In addition, the Review has noted, but has not really addressed, the structural changes that are upon us. Despite ongoing territorial copyright issues, the reality is we have a global market and appetite for content. We also have increasingly varied means and opportunities to consume the content we want to see and hear. Even accepting the Review's statements that it is the traditional players that still have the most influence, this will change. The difference between 2012 and previous reviews of content and media is that Australians now know what they are missing out on if attempts are made to stop or restrict access to content they want. That is the real challenge for the sector.

Whether this new fund will ease that debate remains to be seen. There is a sense, however, that this new approach is arranging things nicely in the little safe pond, and just hoping that the inundation that is upon us will somehow spare us any local damage.

In addition, the Review rides an uneasy line regarding innovation in the sector. The message seems to be — while you are small, we will leave you alone, but get too successful and you may need to be regulated regarding Australian content.

Well, maybe, but equally the message to existing big players could be adapt or die. No-one really bemoans the decline of fixed line telephones, or the innovation of electric public lighting, or any other of the myriad developments in technology over the last 100 years. And despite some views, there is nothing inherently different about the media sector that insulates it from further technological change.

Radio content

Meanwhile, in relation to radio, the Review has adopted a similar approach, recommending that:

- Australian music quotas should continue to apply to analog commercial radio services offered by content service enterprises and be extended to digital-only radio services offered by content service enterprises.
- Music quotas should not be applied to occasional or temporary digital radio services.
- Given the evolving state of internet-based music services, quotas should not be applied at this time.[36]

Having said this, the Review notes the difficulty, if not futility, of attempting to impose quotas on Internet based services:

> The principle of regulatory parity suggests that radio-like services on the internet and terrestrial radio services should be treated in a similar manner. However, the diversity of audio formats and music delivery mechanisms on the internet would make it difficult—if not impossible—to consistently regulate non-simulcast internet-based services through a quota system. There are also different transactions on internet-based services (for example, purchasing music as opposed to listening to advertising-supported or subscription services, the user-directed nature of some services, and subscriber and purchase models). In light of these issues, there is no compelling reason to institute music quotas on internet-based services.[37]

35 Ibid 73.

36 Ibid 76 (emphasis added).

The Review's use of the phrase '*no compelling reason*' is interesting. There is a temptation to mentally add the words *'nor any real ability*' to the sentence. That said, the Review acknowledges that these services are already well used, much loved and happily providing services people want and are prepared to pay for without any particular concern for the country of origin of that content. In addition, we can already stream many thousands of radio stations from around the world. Those stations will be singularly unconcerned about whether they may become theoretically subject to Australian music quotas. And if they were, it is easier to deny access to Australian IP addresses, in which case the business model for proxy IP address providers improves significantly.

Local content rules

In a similar vein, the Review leaves the local content rules for radio and television largely untouched. The Review recommends that:

- Commercial free-to-air television 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 television and radio should be implemented [in connection with the obligations to devote a specified amount of programming to material of local significance].
- The current radio 'trigger event' rules should be removed.[38]

The only significant change is the removal of the trigger event rules, which currently apply when there is

> a transfer of a regional commercial radio licence; the formation of a new registrable media group that includes a regional commercial radio broadcasting licence; or a change of controller of a registrable media group that includes a regional commercial radio broadcasting licence.[39]

The rules that would be removed currently require broadcasting a minimum number of:

- eligible local news bulletins (five per week of at least 12.5 minutes per day)
- eligible local weather bulletins (five per week)
- local community service announcements (one per week)
- emergency warnings (as required).[40]

The rules regarding local content have long been the subject of intense and even passionate views regarding the need for local communities (especially regional and rural communities) to have proper access to relevant local news and information. In a country such as Australia, with its vast distances and small and physically remote communities, this has been a big issue. It will be interesting to see if things change with the rollout of the National Broadband Network and (assuming for the moment that it continues regardless of any change of Government) the deployment of services to regional and rural communities by means of the NBN. The issues about cost of production and distribution of local content may reduce somewhat and new and innovative service providers may find business models for servicing local content needs.

In the meantime, however, carry on.

Conclusion

In essence, a new regulator, incorporating the functions of the office of classifications, the characterisation of Australia's larger professional content providers as CSEs, the adoption of the ALRC's recommendations on content standards, and the establishment of a converged content production fund to ensure the ongoing production and distribution of Australian content are the key features of the Review's recommendations regarding content regulation.

The Review has been public since 30 April 2012. The Government has said it will respond in due course. Undoubtedly, more fun awaits.

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37 Ibid 78.

38 Ibid 79.

39 Ibid 80.

40 Ibid.