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Response to Convergence Review Interim Report

1. Executive Summary

General

- The Convergence Review represents a crucial opportunity to develop a policy framework capable of promoting a diverse, innovative, and efficient communications and media sector for Australia. That was the task set for the Committee by the Minister, as reflected in the Terms of Reference. The Minister sought the assistance of the Committee in designing media regulation that was “dynamic enough to support creativity in new digital services, and flexible enough to deal with rapidly changing technologies for the delivery of content.”

- Google was generally supportive of the approach set out by the Minister in the Terms of Reference, and with the main thrust of the governing policy principles for the Convergence Review process set out in the Framing Paper and Emerging Issues paper.

- We are, however, surprised and disappointed that in its Interim Report, the Committee has flagged an intention to make recommendations that appear to be at odds with the Minister’s Terms of Reference for the Convergence Review, as well as the Committee’s own Guiding Principles. They would impose unprecedented and unwarranted regulation on the online media sector.

- In the interests of a promoting a flourishing digital economy in Australia and achieving the goals set out in the Government's National Digital Economy Strategy, we urge the Committee not to miss the opportunity at hand and to reconsider the approach set out in the Interim Report.

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The old rationales for regulation of content are diminishing

- The most enduring “in-principle” justification for government regulation of TV broadcast content - the so-called “scarcity rationale” - has less and less relevance. This rationale was based on the fact that radio-frequency spectrum was a scarce public resource, not available to all, which for that reason needed to be allocated by government in order to maximise public benefit. Government regulation of broadcast TV content was held to be justified on the basis that broadcasters could be expected to give a “quid pro quo” in return for having access to this scarce resource. It is worth noting that online content services do not avail of any such access to spectrum resources.

- The scarcity rationale could also be said to have applied more broadly to the media sector where entry costs were typically very high. For example the cost of building and operating a cable TV network was significant. As a result, in this socially important and commercially vibrant sector, government policy came to focus on the perceived need to ensure that Australian voices were not crowded out and that the power of the media to shape public opinion be constrained to some extent.

- The scarcity rationale has little if any continuing relevance in an era where more efficient uses of spectrum have resulted in relatively less “scarcity” and where, more generally, barriers to entry in the content and media sector are much reduced.

- More fundamentally, the internet is not a scarce resource. On the contrary, anyone can launch a content service, or make content available to a global public, subject only to complying with the general law.

No case for regulation of online services has been made

- The proposed regime put forward by the Committee is offered without any evidence in the Interim Report to suggest that it is warranted. This is at odds with Guiding Principle 1: that where regulation is required, it should be the minimum needed to achieve a clear public purpose.

- The proposed regime also fails to comply with Government’s Office of Best Practice Regulation handbook, published by the Office of Regulation Review (ORR), which sets out the best practice process for policy design and evaluating between competing regulatory approaches.
Online services are delivering

- The Committee appears not to have fully considered evidence, submitted by Google and others, to the effect that the government’s policy goals with respect to the media sector are already being met by online content providers.

- The web is driving innovation and economic growth and helping the emergence of new business models. According to the Connected Continent report by Deloitte Access Economics (August 2011), the Internet contributed $50bn, equivalent to 3.6% of GDP, to the Australian economy in 2010. This is forecast to grow at 7% a year to $70bn by 2015, twice as fast as the forecast for the rest of the economy.

- Online content service like YouTube are already making a significant contribution to the content and media sector
  - The YouTube platform itself represents a massive investment in infrastructure and systems over a number of years. Storing the total body of videos uploaded to YouTube, with 60 hours of new video being uploaded every minute on average, requires a major infrastructure investment on an on-going basis
  - YouTube has developed a range of tools and systems, such the Content ID system that gives content owners control over their content across YouTube, that together have allowed new, primarily ad-supported, business models to emerge, generating a new revenue stream for content owners
  - YouTube provides Australians with access to a very rich and diverse range of local and overseas content at no charge
  - YouTube also provides an open platform for Australian content creators to reach local and global audiences at no charge and to make a living out of doing so. Annex B contains a number of relevant examples
  - Services such as YouTube also have strong commercial incentives to respond to user concerns regarding content standards, and are doing so. If they don’t, users will switch to a different service. This is most true in the highly competitive world of the web, where an alternative is just a click away.

- Contrary to the suggestion in the Interim Report that Australian content will only flourish with government intervention, there appears to be every reason to be optimistic about the ability of more and more Australian creators to use the power of the internet to find new audiences for their creative content, both here and overseas.

Targeting regulation in the wrong areas

- The Interim Report proposes the concept of a Content Services Enterprise as the core of the new regulatory regime. While the exact manner in which CSE status would be determined is not clear from the Interim Report, the objective seems very clear - to
capture a very diverse range of content entities within a prescriptive regulatory framework. This one-size-fits-all TV-like regulatory framework is not needed, based on developments in the sector as outlined in this and other submissions, and won’t work.

