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Convergence Review Secretariat
Department of Broadband, Communications
and the Digital Economy

by email: convergence@dbcde.gov.au

Dear Sir/Madam

Free TV Australia is the peak industry body representing each of Australia's commercial free-to-air television licensees.

Free TV Australia welcomes the Government's review of convergent media. The proposed terms of reference provide a solid base for the Committee to undertake the wide-ranging, comprehensive review required.

However, Free TV recommends some amendments to specifically address the following:

- The appropriate level of licence fee paid by commercial free-to-air television broadcasters;
- The current regulatory imbalance across platforms and industry sectors;
- The appropriate level of oversight and intervention by the media regulator across all media platforms; and
- Enabling the Committee to report on a staged basis as appropriate.

The context and urgent need for the review

The current regulatory framework which pre-dates the introduction of pay TV, the internet, the NBN, smartphones, iPads, IPTV and the general convergence of media content, is well out of date.

The advent of the NBN is a game changer for everyone and has increased the need for an urgent review of the entire media landscape.

The regulatory imbalance

Notwithstanding the fact that Australians are now accessing media content from a number of platforms and through a wide range of devices, commercial free-to-air television remains the most heavily regulated platform. Other media distribution platforms and services remain largely untouched by regulation, despite an increasing reach, accessibility and level of influence.

Without a broad-ranging review of the current regulatory settings, the sharp regulatory imbalance between new content services and services provided on existing broadcasting platforms will grow and increasingly undermine the objectives of the *Broadcasting Services Act 1992* (BSA).

From a consumer's point of view the delivery platform itself is largely irrelevant to the experience of the content they are viewing.

A viewer can already move seamlessly from one platform, such as free-to-air television, to another, such as pay TV, or connected TV, with the press of a button while navigating through an electronic program guide viewed on a digital television set.

A young viewer watching TV at 6 pm for example may not even register whether they are watching a G-rated episode of *The Simpsons* on a free-to-air channel or a PG-rated episode on a pay TV channel or downloaded through Apple TV but the regulation applying to those three platforms varies greatly.

Advertisements for certain products that are prohibited or more heavily regulated on free-to-air television at certain times of the day can be freely broadcast on a pay TV or IPTV channel at any time. Similarly, programming prohibited on a free-to-air channel in certain timezones can be shown or made available for viewing at any time of day on a pay or IPTV service.

Limits on the minutes of advertising during a program on the free-to-air channel do not apply to pay or IPTV channels and there is no mandated daily quota of Australian or children's content on any IPTV or pay TV channel. Only the operators of the free-to-air channels are required to pay a licence fee to government.

The regulatory focus on free-to-air television extends to the operations of the regulator. Despite the fact that news and information is available through so many local and international sources, the media regulator is reaching further and further into the day-to-day workings of some news media businesses and not others.

The media regulator can look into the accuracy of a story on a commercial television news program, down to the use of individual words, but when the same story is re-transmitted on a pay TV news channel or online, that content is not subject to the same level of regulation or scrutiny.

Convergence, and the fact that content is now so easy to access through a range of sources, is undermining the current platform-specific regulatory framework. Viewers, content creators or advertisers actively wanting to avoid the onerous rules on free-to-air television can simply side-step regulatory limitations by going to other platforms. This is a poor outcome in terms of the regulatory balance and it is a poor outcome in terms of the public policy aims sought to be achieved.

Furthermore, the viability and vibrancy of the free-to-air platform, so important in the creation and distribution of Australian content now and going forward, will be increasingly threatened by this heavy regulatory imbalance.

Appropriate regulation for a converged market

The rapid convergence of media platforms and the roll-out of the NBN highlight the need for a fresh approach to regulation.

The review needs to clearly identify what outcomes are being sought through regulation. What are the key principles underlying regulation? What are the market failures to be addressed? What are the harms to be prevented? What are the key benefits to be encouraged?

