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Submission in response to Convergence Review Framing Paper

This submission is made on behalf of the Interactive Games & Entertainment Association (iGEA), the Australian Direct Marketing Association (ADMA), the Australian Interactive Media Industry Association (AIMIA), the Australian Library and Information Association (ALIA), eBay, Google, nineMSN, and Yahoo!7 in response to the Government's Convergence Review Framing Paper.

Introduction

The above named entities appreciate the opportunity to contribute to the discussion as to what fundamental principles should underpin any new policy framework emerging from the Government's Convergence Review (**the Review**). The release last month of the Government's National Digital Economy Strategy (**NDES**) has highlighted the importance of the Review. As the NDES notes, the National Broadband Network (**NBN**), and the devices and applications that it can support, will lead to innovation that cannot presently be imagined. Ensuring that the Australian regulatory environment facilitates rather than impedes investment and innovation is imperative if Australia is to realise its vision of being a leading digital economy by 2020. We strongly support the goals of the NDES and highlight the critical link between a thriving digital economy and e-commerce environment with a convergent media regulatory policy that reflects and supports these broader digital economy goals.

In this submission, we will make some specific comments on the Principles, including commenting on what appear to be inherent contradictions in some of the Principles. We will also comment on two of the "other policy considerations" set out at the end the Framing Paper.

We also make some comments in relation to the Principles about how they might better reflect the realities of a converged media environment, and better align with the Government's objectives of promoting innovation and a strong digital economy as set out in the NDES.

General observations

The Framing Paper makes clear that consideration of a new policy framework should not proceed until the objectives that it seeks to achieve are clearly articulated. We are pleased to see that the Committee has postponed any consideration of detailed policy until the principles that should underpin that policy are addressed.

We are in broad agreement with many of the policy objectives set out in the Proposed Principles (**Principles**), although we seek clarification regarding some aspects of the Principles. Further, we would like to put forward further, or alternative, principles for consideration by the Committee.

While welcoming the Committee's acknowledgement that there are a number of different ways to achieve the policy objectives that will emerge from this first stage of the Convergence Review, we have some concern regarding the Framing Paper's apparent focus on the objects of *existing* legislation as a starting point for the review. This suggests that the Committee may be approaching its task from the perspective of the existing policy framework and regulatory models, which, while arguably well suited to a traditional media environment, are in many respects no longer appropriate in an era where traditional models of media creation, consumption and engagement no longer hold true.

We urge the Committee to take this opportunity to consider media policy afresh and to acknowledge the important structural changes that are taking place as the Australian media environment moves rapidly towards convergence. The current policy was adapted for a pre-convergence landscape of technologically distinct (or vertical) silos, publishing content for passive consumption by consumers. That marketplace operated strictly within Australian territorial borders, was geographically segmented through the licensing arrangements and competitively constrained both by the limited availability of broadcast spectrum and potential audience. The converged landscape in contrast consists of horizontal layers of platforms, content providers and users engaging *interactively* to create and distribute content across platforms. The converged media sector is part of a global digital environment which has to date enjoyed low barriers to entry, minimal regulation, and thriving competition amongst content distributors, where the consumer has limitless choice as what content they will view. We agree with the recent observation of the ACMA's Chairman Chris Chapman that regulation of a converged media environment should be "market-based to the extent possible, consistent with best practice in regulatory design which requires an in-principle rationale for intervention..."¹.

¹ Chris Chapman, Speech to the Communications and Media Lawyers Association: The "convergence phenomena' from a regulator's perspective", May 30, 2011
http://www.acma.gov.au/webwr/assets/main/lib312076/camla_chris_chapman_speech.pdf

Comments on the Principles

Principle 1 – Australians should have access to a broad diversity of voices, views and information

We support this principle. In a liberal democracy such as ours, ensuring that citizens have access to a broad diversity of voices, views and information is a central plank of any media policy.

In a traditional media environment, this policy objective has required government regulation in order to positively promote diversity amongst the broadcast media (though not the print media) due to the scarcity of spectrum, high costs of producing local content, the availability of cheaper overseas content and the “capacity to influence” Australian audiences exerted by this media. Absent such regulation, the “media sector” could arguably not have been expected to have provided “consumers” with a diverse range of views and interests.