- The proposed regime would impose the same regulatory burden on a video-sharing site such as YouTube, that does not determine the content that its users upload or watch, as it would on a broadcaster who determined what content it will distribute or broadcast, e.g. by upload onto an online content platform.

- This approach to content regulation appears to be based on an assumption that all content services operate online in the same way. While some entities (e.g. broadcasters making their content available online) are in a position to exercise editorial/curatorial control over content that they host, others (e.g. video-sharing sites) provide the platform or infrastructure for content to be uploaded by others. They do not “press the upload button” - that is done by their users. Nor do they even know whether particular content has even been uploaded to the platform unless and until it is drawn to their attention.

- This difference is of critical importance to any consideration of how to regulate content services in a converged media environment. We urge the Committee to consider carefully the regulatory framework adopted in the European Union, with the Audio-Visual Media Services Directive, which does draw a distinction between these two types of services. Under the EU regime, providers such as video-sharing sites are outside the scope of the regulatory regime that applies to “television-like” services that exercise editorial control. This is on the basis that it is users (whether they be private individuals or large organisations) of video-sharing sites, and not the site itself, that “press the upload button” to make content available.

**The proposed content standards regime is unworkable for services like YouTube**

- While the Interim Report provides very little detail on these issues, our view is that the proposed content standards regime could not be complied with by many of the entities that seem to be covered by it, including services like YouTube:
  - Firstly, services that do not exercise editorial control over content have no way of knowing the nature or type of the content before it is uploaded. They have no opportunity to view content before it is uploaded.
  - Secondly, the sheer volume of content uploaded to these online services makes it impractical (and in many cases impossible) for them to do so. By way of example, under the proposed regime, a broadcaster making its own content available would be required to view content on no more than a few channels in order to ensure regulatory compliance. YouTube, on the other hand, could only
comply if it was in a position to preview the 60 hours of content that is uploaded onto YouTube every minute. This is completely unworkable.

**Regulatory burden and uncertainty would harm Australia’s Digital Economy**

- A key part of meeting the Government’s digital economy goals is ensuring that Australia’s online media, communications and creative sectors are thriving. The regulatory regime proposed in the Interim Report would not, in our view, achieve this. On the contrary, we are concerned that the likely regulatory burden and uncertainty would create real disincentives for internet industries to invest in Australia.

- The suggested threshold criteria for determining which entities were Content Services Enterprise would be very difficult to apply, and would likely involve a high degree of subjectivity and administrative complexity. They would also impose a significant disadvantage on local providers vis-a-vis international competitors.

- Such an approach to regulation would most likely pose a serious disincentive for small local providers not to become ‘too successful’ or ‘too big’. A small local start up growing in popularity so quickly that it is on its way to becoming ‘the next big thing’ on the internet would face an unwelcome choice: does it grow and attract regulation; or does it shift its operation overseas to avoid burdensome regulation?
2. **Introduction**

The challenge set for the Convergence Review by the Minister was to advise the Government on an appropriate policy framework for a converged media environment, having regard to the Government’s desire to promote a diverse, innovative, efficient and effective communications and media market.\(^2\) The Minister stated that any new policy framework recommended by the Convergence Review must “not impede continued technological change and innovation”. \(^3\)

This policy aim was reflected in key guiding principles developed by the Review Committee, as first set out and developed in the Framing Paper and Emerging Issues paper, in particular:

**Principle 1:** that citizens and organisations should be able to communicate freely, and where regulation is required, it should be the minimum needed to achieve a clear public purpose;

**Principle 2:** Australians should have access to and opportunities for participation in a diverse mix of services, voices, views and information;

**Principle 3:** the communications and media market should be innovative and competitive, while balancing outcomes in the interest of the Australian public; and

**Principle 4:** Australians should have access to Australian content that reflects and contributes to the development of national and cultural identity.

The Minister’s Terms of Reference for the Convergence Review recognise the need to balance policy considerations in a converged media environment, such as the need to foster competition, to encourage diversity, and to protect Australian stories, community values and citizens’ rights. The Terms of Reference also recognise, however, that regulation “must be dynamic enough to support creativity in new digital services, and flexible enough to deal with rapidly changing technologies for the delivery of content.”\(^4\)

In general, Google was supportive of the approach set out in the Terms of Reference, and indeed, with the main thrust of the governing policy principles for the Convergence Review Process set out in the Emerging Issues paper.

This review represents an opportunity to set a policy framework for a vibrant and flourishing media and communications sector in the Australian digital economy - a highly challenging task. As such, we were pleased to engage actively with the Committee’s process during the course of this review, with a view to providing such assistance as we were able to.

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\(^2\) Convergence Review, Terms of Reference 1 and 5.

\(^3\) Convergence Review, Terms of Reference preamble.

We are, however, surprised and disappointed that in its Interim Report, the Committee has flagged an intention to make recommendations that appear to be at odds in their practical effect with the Minister’s Terms of Reference for the Convergence Review, as well as the Committee’s own Guiding Principles. They would impose unprecedented and unwarranted regulation on the online media sector.

