



**Australian Mobile  
Telecommunications  
Association**

# **Convergence Review**

**AMTA Submission**

October 2011

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## 1. Introduction

1.1 The Australian Mobile Telecommunications Association (AMTA) is the peak industry body representing Australia's mobile telecommunications industry. Its mission is to promote an environmentally, socially and economically responsible, successful and sustainable mobile telecommunications industry in Australia, with members including the mobile Carriage Service Providers (CSPs), handset manufacturers, network equipment suppliers, retail outlets and other suppliers to the industry. For more details about AMTA, see <http://www.amta.org.au>.

1.2 AMTA has been an active participant in the Convergence Review (the Review) process and has previously provided submissions on the terms of reference of the Review and Framing Paper.

1.3 AMTA is broadly supportive of the ten principles developed to guide the Review process that were finalised with the publication of the *Emerging Issues* paper. In particular, AMTA appreciated the variation to principle 8 that gave recognition to the increasing tendency of Australians to rely on mobile devices to access content:

***“Principle 8: Australians should have access to the broadest possible range of content across platforms, services and devices.”***

1.4 While all the principles are important, AMTA believes that adherence to principles 1 and 3 will be fundamental in ensuring that any regulatory reforms resulting from the Review process are light in touch, promote competition and encourage further innovation and investment in convergent technologies and infrastructure.

***“Principle 1: Citizens and organisations should be able to communicate freely, and where regulation is required, it should be the minimum needed to achieve a clear public purpose.”***

***Principle 3: The communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public.”***

1.5 AMTA welcomes the opportunity to comment on the detailed discussion papers. As not all of the issues considered in the discussion papers are relevant to the mobile telecommunications industry we have accordingly provided varying levels of commentary on the following papers below:

- Spectrum Allocation and Management
- Layering, Licensing and Regulation
- Australian and Local Content
- Community Standards

## 2. Executive Summary

- 2.1 While content and consumer desire for accessibility to content anytime and anywhere are the drivers of convergence, the underlying infrastructure and carriage of content is still fundamental to delivering on these consumer expectations. The challenge for government and regulators lies in the fact that in a converged environment particular types of content and infrastructure are no longer linked and content is increasingly global in nature.
- 2.2 It is increasingly true that consumers are able to access the same content on multiple screens and platforms almost seamlessly. The distinctions between traditional media broadcasting services, such as television, and new media platforms, such as mobiles and the internet, are increasingly blurred from the consumer's perspective.
- 2.3 AMTA believes that convergence provides exciting opportunities for both industry and consumers. Existing legislative and regulatory frameworks are challenged in their ability to adapt and respond to such rapidly evolving technological changes and developing business models. The ACMA has clearly recognised this challenge in its recent publication, *Broken Concepts* that examines how the process of convergence has strained legislative concepts that form the basis of current communication and media regulatory arrangements, including legacy regulation of mobile services.<sup>1</sup>
- 2.4 While not part of the terms of reference for the Review, it is imperative that the development of a new media and communications legislative and regulatory framework include an assessment of the continuing relevance and application of legacy mobile regulation so it does not act as a dead weight to future innovation and competition in a converged market. AMTA suggests such a consideration of legacy mobile regulation will need to be included in any proposals for legislative and regulatory reforms made by the Review.
- 2.5 AMTA's position on the issues raised in the Review's discussion papers can be broadly summarised as support for:
  - ❖ A regulatory framework that encourages continued innovation in convergent technologies and promotes investment in infrastructure, including spectrum for mobile broadband.
  - ❖ A layered analysis that recognises and maintains a distinction between the regulation of content that is produced and supplied by content service providers and the distribution and delivery of such content by carriage service providers. Regulation at the content layer should be separated in both practice and principle from any regulation of the means or platform of delivery. Further, a layered analysis needs to recognise that the content layer is complex and varied and includes a range of content services and applications.

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<sup>1</sup> ACMA *Broken Concepts: The Australian communications legislative landscape* August 2011

- ❖ The principle of regulatory parity with regard to the consistent regulation of content with the proviso that the regulatory framework allows for flexibility so that industry can continue to adapt to the rapid pace of change and development of business models and technology in this sector. AMTA also believes that some regard should be given to the various delivery platforms involved in a converged market in order to make an assessment of the level of impact and accessibility of various platforms.
- ❖ No extension of legacy broadcasting regulations (such as local content rules or the national classification scheme) to new media platforms.
- ❖ A single regulatory framework for the management and allocation of spectrum, including broadcasting spectrum. This should be combined with a separation of the regulation of content or services delivered over spectrum from the regulation of spectrum as a resource.

