

# Converged legislative frameworks— International approaches Occasional paper

JULY 2011



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# Executive summary

## About this paper

This paper forms part of the broader program of regulatory research undertaken by the Australian Communications and Media Authority (the ACMA) to inform its regulatory development activities, and to maintain current information and internal awareness about regulatory developments.

The focus of this paper is legislative convergence—the coming together of communications and media legislation under a single, converged legislative framework. Legislative convergence has often been viewed as a best practice response to convergence issues. This paper provides information on jurisdictions that have enacted converged legislation. It sets out information on the context of, and rationale for, the move to converged legislative frameworks. It discusses key features of converged legislative frameworks, including legislative objects, the use of a ‘network layers’ regulatory model, the treatment of content regulation, the emergence of approaches to the internet, and the use of competition law. Additionally, it considers whether any evaluation or review has been undertaken of the effectiveness of the converged legislation.

## Key findings

### Overview, context and rationale

To date, several jurisdictions have integrated their media and communications laws into a converged legislative framework—Malaysia; the European Union (EU) and its member states of the United Kingdom (UK), Finland, Sweden and Italy; and South Africa. Korea, Japan and Taiwan are in the process of legislative change and have made some steps towards converging their laws. However, the research indicates that, for most jurisdictions around the world, it is likely that separate media and communications laws remain the norm.

It was found that, generally, the move to converged legislative frameworks was accompanied by transformation of the institutional structures for media and communications regulation—namely, the creation of a converged regulator.

While the primary driver for these legislative reforms was the need for governments to provide a policy response to convergence, underlying this was a range of further contextual factors. These included the need to reform licensing regimes, regional harmonisation goals and the desire to promote the competitiveness of national communications markets.

### Key features of converged legislative frameworks

The theory behind converged legislation is that regulation should follow the logic of technological change and converge into one unified structure. This would represent the coming together of three historically different regulatory traditions—specific to communications, media and the internet—into one regulatory framework.

The following key features are apparent in the converged legislative frameworks examined in this paper:

- > *Objects, regulatory principles and role of regulator.* Converged legislation is underpinned by a broad range of legislative objects relating to national, industry, technological, social, cultural and market interests that may conflict, despite being contained in a single piece of legislation.
- > *Network layers regulatory model.* A common feature of converged legislative frameworks in the EU, Malaysia and Korea is the use of a regulatory model that is structured on the network layers of next-generation networks or IP-based technologies, rather than on the vertical industry structures of telecommunications, broadcasting and IT. This is described as a technology-neutral approach, which is based on the functions of the different network layers of next-generation networks. This layered regulatory model is used to structure the regulation of market entry and market conditions; for example, licensing.
- > *Treatment of content regulation.* In the EU and the UK, content regulation is distinguished from the regulation of carriage, governed by a separate regime or with reference to sector-specific measures. These may aim to protect certain interests to do with media content or be specifically directed at the broadcasting sector.
- > *Graduated approach to content regulation.* The EU and the UK have a tiered or graduated approach to content regulation that applies largely to traditional broadcasting.
- > *Emergence of approaches to the internet and the online environment.* Approaches to addressing concerns relating to the online environment continue to emerge. Since the introduction of converged legislation, new issues have arisen such as packet prioritisation, and online data protection, privacy and copyright.
- > *Use of general competition law.* This is apparent in the EU and UK legislative frameworks; in both jurisdictions, the converged legislative framework for electronic communications has been linked to or made consistent with general competition law.

The research uncovered little information evaluating the effectiveness of converged legislative frameworks. It was found that:

- > commentators have considered that in the EU, further work is needed for the goals of the EU electronic communications regulatory framework to be fully realised, and there is a lack of clarity about the aims of national regulators; and
- > a study concluded that in the UK and Korea, change is ongoing and cannot be confined by a single approach to convergence. Even the UK – considered to have the most coherent and well-developed regulatory approach amongst the countries examined – was found to face difficulties in responding to uncertainty and change.

## **Conclusion**

Converged legislation represents the coming together of three differing regulatory traditions—telecommunications, media and the internet—into one regulatory framework. The experiences of jurisdictions with converged legislative frameworks suggest that, to date, converged legislative frameworks demonstrate a partial integration of media and communications regulation.

The partial integration of media and communications regulation is apparent from the content/carriage distinction adopted in jurisdictions with converged legislative frameworks. Carriage regulation is marked by a layered regulatory approach applicable to electronic communications networks and services. However, content regulation remains subject to largely sector-specific media regulation, applicable to television or television-like content.

While the introduction of converged legislation involved significant change, the emergence of issues to do with the internet and the online environment is necessitating further change. Overall, converged legislative frameworks represent an evolutionary approach to regulating for convergence.

# 1. Introduction

Driven by technological, economic, political and social imperatives, various jurisdictions around the world have undergone significant legislative reform in order to put in place new regulatory frameworks for media and communications. In this context, a converged legislative framework has often been considered a best practice response to convergence issues. A number of jurisdictions have implemented converged legislative frameworks with the aim of responding to the opportunities and challenges created by convergence and the transition to a digital economy. This has also involved transformation of the institutional structures for media and communications regulation. Other jurisdictions are in varying stages of implementing or developing converged legislative frameworks, while other jurisdictions have expressed there is interest in such a framework.

At the heart of these changes is ‘convergence’, which has been described as the ability of different networks to carry similar kinds of services or the ability to provide a range of services over a single network, and the consequent blurring of the boundaries between previously separate industries.<sup>1</sup>

This paper examines the approaches and experiences of jurisdictions that have adopted converged legislative frameworks, in order to contribute to discussions within Australia about effective regulatory models. For the purposes of this paper, ‘legislative convergence’ refers to telecommunications, radiocommunications and broadcasting regulation merged within a single piece of legislation or an integrated legislative framework.

This paper is structured as follows:

- > Executive summary.
- > Chapter 1—Introduction and methodology.
- > Chapter 2—Overview of international developments. This chapter provides overarching information on jurisdictions with converged legislation, including information on the context of, and rationale for, the move to converged legislative frameworks in various jurisdictions.
- > Chapter 3—Key features of converged legislative frameworks. This chapter provides a closer examination of these frameworks, including the degree of integration between communications and broadcasting regulation in practice. It considers the legislative objects, the use of a horizontal regulatory model, the treatment of content regulation, the use of competition law and the evolutionary approach of converged legislative frameworks. Additionally, it looks at whether any evaluation or review has been undertaken of the effectiveness of the converged legislation.
- > Chapter 4—Conclusion.

## 1.1 Methodology

This paper was prepared through desktop research. This included searches through academic and third-party databases, regulator and government websites, and ITU and OECD websites, focusing primarily on post-2002 publications. A limitation of this research was that it was conducted in English.

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<sup>1</sup> Colin Blackman, ‘Convergence between telecommunications and other media: How should regulation adapt?’ 22(3) *Telecommunications Policy* (1998), 163 at p.164; ITU/InfoDev, *ICT Regulatory Toolkit*, Module 6 Legal and Institutional Framework, 4.1 ‘What is convergence’.

## 2. Overview of international developments

The OECD reported that as of 2003, separate laws for telecommunications and broadcasting were the norm for most OECD nations, even when converged regulators had been established.<sup>2</sup> It appears that the situation has changed slightly since then. Based on desktop research, including an examination of over 70 regulator websites, a number of jurisdictions have adopted converged legislation; however, it is likely that for most jurisdictions there are separate laws for telecommunications and broadcasting.

To date, Malaysia; EU nations such as the UK, Finland, Sweden and Italy; and South Africa have each implemented converged legislative frameworks. A few other jurisdictions are in the process of legislative change, with South Korea, Japan and Taiwan currently implementing or developing new laws. Legislative change has been contemplated in India for a number of years and is presently being considered in Indonesia, while in Canada the communications regulator commented on the need for converged legislation.

This chapter provides an overview of the legislative frameworks in those jurisdictions with a converged framework, and the context within which they have occurred, including regional and national ICT or digital policies, political imperatives and economic goals.

### 2.1 Malaysia—*Communications and Multimedia Act 1998*

Malaysia was the first jurisdiction to introduce converged legislation, enacting the *Communications and Multimedia Act (CMA)* in 1998 to replace the *Telecommunications Act 1950* and *Broadcasting Act 1988*. The CMA sets out the regulatory framework for telecommunications, radiocommunications, broadcasting and online activities in Malaysia. The CMA is described as being ‘based on the basic principles of transparency and clarity; more competition and less regulation; flexibility; bias towards generic rules; regulatory forbearance; emphasis on process rather than content; administrative and sector transparency; and industry self-regulation.’<sup>3</sup> Malaysia also passed the *Communications and Multimedia Commission Act* in 1998, creating a new converged regulator to administer the CMA—the Malaysian Multimedia and Communications Commission (MCMC).

As described by the MCMC, the CMA contains provisions for:

- > *Economic regulation*—including the promotion of competition and prohibition of anti-competitive conduct, and the development and enforcement of access codes and standards. It also includes licensing, enforcement of licence conditions for network and application providers, and ensuring compliance with rules and performance/service quality.
- > *Technical regulation*—including efficient frequency spectrum assignment, the development and enforcement of technical codes and standards, and the administration of numbering and electronic addressing.
- > *Consumer protection*—empowering consumers while at the same time ensuring adequate protection measures in areas such as dispute resolution, affordability of services and service availability.

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<sup>2</sup> OECD, *The Implications of Convergence for Regulation of Electronic Communications* (2004) p. 7.

<sup>3</sup> MCMC website, ‘Legislation’, [www.skmm.gov.my/index.php?c=public&v=art\\_view&art\\_id=30](http://www.skmm.gov.my/index.php?c=public&v=art_view&art_id=30).

- > *Social regulation*—including content development as well as content regulation; the latter comprises the prohibition of offensive content as well as public education on content-related issues.

Commentators such as Garcia-Murillo have discussed a range of factors that led the Malaysian Government to integrate communications and broadcasting laws.<sup>4</sup> Commentators claimed that the need for institutional change, namely the introduction of a single regulatory body, was considered a major factor leading to the enactment of the CMA. Another significant factor was the government's desire to meet broader ICT and economic policy goals. Also related to this was the impact of the 1997 Asian financial crisis; in this context, the government's decision to undertake regulatory reforms in the telecommunications sector was part of a broader strategy of industry restructuring. Issues with the existing legal framework also pointed to the need for legislative change.

## 2.2 European Union—2003 electronic communications regulatory framework

The EU's converged legislative framework is often considered a best practice model. The ITU considers the EU's electronic communications regulatory framework (the ECRF) to be the 'paradigm legislation aimed at addressing convergence and its challenges'.<sup>5</sup> Commentators have called for the application of the EU model in Australia<sup>6</sup> and the US.<sup>7</sup> The EU's the ECRF came into force in July 2003 and forms the basis for all national telecommunications laws in EU member states. It sets overarching rules for the regulation of electronic communications services and networks, which member states are required to transpose into domestic law. The UK, Finland and the other Nordic states were the first to implement changes transposing the 2003 EU regulatory framework to domestic legislation. The European Commission (EC) has reported that all EU nations have transposed the ECRF into domestic law.