Google submits that the opportunity to develop a policy framework capable of promoting a diverse, innovative, efficient and effective communications and media market will have been missed if the recommendations in the Interim Report are implemented. In our view, the recommendations contained in the Interim Report would have the opposite effect of the Government’s guidance to the Committee in the Terms of Reference in the Review, and the Committee’s own guiding policy principles. Far from promoting technological innovation and a dynamic media and communications industry, we are concerned, for the reasons set out in this submission, that the proposed content regime would operate as a serious impediment to a flourishing digital economy.

3. **The old rationales for media regulation are becoming less relevant**

In Australia, as well as in comparable jurisdictions, the most enduring "in-principle" justification for government regulation of broadcasting has been the so-called “scarcity” rationale. This rationale was based on the fact that radio-frequency spectrum was a scarce public resource, not available to all, which for that reason needed to be allocated by government in order to maximise public benefit. Government was justified in imposing obligations on broadcasters as a “quid pro quo” for their being given the privilege of using a scarce public resource, ie spectrum.

The scarcity rationale could also be said to have applied more broadly to the media sector where entry costs were typically very high - for example, the cost of building and operating a cable TV network was significant. As a result, in this socially important and commercially vibrant sector, government policy came to focus on the perceived need to ensure that Australian voices were not crowded out and that the power of the media to shape public opinion be constrained to some extent.

The scarcity rationale has little if any continuing relevance in an era where more efficient uses of spectrum have resulted in relatively less “scarcity”. The Committee acknowledges this. And yet, the Committee argues - for all types of content services - in favour of the kinds of broadcast-style content regulation that has traditionally been justified on the basis that it is a “quid pro quo” for the privilege of being granted a broadcast licence and use of public spectrum.

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5 Interim Report, p 4.
The effect of the Committee’s recommendations would be to extend broadcast-style regulation to all online content, including traditional news print publishers, to the extent that their content is made available online. We do not believe that this is warranted, nor that it would help to achieve the Government’s overall policy objectives as set out in the Terms of Reference.

More fundamentally, the internet is not a scarce resource. On the contrary, anyone can launch a content service, or make content available to a global public, subject only to complying with the general law. This reality was highlighted in a recent New Yorker article on YouTube. Author John Seabrook wrote:

“In TV, airtime is a scare resource, and quality programming is scarcer still, and expensive to create. Writers spend months or years developing an idea, which they then pitch to the network or cable executives who make decisions based, in part, on their “gut”. The majority of ideas never get produced. If the project is green-lighted, the networks or cable channels buy it and fund its production, and the creators have to give up some or all of their content over the material. But on YouTube, airtime is infinite...’YouTube greenlights everything... it’s up to the audience, not the executive gut, to decide what’s worth watching’.”

4. No evidence to suggest that the proposed regime is warranted

The regulatory regime put forward by the Committee - which we address more directly below - is proposed without any evidence to suggest that it is warranted. Again, this is at odds with Guiding Principle 1: that where regulation is required, it should be the minimum needed to achieve a clear public purpose.

The Government’s Office of Best Practice Regulation handbook, published by the Office of Regulation Review (ORR), sets out the best practice process for policy design and evaluating between competing regulatory approaches. It requires consideration of at least the following questions:

- Has a case for regulation been made out? What clear public purpose is sought to be achieved?
- Is this purpose already being achieved without regulation? (by user-regulation, industry self-regulation, market-based mechanisms etc)? If so, is the best approach to “take no action”?
- If not, how can the purpose be achieved with the least amount of government intervention; ie what policy levers apart from government regulation are available to achieve the desired policy outcomes?

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6 [http://www.newyorker.com/reporting/2012/01/16/120116fa_fact_seabrook](http://www.newyorker.com/reporting/2012/01/16/120116fa_fact_seabrook)
Are there any technical or other obstacles that make it likely that a particular mode of regulation is likely to be ineffective, thus imposing costs on industry with no public benefit?

Google submits that the policy regime proposed by the Committee does not comply with the Government’s best practice guidelines:

Firstly, the Committee has made no case in the Interim Report for the level of regulation of online content it proposes. It appears to have taken the view that content ought to be subject to the same degree of regulation regardless of the platform on which it appears; whether offline or online. This has led the Committee to recommend “regulating up” rather than “regulating down”. The Committee appears to take the view that “technological neutrality” is an end in itself, without establishing that broadcast-style content regulation of online content platforms is justified or warranted. This is in contrast to the more nuanced EU approach to media regulation, which for the online world focuses on “television-like” services that exercise editorial control, that we describe below.

