Submission on: *Exploring Digital Convergence- issues for policy and legislation* and *Content Regulation in a Converged World* October 2015

1 Preamble The Coalition for Better Broadcasting[1] welcomes the opportunity to comment on the *Exploring Digital Convergence- issues for policy and legislation* and *Content Regulation in a Converged World* discussion documents. The following submission encompasses responses to both papers. Given that the regulatory issues overlap on several practical and conceptual levels, the submission pertains to both and we would ask that the comments be taken into consideration in any deliberations stemming from both the convergence documents and, where relevant, the review of telecommunications legislation (see comments in sections 2 and 5). We are pleased that the government has decided to address the regulatory questions stemming from convergence, especially since the earlier (2008) government initiative *Digital Broadcasting- Review of Regulation*[2], which was intended to address many of the issues the current consultation covers, was cut short in 2009 after a limited review of competition issues.
Given the complexities of the convergence-related issues to be addressed, we have to observe that the time-frame for stakeholder response has significantly constrained the opportunities for a more fulsome response, and given the that selected industry stakeholders were reportedly consulted at earlier points in the process of formulating this framework, we are concerned that groups representing civil society appear not to have had an equal opportunity to engage. Given the experience and expertise of the CBB's board and their independence from vested commercial interests, we would be keen to participate in any future consultations and would appreciate being kept informed about the time-frames for the planned review of issues emerging from these consultations.

2a Convergence papers- assumptions about competition and regulation: Before embarking on a specific discussion of the questions raised in the convergence documents, it is necessary to point out some issues arising from the scope and focus of the framework they set out. In particular, the 'problem definitions' pertaining to the nature of convergence and competition in media markets would benefit from clarification. The definition of convergence in the papers is accurate *in some respects* (i.e. the blurring of previously discrete media value chains) and we would agree that there is a need for regulatory updates to take account of this, including legislative reform. But the way the issues are currently framed also overlooks some key aspects of convergence. The convergence framework presented is also indicative of a default assumption of 'market naturalism', i.e. the notion that the prevailing commercial and technological arrangements in the media sector pre-exist and function independently of the state. This tends to construe regulatory measures as an artificial, post-hoc intervention and distortion of what would otherwise be a natural state of affairs. A concomitant assumption is that regulation is primarily an impediment to market efficiency and liable to inhibit innovation and economic growth. For example, the Exploring Digital Convergence paper talks of 'government not getting in the way', 'roadblocks to innovation' and contrasts technological and market 'realities' with policy and regulatory 'constructs'. Such formulations are potentially problematic because markets and technologies are themselves constructed phenomena which evolve from the particular regulatory and institutional arrangements that shape the forms of possible exchange and the parameters of competition. Indeed, media markets and their technological arrangements could not exist in modern society without being deeply embedded in an array of legislative frameworks and institutional provisions ranging from contract law and monetary systems to technical standards and the availability of an educated workforce. This issue is raised not as a philosophical abstraction but as a substantive diagnosis of the ideological suppositions that frame the discussion papers. Policy definitions and models can directly shape market reality and the development of technology- for example, in regard to competition law, weak definitions of distortion (especially the factual/counter-factual tests which the Commerce Act delineates-see later) effectively preclude regulatory intervention until there is already a substantial negative impact on consumers (which certain telecommunication and subscription content providers have fully exploited in the past). Meanwhile, the recent disputations over the Commerce Commission's TSLRIC modelling of wholesale UCLL and UBA prices are indicative of the extent to which ostensibly objective market measures and

[1] The CBB trust http://betterbroadcasting.co.nz/ is a Non-Government Organisation which promotes public service media principles for broadcasting and other media platforms as well as facilitating public debates and commissioning research into media policy. It is not party-political in orientation. Its membership encompasses a wide demographic and the board, which is elected by the members, includes both media practitioners and academic experts. We are currently in the process of applying to become a charitable trust. This report was compiled by Peter Thompson in consultation with the CBB Board- it reflects the views of CBB, which follows from a process of extensive consultation and discussion with trustees, members and other interested parties

[2] See http://www.mch.govt.nz/research-publications/our-research-reports/digital-broadcasting-review-regulation-january-2008

calculations are highly model-dependent and that market 'reality' is ontologically dependent on the prevailing epistemologies. It would be useful to clarify the definitions of ostensibly common-sense terms such as 'market', 'competition' 'efficiency' 'platform', 'network', 'transmission', 'broadcasting' etc. because what these terms mean in a technical or policy sense may be redefined or rendered ambiguous by the convergence processes in question.

2b Regulatory Context in NZ: In comparison to the large majority of advanced industrial economies, New Zealand media markets are regulated extraordinarily lightly (e.g. no restrictions of cross-media ownership or foreign shareholdings, no anti-siphoning legislation, no rules for set-top-boxes or EPGs, virtually no restrictions on 'walled garden' strategies which lock consumers into using particular types of hardware to access particular forms of software/content, and trade deals like GATS and CER limit the possibility of introducing local content quotas) and it is fair to say this has often *not* served the best interests of the public. It is therefore bewildering that the discussion paper could assert that "the current framework of regulation has worked well for many years" (p.13). **No it hasn't-** at least not if the aim of regulation is the long-term benefit of the public rather than market incumbents. There have been ongoing problems ever since the deregulation of media markets in the late 1980s and 1990s which have, in many cases, been exacerbated by successive governments which were inhibited- often under heavy lobbying pressure- from grasping the regulatory nettle.

For example, problems with Telecom's near-monopoly over telephone infrastructure were evident by the mid-1990s but only started to be tackled with LLU after 2006, followed by the 2011 separation of Chorus and Spark. Even so, the cost of phone calls in New Zealand remains high by international standards- e.g. the cost of domestic mobile-mobile calls in New Zealand is greater than calling from a mobile in the UK. Meanwhile, Sky's de facto monopoly over Pay-TV and its contracts with ISPs were investigated by the Commerce Commission[3] which signalled its concerns without prosecuting because of the costs and the difficulty of proving its case under the dysfunctionally vague terms and retrospective requirements of the Commerce Act. There remain no provisions such as 'must-carry-must-pay' rules to balance the relationship between Sky and the free-to-air channels it carries on its platform (which comprise a substantial proportion of its viewership but for which it pays nothing) while using its control of Prime to compete aggressively for content packages in the FTA sector.

One reason for the government's historic reluctance to intervene in the media market would appear to be a preference for 'wait and see' or 'do nothing' policy alternatives when the complexity of evolving technologies and markets makes it difficult to predict outcomes or the appropriate point or level of intervention (see for Departmental Analysis of Competition in Broadcasting[4]). The problem with such an approach is that delaying policy action until the shape of a rapidly-evolving market becomes clearer often serves incumbent interests and either precludes remedial regulation or requires a far greater level of intervention than would have been necessary had lighter, but pre-emptive options been considered. The result is that government can get locked into path-dependent trajectories in which passive acceptance of technological and market 'realities' as inevitable precludes any unfair advantages historically accrued by market incumbents from being remedied. Insofar as it is politically unacceptable to retroactively 'close the stable door after the horse has bolted' the emphasis must be on developing regulatory measures which are forward-looking, not retroactive, and prevent market distortions occurring in the first place.