While the ECRF applies to electronic communications services and networks, it does not apply to the content that travels over those services and networks. Content is regulated at the national level, with broad guidance at the EU level in the form of the Audio-Visual Media Services Directive (AVMS Directive). However, as the EC and commentators have noted, there are elements of the electronic communications regulatory framework that do impact on content. This, and other aspects of content regulation in the EU, are discussed in Chapter 3, at section 3.4.

As described by the EC, the ECRF for electronic communications comprises the following five directives, which apply to all communications infrastructures and associated services:

- > *The Framework Directive*—applies to all electronic communications networks and services, including fixed-line telephony, mobile and broadband communications, and cable and satellite television. It establishes the structural and procedural elements of the EU regulatory framework. These include requirements for the

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<sup>4</sup> Martha Garcia-Murillo, 'Regulatory responses to convergence: experiences from four countries' 1(1), *Info* (2005) p. 28; also see Martin Painter and Shui-fai Wong, 'Varieties of the Regulatory State? Government-Business Regulations and Telecommunications Reforms in Malaysia and Thailand', 24(3), *Policy & Society* (2005) 27, pp. 35–36.

<sup>5</sup> ITU/InfoDev, *ICT Regulation Toolkit*, Module 6 'Legal and Institutional Framework', Chapter 4 'Impact of Convergence', section 4.5 'Case Studies of Converged Legislation'.

<sup>6</sup> See Niloufer Selvadurai, 'The Creation of the Australian Communications and Media Authority and the next necessary step forward', 26 *Adelaide Law Review* (2005) 271 and 'Regulating for the future - accommodating the effects of convergence', 13 *Trade Practices Law Journal* 20.

<sup>7</sup> See Frieden, Rob, 'Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and a New Layered Approach', 55(2) *Federal Communications Law Journal* (2003) 208.

establishment and remit of national regulatory authorities (NRAs) and processes for NRAs to define relevant national competition markets and analyse whether there are any operators with significant market power (SMP) in that market. It also sets out rules for granting resources such as numbering.

- > *The Authorisation Directive*—harmonises and simplifies authorisation rules and conditions throughout the EU, replacing individual licences with a general authorisation scheme.
- > *The Access Directive*—applies to all forms of communications networks carrying publicly available communications services and covers the relations between electronic communications providers on a wholesale basis. It establishes rights and obligations for operators and undertakings seeking interconnection and/or access to their networks. Overall, it means that member states must ensure there are no restrictions preventing negotiations from taking place between operators about the technical and commercial arrangements for access and interconnection.
- > *The Universal Service Directive*—concerns the relationship between electronic communications providers and end-users. It requires the provision of directory enquiry services and directories, public payphones and access for users with disabilities. The directive also contains provisions on universal service obligations, such as quality of service, as well as for regulatory control of undertakings with significant retail market power, and a number of users' interests and rights. NRAs may impose a number of obligations on operators with SMP—these can include imposing 'must carry' obligations on the transmission of specified radio and television broadcast channels and services, where the relevant network serves as the primary means of access to the services for a large number of users.
- > *The Privacy and Electronic Communications Directive*—concerns the processing of personal data relating to the delivery of communications services.

A diagram providing an overview of the EU regulatory framework is set out at Appendix A.

The need to respond to convergence was a significant driver for the enactment of the ECRF. The ECRF was designed to recast the existing telecommunications regulatory framework in order to make the electronic communications sector more competitive.<sup>8</sup> As Humphreys and Simpson have reported, the 2003 package extended the EU telecommunications regulatory framework to all electronic communications services and associated networks in order to cater to the digital convergence of the telecommunications, broadcasting and internet sectors. The ECHR also responded to an urgent concern within the EU to harmonise licence/authorisations conditions; these varied across the EU from onerous (for example, France, Belgium) to light (Sweden, Denmark, Finland).<sup>9</sup> As the EC has stated, the ECRF aimed 'to provide a coherent, reliable and flexible approach to the regulation of electronic communication networks and services in fast moving markets' and 'to provide a lighter regulatory touch where markets have become more competitive yet ensure that a minimum of services are available to all users at an affordable price and that the basic rights of consumers continue to be protected.'<sup>10</sup>

Since 2003, further changes have been made to the EU's regulatory framework. In 2009, a telecommunications reform package was passed that makes a number of

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<sup>8</sup>European Commission, 'Regulatory framework for electronic communications', [http://europa.eu/legislation\\_summaries/information\\_society/l24216a\\_en.htm](http://europa.eu/legislation_summaries/information_society/l24216a_en.htm)

<sup>9</sup> Humphreys and Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, p. 99.

<sup>10</sup> 'New Regulatory Framework', European Commission website at [http://ec.europa.eu/information\\_society/topics/telecoms/regulatory/new\\_rf/text\\_en.htm](http://ec.europa.eu/information_society/topics/telecoms/regulatory/new_rf/text_en.htm)

changes to the ECHR.<sup>11</sup> It establishes a new regulatory agency, the Body of European Regulators for Electronic Communications (BEREC), to ensure a consistent and coordinated approach to regulation. It also introduces new remedies for dealing with dominant companies, improved spectrum management and mobile broadband services, and new rights for citizens and consumers—the most important of which are the concept of a right to internet access and greater protection for personal data. While the enactment of the converged framework of the ECHR in 2003 represented significant change, changes are continuing, and the framework continues to evolve.

## 2.3 The UK—*Communications Act 2003*

Within the EU, the UK's approach is considered best practice in terms of the way it has implemented the EU regulatory framework. This paper therefore focuses on the UK's converged legislative framework rather than those of other EU member states.

The UK passed its Communications Act and created Ofcom in 2003, introducing sweeping changes to the regulation of media and communications. The Communications Act requires Ofcom to balance broad and sometimes conflicting economic and cultural policy considerations. The Communications Act was intended to make the UK home to the most dynamic and competitive media and communications market in the world—this would be achieved through a light touch approach to regulatory decision-making, a greater emphasis on industry self-regulation, relying on market forces to assure optimal use of the radio spectrum and promoting new media markets, whilst safeguarding the interests of citizens and consumers.<sup>12</sup> According to Doyle and Vick, the UK Government rejected calls for full deregulation of communications industries, and determined that Ofcom would be required to safeguard basic public service values such as the principle of universality in telecommunications and the fundamental precepts of public service broadcasting.<sup>13</sup>

The *Communications Act 2003* transferred functions from five previous regulatory organisations to Ofcom. In broad terms, it:

- > sets out Ofcom's general duties and provides for the establishment of a Content Board and a Consumer Board to advise Ofcom (Part 1 of the Act)
- > provides for the regulation of electronic communications networks and delivery infrastructures, with a number of measures transposing the ECRF into domestic law, including the introduction of a new licensing system (Part 2)
- > provides for the regulation of broadcasting content, including reforms to accommodate the switchover to digital broadcasting and rationalise the regulation of public service broadcasting (Part 3)
- > provides for licensing of television reception (Part 4)
- > deals with competition in communications markets (Part 5)
- > contains miscellaneous provisions (Part 6).

Other laws that govern communications industries in the UK are contained in the following Acts:

- > *Broadcasting Act 1990*
- > *Broadcasting Act 1996*

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<sup>11</sup> 'Agreement on EU Telecoms Reform paces way for stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizens', press release, 5 November 2009, <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/491>.

<sup>12</sup> Department of Trade and Industry (DTI) and Department for Culture, Media and Sport (DCMS), *A New Future for Communications (2000)* Cm 5010 ('Communications White Paper') p 10.

<sup>13</sup> Gillian Doyle and Douglas Vick, 'The Communications Act 2003: A New Regulatory Framework in the UK', 11 *Convergence* (2005) 75, p. 77.

- > *Marine and Broadcasting Offences Act 1967*
- > *Telecommunications Act 1984*
- > *Wireless Telegraphy Act 1949*
- > *Wireless Telegraphy Act 1967*
- > *Wireless Telegraphy Act 1998*.

As noted by Garcia-Murillo, the Communications Act did not repeal these pieces of legislation, but rather amended them to take into account the new responsibilities of Ofcom and its merged functions.

The government's desire to provide a policy response to convergence was the key impetus for the integration of existing media and communications laws in the UK. The creation of Ofcom was central to the Blair Government's policy response to communications and media convergence. The government considered that a new regulatory body would have 'the vision to see across ... converging industries'<sup>14</sup> and to provide a 'comprehensive, coherent and joined up approach to regulation'.<sup>15</sup>

While the Communications Act ushered in significant change to the UK's regulatory framework, change is ongoing in a number of areas. The Department for Culture, Media and Sport (DCMS) business plan for 2010-2015 includes plans to 'change the media regulatory regime by reforming Ofcom and deregulating the broadcasting sector to reduce the burden placed on business'.<sup>16</sup> Under the proposed Public Bodies Reform Bill, Ofcom's policy-making function in certain areas is to be devolved back to the appropriate ministry and regulation of certain areas will be reduced by 2012.<sup>17</sup> Most of these proposed changes to Ofcom's remit relate to broadcasting regulation. For instance, Ofcom will no longer be required to review public service broadcasting every five years or review media ownership rules every three years. Instead, both will now be performed at the discretion of the Culture Secretary.<sup>18</sup> The DCMS business plan also includes development of a new framework for the communications industries to promote growth.<sup>19</sup> In May 2011, DCMS launched a consultation process, calling for evidence on how to reduce regulatory burdens and future-proof for a digital age.<sup>20</sup> This is expected to culminate in a White Paper and draft Communications Bill by April 2013.<sup>21</sup>

Other changes to the UK's regulatory landscape have been signalled in the *Digital Economy Act 2010*. This legislation brings online copyright infringement provisions into Ofcom's purview, creating new responsibilities for it to adopt measures aimed at significantly reducing levels of unlawful file-sharing via peer-to-peer online networks. The implementation of the Digital Economy Act's full measures met with some opposition from industry, with the instigation of a judicial review by BT and TalkTalk. However, the UK High Court in its 20 April 2011 judgement has upheld the principle of taking measures to tackle online copyright infringement and the UK Government is now planning to proceed with the implementation of the measures to tackle online piracy.<sup>22</sup> In addition, the Digital Economy Act amends Ofcom's market review

<sup>14</sup> DTI and DCMS, *Communications White Paper*, p. 11.

<sup>15</sup> Regulatory Impact Statement, *Setting up Ofcom as a Single Regulator*, para 10.

<sup>16</sup> DCMS, *Business Plan 2010–15*, <http://www.culture.gov.uk/publications/7545.aspx>.

<sup>17</sup> Department for Culture, Media and Sport, media release, [www.culture.gov.uk/news/media\\_releases/7485.aspx](http://www.culture.gov.uk/news/media_releases/7485.aspx).