Secondly, there is compelling evidence to the effect that the government’s policy goals with respect to media and content are already being met online:

- online providers have strong commercial incentives to respond to user concerns regarding content standards, and are doing so. If they don’t, users will switch to a different service. This is most true in the highly competitive world of the web, where an alternative is just a click away. As we set out in detail in Annexure A to this submission, platforms like YouTube take the following steps to meet consumer expectations:

  - They have clear policies and guidelines regarding what is and what is not acceptable
  - They provide individual user controls that empower users, including parents, to exercise informed content choices
  - They provide reporting and flagging tools that empower communities of users to act to enforce community guidelines and standards
  - They respond quickly and appropriately to user reports of inappropriate content by investigating the report and taking appropriate action
  - They are actively engaged in educational initiatives with a view to ensuring that users, including parents and children, acquire the digital literacy skills that enable them to navigate the internet safely. Google initiatives include the YouTube Safety Centre (providing information and tools), working with the ACMA on initiatives such as the Cybersmart YouTube channel, and partnering with child safety organisations such as The Alannah and Madeline Foundation’s eSmart
Schools program, the Youth and Wellbeing Cooperative Research Centre, Kids Helpline and the Inspire Foundation.

- online content infrastructure providers, such as YouTube, have invested massively in open platforms providing access to a vast amount of Australian and local content at no charge to the end user or consumer; again meeting the Government’s policy goals without the need for regulation. At no cost to the public or those contributing content, they provide the infrastructure for Australian content creators to reach local and global audiences, and to make a living out of doing so. Millions of Australians are adding their voices to those in the YouTube community, contributing to the 60 hours of new video content uploaded onto YouTube every minute of every day. YouTube has invested more than $30 million on “content ID” software, that allows content owners to control, and if they wish, monetise their content on YouTube by sharing in the advertising revenue generated by that content. The statement in the Interim Report that there is “an ongoing need for government intervention to support the production and distribution of Australian content” is not, in our view, supported, at least with respect to online content. The statement appears not to have regard to the explosion in new and innovative forms of Australian content - including user-generated content and games - that is taking place on online platforms without the need for government regulation. See Annexure B to this submission where we set out the ways in which this is occurring.

- The recommendations in the Interim Report do not appear to fully appreciate the extent to which the policy objectives underlying the community standards obligations imposed on broadcasters are already being met by online providers, nor the enormity of the contribution (financial and otherwise) that online providers are making to the promotion of Australian and local content, as illustrated by the examples given in Annexures A and B. Google submits that it is imperative that these factors be taken into account when designing a regulatory regime for a converged environment.

Thirdly, for the reasons that we have already outlined, the proposed content regime would not achieve the stated policy objectives with respect to many of the entities that were intended to be regulated. The result of implementing the proposed regime would be to impose costs on internet industries with little or no public benefit. This would operate as a very real disincentive for internet industries to set up in Australia. It would also result in Australian media and communications businesses being placed at a competitive disadvantage to their overseas competitors. This would run counter to the Government’s aim of ensuring that Australia becomes one of the world’s leading digital economies by 2020.7

7 National Digital Economy Strategy.
5. The regime would target regulation in the wrong areas

The Interim Report has called for a regulatory regime that is “technologically neutral”; i.e. a regime that would apply equally to all entities that provide “content services”, regardless of the technology or delivery platform used. On its face, the proposed regime would apply to “content services” - to be known as Content Service Enterprises (CSEs) - regardless of their nature and regardless of whether the CSE itself uploaded the content, or whether content was uploaded only by the CSE’s users.

This would impose the same regulatory burden on, say, a video-sharing site such as YouTube, that does not determine the content that its users upload or watch, as it would on a broadcaster who determined what content it will broadcast and/or upload onto an online content platform.

Google submits that this approach to achieving “technologically neutral” content regulation is flawed. The regime would not have a technologically neutral effect. Contrary to the unstated assumption in the Interim Report, it is not the case that all content services operate in the same way as traditional content platforms such as broadcasters. While some of these entities are in a position to exercise editorial/curatorial control over content that they host, others merely provide the platform or infrastructure for content to be uploaded by others.

Google submits that the Committee’s recommendations fail to take into account important differences between an online content provider and a provider of online content infrastructure. Despite the significant differences between the two types of entities (and their relationship to online content), the Interim Report proposes to impose the same standards of content regulation on both by treating them both as CSEs.

<table>
<thead>
<tr>
<th>Online content provider: The entity making content available on an online platform</th>
<th>Online content infrastructure provider: An entity providing the infrastructure for others to make content available online</th>
</tr>
</thead>
<tbody>
<tr>
<td>Free to air broadcaster uploading program onto an online catch up TV service</td>
<td>YouTube hosting an episode of a TV show uploaded by a broadcaster to the broadcaster's YouTube channel</td>
</tr>
</tbody>
</table>
Entities on the left hand side of the above diagram - which we will refer to as online content providers - exercise editorial control over content. In other words, they are the person who 'presses upload' in determining whether something is made available online.

In the case of online content providers, they are in the same position to exercise control over content decisions irrespective of the distribution platform chosen to reach an audience, whether that be via broadcasting services bands or via a website.