2c Further regulation and competition issues: Despite the concerns raised above, the discussion paper casually proclaims that " the rapid entry of telecommunications and internet businesses into the distribution market for online video content has addressed many of the previous concerns of resulting from the lack of competition in the domestic broadcast sector" (p.11). Again, ***no it hasn't.*** There may be more consumer choice on SVOD services for *certain genres* of content, and that may challenge Sky's hold on premium movies and drama. But the overall shape of the market is shifting to a model where intensification of competition means many forms of local content are becoming much harder to sustain. NZ On Air has been structurally unable to sustain a full range of local content genres because it requires a broadcaster to agree to schedule the content before funding; consequently, the drive for ratings means that programmes are often rejected for commercial/opportunity cost reasons. Indeed, of all the content on the now-discontinued TVNZ 7, only two programmes have survived (Back Benches on Prime and Media Take on Maori TV [which was Media 3 until Mediaworks rejected a new series because it wasn't commercially attractive even with NZ On Air fund]). The opportunity costs of providing anything other than the most populist forms of local content are proving prohibitive, *even when NZoA funding is available*.

The Content Regulation paper does invite further consideration of these issues, and this is welcome- but the framework it sets out is primarily concerned with *already-existing* content and the gaps in the classification and standards regimes that have become apparent since the development of online delivery platforms. These are important issues and this submission will address them in due course. But there is relatively little said about the *conditions of content creation*

---

[3] See section 363 www.comcom.govt.**nz**/dmsdocument/11184

[4] This report contained very different perspectives and policy suggestions from MCH and MBIE, and the latter's preference for the 'wait and see' options led to the termination of the Digital Broadcasting- Review of Regulation programme. http://www.beehive.govt.nz/sites/all/files/Departmental%20Analysis%20of%20Competition%20in%20Broadcasting.pdf

needed to ensure diversity and quality and the institutional and regulatory settings which can best serve the needs of the public as citizens as well as as consumers. The government has suggested previously that it prefers to focus its interventions on supporting content provision on a *platform-neutral* basis rather than supporting particular forms of media institutions, but it is essential to recognise that some forms of institutions (i.e. those with commercial priorities) may not be well placed to produce or distribute many forms of content that are desirable for civic or cultural reasons. The digital environment may have seen a proliferation of content in terms of overall volume, but the intensification of competition across the value chain and previously discrete sectors often results in market failures and sub-optimum outcomes for end users. For example, there have been cuts in news/current affairs production budgets both within the print and broadcasting sectors, but this has not been compensated for by the growth of SVOD services, and even if reliable international news services are available online they rarely deal with political, economic and social issues specific to New Zealand. We urge the government to recognise that market forces coupled with digital technology are not some kind of magic bullet which makes concerns about market failures and the need for regulatory intervention redundant.

3a Scope of the convergence discussion framework- normative and technological gaps: As the Exploring Digital Convergence papers acknowledge, the policy framework and work programme which informs this initiative is the government's Business Growth Agenda. While this a legitimate priority, it is important to note that there are also civic and cultural policy priorities which may not be best served by an exclusive focus on economic growth and a conception of the public primarily as consumers. Indeed, there are important overlaps between the economic and technological aspects of media policy and those concerning civil rights and cultural rights (including fundamental questions of universal access, Treaty of Waitangi considerations [there is virtually no discussion of any Maori-specific issues] and Human Rights [such as Article 19 on the freedom to communicate[). The question of civic rights to media and information cannot be reduced to a function of the market because sometimes there are tensions between these imperatives (for example, the now-repealed TVNZ Charter arrangement proved difficult to sustain because public service and commercial priorities could not be aligned). It is therefore essential to consider the civic and cultural aspects of media policy alongside the convergence discussion.

On that point, although the current convergence documents have a degree of overlap with the 2008 Review of Regulation framework, several principles and outcomes are conspicuous by their absence; i.e. securing public value, supporting diversity of content, and social equity and cultural value. This excludes some very important dimensions of media policy which are not identified in the government's convergence work programme. Unfortunately, it cannot be assumed that these issues are no longer salient in a converged media environment. Digitalisation and distribution/ reception of on-demand content on multiple platforms/devices *does not mean that all forms of content are available to all consumers*. Digital technology is not a magic bullet which obviates concerns about market failures. On the contrary, it may actually intensify market competition, exacerbate such tendencies and disadvantage the long-term interests of the public; e.g. competition for premium international content packages has increased the cost for all providers, and as the emergence of SVoD services pushes up prices for the free-to-air sector, they are less willing to accept the opportunity costs of providing many forms of local content. This is the downside of the blurring of value chains which convergence facilitates, and there is insufficient recognition of the potentially negative consequences for the media ecology as a whole in the discussion documents. Quite apart from the questions of affordability and access, there are many forms of content which are under-provided in a competitive multi-media environment (e.g. Netflix and Lightbox offer movies and high-end dramas but not news, current affairs or many other local content genres).

3b Scope of the convergence discussion framework- content creation gaps: The two convergence papers focus primarily on platforms and content respectively. While these encompass a range of important issues, they also circumscribe some important areas of consideration. The models (figures 2 and 5) of consumer personal communications options and consumer multimedia options are useful heuristics in regard to understanding the proliferation of reception devices and delivery platforms. However, conspicuous by its absence from the models is consideration of how convergence affects how content is created and how market arrangements, technology and regulation shape what forms are actually viable- in effect, *half the value chain is missing*. Figure 7 on the government's work programme likewise makes no mention of the need to consider the way convergence shapes the conditions under which content is produced. To suppose that the availability (and affordability) of content in the digital environment can be taken for granted as a direct outcome of digitalisation ascribes an unrealistic degree of utopian optimism and technological determinism to new media platforms.

Content creation is duly mentioned on page 10, but this merely points to new opportunities to create and distribute content. This is valid on one level, but any inference that digital convergence removes impediments to content creation would be mistaken. Even if many people are now able make a cat video on their smart phone and post it on YouTube, this does not confer the facilities, resources, time or expertise to produce, a high quality documentary or drama. The first copy costs for many professional content forms are actually increasing, not diminishing in the digital environment. Likewise, just because anyone with an opinion and an internet connection can start a citizen journalism blog does not mean they are going to rival global media corporations. There may be a few- a very few- artists and bloggers who make money from online content or perhaps attract professional contracts from sharing amateur work online. But increased

access to digital media platforms actually does very little to redress the economic power of large media companies, their massive advantages in making content visible and available to audiences, and the under-supply of some key genres.

