Regulatory Impact Statement

Digital Convergence: Changes to Content Regulation

Agency Disclosure Statement

This Regulatory Impact Statement addresses options for content and advertising regulation that were canvassed in the discussion paper Content Regulation in a Converged World (August 2015). The preferred options have been drawn from the set of options in the discussion paper. No further options were identified after analysing submissions to the paper.

Quantitative analysis of the compliance and other costs of the proposals is limited at this stage. Detailed design work is required to develop this analysis. Detailed design work would develop arrangements to meet the cost of extending the Broadcasting Act to apply to on-demand providers. The Broadcasting Act currently requires broadcasters to receive and respond to complaints and to classify content. Broadcasters meet these obligations within their operating costs. In addition, the Act requires broadcasters to pay a levy to contribute to the operating costs of the Broadcasting Standards Authority (BSA). The formula to determine this levy is set out in this paper and is tied to the broadcasters’ stated revenue. We expect that similar costs would apply to on-demand providers (who are not already broadcasters). We would discuss with on-demand providers the levy formula, and whether there is a case for it to be modified to apply to them, during the detailed design stage.

The cost to broadcasters and Government of making or processing application for an exemption to Sunday morning advertising restrictions is expected to be minimal. The cost will most likely be human resource only that could be met within existing baselines. This would be assessed in greater detail in consultation with broadcasters at the detailed design stage.

Content Regulation in a Converged World also discussed issues arising from the regulation of electoral programming, including the relationship between the Broadcasting and Electoral Acts. Proposals for reform in this area will be made to Cabinet separately at a later time. The paper also sought views on the policy tools used by Government to support the production of New Zealand content for broadcasting and online distribution. However, no proposals to change policy settings or legislation are being made in this area.

Paul James
Chief Executive, Manatū Taonga the Ministry for Culture & Heritage
Executive Summary

1. The Government is reviewing policy and regulatory settings in view of the convergence of the telecommunications, information, media and entertainment sectors. This digital convergence is disrupting the telecommunications and media sectors. It is providing opportunities to businesses to expand into new markets and providing greater choice to consumers.

2. However, regulatory settings for the media sector reflect historical silos of different media services and do not provide clarity for businesses. There is a lack of clarity about how regulatory settings should apply to new services such as on demand provision of content, and there are inconsistencies where measures apply to long-established media services that do not apply to new media services. The purpose of the convergence review is to ensure regulatory settings are consistent across platforms where appropriate, provide clarity and are fit for purpose.

Content standards and classification

3. The proposed option is to extend the Broadcasting Act 1989 to cover on-demand content that is not otherwise broadcast. Extending the Broadcasting Act is one of six options canvassed in the discussion paper Content Regulation in a Converged World. The Broadcasting Act provides “co-regulatory” settings that allow industry to act with speed and agility and provides the public a complaints mechanism with statutory underpinnings.

4. Extending these co-regulatory settings to on-demand content is a proportionate, timely way to provide clarity about regulatory settings for on-demand content. It provides consistency and clarity of legislation, including requirements (such as fees) for businesses. It extends the regulatory settings that are working effectively for broadcast content, including the provision of clear information for consumers, as well as standards of fairness and privacy for individuals included in the content.

Advertising regulation

5. The proposed option is to maintain existing restrictions but make provision for exemptions to permit advertising during the live screening of events of major significance on Sunday mornings. Advertising restrictions currently apply on television between 6 am and noon on Sundays and on Anzac Day, and both television and radio on Good Friday, Easter Sunday and Christmas Day. The same content that is broadcast on television or radio during times subject to advertising restrictions is available on demand without advertising restrictions.

6. This option may enable broadcasters, including free-to-air broadcasters, to recover at least some of the costs of screening these events through advertising. It may therefore increase competition for the broadcasting rights for such events, while retaining the non-commercial programming space, other than when the exemption applies, for special interest programmes.

7. Content Regulation in a Converged World canvassed five options in response to the inconsistent application of advertising restrictions across platforms.
Options ranged from keeping the status quo to repealing advertising restrictions for television and radio advertising. Removing advertising restrictions appears to have little commercial benefit. If advertising restrictions were removed, existing advertising revenue would most likely be redistributed across the programming schedule.

8. However, removing restrictions would bring commercial considerations to Sunday morning broadcasting. This programming time is used in part to broadcast special interest programmes. These programmes do not attract significant advertising revenue but are important in reflecting the interests of groups that might otherwise not be catered for. Removing the restrictions is therefore likely to have an adverse impact on the programming of such special interest programmes.

Content regulation

Background

9. The digital convergence content regulation review seeks to ensure that content regulation is fit for purpose in view of the convergence of previously separate sectors: telecommunications, information technology, media and entertainment.

10. Changes in the nature of regulated markets, industries and technologies as a result of convergence are challenging current policy and legislation. In many cases policy and legislation were written before the impact of convergence was apparent in New Zealand. As such they may not reflect the current realities of the relevant sectors. While the sectors are rapidly moving towards a single broad communications market, New Zealand’s regulatory and policy settings remain segmented according to historical silos. Policy and legislation do not clearly apply to new services such as on demand. There are inconsistencies where measures apply to long-established media services that do not apply to new media services.

11. Although the convergence of previously separate sectors is under way, it is not yet complete. For example, while some telecommunications providers have expanded their business into content offerings, New Zealand broadcasters have not become telecommunications suppliers. There may be continued change in these sectors. Regulatory updates should therefore be proportionate to the extent of digital convergence.

12. The Government’s long term vision for the media sector is to ensure New Zealanders have access to relevant, high quality local and global content, legally, safely and cost effectively.

13. Through a Digital Convergence Bill, the Minister of Broadcasting is currently proposing to amend regulatory settings in two areas: the regulation of on-demand audio-visual content through applying standards and classifications; and advertising restrictions.
General objectives

14. Each of the options for standards and classification and advertising restrictions has been assessed against our regulatory review objectives. These objectives are that regulatory settings should:

a. treat likes alike and be platform neutral;
b. be flexible to cope with future change;
c. encourage healthy competition and innovation and ensure content standards, without steering the market;
d. be cost efficient for Government;
e. be at low cost for industry, with low cost of compliance;
f. be at low cost for consumers;
g. support access to international content; and
h. reflect consumer behaviour and demand.