## 3. Spectrum allocation and management

### Background

- 3.1 The mobile telecommunications industry makes a substantial contribution to the Australian economy. An Access Economics report commissioned by AMTA found that the industry contributed \$17.4 billion to the Australian economy in 2008-09.<sup>2</sup> AMTA is planning further research to analyse and quantify the current contribution made by the sector to Australia's economic productivity.
- 3.2 A recent industry report found that convergence and the availability of high-speed broadband networks is driving investment in the media and communications sector with investment levels predicted to reach \$6.4 billion by 2014.<sup>3</sup>
- 3.3 Mobile broadband is proving to be an enabling force in a converged environment. It is a global driver of productivity and economic growth. A study conducted by Ericsson and Arthur D. Little found that for every 10 percentage point increase in broadband (fixed and mobile) penetration that GDP increases 1 percent. The study also confirmed the correlation between faster broadband speeds and increases to GDP.<sup>4</sup>
- 3.4 AMTA believes that continued investment in infrastructure and innovation must be encouraged and fostered by the government's policy and regulatory framework so that the benefits of convergence and a digitised economy can be realised by all Australians.
- 3.5 Australia now leads the world in the adoption of smartphone technology with 37% of Australians owning a smartphone and predictions that this will rise to 50% by 2012.<sup>5</sup> As the expectations of end users rises there is increasing pressure on the mobile network operators to ensure they have the capacity to meet an ever increasing demand for faster speed and bandwidth-hungry mobile data applications and services.

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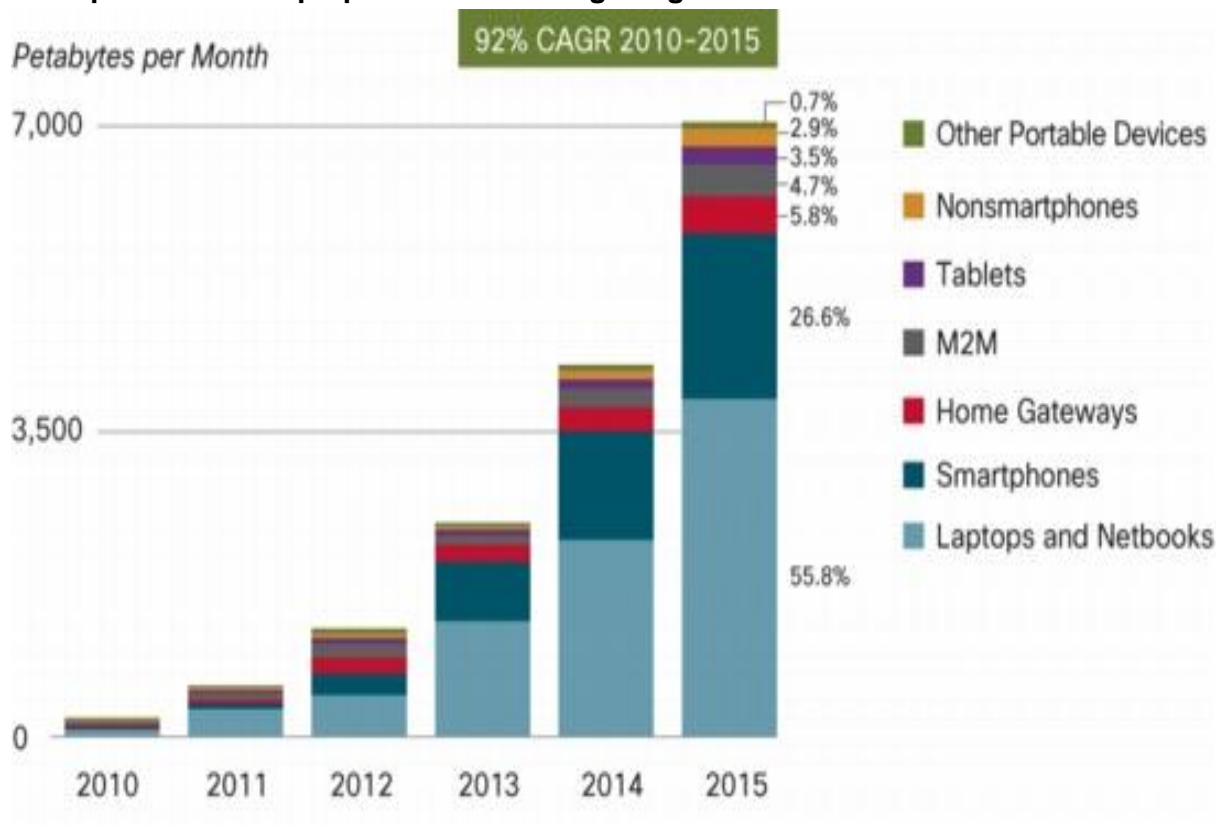
<sup>2</sup> Access Economics Report, *Economic Contribution of Mobile Telecommunications in Australia*, June 2010.

<sup>3</sup> "Comms and Media Sector spend to grow to A\$6.4 billion by 2014: IDC" Communications Day 18 Oct 2011

<sup>4</sup> Ericsson [New study quantifies the impact of broadband speed on GDP](#) 27 Sept 2011

<sup>5</sup> Australia's White Hot Smartphone Revolution, Sydney Morning Herald 8 Sept 2011

