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AUSTRALIAN FEDERATION AGAINST COPYRIGHT THEFT

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AFACT SUBMISSION

NATIONAL BROADBAND NETWORK: REGULATORY REFORM FOR 21ST CENTURY BROADBAND

1 June 2009

INTRODUCTION

The Australian Federation Against Copyright Theft Limited (**AFACT**) appreciates the opportunity to provide a submission in response to the Australian Government's ***National Broadband Network: Regulatory Reform For 21st Century Broadband Discussion Paper (Paper)*** to assist the Government's exploration of reform options to implement a more effective regulatory framework in the telecommunications sector that serves the shared interests of both consumers and businesses in Australia.

In his foreword to the Paper, the Minister for Broadband, Communications and the Digital Economy invited the public to submit views. Although the Paper raises a number of issues, AFACT has been selective in its response. AFACT's submission considers specific issues raised in the Paper from the perspective of the impact and potential impact of the regulatory environment on the business of production and distribution of cinematographic film (**film**) in Australia.

The convergence related issues raised in Chapter 5 of the Paper are of particular importance to AFACT. We understand the Government's preferred approach is "*to wait until the new arrangements are further advanced before launching a full scale review of convergence related issues.*" While the Paper flag 2011, as the date for the Government to consider its overall approach to regulation in a converged world, AFACT believes that it will be helpful in the current process to identify, now, some convergence related issues for future consideration.

AFACT stands ready to assist and participate actively in the more detailed consultation, investigation, and formal public review process that would be expected to precede any Government consideration of regulation in a convergent environment, particularly if specific instances of legislative or regulatory reform are identified for consideration as a result of the present Paper or associated processes.

We take this opportunity to commend the Government for its ongoing work in this area and for its appreciation that any consideration of how to design a more effective regulatory framework that services the interests of consumers and businesses must examine both the opportunities and

concerns presented to consumers and businesses by the communications environment in Australia.

Information on AFACT, the film industry in Australia, movie piracy and copyright theft is attached in Annexure A.

AFACT appreciates the opportunity to contribute to the Paper and looks forward to actively engaging with Government in the development and implementation of regulatory reform.

AFACT SUBMISSION - NATIONAL BROADBAND NETWORK:

REGULATORY REFORM FOR 21ST CENTURY BROADBAND DISCUSSION PAPER

AFACT has made comment on specific relevant sections of the Paper. Each section of the Paper is identified below with general comment and response to the questions posed in the Paper, as appropriate.

A. Chapter 3 Telecommunications Competition Framework

Horizontal Separation (pp 23 -27)

This section of the Paper discusses Telstra's ownership of the "*near ubiquitous*" fixed line copper network and its cable network and the consequent negative impact on facilities based competition in Australia.

The Paper addresses the fact that access to content is important for telecommunications service providers seeking to increase the demand for their carriage services and asserts that "*Exclusive access to content creates an effective means of locking customers in.*"¹ The emphasis is on the "*potentially significant negative consequences*" to consumers of telecommunications service providers entering the content business.

The concern articulated by the Paper is summarised in this paragraph:

*Quite simply, the entry of powerful telecommunications service providers into the media sector could reinforce their power in the carriage sector and extend their power to the content sector with negative consequences for content providers, competitors, consumers and the wider community.*²

In Option 1 of the ***Options for Reform***, the Paper proposes that if the risk of Telstra's dominance is considered significant enough, one option could be to prevent future acquisition of "*certain business or exclusive content rights*".

AFACT's position

AFACT wishes to comment on the general issue of exclusive rights in content. AFACT does not wish to comment on the more specific issue of Telstra's acquisition of other media assets (ie businesses) or divestment of Telstra's hybrid fibre coaxial network, per se.

AFACT submits that any consideration of imposing cross media restrictions should:

- a. treat the ownership and control of platforms – such as telecoms networks, pay TV services, mobile services – as a completely separate issue to the ownership of exclusive content rights, so that cross media ownership restrictions relate to platform or spectrum licenses and not to content; and
- b. consider the position of content owners.

AFACT's members include many content providers of audiovisual and digital content of the kind that is referred to in this section of the Paper.

¹ Paper p24

² Paper p24

AFACT is concerned by the suggestion that the Government may impose restrictions on exclusive content arrangements. In summary AFACT submits that exclusive content arrangements do not necessarily have adverse market effects. In fact such arrangements can maximise the availability and diversity of products, prices and services to consumers over the long term and should not be restricted without prior commissioning and consideration of sophisticated economic analyses to avoid unintended negative consequences and unnecessary regulation.