3c Scope of the convergence discussion framework Following from the above, access to the channels of distribution have not become democratised because of convergence. Even if more people can create content and distribute it online, this does not entail access to the infrastructures and technologies and brand visibility required for commercial viability. Some forms of production require formats and professional editing standards that remain well out of the reach of smaller artists and producers. Meanwhile, the online distribution of media content has no guarantee of being identified and accessed by audiences. There are millions of websites and even on relative well-recognised platforms like YouTube, millions of content items. There remain significant gatekeeping barriers to accessing mainstream media platforms which have the visibility and branding required to access substantial audiences (which is also a key reason why, despite popular myths to the contrary, traditional mass media platforms remain central to the media ecology).
The assumption that convergence necessarily removes barriers to market entry is therefore flawed. For example, the success of the on-demand services for the free-to-air broadcasting sectors has been possible *because of*, not in spite of their regular broadcast channels. Consequently, independent producers of content who lack the visibility and branding of a mainstream channel are not competing on a level playing field just because they can place content online. A video on YouTube not linked to a recognised brand such as TVNZ is unlikely to be visible to audiences, and certainly not on the level that a programme scheduled on a linear broadcast would be. Likewise, the decline of local music being played on the radio (e.g. the demise of Kiwi FM) has not been compensated for by online distribution, and subscriber services such as Spotify tend to pay such marginal sums that only well-established artists with an existing following are likely to generate significant revenue (indeed, some major artists have actually removed their content from these platforms because they can attract more income through other forms of distribution). Again, it must be stressed that digital convergence is not a magic bullet that enables content producers to compete on an equal footing- the mainstream media companies remain the dominant market actors in most cases. This leads to a further point concerning new and traditional media.

4 Convergence- continuities and disjunctures Despite evident changes in the media sector related to convergence, it is vital to recognise that there are significant continuities too. Numerous studies[5] show that, despite the trend toward time-shifted/ on-demand viewing and listening on new platforms, audiences for linear free-to-air broadcasting remain relatively stable, even if they are also using new reception technologies to allow flexibility in accessing content. But convergence has not overturned the entire value chain of the established media, and many respects, new platforms extend or complement rather than supersede, the existing models. Indeed, the recent growth of the on-demand services of linear broadcasters has not resulted in a proportional decline traditional viewing, and is largely an extension of the continuing demand for linear scheduled viewing**.**
Figure 1 in the discussion document (p.7) draws an unduly simplistic binary distinction between 'legacy industries' and the 'converged, IP-based world. Although the blurring of the formerly discrete value chains is apparent in some cases, this has not occurred through a wholesale transition to online platforms. The medium which has been affected the most by a widespread transition to online distribution and reception is the newspaper, and this sector is in crisis as a result of declining hard copy sales and online revenue streams fragmenting across platforms. The implied dichotomy between traditional or so-called 'legacy' platforms vs. converged platforms needs to take account of continuing centrality of the 'legacy' services within the converged media ecology. In particular, this requires recognition of the continuing salience of traditional platforms and institutional forms in the delivery of key policy outcomes. For example, Radio New Zealand is extending its services online but these do not entail an abandonment of its core radio broadcast services.

5a Legislative Arrangements- gaps and reforms: In respect to regulation and policy, it is clear that there needs to be greater consistency between the respective Acts for Broadcasting, Telecommunications, Radiocommunications, and Films, Videos and Publications Classification. Broadcasting and Telecommunications are especially important here because the respective acts mutually exclude each other from consideration.

The Telecommunications Act 2001 defined telecommunication services thus:

Telecommunication—

(a) means the conveyance by electromagnetic means from one device to another of any encrypted or non-encrypted sign, signal, impulse, writing, image, sound, instruction, information, or intelligence of any nature, whether for the information of any person using the device or not; and

(b) for the purposes of subpart 2 of Part 4, includes any conveyance that constitutes broadcasting; but

(c) for all other purposes, does not include any conveyance that constitutes broadcasting

[5] e.g. see http://www.thinktv.co.nz/wp-content/uploads/TV-Trends-Report_2014.pdf and http://www.nzonair.govt.nz/research/all-research/childrens-media-use-study-2015/ It is important to note that there are no contemporary studies which demonstrate that traditional platforms have already been superseded by digital/online or that this is imminent. Although there will clearly be an increased role for online delivery platforms, there is no guarantee that this will result in superior forms of market competition that ensure greater diversity and quality of content- in fact the reverse is entirely possible.

Telecommunications service means any goods, services, equipment, and facilities that enable or facilitate telecommunication.

Clause c indicates that broadcasting-like content services (i.e. linear/scheduled) are excluded from consideration here, but in the context of convergence where network providers have entered the content distribution, these sectors have begun to overlap. Meanwhile, the recognition that telecommunications services include equipment that facilitate telecommunication should presumably include set-top-box/PVR/ technologies, and by extension the electronic programme guide (EPG). These reception-end technologies are a key part of the media value chain. Indeed it is interesting that the Broadcasting Act suggests that it does not extend to 'pull' services provided on an individual basis: **The Broadcasting Act 1989**, states that:

Broadcasting means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes—
(a) made on the demand of a particular person for reception only by that person; or
(b) made solely for performance or display in a public place

Clause a excludes video-on-demand and other non-linear on-demand content delivery services, meaning their status precisely between the two legislative frameworks. It is therefore important to align these Acts so as cover both linear and non-linear content distribution. The question of how the current arrangement for content classification and standards might be managed will be discussed in a later section of this submission.

5a Telecommunications and Competition issues In addition to aligning the aforementioned legislative Acts, it is also essential to re-examine the Commerce Act alongside the Broadcasting and Telecommunications Acts. Given the a) the historical problems in ensuring fair competition and b) the complexity of media convergence and the intensification of competition across previously discrete sectors and parts of the value chain, the function of the Commerce Commission in ensuring fair competition in the long term interest of the public is essential. The Telecommunications Commissioner role therefore needs to be expanded to take account of the changes occurring because of convergence. This needs to include:

- Jurisdiction over all points of competition in the value chain, especially where there is the possibility of market-distorting gatekeeping. This should extend across platforms and include, where relevant, reception devices where proprietary control or dominant market share over technologies or reception technologies (EPG rankings, 'walled garden' restriction of content/software to hardware, online search engine platforms[6]) unfairly limits competition/access for content and audience.
- Jurisdiction over all electronic distribution networks (this would include telephone/broadband lines and switches, as well as broadcast transmission networks and spectrum allocation) and a responsibility to ensure fair, reasonable, non-discriminatory carriage/transmission access. This should also include provisions for must-carry (or must-offer-must-pay) requirements where a market actor controls access to platforms which could extend non-commercial services at no/marginal expense or where a market actor is deemed to benefit disproportionately from carriage of public channels/ services without compensation.
- Power to require disclosure of relevant media industry data including information about market activities of private equity companies where such disclosure would not directly compromise the commercial interests of the relevant business. This is essential for the development of sound public policy, to gauge the health of market competition and to allow reasonable public access to information about the media system as a part of the fabric of social life and democratic process.
- Advocacy role in identifying and pre-empting the emergence of sub-optimum market outcomes where the long term interests of the public are liable to be compromised. This should include identification of cases where competition is leading to ownership concentration, increasing consumer prices, or acquiring rights to content or distribution capacity for the purpose of restricting the competition.
- Independence from the government of the day including prohibition of Cabinet interference in/ attempts to circumvent the Commerce Commission's processes. This includes Commissioner appointments being made by inter-party agreement through Parliament or Ombudsman.