15. Another objective considered in this paper is timeliness. Digital convergence is still at an early stage. While it has already resulted in some change to the media market, it is likely that the market will continue to change in New Zealand as it is doing internationally. Regulatory settings should provide clarity in response to the immediate effects of convergence. A complete overhaul of these settings would be a disproportionate response to an evolving situation. A timely solution is needed to provide clarity and address inconsistencies.

Content standards and classification

Status quo and problem definition

16. The objectives of current regulation of broadcast and retail audio-visual content are broadly to protect community values, prevent harm to the public good, provide information to consumers to make informed choices about their consumption of this content, and provide certainty for distributors and broadcasters making commercial decisions. These objectives for content regulation are common among comparable democracies. The Broadcasting Act meets these objectives by:

a. setting out statutory standards;
b. requiring these standards to be elaborated into broadcasting codes that are developed by the BSA and broadcasters in collaboration;
c. requiring broadcasters to apply classifications to content based on these codes;
d. prohibiting broadcasters from broadcasting content previously classified as objectionable;
e. requiring broadcasters to receive and address complaints in the first instance; and
f. establishing the BSA to provide an appellate function where complainants are not satisfied.

17. The Classification Act meets these objectives by:

a. providing for the pre-vetting, rating/classifying and labelling of retailed audio-visual content (films and DVDs) by the Office of Film and Literature Classification (OFLC) and the Film and Video Labelling Body;

b. providing that publications including audio-visual content can be classified as “objectionable” by OFLC; and

c. providing that, once made and subject to the review process, classification decisions generally cannot be reconsidered for a period of three years.

18. Current regulatory settings do not clearly apply to on-demand content unless it has been provided by a broadcaster and also broadcast. This creates inequalities in the market as some providers of content are required to absorb costs of the regulatory regime, whereas others providing a similar service and in competition are not. It also means standards and requirements to provide consumers with appropriate information to inform choices apply only to part of the market. The current problem being addressed, therefore, is consistency of regulation. The content regulation objectives that have been outlined above need to be met in relation to on-demand content.

19. The Broadcasting Act defines on-demand content as content that is provided on a “one to one” basis on the demand of an individual. It is distinct from broadcasting which is a “one to many” form of distribution. On-demand content includes content made available online by broadcasters. Some of this content may be the same as broadcast and some is an extension of broadcast content (full versions of interviews excerpted for broadcast, for example). Some on-demand content is unique to the broadcaster’s online offerings. The other source of on-demand content is a relatively new group of providers that are not broadcasters offering on-demand content. These providers include Netflix, Lightbox, Quickflix and Neon (provided by the broadcaster, Sky).

20. The Broadcasting Act requires broadcasters to observe statutory standards and an approved code, and to consider complaints about programme standards in the first instance. The Broadcasting Act also establishes the BSA to act as an appellate body for complaints and, among other things, to approve and issue codes, partly based on statutory standards. It develops these codes in collaboration with broadcasters. As an appellate body the BSA receives complaints that have been unable to be resolved by the Broadcaster. Only a small proportion of complaints are escalated to the BSA. In the 2014/15 financial year TVNZ received 1073 formal complaints. Of these, just 39 (3.6%) were referred to the BSA.

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1 Except for complaints involving issues of privacy, which may be made directly to the Broadcasting Standards Authority
21. The BSA is half funded by Government and half by industry. Government funding comes from an appropriation under Vote Arts Culture and Heritage ($609,000 in 2015/16 with the last significant increase in 2003/4). Industry funding comes from an annual levy required from broadcasters with annual revenues above $500,000. The formula for this levy is set out in the Broadcasting Act as ‘a’ × ‘b’, where:

- ‘a’ is the broadcaster's total revenue for the financial year of the broadcaster; and
- ‘b’ is .00051.

22. The Classification Act establishes the OFLC. OFLC is funded partly by a Crown appropriation of $1.960 million per annum (that is unchanged since 1996) and partly from a fee-per-classification. The fees per classification paid by industry distributors are typically $1,431.10 for a computer game and $1,124.40 for a DVD or cinematic film.

23. On-demand content is not covered by the Broadcasting Act (unless provided by a broadcaster and also broadcast) or labelling requirements of the Classification Act (although on-demand content is a publication and subject to penalties if “objectionable” under the Classification Act).

24. This lack of coverage results in three problems:

   a. It creates unfair competition amongst providers and broadcasters. Distributors of broadcast content and films and videos are legally subject to regulatory costs that are not clearly required of on-demand providers;

   b. If on-demand content is not regulated or is inconsistently regulated, this potentially exposes the public to the harms that the existing regulation of content seeks to avoid through classification of content and the provision for complaint; and

   c. It may create confusion for consumers about classifications and the complaints process.

25. Of the on-demand providers, there has been a range of responses to the regulatory settings and their associated fees. One has opted to be subject to the Broadcasting Act and one has opted to be subject to the Classification Act. One has opted to apply Australian classifications. One has been criticised publicly by the Chief Censor for what he regards as inadequate forewarning – through classification and description – of violent and sexually violent content. In opting out of voluntarily conforming to current regulation, this provider cited the Government’s stated view, in *Content Regulation in a Converged World*, that on-demand content is not covered by the Classification Act.
Objectives

26. The aim of the policy review is to apply a classification and complaints system to on-demand content, such that the current regulatory principles apply to all content, regardless of the platform through which a consumer access it. Classifications should indicate the nature of on-demand content and the age group for which it is suitable, enabling the consumer to make an informed choice about accessing the content. The public should also have the ability to make a complaint about on-demand content, including its classification.

27. The options have been tested with reference to the regulatory review objectives stated in paragraph 14 above, and to the objectives for existing regulation of broadcast and retail content outlined in paragraphs 16 and 17. Based on these a full list of objectives relating to classification and standards is to:

a. protect children’s interests;
b. provide advice to adults with which to make informed choices;
c. protect the interests of people who are the subject of factual content, for example in cases raising questions of privacy or fair treatment;
d. protect sections of the community from denigration; and

e. maintain agreed community values.