Very different circumstances prevail in a converged media environment. The model of a professional media sector delivering content to passive consumers has been replaced by a model in which the lines between creation and consumption of content have been blurred. Content creation is no longer the sole preserve of a “media sector” - professionally produced content from traditional sources competes with user generated content shared via social networking, blogging and micro-blogging sites. Content consumption and engagement is no longer a one way street - consumers are interactively engaged, responding to content, and in that process generating new content to be shared with others

This engagement is happening both inside and outside of mainstream media sites. The internet has enabled the development of a wider range of both professionally produced content and user generated content that has never before been seen in the Australian media market. Broadcast media outlets are offering innovative new products such as ‘catch up TV’ offerings (for example Channel 7’s PLUS7 on Yahoo!7, ninemsn’s FixPlay, the ABC’s iView or Austar’s Anywhere services) which are changing the ways consumers access professionally produced content. Australian media consumers are also benefiting from broadcasters merging aspects of Web 2.0 social networking features with traditional broadcasting content, such as ninemsn’s A Current Affair website and the ABC Local initiative, allowing user interactivity and response to program content. The NBN will provide the opportunity for an even greater diversity of voices including from remote regional areas.

Use of social media is growing exponentially. As reported in the NDES, in their annual *Predictions*, Deloitte suggested that in 2011 social networks will pass the milestone of 1 billion unique members globally this year.²

² Deloitte, *Technology, Media and Telecommunications Predictions 2011*
http://www.deloitte.com/assets/Dcom-Australia/Local%20Assets/Documents/Industries/TMT/2011_TMT_Predictions_Australia_Web_FINAL.pdf

Example: 2011 Queensland floods

Mainstream media outlets, government agencies and citizens spontaneously engaged to generate and share crucial information as this crisis unfolded. Associate Professor Axel Bruns, from the ARC Centre of Excellence for Creative Industries and Innovation at the Queensland University of Technology, has commented that:

As important as the use of Twitter and Facebook themselves during the flood events was their use for pointing to further online resources, too – with such resources including many pre-existing sites such as the Website of the Australian Bureau of Meteorology (BOM), which provides up-to-the-minute weather radar and river level observations as well as forecasts and warnings for a wide range of locations, the sites of Brisbane City Council and Queensland State Government, and the sites of major infrastructure providers (such as electricity and telephone companies). But beyond – and in addition to – such official sources, the flood event also saw the rapid establishment of a number of user-initiated online resources: some sites were set up to mirror official sites whose servers were struggling to cope with the increased amount of page requests; some pulled together the information from a variety of sources in a faster and more user-friendly format (for example by marking road closures on Google Maps, or providing a simple list of links to flood forecast maps); some set up eyewitness sites providing photos, videos, and even live Webcam footage of the rising Brisbane river. Some such activities also incorporated information from open data resources made available by Australian governments at various levels as part of their Government 2.0 initiatives....

...one key observation to be made about the distributed, multi-channel media response to the Queensland floods is that citizens and officials together determined the media mix, and continued to fine-tune it as the event unfolded; the substantial shift which we have observed in the Queensland Police Service's media practices during the flood crisis provides just one key example here. This successful emergency response was also a success of e-democracy, therefore."³

In this model, the policy objective of diversity is well and truly met, without the need for government regulation to address market failure and positively promote this outcome. In fact, it is likely that a top-down approach to policy and regulation may actually impede the ability of a converged media to achieve the desired policy objective by impeding innovation in this fast growing and adapting media landscape which has flourished largely through the ability to provide new and diverse content distribution paths and platforms which are not constrained by traditional market-based approaches.

We submit that Principle 1 should therefore be expressed in such a way as to make clear that the principle is directed towards ensuring that media policy reflects and encourages innovative new models of content creation and distribution, and should not be understood as reinforcing a traditional media approach to regulation directed towards promoting diversity in the face of a market failure that in many cases does not today exist. We submit that in the case of internet

³ Axel Bruns, Towards a Distributed Citizen Participation: Lessons from Wikileaks and the Queensland Floods, p 7,8 <http://snurb.info/files/2011/Towards%20Distributed%20Citizen%20Participation.pdf>

content models, and content distribution models involving the internet and other similar distribution channels (for example, 'television' delivered via Internet Protocol) there is no "in-principle rationale" for any regulatory intervention directed to ensuring diversity.