<sup>18</sup> *ibid.*

<sup>19</sup> DCMS, *Business Plan 2010–15*, [www.culture.gov.uk/publications/7545.aspx](http://www.culture.gov.uk/publications/7545.aspx)

<sup>20</sup> DCMS, 'First step to Communications Bill', press release 16 May 2011, [http://www.culture.gov.uk/news/media\\_releases/8122.aspx](http://www.culture.gov.uk/news/media_releases/8122.aspx)

<sup>21</sup> *ibid.*

<sup>22</sup> Department for Culture, Media and Sport, media release, [www.culture.gov.uk/news/news\\_stories/8060.aspx](http://www.culture.gov.uk/news/news_stories/8060.aspx).

processes, requiring it to conduct a review of the state of the UK's landline, mobile, broadband and broadcast networks and services every three years. The first of these is due out in September 2011.<sup>23</sup> While the UK's enactment of converged legislation in 2003 introduced significant change, the Digital Economy Act and DCMS reforms indicate that change is continuing in the UK regulatory environment.

## 2.4 South Africa—*Electronic Communications Act 2005*

South Africa introduced converged legislation in 2006 with the enactment of the *Electronic Communications Act 2005* (ECA). According to the regulator, the Independent Communications Authority of South Africa (ICASA), the ECA introduced radical changes in the way the communications industry would be regulated. The legislation established a new licensing regime and a review of regulations that sought to govern previously distinct, but now converging technologies of telecommunication, broadcasting and computing.<sup>24</sup> The ECA was aimed at remedying 'possible past defects with sector regulation'.<sup>25</sup> The preamble of the ECA states that it is an Act to 'promote convergence in the broadcasting, broadcasting signal distribution and the telecommunications sectors and provide the legal framework for convergence of those sectors'.<sup>26</sup> The ECA contains:

- > a licensing regime
- > provisions relating to electronic communications networks and communications facilities
- > provision for the control of the radiofrequency spectrum
- > provisions for technical regulation
- > interconnection obligations and regulation
- > provisions for electronic communications facilities leasing
- > broadcasting licence requirements, regulation of political content and ownership limitations
- > competition provisions
- > provisions relating to consumer issues
- > provisions relating to the Universal Service Agency and the Universal Service Fund.

South Africa implemented institutional convergence by merging the telecommunications and broadcasting regulators to create ICASA in 2000. According to Garcia-Murillo, this was undertaken while the South African telecommunications industry was still in the early stages of deregulation, making South Africa a unique case among converged regulators.

It appears that the ECA was part of a broader reform agenda within South Africa.<sup>27</sup> The initial policy blueprint of the South African Government identified affordable access to communications services as a basic need to be targeted and also indicated changes in governance such as the separation of policy, regulation and implementation, and the establishment of an independent regulator.<sup>28</sup>

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<sup>23</sup> The State of the Communications Nation, <http://media.ofcom.org.uk/2010/07/22/the-state-of-the-communications-nation/>.

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> Preamble, *Electronic Communications Act* (South Africa) 2005.

<sup>27</sup> For a discussion of media and communications institutional change in South Africa, see Alison Gillwald, 'Experimenting with institutional arrangements for communications policy and regulation: The case of telecommunications and broadcasting in South Africa', *The South African Journal of Information and Communication* (2001), Issue 2, [www.sajic.org.za/index.php/SAJIC/article/viewArticle/SAJIC-2-3](http://www.sajic.org.za/index.php/SAJIC/article/viewArticle/SAJIC-2-3).

<sup>28</sup> *ibid.*

## 2.5 Korea, Japan and Taiwan—movements towards converged legislative frameworks

Both Korea and Japan have enacted reforms to their telecommunications and broadcasting regulatory frameworks, while Taiwan has announced it will be undertaking a series of changes resulting in a converged law by 2014.<sup>29</sup>

In Korea, proposals for new legislation to integrate separate laws for television broadcasters and telecommunications carriers were developed by the regulator, the Korea Communications Commission (KCC).<sup>30</sup> Korea's first converged regulator for broadcasting and communications, the KCC was formed in 2008 from the former Ministry of Information and Communication and the Korean Broadcasting Commission. Shortly after its establishment, the KCC integrated the former Telecom Basic Act and Broadcasting Act to create the Broadcasting and Telecommunication Development Basic Act.<sup>31</sup> The new converged legislation was reportedly enacted in March 2010.<sup>32</sup> However, news reports in 2010 suggested that the enforcement of the legislation, which was meant to commence in September 2010, may be delayed due to disputes between the KCC and the Ministry of Culture, Sports and Tourism about digital content policies.<sup>33</sup>

Initial plans for wide-ranging legislative reforms in Japan appear to have been scaled back. Japan's Ministry of Internal Affairs and Communications (MIC) announced it would converge its telecommunications and broadcasting laws by 2010.<sup>34</sup> As discussed by Lui, between 2006 and 2009, the MIC had worked towards integrating the regulation of telecommunications, broadcasting, network facilities and relevant matters into one law, to be called the Information and Telecommunications Law.<sup>35</sup> At first, the law was envisaged to dispense with current distinctions based on telecommunications and broadcasting, and instead create a regulatory framework around three function-based categories—content, platform and transmission facilities.

However, as discussed by Hayashi and Marumo, the draft of the new law that was submitted to the Japanese Parliament in March 2010 aimed for less drastic changes, with only broadcasting laws integrated into one law.<sup>36</sup> According to Hayashi and Marumo, the draft law indicates that laws regulating telecommunications and network facilities will not be integrated and the distinction between telecommunications and broadcasting remains. It has been reported that the new broadcasting law was passed by the Japanese Parliament in November 2010.<sup>37</sup>

In Taiwan, the proposed legislative change forms part of the government's broader digital convergence development plan, which involves broadband coverage to 80 per cent of households at speeds of over 100 Mbit/s, and other measures such as

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<sup>29</sup> 'Government to announce digital convergence plan', *The China Post*, 6 July 2010.

<sup>30</sup> Nasser, Jolaina, 'Korea plans new laws to maintain broadcasters' edge', Asia-Pacific Broadcasting Union, 28 August 2008.

<sup>31</sup> David Kennedy and William Lee, *South Korea (Country Regulation Overview)*, Ovum report, 15 June 2010, p. 11.

<sup>32</sup> *ibid.*

<sup>33</sup> Kim Tong-hyung, 'Government turf war confounds content developers', *Korea Times*, 9 August 2010.

<sup>34</sup> Yu-li Lui, 'The Impact of Convergence on Telecommunications Law and Policy: A Comparison between Japan and Taiwan', Department of Radio and TV, National Chengchi University (2009) Taiwan, p.8.

<sup>35</sup> Lui, 'The Impact of Convergence on Telecommunications Law and Policy'; Hiromi Hayashi and Akira Marumo, 'Japan', *International Comparative Legal Guide to Telecommunications Laws and Regulations 2011*, (2011) p. 101.

<sup>36</sup> Hiromi Hayashi and Akira Marumo, 'Japan', *International Comparative Legal Guide to Telecommunications Laws and Regulations 2011*, (2011) p. 101.

<sup>37</sup> Yu-li Lui, 'The Impact of Convergence on the Telecommunications Law and Broadcasting-Related Laws: A Comparison between Japan and Taiwan', *Keio Communication Review* No. 33, 2011, p. 50.

subsidies for set-top boxes.<sup>38</sup> According to news reports, convergence of different media has not been possible due to various restrictions under Taiwan's Broadcasting Act and Telecom Act, which ban broadcasting and telecommunications operators from entering into each other's businesses.<sup>39</sup> The government plans to change these laws in a three-phase process, commencing with amendments to each Act to remove the cross-industry restrictions, and culminating in the integration of both acts into one law by 2014.

## 2.6 Other jurisdictions

There is some interest in converged legislation in other jurisdictions. In Indonesia, research on converged regulatory structures has been undertaken by the Ministry of Communication and Information Technology, in order to inform the government's strategies for addressing convergence issues.<sup>40</sup> In Canada, the Canadian Radio-television and Telecommunications Commission (CRTC) has publicly advocated converged legislation, with its chairman telling a parliamentary committee in 2010 that 'Canada clearly needs unified legislation to cover telecom, broadcasting, and radio communications. Other countries have already done this. It is time for us to do the same.'<sup>41</sup> He explained that the CRTC had been 'doing what it could internally to implement regulatory convergence' through the creation of a policy development and research branch, and conducting joint telecommunications and broadcasting hearings wherever possible. However, legislative change was said to be needed so that regulation could better address the reality of convergence.

In India, the Convergence Bill of 2000 was initiated to accommodate convergence through measures such as the creation of a converged industry regulator and a single legal framework for telecommunications, broadcasting and the internet.<sup>42</sup> The Bill proposed a simplified licensing regime based on functional categories similar to those used in the Malaysian legislation and outlined the functions of the new integrated regulator. It was intended that the Convergence Bill would replace five existing laws. However, the Bill has never become law in India—the Bill remains pending in India's Parliament and it is unclear when the government will move forward with its implementation.<sup>43</sup>

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<sup>38</sup> Li, Judy, 'Government Plans for Digital Convergence Network in Taiwan by 2015,' CENS.com, 6 August 2010, [http://www.cens.com/cens/html/en/news/news\\_inner\\_33151.htm](http://www.cens.com/cens/html/en/news/news_inner_33151.htm)

<sup>39</sup> 'Government to announce digital convergence plan', *The China Post*, 6 July 2010.

<sup>40</sup> Yudhista Nugraha and Cahyana Ahmadayadi, 'Horizontal regulation of ICT in the era of convergence' (2010), presentation to Communications Policy and Research Forum, 15 November.

<sup>41</sup> Von Finckenstein, Konrad (Chairman of CRTC), evidence given at Standing Committee on Industry, Science and Technology, Tuesday 13 April 2010.

<sup>42</sup> Garcia-Murillo, 'Regulatory responses to convergence', p. 36.

<sup>43</sup> ITU/InfoDev, *ICT Regulation Toolkit*, 'Practice Note: India's Communications Convergence Bill', last updated 16 September 2010.

# 3 Key features of converged legislative frameworks

## 3.1 Background—differing regulatory traditions for telecommunications, media and IT

As various commentators have discussed, the conceptual basis for converged legislation appears to be that, in response to the challenges of convergence, policy and regulation will ‘follow the logic of technology’, with communications and media policy having ‘the same goals and applying the same principles and means, within some sort of unified regulatory apparatus’.<sup>44</sup> The ITU/InfoDev has noted that, in order to facilitate the development of new technologies, which bring telecommunications, broadcasting and the internet closer together, the regulatory frameworks governing these industries are being coordinated, and correspondingly modified, so that they are focused on the same objectives.<sup>45</sup>

However, as Blackman notes, it is well understood that telecommunications, the media sector and internet-related industries have differing regulatory traditions.<sup>46</sup> As discussed by Blackman, telecommunications regulation traditionally concerns the provision and operation of the physical infrastructure, the network and network access—the conduit of content rather than the content itself. Content carried over telecommunications networks has traditionally been considered a private matter and unregulated. Telecommunications regulation has historically controlled market entry, service pricing and technical regulation to ensure interoperability of equipment. Liberalisation of telecommunications markets has also been a feature of the telecommunications regulatory tradition and so a strong feature of telecommunications regulation is facilitating effective competition in the market.

