

1. General Observations

Need for Clarity and Consistency: There are some potential inconsistencies within and between the four documents released on 14 December – i.e. the media release, the draft ToR, the Background Paper and the Questions and Answers.

For example, the media release states that the review will look at “all content delivery platforms” including the fixed telecommunications network. The proposed ToR similarly appear to embrace an examination of all aspects of all aspects of “the current policy framework for the production and delivery of media content and communication services.”

However, the Convergence Questions and Answers Document suggests that the Review will not focus on telephony and voice services, and offers some reasons for this.

Notwithstanding the merits of these arguments (discussed later in this document), the final ToR should attempt to provide greater clarity on the intended scope of the Review. Part of the difficulty here probably relates to language usage e.g. the distinction between terms such as “platform” and “services” and the different ways that terms can be used in different sectors. It may be that the Review Committee will need to expend some effort early in its work to establish a clearly understood glossary of terms.

Structure of the Review: Communications Alliance is comfortable with the decision to entrust the review to a panel of three independent experts, supported by DBCDE. We recommend that the Review Committee be instructed, via the final ToR or otherwise, on the process to be followed during the Review, and that this process should include the requirement for the release of a draft report, followed by a second consultation round - including public hearings - along the lines of the process typically followed by the Productivity Commission.

2. Comments on the Proposed Terms of Reference

- 2.1 Investment and Competition Imperative: We recommend that the final ToR include policy parameters that require the Review Committee to consider the need to create an environment that promotes:
- investment in convergent industries, particularly in the applications layer, that will help deliver the economic and social benefits that can be generated by next-generation and/or converged networks and service delivery platforms; and
 - robust competition across converged industry activities.
- 2.2 Regulatory Forbearance: We recommend that the final ToR require the Review Committee to consider the risks of creating undesirable, unintended outcomes when making regulatory interventions into rapidly changing and unpredictable convergent environments and the consequent need for regulatory forbearance as a guiding principle for convergent regulation. In this vein, the Review Committee should have regard to the "Principles of Best Practice Regulation Making" set out in the Government's Best Practice Regulation Handbook 2010." (see, for example, the excerpt at ATTACHMENT 1)
- 2.3 Level Playing Field: The ToR should direct the Review to attempt to harmonise and simplify media and ICT regulation to create a level playing field between Terrestrial Broadcast, Satellite, Telecom, Cable and Internet delivery. This is not to suggest that all forms of content should necessarily be treated identically (see 2.6 below, for example), but rather that content that can be viewed as being of the same general category (e.g. entertainment video) should not be treated

differently from other content within the same category simply because it reaches its audience or users via a certain platform.

- 2.4 Online Copyright Infringement: We recommend that the issues around the improper downloading of content be excluded from the scope of the Review – at least in the first instance – on the grounds that there are ongoing judicial processes underway that ought to be allowed to be concluded before commencing further policy development (as recognised in the Attorney General's incoming government brief at pp35-36).

Notwithstanding this, the Review should examine potential measures to stimulate the growth of legal digital media services to make sure that Australian consumers have timely access to legal and attractive digital content, including via new platforms such as IPTV, Mobile TV and Internet TV.

- 2.5 Role of consumers/citizens in the regulatory framework: Existing regulatory provisions tend to view consumers or users of communications and content as occupying a traditionally passive role in the regulatory construct. Consumers/citizens already play a proactive role in regulating content - for example in the way that consumer complaints can prompt action against some categories of content on free-to-air television, and the way in which viewers participate in the editing or classification of content on such sites as YouTube. The Review Committee should be encouraged to consider how the participation of consumers/citizens can be enhanced or used more effectively in any new regulatory framework.