28. These objectives are of equal importance.

29. Take-up of on-demand services in New Zealand has been rapid. Roy Morgan research on media use, published in May 2016, shows that:

a. 83 per cent of New Zealanders access some type of content on demand, including “24% who already have a subscription video on demand service at home.”

b. 46 per cent stream one or more content types. Roy Morgan also notes that Netflix has the greatest share of VOD subscribers, at 264,000 by the end of 2015, compared with Lightbox with 128,000 and Neon just 22,000.

30. The rapid take-up of on-demand content magnifies the potential harm to consumers if classifications and standards are unclear or absent and a complaints process is not provided. The harms resulting from absent or inconsistent regulation have the potential to grow proportionately as more people consume on-demand content.

31. As noted at paragraph 14 above, one of the objectives for the regulatory review is that regulation should encourage healthy competition and innovation and ensure content standards, without steering the market. When considering content classification and standards, this objective means that the Government should have a role only where necessary. Rather than adopting a “top-down” form of regulation, New Zealand has developed a “co-regulatory” approach where the broadcaster assigns classifications, rather than the regulator, and hears complaints in the first place (with the exception of privacy complaints).
The regulator performs an appellate function. It maintains an online codebook for broadcasters and the public to guide how the standards set out in the Broadcasting Act should be interpreted.

32. We consider it is appropriate for a regulator to assess whether regulatory standards are met. A co-regulatory approach such as this is also common internationally. A review of relevant overseas jurisdictions suggests that an entirely self-regulatory approach would take New Zealand out of the mainstream of international practice.

Options and Impact Analysis

33. The public discussion paper *Content Regulation in a Converged World* set out six options to respond to the lack of clarity about regulatory settings for on-demand content:

a. **Option 1, status quo.** This option does not provide clear regulatory settings for on-demand content. Providers may choose to comply with the broadcasting or film regimes, or neither.

b. **Option 2, voluntary code for on-demand content.** On-demand content would be subject to a voluntary code developed and maintained by providers. The Government would not have a regulatory role in setting parameters for content standards. No regulatory body would be in place should a member of the public wish to escalate a complaint about content that had not been adequately addressed by the provider. Self-regulation could lead the producers and distributors of audio-visual content, under commercial pressure, to push at the boundaries of what the community considers acceptable. While industry stakeholders favoured this option, they have also expressed a willingness to engage in co-designing regulatory change even if it does not provide for full self-regulation.

c. **Option 3, extend broadcasting regulatory settings to apply to on-demand content.** The Broadcasting Act regime, which establishes the BSA, would be extended to clearly apply to purely on-demand content. This extension would also encompass audio-only content placed online, mainly by broadcasters (for example, podcasts not also broadcast).

Regulatory change could also include changes to remove some duplication between the Broadcasting Act and Classification Act, for example where retail film distributors are required to apply for a classification for a film or television series that has already been classified for broadcast. These issues were raised by stakeholders during consultation and will be investigated further as part of the detailed design phase.

As described further below, this option would amend regulatory settings in a way that is most proportionate and relevant to the lack of clarity for regulation of on-demand content.

d. **Option 4, extend the Classification Act regime to apply to on-demand content.** On-demand content would be subject to the labelling requirements of theatrically exhibited and retail content. This would be a relatively timely reform. However, it would treat on-demand content in the same way as retail content. This may be problematic because on-demand content is
more similar to broadcast content than retail content. It would not be practical or desirable to classify news and current affairs content, given this content is made available as on-demand content live or very soon after live events. On-demand news and current affairs content would have to be excluded from this regime, if it were extend to apply to on-demand content. This option would be more costly to on-demand providers than extending the Broadcasting Act. It may also be more time consuming as providers would have to apply to OFLC to have content classified, before making content available online.

e. Option 5, a broadcasting regime (including on-demand content) with increased self-regulation (a variation of option 3). Most appeals and complaints would be handled by providers in the first instance, either acting as a collective body or through certified representatives. The BSA or an equivalent body would have a higher-level role in providing advice, or ruling on the most difficult cases. However, it would be difficult for a regulator with a high-level role and limited workload to remain effective and engaged with the issues. This option would require more extensive legislative change than simply extending the current broadcasting or film regimes. It would also increase the classification role of broadcasters and providers. Increasing this role would create extra costs for broadcasters and providers.

f. Option 6, a new Media Standards Act replacing the current broadcasting standards and film classification regimes. This option divides into further sub-options, with or without a statutory basis. It could be constructive in allowing for a “spectrum” approach where material likely to need age restriction could be pre-vetted, and other content could be self-classified. However, of all the six options, this would require the greatest degree of change and disruption. It would take the longest amount of time to develop and would not provide a timely response to immediate concerns. It may establish a new regulatory body or bodies or regulatory settings that are more costly to Government and industry. It would be a disproportionately complex, lengthy and potentially costly way to provide clarity about regulatory settings and regulatory settings for on-demand content at this time. It may also be premature to carry out such a thoroughgoing reform during a period of rapid evolution in the media sector.

34. Appendix 1 shows how we have assessed each of the options against the objectives for content regulation in comparison with the status quo. Option 3, extend the Broadcasting Act, and option 6, a new Media Standards Act score equally in this assessment. However, as mentioned above regulatory change to give effect to option 6 would take the longest to implement, and would be the most costly to develop, as it would involve setting up new institutional arrangements. It would not provide a proportionate response to the lack of clear regulation for on-demand content. Extending the Broadcasting Act is therefore the preferred option. Regulatory change to give effect to this option could be implemented more quickly than a new Media Standards Act.

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2 although the print media would be unlikely voluntarily to join even an entirely non-statutory regime; its use of audio-visual material, however, remains limited and secondary.
Preferred option: Extend the Broadcasting Act

35. This Regulatory Impact Statement (RIS) proposes to extend the Broadcasting Act to include on-demand content that has not also been broadcast. If content has already been broadcast then it would be subject to the existing broadcasting standards regime. This option is proportionate and sufficient to address the problem of on-demand content not being subject to consistent content regulation.