Principle 2 – The communications and media market should be innovative and competitive, while still ensuring outcomes in the interests of the Australian public

We agree that it is fundamentally important that regulatory and policy settings facilitate and promote the innovation and competition that will be essential if Australia is to meet its objective of being amongst the world's leading economies by 2020. Continued innovation and investment in the Australian digital economy – further facilitated by the opportunities that will be created by the NBN - represent an opportunity for almost unlimited potential to deliver even more innovation in the types of content creation, delivery and consumption models that will be available to the Australian content industry and the Australian public.

We support the Committee's view that the policy framework should be device and technology agnostic wherever possible. In a converged media environment, where a multitude of different devices and technologies can be used to create and distribute content, it is imperative that regulation does not have the unintended consequence of restricting or impeding technological innovation and investment. The policy framework that is adopted will impact strongly on the development and maintenance of a vibrant digital economy.

In a converged media environment, the question of what, *if any*, restraint on competition might be appropriate in order to ensure that the communications and media market is responsive to audience needs will require careful consideration.

The converged media marketplace is a very different environment, from a competition standpoint, than that which exists for traditional broadcast media - particularly given the global nature of the digital marketplace and the reality that, to date, few regulatory constraints have been imposed on its development. Policy settings that continue to encourage innovation and competition, and which require an in-principle rationale for intervention, are best placed to ensure that the desired outcomes – i.e. a diverse and vibrant media that is responsive to audience needs – will flourish. It is imperative that an appropriate balance be struck between regulation and innovation. The presumption should be in favour of a free and open Internet, with regulatory intervention confined to those instances where there is a compelling policy justification.

Principle 3 – Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity

Again, we support the Committee's recognition that media and communications policy should be set in such a way as to ensure that the market responds to the public desire for content that is relevant to, and speaks to, Australian national culture and identity.

We question, however, the continuing relevance of a regulatory approach that presupposes that Australian content will only be produced and distributed via "professional" media and through the imposition of mandated content requirements. We also question the ongoing applicability of

“capacity to influence” rationale (which assumes a very high social impact from broadcast media) that has been relied on in support of imposing these requirements on Australian broadcast media

Firstly, the financial barriers to producing quality Australian content that may have operated in a traditional broadcast environment no longer apply to the same degree. New internet-based models of funding and distribution are emerging, with the result that entry barriers to the creation and distribution of Australian content are being broken down:

- In May 2011, a group of Sydney filmmakers partnered with BitTorrent to promote and distribute their film, *The Tunnel*, through the US software-maker’s internet platforms after a more conventional cinema release.⁴
- In March, 101 musicians from 33 countries converged on Sydney for a week long festival of musical collaboration and participation. A grand finale concert was streamed live on YouTube from Sydney Opera House.⁵
- A recent collaboration between Screen Australia and YouTube – Map My Summer – invited users to upload videos (anything from mobile phone footage to a short file) to a web portal that celebrated the collective Australian summer experience. The project involved legendary filmmaker George Miller selecting an upcoming local filmmaker, Amy Gebhardt, to create a short film based on the footage uploaded by users onto the Map My Summer web portal.

Secondly, while the “capacity to influence” rationale for mandated content requirements may have held true in an environment where the landscape comprised passive consumers, and a limited number of media channels, it has less relevance to a converged media environment characterised by diversity of content and the active engagement of users. We recognise that there may be an important continuing role for government to encourage the *creation* of Australian content by appropriate funding and incentive schemes, however, in a converged media landscape where the barriers to content distribution are low – if not non-existent – we suggest that there is no longer a compelling policy rationale for focused regulatory intervention in content *distribution*.

The desired policy outcome will be best achieved by a framework that promotes an innovative and competitive media and communications market, as reflected in Principle 2. In this regard, we question whether there is a tension between Principle 2 and Principle 3. Does the Committee intend to suggest that the policy outcomes reflected in Principle 3 can *only* be achieved as a result of government intervention (whether by regulatory or non-regulatory means)? If so, we consider that Principle 3 is in tension with the apparent intention of Principle 2, which is focused on fostering innovation and competition.