To put it simply, regardless of the platform used to deliver the content, in the left hand side of the above graph, the broadcaster “presses the upload button” when it decides to make the content available.

Entities on the right hand side of the graph - which we will refer to as online content infrastructure providers (OCIPs) - have a completely different relationship to the content that they host. They do not “press the upload button”. That is done by their users. Indeed, they do not know whether content has even been uploaded to the platform unless and until it is drawn to the OCIP’s attention. They provide the infrastructure - such as the video-sharing site or social networking site - for users to upload and share content.

This difference is of critical importance to any consideration of how to regulate content services in a converged media environment. Google submits that a failure to differentiate between content services that exercise editorial control over content on the one hand, and content infrastructure providers, where infrastructure users exercise control over what content is uploaded or shared via the infrastructure, would lead to a flawed content regulation regime.

This distinction is central to European regulation of audio-visual services. Under the EU Audio-Visual Media Services (AVMS) Directive (which inter alia deals with regulation of internet TV and video-on-demand services) only online services that are “television-like”, and "under the editorial responsibility of a media service provider", are subject to content regulation. Editorial responsibility requires "effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services."

Online content infrastructure providers such as those operating video-sharing sites, who do not have “editorial responsibility”, are outside the scope of the AVMS Directive. These sites, of course, remain subject to general law, including laws which restrict the display of unlawful content.

In a speech to the Oxford Media Convention in January 2012, Ed Richards, CEO of the UK media and communications regulator, Ofcom, highlighted the difference between broadcast communications and content delivered over the internet, and the significance of those
differences from a regulator’s perspective. In thinking about how to regulate a converged media landscape, he said:

“First, we should avoid tinkering with the established regulation around broadcast TV. It is respected and trusted by the public, and understood by practitioners.

Second, as I have mentioned, we should strive to preserve the spirit of the open internet. This is desirable in and of itself. In light of the hundreds of thousands of services emanating from places well beyond the UK or even EU jurisdiction, it is also recognition of what is practical. That isn’t to say that people should be left unsupported to navigate this world.

My third area is the task for government, regulators and industry to provide clear information, education and a framework of personal responsibility through which individuals and families can exercise informed choice.

In between the twin poles of linear TV and the open internet, it becomes quite interesting – and this seems to me to be the fourth area. When something looks, feels and acts like TV, but is delivered over the internet and into people’s living rooms, we need something that meets audiences’ expectations and provides the right degree of reassurance. It is here that such services intersect with the views and concerns expressed by the participants in our research and where greater assurance than currently on offer may need to be considered.

It seems undesirable for these services to be subject to full broadcasting style regulation – by and large they belong to a different form of service and come from a very different context. But we do need to consider whether to develop the approach in relation to existing co-regulation for video on demand to offer greater assurance and to ensure there is public trust in the approach to regulation as these services become more and more pervasive and significant.”

In other words, media regulators should have regard to:

- The importance of an open internet.
- The practical difficulties of seeking to regulate services that emanate from places beyond their jurisdictional reach.
- The importance of providing clear information, education and a framework of personal responsibility through which individuals and families can exercise informed choice.

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The fact that services delivered over the internet are very different to traditional broadcast services, and should not be subject to full broadcast-style regulation.

6. **Broadcast-style content standards regulation is unworkable for OCIPs**

While the Interim Report provides very little detail on these issues, our view is that the proposed content standards regime could not be complied with by many of the entities that seem to be covered by it, including services like YouTube.

Firstly, OCIPs do not know the nature or type of content that will be uploaded to the site prior to it being uploaded. It follows that they have no opportunity to view content before it is uploaded.

Consider a YouTube user creating a video in his or her house. The user can edit the video on a home computer or smart phone, and upload it onto YouTube.

There is simply no technical or procedural way for YouTube to know that the user is creating that video, let alone the nature of the video being created (ie, whether it will be suitable for children or adults). YouTube or any other similar OCIP would only know of the existence or content of a video if another user ‘flags’ or reports that video as being inappropriate or otherwise in breach of YouTube’s community guidelines (or if YouTube receives notification from, for example, a law enforcement agency).

Similar practical considerations apply to all OCIPs, whether they are other Google platforms such as Google +, Blogger or Picasa, or other sites such as Facebook, Twitter or Wikipedia.

Secondly, OCIPs host a vast amount of content. The sheer volume of content uploaded to OCIPs makes them fundamentally different from entities on the left hand side of the above diagram.

By way of example, the regime set out in the Interim Report would result in online content providers being required to review the online content they upload in order to ensure regulatory compliance. This will typically involve reviewing content on no more than a handful of channels, at most.
The volumes of content that an OCIP would be required to review in order to ensure compliance with the proposed regime are of a completely different magnitude:

- There are 60 hours of video uploaded to YouTube every minute. That’s more than double what it was last year. Indeed, upload volumes have increased by 30% in the last 8 months.  
- More data is uploaded to YouTube in one month than was created by the 3 main United States television networks in 60 years.  
- There are 1 billion tweets sent by Twitter users every week.  
- Facebook has more than 800 million active users.  
- Flickr members upload more than 3500 images per minute and Flickr now contains more than 6 billion images.