5c Convergence and Commerce Act issues. In order to ensure any new media and Communications Commissioner were able to promote fair competition effectively, it would be essential to review and revise the Commerce Act, especially the provisions in section 36. The Act states that *no firm with a substantial degree of market power may take advantage of that power for the purpose of preventing, deterring or excluding competition.* However, the procedures and criteria for demonstrating market distortion are not sufficiently robust to prevent the acquisition and- whether intentional or

[6] This could include regulating search engines like Google if they engage in activities that constitute an abuse of their significant market power (in the form of their significant market share as the default search facility for most online content users), e.g. interfering with/restricting search engine results in a manner not in the long term interests of the public.

otherwise- the misuse of market power. In particular, there are problems with the Factual/ Counterfactual tests which have been acknowledged by the Commerce Commission[7]. Counterfactual tests currently require the demonstration that a market actor enjoys a 'substantial degree' of market power and they 'take advantage' of that market power in the pursuit of exclusionary purposes described in Section 36. In effect, this requires determination of what market conditions would obtain if the market actor in question did *not* exert their market power. However, the current model requires a high level of abstraction and hypothetical modelling which is difficult to demonstrate to the standard required in legal proceedings.The validity of any hypothetical scenario can almost always be disputed unless one can conclusively prove that some more desirable market outcome was directly prevented by the actions of the market actor in question. This often permits incremental market power to accrue over time where no specific action/decision in its own right ever meets the threshold required to constitute market distortion or abuse of market power. Although the Commerce Act is not identified as directly relevant to the media convergence agenda, we believe that adequately addressing the regulatory and legislative issues which stem from this requires its inclusion- and this is also true for the review of telecommunications legislation. Without being definitive or exhaustive, these measures should encompass the following:

- Development of new competition benchmarks/criteria based not on the market counterfactuals but on whether or not a hypothetical state-owned enterprise could plausibly provide the service more cheaply to the consumer- if the product or service could be provided more cheaply to consumers under a state-run enterprise then the market is distorted and remedial action such as pricing designation might be considered.
- Remove any requirement that the abuse of market power leading to market distortions necessarily be intentional and focus instead on outcomes where the long term interests of the public are not served. There should be provision for retroactive remedial action to correct market distortions (while respecting the rights of the where market power has been accrued incrementally.
- Where overseas market actors take advantage of the availability of distribution or reception platform infrastructures provided by New Zealand-based companies in order to compete with those companies in the provision of services which use those infrastructures without making any comparable investment in infrastructure or content, measures to ensure a more level playing field (such as imposing GST on SVoD providers or small levies to contribute to domestic platform infrastructure or content) should be considered. This should align with the principle of ensuring fair, reasonable, non-discriminatory carriage/transmission access to distribution platforms.
- The Commerce Act clauses on copyright and intellectual property should be clarified and include provision to; limit the extent to which proprietary technologies and software can be used to facilitate garden wall strategies; make provision for creative commons and fair use principles to apply where these entail creation and dissemination of public goods and do not entail commercial activity or the production of substitutable products which have a negative impact on sales.
- Consideration should be given to anti-siphoning rules for forms of content with a significant public/cultural interest such as national sporting events to ensure universal access.
- There is a need to prevent the over-concentration of media holdings in the hands of a small number of operators or shareholding companies. This is especially important in the converged environment and although it may not be realistic to restrict ownership across different media when platforms are becoming blurred, it is important to look at structural conditions which could inhibit market entry or effectively give rise- even without intention/design- to the emergence of duopoly/oligopoly or cartel-like arrangements. We would suggest that several dimensions of market concentration be considered, including market capitalisation relative to competitors, market share by revenue, and audience share[8].
- Competition law should future-proof potential requirements for community/access or public service media provisions. This would preclude the disposal of spectrum management rights that prevent the maintenance and development of non-commercial public services. As the demise of Stratos TV, Triangle TV and several regional broadcasters demonstrates, this cannot be left to the market or to Kordia. On the principle of ensuring fair, reasonable, non-discriminatory carriage/transmission access, the acquisition of spectrum management or other platform distribution rights in order to deny access to other market actors would also be prohibited (with use-it-or-lose-it sunset clauses).

[7] See www.comcom.govt.**nz**/dmsdocument/11019 also http://www.russellmcveagh.com/Portals/1/Documents/PDFs/DeathKnellOftheCounterfactual.pdf

[8] If the Herfindahl-Hirschman Index of market concentration (See http://www.investopedia.com/terms/h/hhi.asp) exceeded levels set by the Commerce Commission or resulted in significant increases then intervention would be warranted (e.g. introduction of designated price controls). We would suggest a modest benchmark for NZ which reflects its smaller market size and resultant smaller number of market actors, so perhaps a limit of 2500-3000 would be reasonable and any merger/takeover entailing an increase of >200 would require Commerce Commission approval.

6 Spectrum management The maintenance of Commerce Commission oversight of spectrum allocation and 'spectrum capping' policy to prevent market distortion is important. We also agree that there is a need for more robust undertakings in regard to the usage of radio spectrum, and that legislation to ensure fair, reasonable, non-discriminatory terms of access (under both the Broadcasting and the Commerce Acts) would be useful.

There is a need to challenge the common assumption that spectrum scarcity was ever the primary reason for the licensing and public service obligations on broadcasters, or that it has ceased to be a scarce resource in the era of digital convergence. Neither is true. The drive for Analogue Switch-Off/ Digital Switch-Over has seen terrestrial television transmission free up significant spectrum space which can be utilised by other wireless services. However, the shift to digital frequencies and formats, while heralded as a success, has not been without negative consequences. The way in which Kordia has been tasked with auctioning off digital multiplex rights to generate maximum revenue has not led to efficient allocation of the spectrum. Sky returned some of the spectrum rights it had acquired while some non-profit/community operators like Triangle, Stratos and several regional channels have been forced to close because of the excessive commercial asking price for digital frequencies. It is essential that spectrum be reserved for public service media use. As noted earlier, the notion that traditional broadcasting is a 'legacy' industry no longer relevant in the converged media environment is incorrect. Although satellite reception has grown in NZ, leaving DTT as the delivery mechanism for a minority of New Zealand households, the dependence on satellite transponders which are neither owned or controlled by the NZ government or domestic media companies means that the continuing importance of DTT services should not be disregarded. Indeed, it is often difficult to predict how future technologies might find uses for spectrum currently not currently regarded as usable or valuable. The principle that ought to underpin allocation of spectrum is the allocation of the rights to operate a specific number of services/channels within a given band for which rights are allocated, rather than the wholesale disposal of entire chunks of spectrum for up to two decades without reference to how much is actually utilised by the holder. The use-it-or-lose-it principle would apply here so that if the holder of management rights found that they only required a proportion of the allocated bandwidth to provide the licensed frequencies, the unused spectrum could be returned and reallocated.