In contrast, media regulation is traditionally concerned with the regulation of content, and, in the broadcasting sector, licensing provides the basis for regulation on social policy and cultural criteria—in exchange for the conferring of a limited number of broadcasting licences. Government objectives for media regulation have traditionally concerned freedom of speech, pluralism, impartiality, representation of ethnic groups, protection of vulnerable social groups such as children and the promotion of cultural heritage.<sup>47</sup>

Unlike telecommunications or media regulation, the internet sector has a largely unregulated or self-regulatory tradition. Self-regulatory codes and rules for legal liability for content have emerged in relation to the internet.

Commentators have expressed a number of viewpoints on the integration of these regulatory traditions. Blackman has proposed that a starting point for reconciling these differing regulatory traditions is to re-examine the fundamental goals of regulatory intervention and ask under what circumstances it is needed. According to Blackman,

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<sup>44</sup> Jan van Cuilenberg and Denis McQuail, ‘Media Policy Paradigm Shifts: Towards a New Communications Policy Paradigm’, *European Journal of Communication* (2003) 18:181, p. 202; also see discussion of ‘Integrated Legal Framework and Laws’ in Latzer, Michael, ‘Convergence Revisited: Toward a Modified Pattern of Communications Governance’, 15 *Convergence* (2009) 411, p. 421.

<sup>45</sup> ITU/InfoDev, *ICT Regulation Toolkit*, Module 6 Legal and Institutional Framework, Section 4.4.

<sup>46</sup> Colin Blackman, ‘Convergence between telecommunications and other media: How should regulation adapt?’ 22(3) *Telecommunications Policy* (1998), 163, p. 165.

<sup>47</sup> *ibid*; van Cuilenberg & McQuail, ‘Media Policy Paradigm Shifts’, p. 186; Oranje et al, ‘Responding to Convergence: Different approaches for Telecommunications regulators’ (2008), report prepared by RAND Europe for the Dutch Independent Telecommunications and Post Regulator (OPTA), p. v.

the need for regulation in an environment of convergence can be considered in terms of the public interest or the threat of market failure. Approaching the matter from a media perspective, Latzer has equated the convergence of these regulatory traditions with deregulation and commercialisation, arguing that ‘convergence exemplifies a hostile take-over by telecommunications’.<sup>48</sup> Van Cuilenberg and McQuail have suggested a new conceptualisation of communications policy, in the European context, outlining a new regulatory model based around three central concepts—freedom of communication, access and control/accountability.<sup>49</sup>

Section 3.2 provides a discussion of the key features of converged legislative frameworks, as distilled from the legislative frameworks of the EU, the UK, Malaysia, South Africa and Korea. This discussion shows how previously distinct regulatory traditions have come together in the form of converged legislation, examining whether and how broadcasting, telecommunications and IT regulation have been integrated into one cohesive framework.

### **3.2 Objects, regulatory principles and role of regulator**

The converged legislative frameworks examined are each underpinned by a number of different objectives. These relate to a broad range of matters in pursuit of various national, industry, technological, social, cultural and market interests. Given the very diverse nature of these interests, they may on occasion conflict—this is expressly recognised in sub-sections 3 (6) to 3(8) of the UK Communications Act, which set out how Ofcom is to consider conflicting interests in carrying out its duties. For the EU and the UK, the role of the regulator is central to the framing of the objectives of the converged legislation. The relevant legislative extracts for each jurisdiction are contained in Appendix B.

In the Malaysian context, the objects of the CMA concisely bring together a number of social, cultural, market and technology-related objectives, which are mostly couched in terms of promoting national policy objectives for the communications and multimedia industry (sections 3(1)(a) and 3(1)(b)). Some of these objectives are expressed quite broadly, such as regulating for the long-term benefit of the end-user (section 3(2)(d)). Others are more prescriptive and set specific, quantifiable goals, such as establishing Malaysia as a global centre for ICT and multimedia services (section 3(2)(a)). Another key object of the CMA, at section 3(1)(c), is to establish the powers and functions of the regulator, the Malaysian Communications and Multimedia Commission (MCMC). These include advising the minister, regulating all matters related to communications and multimedia activities, recommending reforms to communications and multimedia laws, promoting the development of the industry and encouraging self-regulation.

In contrast to Malaysia’s legislation, the objects of South Africa’s ECA are expressed in terms of the public interest. The ECA at section 2 states that ‘[t]he primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to ...’. It then sets out a list of 26 subsidiary objects, which cover a broad and varied range of matters relating to technology, social (access and diversity), cultural, national, economic, industry and regulatory objectives and principles. South Africa’s ECA demonstrates the breadth of the regulatory matters that can be covered by converged legislation.

Both the EU’s ECRF and the UK’s Communications Act do not have specific legislative objects sections. However, the key aims of both instruments can be discerned from provisions regarding the functions of the relevant regulatory bodies.

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<sup>48</sup> Latzer, Michael, ‘Convergence Revisited: Toward a Modified Pattern of Communications Governance’, 15 *Convergence* (2009) 411 p. 414.

<sup>49</sup> van Cuilenberg and McQuail, ‘Media Policy Paradigm Shifts’, p. 203.

In the EU context, Article 8 of the Framework Directive does contain a statement of policy objectives and regulatory principles, but in the context of the tasks of NRAs. In short, the policy objectives and regulatory principles state that the NRAs are to:

- > promote competition in the provision of electronic communications networks and services
- > contribute to the development of the internal market
- > promote the interests of EU citizens
- > take all reasonable and proportionate measures to achieve the above aims
- > take into account the desirability of making regulations technologically neutral.

In the UK, where broad policy objectives are set out in the legislation, these are framed as ‘things ... OFCOM are required to secure in the carrying out of their functions ...’ (section 3(2)).

In relation to Ofcom’s general duties, the Act at section 3(1) states that:

- [i]t shall be the principal duty of OFCOM, in carrying out their functions –
- (a) to further the interests of citizens in relation to communications matters; and
  - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

In performing these duties, Ofcom is required to consider the regulatory principles of transparency, accountability, proportionality, consistency and targeted action, and any other principles for best regulatory practice (section 3(3) of the Act). The Communications Act sets out a number of matters that Ofcom is required to secure in the carrying out of its functions in relation to citizens and consumers (at section 3(2)). These are less prescriptive and broader than the national policy objectives set out in Malaysia’s CMA; for example, optimal use of spectrum, availability of a wide range of electronic communications services and high-quality television and radio services, and plurality of television and radio service providers.

### 3.3 Network layers regulatory model

A common feature of converged legislative frameworks is the use of a layered regulatory model that is based on the network layers of next-generation networks or IP-based technologies, rather than on the vertical industry sectors of telecommunications, broadcasting and IT.

This layered regulatory approach originates from the network layers models<sup>50</sup> that have been developed by internet engineers since the 1970s. Models such as the ‘Open System Interconnection’ (OSI) reference model, developed in 1978 by the International Organization for Standardisation (ISO), were used to describe the main elements of the internet and the user interface protocol layers.<sup>51</sup> While the network layers model has been used for some time in an internet engineering context, it is only relatively recently that it has been applied to the analysis of internet regulation.<sup>52</sup>

The growth of the internet and IP-enabled services challenges regulatory approaches based on the legacy ‘vertical’ conception of services and industries. The vertical model is based on communications services and the underlying technology that delivers

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<sup>50</sup> For a good primer on the network layer model, see the discussion on ‘Analytical Model for the Internet’ in ACMA, *Telecommunications Performance Report 2004-05*, at p. 100.

<sup>51</sup> Whitt, Richard. ‘A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model’, 56(3) *Federal Communications Law Journal* (2004) 589, p. 607. Whitt wrote this influential paper while he was senior director for Global Policy and Planning at US communications company MCI.

<sup>52</sup> ACMA, *Telecommunications Performance Report 2004-05*, at p. 100.

those services being one and the same—for example, voice telephony delivered over the copper telephone network. In contrast, the rationale behind the network layers regulatory model is the notion that regulation should follow the architecture of the internet. The argument is that rather than fitting new IP-centric services and applications into pre-existing legal and public policy constructs, regulation should instead be adapted ‘to the reality of how the [i]nternet is fundamentally changing the very nature of the business and social world’.<sup>53</sup> A network layers model could comprise four layers, as set out in Table 1 below. The theory is that regulatory and non-regulatory approaches could be targeted to a particular layer or layers.

**Table 1 Network layers model**

Layer	Description
Applications layer	Programs (e.g. word processors, multimedia, VoIP software, mobile apps) Application protocols (e.g. web browsers, email, file transfer, session initiation protocols, domain name system)
Content layer	Sounds and images (e.g. text, voice, music, videos, pictures)
Logical layer	Transport/transmission control layer (TCP) Network/IP (data flow) Link interface (between computers and physical layer)
Physical layer	Transmission (e.g. twisted copper pair, DSL, optical fibre, WiFi, satellite)

Source: ‘Analytical Model for the Internet’, *ACMA Telecommunications Performance Report 2004–05*, p. 100.

Arguably, a layered approach accommodates internet and IP-enabled services by structuring regulation around service function, taking a technology-neutral approach that is based on identifying various network layers and services carried over those networks, rather than legacy concepts.<sup>54</sup> However, the layers model has been criticised as too technically complex and on the basis that industry players cross layers all the time.<sup>55</sup>

The use of a regulatory model comprising network layers can be seen in the Malaysian and EU regulatory regimes. The Malaysian CMA contains the four categories of ‘network facility provider’, ‘network service provider’, ‘application service provider’ and ‘content service provider’. This is clearly demonstrated in the Malaysian licensing categories, set out below. These categories are based on functions instead of the traditional industry divisions of broadcasting and telecommunications. Elsewhere in the CMA, other terms used are ‘communications and multimedia industry’, ‘communications and multimedia information and content services’, ‘applications environment’, and ‘convergence industries’. Kitley has observed that familiar words such as television, radio and broadcasting are not mentioned in the CMA—the legislation ‘spoke a new language ... the language of information and communications technology’.<sup>56</sup>

<sup>53</sup> Whitt, Richard. ‘A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model’, 56(3) *Federal Communications Law Journal* (2004) 589, p. 589. Whitt wrote this paper while he was senior director for Global Policy and Planning at US communications company MCI.

<sup>54</sup> Rob Frieden, ‘Adjusting the Horizontal and Vertical in Telecommunications Regulation’, p. 214.

<sup>55</sup> Noam, ‘TV or Not TV: Three Screens, One Regulation?’ (2008), p. 8, at [www.crtc.gc.ca/eng/media/noam2008.htm](http://www.crtc.gc.ca/eng/media/noam2008.htm).