3.6 Smartphones and Laptops are now leading the growth in data traffic.



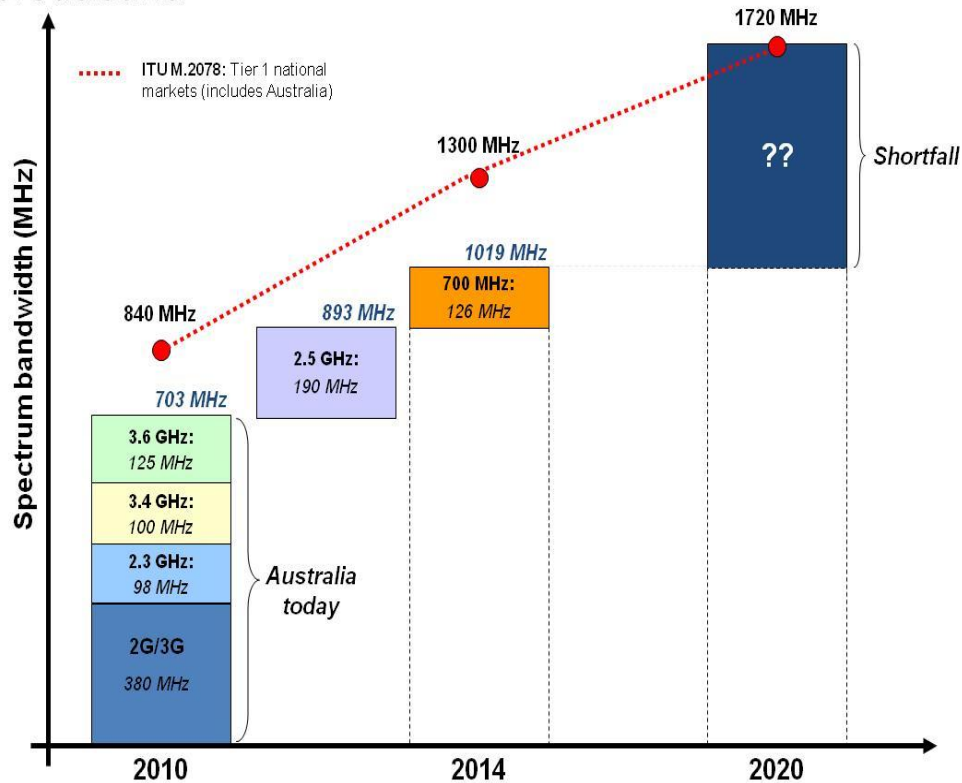
Source: Cisco VNI Mobile, 2011

- 3.7 AMTA recognises and supports the government’s decision to clear a contiguous 126 MHz block of Digital Dividend spectrum between 694 and 820 MHz (including the 2 x 45 MHz for commercial mobile broadband use) so that it can be auctioned and used to deliver substantial connectivity and productivity benefits for Australia. This will enable carriers to roll-out the next generation of mobile communications services.
- 3.8 However, AMTA notes that the ACMA has recognised in its *Towards 2020* paper that Australia will require more spectrum for mobile broadband than the Digital Dividend will release.<sup>6</sup> In fact, the ACMA estimates that Australia will require a further 300 MHz of spectrum for mobile broadband by 2020. In our response to the ACMA’s paper, AMTA has expressed concerns that this estimate is based on a potentially flawed analysis of the baseline demand. AMTA is committed to formulating an industry view on medium to long term demand for spectrum and intends to commission research and consult closely with the ACMA with the intention that this will inform ongoing analysis of spectrum demand for mobile broadband.<sup>7</sup>

<sup>6</sup> ACMA [Towards 2020 – Future spectrum requirements for mobile broadband](#) May 2011 IFC 13/2011

<sup>7</sup> [AMTA Submission](#) on ACMA’s *Towards 2020 – Future spectrum requirements for mobile broadband* July 2011

## Spectrum demand forecast 2010 - 2020 – mobile broadband



Source: ITU-R Report M.2078 (2007) Demand Forecast 2010-2020

- 3.9 AMTA believes that in order to reap the economic benefits of mobility in a converged environment we must ensure that spectrum policy includes a strategy to identify medium to long term spectrum requirements for mobile broadband. Such a strategy will necessarily involve close consultation and partnership between industry, government and the ACMA.
- 3.10 Any review of Australia's long-term arrangements for the management and allocation of spectrum should also include a consideration of spectrum used for broadcasting and its future regulation as per our comments on specific questions asked in the *Discussion paper: Spectrum Allocation and Management* below.



## Broadcasting spectrum and convergence

### ***How will major broadcasting policies best be best dealt with?***

- 3.11 AMTA believes that the regulation of spectrum would be best managed under a single legislative regime, that is, the *Radiocommunications Act 1992* (the Radcoms Act).
- 3.12 AMTA therefore supports a migration of the regulation of broadcasting apparatus licences from the *Broadcasting Service Act 1992* (the BSA) to the policy and regulatory framework of the Radcoms Act.
- 3.13 AMTA believes that the spectrum management regulatory regime should be based on the principle of technology neutrality. The transfer of broadcasting licences to the Radcoms Act will ensure a technology and service neutral spectrum licensing regime in term of allocation methods and renewal processes.
- 3.14 AMTA supports this migration with regard to the technical regulation of spectrum, including allocation and management, as distinct from regulation relating to the provision of content which has also historically been managed under the BSA. AMTA considers that it is important to maintain a distinction between the technical regulation and resource management of spectrum and any regulation of content and services provided using that spectrum. AMTA believes the broadcasting policies relating to content can continue to be dealt with outside the framework of the Radcoms Act.
- 3.15 Transitioning the Broadcasting Services Bands (BSBs) to management under the Radcoms Act will allow for greater competition, innovation and flexibility and will encourage spectrum to move to its highest value use through the application of market forces.
- 3.16 AMTA believes that it is important that spectrum licence owners should have flexibility to devise their own business plans and make their choices regarding the use of spectrum licensed to them under the framework of a technology and service neutral spectrum licensing regime.