The volume of content hosted on these platforms renders the proposed content standards regulatory regime unworkable for OCIPs. There is simply no practical way of scrutinising content unless and until the OCIP is notified. Academics Kate Crawford and Catharine Lumby sum up this reality when they note that nations face challenges in enforcement due to the sheer volume of online user-generated content:

> The amount of material generated and viewed – some of it ephemeral – is clearly beyond the capacity of any national or international regulatory body to monitor and regulate in real-time. In practical terms, there are simply not enough people with hours in the day to monitor and flag the sheer volume of content created by users on a daily basis.

7. Uncertainty - and the impact on the Digital Economy

The Government has identified the digital economy as being “essential to Australia’s productivity, global competitiveness and improved social well being”, and has set itself the goal of becoming one of the world’s leading digital economies by 2020. As outlined in the Government’s discussion paper as part of the development of the Cyber White Paper (Connecting with Confidence: optimising Australia’s digital future), this:

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“... is an optimistic vision which views digital technologies driving productivity, innovation and integration across our economy; empowering citizens; increasing the reach of critical services and reducing their costs; and connecting Australians to one another and to the world”.

A key part of a successful digital economy is ensuring that Australia’s online media, communications and creative sectors are thriving.

The regulatory regime proposed in the Interim Report would not, in our view, support the Government’s important Digital Economy policy goals. On the contrary, it would create real disincentives for internet industries to invest in Australia. As well as the regulatory burden that would be imposed, the regime would also give rise to very real uncertainty, which in itself would be likely to stifle investment and innovation in Australian digital industries.

By way of example:

The Interim Report suggests that the question of whether a content service was covered by the regime should be determined by threshold criteria relating to the “scale and nature of operations involved in supplying content services”, and that criteria might include:

- the viewer/user/subscriber base meeting a threshold
- the service originating in Australia or being intended for Australians
- the provider having the ability to exercise control over the content
- the operating revenue or commercial scale of the enterprise meeting a threshold

Further, the Report suggests that "emerging services, start-up businesses, and individuals should not be captured by unnecessary requirements or obligations".

The suggested criteria would be very difficult to apply, and would likely involve a high degree of subjectivity and administrative complexity.

They would also impose a significant disadvantage on local providers vis-a-vis international competitors. Similarly with the suggested “carve-out” for emerging services and start-ups; apart from the very real problem of how to define such services, such an approach to regulation would most likely pose a serious disincentive for small local providers not to be ‘too successful’ or ‘too big’. A small local start up growing in popularity so quickly that it is on its way to becoming ‘the next big thing’ on the internet would face a choice: does it grow and attract regulation; or shift its operation overseas to avoid burdensome regulation? This is not a pro-innovation regulatory outcome. On the contrary, it is the antithesis of the Government’s broader Digital Economy strategy.
Uncertainty also arises from the jurisdictional issues that would arise in any attempt to regulate offshore content services. The Interim Report acknowledges the potential challenges inherent in any attempt to regulate overseas enterprises. In doing so, the report highlights the reality that local content providers would likely be in a different position to overseas based providers when it came to the practical implementation of the proposed content regime. Again, this would place local content services at a competitive disadvantage; a possibility that the Committee itself acknowledges.\textsuperscript{16}

8. Conclusion

In conclusion, we urge the Committee to reconsider the approach set out in the Interim Report.

We submit that the proposed regime would lead to greatly increased government regulation of the new media sector without any expressed in-principle justification. We are concerned that if the recommendations in the Interim Report were implemented, Australia would become a less attractive place for internet industries to invest and grow.

Kind regards

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\textsuperscript{16} Layering, Licensing and Regulation Discussion Paper, p 21.
Annexure A

Online platforms and OCIPs already meet consumer expectations with respect to content standards

OCIPs want their brand associated with comfort, safety and security - and hopefully a little bit of fun along the way. In order for a service to be successful, users must feel comfortable using the service.

How are they doing this?

- They adopt clear policies and guidelines regarding what content is and is not acceptable

OCIPs have clear policies and guidelines in place that set out what content is and is not acceptable on their sites. An example of this is the YouTube Community Guidelines. All users of YouTube must abide by the terms of use and the YouTube Community Guidelines before uploading videos. The Guidelines are written in easy-to-understand language and are designed to provide users with clear rules on what content is acceptable and what is not. Unacceptable content includes pornography or sexually explicit content, graphic or gratuitous violence and videos showing someone being harassed. A person who is found to have breached the YouTube Community Guidelines is issued with a warning. If a person breaches the guidelines three times, their account is deleted. The deletion of an account results in the removal of every video and comment uploaded to the site by that user.