36. By extending the current co-regulatory regime, this option provides clear and appropriate roles and responsibilities for industry and Government.

37. This option would be low-cost to Government and industry. The BSA is a well-established and efficient agency. It would be able to absorb what would be likely to be a gradual increase in workload arising from an extension of its scope to cover content provided only on demand. Complaints about such content might displace complaints about broadcast content over time, depending on the growth of on-demand viewing compared with consumption of conventional television. The BSA would not require additional Government funding.

38. On-demand providers would need to cover the cost of classifying content and considering complaints in the first instance. Fairness would require that on-demand providers also contribute to the operating costs of the BSA. The levies that broadcasters pay to the BSA, as set out at paragraph 21, could be extended to apply to on-demand providers. We would discuss this with on-demand providers at the detailed design stage to discuss a reasonable threshold and other design issues.

39. By extending the established classification and complaints system this option meets the content regulation objectives for on-demand content. It provides a consistent system that classifies and describes content and provides adults the advice needed to make informed choices. It protects sections of the community from denigration and maintains agreed community values and protects children's interests. It also protects the interests of people who are the subject of factual content. This aspect of content regulation is important in relation to genres that often involve "real people" (not actors) and can result in complex complaints about privacy or fair treatment of the people involved.3

40. We do not propose to extend regulatory settings for classifications and complaints to apply to other online audio-visual material such as user-generated or user-selected content. This content is uploaded in such vast quantities that it would be impractical for content to be vetted before it is made available.

41. Sites that include user-generated or user-selected content, such as YouTube, tend to have systems in place to block certain content swiftly if viewers object

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3 Complaints considered by the BSA have included, for example, instances in which a reasonable expectation of privacy on the part of complainants has been violated by the practices of "reality" programmes, where private disputes have been pursued by radio presenters, and where the inclusion of children in current affairs content has raised questions of consent.
to it. YouTube has a complaints function for viewers and triages complaints according to potential level of harm. There is a risk that some harm may be done to those who access this content before it is removed. However, it is in these sites' best interests, to remain appealing to consumers, to maintain these systems and mitigate this risk as much as possible.

42. Bringing complaints against individuals who generate content would be time consuming and costly and at this stage would not be a proportionate response to the risk of harm from content available through user-generated or user-selected sites.

43. On-demand providers and broadcasters’ systems to classify content and hear complaints may evolve over time as new technology becomes available. The regulatory settings of the Broadcasting Act would allow flexibility for providers and broadcasters’ classifications and complaints systems to evolve. Providers and broadcasters would be required to apply the agreed codes when setting classifications and allow for recourse to the BSA for complaints they have not been able to resolve. As long as those requirements are met, there is flexibility in how the provider or broadcaster delivers its classifications and complaints functions.

44. Overseas-based providers could not be compelled to comply. However, overseas-based providers would be likely to see a commercial incentive in offering consumers a familiar set of classifications and recourse to complaint.

45. Another unintended consequence would be that new entrants in the on-demand market might be deterred by the costs of complying with regulation. However, the levy formula that supports the BSA does not create a significant cost burden on the broadcasters it currently applies to. As noted above, the levy formula and threshold could be modified for on-demand providers if consultation during the design stage suggests that this is warranted. An extended regime that treated broadcasting and on-demand content consistently would appear fair to new entrants.

Conclusions and recommendations

46. Extending the Broadcasting Act best provides clarity about regulatory settings that apply to on-demand content. It is an effective and proportionate response to the problem. Extending the Broadcasting Act would:

   a. be a logical extension of the BSA’s current remit to cover the on-demand content of traditional broadcasters;

   b. reduce the risk of different decisions being made about the same content, when presented at different times or on different platforms;

   c. allow for a code for on-demand content to be developed in a co-regulatory way, with the close involvement of the providers. The details of this code would not have to be included in legislation; and

   d. recognise that video-on-demand content is converging with linear television and may in time replace it. On-demand content may therefore incorporate some of the programme types that involve “real people” (as
opposed to actors). Under the current broadcasting regime, these programme types are raising complex issues of privacy and fairness. It is important that a complaints process is available for people who wish to complain about this content, whether it is viewed on linear television or on demand.

Advertising restrictions

Status quo and problem definition

47. Regulatory settings for the screening of advertising are inconsistent, applying to television and radio but not to other, newer forms of media.

48. The Broadcasting Act 1989 (Section 81) prohibits advertising on television between the hours of 6 am and noon on Sundays and on Anzac Day. In addition, both television and radio are prohibited from broadcasting advertising on Good Friday, Easter Sunday and Christmas Day. The restriction only applies to content broadcast through traditional linear television transmission and not to other media platforms, including online content. In light of the convergence policy review, it is timely to consider advertising restrictions to ensure consistency across media platforms.

49. Parliament's original intentions in preserving advertising restrictions were to retain a space in the week's television schedules that was without interruption by advertising. This was considered worthwhile given that there had earlier been entire days of the week that were without advertising, and it provides a space free of advertising for the benefit of the consumer. The Broadcasting Act also established the Broadcasting Commission (commonly now known as NZ On Air) to provide contestable funding for content that would otherwise not be produced or shown in a market of New Zealand's size. As the following paragraphs explain, these two goals of Parliament in passing the Broadcasting Act—maintaining an advertising-free space in the schedule and creating a content funding agency, including for providing funding for special interest programming—have become interdependent.

50. In carrying out its role of funding content, NZ On Air is required to serve the whole New Zealand audience including special interests within it. It therefore funds programmes for the interests of women, youth, children, persons with disabilities, and minorities in the community including ethnic minorities. NZ On Air is also required to encourage broadcasts that reflect the diverse religious and ethical beliefs of New Zealanders.

51. NZ On Air provides funding to content producers to make programmes, but requires a commitment from a broadcaster to broadcast the programme, as a condition of providing funding. This commitment is likely to be balanced against the alternative uses for any particular time slot. As special interest programmes tend to attract less advertising revenue than more mainstream programmes, there is a potential conflict of interests present in the current funding model. The provision of an advertising-free space in the programming schedule enables broadcasters to commit to programming special interest programmes at times accessible to audiences (as opposed to very late night/early morning time slots, for example). This enables NZ On Air to meet its
statutory requirements to ensure a range of programmes is made available to New Zealand audiences.

