Australian Mobile
Telecommunications
Association

Convergence Review – Interim Report 2011

AMTA Submission

February 2012

Introduction

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 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.

AMTA is pleased to have the opportunity to respond to the Committee's Interim Report.

AMTA has been a consistent participant in the Convergence Review process and appreciates the consideration the Committee has given to such a breadth of issues affecting the converging media and communications markets.

Below is a summary of AMTA's position in support of a reformed regulatory framework for the converging media and communications markets that has as one of its key objectives the promotion of continuing innovation, competition and productivity in the mobile telecommunications industry in Australia.

AMTA has also addressed more specifically suggestions raised in the Interim Report following the summary section of its response.

Summary

Principles to guide regulatory reform

AMTA maintains that the following principles are fundamental to any consideration of any regulatory reform of converging media and telecommunications markets.

- The regulatory framework must promote and encourage continued innovation in convergent technologies as well as ongoing investment in infrastructure, including spectrum for mobile broadband.

- The regulatory framework must promote fair and open competition in the markets and lift or avoid imposing regulatory burdens that can potentially stifle innovation.

- Industry's compliance costs must be minimised.

- Regulation at the content layer should be technology-neutral with the regulation of content separated from any regulation of the delivery platform.

- Any layered analysis needs to recognise that the content layer is complex and varied and includes a range of content services and applications that may require differing regulatory intervention (if any is needed).

- The regulatory framework should encourage deregulation where possible in order to provide the flexibility necessary for industry to adapt to the rapid pace of technological change and ongoing development of business models in media and telecommunications markets.

- The regulatory framework must be clearly understood and applied consistently so that industry has the requisite certainty to allow continued investment into the future.

AMTA believes that the application of the above principles supports a single regulatory framework for the management and allocation of spectrum, including broadcasting spectrum, as suggested in the Interim Report. This would facilitate the separation of the regulation of content services from the regulation of the delivery platform (in this case spectrum resources) used.

Similarly, AMTA believes that the above principles should prevent any extension of legacy broadcasting regulations (such as local content rules or the national classification scheme) to new media platforms. To extend such legacy regulations would stifle innovation in new and emerging media platforms, inhibit fair and open competition and place an unnecessary regulatory burden on industry.

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.[1]

AMTA also believes that it is critical for the Final Report to recommend that an assessment of the continuing relevance and application of new and legacy mobile regulation is undertaken before any reform to the media and communications market is implemented.

Concerns and questions raised by the Interim Report

AMTA recognises that the Interim Report is a preliminary to the Committee's final report and that the Committee has been tasked with a very broad terms of reference and received many varied responses from stakeholders.

However, AMTA is concerned that the Interim Report recommends some significant conceptual changes to the media and communications regulatory framework without providing sufficient detail or specifying how those sweeping changes are proposed to be implemented. This makes it difficult for industry to respond adequately when so many of the proposed reforms are not fully mapped out and are based on unknowns.

For example, the suggestion that the digital economy requires a new regulator is somewhat surprising given that the existing regulator would seem to have historical jurisdiction over both media and telecommunications content regulation. While it is timely to assess the cost and benefits of reforming the current regulatory and legislative framework, AMTA is concerned by the Interim Report's proposal to create a new regulator entity with features such as:

> *"broad powers to make rules"*
>
> *"scope to adopt flexible, managed regulation and to apply self-regulation, co-regulation or direct regulation as the circumstances require"*
>
> *"a range of appropriate sanctions"*
>
> *"secure funding and cost-recovery mechanisms*" [2]

The above proposals simply raise the level of uncertainty for industry and provoke more questions than answers. For example, will industry be required to fund the new regulator and how will that funding vary from the current funding and cost-recovery arrangements of the ACMA? AMTA considers that a key recommendation of the Final Report should be to ensure the cost of compliance for industry of meeting its regulatory obligations is reduced under a new regulatory regime.

AMTA suggests that although broad powers may be required for the regulator to be able to regulate (or not regulate) flexibly, such flexibility must be tempered by clear and precisely

[1] ACMA *Broken Concepts: The Australian communications legislative landscape* August 2011
[2] Interim Report p2

drawn objectives and well-understood principles that are applied consistently so that industry can make timely investment decisions with certainty.

The suggestion of *"a range of appropriate sanctions to encourage compliance*" without any qualification or quantification does not provide comfort to the mobile telecommunications industry that is currently making and planning for significant long-term investment in new infrastructure.

Responses to suggestions in the Interim Report

A new regulator for the digital economy

AMTA is not convinced that the need for a new regulator has clearly been established in the Interim Report. The ACMA would seem to have clear jurisdiction over converging media and telecommunications markets and an evolution of the ACMA's role based upon reform of the regulatory instruments and legislation it administers would seem a more appropriate approach as opposed to the creation of a new regulator.

Further, the proposal does not contain any details of how a new regulator would be funded or established and exactly what powers it would have or how those powers would be defined or moderated. These unanswered questions raise the level of uncertainty for the mobile telecommunications industry at a time when significant long-term investments are being planned and considered.

The suggestion that the new regulator may also deal with competition issues is surprising and not supported by AMTA given the ACCC's long established role as competition regulator, particularly its specific powers in relation to telecommunications.

Similarly the suggestion that the new regulator be a "*one-stop shop for unresolved complaints about relevant content or services"* and its relationship to the current Telecommunications Industry Ombudsman is unclear. Also unclear is how current significant industry code compliance mechanisms such as the Telecommunications Consumer Protections Code and Mobile Premium Services Code would be retained.

The removal of content licences

AMTA has in-principle support for the recommendation that the allocation of a licence should no longer be a precondition for the provision of content. This removal of licence obligations should remove or reduce many of the current regulatory imbalances and burdens.