It is highly unlikely that disposing of currently unused spectrum at current market rates would maximise value to the crown. The opportunity cost of reserving unused spectrum is small compared with the potentially huge cost of selling off rights only to discover that it is needed in the future[9]. Spectrum must therefore be reserved for existing and potential future non-profit, community and public service broadcasters. It would also be sensible to make provision for some form of must-carry or must-offer-must-pay arrangement for carriage of non-commercial channels on fair, reasonable, non-discriminatory terms.

7 The Continuing Relevance of Content Regulation

7a Preamble The paper on Content Regulation in the Converged World provides a useful overview of the issues and regulatory options for applying classification and standards regimes to digital distribution and reception platforms. The current regulatory framework of the Broadcasting Standards Authority and the Office of Film & Literature Classification (and the Film & Video Labelling Board) requires alignment of the Telecommunications, Broadcasting, and Films, Videos & Publications Acts to permit the development of consistent standards across platforms. It is axiomatic that content of a similar form and substance be subject to similar regulatory principles as far as possible, although there may be some variations in how these are implemented or enforced depending on the technical features of the platform and the nature of the services provided (e.g. radio would be exempt from codes pertaining to visual images, while it would be difficult to require SVoD providers based offshore- which supply access to existing 'libraries' of content which have already been published/distributed- to submit each item for re-classification in line with domestic regulations). The CBB is strongly supportive of updating content standards and classifications provisions to remain applicable to the converged media environment, which would encompass elements of options 4, 5 and 6 in the discussion paper. Although industry self-regulation can play an important role here, for reasons that will be made clear, it is nevertheless important to maintain a robust statutory framework for content regulation. As noted earlier, the emphasis on the regulation of already-existing content does not deal with the equally-important questions about the institutional arrangements for the funding and production of content and questions of diversity and quality. The CBB regards these latter concerns as central to the deliberations on convergence and is concerned to ensure they are not disregarded. Some proposals for ensuring the interests of the public as citizens, not just consumers, are served in the converged media environment are included after the discussion of content issues.

7b Myths about convergence and the continuing need for regulation There is a view in some sections of industry - and perhaps government- that the complexity of converging digital media markets, the ready availability of online content

[9] This happened in Thailand in the early 1990s when unused frequencies were sold off to the telecommunication firms only for it to become apparent later on that the frequencies were essential for digital mobile telephony, forcing the government to buy back spectrum at inflated prices.

sourced outside the state's jurisdiction, and the trend toward greater audience agency in actively 'pulling' time-shifted content from on-demand services (in lieu of the tradition linear 'push' of scheduled content delivery) renders content regulation both impractical and unnecessary. Convergence doubtless complicates regulatory arrangements. This does not, however, mean that the normative and practical premises of content regulation are no longer desirable or relevant. On the contrary, the proliferation of content and platforms makes it even *more important* that judicious regulation continues. The media constitute a special sector of public life because they help to shape public opinion and facilitate informed deliberation essential to civic participation. Media discourses are part of the fabric of social life and provide the conceptual and discursive resources that enable us to make sense of our place in the world, relate to other people and cultures... The rights to free speech enshrined in the Bill of Rights Act (section 14) can nevertheless be subject to regulatory restrictions where those rights are abused to harm others. Indeed, the government's recent move to introduce the Harmful Digital Communications Act recognises that our communicative rights also entail responsibilities. The potential for media content to inflict harm/injury and the need for standards and informed audience decisions about access is clearly not obviated by the proliferation of digital distribution and reception technologies. The rapid and widespread dissemination of content forms that could potentially be harmful or injurious to the public good (and the difficulty of controlling their proliferation online) suggests *the need for classification and standards is greater in the converged media environment,* although the legislation, regulatory agencies and modalities of intervention may need updating.

Another crucial consideration here, not covered in the discussion papers, is the question of how far the *absence or under-provision* of content might also constitute harm or prove injurious to the public good. A simple plurality of platforms and sources is not in and of itself a guarantee of functional competition in the wider public interest. Indeed, the converse may be true. The fragmentation of audiences across platforms should not be overstated, of course, and in some respects social media may enhance social engagement and the exchange of information. But in a converged multi-media environment with an increasing quantity (albeit not always diversity) of on-demand content, there is more potential for audiences to avoid perspectives and issues which do not coincide with their own interests or ideological preferences. There is still a need to maintain media services which provide the public with common reference points, discourses and perspectives needed to engage in civic life.

As consumers, audiences still require information about the nature of the content they are able to access in order to make responsible, informed choices. As citizens, the need for factual content that is accurate, fair and balanced is arguably greater than ever before, given the massive increases in the availability of genre-bending infotainment and reality-TV formats and partisan opinions and misinformation presented in formats akin to news and current affairs. But as noted earlier, the presumption that media convergence and the proliferation of distribution and reception technologies ensures all forms of content are available (and affordable) to everyone is fundamentally flawed. Consideration must therefore be given to how the intensification of cross-platform competition and the prioritisation of content forms which guarantee ratings, clicks, and sales/revenue may come at the expense of de-prioritising content genres or formats that are innovative but risky, or liable to appeal to a narrower range of audiences (e.g. Mediaworks dropped Campbell Live from TV3's prime time schedule because, even when drawing around 200,000 viewers, it was not commercially competitive enough; meanwhile, other more in-depth current affairs content is scheduled on weekend mornings where it will not harm ratings and revenue).

It is also important to consider the overall shape of available media content over and above the individual programme or publication. The structural tendency in commercial media markets to over-supply populist and trivial content (e.g. the proliferation of click-bait and celebrity stories and the shorter times/spaces devoted to 'hard' news analysis) may, in aggregate, serve to discourage rational citizen engagement even though none of the individual content items/ programmes violate the existing codes/standards. It is manifestly inadequate to assume that anyone interested in more in-depth information can simply source it from the internet. Although there is a great deal of useful information about politics, economics and social issues available to politically-engaged citizens, there is also a massive amount of misinformation and propaganda. Not everyone has the time or the media literacy to make the time and effort to seek out reliable sources. Even with the availability of subscription TV services including a variety of (international) news channels, viewer attention tends to default to the domestic free-to-air channels augmented by premium sports, movies and drama, with most of the other channels being routinely overlooked. Availability alone does not ensure visibility, accessibility or affordability. Some form of provision to serve the public's media/information needs at citizens over and above what is commercially expedient is therefore necessary.