### ***Are the BSBs necessary to achieve particular spectrum policy outcomes?***

- 3.17 No, AMTA does not believe the BSBs are necessary to achieve particular spectrum policy outcomes. Policy outcomes related to the regulation of broadcasting and content services can and should be separated from spectrum policy outcomes regarding the efficient management and allocation of spectrum.
- 3.18 Spectrum policy outcomes that would have previously been achieved through the exercise of the BSB planning powers can still be achieved by placing terms and conditions on licensees under the framework of the Radcoms Act.

### ***Are the BSBs necessary to maximise the overall public benefit from spectrum assigned for the delivery of content and communications services?***

- 3.19 No, the BSBs are not necessary to maximise the overall public benefit from spectrum assigned for the delivery of content and communication services. In fact, AMTA believes that

the BSBs currently constrain flexibility and prevent market forces from acting to achieve the maximum public benefit.

***Are two separate legislative regimes governing spectrum planning required?***

- 3.20 No, as explained in our answers above, AMTA does not believe that two separate legislative regimes governing spectrum planning are required or in fact, desirable.
- 3.21 A single regime governing spectrum planning under the Radcoms Act will be both more efficient and more conducive to competition and the maximisation of the overall public benefit regarding the use of spectrum for both broadcasting and communication services.

## **Spectrum management and the public interest**

***What approaches would best serve to achieve the outcome of maximising public benefit from use of the spectrum in the convergent environment?***

- 3.22 AMTA agrees that principle 10 of the Review which states that government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communication services is an important and fundamental policy consideration for government.
- 3.23 AMTA believes that the outcome of maximising the overall public benefit derived from the use of spectrum can be achieved by allowing market forces to apply under the auspices of the Radcoms Act and its allocation arrangements for spectrum which reflect its value as a scarce and finite resource. Therefore migration of the regulation of BSBs to the Radcoms Act will enable the achievement of this outcome.

***Would the objects and the planning criteria of the Broadcasting Services Act need to be taken into account under a technology and service-neutral planning process?***

- 3.24 The objects of the BSA are largely content related and other more technical aspects of the planning criteria will generally be able to be covered under the Radcoms Act.
- 3.25 The objects and planning criteria that relate to the regulation of content and social policy considerations should not be taken into account in relation to a technology and service-neutral planning process but could be covered by other separate regulatory means if it is considered necessary.

***Would the ACMA's total welfare standard ensure that the public benefit uses of all spectrum planned under a converged system is adequately considered?***

- 3.26 The ACMA's current five principles used to guide its spectrum management decisions and the total welfare standard provide a sound basis for maximising public benefit from use of spectrum in the convergent environment.
- 3.27 However, while the total welfare standard and five principles are important tools, they are not the only factors the ACMA should consider in its spectrum planning and management decision-making. AMTA suggests that the objectives of the Radcoms Act are also important

tools and that the ACMA should also have regard to other relevant factors such as the international harmonisation of spectrum in order to ensure that the public benefit uses of all spectrum is adequately considered.

***Are the minister's powers to reserve spectrum for national and community broadcasters important into the future? Should it be extended to other 'non-commercial' sectors? If so, how would public benefit then be defined?***

3.28 The minister's powers to reserve spectrum for national and community broadcasters (or other non-commercial sectors) may be necessary in certain circumstances where a market approach is not viable and a clear public benefit exists.

3.29 AMTA suggests that any exercise of the Minister's powers should be based on a consideration of public benefit and that it is important that a market based fee for any such reservation of spectrum should still apply so that the market value of the spectrum is still realised. The Minister's powers to reserve spectrum should not be used as a proxy for subsidisation. Subsidisation, if it is necessary, should form part of the budget planning process for national and community broadcasters.

***To what extent does the current licensing and pricing regime support research? Are the scientific licensing arrangements sufficient for this purpose? If not, why not?***

3.30 AMTA understands that there is some inflexibility in the current scientific licensing arrangements. For example, apparatus testing licences are too prescriptive about technology and so do not provide sufficient scope for comprehensive research and testing. The fixed-term nature of these licences is also inhibitory to research purposes. Further, the licences are intended for technical rather than commercial testing making them less useful for network operators and not as encouraging of joint initiatives between industry and academia as they could be. AMTA suggests that a framework based on spectrum licensing is inherently better suited to promote innovation and stimulate research partnerships and marketplace product development.

## **Impact of digitisation on broadcast spectrum policy**

***What approach should be taken to the licensing of multiplexes and multichannels for digital television into the future?***

3.31 AMTA believes that spectrum licensees should have full flexibility to make their own decisions regarding business models and technologies that they deploy using licensed spectrum. In a competitive converged environment this principle must apply to broadcasters and telecommunication providers alike.

***What policies should determine how any excess capacity freed up by the efficiency gains delivered by digital television transmission should be managed and used?***

3.32 AMTA suggests that market forces under the framework of the Radcoms Act should determine how any excess capacity freed up by the efficiency gains delivered by digital television transmission should be managed and used.

***Who should benefit from these efficiency gains? What approach would lead to the maximum public benefit?***

- 3.33 Any efficiency gains should be realised in a way that maximises the overall public benefit. As per our comments above, the licence renewal process and ACMA's planning processes (including the objects of the Radcoms Act, the total welfare test and five spectrum management principles) should provide the basis of an approach that will lead to the maximum public benefit.