⁴ : <http://www.smh.com.au/technology/technology-news/filmmakers-bet-on-bittorrent-for-a-hit-20110517-1eqdb.html#ixzz1NoCudfTA>

⁵ <http://www.youtube.com/user/symphony>

Principle 4 – Australians should have access to news and information of relevance to their local community

The comments made above with respect to Australian content are equally relevant to the policy objective of ensuring that Australians have access to relevant news and information. That policy objective is already being met, and is likely to continue to be met if emerging (and future) models of content creation and distribution are allowed to develop and innovate without undue regulatory constraints.

The year 2011 has provided very many examples – locally and internationally - of citizens employing these new models of communication to engage with each other and share news and information of interest to their local communities. We have already discussed the way in which social media users engaged with traditional media and government agencies to communicate vital information in a timely and directed fashion in the context of the Queensland floods. Not only were locals directly affected by the disaster kept informed, but the traditional media found itself communicating to the rest of the nation information that had been generated by users of social media networks.

Unlike traditional media, the Internet has provided a platform for what has become known as “hyper-journalism” or “hyper-local content”: content that is created for a small, local audience. A good example is the *Castlemaine Independent*; a website that has a particular focus on issues of interest to its local community of rural Victoria.⁶ The financial barriers that apply to traditional media, such as a local newspaper, are broken down as locally relevant content is delivered via the Internet. In a different content, social media sites such as Facebook and Twitter became a primary ‘media’ source (both of information and grass-roots political organisation) during the recent events in Egypt⁷.

We submit that policy should be directed to ensuring that this diversity continues to flourish organically. There is no in-principle rationale for government intervention to actively promote diversity in a converged media marketplace, other to ensure that the regulatory and policy settings are conducive to an open network.

Principle 5 – Communications and media services available to Australians should reflect community standards and the views and expectations of the Australian public

It is not clear from the Framing paper exactly what the Committee means by “community standards”. As has been noted by Professors Crawford and Lumby, “social mores and community perceptions differ markedly across cities, rural and regional areas, and...ethnic and religious groups”.⁸ As the Internet becomes populated by more and more diverse communities of interest, traditional rationales for government regulation of content that is legal, but likely to be offensive to some, have less widespread relevance. Online communities of interest are setting and enforcing their *own* standards.

⁶ <http://www.castlemaineindependent.org/>

⁷ <http://social-media-optimization.com/2011/02/the-powerful-effects-of-social-media-in-egypt/>

⁸ Associate Professor Kate Crawford and Professor Catharine Lumby, *The Adaptive Moment: A Fresh Approach to Convergent Media in Australia*, <http://www.unsw.edu.au/images/pad/2011/May/Convergentmedia.pdf>, p

If by “community standards” the Committee intends to refer to community standards of “offensiveness”, we question whether a policy that requires communication and media services to “reflect” community standards is in tension with Principle 1 i.e. the promotion of *diversity* of views and information. In a converged media environment, where users have access to a diversity of voices, a policy approach that positively privileges a pre-determined standard of morality, social mores etc, may be at odds with the need to ensure a ‘diversity of voices’.

That is not to say that Government regulation is not appropriate where the content is illegal; for example, child abuse imagery. We fully support a regulatory regime whereby content of this kind continues to be subject to government regulation.

In this respect we note the effectiveness of self-initiated responses from industry in developing tools that enable citizens to exercise greater control than ever before over the content they choose to consume (or not consume). These include :

- *Individual controls* – where internet users can exercise informed content choices about the content accessed via internet sites (for example, setting privacy settings and ‘hiding’ or ‘blocking’ users on Facebook, ‘ignoring’ users on Yahoo!7 Messenger, determining who can see, share, comment on, print or add tags to photos on Flickr, protecting tweets or choosing not to follow particular users on Twitter, eliminating age-restricted content on YouTube or switching on SafeSearch on Google, Yahoo!7 and Bing search, creating a sign-in seal on Yahoo!7 to protect against phishing websites.
- *Community controls* - where the community of users on a particular site act to enforce the community guidelines and standards applicable to that site (for example, flagging videos as violating community guidelines on YouTube or reporting illegal or offensive content using social networking services’ abuse tools
- *Platform self regulation* – where hosts of user generated content quickly and appropriately respond to user reports by investigating the report and taking appropriate action. This is commonly referred to as a ‘notice and take down’ process and is a common practice amongst sites which host user generated content. Internationally, self-regulatory initiatives such as the European Union Safer Social Networking Principles⁹ formalise these proactive initiatives.