The Committee must then ask how this can be achieved with regulation that is proportionate to the harms/benefits being regulated for or against. And it must ask how it can do so equitably across all platforms and technologies, in a way that won't become rapidly outdated or fixed in time.

This must be more than a simple reworking of existing rules. There must be an imaginative and forward thinking approach to regulation that encompasses each platform and provider, existing and new, in the converged media market.

The Draft Terms of Reference

The draft terms of reference and the scope of issues they are to address recognise these factors and Free TV supports the Committee being given the mandate to consider the fundamental settings of media regulation through an inquiry into the regulatory objects of the current framework.

Free TV is confident the proposed terms of reference largely provide the scope necessary to consider these fundamental questions. They will allow the Committee to formulate regulatory proposals which are proportionate and equitable and which provide certainty and clarity.

However, in order to ensure particular regulatory pressures and imbalances are addressed, we suggest some additions to the terms of reference.

In particular, there are some key issues which Free TV considers are of sufficient urgency and importance to warrant specific mention in the terms of reference.

The first and most important of these is the future of licence fees paid by holders of commercial television broadcasting licences under the *Television Licence Fees Act 1964*. The existing system has been in place since 1964 and has not been reviewed since 1987. Australian broadcasting licence fees are out of step with international best practice when compared with other countries whether measured as a percentage of industry revenue, a percentage of GDP or on a per capita basis. In the current converged media environment the old system of licence fees needs to be reviewed.

The terms of reference for the Review should therefore include a specific requirement for the Committee to have regard to the rationale and overall level of licence fee paid by commercial free-to-air television broadcasters.

Given the availability of the same or similar content across platforms, Free TV supports specific mention of the benefits of technology neutral regulation and the equitable treatment of the same and similar content across platforms. This would best be undertaken as part of a broader consideration of the regulatory imbalance across platforms and industry sectors, which should also be specifically mentioned as a policy parameter in part 5 of the draft terms.

Appropriately, the draft terms of reference include several references to the efficiency, competitiveness and diversity of the communications and media industries. However there is nothing in the draft terms which would direct the Committee to consider how the regulator can be best positioned to promote these outcomes. Given the significant impact that the regulatory burden can have on industry, an efficient, competitive and diverse industry will be driven in large part by a regulator which acts swiftly, cost-effectively and judiciously, and which only uses additional regulation as a last resort.

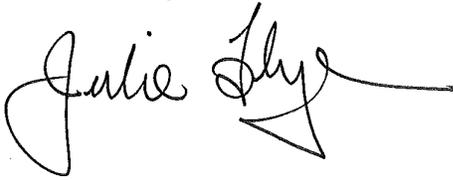
The Committee should also be required to have regard to the appropriate level of oversight and intervention by the media regulator across all media platforms. This would be consistent with the Government's broader reform agenda which includes the objective of reducing regulatory red tape and promoting technology neutrality. Broadcasters are experiencing a more interventionist and legalistic approach to investigations and this approach is not evident in the regulation of other platforms.

Finally, in describing the ideal values of the communications industry, the terms of reference should address innovation and creativity, in addition to efficiency, diversity and competition.

With respect to process, Free TV is concerned that the proposed timeframe for the review may result in significant elements of reform not being implemented until 2012/2013. We suggest the Committee be given the ability to report on a staged basis on particular subjects or findings as appropriate. This would be consistent with approaches taken by other Parliamentary committees in the past, such as the Copyright Law Review Committee.

As the most pervasive and heavily regulated distributors of media content, the commercial free-to-air television broadcasters look forward to taking a leading role in contributing to and working with the review Committee. We are confident that with the above suggested additions, the proposed terms of reference will provide the appropriate guidance and parameters for a very timely and much needed review of convergent media.

Yours sincerely

A handwritten signature in black ink that reads "Julie Flynn". The signature is written in a cursive style with a long horizontal stroke extending to the right.

Julie Flynn
CEO