

**COMMUNICATIONS
ALLIANCE LTD**



CONVERGENCE REVIEW 2011

DETAILED DISCUSSION PAPERS

COMMUNICATIONS ALLIANCE SUBMISSION
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INTRODUCTION

Communications Alliance welcomes the opportunity to make this submission in response to the detailed Discussion Papers released by the Convergence Review Panel in September 2011.

Communications Alliance has taken a close interest in the work of the Convergence Review, particularly given the profound ramifications of convergence for the telecommunications and content industries that comprise a large proportion of the Communications Alliance membership.

We continue to support the viewpoints advanced in the earlier Communications Alliance submissions to the Review, including that the Review Committee should closely consider the risks of creating undesirable and unintended outcomes when recommending regulatory interventions into rapidly changing and somewhat unpredictable convergent environments.

Communications Alliance has commissioned a program of research, undertaken through the Institute for a Broadband Enabled Society (IBES) at the University of Melbourne, to examine relevant convergence issues and endeavour to make considered and substantive submissions to the Review.

The first two outputs of this research program: **“Regulation in the Digital Economy”** and **“The Future of the Universal Service Obligation”**, were submitted to the Review in May and August 2011 respectively. The third and final component of the research program, **“Content Regulation in the Digital Economy”** focused on content issues, is appended to this submission.

Communications Alliance commends the Review Panel for the commitment it has shown to broad and deep consultation with Australian industry, academia and the general public in pursuit of broadly based inputs to consideration of the many challenging issues confronting the Review. We have welcomed, in particular, the opportunity to have several face-to-face sessions with the Panel and exchange views and ideas on specific elements of the issues under review.

Given the breadth of material covered by the five detailed Discussion Papers, the time available to comment on them, and the comments put forward by Communications Alliance in our earlier submissions to the Review, this submission is selective in its focus. We have chosen to comment primarily on areas of specific interest to the industry sectors represented by Communications Alliance.

About Communications Alliance

Communications Alliance is the primary telecommunications industry body in Australia. Its membership is drawn from a wide cross-section of the communications industry, including carriers, carriage and internet service providers, content providers, search engines, equipment vendors, IT companies, consultants and business groups.

Its vision is to provide a unified voice for the telecommunications industry and to lead it into the next generation of converging networks, technologies and services. The prime mission of Communications Alliance is to promote the growth of the Australian communications industry and the protection of consumer interests by fostering the highest standards of business ethics and behaviour through industry self-governance. For more details about Communications Alliance, see <http://www.commsalliance.com.au>.

1 DISCUSSION PAPER: AUSTRALIAN AND LOCAL CONTENT

- 1.1 Communications Alliance supports the contention that there is cultural benefit in the consumption of Australian content, and that without government support such content would be under-produced.
- 1.2 Communications Alliance has argued that convergence implies the need for recognition that there exists today a broader variety of "Australian Content" than has ever been so in the past.
- 1.3 We contend in particular that the user-generated content being produced by individuals and independent entities, and often gaining meaningful audiences on digital platforms, social networking sites, via over-the-top (OTT) services and through other non-traditional channels both within Australia and overseas, should not necessarily be excluded from consideration as Australian content.
- 1.4 This is notwithstanding that these forms of content might not need to be subject to the types of controls and interventions that might apply to more 'traditional' Australian content. There are numerous manifestations of this type of content in Australia today and worldwide – see Natalie Tran's [Community Channel](#) on YouTube, for example.
- 1.5 Similar arguments can be made for other Australian-produced content forms, such as computer gaming software, (which can influence culture and be a major export earner) to find their way into the broader recognition of Australian content.
- 1.6 Alternative and user-generated content are already increasingly important components of how Australians express themselves, reflect their cultural values and consume content that is uniquely Australian. User generated content thrives on innovation and imagination and is typically not well suited to being fostered by direct Government intervention.
- 1.7 One logical extension of this argument is that user-generated content should be encouraged indirectly through Government settings that foster innovation and activities such as the creation of a vibrant applications-development climate – the type of initiative envisaged under the Federal Government's National Digital Economy Strategy.
- 1.8 The Communications Alliance response to the question on Page 12 of the paper: "*Should Australian content rules be extended to convergent platforms?*" is, therefore "No". The extension of content rules to new forms of content will almost invariably be a poor fit and the burden of such regulation will tend to stifle creativity and impede the proliferation of new types of content. The attendant risks include that Australian creators of new forms of content will be at a disadvantage to those doing so offshore – thereby lessening Australia's impact in the new media world.
- 1.9 The five different options for facilitation of Australian content, outlined on pages 11 and 12 of the discussion paper, are wisely described as an "exploration of the range of possibilities" – it is true that no single option is likely to be capable of generating a comprehensive solution. Of the five options listed, Communications Alliance believes that emphasis should be given to further exploring the "Subsidy Only" option.
- 1.10 The Subsidy Only option is generally consistent with the principle of regulatory parity, and would see existing content quotas removed. The result would see regulatory input focused – through the subsidies – at the level of content creation, as opposed to content distribution, which is best left to the market. The option could be executed in part by production funds being directed to independent content producers via an