7c Self-regulation v Statutory regulation. Ideological opponents of media regulation often dismiss statutory content restrictions as nanny-state interference in the free market, while vested interests within industry often contend that in a complex digital environment, practitioners are better positioned to regulate itself than any government-appointed body. The commercial media sector evidently has a preference for industry self-regulation over a statutory regulator whose decisions can sometimes carry commercial consequences. The need to remedy the obvious gap between the Broadcasting and Telecommunication Acts, especially in regard to content delivered online has been recognised for

several years (e.g. see the 2006 Millwood Hargave report for the BSA[10] and the 2008 MCH paper on the Future of Content Regulation). The broadcasting sector's move to establish the Online Media Standards Authority was in many respects a welcome move to bridge the interim policy gaps, although a key strategic motive here was to pave the way for government to delegate the policy complexities and the costs of converged content regulation to OMSA once the legislative frameworks were eventually reviewed- as they are now. As with the Law Commission's review of news media regulations in 2013, industry's default position tends to be antipathy to statutory regulation. This is largely premised on an expedient 'market naturalist' position entailing a specious conflation of legislation with government interference, with the real motivation being avoidance of commercial risks entailed by legally-enforceable decisions with financial repercussions. Insofar as statutory regulation is regarded as a source of commercial uncertainty, such misgivings are perhaps understandable in a tight market where even small margins and market advantages are fiercely defended. Having said that, concerns that statutory powers could be used to suppress free speech and media activity should not be dismissed lightly. Recent deployments of state powers to surveil, undermine, or discredit investigative journalists who had incurred the displeasure of the government would suggest complacency in defending democratic freedoms would be unwise. However, in defending the media freedoms against state control, one must also be cautious of expedient conflations of free speech and free trade. Not all state interventions in the market are a threat to liberty, and indeed, some level of control over media content is required to *protect* the rights of citizens. In regard to the OFLC and the classification board, it is ironic that the popular media attention given to the recent interim ban on the Into the River book suggested that the state was suppressing freedom of speech when, in fact, the issue only arose from an attempt by the deputy censor to *relax* previous restrictions. There is doubtless an ongoing need to provide the public with information about the nature of the media content they access and to prevent (as far as possible) the harm/disturbance that may stem from inappropriate access of restricted content by minors. Of course, even those who claim to object to state censorship of all forms would generally agree that the OFLC plays a crucial role in preventing public exposure to objectionable material. The role the OFLC plays in assisting the police and courts to control illegal production and dissemination of objectionable content (especially that which entails child abuse) is probably under-recognised but obviously essential, especially in a converged environment where the criminal activities underpinning such material has been rendered much easier by digital media and the internet.

7d The role of industry self-regulation There is nevertheless a case to be made for involving the market actors subject to regulation in the formulation and implementation of codes and standards. They are, after all, most familiar with the conditions of content production and the practical and technical constraints of professional media practices. Most industry actors are socially responsible and willing to observe regulations involving classifications and standards, at least up to the point where direct competitors are not hampered by such obligations (which is an argument for a level playing field, not deregulation) or where the opportunity cost of abiding by regulations threatens to compromise commercial performance. The problem with industry self-regulation without recourse to statutory appeal and enforcement is not that the media companies are grossly irresponsible and cannot be trusted, but that over time, any self-regulatory regime will tend to accommodate the prevailing norms of practice as legitimate. Over time, incremental shifts in the boundaries of what is considered reasonable and acceptable and what is considered commercially realistic will lead to an accumulation of small compromises which can undermine the regulatory function.
For example, the Advertising Standards Authority, despite its well-respected and professional approach to resolving complaints through its formal procedures, is structurally unable to protect the consumer from misleading adverts and seems reluctant to set precedents by making decisions that might require a significant reform of advertising practices. (For example, despite widespread concerns about obesity and unhealthy diets, and the detailed codes on food advertising, it still remains possible to advertise unhealthy foods in a technically factual but unbalanced and misleading way, e.g. by emphasising vitamin contents of sugary foods). If one disagrees with the ASA's determination there is no recourse to appeal to any higher authority. Likewise, although the NZ Press Council is likewise well respected, it has no formal power to require compliance with its rulings, although the professional commitment of (most) journalists and news publications to observing reporting codes of practice has conferred gravitas on its rulings. But there is no certainty that the cuts in newsroom budgets and staffing, and increasing pressures on journalists will not over time lead to an accommodation of lower expectations about what standards are reasonable and realistic to uphold- competition among news media for immediacy has seen a growing tolerance for inaccuracy in online news reports on the assumption that corrections can easily be made later. Note these comments are *not* intended to denigrate the ASA or NZPC's members- the limitations are structural in nature. The Online Media Standards Authority, meanwhile, is a relatively new entity, but again its powers do not include any enforceable sanctions with commercial implications for those who breach standards (which in the case of certain commercial media operators, is part of the attraction). The CBB regards industry self-regulation to have a place in any regulatory approach to content in the converged media environment, but given that competition pressures, cost-cutting and risk-aversion are liable to increase, there must be also recourse to a statutory framework of regulation to oversee (and where necessary, overhaul) industry-based self-regulators.
With appropriate checks and balances and appeal provisions, it is possible to use a statutory framework to establish independent regulatory bodies at arm's length from government which treat all media actors equitably and consistently

[10] Available here- https://bsa.govt.nz/images/assets/Research/Issues-Facing-Broadcast-Content-Regulation-BSA2006.pdf

and set out standards and codes with sufficient flexibility to allow periodic revision (including consultation with affected stakeholders) without necessitating constant legislative repeal.
The BSA, for example, does have the power to impose significant fines, or even require a broadcaster to cease transmission. But these powers have only been deployed in very rare cases of gross disregard for content standards or failures of governance which, crucially, cannot be adequately addressed by non-statutory codes which are non-enforceable. A more common (and perhaps legitimate) concern among industry is inconsistency or unpredictability of decisions on complaints which incur appeal expenses and take up time and resources. However, there can be no guarantee that a non-statutory regulator would prevent the need to appeal against decisions.
Unless codes are defined in such mechanical terms that they preclude considerations of context, then some degree of interpretation of how particular standards apply to particular content examples is inevitable in any form of content regulation. There has been a recent review of the BSA's three codes of practice for Pay-TV, Free-to-Air TV and Radio[11]. Although the specifics of these changes lie outside the immediate focus of the convergence discussion, there are some points of overlap worth mentioning. Although some formats and platforms do remain distinct in the digital environment (e.g. the visual aspect of television is obviously not part of radio broadcasts), convergence across formerly discrete media platforms suggests there is merit in trying to ensure a level of cross-platform consistency in content standards. Although variations in the mode of audience engagement may sometimes depend on the context and technology of reception, the manifold variables that influence how audiences engage with and respond to content make it very difficult to maintain that there are intrinsic platform-related qualities which require the same media content to be subject to different regulatory treatments. Insofar as the currently separate Radio, Free-to-Air and Pay-TV codes are premised on such assumptions, changes in audience consumption of broadcast content, including the use of new reception devices, on-demand services and time-shifting suggest that maintaining rigid distinctions between the codes (and hence across platforms) is out-dated.