52. There appears to be little commercial benefit to broadcasters in removing advertising restrictions:

a. According to information provided by the Television Broadcasters' Council, representing the non-competing interests of the television networks, in 2012, around $592 million per year in advertising revenue was being lost by broadcasters as a result of the restrictions on television advertising on Sunday mornings and public holidays.

b. However, according to comments from the industry, around 0% per cent of the anticipated loss was based on foregone advertising on public holidays, rather than Sunday mornings.

c. The Advertising Standards Authority reported total television advertising revenue in 2010 of $607 million, and $614 million in 2014, little more than a one per cent increase.

53. The likely increase in advertising revenues from removing these restrictions is not substantial. A more likely outcome is a redistribution of revenue across the programming schedule.

Objectives

54. The options for amending advertising restrictions have been assessed against the objectives for regulatory review listed at paragraph 14.

55. A specific objective in assessing options to amend advertising restrictions is to preserve programming times when broadcasters will be willing to feature special interest programming funded by NZ On Air.

Options and impact analysis

56. Five options were considered to address the problem definition and meet the objectives. The five options, as set out in Content Regulation in a Converged World, were:

a. Option 1. Maintain the status quo. Continue the current restriction of advertising on television between the hours of 6 am and noon on Sundays and on Anzac Day, or on television and radio on Good Friday, Easter Sunday and Christmas Day. This regulation is inconsistent with regulation of other platforms, to which restrictions do not apply.

However, there is value in retaining the status quo because it provides important non-commercial programming time on television and radio. This is in part used to broadcast special interest programmes. These

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4 Public holidays are days when larger television audiences are expected to be watching and for which a premium could be charged in advertising rates.
5 On this basis we can assume that there would be little change in the assessment of $592 million per year in foregone revenue. We suspect that with more advertising revenue moving to online platforms (the figure has more than doubled since 2010) it is unlikely that additional advertising hours would result in an overall higher level of television advertising revenue.
programmes tend to attract lower audience numbers and have low commercial appeal. Allowing advertising on Sunday mornings would bring commercial considerations to this programming time. There is a high risk that broadcasters would seek to broadcast programmes that attract a larger audience, in order to seek whatever additional advertising revenue could be gained by serving a larger audience. In this case, special interest programmes be moved to less accessible times or not shown at all.

A survey commissioned by the Ministry of Culture and Heritage in 2010 shows a majority support for the status quo. Of respondents, 55% supported retaining advertising restrictions on Sunday mornings. Public opinion about retaining advertising restrictions on Sunday morning is unlikely to have changed significantly since that survey was conducted.

b. **Option 2**, maintain existing restrictions with exemptions for events of major significance. Exemptions could be provided if these events occur during the Sunday morning time slot on television. This would largely maintain existing non-commercial programme time well suited to special interest programmes, but greater opportunity for broadcasters to re-cover the cost of screening events of major significance. The benefits of this option are set out further below.

c. **Option 3**, repeal existing restrictions including restrictions on certain public holidays. This option would remove existing restrictions in respect of both television and radio advertising on Sundays and public holidays. This would provide consistency across platforms, but would remove non-commercial programming time at a likely cost to special interest programmes. Increased advertising income for broadcasters is expected to be minimal, because advertising revenue would most likely be re-distributed across the programming schedule without an overall increase.

Parliament's intention in relation to advertising restrictions on the specified public holidays was for these days to retain a special status recognising the importance the public attaches to these days, for traditional, commemorative, recreational and religious reasons. There is unlikely to be an event of major significance that occurs at a time that would coincide with live broadcast in New Zealand on the specified public holidays. Anzac Day commemorations would likely meet the criteria for an event of major significance, but these are broadcast free-to-air currently, with advertising restrictions in place. Furthermore, there is likely to be strong public support for continued advertising restrictions on these days. In the 2010 survey commissioned by the Ministry, 71% of respondents supported advertising restrictions on Christmas Day; 66% supported advertising restrictions on Anzac Day, Good Friday and Easter Sunday. Again, public opinion on this matter is unlikely to have changed since the survey was conducted.

d. **Option 4**, repeal restrictions but set aside special interest programming time. This option would remove existing restrictions in exchange for setting aside blocks of time for special interest programming. This option was less-preferred by broadcasters than the status quo. Regulating the screening of special interest programming time would remove some flexibility for broadcasters.
e. **Option 5, extend restrictions.** This option would extend restrictions to broadcasters’ websites and possibly also to on-demand services and other audio-visual content. This may create a loss of income for broadcasters and providers. It would be difficult for Government to enforce restrictions on content from international platforms. Given the high cost to broadcasters and difficulty for Government enforcing this option, it would be a disproportionate response to the issue of inconsistent advertising restrictions across platforms.

57. Appendix 2 shows how each option has been assessed against the objectives for content regulation compared with the status quo. Assessment against the objective “reflects consumer behaviour and demand” includes assessment of whether the option meets consumer demand for non-commercial space for special interest programming. **Option 2, provide an exemption for events of major significance, best meets the convergence objectives.**

**Preferred option**

**Exemptions for events of major significance**

58. We consider that the cost to broadcasters and the Government of complying with and enforcing the status quo is low. The cost to broadcasters is in terms of lost revenue from advertising. Although broadcasters generally support the repeal of restrictions, broadcasters have confirmed in discussion with the Ministry that the likely increase in advertising revenues from removing these restrictions is not substantial. A more likely outcome is a redistribution of revenue across the programming schedule. Advertising restrictions incur some enforcement cost to Government, but this is generally low.

59. A current benefit of the status quo is to provide a non-commercial slot in the television programme schedule that enables special interest content to be shown. Much of this content is crown-funded through NZ On Air. Providing this non-commercial programming time supports a range of diverse content being accessible to New Zealanders. Without the non-commercial slot in the schedule there is a risk that these programmes would be moved to less favourable times and therefore not be as accessible.