## **Pricing broadcasting spectrum**

***Should spectrum used for broadcasting be priced as an alternative to the current licence fee regime?***

- 3.34 AMTA prefers to move to market based pricing for all spectrum, including broadcasting spectrum.
- 3.35 Auctions are the preferred mechanism for obtaining market prices for new allocations of spectrum with opportunity cost pricing used when spectrum is being re-issued, for example, during a licence renewal process.

***What should be the objective of pricing spectrum used for broadcasting? Why? What is the best pricing model to apply to spectrum used for broadcasting? Does this fit the objectives you have identified?***

- 3.36 The objective of pricing spectrum used for broadcasting should be the same objective as for pricing spectrum used for any other purpose. That is, the objective of pricing should be to ensure that the user of spectrum pays a fair and reasonable price for its use of a scarce resource. Such an objective should also encourage and enable spectrum to move to its highest value use.
- 3.37 As broadcasters have an existing investment in infrastructure, AMTA suggests that the best pricing model to apply to existing spectrum used for broadcasting is one that reflects the opportunity cost of the spectrum used on the basis that this will encourage broadcasters to deliver their services by the most efficient use of spectrum or other platforms over time.

***Do you have comments on the advantages and disadvantages of each model? Are there other suitable models?***

- 3.38 AMTA believes that only a model that results in a market-based price being paid is reasonable.

***Current regulatory obligations could place restrictions on use of spectrum. Should these be recognised in spectrum charging or under an additional licensing mechanism that recognises other obligations?***

- 3.39 AMTA believes that the only charge that should be included in spectrum charging is one that is based solely on the use of the resource. Any other regulatory obligations and charges should be administered separately under other regulatory instruments or frameworks.

***What are the reasons why non-commercial users might be included or excluded from pricing objectives?***

- 3.40 AMTA does not believe that there is any clear reason why non-commercial users might be excluded from pricing objectives. In fact, AMTA suggests that they should be included so that pricing models and mechanisms are transparently applied to all users of spectrum.
- 3.41 If there is some reason why non-commercial users are not able to pay for the use of their spectrum, the arrangements for public or government subsidisation of their use should be made outside of spectrum allocation and pricing processes.

***What are key transitional issues if the spectrum strategies discussed in this section were to be embraced?***

- 3.42 A transfer of regulation of broadcasting spectrum to the Radcoms Act would require a clear transition pathway and implementation period. Any transition would need to occur with minimal disruption to the broadcasting industry.
- 3.43 A key transitional issue will be pricing and AMTA firmly believes that the adopted pricing model for the transition should be market based to reflect the value of resource.

## 4. Layering, licensing and regulation

### Layering

4.1 The very first principle of the Review states:

***“Citizens and organisations should be able to communicate freely and, where regulation is required, it should be the minimum needed to achieve a clear public process.”***

And principle eight states that:

***“Australians should have access to the broadest possible range of content across platforms, services and devices.”***

AMTA supports both these principles and suggests that any regulatory reform resulting from the Review process must be light in touch and flexible enough to allow for development of varied and innovative business models, continuing technological innovations and investment in key infrastructure.

4.2 Convergence means that content has become detached from specific delivery platforms.

4.3 This separation of content and platforms leads us to contemplate the principle that content should be regulated consistently across platforms without having regard to the platform or technology used to deliver the service or content.

4.4 AMTA agrees that content should be regulated on a technology-neutral basis.

4.5 The concept of regulatory parity seems an ideal approach in a convergent environment however AMTA is concerned that strictly applying the principle has the potential to create market distortions that may actually impede competition, innovation and investment. The challenge in applying the principle of regulatory parity is to ensure that the regulatory framework is still flexible enough to foster innovation and competition.

4.6 AMTA believes that some regard should be given to the various delivery platforms involved in a converged market in order to make an assessment of the level of impact and accessibility of various platforms. Any framework must be flexible enough to allow for continued innovation, competition and investment in emerging media platforms.

4.7 For example, there currently exists healthy global competition and opportunities for Australian mobile application developers. A recent study states that the total number of mobile apps downloaded each year is forecast to grow from 38.2 billion in 2011 to 182.7 billion in 2015.<sup>8</sup> While the most popular mobile apps are games, the number of other apps available for download is now growing at a faster rate than that of games. The average sales price of mobile app games has declined by 28% over the last year while the total revenue generated by top-grossing games increased by 79% in the Apple App Store for iPhone.<sup>9</sup>

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<sup>8</sup> IDC, Worldwide and U.S. Mobile Applications, Storefronts, Developer, and In-App Advertising 2011-2015 Forecast: Emergence of Postdownload Business Models, Doc # 228221, Jun 2011

<sup>9</sup> Distimo *Mobile Gaming Trends: Popularity, Pricing and Monetization* by Hendrik Koekkoek July 2011

Current and proposed regulation of content across platforms should be assessed and measured against its impact on adversely affecting an emerging, innovative and competitive market.

- 4.8 AMTA agrees that the existing Telecommunications Act 1997 (Telco Act) already contains a technology-neutral framework for regulation based on broad layers (carriers, carriage service providers and content service providers). AMTA believes that the distinction between content and carriage services is still relevant and important. However, the simple framework contained in the Telco Act no longer adequately covers the content and applications layers that could be considered to include VoIP services, social media platforms and a multitude of mobile applications.