AFACT supports its position as follows.

Inconsistency with Copyright Law

It is customary in international copyright laws that rights holders have the freedom to authorise or prohibit use of their works.

Protection of copyright is of vital importance to AFACT including the recognition that rights owners should have the exclusive right to determine whether how and where their works are made available. Moreover, the commercial viability and accepted business models of broadcasters and other platform providers rely on the exclusive right to make available the content, for which they have obtained an exclusive license, to their viewers or subscribers. Exclusive content rights tend to benefit all entities associated with audiovisual works, including consumers. This is illustrated below.

Impact on Investment in content industries

Any limitation on the ability to make exclusive content arrangements will restrict the commercial value of content produced or distributed in Australia and send the wrong message to foreign and domestic investors in content development or distribution companies. This is an important consideration especially at a time when Australia is seen internationally as a producer of premium audiovisual content supported by significant Government investment.

Competition

To promote and protect further development of the content industries it is important that Government construct a regulatory environment that fosters healthy competition. The inability of a platform provider to secure exclusivity for certain programming may seriously erode potential subscriber and advertiser revenue and limit the funding of new program production or acquisition, thus limiting the availability of quality content and subscription options to consumers.

For instance, in the pay TV environment, subscribers will be unwilling to pay for programming on a pay per view basis if a free advertising based channel is likely to provide the same programming. In the short term this may seem to benefit consumers. But over the long term the acquisition of quality programming and the development of platform infrastructure will suffer, limiting competition and reducing the quality and quantity of programming options available to consumers.

Impact on quality programming

To promote healthy content industries it is best to rely on industry-led and market driven approaches. Platform providers should have the option to negotiate exclusive arrangements with content providers. Restrictions on exclusivity will erode potential advertising revenue or subscription revenue that platforms rely on to operate. This will impact on their commercial viability as there is less ability to differentiate offerings and in turn consumers will suffer the loss of programming options.

A contractual grant of exclusivity for programming is common internationally and in Australia and is typically purchased for a premium. The potential to gain such a premium will tend to encourage the

development and licensing of additional quality content – a benefit to consumers. In addition where a platform operator has proper incentives, it may create its own propriety content or channels. If it cannot be assured of exclusive ownership of such programming, the incentives will be diminished to create the channel at all, and consumers may lose out on access to certain programming.

Summary

AFACT believes that exclusivity content arrangements are a necessary outgrowth of the exclusive rights of copyright holders to determine where and how their works are to be commercially exploited.

The market will tend to ensure that exclusive arrangements provide a maximisation, innovation and diversity of products or services to consumers over the long term. This trend is already being seen in the on-line environment for example in the exclusive content [“Road Tour” produced by Freemantle Media] developed for My Space to add value and retain users of that social networking site. Similarly SkyNews development of mobile phone and on-line content offerings from its news service are examples of specific content developed to service consumers of different platforms and drive consumer loyalty.

AFACT believes that the Government should continue to monitor the development of new platforms and communications technology but be careful to avoid unnecessary regulation that may undermine the purposes of general anti competition laws and limit consumer choice.

B. Chapter 4: Telecommunications consumer safeguard framework

Communications Service Standard (p30-32)

The Paper discusses the necessary scope of the universal service obligations – both the services covered and the limitation of the obligation, as well as the recommendations of the Glasson Report on this issue.

The Glasson Report took the view that mobile and broadband services have become as significant and important to Australians as fixed line voice telephony, and that any consumer safeguards for the provision of telecommunication services should cover the availability and quality of voice, broadband, mobile phone and payphone services. It therefore proposed a Communications Service Standard, which would fulfil the role of the current Universal Service Obligation, Customer Service Guarantee, and possibly the Network Reliability Framework.³

The recommendations of the Glasson Report included that the Communications Service Standard (**CSS**) would encompass universal access and quality of service obligations by:

“providing an assurance of ongoing access to voice, mobile, broadband and payphone services; and

allowing the Minister to set standards for the provision of each specified service with a ‘plan of measures’ to ensure that all individuals and small businesses can purchase services that meet the relevant standards on an equitable basis,”⁴

³ Paper p30

⁴ Paper p30

The Paper discussed the way that providers of the individual service strands of the CSS would implement the required standards and obligations. There was support for a range of non-regulatory approaches which could both address consumer needs for different telecommunications services, and minimise any regulatory impost on telecommunications providers.