AMTA expects the Final Report to provide further detail around the legislative changes that would be required to implement this proposal, as AMTA understands that they will necessarily be substantial and significant.

Content service enterprises

AMTA supports the need to adhere to a principle of technological-neutrality when regulating content services and notes that the Interim Report lacks detail in regard to the definition of a "content service enterprise" (CSE) therefore impeding industry from making substantial comments.

While thresholds based on subscriber/user base and revenues are suggested there is no quantification of what these thresholds are likely to be so industry is not clear about which current content providers will be captured and have obligations as CSEs.

AMTA is also unclear about how the CSE concept will be able to capture international brands supplying content to Australians. The Interim Report hints at legal and financial incentives for these firms but it is unclear exactly what these incentives may be. AMTA is concerned that placing obligations on Australian CSEs (who are yet to be defined) may place those CSEs at a disadvantage compared to content service providers based overseas.

Spectrum allocation and management

AMTA strongly supports the recommendation that there be a common and consistent approach to allocation and management of both broadcasting and non-broadcasting spectrum.

AMTA believes that separating content-related obligations from the licence to use spectrum resources will provide increased flexibility for licence holders and therefore encourage more innovative and efficient spectrum use.

AMTA agrees that this new approach should include:

- Arrangements that allow more flexibility of use, greater innovation, trading and new entry
- A market-based pricing approach
- Increased certainty around licence renewal processes
- A managed transition for FTA broadcasters

AMTA maintains that Ministerial powers to reserve spectrum to achieve "*policy objectives considered important by government and the community"* must be made more transparent.

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.

AMTA supports market-based pricing of spectrum. This is usually best achieved through an auction process for new spectrum allocations. AMTA believes this mechanism for allocating cost best reflects the value of spectrum.

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.

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.

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.

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.

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.

Diversity

AMTA acknowledges that convergence has blurred the traditional boundaries between print, television and radio platforms and notes the trend for mobile to increasingly be the means by which consumers choose to consume content, particularly online content. However, we are not aware of any evidence that this or other convergence-driven trends have the potential to decrease diversity of ownership or voices.

AMTA believes the impact of the Committee's proposal would be to extend the scope of existing diversity of ownership regulation to emerging markets that are already highly diverse compared with legacy broadcasting and print markets. This in turn would create regulatory uncertainty for many transactions which pose no threat to diversity, restricting investment and undermining the productive dynamism of the digital content market. Such an extension of regulation is therefore neither necessary nor desirable.

AMTA suggests that any extension of diversity rules should only apply to media with a proven and substantial level of influence and that many "Content Service Enterprises", particularly in the mobile market, simply would not reach that threshold.

Competition

AMTA is surprised by the Committee's recommendation that "*the new regulator to be given broad and flexible powers to issue directions and make rules to promote fair and effective competition in content and communication markets".*

Even though the Interim Report states that these powers should only be re content-related competition issues and should be exercised in co-ordination with the ACCC's powers, it would seem most unusual for the new regulator to be given responsibility for competition issues that have traditionally resided with the ACCC. It is unclear from the recommendations in the Interim Report how these content-related powers would be distinguished from the general powers of the ACCC. AMTA suggests that any attempt to

delineate these powers could prove to be a futile and frustrating exercise when the ACCC already has jurisdiction over competition issues.

Promoting Australian Content

As the definition of a CSE remains unclear it is difficult for AMTA to adequately comment on the proposals relating to the promotion of Australian content.

While a new uniform scheme may seem attractive and technologically neutral, AMTA is concerned that (depending on the definition of a CSE), the imposition of quotas regarding expenditure or obligations to contribute to a production fund constitutes too heavy of a regulatory burden on emerging media content services and still evolving business models.

AMTA does not support any extension of legacy broadcasting requirements or similar schemes in relation to Australian content to new media platforms providing audio-visual content as proposed in the Interim Report. To extend such requirements to new media platforms would stifle innovation, inhibit fair and open competition and place an unnecessary regulatory burden on industry.

Promoting local and community content

As per the comments in the section above, AMTA does not support any extension of minimum quotas for local content to new media platforms.

Further AMTA suggests that the very nature of new media platforms, social networking media in particular, actually fosters the organic development of local content by users themselves as well as small businesses and community based organisations.

Content standards

AMTA and many of its members have been active participants in the Australian Law Reform Commission's (ALRC) review of the National Classification Scheme.

AMTA broadly supports the recommendations made by that review process and would prefer to see any proposed legislative or regulatory reforms reflect the findings and outcomes of the ALRC review.

Legislative structure and implementation

While AMTA recognises that the terms of reference of the Convergence Review are broad, it would seem that the Interim Report has broadened its scope even further with the recommendation that

"the new legislation should ultimately encompass :

- *all communications infrastructure, platforms, devices and services*
- *the regulation of CSEs*
- *the establishment of a new independent regulator for the digital economy, with the flexibility to adapt to the changing environment"*

AMTA does agree that the regulatory and legislative reforms envisaged by the Committee cannot and should not be undertaken without having regard to legacy and new mobile telecommunications regulation and legislation.

Issues relating to the regulation of telecommunications services, particularly mobile services, have not been looked at in any great detail in earlier stages of the Review as the Review process concentrated on content-related issues. These issues will therefore need to be given due consideration as follow up to the Review before such all-encompassing reform can be embraced by industry stakeholders as part of a broader communications reform package.

AMTA looks forward to continuing to participate in the Review, its outcomes and the suggested broader communications reform process.

If you have any questions about this submission please contact Lisa Brown, Policy Manager, AMTA on 0405 57 00 59 or at lisa.brown@amta.org.au.