- They provide individual user controls

OCIPs provide users, including parents, with simple and effective ways to exercise informed content choices. Examples include:

- YouTube Safety Mode. This tool operates at the family level. Parents are empowered to determine what content they wish their children to be exposed to. By switching on this tool, users have the option of choosing not to see mature content that they or their children may find offensive, even though the content is not against the YouTube Community Guidelines. Videos that have been age restricted will not show up in video search, related videos, playlists, shows and movies. A demonstration of YouTube Safety Mode is available at http://www.youtube.com/watch?v=gkI3e0P3S5E.

- Yahoo!7 search (which is now powered by Bing) - uses safe search on mobile and it is turned on by default.

- Twitter settings that permit users to label their media for the appropriate viewers. For example, users are told that if they upload media that might be considered sensitive content such as nudity, violence, or medical procedures, they should consider applying the account setting “Mark my media as containing sensitive content”. This triggers a
warning message to users that the media may be sensitive, and requires them to click through if they wish to see the content.

- *They provide community controls*

OCIPs also provide reporting and flagging tools that empower communities of users on a particular site to act to enforce community guidelines and standards applicable to that site. Examples include:

- The YouTube flag system - a tool that empowers users to report harmful content, or content that violates the norms of their particular user community. YouTube is able to respond quickly and take action where appropriate.
- Twitter - provides a mechanism for users to report content containing or promoting child pornography. The content is removed and reported to authorities, and the user’s account is suspended. Users can also flag content if they consider it has not been marked appropriately. This content is reviewed by Twitter, and a decision is made as to whether the content should be marked as sensitive.
- Facebook - users can anonymously report content that violates the Facebook Statement of Rights and Responsibilities (such as pornography), for example by clicking on the ‘Report This Photo’ link. There are also a range of tools to address offensive behaviour on the site. Facebook reviews these complaints and takes down content as necessary.
- Ninemsn - provides a “report abuse” functionality for users.

OCIPs respond quickly and appropriately 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 among all major OCIPs. Internationally, self-regulatory initiatives such as the European Union Safer Social Networking Principles formalise these proactive initiatives.17

- *They continue to develop educational initiatives, and cooperate effectively with government and other stakeholders*

OCIPs are also actively engaged in educational initiatives with a view to ensuring that users - including parents and children - acquire the digital literacy skills that enable them to navigate the internet safely. Examples include:

- The Cybersafety Help Button. This is a joint initiative between industry and government. The Help Button provides easy online access to cybersafety information and assistance available in Australia. It offers counseling, reporting and educational resources to assist young people deal with online risks including cyberbullying, unwanted contact, scams and fraud, and offensive or inappropriate material.

Google Family Safety Centre. The Safety Centre contains tips from Google parents and advice from Google partners, as well as information about Google Safety Tools such as Google SafeSearch.

The YouTube Safety Centre. The Safety Centre contains tips from local Google partners, including the ACMA, the Australian Federal Police, Kids Helpline, Inspire Foundation and Bravehearts, as well as information about Google Safety Tools such as the YouTube community flagging system.

In summary, there is no “in principle” need for government regulation to ensure that OCIPs meeting community expectations with respect to content standards. They are already doing so without being forced to by regulation.
Online platforms and OCIPs contribute to the promotion of Australian and local content

The contribution made by OCIP’s to the promotion of Australian content is growing in importance, and will continue to do so.

At no cost to the public or those that upload content, OCIPs provide the infrastructure for Australian content creators to reach local and global audiences, and tools - such as Google content ID software - that allow creators to make a living out of their content.

New internet-based models of funding and distribution are emerging. Entry barriers to the creation and distribution of Australian content are being broken down. Online video-sharing platforms such as YouTube have provided a platform for Australian video-bloggers to make a living by distributing their creative content online:

- Sydney-based video blogger Natalie Tran made it to the list of the 20 most-watched videos on YouTube globally. Her Tube channel, communitychannel, has more than 1 million subscribers. Tran earns thousands of dollars each month from the advertisements that run alongside her videos. Business Insider recently reported that she earns more than $100,000 a year from her YouTube videos.18

- Christiaan Van Vuuren is a Sydney-based video blogger who uses the name The Fully Sick Rapper on YouTube. Finding himself in hospital for six months with tuberculosis, he recorded a rap song, I'm Not Sick, But I'm Sick Sick. He uploaded the song to YouTube, where it attracted 10,000 hits within days. He’s now amassed 2.5 million hits for a string of videos. Van Vuuren has been able to trade his career as a sales account manager for a creative career, and is currently filming a TV pilot based on The Fully Sick Rapper.

- In 2008, while working as ground staff at Perth Airport, Rob Nixon launched Nicko’s Kitchen on YouTube "as a bit of a hobby". Almost three years later he has two more channels, Nicko's Bakery and Nicko's Baby Food, and almost half a million viewers a week. His channels are now so popular here and overseas that just over a year ago he quit his job to work on them full-time. He films five cooking shows a week and now makes a living out of it.