60. Allowing exemptions for events of major significance could provide some benefit to broadcasters. The Sunday morning restrictions are likely to have the most impact on businesses when overseas events occur on Saturday afternoon or evening (primarily in the Northern Hemisphere) and there is demand for these to be broadcast live in New Zealand. These events are generally sporting in nature and may attract significantly more advertising revenue than a typical Sunday morning slot.

61. A recent example was the Rugby World Cup in the United Kingdom when a number of Saturday games, including some involving New Zealand, were played during the Sunday 6 am to noon timeslot. A future example is the 2016 Summer Olympic Games in Rio de Janeiro where competitions of particular interest to New Zealand (e.g. rowing, athletics, swimming) are expected to be screened during the times when Sunday morning advertising restrictions apply.
62. This amendment of the current restrictions might strengthen competition in bidding for the rights to broadcast these events, with the potential for more to be won by free-to-air broadcasters. However, it is not possible to predict the extent to which an exemption provision would have the effect of increasing competition, including free-to-air broadcasters. There is a risk that amending the current restrictions may merely drive up the price paid for rights, with subscription services passing on increased costs to consumers as well as attracting the additional advertising revenue permitted. However, there is also a chance that an exemption for such events may encourage bids from consortia involving both broadcast and online media providers in competition with the traditional single platform provider.

63. Allowing an exemption, for events of major significance only, would retain the majority of the non-commercial programming space that is beneficial for the screening of special interest programmes.

64. Further work is needed to define an "event of major significance" for the purposes of applying such an exemption. This would involve consultation with relevant stakeholders, development of criteria that would be used to assess applications for an exemption, and how and by whom decisions would be made to grant exemptions. This option would be designed so that the process to apply for an exemption is as straightforward as possible.

65. The process for broadcasters to apply for, and Government to assess and provide an exemption would be designed so that it creates low compliance costs for broadcasters and Government. Cost would most likely be in terms of submitting and processing an application. As noted above, we would want to design the process to apply for an exemption to be relatively simple, and thereby minimal costs involved for a broadcaster to apply for an exemption, and for the government to process the application and make a decision.

66. An unintended consequence may be that in not treating likes alike, broadcasters' options for developing their programming schedule are restricted compared with on-demand providers. On-demand providers do not have to take scheduling into account. However, Sunday morning represents only a small segment of the viewing week, is well outside of primetime hours, and the broadcasters are not restricted from developing their online options to compete with on-demand providers. On balance, therefore, restricting a limited portion of the programming schedule and applying different rules to the same content, are justifiable in this context. Doing so retains the benefit of a continued broadcasting space for special interest programming. We consider this benefit outweighs the limited restriction that is placed on broadcasters. NZ On Air may have difficulty fulfilling its statutory duty of supporting special interest programming if this broadcasting space is not preserved.

Conclusions and recommendations

67. This RIS recommends retaining existing advertising restrictions but allowing exemptions for the screening of events of major significance on Sunday mornings.
68. Maintaining advertising restrictions protects non-commercial programming time that is used in part to screen special interest programmes. Special interest programmes are largely crown-funded through NZ On Air. Losing this non-commercial programming time could mean special interest programmes are screened at less accessible times.

69. There is benefit in amending the current restrictions to allow for an exemption for advertising during events of major significance being broadcast in these timeslots. This exemption may increase potential revenues for broadcasters and increase competition for the broadcast rights to these events. Further design and implementation work would be required to agree definitional matters and a straightforward process for broadcasters to apply for an exemption.

70. There may be objection to a limited amendment to the Sunday morning advertising rules to accommodate events of major significance. However, providing such an exemption increases the likelihood that free-to-air broadcasters may secure the rights to broadcast these events.

Content regulation work programme

Consultation

71. Submissions to Content Regulation in a Converged World closed in October 2015. Fifty submissions were received. Key broadcasting and media stakeholders submitted, as did several interest groups, and some individuals.

72. On classification issues, there was strong interest from media companies in the self-regulatory elements of options 2 (a voluntary approach to maintaining standards for on-demand content) and 5 (increased self-regulation with the regulator restricted to difficult cases and an advisory role). However, there was also willingness to collaborate on the design of option 3 (extend the Broadcasting Act to apply to on-demand).

73. Media companies differed markedly from the current state regulators in their attitude to the involvement of a state agency in any regulatory model. The companies generally took the view that self-regulation provides agility and responsiveness, and does not need the "back-up" of a state agency. The current regulatory bodies consider that entire self-regulation would be an abdication by the Government of its responsibility to protect society from certain harms while upholding freedom of expression.

74. The preferred option of extending the broadcasting regime, as noted, provides for a large degree of participation in regulation by the industry, through the co-regulatory model.

75. There was also some support for a more comprehensive reform across all media (option 6 in the discussion paper). Some stakeholders noted that this option would be premature given the current level of convergence and ongoing change in the market. As noted, this option is considered disproportionate and premature given the scale of the problem of lack of clarity about regulatory settings for on-demand content.
76. Most submitters supported liberalisation of the advertising regime. Those opposed generally expressed concern at the impact of liberalisation on special interest programming. Some submitters to Content Regulation in a Converged World supported the idea of an exemption for major events such as international sports fixtures, one noting that the exemption should be carefully defined so that it is not used too frequently.

77. Two other areas of media regulation were canvassed in Content Regulation in a Converged World:

a. Proposals to address issues arising from the regulation of electoral broadcasting in the Broadcasting and Electoral Acts. These issues will the subject of later report to Cabinet that will cover detailed policy responses.

b. Questions posed in the discussion paper on the government’s tools for supporting New Zealand audio-visual content. Submissions from broadcasters mostly referred to better access to Crown funding for content, while lobby groups and individuals focussed on the need for better public broadcasting services. These questions have not resulted in proposals for change in this area. We consider that our current focus on contestable funding for programmes, through the funding agencies NZ On Air and Te Māngai Pāho, combined with funding of some public broadcasters, is effective given New Zealand’s size and circumstances.