The Glasson Report also noted the varying roles of the ACCC, the ACMA and the Telecommunications Industry Ombudsman in respect of telecommunications access and competition, technical standards and consumer complaints. Should there be fundamental changes in telecommunications market and regulatory structures, the Glasson Report suggested the reporting, enforcement and consumer representation roles might also need to evolve

One of the Questions the Paper posed on the CSS was as follows.

What mechanisms should be in place to address and resolve access, reliability and other service issues faced by consumers and small businesses? What role should industry play?⁵

AFACT's position

Conditions of access

AFACT supports the extension of the Universal Service Obligation to the CSS provided that appropriate checks and balances exist both in the consumer conditions of use of the CSS and in the service provider obligations. This is particularly the case with those services such as broadband and mobile services that are used to transmit film and audiovisual content.

AFACT believes that the “*assurance of ongoing access to voice, mobile, broadband and payphone services*” constituted by the CSS should be clearly spelt out so that the assurance of access is only available where the services are used in accordance with reasonable terms of use imposed by a service provider. For instance, a service forming part of the CSS will not be guaranteed to a particular consumer or business if that service is used for abusive calls, or if a consumer fails to pay his bill or if the service is used for illegal purposes.

Co- Regulation

Similarly AFACT supports the retention of the current co regulatory approach to communications regulation for a CSS. The features of a co regulatory approach are evidenced in many of the codes of conduct imposed on service providers operating under the Telecommunications Act and the Broadcasting Services Act and overseen by industry bodies in the first instance with regulators such as ACMA and ACCC as the ultimate enforcement body.

The recent comments of the [ACMA Chair, Chris Chapman at the 7th Annual Broadcasting Summit March 2009](#) are helpful to understand the features of a co-regulatory approach and to distinguish between self regulatory and co regulatory models.

ACMA endorses a co-regulatory model as more desirable as it has an available final solution – a regulator that enforces codes and legislation where there is participant failure.

AFACT regards it as important that in developing and assessing any new industry self or co-regulatory codes of conduct that the relevant regulator assess the code against the interests of the persons proposing the code ie do they have an interest in solving the problem and is the solution in the best interests of users and consumers.

⁵ Paper p32

This is a model adopted by Ofcom in the UK and set out in full in the Ofcom statement: **Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation**.⁶ An important feature of Ofcom's approach is the five steps for deciding whether self-regulation is appropriate for an area:

- 1 Do the industry participants have a collective interest in solving the problem?
- 2 Would the likely industry solution correspond to the best interests of citizens and consumers?
- 3 Would individual companies have an incentive not to participate in any agreed scheme?
- 4 Are individual companies likely to 'free-ride' on an industry solution?
- 5 Can clear and straightforward objectives be established by industry?

Summary

AFACT supports the co-regulatory model of governance to address and resolve access, reliability and other service issues faced by consumers and small businesses in the communications industries. In such a model the regulator would be empowered to enforce obligations under any industry code but only after performance and resolution mechanisms under the relevant code had been exhausted.

AFACT believes that in this process it is incumbent on industry to work constructively with consumer and business representatives and the regulators to develop a co-regulatory solution in the best interests of consumers and business.

C. Chapter 4: Telecommunications consumer safeguard framework

Enforcement (p46)

The Paper confirms the Minister's announcement that ACMA's range of enforcement powers under the Telecommunications Act will be extended by giving ACMA the ability to issue infringement notices which will allow ACMA to take enforcement action for a range of offences or contraventions of the Telecommunications Act without having to resort to court proceedings.

One of the Questions the Paper posed on the enforcement was as follows.

Should the ACMA's informal monitoring benchmarks for carrier performance against the Customer Service Guarantee and priority assistance be made enforceable requirements subject to civil penalties?

AFACT's position

AFACT believes that the proposal to extend ACMA's enforcement powers to allow it to issue infringement notices is a sensible step towards reducing regulatory red tape, increasing efficiency and promoting competition across the industry as well as assisting to deliver better services for business and consumers.

AFACT looks forward to the opportunity to comment on any proposed amendments to the Telecommunications Act to effect this change, in due course.