In September 2011, a range of companies sponsored Creative Australia Online, a showcase of exciting Australian content across digital platforms. The showcase highlighted the innovative methods of production, distribution and audience engagement that are finding contemporary success. Presenters such as the creators of Beached Az, the Sydney Opera House, YouTube,

Aussie games developers, and the interactive news teams at ninemsn and Yahoo!7 demonstrated how the internet offers Australians unprecedented opportunities to produce and distribute content. Presentations and hands on demonstrations showed how advances in technology mean that content production is widely accessible. Australians are creating content that reflects our culture, reaching audiences at home and abroad.

More information about Creative Australia Online is available at [http://google-au.blogspot.com/2011/09/creative-australia-is-online.html](http://google-au.blogspot.com/2011/09/creative-australia-is-online.html). A 'highlights reel' of the presentations is also available.\(^\text{19}\)

Other examples of Australian content creators enjoying local and international success online highlighted at Creative Australia Online included:

**Users engaging in co-productions with “professional” content makers to tell Australian stories: Map My Summer**

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 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.\(^\text{20}\) This collaboration between “professional” content creators and users resulted in an entirely new cultural genre. The film was a chronicle of an Australian summer, as told by those who lived it.

**Australian content creators using the internet in conjunction with traditional cinema release to promote and distribute their content: The Tunnel**

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.\(^\text{21}\) The film won the award for Best Use Of Social Media, Viral Or Word of Mouth at the 17th Annual Australian Interactive Media Industry Association awards, and was nominated for the Cross Platform Interactive award at the 2010 Australian Directors’ Guild awards.

**Classical musicians from around the world are coming together via the internet: YouTube Symphony Orchestra**

The YouTube Symphony Orchestra is a recent example of the internet being used to break

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\(^\text{19}\) [http://www.youtube.com/watch?v=9vQXFODG3mQ&feature=related](http://www.youtube.com/watch?v=9vQXFODG3mQ&feature=related).

\(^\text{20}\) [http://www.youtube.com/watch?v=ZBxvJ8AcAiQ](http://www.youtube.com/watch?v=ZBxvJ8AcAiQ).

down barriers to inclusion - both on the part of musicians and on the part of audiences. In 2010, musicians from around the world were invited to post an audition on YouTube. A panel of international musical experts selected more than 300 finalists from 46 countries based on skill and technique. Nine orchestras around the world participated in the judging, including London Symphony Orchestra, Berliner Philharmoniker and Sydney Symphony. During a week of online voting in December, the YouTube community gave their input on the finalists. The 101 musicians who were finally selected to take part in the YTSO were flown to Sydney for a series of seven sold-out concerts at the Sydney Opera House. The event was also watched by millions of Australians (there were 2.42 million streams in Australia) and many more millions of overseas viewers (there were 33 million streams around the world) who were unable to attend in person. The internet was not only integral to the delivery and consumption of this cultural event, but also to its creation.

The internet changing the way that news is gathered and told: ninemsn and Yahoo!7

Shaun Davies from ninemsn and Samantha Yorke from Yahoo!7 discussed the way in which the internet is changing both the creation and consumption of news media by blurring the distinction between audience and creator “and transforming the idea of an Australian story”. Ninemsn is working on the creation of a tool that will automatically deliver the mass of user content that it receives via email, Facebook etc into a content management system so that it can fact checked and edited for style, and then “push-published straight up onto the web”. See a video of the Davies/Yorke presentation here.

Innovation in the development of online games

Tony Reed from the Games Developers Association, Shainiel Deo from Halbrick Studios (creators of Fruit Ninja online game); John Passfield from 3 Blokes Studios (creators of Hospital Town); and Robert Connolly (director of Romulus my Father), discussed the innovation that is occurring in the digital game space. See a video of their presentation here.

Viral success leads to commercial success

Young Australian animators Jarod Green, Nick Boshier and Anthony McFarlane, discussed the way in which a YouTube video that went viral led to their highly successful online cartoon series Beached Az. You can see a video of their presentation here.

Arts companies and the internet

Traditional arts companies are also looking to use the internet to increase audience reach and/or access new income streams. For example, the Sydney Opera House is expanding its engagement with people around the world. You can hear about their digital strategy in this video (at 3.55) of their presentation at Creative Australia Online.
In summary, contrary to the suggestion in the Interim Report that Australian content will only flourish with government intervention, there appears to be every reason to be optimistic about the ability of more and more Australian creators to use the power of the internet to find new audiences for their creative content, both here and overseas.

As with the proposed content standards obligations, a regime that imposed onerous content expenditure or other financial obligations on OCIPs is not only unwarranted, but would put Australian hosted platforms and services at a significant disadvantage relative to offshore hosted competitors. This would operate as a regulatory disincentive for Australia to become an attractive destination for investments from overseas platforms and services.