***How might a “layered approach” to media regulation be best used?***

- 4.9 AMTA recognises that there may be more value in the layer model as an analytical tool rather than as a basis for regulation. Many mobile telecommunications providers would cross layers and business models may be more complex than the layered approach would lead us to believe. Further, some layers such as the content or application layers contain such a varied group of services and providers that it could be too restrictive to consider them all as simply one layer that can or should be regulated the same way. The adoption of a layered approach and the application of the principle of regulatory parity does not require that all media and content services are necessarily regulated in a similar fashion. A framework based on the principle of regulatory parity can determine those media and content services that need to be regulated and those that do not. For example, linear push services might be regulated but non-linear pull services may not require the same regulation. It is equally important to identify non-regulated media services to ensure the transparency and predictability of the regulatory framework.
- 4.10 While the principle of regulatory parity may be a defining element of a pro-competitive economic regulatory framework, adopting a layered approach that incorporates elements of public interest regulation (such as local content rules) at the content layer will necessarily be a step away from a pro-competitive economic regulatory parity framework and possibly cause market distortions. If public interest based regulation of the content and applications layer is warranted it must be imposed effectively so as to minimise any distortions of the overall market. AMTA suggests that a layered approach that effectively considers appropriate economic regulation at the distribution and delivery layer with elements of public interest policy at the content layer should be the aim of the new regulatory framework in a converged market.

***What regulatory obligations and incentives might be appropriately placed at which layer?***

- 4.11 AMTA believes that the distinction between content services and carriage services continues to be a valuable and necessary distinction to make. While some carriage service providers may also provide content (and so act as content providers) it is more than likely that they simply provide the means to access content of which they have no or limited control.

***What exceptions to regulatory parity principle are appropriate? Eg audiovisual content on mobile devices versus home-based services?***

- 4.12 AMTA maintains that it is valuable to consider the means of delivery and its level of impact on consumers. For example, traditional broadcasting services such as free-to-air television will still have a greater potential impact on consumers than premium or opt-in content services delivered via mobiles. Mobile premium services, for example, are generally subscription based, opt-in and regulated via an industry code of practice.<sup>10</sup> Similarly, mobile applications are downloaded from online stores by individual users and so are an opt-in product rather than a broadcasted service.

***Are there alternatives to layering? If so, what form might they take?***

- 4.13 AMTA suggests that a layer model provides a valuable analytical tool, but that the layer model should not be an end in itself and not the sole determinant for regulatory reform. The value of a layer model is that it encourages the removal of legacy platform-based regulation and it supports the trend towards convergence and enables regulation to be better targeted to specific types of content or activities.

## Licensing

***What entities/services/functions subject to regulatory obligations/incentives need to be licensed?***

- 4.14 AMTA considers that in a majority of instances licensing is not necessary as legal and regulatory obligations can be placed on industry members outside of the licensing framework. In other instances, licensing provides industry with the certainty it requires to make necessary investment in infrastructure using a licensed resource, for example, spectrum.
- 4.15 Licensing can also be a useful means to impose legal and regulatory obligations on industry participants and can allow for some flexibility where processes exist for licensing terms and conditions to be re-negotiated either during a licence period or renewal processes. Licensing can also provide a means of control over the number of participants in a particular industry and can also limit new entrants.
- 4.16 Licences have also been used to impose obligations on industry. For example, carrier licences fees are used to fund the Universal Service Obligation and the National Relay Service. Whether future licensing arrangements should continue to be the link between funding of the Government's social policy obligations needs further assessment in the development of a new regulatory framework.

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<sup>10</sup> [Mobile Premium Services \(MPS\) Code C637:2009](#)



## Regulation

### ***What kinds of service should attract a potentially greater degree of regulation?***

4.17 AMTA believes strongly in the principle of regulatory forbearance and therefore agrees with the ACMA's outlined principles<sup>11</sup>:

- “Governments should not act to address problems until the case for action has been clearly established.
- A range of feasible policy options need to be identified and their benefits and costs assessed.
- Only the option that generates the greatest net benefit to the community should be adopted.
- Effective guidance should be provided to regulators and regulated parties.
- Machinery is required to ensure that regulation remains relevant and effective.
- Regulated parties should be consulted.”

4.18 AMTA therefore submits that there must be evidence of the existence of a problem, such as adverse consumer outcomes, before a service should attract a potentially greater degree of regulation. Further, any demonstrated problem should first be analysed to see if greater regulation would provide the desired improved outcome or whether education, self or co-regulatory measures would achieve the same or better improvements.

4.19 In terms of drawing distinctions between types of content services depending on their perceived level of influence or reach, AMTA agrees that some differing treatments of different kinds of content may still be appropriate. AMTA suggests that the level of influence and reach of a particular service be the factor that decides any differing regulatory treatment, noting that levels of influence and reach are subject to change over time.

4.20 AMTA considers that (while outside of the terms of reference for the Review) it is imperative that the development of a regulatory regime includes an assessment of the relevance of legacy mobile regulation (not just the prospect of new regulation) so that it does not act as a dead weight to future innovation and competition in a converged market.