⁶ Ofcom Identifying appropriate regulatory solutions: principles for analysing self- and co-regulation, visited 4 February 2009, <http://www.ofcom.org.uk/consult/condocs/coregulation/statement/>

D. Chapter 5: The bigger picture (p48-49)

The Paper indicates the intention of Government to consider its overall approach to regulation in a convergent environment. However due to the expected significant change to be brought by the NBN to Australian businesses and consumers, this review will not take place until 2011.

The Government has also indicated that a “key theme” in its 2011 deliberations will be to reduce industry specific regulation particularly in relation to access and consumer protection.

AFACT’s position

No doubt any consideration on the approach to regulation in a converged world will take account of the consultation and final drafts of the Department’s **Digital Economy Future Directions Paper**⁷. Through the Future Directions Paper the Australian Government is seeking to increase the effective use of networked information and communication technologies (ICTs), especially the internet, by consumers and all businesses to drive higher productivity growth and community participation in the digital economy.

A number of the issues raised in the Future Directions Paper are integrally linked to any Governmental consideration of its approach to regulation in a convergent environment.

AFACT has previously made a submission to the Department’s Digital Economy Future Directions consultation and attaches the Executive Summary of that submission as Annexure B. The full Submission is available on the Department’s webpage⁸

AFACT appreciates this opportunity to contribute to the Paper and looks forward to actively engaging with Government in the development and implementation of Australia’s approach to regulation in a convergent environment as this process progresses.

Adrienne Pecotic
Executive Director

⁷ See http://www.dbcde.gov.au/communications_for_business/digital_economy/digital_economy_consultation

⁸ http://www.dbcde.gov.au/data/assets/pdf_file/0017/112337/Australian_Federation_Against_Copyright_Theft_AFACT.pdf

ANNEXURE A

The Australian Federation Against Copyright Theft

The Australian Federation Against Copyright Theft was established in 2004 to protect the film and television industry, retailers and movie fans from the adverse impact of copyright theft in Australia. AFACT works closely with industry, government and law enforcement authorities to achieve its aims.

AFACT acts on behalf of the 50,000 Australians impacted by copyright theft including independent cinemas, video rental stores and film and television producers across the country. AFACT members include: Village Roadshow Limited; Motion Picture Association: Walt Disney Studios Motion Pictures Australia; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Twentieth Century Fox International; Universal International Films, Inc.; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

Film Piracy in Australia

A report by LEK indicates that movie piracy cost the film industry in Australia in excess of \$230 million in potential revenue in 2005. The illegal distribution of unauthorized copies of movies rose from 4% in 2000 to around 11% of the legitimate market in 2005. Discs seized by police comprise mostly DVD-R copies made in Australia as DVD-R technology has increased its share of the pirate optical disc market. In addition, Australian Customs seized more than 40,000 pirate DVDs imported into Australia in 2004, a 185% increase compared to the 14,000 seized by Customs in 2003.

In 2008, state and federal police conducted 51 raids involving movie piracy and seized 544,697 pirated DVDs. They also seized 488 burners capable of producing 12 million pirated DVDs a year with a potential street value of over \$61million.

Internet Piracy

Internet piracy is the downloading or distribution of unauthorized copies of intellectual property such as movies, television, music, games and software programs via the internet. Illegal downloads occur in many forms including via file sharing networks, pirate servers, websites and hacked computers. Each file posted on the internet can result in millions of downloads. Posting movies on a peer-to-peer (P2P) networks or unauthorized websites can result in the transmission of these illegal files to millions of people.

Hard goods pirates, who distribute illegal copies of copyrighted material recorded onto DVDs, CDs and videotapes, use the internet to extend their reach, selling these materials through auctions and websites.

In 2005, research firm LEK Consulting estimated that internet piracy accounted for \$92 million in lost revenues for the film industry (not including piracy of free-to-air television programs) in Australia. The report estimated that Australians downloaded 11 million illegal copies of films in 2005.

Annexure B

AFACT Submission to Digital Economy Future Directions Consultation Paper [extract] 10 February 2009

“EXECUTIVE SUMMARY

The film and television industry in Australia has challenges but is successful and diverse - it delivers films to consumers in a wide and increasing range of formats and price points and has adopted innovative ICT in many areas of development, production, post production, animation, high definition digital disc, digital effects, digital/3D cinema and distribution. Our industry sees great opportunity for ICT and emerging internet applications to enable legitimate content to be offered to both create and meet wider audience demand in vastly more flexible, effective and productive ways.