organisation such as Screen Australia. This would enable Government to set priorities for subsidised production of Australian content. Government could choose, for example, to more heavily promote the production of high quality content including Australian drama, children's programming and documentaries – which collectively at present constitute a minority portion of overall Australian production – and thereby increase the availability of quality programming. Removing sports programming from the categories of explicitly-supported content might carry a risk that 'minor' sports, including some sports where the participants are predominantly female, could suffer reduced exposure. Communications Alliance believes, however, that priority setting within the subsidy criteria could be sufficiently granular to guard against this risk.

- 1.11 While some might argue that removing content quotas from all platforms will reduce the volume of Australian content being viewed, this is not necessarily so. High quality content will find an audience. The volume of Australian content being viewed should be judged across all platforms – traditional and new – not merely through the lens of traditional free-to-air networks. Digital platforms are creating new opportunities for redistribution of 'traditional' content, thereby extending its reach and viewership potential. The national broadcaster, the ABC, has already demonstrated this potential by allowing its content to be 're-broadcast' free of charge on Australian broadband networks.
- 1.12 Further, and as argued by Iarla Flynn of Google Australia and other expert contributors to the IBES report on Content, content quotas will not necessarily continue to be effective in a convergent environment as the plethora of new platforms and evolving viewing habits drive the continuing trend away from average viewers devoting much of their attention to free-to-air broadcast television.
- 1.13 Several informants to the IBES research pointed to the difficulty of imposing content or other Australian-specific obligations on over-the-top content providers, many of which are overseas-based entities.
- 1.14 In its August 2011 report "**Navigating Convergence II**" The Canadian Radio-television and Telecommunications Commission (CRTC) addressed the issue of local content and pointed to the need to adopt, in the face of convergence: "a more holistic approach that transcends Commission-imposed contributions and quotas on the regulated players". The CRTC canvassed the possibility of moving to multi-platform subsidies and Government support such as tax-based incentives, as part of an alternative to content quotas.

2 DISCUSSION PAPER: SPECTRUM ALLOCATION & MANAGEMENT

- 2.1 Communications Alliance has coordinated its response to this discussion paper with the Australian Mobile Telecommunications Association (AMTA) and supports the arguments tendered in the AMTA submission to the Convergence Review.
- 2.2 Communications Alliance expects the explosive growth in mobile data demand and usage to continue. We therefore support the Government's decision to clear a contiguous 126MHz block of Digital Dividend spectrum to underpin the roll-out of next-generation mobile services. Communications Alliance believes that demand for mobile broadband spectrum will outstrip current estimates and that vigorous efforts will be needed to clear additional spectrum for this purpose in coming years.
- 2.3 Such efforts will necessarily involve hard decisions about how to access additional spectrum – decisions that will require a close examination of the current spectrum allocations for purposes including broadcasting and national defence forces.
- 2.4 As well as ensuring that the spectrum allocation and licensing regime operates optimally for competition, it is important to recognise the public benefits that can flow from freeing up under-utilised spectrum resources. Unlicensed spectrum provides a crucial platform for “innovations without permission”. This innovations stems from low barriers to entry, the ability to experiment, the deployment of open standards and the creation of multi-layer competition – all of which allow almost anyone to bring low-cost products and services to market. Policy makers should endeavour to liberalise the spectrum management framework to enable the unlicensed use of spectrum-efficient devices and services where appropriate and technically feasible.
- 2.5 The potential for the National Broadband Network (NBN) to create new distribution paths and to lighten the load on spectrum capacity through off-loading data traffic from mobile networks and wi-fi networks onto fibre networks, are topics that also warrant significant attention going forward.
- 2.6 Communications Alliance supports the argument for a migration of the regulation of broadcasting spectrum licences from the Broadcasting Service Act 1992 to the policy framework of the Radiocommunications ACT 1992 – paving the way for more economically rational management of spectrum allocation.
- 2.7 Communications Alliance supports a market-based approach to the management of spectrum – leading to market-based pricing of all spectrum, including that used for broadcasting.
- 2.8 Such a move is consistent with the Communications Alliance position on the fostering of Australian content production outlined earlier i.e. if Australian content is generated in part through direct subsidies, the rationale for special treatment of broadcasting spectrum is much diminished.