Examples of platform level initiatives include:

- The YouTube flagging system, whereby YouTube users click a “flag” button to report a video which they consider to be inappropriate.¹⁰ YouTube staff then review the video to determine whether it should violate the Terms of Use and should be removed;
- The Twitter Child Pornography reporting system, whereby users can report content that appears to promote or support child pornography;¹¹

⁹ http://ec.europa.eu/information_society/activities/social_networking/docs/sn_principles.pdf

¹⁰ <http://www.google.com/support/youtube/bin/answer.py?answer=95403>

¹¹ <http://support.twitter.com/articles/37370>

- The Facebook “report this Photo” link, whereby users can report a photo that appears to be pornographic or otherwise violate Facebook’s Statement of Rights and Responsibilities.¹²
- The Flickr ‘flag this photo’ link located in the bottom right hand corner of the page the photo appears on
- The Yahoo!7 network has ‘Report’ buttons located alongside each item of user-generated content
- the major gaming platforms all offer parental controls which work in harmony with Australia’s National Classification Scheme.

Finally, while a more detailed consideration of the appropriate regulatory framework for offensive content will likely await the upcoming National Classification Scheme Review, so far as the protection of children is concerned, we submit that it is appropriate at this stage of the development of a media policy framework to acknowledge the vital role that can and should be played by education. We support Crawford and Lumby’s proposal for a “research-led approach” to achieving the right balance between regulation and the *education* of young people and parents about safe Internet use. The importance of media literacy has also been recognised by the Byron review in the United Kingdom¹³.

Principle 6 – Australians should have access to the broadest range of content across platforms and services as possible

We agree with the comments in the Framing Paper to the effect that this policy objective will require policy and regulation that is flexible and adaptable to changing market and technological circumstances.

We would add, however, that preserving the open nature of the Internet – under-pinned by real choice, mobility, and transparency for users - is fundamental to ensuring that Australians continue to have access to the widest choice of legal content and innovative delivery platforms. In our view, it is imperative that the Committee recognise the importance of facilitating a culture of “innovation without constraints” if the Australian media and communications market is to remain innovative and competitive, and to continue to provide the broadest possible range of content across platforms and services. There should be no undue regulatory impediments to content flowing freely across platforms and/or services.

In this regard, we note that the Framing Paper refers to Australians having access to *legitimate* content. If, by “legitimate”, the Committee intends to suggest that the content is legally available, or that content owner or rights holder have granted permission for the content to be used, we agree completely (subject of course to any rights of internet users under copyright laws, for example to fair dealing of copyright material for news reporting). If, however, the intention is to suggest that access

¹² <http://www.facebook.com/help/?search=report>

¹³ Safer Children in a Digital World. The Report of the Byron Review:
<http://webarchive.nationalarchives.gov.uk/20100202100434/http://dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf>

should be confined to content that is not considered ‘offensive’ by certain groups, then for the reasons already set out, we would disagree with the way this argument is framed in the paper.

Finally, technological neutrality should be a central feature of a policy that is intended to promote access to the widest possible range of content: regulatory and policy settings must be applied so as not to impede market innovation by applying favourable conditions to some platforms and not others. We suggest that the best way to achieve this goal is to allow innovation to flourish. However, in our view it may be appropriate for the Committee to consider whether adjustments to competition laws are required to accompany changes to the media regulatory landscape, to ensure that consumer choice and access to the widest range of content services is not unnecessarily restricted

Principle 7 – Service Providers should provide the maximum transparency for consumers in how their service is delivered

We strongly support this principle. Preserving the open nature of the internet is fundamental to ensuring that rapid innovation continues to happen in the communications and media sector and ensuring that consumers continue to have access to the benefits of that innovation, in the form of the widest choice of legal content options and innovative new content delivery platforms.