<sup>56</sup> Kitley, Philip, ‘Subject to what? A comparative analysis of recent approaches to regulating television and broadcasting in Indonesia and Malaysia,’ 2(3) *Inter-Asia Cultural Studies* (2001) 503, p. 509.

**Table 2 Description of licensing categories, Malaysia**

<b>Licensing category</b>	<b>General description of licensable activities</b>
Network facility provider	Owners of facilities. Includes broadband cables, telecommunications lines and exchanges, radiocommunications transmission equipment, mobile base stations, broadcasting transmission towers and equipment.
Network service provider	Provides the basic connectivity and bandwidth to support a variety of applications. Network services enable connectivity or transport between different networks. A network service provider is typically also the owner of the network facilities; however, a connectivity service may be provided by a person using network facilities owned by another.
Application service provider	Provides particular functions such as voice services, data services, content-based services, electronic commerce and other transmission services. These are the functions or capabilities that are delivered to end-users.
Content application service provider	A special subset of application service providers. Includes traditional broadcast services and newer services such as online publishing and information services.

Source: 'Categories of Licensable Activities', MCMC website, [www.skmm.gov.my/index.php?c=public&v=art\\_view&art\\_id=81](http://www.skmm.gov.my/index.php?c=public&v=art_view&art_id=81).

In contrast, the South African ECA maintains a distinction between electronic communications services and broadcasting services. In a recent policy paper, ICASA determined that IPTV is to be licensed as a broadcasting service, while video-on-demand is to be licensed as an electronic communications service.<sup>57</sup>

In the EU, the ECRF applies to all electronic communications networks and services, which includes fixed-line telephony, mobile and broadband communications, and cable and satellite television.<sup>58</sup> The ECRF establishes definitions for 'electronic communications network', 'electronic communication service' and 'information society service' rather than using sector-specific terms. As discussed by Frieden, the ECRF uses a layered regulatory model to attempt to establish regulatory parity among similarly situated operators. Rather than apply regulation based on specific service definitions, the ECRF establishes a process for determining whether to apply regulation and when to remove it. This requires NRAs to conduct market analysis and determine whether a provider has significant market power (SMP) before imposing regulatory obligations. As Frieden states, this approach makes a functional assessment of what a company currently provides and whether it possesses market power, rather than who provides a service and that provider's legacy regulatory status. The EU's market analysis process is discussed further in section 3.7 below.

During the development of Korea's new legislation, there was agreement about the adoption of a layered regulatory model but differences in opinion amongst the legacy regulators about how to characterise the layers involved.<sup>59</sup> The former KBC proposed a three-layered regulatory model comprising content, platform and network. This is set out in Table 3 below.

Under the KBC model, content regulation would focus on societal, cultural and economic values; platform regulation would protect the consumer, promote competition and regulate business entry/exit; and the network would be considered

<sup>57</sup> ICASA, 'Position Paper in Relation to Internet Protocol Television (IPTV) and Video on Demand (VOD) Services' (2010).

<sup>58</sup> 'Regulatory framework for electronic communications', European Commission website. European Parliament and Council of the European Union, Directive 2002/21/EC of March 2002 on a common regulatory framework for electronic communications networks and Services ('Framework Directive').

<sup>59</sup> Oranje et al (RAND Europe), 'Responding to Convergence', p. 74.

neutral, so network regulation would focus on technical standards, price and market power.

In contrast, the former MIC outlined a two-layer regulatory model comprising content and carriage. This is set out in Table 4 below. Unlike the KBC, the MIC considered the platform layer to be neutral in value and regulated accordingly. At the time of writing, it is not known which model was adopted in the Korean legislation.

**Table 3 KBC layered regulatory model**

	<b>Business</b>	<b>Objective of regulation</b>	<b>Entry regulation</b>	<b>Objects</b>
<b>Network (Infrastructure)</b>	Network operator	<ul style="list-style-type: none"> <li>&gt; Ubiquitous service</li> <li>&gt; Protecting private information</li> </ul>	Licence	<ul style="list-style-type: none"> <li>&gt; Licence</li> <li>&gt; Price regulation</li> </ul>
<b>Platform (packaging, distribution)</b>	Program distributor	<ul style="list-style-type: none"> <li>&gt; Consumer protection</li> <li>&gt; Fair competition</li> </ul>	Licence/ registration	<ul style="list-style-type: none"> <li>&gt; Unfair competition</li> <li>&gt; Must carry</li> </ul>
<b>Contents (production, creation)</b>	Multimedia contents producer	<ul style="list-style-type: none"> <li>&gt; Cultural and societal diversity</li> <li>&gt; Protecting property rights</li> </ul>	Report	<ul style="list-style-type: none"> <li>&gt; Diversity of content</li> <li>&gt; Contents (obscenity)</li> </ul>

Source: Adapted from KBC, 2006 in Oranje et al.

**Table 4 MIC layered regulatory model**

	<b>Business</b>	<b>Objective of regulation</b>	<b>Entry regulation</b>	<b>Objects</b>
<b>Carriage</b>	Communication network, internet network, cable network, satellite network, terrestrial transmission network etc.	<ul style="list-style-type: none"> <li>&gt; Focusing on economic value</li> <li>&gt; Societal and cultural values are secondary</li> </ul>	Competition	<ul style="list-style-type: none"> <li>&gt; Regulating leading incumbents' anti-competition</li> <li>&gt; Securing equal accessibility to network</li> <li>&gt; Using spectrum efficiently</li> <li>&gt; Regulating price to protect consumer</li> </ul>
<b>Content</b>	Business providing broadcasting programmes and information	<ul style="list-style-type: none"> <li>&gt; Focusing on societal and cultural values</li> <li>&gt; Economic value is secondary</li> </ul>	Different regulation level depending on influence of contents	<ul style="list-style-type: none"> <li>&gt; Diversifying content</li> <li>&gt; Protecting property rights</li> </ul>

Source: Adapted from MIC, 'Changes in Broadcasting Law and contents regulation', December 2007, in Oranje et al.

A range of layered regulatory models have been adopted in Malaysia, the EU and Korea. There are different approaches to implementing a network layers model and it is yet to be determined which approach is more successful.

### 3.4 Treatment of content regulation

In the EU and UK, content is regulated by a separate regime or with reference to different regulatory measures to those applicable to carriage—these may aim to protect certain interests to do with media content or be specifically directed at the broadcasting sector. This distinct treatment of content is intended to ensure adequate consideration of the particular interests at stake in content regulation. These have proven to be very contentious; for example, in the EU they acted as a barrier to the adoption of a fully converged legislative framework.

Humphreys and Simpson discuss how in the EU context, the central significance attributed to content in the service offerings of both the internet and broadcasting industries led to internet and broadcasting regulation largely being excluded from the ECRF.<sup>60</sup> As mentioned in section 2.2, the regulation of content has been specifically excluded from the electronic communications regulatory framework. As the Framework Directive states, in the EU context it has been considered necessary to separate the regulation of transmission from the regulation of content.<sup>61</sup> The ECRF does not therefore cover the content of services delivered over electronic communications networks using electronic communications services, such as broadcasting content, financial services and certain information society services. While the regulation of communications and media transmission is converged in the EU, content regulation has its own regime. The AVMS Directive is discussed further in section 3.5.

While there is a clear divide between the regulation of carriage and content in the EU, the Framework Directive also notes that '[t]he separation between the regulation of transmission and the regulation of content does not prejudice the taking into account of the links existing between them, in particular to guarantee media pluralism, cultural diversity and consumer protection.' On this point, commentators have noted that 'infrastructural matters can directly impinge upon the regulation of communications content'.<sup>62</sup> As mentioned earlier, the Access Directive enables NRAs to impose 'must carry' obligations on operators with SMP, for certain radio and TV services. It has been noted that the EU Access and Universal Service Directives will be crucially important in ensuring the ability of member states to maintain fully and develop certain staples of public service broadcasting—for example, universality of access and pluralism—in a time of digital convergence. Despite the existence of discrete regulatory frameworks for carriage and content in the EU, there are likely to be consequences for content stemming from the regulation of carriage.

### 3.5 Graduated approach to content regulation

A graduated approach is apparent in both the EU and UK frameworks for content regulation, involving different levels of regulatory control depending on the nature of the service. This tiered approach is, however, limited in scope to broadcasting or broadcasting-like content, and not to content on the internet generally.

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<sup>60</sup> Humphreys and Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, p. 178.

<sup>61</sup> European Parliament and Council of the European Union, Directive 2002/21/EC of March 2002 on a common regulatory framework for electronic communications networks and Services ('Framework Directive'), paragraph (5).

<sup>62</sup> Humphreys & Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, p.141. Also see Hills & Michalis, 'Restructuring Regulation: technological convergence and European telecommunications and broadcasting markets,' (2000) *Review of International Political Economy*.

At the EU level, the AVMS Directive covers all audiovisual media services—this means traditional television (linear services) and video-on-demand (non-linear) services that are directed at the general public and intended to inform, entertain and educate under the editorial responsibility of a media service provider (Article 1(1)(a)). As the EC explains, the AVMS Directive provides a minimum set of common rules covering aspects like advertising and protection of minors. There are different levels of strictness, or ‘graduated regulation’, depending on the nature of the service. Only a basic tier of rules applies to on-demand audiovisual media services, as users have different degrees of choice and control over these services, whereas rules are stricter for television broadcasts.

The AVMS Directive was passed in 2007. It replaced, updated and extended the Television Without Frontiers Directive. It was intended to take account of technological developments and changes in the structure of the audiovisual market, and is based on a new definition of audiovisual media services that is independent of the method of broadcasting.<sup>63</sup> The AVMS Directive applies to linear, traditional television services as well as new ‘on-demand’ media services delivered over the internet that are ‘television-like’—that is, they compete for the same audience as television broadcasts and the nature and means of access of the service would lead the user to reasonably expect regulatory protection within the scope of the AVMS Directive.<sup>64</sup>

Under the UK’s *Communications Act*, content regulation is divided into three tiers. The first tier relates to basic regulatory obligations for harm and offence, accuracy and impartiality, protection of minors, ads and sponsorship, and people with disabilities. This first tier of obligations is regulated directly by Ofcom through an industry code and by a co-regulatory body, the Authority for Television on Demand (ATVOD), for certain video-on-demand services.<sup>65</sup> Although this tier is governed by direct and co-regulation, it is imbued with a self-regulatory flavour; for example, the industry code is principles-based, leaving a level of discretion for broadcasters in meeting their obligations.

The second and third tiers of content regulation relate to public service broadcasting requirements. In the UK, different broadcasters are licensed to deliver different levels of public service broadcasting. This second tier sets quantifiable public service broadcasting requirements and is regulated by Ofcom primarily via licence conditions. These regulatory obligations relate to production quotas, regional programming targets, news scheduling targets and political broadcasting. The third tier contains qualitative public service broadcasting requirements relating to quality and diversity obligations to air educational, arts or religious programmes and to serve minority audiences. These less quantifiable content requirements are subject to a self-regulatory regime whereby broadcasters are required to develop policy statements and self-evaluate against them. Ofcom’s role is to review and report, as well as retain the power to intervene.