78. This RIS, with an accompanying Cabinet paper, has been circulated to the Ministry of Business, Innovation and Employment, the Department of Internal Affairs, the Ministry of Justice, the Treasury, Te Puni Kōkiri, and the Department of Prime Minister and Cabinet.

Implementation plan

79. Following a public announcement of the policy decisions, the recommended options for classification and standards and advertising restrictions will be developed in further detail in consultation with stakeholders. For example, consultation will determine the process to grant exemptions for events of major significance to be broadcast on Sunday mornings. Industry stakeholders have indicated that they will be willing to engage in consultation on regulatory change.

80. This consultation will assist in determining when the expanded regime for broadcasting and on-demand content should commence. Timing can then be stipulated in the Digital Convergence Bill.

Monitoring and review

81. An expanded classification and standards regime, under the preferred option, would be monitored by us on a similar basis to the present monitoring of the BSA, and at no additional cost. This monitoring would ensure that the general objectives for content regulation and the specific objectives relating to standards and classification and advertising restrictions were being achieved.
82. The BSA is an Independent Crown Entity and would remain so, and, with a wider scope, continue to report in accordance with the Crown Entities Act 2004. Its Statement of Intent and Statement of Performance Expectations would incorporate appropriate objectives and measures in relation to on-demand content. Its ability to enforce its rulings, subject to any of the ancillary amendments discussed in this statement, would be the same as presently stipulated in the Broadcasting Act.

83. The Ministry’s monitoring of compliance with advertising restrictions — consisting of responding to community complaints rather than active monitoring, which would be impractical — would continue as before under the preferred option. It would be supplemented by the periodic consideration of requests for exemptions under the proposed provision of exemptions to advertising restrictions for events of major significance.