### ***What practical scope is there to regulate a service supplied from abroad?***

4.21 Without international co-operation between governments there is very limited scope to regulate a service supplied from abroad. The Australian Customs and Border Protection Service is limited by practical constraints in its ability to regulate all imports, particularly the purchase of products or services online. AMTA suggests that user-focussed measures such as education and awareness promotion form part of the practical response to this issue.

4.22 AMTA does not agree with the proposition that regulating local delivery networks in order to regulate content services supplied from abroad is an appropriate response. AMTA maintains that carriage service providers cannot be responsible for content or content services when they are merely providing the conduit for the delivery of such services. It would be both impracticable and unfair to impose such obligations on the carriage service provider.

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<sup>11</sup> ACMA *Optimal conditions for effective self- and co-regulatory arrangements* June 2010

***How feasible is it to deal with problems, using non-legislative means (e.g. international co-operation, education, official endorsement, naming and shaming etc.)?***

4.23 AMTA supports the use of non-legislative means to deal with problems and suggests that alternative approaches to legislation should always be considered in depth before moving to a rigid legislative solution. This is particularly important in a convergent environment when technology and business models are developing and changing rapidly. Legislation is by its nature the slowest and least adaptable tool in the regulatory toolbox.

***What are the strengths and weaknesses of the following regulatory approaches:***

- ***Education***
- ***Self-regulation***
- ***Co-regulation***
- ***Direct regulation***
- ***Other incentives?***

4.24 AMTA agrees with the argument outlined by Crawford and Lumby that an effective regulatory response to convergence will require active participation by consumers and suppliers of services as well as government.<sup>12</sup>

4.25 AMTA suggests that in a convergent environment the role of consumers in exercising control over the content they choose to consume will necessarily be a much larger one than ever before. In fact, new platforms such as social media are founded on such a presumption.

4.26 AMTA supports an approach that always uses an evidence based approach first before considering education and then self- or co-regulation to solve a perceived problem rather than focussing on prescriptive regulation. AMTA believes that such an approach is most appropriate to the convergent environment which is experiencing such rapid development and includes many emerging business models and technologies. In such an environment it is better to react with flexible solutions to any problem that arises so that consumers, industry and government are not stuck with unwieldy regulations that can quickly prove to be irrelevant, burdensome and difficult to change.

***For what matters and to what extent should regulation aim for a principles-based approach rather than a prescriptive “black letter law” approach?***

4.27 AMTA contends that all media and communications regulation should aim for a principles-based approach rather than a prescriptive “black letter law” approach. The first principle of the Review clearly states that regulation, where it is required, should be the minimum needed to achieve a clear public purpose. AMTA believes that in order for the communications market to be innovative and competitive, as per principle 3, a principles-based approach will always be more appropriate than a prescriptive “black letter law” approach. Regulation that is too prescriptive and difficult to change will tend to impede competition and stifle innovation.

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<sup>12</sup> Crawford and Lumby, *The Adaptive Moment: A fresh approach to convergent media in Australia* Journalism & Media Research Centre UNSW

***What factors are important in deciding on what matters are more appropriately dealt with by a regulatory body or by government policy?***

- 4.28 AMTA agrees that it is important for the regulation of media and communications to be independent from the development of government policy.

## 5. Australian and local content

### ***Should content rules be extended to convergent platforms?***

- 5.1 No, AMTA does not support extending Australian and local content rules to convergent platforms such as mobile.
- 5.2 AMTA does not believe that there is any demonstrated need to extend content rules as they currently apply to broadcasters to cover mobile content services or other convergent platforms.
- 5.3 AMTA refers the Review committee to Canada's experience where the Canadian Radio-television and Telecommunications Commission (CRTC) recently ruled that mobile and online content services were complementary to the content provided by traditional broadcasting services. The CRTC therefore decided that such mobile and online services should not be regulated for now and suggested examining the possibility of moving to multi-platform subsidies and tax-based incentives in the future as an alternative to content quotas.<sup>13</sup>
- 5.4 While smartphones allow mobile users to access an increasing volume of content, including the ability to download previously broadcasted material, it must be recognised that mobiles are highly personalised devices where individual users decide which content they will access and when. Content quotas will simply be a difficult fit to convergent platforms such as mobile as their very nature alters viewing habits as we understand them in a free-to-air broadcasting environment.
- 5.5 The content layer is a varied one and depending on the analytical framework adopted can include both traditional broadcasting services such as television and radio as well as mobile applications or games and user-generated content on social media platforms. Any regulatory framework devised to regulate content in Australia must be flexible enough to allow viability of business models that range from individual mobile application developers to local broadcasters and extends to international corporations that produce broadcasting programs, games and other online content.
- 5.6 AMTA notes that user-generated content is increasingly consumed by Australians and suggests that it should not necessarily be excluded from consideration as forming part of the spectrum of Australian local content while acknowledging that there will necessarily be limitations to any inclusion of non-professional content in terms of any quotas or subsidisation scheme relating to local content levels.

### ***Should we move away from minimum content requirements to a subsidy model?***

- 5.7 AMTA would be supportive of such a model.