### **3.6 Emergence of approaches to the internet and the online environment**

The layered regulatory approach, discussed in section 3.3, applies to all electronic communications infrastructure and services, including those relating to the internet.<sup>66</sup> There are also high-level objectives or aspirations relevant to internet-enabled

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<sup>63</sup> EC, ‘Audiovisual media services without frontiers’,

[http://europa.eu/legislation\\_summaries/audiovisual\\_and\\_media/l24101a\\_en.htm](http://europa.eu/legislation_summaries/audiovisual_and_media/l24101a_en.htm)

<sup>64</sup> *Audiovisual Media Services Directive*, Recital 17.

<sup>65</sup> Provisions requiring the regulation of video-on-demand services in the UK were enacted in 2010 in response to the AVMS Directive.

<sup>66</sup> The ACMA describes ‘the internet’ as ‘a distributed, global, multi-layered network of networks,’ in the *Telecommunications Performance Report 2004-05*, at p. 99. The Macquarie Dictionary defines ‘the internet’ as ‘the communications system creating by the interconnecting networks of computers around the world.’

services, users and industries in the converged legislation, as set out in the legislative objects. For example, the Malaysian CMA explicitly states, in its objects, that the CMA is not to be construed as permitting the censorship of the internet.<sup>67</sup> Under the UK's Communications Act, Ofcom is charged with promoting digital media literacy—which includes educating internet users—rather than regulating internet content directly.

However, since the introduction of converged legislation, new issues have arisen in the provision of internet services and in the online environment. Issues such as packet prioritisation, and online data protection, privacy and copyright have emerged more recently. Some changes to converged frameworks have occurred or are proposed in response to such emerging issues, many of which were not envisaged at the time these frameworks were enacted. For example, as mentioned in section 3.2, the Digital Economy Act brings online copyright infringement within Ofcom's purview. Ofcom is currently considering how workable the proposed plans are. The EU experience provides another example of the emergence of new, internet-related issues. When the ECRF was introduced, it was observed that it did not cover the internet.<sup>68</sup> This has changed— as part of the 2009 package of reforms amending the ECRF, there is a new internet freedom provision. This requires that any measures taken by EU member states on citizens' internet access—for example, measures to prevent child pornography or other illegal activities such as piracy—are to be governed by rules to protect the rights and freedoms of citizens in relation to fair procedure.<sup>69</sup> The reforms also include new guarantees for an 'open and more neutral' internet, with NRAs having the power to set minimum quality levels for network transmission services so as to promote 'net neutrality' and 'net freedoms' for EU citizens.<sup>70</sup> EU member states are expected to transpose these rules into domestic legislation in 2011.

A range of issues relating to internet provision and the online environment have arisen since the enactment of converged legislative frameworks. Responses to these issues are emerging, some of which involve changes to the converged frameworks, and others being addressed through different regulatory and non-regulatory mechanisms.

### 3.7 Use of general competition law

The EU and UK legislative frameworks both demonstrate a greater consistency with general competition law.<sup>71</sup> In the EU, this involved an alignment of sector-specific telecommunications regulation with competition law. This was intended to address the challenge created by convergence between telecommunications and sectors of the European information economy—it recognised that highly telecommunications-specific regulations, particularly those imposed before market impacts can be seen, run the risk of creating unintended consequences into other sectors such as the information economy.<sup>72</sup> In the UK, the trend towards reliance on competition law was extended to broadcasting regulation. In an approach described by the government as 'competition plus', general competition law provides the basis for structural regulation, with industry-specific rules retained where deemed essential by the government.<sup>73</sup>

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<sup>67</sup> *Communications and Multimedia Act (Malaysia) 1998*, section 3(3).

<sup>68</sup> Humphreys & Simpson, *Globalisation, Convergence and European Telecommunications Regulation*, p.162.

<sup>69</sup> European Commission, 'Agreement on EU Telecoms Reform paves way for stronger consumer rights, an open internet, a single European telecoms market and high-speed internet connections for all citizens', press release 5 November 2009.

<sup>70</sup> *ibid.*

<sup>71</sup> See O'Flinn and Eaux, 'An Overview of the EU Regulatory Framework'; Oranje et al, 'Responding to Convergence', p. 27

<sup>72</sup> Oranje et al (RAND Europe), 'Responding to Convergence', p.27.

<sup>73</sup> Communications White Paper, note 27 above, p. 36.

In the EU, the principle is to allow competition rules to act as an instrument for market regulation in relation to electronic communications networks and services. However, to the extent that there is no effective competition in the market, the ECRF requires NRAs to impose obligations on providers with significant market power. NRAs are responsible for carrying out regular market analysis, which makes use of a horizontal approach to market definition—defining markets with regard to a functional assessment of the services provided and whether the provider possesses market power (see section 3.2). Where this identifies that an operator has significant market power in a given market, the NRA will impose ex ante obligations on that operator—depending on the circumstances, these could be of transparency, non-discrimination, accounting separation, access to and use of specific network facilities, cost recovery and price controls, or functional separation.

These options are effectively a regulatory toolbox from which the NRAs may pick whatever measures are appropriate and adequate to address the identified market failure. The significant market power (SMP) regime also provides for a progressive removal of obligations as competition develops in the different markets and facilitates the transition towards the application of competition law when sector-specific regulation is no longer necessary.

In the UK, the *Communications Act 2003* liberalised the existing media and cross-media ownership rules affecting commercial organisations. The government aimed to ‘re-base broadcasting regulation upon modern Competition Act principles and give the regulator [Ofcom] concurrent powers with the Office of Fair Trading [one of the UK competition authorities].’<sup>74</sup> Sector-specific media ownership restrictions were relaxed, and rules preventing non-EU media companies from holding UK broadcasting licences were abolished, along with most cross-media ownership rules. The rationale for this approach was that the UK commercial media needed new sources of investment, that the source was unimportant so long as effective content regulation ensuring equality and diversity was in place, and that there was a need for ownership rules to reflect the reality of a global marketplace.<sup>75</sup> As noted by Doyle and Vick, in order to ensure the passage of the Communications Act, the government agreed to a compromise whereby all mergers and acquisitions affecting broadcasting would be subject to a ‘plurality test’.<sup>76</sup>

As discussed in section 2.3, there are plans to further liberalise the broadcasting sector in the UK. DCMS has reportedly stated that:

[t]he broadcasting sector is currently heavily regulated and we believe that it is time to remove unnecessary regulation. We will remove or reduce regulation in areas where it is possible to do so in advance of a new Communications Bill, but this is a complex sector and we will need to get the interdependencies right.<sup>77</sup>

### 3.8 The effectiveness of converged legislation

Excepting the EU, there has been little commentary on the effectiveness of converged legislative frameworks. Commentators have noted the difficulty of attributing the effectiveness of a regulatory regime to factors such as a converged legislative framework or a converged regulator. As Geach<sup>78</sup> notes:

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<sup>74</sup> DTI and DCMS, Communications White paper, para 8.9.1.

<sup>75</sup> Culture Minister Tessa Jowell, Hansard Parl Dec, HC (2002), December.

<sup>76</sup> Doyle and Vick, ‘The Communications Act 2003’, p. 85.

<sup>77</sup> DCMS spokesperson, in McCabe, ‘Ofcom prepared to surrender powers’.

<sup>78</sup> Geach, Neil, ‘Converging Regulation for Convergent Media: an overview of the Audiovisual Media Services Directive,’ *Journal of Information, Law and Technology* (2008) p. 4.

Finland, Italy and the UK do have converged regulators which may explain why their ICT sectors are regarded as amongst the best performing in the EU however this is debatable, and is more likely due to factors such as the individual governmental approach to competition issues and how effectively they have implemented the EU's regulatory framework ...

Burdon observes that judgments of success are difficult—it may be too soon, and it is impossible to compare what had transpired, with what would have happened if the previous regulatory structure had been retained.<sup>79</sup>

The EU's ECRF has been subject to a number of assessments. The EC reports regularly on the progress of member states in achieving the goals of the ECRF, and has also commissioned several consultant reports on aspects of the framework. In addition, there are a number of scholarly assessments of the ECRF.<sup>80</sup> It has been observed by the EC itself, as well as by a number of commentators, that the goal of a single market and EU-wide regulatory harmonisation is yet to be reached, due to the variations in regulatory approaches across EU nations.<sup>81</sup> It is hoped that the new Body of European Regulators for Electronic Communications (BEREC)—established as part of the reforms introduced under the 2009 package—will play an important role in strengthening the single market and ensure consistent regulation across Europe.

It has been contended by de Steel that it is unclear whether the goal of proportionality is being achieved and that, overall, the increase of regulation does not match the de-regulatory rhetoric of the [regulatory] authorities.<sup>82</sup> Further, de Steel considers that the aims of national regulators are difficult to understand, leading to less legal certainty:

[it is] not clear whether the regulators directly protect the consumers (for example when regulating international roaming prices), promote entry (and ... what kind of entry: infrastructure-based competition or service-based competition) or merely prohibit abuse of market power. In particular, the attitude of regulators is not clear with regard to new markets, whether they are retail markets such as VoIP or new underlying wholesale markets such as VDSL infrastructure or 3G networks.<sup>83</sup>

A report by Oranje et al of RAND Europe for OPTA, the Netherlands' independent telecommunications regulator, examined the phenomenon of convergence and assessed the consequences for telecommunication regulators and regulation. The report aimed to draw out useful lessons from approaches applied in the US, the UK and Korea. While the report did not focus specifically on converged legislation, it did provide assessments of the UK and Korean regulatory responses to convergence. The report concluded that change is ongoing and cannot be confined by a single approach to convergence.<sup>84</sup> Even the UK—considered by the study to have the most coherent and well-developed regulatory approach—was found to face difficulties in responding to uncertainty and change.

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<sup>79</sup> Burdon, Steve, 'Leading digital economies: a best practice approach to converged regulation' (2010) 12 (3) *Info* 3, p. 4.

<sup>80</sup> See, for example, Humphreys and Simpson; Alexandre de Steel, 'Current and future European regulation of electronic communications: A critical assessment' (2008) 32 *Telecommunications Policy*, 722; Hills and Michalis.

<sup>81</sup> EC, '15<sup>th</sup> Progress report on the Single European Electronic Communications Market 2009', May 2010; de Steel, p. 725; Oravaninen, Henriikki, 'Sensing and responding in the telecoms markets – an EU regulatory perspective', presentation to Communications Policy and Research Forum, 15 November 2010.

<sup>82</sup> de Steel, p. 725.

<sup>83</sup> *ibid.*

<sup>84</sup> Oranje et al (RAND Europe), 'Responding to Convergence', p. 92.

## 4. Conclusion

Converged legislation represents the coming together of three differing regulatory traditions—telecommunications, media and the internet—into one regulatory framework. However, the experiences of jurisdictions with converged legislative frameworks to date demonstrate a partial integration of media and communications regulation.