84. The Ministry’s monitoring and policy advice in relation to both the classification and standards regime and the advertising restrictions would be subject to future performance improvement framework reviews.
<table>
<thead>
<tr>
<th>Objective</th>
<th>Option 1: Status quo – no change to current regulations</th>
<th>Option 2: Voluntary Code</th>
<th>Option 3: Extend the Broadcasting Act</th>
<th>Option 4: Extend the Classification Act</th>
<th>Option 5: Increased self-regulation</th>
<th>Option 6: New media standards act</th>
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<tbody>
<tr>
<td>Assessment summary</td>
<td>Better than the status quo: 1. more flexibility 2. cheaper for Government 3. cheaper for industry Positive like the status quo: 1. little cost to consumers Problematic like the status quo: 1. does not treat likes alike 2. unfair competition 3. may confuse consumers</td>
<td>Better than the status quo: 1. more flexibility 2. clear for consumers 3. fairer competition 4. more clarity for consumers Positive like the status quo: 1. low cost to Government 2. low cost to industry 3. low cost to consumers Worse than the status quo: 1. does not treat likes alike 2. unfair competition</td>
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<td>Would take the longest amount of time to implement and would not provide a timely or proportionate way to clarify regulatory settings for on-demand content. Better than the status quo: 1. treats likes alike 2. more flexibility 3. fairer competition 4. more clarity for consumers Positive like the status quo: 1. low cost to Government 2. low cost to industry 3. low cost to consumers Worse than the status quo: 1. does not treat likes alike 2. unfair competition</td>
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<tr>
<td>Treat likes alike and be platform neutral</td>
<td>The public is unable to make complaints to a regulatory body about on-demand content that has not already been broadcast. Similar content may be subject to different decisions by different regimes. Lack of clarity about whether on-demand providers are subject to the Classification Act or the Broadcasting Act, and associated fees, classification and complaints measures.</td>
<td>Like the status quo, this would be problematic because it would keep linear television separate from on-demand. Ongoing growth in on-demand content will highlight this inconsistency. This could result in similar content being subject to different decisions by different regimes.</td>
<td>Better than the status quo because it avoids the risk of different decisions being made about similar content, when shown as an on-demand item or when broadcast. However, it would not treat all similar content consistently. Retail films and DVDs (retail content) would still be subject to the Classification Act. We will consider whether duplication of measures in the Broadcasting Act and Classification Act could be addressed.</td>
<td>Would treat on-demand films in the same way as retail films. However, it would treat retail and on-demand differently from broadcast content. On-demand content is more predominantly comprised of &quot;television-like&quot; content, like that of broadcast content subject to the Broadcasting Act. It would not be practical to classify news and current affairs content, given this content is made available as on-demand content live or very soon after live events.</td>
<td>Like the status quo, this option creates the risk of different decisions being made about similar content and retail content would still be subject to the Classification Act.</td>
<td>Better than the status quo in that it would provide consistent regulatory settings across on-demand, retail and broadcast content.</td>
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<tr>
<td>Be flexible to cope with future change</td>
<td>Existing regulatory system was last updated in 1993, long before the growth of on-demand content. Unless it is updated, it will be unable to respond to further changes in on-demand content.</td>
<td>Would allow a voluntary code that could respond quickly to future changes, unless the Government takes a role in evaluating proposed response to change.</td>
<td>Refreshes the Broadcasting Act to respond to on-demand content and provides flexibility for non-legislative updates in case of changes to this content through refreshing of codes.</td>
<td>Allows more flexibility because classification codes can be updated over time as required without legislative change.</td>
<td>Provides some flexibility through the ability to update codes without legislative change.</td>
<td>Could be designed to accommodate changing technology and viewing habits without further amendment to legislation.</td>
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<td>Encourage fair competition, innovation and ensure content standards without steering the market</td>
<td>Unfair competition due to lack of clarity about measures that apply to on-demand providers. Does not provide a clear regulatory mechanism to ensure on-demand providers maintain content standards.</td>
<td>Like the status quo, creates unfair competition due to requirements for on-demand providers that are different from regulatory requirements on broadcasters. Does not provide a clear regulatory mechanism to ensure on-demand providers maintain content standards.</td>
<td>Fairer competition due to the same regulatory requirements for on-demand providers and broadcasters alike. Broadcasters and providers would assign classifications and hear complaints in the first instance, allowing agility.</td>
<td>Would impose the same regulatory requirements on on-demand providers and retail distributors alike. These regulatory requirements do not provide for provider classification and hearing of complaints in the first instance, like those that apply to broadcast content.</td>
<td>Fairer competition due to the same regulatory requirements for on-demand providers and broadcasters alike.</td>
<td>Could be designed to allow fair competition and ensure content standards, without steering the market.</td>
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<tr>
<td>Be cost efficient for Government</td>
<td>Fairly cost effective for Government although funding is required for the BSA and OFLC.</td>
<td>Better than the status quo because there would be no cost to Government to oversee classification and standards of on-demand content.</td>
<td>Similar to the status quo. The BSA has sufficient reserves to absorb complaints about on-demand content without requiring an increase in its appropriation, at least in the short to medium term. Complaints about on-demand content would likely increase gradually as a proportion of the BSA’s workload. These complaints may, in time, displace complaints about broadcast content, depending on consumption trends.</td>
<td>Similar to the status quo, with funding for OFLC.</td>
<td>May be lower cost than the status quo. A change in the BSA’s role may mean it requires less funding from Government and industry.</td>
<td>Like the status quo, government funding may be required for a regulatory body, depending on how this option was designed.</td>
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<td>Low cost of compliance for industry</td>
<td>If the status quo continues, on-demand providers might still self-classify, for commercial reasons, but would have less incentive voluntarily to comply with one of existing regimes or to develop an equivalent.</td>
<td>Lower cost than the status quo. Would require set-up and maintenance costs but these are likely to be low.</td>
<td>Like the status quo, fairly low cost to industry. For fairness, on-demand only providers should contribute to the cost of the regulator. We would consult industry to determine an appropriate contribution.</td>
<td>Like the status quo, fairly low cost to industry. The extension of coverage would be funded by charging providers for classifications, as in the case of retail content.</td>
<td>No better or worse than the status quo. A change in the BSA’s role may mean it requires less funding from Government and industry. However, industry would be required to fund the self-regulatory</td>
<td>Like the status quo, industry funding may be required for a regulatory or self-regulatory body, depending on how this option was designed.</td>
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6 It already has a voluntary arrangement with Sky's VOD service Neon.
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<tr>
<th>complaints process to the one in place for broadcast content.</th>
<th>Subject to further consultation, this option could provide for the collective hearing of complaints about on-demand content by the Online Media Standards Authority (OMSA, an industry funded, self-regulatory body) in the first instance.</th>
<th>element of this option.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Be at low cost for consumers</td>
<td>Little to no cost is likely to be passed on to consumers.</td>
<td>Like the status quo, little to no cost is likely to be passed on to consumers.</td>
</tr>
<tr>
<td>Reflect consumer behaviour and demand</td>
<td>Providers of similar content are complying with different regimes or assigning their own classifications. This causes confusion for the public. This risk should not be exaggerated however, as roughly equivalent information about the content of offerings is available.</td>
<td>Like the status quo, little to no cost is likely to be passed on to consumers.</td>
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<td>Provides more consistent classification and complaints settings for broadcast and on-demand content. This content is often similar and likely to be subject to similar expectations from consumers.</td>
<td>More clarity for consumers about regulatory settings. Pre-vetting of content may delay the availability of content. However, OFLC argues that it has already developed processes to classify content very quickly. If we make ancillary changes to the classification regime to remove some duplication, content that has already been broadcast may not need to be submitted for re-classification, decreasing OFLC's workload and helping OFLC provide prompt classifications.</td>
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<td>May be worse than the status quo because consumers may find this option cumbersome. It would produce a three-tier structure: first line complaints, appeals, a higher appeals and advisory body. I would provide four tiers if appeals to the High Court, as under the present regime and the preferred option, are allowed.</td>
<td>Could provide consumers a clearer, more consistent and streamlined classification and complaints system.</td>
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<tr>
<td>Objective</td>
<td>Option 1: Status quo</td>
<td>Option 2: provide exemptions for major events</td>
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<td>Assessment summary</td>
<td>Better than the status quo: 1. treats likes &quot;more alike&quot; 2. more flexibility 3. fairer competition 4. lower cost for Government 5. lower cost for industry 6. better reflects consumer demand</td>
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</tr>
<tr>
<td>Treat likes alike and be platform neutral</td>
<td>Does not treat likes alike. Advertising restrictions apply to television and radio that do not apply to other media.</td>
<td>Provides more consistency for television and radio with other media, compared with the status quo.</td>
</tr>
<tr>
<td>Be flexible to cope with future change</td>
<td>Does not provide any flexibility for restrictions to be lifted for television and radio if appropriate.</td>
<td>Allows more flexibility to screen events of major significance without advertising restrictions.</td>
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<tr>
<td>Encourage fair competition, innovation and ensure content standards without steering the market</td>
<td>Restricts advertising revenue for television and radio broadcasters at certain times, without exception for certain programming.</td>
<td>Lightens regulatory settings where likely to benefit industry and consumers.</td>
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<tr>
<td>Be cost efficient for Government</td>
<td>Cost to Government of enforcing these restrictions is fairly low. In most cases the Government issues a warning and this is sufficient. There has been only</td>
<td>The costs of compliance monitoring would potentially reduce for government.</td>
</tr>
<tr>
<td>Low cost of compliance for industry</td>
<td>Some cost to industry in the form of lost revenue. This cost is not considered likely to be significant.</td>
<td>May increase the likelihood of such events being screened on free-to-air television. Increased chance of advertising revenue may increase the likelihood of recouping the cost of buying the rights to screen these events. Even where sporting events screen across several days, the final stages of competition often occur at advertising-restricted times. Like the status quo, likely to be low cost to industry.</td>
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<tr>
<td>Be at low cost for consumers</td>
<td>Low cost for consumers.</td>
<td>Increased competition for screening rights may drive up the cost of successful bids. If won by subscription services, this cost may be passed on to consumers.</td>
</tr>
<tr>
<td>Reflect consumer behaviour and demand</td>
<td>Reflects consumer demand for commercial-free time.</td>
<td>Largely reflects consumer demand for commercial-free time provided by the status quo, with some exceptions that may increase the likelihood that free-to-air channels may win the rights to screen events of major significance.</td>
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</table>