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<sup>13</sup> *Canada's broadcasting sector loses battle with Netflix* by Ben Dummett, Dow Jones Newswires 6 Oct 2011

***Should content arrangements be removed entirely?***

- 5.8 AMTA does not see why content arrangements could not be removed entirely. This would necessarily be a policy decision to be determined by government in close consultation with the Australian public, Australian content producers and broadcasters. AMTA suggests that a removal of existing content arrangements without the introduction of any alternative government support for the production of local Australian content would likely result in an under-production of such content.
- 5.9 AMTA considers that alternate policy approaches that are more effective in delivering sustainable investment in Australian content production should be considered. For example, government subsidies could be allocated for the production of Australian, local or children's content where this content is not tied to a specific delivery platform but produced in a format that is as accessible as possible over multiple platforms.

## 6. Community standards

- 6.1 AMTA has been an active participant in the Australian Law Reform Commission's (ALRC) Review of the National Classification Scheme (NCS). AMTA is cognisant that the ALRC Review will have some overlap in policy considerations with this Review and is confident that both review processes will be consistent in their approach and findings.
- 6.2 Technological convergence is now delivering an increasing amount and variety of media and content to mobile phones and similar devices.
- 6.3 AMTA supports the legislation introduced by the Home Affairs Minister which provides for interim arrangements for the regulation of mobile games and applications until any reforms recommended by the ARLC review can be implemented. These interim arrangements allow for mobile applications to be supplied without classification for two years subject to consumer safeguards administered by the ACMA under the auspices of schedules 5 and 7 of the BSA.<sup>14</sup>
- 6.4 The mobile telecommunications industry also developed the Mobile Premium Services Code: C637 2009 which provides a co-regulatory framework for mobile premium services. The code is enforced by the ACMA.<sup>15</sup>
- 6.5 Similarly, the IIA Content Services Code developed under the auspices of the Internet Industry Association also provides a self-regulatory framework for mobile internet content.<sup>16</sup>
- 6.6 AMTA notes that the Senate Legal and Constitutional Affairs Committee published its report on its inquiry into the NCS earlier this year. Recommendation 22 of the Committee's report recommends that the NCS should apply equally to all content, regardless of the medium of delivery.<sup>17</sup>
- 6.7 AMTA has concerns about the practicalities in extending the NCS so that it covers all content available in Australia, including online content that may often be sourced from foreign-based producers of content or be produced by internet users rather than more traditional content providers. Such an extension of the NCS would be almost impossible to administer, either by the regulatory body or by telecommunications service providers. Further, AMTA believes that the existing classification requirements that apply, for example, to film, may not be easily or appropriately translated to other platforms, such as mobiles.
- 6.8 AMTA suggests that a self-regulatory framework could be the most appropriate policy framework for classification of mobile content. Given the rapid pace of technological development and convergence in the mobile industry, AMTA suggests that any self-regulatory scheme needs to be light in touch and easy and inexpensive to administer. It is clearly not necessary to classify all mobile content and in fact, impractical to attempt to do so as the sheer volume of content would make the task unmanageable.

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<sup>14</sup> [Legislation introduced to ensure continued access to mobile phone and online computer games](#) 12 Oct 2011 press release by Home Affairs Minister

<sup>15</sup> Information on the code can be found at [www.acma.gov.au](http://www.acma.gov.au) and [www.commsalliance.com.au](http://www.commsalliance.com.au)

<sup>16</sup> [www.ii.net.au](http://www.ii.net.au)

<sup>17</sup> [Review of the National Classification Scheme: achieving the right balance](#), 23 June 2011

- 6.9 AMTA suggests also that any self-regulatory framework should also support consumer education and the provision of end-user self-help tools which can range from simple phone locks to parental control software applications. AMTA notes that there are self-regulatory models already in place in North America and in Europe.
- 6.10 Further, AMTA notes that consumers play an increasing role in determining both the content they access, how they choose to access it and also in generating and distributing their own content.
- 6.11 AMTA therefore asserts that the preferred and most effective method of controlling access to mobile and online content lies in empowering and educating consumers so that they can exercise their own controls over the content they choose to access and/or restrict their children from accessing online.
- 6.12 AMTA supports the position outlined by Crawford and Lumby,

“At the network layer, we argue, policy makers should focus on ensuring network openness, innovation and user choice. At the platform and content provider layers, government should work with industry and users, including in global fora, to encourage self-regulation while facilitating referral of genuinely disturbing material to national and international government regulatory instruments and agents. Community education about internet use, online security and legal obligations should be a priority in this area. There needs to be ongoing commitment to researching international approaches, emerging tools and community expectations.”<sup>18</sup>

- 6.13 AMTA believes that educating parents, teachers, caregivers and children themselves is the best way to ensure that children are protected from inappropriate content online. Again, AMTA agrees with Crawford and Lumby’s proposal:

“Convergent media governance must take the full spectrum of stakeholders into account from the end-user to the parent, from the school into the wider community, to industry and government. A key plank of this cooperation is the need for government and industry to educate consumers and provide them with resources to work in online communities to identify problematic content and to notify relevant organisations or authorities. Media literacy is vital. Education about opportunities and risks online is a particularly critical component of any strategy that aims to protect children, as well as maximise the potential for innovation and creative engagement.”<sup>19</sup>

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<sup>18</sup> Crawford and Lumby, *The Adaptive Moment: A fresh approach to convergent media in Australia* Journalism & Media Research Centre UNSW

<sup>19</sup> *Ibid.* p 6

## 7. Conclusion

AMTA looks forward to continued participation in the Convergence Review and we would welcome the opportunity to discuss our comments further at the Review Committee's convenience.

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