This partial integration of media and communications regulation is apparent from the content/carriage distinction adopted in jurisdictions with converged legislative frameworks. Generally, converged legislative frameworks display an industry-agnostic approach to carriage regulation—telecommunications, broadcasting and internet-related industry players are governed by a common, layered regulatory approach in areas such as licensing. The attributes of this regulatory approach are deregulation, reliance on competition law and use of self-regulation—characteristics associated more with telecommunications regulation than other regulatory traditions.

However, content remains subject to sector-specific media regulatory measures. Content regulation may sit outside the converged legislative frameworks, as in the EU, or require sector-specific measures, as in the UK. In the EU and the UK, these regulatory measures apply largely to television and television-like content.

While the introduction of converged legislation involved significant change, change is ongoing. The emergence of issues to do with the internet and the online environment is necessitating further change. Such issues include packet prioritisation, and online privacy, data protection and copyright. In the EU, there are new regulatory measures under the ECRF to protect ‘internet freedom’; in the UK, Ofcom has been charged with new responsibilities to reduce online piracy. The emergence of issues since the initial enactment of converged legislation suggests that legislation will continually need to evolve to keep pace with technological change. Overall, converged legislative frameworks represent an evolutionary approach to regulating for convergence.

This examination of converged legislative frameworks aims to provide background for current discussions about future regulatory models. In particular, this paper provides a discussion of experiences of other jurisdictions in bringing together the previously distinct regulatory traditions of telecommunications, media and the internet. These experiences provide ideas and insights that could inform discussions about the Australian approach.

# Appendix A—Overview of EU Electronic Communications Regulatory Framework

## EU Electronic Communications Regulatory Framework

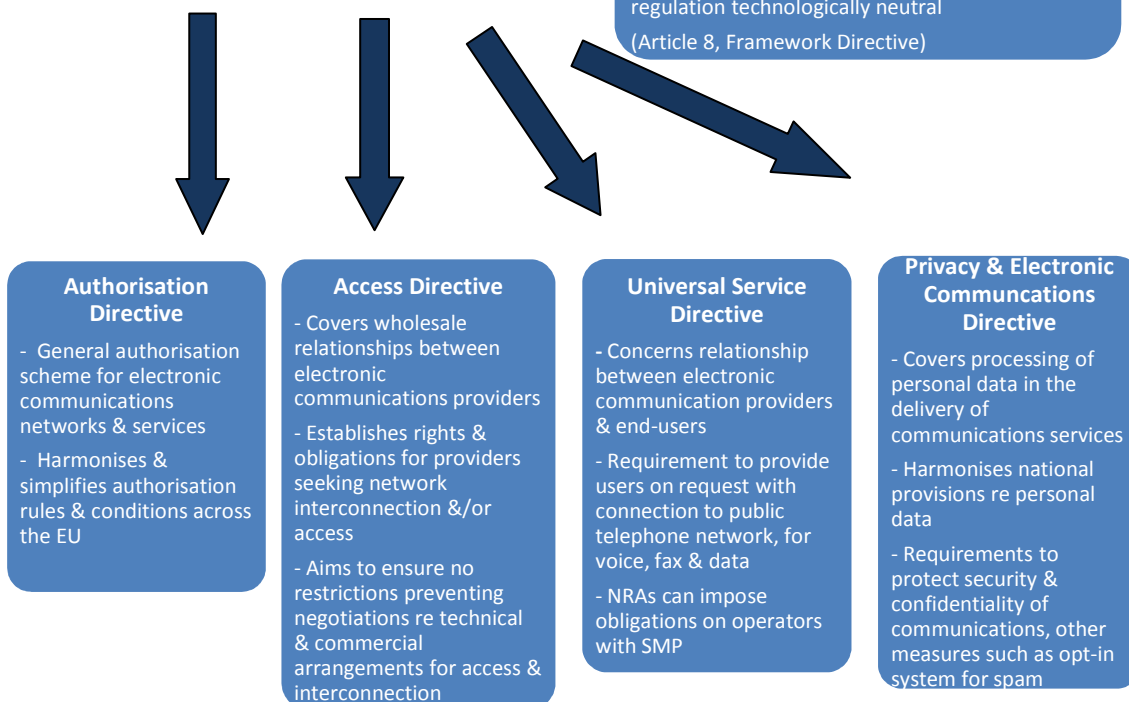
- Basis for all national telco laws in EU member states
- Applies to all electronic communications **networks & services** regardless of platform
- Expressly does not apply to **content** delivered over those networks & services
- Comprises 5 key directives
- Came into force in 2003, updated & amended in 2009
- Considered by ITU to be 'paradigm legislation aimed at addressing convergence & its challenges'

### Framework Directive

- Establishes structural & procedural elements of EU regulatory framework
- Sets out EU level regulatory principles, basic definitions
- Sets out NRAs' responsibilities including :
  - Promotion of competition
  - Rules for granting resources such as numbering, radio frequencies, rights of way, facility sharing
  - Conducting market analysis; if this reveals that any operators have significant market power (SMP), can use remedies under Access & Universal Service Directives

### Tasks of NRAs - Policy objectives & regulatory principles

- NRAs shall promote competition in provision of electronic communications networks & services
- NRAs shall contribute to development of EU market
- NRAs to promote interests of EU citizens
- NRAs to take all reasonable & proportionate measures to achieve these objectives
- NRAs to take into account desirability of making regulation technologically neutral (Article 8, Framework Directive)



### Authorisation Directive

- General authorisation scheme for electronic communications networks & services
- Harmonises & simplifies authorisation rules & conditions across the EU

### Access Directive

- Covers wholesale relationships between electronic communications providers
- Establishes rights & obligations for providers seeking network interconnection &/or access
- Aims to ensure no restrictions preventing negotiations re technical & commercial arrangements for access & interconnection

### Universal Service Directive

- Concerns relationship between electronic communication providers & end-users
- Requirement to provide users on request with connection to public telephone network, for voice, fax & data
- NRAs can impose obligations on operators with SMP

### Privacy & Electronic Communications Directive

- Covers processing of personal data in the delivery of communications services
- Harmonises national provisions re personal data
- Requirements to protect security & confidentiality of communications, other measures such as opt-in system for spam

EU MEMBER STATES REQUIRED TO TRANSPOSE EU DIRECTIVES INTO NATIONAL LAW

# Appendix B—Objects/regulatory policy of converged legislation

## Extracts from Communications and Multimedia Act (Malaysia) 1998

### Section 3. Objects.

(1) The objects of this Act are—

*(a)* to promote national policy objectives for the communications and multimedia industry;

*(b)* to establish a licensing and regulatory framework in support of national policy objectives for the communications and multimedia industry;

*(c)* to establish the powers and functions for the Malaysian Communications and Multimedia Commission; and

*(d)* to establish powers and procedures for the administration of this Act.

(2) The national policy objectives for the communications and multimedia industry are—

*(a)* to establish Malaysia as a major global centre and hub for communications and multimedia information and content services;

*(b)* to promote a civil society where information-based services will provide the basis of continuing enhancements to quality of work and life;

*(c)* to grow and nurture local information resources and cultural representation that facilitate the national identity and global diversity;

*(d)* to regulate for the long-term benefit of the end user;

*(e)* to promote a high level of consumer confidence in service delivery from the industry;

*(f)* to ensure an equitable provision of affordable services over ubiquitous national infrastructure;

*(g)* to create a robust applications environment for end users;

*(h)* to facilitate the efficient allocation of resources such as skilled labour, capital, knowledge and national assets;

*(i)* to promote the development of capabilities and skills within Malaysia's convergence industries; and

*(j)* to ensure information security and network reliability and integrity.

(3) Nothing in this Act shall be construed as permitting the censorship of the Internet.

## Extracts from EU Framework Directive

(16) National regulatory authorities should have a harmonised set of objectives and principles to underpin, and should, where necessary, coordinate their actions with the regulatory authorities of other Member States in carrying out their tasks under this regulatory framework.

[...]

Chapter III

TASKS OF NATIONAL REGULATORY AUTHORITIES

Article 8

### Policy objectives and regulatory principles

1. Member states shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Member states shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*:
  - (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price and quality;
  - (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;
  - (c) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.
3. The national regulatory authorities shall contribute to the development of the internal market by *inter alia*:
  - (a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;
  - (b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;
  - (c) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;

(d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia:

(a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);

(b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

(c) contributing to ensuring a high level of protection of personal data and privacy;

(d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;

(e) addressing the needs of specific social groups, in particular disabled users; and

(f) ensuring that the integrity and security of public communications networks are maintained.

## Extracts from Communications Act (UK) 2003

### 3 General duties of OFCOM

- (1) It shall be the principal duty of OFCOM, in carrying out their functions—
- (a) to further the interests of citizens in relation to communications matters;
  - and
  - (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- (2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, each of the following—
- (a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;
  - (b) the availability throughout the United Kingdom of a wide range of electronic communications services;
  - (c) the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests;
  - (d) the maintenance of a sufficient plurality of providers of different television and radio services;
  - (e) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services;
  - (f) the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public and all other persons from both—
    - (i) unfair treatment in programmes included in such services; and
    - (ii) unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.
- (3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
  - (b) any other principles appearing to OFCOM to represent the best regulatory practice.
- (4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—
- (a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
  - (b) the desirability of promoting competition in relevant markets;
  - (c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;
  - (d) the desirability of encouraging investment and innovation in relevant markets;
  - (e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;
  - (f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;

- (g) the need to secure that the application in the case of television and radio services of standards falling within subsection (2)(e) and (f) is in the manner that best guarantees an appropriate level of freedom of expression;
- (h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;
- (i) the needs of persons with disabilities, of the elderly and of those on low incomes;
- (j) the desirability of preventing crime and disorder;
- (k) the opinions of consumers in relevant markets and of members of the public generally;
- (l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;
- (m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

(5) In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money.

(6) Where it appears to OFCOM, in relation to the carrying out of any of the functions mentioned in section 4(1), that any of their general duties conflict with one or more of their duties under sections 4, 24 and 25, priority must be given to their duties under those sections.

(7) Where it appears to OFCOM that any of their general duties conflict with each other in a particular case, they must secure that the conflict is resolved in the manner they think best in the circumstances.

(8) Where OFCOM resolve a conflict in an important case between their duties under paragraphs (a) and (b) of subsection (1), they must publish a statement setting out—

- (a) the nature of the conflict;
- (b) the manner in which they have decided to resolve it; and
- (c) the reasons for their decision to resolve it in that manner.

[...]

#### **4 Duties for the purpose of fulfilling Community obligations**

[Sets out duty for Ofcom to carry out various functions in accordance with Article 8 of the EU Framework Directive]

#### **5 Directions in respect of networks and spectrum functions**

[Duty of OFCOM to carry out various functions in accordance with directions as may be given to them by the Secretary of State]

(3) The Secretary of State's power to give directions under this section shall be confined to a power to give directions for one or more of the following purposes—

- (a) in the interests of national security;
- (b) in the interests of relations with the government of a country or territory outside the United Kingdom;
- (c) for the purpose of securing compliance with international obligations of the United Kingdom;
- (d) in the interests of the safety of the public or of public health.