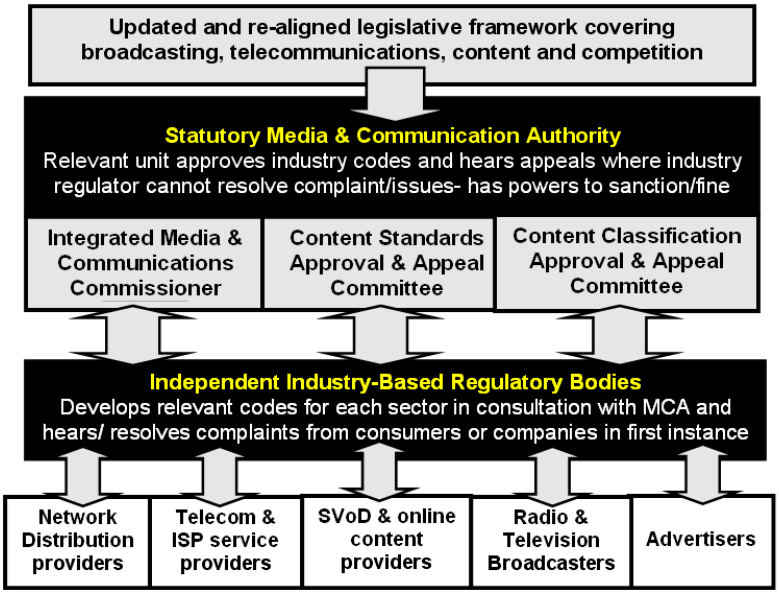
7e The shape of classification and content standards regimes There is evidently a need to take account of multi-platform interactive distribution and reception technologies. Consequently there is a *prima facie* case for a more generic set of content standards and classification codes. However it is important to emphasise that this does not automatically constitute a reason *to default to the least restrictive code of practice*. In assuming the desirability of a more consistent set of cross-platform standards, the case for relaxing/minimising those standards cannot be logically premised on some notion of technological inevitability stemming from digital convergence- the case must be made on the basis of demonstrable harm minimisation and outcomes in the wider public interest.
In the multi-platform on-demand digital media environment, it might be argued that some content standards regimes are no longer practical to implement. The point of intervention in the value chain is important to consider here. It is relatively easy to impose and enforce professional codes of practice in the creation of domestic NZ content, but even though these standards are enforced post-distribution, the intention is the have an impact at the point of content creation. This is obviously less practical where content is created in and for other markets before being imported (e.g. see comments on the issues surrounding overseas news channels carried on subscription platforms in the BSA submission attached as an Appendix). Classification *prior to distribution* helps ensure that content information can be provided to consumers with a high degree of confidence in its accuracy and consistency. As with the current film and video labelling system, it is also possible to maintain some level of consistency by translating classifications provided by other countries' content regulators, especially if the rules for classification are based on relatively objective manifest content criteria (e.g. sexually explicit scenes, graphic violence). This obviously does not apply to a lot of online material where NZ audiences may access content held on overseas servers. However, the online environment will always make it possible to access unregulated content which does not come with any guarantee of content standards or classification. Audiences cannot be protected against any and all forms of content exposure, but they still have a right to be protected from harm by domestic media operators, including online providers whose business models entail payments from New Zealand audiences (such as SVoD services based offshore) and in these cases it is not unreasonable to seek some level of compliance with domestic content standards and classifications.
Content classification systems are generally applied at a point after content creation but before distribution to audiences (although in some cases classifications regimes influence the production process, especially if there are commercial consequences of having an overly restrictive rating imposed). Some media actors have a preference for content information disclosure regimes. The assumption here is that by disclosing relevant information about classifications, strong language, sexual/violent content and so forth, the audience is thereby empowered to make an informed choice. It may be true that *without* such information, the audience would not be sufficiently informed. But it does not necessarily follow that providing information about programmes confers sufficient levels of media literacy to make viewing or listening choices in the long term best interests of the individual or society as a whole. That said, there is certainly no reason for content providers such as SVoD services which generate revenue from NZ-domiciled audiences *not* to provide content information, including classifications of a recognisable form (both at the beginning of a programme and where possible, at periodic intervals or at points of channel-switching to ensure the probability of 'channel surfers' or 'web surfers' inadvertently accessing inappropriate or disturbing material is minimised).

[11] The CBB's submission on the BSA codes is attached as a separate appendix to this submission.

However, the incremental shuffle toward regarding programme information disclosure as the *principal and only* obligation of content providers toward the audience is potentially insidious. In effect, it can lead to a position where no standards are enforced and any and all content is deemed acceptable so long as programme information is disclosed- indeed, this is arguably already happening in cases where news and entertainment genres have become blurred with the result that fact and information are no longer easily separable (indeed, one rather opinionated presenter of an early evening television current affairs/magazine programme has denied being a journalist in defence of his alleged lack of balance). It is incumbent on (all) media providers to recognise that their content and services play a role in shaping social discourses in ways that make them incomparable to most other consumer goods. Just as car manufacturers and oil companies can (or should) take some responsibility for the environmental consequences the widespread use of their products have on the environment, so too should the media be cognizant of their collective influence on society. It is therefore important not to default to lowest-common-denominator prescriptions to eliminate regulation as a barrier to commercial flexibility and economic growth. Where content regulation regimes are inconsistent across platforms and arbitrarily disadvantage some media subsectors over others, the platform neutrality and 'level playing field' principles requires solutions that enable all media operators to accept basic social responsibilities, not to abrogate them. If that is that is not practicable for technical or geopolitical reasons, it is essential to ensure that at least *some* channels and content providers can be trusted by the public to deliver content of reliable quality consistent with cultural standards.

7f **A proposed framework for media regulation in the converged media environment**

The CBB would like to propose a two tier framework for the development of media regulation, including competition and content classifications/standards regimes. We are not proposing this as the only possible or desirable approach, and the framework here is a starting point rather than a detailed final model. However, we think this approach has the potential to cover most media platforms and ensure robust protection of the public interest while allowing for a significant level of industry input and self-regulation.



The basic model here comprises of two levels. The lower level comprises the industry-based regulators which would include, for example, the OMSA, the ASA, the FVLB and possibly the NZPC. These could remain as separate entities but where convergence makes it practicable, it may be possible to integrate some functions. The upper level would be the Media and Communication Authority (MCA), a statutory regulator which would operate as an 'umbrella' coordinator of its sub-units, including the expanded Media & Communications Commissioner (who would also remain part of the Commerce Commission), and two committees dealing with classifications and content standards respectively.
The two tiers are related as follows:

- The industry-based bodies would develop codes/standards/operating principles for their platform/sector in consultation with the Media and Communications Authority, which would also sign off and approve them.
- Complaints would go initially to the media operator, but if this does not resolve the matter then the industry-based bodies would hear the complaint and issue rulings and sanctions in line with the codes.
- However, where the complaint does not lead to resolution at the level of the industry-based bodies, an appeal can be taken to the MCA, and the relevant office would then make rulings on the matter, including the imposition of legally-enforceable sanctions such as publication of apologies, fines, etc.
- Periodically (say every 5 years) the MCA would review the adequacy and efficacy of the industry-based regulatory bodies and their codes/standards regimes. If shortcomings in their capacity to maintain standards and protect the public interest are identified, then the MCA would be able to require reforms/updates.

