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Dear Mr Gamble

Consultation on the Communications Legislation Amendment (Content Services) Bill 2006

Free TV Australia is the peak industry body representing all 48 commercial free-to-air television licensees in Australia.

Free TV welcomes the opportunity to provide comment to the Department's Consultation on the Communications Legislation Amendment (Content Services) Bill 2006 which will provide regulatory reforms to extend the current safeguards that apply to content delivered over the Internet or television. Free TV notes the short timeframe for submissions and the complexity of the Bill and submits that further industry consultation would be beneficial to consider the implications of the Bill and ensure effective consumer protections are implemented without undue impact on industry.

As creators and suppliers of content for distribution on the internet and to mobile phones, Free TV members have a strong interest in regulatory measures that provide consumer protection and impact upon the provision of content services.

Free-to-air broadcasters create and supply content for a number of internet and mobile telephone services ranging from news, weather and sport to live streaming of program content on a subscription basis. The range of internet and mobile content offered by broadcasters is expected to increase over time as mobile devices that are capable of receiving video footage become more prevalent and as experience demonstrates which content is most appealing to consumers.

At this time, when the market for internet and mobile content is still emerging, it is essential that over-regulation does not unnecessarily stifle commercial development or create an environment which disadvantages broadcasters as creators and suppliers of content.

Free TV's principle concern with the Bill is the breadth and range of content which is potentially caught by the restrictions. This combined with the serious penalties of breaching the rules raised serious concerns for Free-to-air broadcasters. In summary, our concerns are:

1. **Commercial Content Services:** We are concerned about the breadth of content that could be caught by the definition of a "commercial content service". We presume that the definition includes any content on a service associated with a profit-making enterprise, irrespective of whether the content provider is making money from the particular content.

   As an example, the regulation may capture a web user forum for fans of a television show. A user forum typically provides a means for fans to post comments regarding the show.

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While a website operator may employ industry best practice techniques and technology standards to prevent and remove prohibited content being posted by users (such as MA15+ coarse language), it is not possible for the website operator to warrant that no such content will be posted on these forums or message boards. However as soon as the comment is posted the website provider will be in breach of the legislation and subject to potentially significant penalties.

In many cases the underlying forum may contain material which is not predominantly prohibited content or the service may be one that does not specialise in potential prohibited content. The ambit of the Bill's reach should be limited to exclude such services. We note that such an exclusion is consistent with other types of services which are excluded from the definition of "content services" such as exempt user-based content service.

2. **Content Service Provider:** We are concerned that there is not enough clarity around the definition of who is a "commercial content service provider". As it stands, the Bill simply states that a commercial content service provider is a "person who provides a commercial content service". However, this language offers no practical guidance on the question of who will be legally responsible for compliance with these regulations. It therefore leaves room for confusion between the legal responsibilities of parties (such as broadcasters) who create content, on the one hand, and those who actually develop and provide the services by which that content is delivered to or accessed by end users. It also leaves too much room for the Authority to make discretionary decisions about enforcement action based on its own perceptions of who should be legally responsible for a content service.

   Clause 4 of the draft Bill offers relief for carriage service providers, by stating that "a person does not provide a content service merely because the person supplies a carriage service that enables content to be delivered or accessed". Free TV submits that a similar provision should be included in the Bill to make it clear that a person does not provide a content service merely because they create content that is delivered or accessed via such a service.

3. **Penalties and enforcement powers:** The penalties for breaching the designated content service provider rules seem severe (i.e. $5,500 per offence, plus civil penalties and in addition the service can be shut down on application to the Federal Court for a single breach). We consider the penalties should be commensurate with the existing on line scheme.

   As we understand the offences to be strict liability offences, it would seem sensible to distinguish between a reckless or deliberate act as opposed to an accidental or incidental act. Inadvertent or accidental streaming of potentially prohibited content in a program or website should not be subject to the substantial penalties outlined in the legislation. This is particularly the case where the program or website does not specialise in potential prohibited content

   Free TV supports a graduated approach to enforcement powers. The draft Bill provides for ACMA to issue remedial directions but only where ACMA has, by legislative instrument, established rules under a designated content service provider determination. Free TV considers that there is a lack of clarity regarding both the nature and scope of remedial directions, particularly for matters that may not be covered by a determination.

The take-down notice scheme under Schedule 5 is an effective means of addressing breaches and should be adopted for Schedule 7.

4. **Duplication of regulatory regimes:** On a related point, we note that there is significant overlap between the regulations set out in existing Schedule 5 and those proposed for new Schedule 7. This has the potential to create uncertainty for those involved in content services industries, and once again leaves room for the Authority to make discretionary decisions about taking enforcement action under one or other of the regulatory regimes. Free TV suggests that the draft Bill would benefit from a clear separation of Schedule 5 and Schedule 7, to ensure that no duplication can arise. This could be achieved simply by carving out "commercial content services" (as defined in Schedule 7) from the scope of the current Schedule 5 regime.

5. **Re-transmitted broadcasting service:** We note that retransmitted broadcasting services are excluded from the definition of "content service". However Clause 8 provides that a service is a re-transmitted broadcasting service if the service does no more than re-transmit programs that have been previously transmitted by a licensed broadcasting service.

   In many cases broadcasters may simultaneously transmit a broadcasting service and stream the same content to the internet. There is no reason why the simultaneous re-transmitted broadcasting services should be subject to the additional regulation when delayed re-transmitted broadcasting services are not, given that in both instances the re-transmitted service will have been subject to the various existing broadcasting and other regulatory requirements. We suggest the definition of re-transmitted broadcasting services be amended to include programs simultaneously transmitted with a broadcasting service.

6. **"short duration rules":** We note the short duration rules with arbitrary timeframes are so designed for classification purposes. However, live streaming that clearly relates to the one program or item of offending content should not result in multiple breaches where it runs over ten minutes. The definition of short duration rules should be amended to reflect this.

As noted above, while we appreciate the opportunity to provide a submission, the short time frame has only allowed us to provide preliminary comments. We believe the draft Bill would benefit form further industry consultation prior to its introduction and during its passage through Parliament and we therefore remain interested in participating in ongoing consultation on the development of this legislation.

Yours sincerely

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Chief Executive Officer