#### **6 Duties to review regulatory burdens**

(1) OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve—

- (a) the imposition of burdens which are unnecessary; or
- (b) the maintenance of burdens which have become unnecessary.

[...]

## **7 Duty to carry out impact assessments**

[...]

## **8 Duty to publish and meet promptness standards**

(1) It shall be the duty of OFCOM to publish a statement setting out the standards they are proposing to meet with respect to promptness in—

- (a) the carrying out of their different functions; and
- (b) the transaction of business for purposes connected with the carrying out of those functions.

[...]

## **Media literacy**

### **11 Duty to promote media literacy**

(1) It shall be the duty of OFCOM to take such steps, and to enter into such arrangements, as appear to them calculated—

- (a) to bring about, or to encourage others to bring about, a better public understanding of the nature and characteristics of material published by means of the electronic media;
- (b) to bring about, or to encourage others to bring about, a better public awareness and understanding of the processes by which such material is selected, or made available, for publication by such means;
- (c) to bring about, or to encourage others to bring about, the development of a better public awareness of the available systems by which access to material published by means of the electronic media is or can be regulated;
- (d) to bring about, or to encourage others to bring about, the development of a better public awareness of the available systems by which persons to whom such material is made available may control what is received and of the uses to which such systems may be put; and
- (e) to encourage the development and use of technologies and systems for regulating access to such material, and for facilitating control over what material is received, that are both effective and easy to use.

(2) In this section, references to the publication of anything by means of the electronic media are references to its being—

- (a) broadcast so as to be available for reception by members of the public or of a section of the public; or
- (b) distributed by means of an electronic communications network to members of the public or of a section of the public.

## **OFCOM's Content Board**

### **12 Duty to establish and maintain Content Board**

[...]

### **13 Functions of the Content Board**

(1) The Content Board shall have such functions as OFCOM, in exercise of their powers under the Schedule to the Office of Communications Act 2002 (c. 11), may confer on the Board.

(2) The functions conferred on the Board must include, to such extent and subject to such restrictions and approvals as OFCOM may determine, the carrying out on OFCOM's behalf of—

- (a) functions in relation to matters that concern the contents of anything which is or may be broadcast or otherwise transmitted by means of electronic communications networks; and

(b) functions in relation to the promotion of public understanding or awareness of matters relating to the publication of matter by means of the electronic media.

[...]

#### **14 Consumer research**

(1) OFCOM must make arrangements for ascertaining—

(a) the state of public opinion from time to time about the manner in which electronic communications networks and electronic communications services are provided;

(b) the state of public opinion from time to time about the manner in which associated facilities are made available;

(c) the experiences of consumers in the markets for electronic communications services and associated facilities, in relation to the manner in which electronic communications networks and electronic communications services are provided and associated facilities made available;

(d) the experiences of such consumers in relation to the handling, by communications providers and by persons making such facilities available, of complaints made to them by such consumers;

(e) the experiences of such consumers in relation to the resolution of disputes with communications providers or with persons making associated facilities available; and

(f) the interests and experiences of such consumers in relation to other matters that are incidental to, or are otherwise connected with, their experiences of the provision of electronic communications networks and electronic communications services or of the availability of associated facilities.

(2) The matters to which the arrangements must relate do not include the incidence or investigation of interference (within the meaning of the Wireless Telegraphy Act 1949 (c. 54)) with wireless telegraphy.

(3) The matters to which the arrangements must relate do not (except so far as authorised or required by subsections (4) to (6)) include public opinion with respect to—

(a) the contents of anything broadcast or otherwise published by means of an electronic communications network; or

(b) the experiences or interests of consumers in any market for electronic communications services with respect to anything so broadcast or published.

(4) OFCOM must make arrangements for ascertaining—

(a) the state of public opinion from time to time concerning programmes included in television and radio services;

(b) any effects of such programmes, or of other material published by means of the electronic media, on the attitudes or behaviour of persons who watch, listen to or receive the programmes or material; and

(c) so far as necessary for the purpose mentioned in subsection (5), the types of programmes that members of the public would like to see included in television and radio services.

(5) That purpose is the carrying out by OFCOM of their functions under Chapter 4 of Part 3 of this Act.

(6) OFCOM must make arrangements for the carrying out of research into the following—

(a) the matters mentioned in section 11(1);

(b) matters relating to, or connected with, the setting of standards under section 319 of this Act;

(c) matters relating to, or connected with, the observance of those standards by persons providing television and radio services;

(d) matters relating to, or connected with, the prevention of unjust or unfair treatment in programmes included in such services; and

(e) matters relating to, or connected with, the prevention of unwarranted infringements of privacy resulting from activities carried on for the purposes of such services.

[...]

#### **15 Duty to publish and take account of research**

(1) It shall be the duty of OFCOM—

(a) to publish the results of any research carried out by them or on their behalf under section 14; and

(b) to consider and, to such extent as they think fit, to take account of the results of such research in the carrying out of their functions.

[...]

#### **16 Consumer consultation**

(1) It shall be the duty of OFCOM to establish and maintain effective arrangements for consultation about the carrying out of their functions with—

(a) consumers in the markets for the services and facilities in relation to which OFCOM have functions;

(b) consumers in the markets for apparatus used in connection with any such services or facilities;

(c) consumers in the markets for directories capable of being used in connection with the use of an electronic communications network or electronic communications service.

(2) The arrangements must include the establishment and maintenance of a panel of persons (in this Act referred to as “the Consumer Panel”) with the function of advising both—

(a) OFCOM; and

(b) such other persons as the Panel think fit.

(3) The arrangements must secure that the matters about which the Consumer Panel are able to give advice include the interests of domestic and small business consumers in relation to the following matters—

(a) the provision of electronic communications networks;

(b) the provision and making available of the services and facilities mentioned in subsection (4);

- (c) the supply of apparatus designed or adapted for use in connection with any such services or facilities;
- (d) the supply of directories capable of being used in connection with the use of an electronic communications network or electronic communications service;
- (e) the financial and other terms on which such services or facilities are provided or made available, or on which such apparatus or such a directory is supplied;
- (f) standards of service, quality and safety for such services, facilities, apparatus and directories;
- (g) the handling of complaints made by persons who are consumers in the markets for such services, facilities, apparatus or directories to the persons who provide the services or make the facilities available, or who are suppliers of the apparatus or directories;
- (h) the resolution of disputes between such consumers and the persons who provide such services or make such facilities available, or who are suppliers of such apparatus or directories;
- (i) the provision of remedies and redress in respect of matters that form the subject-matter of such complaints or disputes;
- (j) the information about service standards and the rights of consumers that is made available by persons who provide or make available such services or facilities, or who are suppliers of such apparatus or directories;
- (k) any other matter appearing to the Panel to be necessary for securing effective protection for persons who are consumers in the markets for any such services, facilities, apparatus or directories.

(4) Those services and facilities are—

- (a) electronic communications services;
- (b) associated facilities;
- (c) directory enquiry facilities;
- (d) a service consisting in the supply of information for use in responding to directory enquiries or of an electronic programme guide; and
- (e) every service or facility not falling within any of the preceding paragraphs which is provided or made available to members of the public—
  - (i) by means of an electronic communications network; and
  - (ii) in pursuance of agreements entered into between the person by whom the service or facility is provided or made available and each of those members of the public.

(5) The matters about which the Consumer Panel are to be able to give advice do not include any matter that concerns the contents of anything which is or may be broadcast or otherwise transmitted by means of electronic communications networks.

[....]

(7) It shall be the duty of OFCOM, in the carrying out of their functions, to consider and, to such extent as they think appropriate, to have regard to—

- (a) any advice given to OFCOM by the Consumer Panel; and
- (b) any results notified to OFCOM of any research undertaken by that Panel.

## Extracts from Electronic Communications Act (South Africa) 2005

### Object of Act

2. The primary object of this Act is to provide for the regulation of electronic communications in the Republic in the public interest and for that purpose to—

- (a) promote and facilitate the convergence of telecommunications, broadcasting, information technologies and other services contemplated in this Act;
- (b) promote and facilitate the development of interoperable and interconnected electronic networks, the provision of the services contemplated in the Act and to create a technologically neutral licencing framework;
- (c) promote the universal provision of electronic communications networks and electronic communications services and connectivity for all;
- (d) encourage investment and innovation in the communications sector;
- (e) ensure efficient use of the radio frequency spectrum;
- (f) promote competition within the ICT sector;
- (g) promote an environment of open, fair and non-discriminatory access to broadcasting services, electronic communication networks and to electronic communications services;
- (h) promote the empowerment of historically disadvantaged persons, including Black people, with particular attention to the needs of women, opportunities for youth and challenges for people with disabilities;
- (i) encourage research and development within the ICT sector;
- (j) provide a clear allocation of roles and assignment of tasks between policy formulation and regulation within the ICT sector;
- (k) ensure that broadcasting services and electronic communications services, viewed collectively, are provided by persons or groups of persons from a diverse range of communities in the Republic;
- (l) provide assistance and support towards human resource development within the ICT sector;
- (m) ensure the provision of a variety of quality electronic communications services at reasonable prices;
- (n) promote the interests of consumers with regard to the price, quality and the variety of electronic communications services;
- (o) subject to the provisions of this Act, promote, facilitate and harmonise the achievement of the objects of the related legislation;
- (p) develop and promote SMMEs and cooperatives;
- (q) ensure information security and network reliability;
- (r) promote the development of public, commercial and community broadcasting services which are responsive to the needs of the public;
- (s) ensure that broadcasting services, viewed collectively—
  - (i) promote the provision and development of a diverse range of sound and television broadcasting services on a national, regional and local level, that cater for all language and cultural groups and provide entertainment, education and information;
  - (ii) provide for regular—
    - (aa) news services;
    - (bb) actuality programmes on matters of public interest;
    - (cc) programmes on political issues of public interest; and
    - (dd) programmes on matters of international, national, regional and local significance;
  - (iii) cater for a broad range of services and specifically for the programming needs of children, women, the youth and the disabled;
- (t) protect the integrity and viability of public broadcasting services;
- (u) ensure that, in the provision of public broadcasting services—
  - (i) the needs of language, cultural and religious groups;
  - (ii) the needs of the constituent regions of the Republic and local communities; and
  - (iii) the need for educational programmes, are duly taken into account;
- (v) ensure that commercial and community broadcasting licences, viewed collectively,

are controlled by persons or groups of persons from a diverse range of communities in the Republic;

(w) ensure that broadcasting services are effectively controlled by South Africans;

(x) provide access to broadcasting signal distribution for broadcasting and encourage the development of multi-channel distribution systems in the broadcasting framework;

(y) refrain from undue interference in the commercial activities of licencees while taking into account the electronic communication needs of the public;

(z) promote stability in the ICT sector.

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