Measuring Success

The nature of digital technology and especially ICTs as “both disruptive and generative”⁹ means an increase in adoption of the internet cannot of itself be assumed to be of benefit to particular businesses, content creators or consumers in Australia.

For example, how do we measure the value of a cinema to the local community it services, what business factors sustain the ‘success’ of that business, and what opportunities and threats does it face in the digital economy?

A recent study by Price Waterhouse Coopers into the economic value of copyright industries to Australia found that they contributed 10.3% to Australia’s GDP – an increase of 66% since 1996, employing 837,000 Australians and contributing \$8.8 billion or 4.1% of all exports.

For content industries to adopt on-line delivery, requires a safe, stable digital environment in which to thrive. However little work is being done outside of individual affected IP industries to examine the economic impact of internet piracy, the attitudes and issues of internet users that contribute to this behaviour, and the impact on business take-up and investment in legitimate on-line content delivery business models.

The filmed content industry is challenged by increasing internet piracy, but the combination of successful business models meeting consumer tastes and desires, improved cross industry co-operation, regulation and law enforcement efforts, technological protection measures and clear consumer education – can if consistently applied be expected to deliver increased compliance and more productive on-line participation with determined effort and investment.

Filmed content businesses [like newspapers and many other copyright based businesses] continue to assess on a business case basis the extent to which embracing internet distribution of their content may reduce or expand the market return for their content.

The benefits of adopting internet distribution in Australia and therefore its ‘success’ must be assessed on whether the benefits outweigh the risk or reality of collapsing/cannibalising diverse revenue streams and reducing both the return on investment, the community services available,

⁹ Ibid pg 17

and the capacity [for content producers] to invest in the creation of more content – especially high value or niche audience content in Australia.

Digital Confidence

In 2005, research firm LEK Consulting estimated that internet piracy accounted for \$92 million in lost revenues for the film industry in Australia (not including piracy of free-to-air television programs). The report estimated that Australians downloaded 11 million illegal copies of films in 2005. Broadband penetration in Australia has more than doubled since that study.

Trust and confidence in on-line transactions will be improved by both an increase in education about e-security and about 'what is legal and what isn't legal on-line' as well as adequately resourcing law enforcement bodies to enforce the law in the on-line environment.

AFACT submits the Final Paper should examine ways to limit the exposure of public and private organisations to on-line business failure and security issues as a result of the unauthorised use of P2P networks for distribution of unauthorised copies of film and television programs and other copyright works. In particular that Government take steps to more effectively discourage illegal file sharing by encouraging IP industries and ISPs to implement 'graduated response'. A study by 'Wiggin'¹⁰ in 2008 shows that 70% of people, across all age groups, would discontinue illegal file sharing if they were to receive a warning letter from their ISPs.¹¹

Australia's Regulatory Framework

The Australian safe harbour regime represents a fine balance between the interests of copyright owners and other parties by adopting some parts of the equivalent regime operating under US copyright, while recognising Australia's existing unique legislative and judicial framework and following extensive consultations and both Senate and LACA Reviews. There are cogent reasons for not amending the law at this time including the complexity of balance struck in the existing regime which would impact other areas of the Copyright law, the failure of the regime to encourage ISPs covered under the existing definition to effectively address on-line copyright theft, and the likely impact on a significant case addressing this area of the legislation currently before the Federal Court.

Any further examination of the Copyright Act and its impact on the operation of basic and important internet services will need to be made in the light of how the law operates to encourage the creation of innovative copyright works, the remuneration to the authors of those works through exclusive usage rights, the system of exceptions for various fair dealing uses and the system of protection and enforcement of IP rights on-line. We would anticipate a need to address this impact through specific consultation on any specific suggestions or recommendations that may be brought to light following the publication of the Final Paper.

AFACT appreciates the opportunity to contribute to the Paper and looks forward to actively engaging with Government in the development and implementation of Australia's "Digital Economy Future Directions."

¹⁰ http://www.wiggin.co.uk/article_read.asp?ID=87

¹¹ Graduated Response is a proposed cooperative system between rights holders and ISPs. When an infringement is detected on an Internet Protocol (IP) address, the ISP is notified who then determines the owner of the IP address. The ISP warns the user of illegal activity on their internet connection providing sanctions against users who continue to engage in illegal activity after being warned.