- 2.6 User-generated Content: The Review Committee should consider carefully the issues surrounding the significant and ongoing increase in user-generated content. Approximately 34 hours of user-generated video content, for example, is uploaded to YouTube every minute of each day. The Review Committee should consider the potential need to address the digital rights of Australians in regards to their own content, particularly the confusion over individual's rights when using "next generation" applications and services (e.g. social networking media) to communicate and publish content. The Review Committee should also consider the potential need for the regulatory framework to differentiate between user-generated and commercially-generated content. It may be, for example that both forms of content should enjoy the same rights and protections, but that obligations which attach to commercially-generated content do not necessarily attach to user-generated content.

- 2.7 Australian Content: Proposed ToR 5(b) suggests that the Review Committee should look for the appropriate regulatory and legislative settings to ensure the continued production of Australian media content. Communications Alliance supports the aim of fostering Australian content production, and would not wish to see current local content levels diminish as a result of any decisions arising from this Review. We believe, however, that there is a question as to whether regulatory instruments are the most appropriate tools to pursue this objective. The Review Committee should examine whether policy initiatives, unrelated to regulation, should play a stronger role in facilitating Australian content creation. In any event, the Australian telecommunications industry believes that the emergence of new platforms, services, applications and markets that will flow from the creation of seamless next-generation networks such as the National Broadband Network, will serve to promote the creation of new and additional Australian content.

- 2.8 Carve-out of Telephony: We agree with the view expressed in the Question and Answer document, that it is premature to conduct a fundamental review of basic telephony obligations while other relevant processes and reviews - e.g. examinations of the Universal Service Obligation and Standard Telephone Service - are underway. However the Review should recognise that content is increasingly

delivered on telephony devices, and that services such as Voice over Internet Protocol (VoIP) are in fact another type of content i.e. voice as an application.

- 2.9 Spectrum Allocation: Proposed ToR 5 (g) asks the Review Committee to determine the appropriate processes by which to manage spectrum allocation. We believe the Review should at most attempt to define the guiding principles in spectrum allocation in a converged environment, rather than seeking to precisely define the processes to manage it.
- 2.10 Cross-Border Content: Proposed ToR 5 (d) implies that regulation is the solution for the apparent perceived or assumed “problem” of content that is cross-border in nature. The Review Committee should consider whether non-regulatory measures are the best way to address this issue.
- 2.11 Classification issues: Further clarity is needed on what the Convergence Review will attempt to achieve in this area versus the ongoing Australian Law Reform Commission review – the documentation available to date is not helpful on this front. Regulatory forbearance should be at the forefront of thought when addressing potential new moves or changes in the classification arena, in an environment where so many variables are in a state of change.
- 2.12 Other Reviews: The ToR should specifically refer to the other existing inquiries and projects that are underway by the Government, in particular the classification review, the USO revisions (including USO Co) and other NBN impacts. The Committee needs to be instructed to be mindful of these reviews and to consult with them and to frame their recommendations so that they can be implemented in conjunction with specific policy decisions in these areas.

Best Practice Regulation Making – Excerpt from the Chapter: Productivity and Regulation

“While regulations are essential for the proper functioning of society and the economy, the challenge for government is to deliver effective and efficient regulation - regulation that is effective in addressing an identified problem and efficient in terms of maximising the benefits to the community, taking account of the costs.

Determining whether regulation meets the dual goals of effectiveness and efficiency requires a structured approach to policy development that systematically evaluates costs and benefits.

The problem to be addressed and the related policy objective should be identified as first steps in the policy development process. A range of options for achieving the objective should be considered (as well as no action or the status quo option); and an analysis of the likely economic, social and environmental consequences.

Effective consultation ensures that both the regulator and the regulated have a good understanding of the problem, alternative options to address it, potential administrative and compliance mechanisms, and associated benefits, costs and risks.

The broader concept of transparency in government has become increasingly important for regulatory governance. Transparency can improve accountability as well as address issues concerning regulatory failure, such as regulatory capture, rigidity, market uncertainty and inability to understand policy risk.

The Australian Government's best practice regulation requirements provide a systematic approach to ensure high quality regulation and are consistent with the OECD Guiding Principles for Regulatory Quality and Performance.”