The model is not intended to impose an unduly onerous statutory burden on the media sector. On the contrary, the system allows co-regulation including in the development of standards and codes with the industry bodies as the first port of call. Indeed, if industry self-regulation is as efficient and as functional as its proponents maintain, then the large majority of complaints will not be appealed to the MCA. However, the statutory standing of the MCA means that in the final instance, there is recourse to legal enforcement which can enforce sanctions in serious cases of code violations or abrogations of responsibility. This model also helps ensure that the potential for increasing commercial pressures to result in a gradual erosion of standards to accommodate prevailing practices is limited by periodic review.

7g Advertising The discussion of the regulation of advertising in the convergence discussion documents is welcome. However, the CBB believes there is a need for a more fundamental review of how advertising is regulated. The self-regulatory model overseen by the ASA does not always serve the wider public interests and indeed, accommodates many industry practices which are commercially expedient without being publicly beneficial.
In regard to the various options for dealing with Sunday advertising restrictions and the cases of major sporting events, the CBB considers it revealing that the continuing *absence* of advertising is regarded as anomalous, rather than its unrestricted and ubiquitous presence. Our preference ideally would be to retain the status quo and keep the restrictions, and indeed, to extend the periods of commercial-free broadcasting to other days and times (or at least limit the ratio permitted each hour).
However, being realistic, there is no way that many media would survive without the ability to include advertising. It is also clear that the advertising pool is a zero-sum-game which tends to fluctuate with the state of the economy and if media operators are unable to attract advertising during some periods with the result that this is lost to other platforms, then their concern over the restrictions is understandable.
However, any relaxation of the regulations MUST be accompanied by alternative provisions to protect the spaces during which programming that is unlikely to be attractive to commercial schedulers can be broadcast. The best solution to this would be to lift the restrictions on Sunday and special event advertising in return for the industry accepting a small levy on its overall revenues (say 1%) which would go towards funding a commercial free television service to be operated by Radio New Zealand.

7h Election programmes The importance of mediation and communication during election periods (and indeed, during non-election periods) can hardly be overstated. In a healthy democracy, it is essential to ensure the media facilitate balanced coverage diversity of perspectives from politicians, parties and policy issues. The notion that in the digital media environment there is sufficient information online to make continuing regulation redundant is fundamentally flawed. On the contrary, it becomes even more imperative that the media provide balance and diversity as well as observing generic standards.
However, it is apparent from cases such as the appearance of the prime minister talking with celebrities on an ostensibly non-election programme on Radio Live (the complaints about which were rejected by the BSA but upheld by the Electoral Commission), that there is a need to extend the definition of what constitutes an election-related programme. The inclusion of candidates or other party figures in broadcast programmes during the run-up to an election cannot avoid conferring an enhanced public profile on the persons concerned, even if the subject matter does not directly relate to the election itself. Obviously this would exclude mainstream news and current affairs where politicians become newsworthy for other everyday reasons, but broadcasters should still be cognizant of the extent to which political PR firms seek to shape the news agenda before elections in ways that gain politically-relevant coverage over-representing certain political figures.
In regard to whether or not the Electoral Commission should subsume the responsibilities for election programming, we would point out that there is nothing intrinsically harmful in retaining the BSA's oversight here. The media's role in democracy is important enough to makes the overlap of oversight a potentially useful arrangement.

8 Policy tools for supporting local content.
As noted in earlier comments, the CBB is concerned that the convergence discussion papers have not given priority to consideration of how media convergence has implications for the conditions under which content is created and the implications this may have for how far the media are able to service the interests of the public as citizens not just as consumers.
The first point we would make is that local content is an important component of public service media provisions but it does not follow that any and all local content is equally valuable. Diversity across genres and high production standards are also vital, but this is difficult to sustain in an environment where media companies are competing over increasingly fine margins. The need for local content is not diminished in the converged media environment, and indeed, commercial pressures on broadcasters (including increases in the costs of acquiring international content packages) have increased the opportunity costs entailed in the production of local content. The structural limitation of NZ On Air (apart from its frozen budget) is that it is not vertically integrated, so agreement from broadcasters to schedule the proposed content is

essential. However, this places the commercial channels in the role of gatekeeper, and there is increasing reluctance to accept local content unless it can be readily slotted into a commercially viable schedule. NZ On Air often has to reject funding for potentially useful programmes because none of the mainstream channels will schedule it.
The most obvious solution to this scenario is the reintroduction of a public service channel which can schedule content without the obligation to maximise ratings and revenue in every time-slot. It will be recalled that the now-defunct TVNZ7 offered a very different schedule which allowed viewers a choice of content which (with the exception of Back Benches and Media Take) is no longer available on any platform. Given Radio New Zealand's extension of its services online and involvement in the Parliament TV channel, we believe it would be very useful to explore the options for extending RNZ's remit to provide a 'public service publisher' model. This would obviously need public funding.
In the appendix, two articles are attached which discuss the need for a public service channel and some funding options in more detail.
Otherwise, the CBB considers all the policy levers mentioned to be relevant to securing media policy outcomes in the public interest. Public ownership and public funding are essential. Local content quotas are desirable but may be complicated to introduce because of historical trade agreements (CER and GATS), and of course, requiring additional local content outputs would increase demand for public funding, given the opportunity costs these entail.
Likewise, licensing requirements are desirable in ensuring that a range of media carry some basic social responsibilities in return for the right to operate. This was historically the model adopted in the UK. Such provisions are, however, difficult to implement retroactively in an already heavily-deregulated and commercialised media market. An added complexity is the question of how to apply licensing requirements to online providers which operate primarily offshore. Nevertheless the policy options are worth further exploration, perhaps with a view to linking public funding eligibility to the acceptance of some modest level of social responsibility.

9 Appendices:

In support of this submission, three other documents are attached.

a) The CBB's submission to the BSA on its revised codes for radio, Pay-TV and Free-to-Air TV. It includes discussion of the merits of a more consistent approach across these platforms and also details some specific arguments about the meaning and continuing relevance of principles such as balance, accuracy and fairness in factual content, as well as the need to provide audiences with information about content forms.

d) A paper written by Dr. Peter Thompson, the CBB chair presented at a SPADA conference in 2011. It addresses a range of issues related to the rationales and potential funding options for public television. This provides support for the issues raised in section 8 and also outlines the continuing need for some kind of public service television channel in the digital media ecology.

c) A CBB discussion document on the viability of a marginal levy on a range of media products and services in order to support the provision of public media services. The document does not specify the exact form of any future public service media provisions but the CBB would be very keen to discuss the alternatives with relevant policy makers.