The Preamble to the TOR recognises the need to protect citizens’ rights in relation to content. One aspect of citizens’ rights in a convergent environment is the right of citizens to access the (lawful) content and services of their choice, in a free, open and pro-competitive manner, including via the internet.

Another aspect to these rights is the right to transparency in how consumer content is delivered. Tools such as Measurement Lab¹⁴ enable consumers to test their broadband connections to assess whether any problem is caused by a broadband connection, and application, or something else. Tools such as these are an important transparency tool for consumers, but more can be done.

Policy makers in many countries (including Canada, Norway, the EU and the USA) have considered policy measures, such as network neutrality, aimed at preserving the open nature of the Internet and ensuring that citizens continue to enjoy the benefits of that dynamic environment. We are encouraged that this Principle will ensure that the policy settings underpinning the Australian regulatory environment will provide these same protections and transparency for Australian consumers.

Principle 8 – the Government should seek to maximise the overall public benefit derived from the use of spectrum assigned for the delivery of media content and communications services

We agree that the fundamental goal of spectrum policy should be to maximise overall public benefit. We note with some concern, however, the reference to spectrum being “assigned” for the delivery of media content and communications services. This appears to reflect traditional models of spectrum policy and allocation rather than “future proofed” thinking about innovative ways in which

¹⁴ <http://measurementlab.net/>

to maximise the public benefit from spectrum, such as a mixture of spectrum auctions and allocations combined with new spectrum models such as test beds or appropriate use of spectrum sensing devices.

We submit that the following principles represent a useful starting point for the Committee's consideration of how best to maximise public benefit in spectrum policy:

- Convergent media policy should focus on liberalising the spectrum regulatory framework and enabling the unlicensed use of spectrum-efficient devices where appropriate (for example, permitting the use of 'white spaces' devices which detect and avoid established users of spectrum)
- The policy framework should encourage two forms of competition in spectrum markets:
 - 'first-order' competition by facilities-based market entrants; and
 - 'second-order' competition by web-based entities, permitted to use spectrum in innovative ways.

We submit that these policy principles would ensure both that Australia maximises the broader public benefit from its valuable spectrum assets and that the regulatory environment in relation to spectrum policy is consistent with the Government's broader policy goals in relation to development of Australia as a world leading digital economy and e-commerce environment.

Comments on two of the additional policy considerations set out in the Terms of Reference

- ***The impact of policy settings on industry and government revenue***

Clearly the revenue impacts of policy decisions cannot be ignored. However, at this initial "greenfields" stage of the Convergence Review – the stage of designing the optimum policy framework for a convergent media environment – we encourage the Committee to put revenue considerations to one side. Consistent with the framework set out in the Office of Regulation Review's Best Practice Regulation handbook, we submit that the revenue implications of particular policy choices are more appropriately considered when balancing the merits of and selecting regulatory approaches to give effect to the principles that emerge from this first stage of the process.

- ***Appropriate ways to treat content sourced from outside Australia***

We are aware that the reference in the Framing Paper to how to *treat* content sourced from outside of Australia could be interpreted as a question as to appropriate ways in which to *regulate* such content. Although in the context of the broader Framing Paper we believe that this is not the intended effect of this question, we do recognise that these are difficult questions with which the Committee will need to grapple.

We acknowledge that the challenges posed to domestic policy frameworks from offshore content sources can be difficult to address. Although we submit that the fundamental policy principles of content regulation do not change based on the geographic source of the content, there may be

certain practical and regulatory realities that apply to these categories of content that do not arise for domestically-hosted content platforms or services.

The experience of the above-named companies internationally has shown that best-practice self-regulatory approaches provide the best outcomes. Policy approaches which require or encourage technical or regulatory arbitrage from the operators of global services are difficult (or impossible) to enforce in practice and would be contrary to the Government's broader goals as set out in the NDES.

We would be pleased to provide whatever assistance members of the Committee may require in relation to the range of self-regulatory approaches that have been adopted internationally which may be applicable to the Australian environment.

Conclusion

In conclusion, we welcome the opportunity to contribute these views on the policy principles that will shape this important review and looks forward to exploring these issues further over the course of the review.

Any questions or comments about this submission can be directed to :

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