3 DISCUSSION PAPER: LAYERING, LICENSING & REGULATION

- 3.1 Communications Alliance in its submissions to the Convergence Review has strongly supported the concept that a media and communications policy framework should strive for regulatory parity by being applied consistently to like services, whatever network, application or platform is used to deliver the service to the end user.
- 3.2 Finding a framework to achieve this goal will inevitably require some move away from the traditional regulatory approach, based on platform-specific regulation. The Convergence Panel has begun to explore the potential of a move to a Layers-based model.
- 3.3 Although much of the telecommunications industry activity covered by legacy telco regulation has been excluded from the scope of the Convergence Review, this legacy regulation does need to be part of the convergence-related reform process. The relevance of legacy regulation needs to be assessed to ensure that it does not act as a drag on future competition and innovation in a converged market.
- 3.4 Many Communications Alliance Members have expressed in-principle support for the 'Layers' approach outlined in the Review documents. This is not surprising, for several reasons. First, the telecommunications industry is very familiar with the concept and utilisation of network-based layers, such as the Open System Interconnect (OSI) reference model. Secondly, the layers approach is inherently more reflective of the horizontal integration that characterises the growing trend in the communications environment – as opposed to the vertically integrated models that dominated telecommunications service delivery until quite recently.
- 3.5 The Discussion Paper correctly points to the complexities and potential imprecisions, however, that will likely flow from trying to ensure that a layers-based framework is flexible enough to distinguish between services that look equivalent or identical from a layers perspective, but which in fact are inherently different.
- 3.6 Take, for example, a free-to-air broadcaster who decides to make a piece of content available via the broadcasting services bands, then also makes the material available via its web-site and subsequently also via its YouTube channel and Facebook page. From one perspective the same piece of content is being made available to audiences via multiple mechanisms or 'layers'. In all cases, however, the broadcaster has knowledge of the content and could be in a position to pre-classify the content prior to distribution. In the case of the content being made available on social media sites, while the broadcaster continues to have knowledge of the details of the content, the social media platform will not have knowledge of the details of the content, nor even of its existence, unless and until it is brought to the platform's attention (for example via a site user reporting the content to be inappropriate or in contravention of the platform's community rules and standards.)
- 3.7 Another telling potential example of this is fixed voice services, which in an NBN-based communications environment will eventually resemble – from a simplistic layers perspective – simply low bit-rate applications running on a data network.
- 3.8 Fixed voice services have traditionally been given particular significance from a regulatory perspective, with a raft of voice-specific regulatory measures having been implemented in Australia over several decades. These include provisions for untimeed local calls, emergency call arrangements and long-distance pre-selection, among many others.

- 3.9 One of the most important voice-related regulatory measures is that of the Universal Service Obligation (USO), introduced in Australia in 1991, and which has been specifically excluded from the terms of reference of the Convergence Review. The future of the USO is now subject to legislative action by Government to create a new body, the Telecommunications Universal Service Management Agency (TUSMA) that will come into operation on 1 July 2012 and will eventually take over from Telstra the responsibility for USO provision.
- 3.10 The USO has historically been based firmly in a 'silo' model – an end-to-end service model in which one provider (Telstra) is responsible for the entire service. It is unclear at this stage how the USO would be integrated into a layers-based regulatory model – and/or whether such integration would generate pressures to expand the definition of the USO beyond basic, fixed-voice service. If these issues are not to be addressed by the Convergence Review, it would be appropriate to ensure that the Review's recommendations at least recognise the potential implications for the USO going forward, and lay the foundations for ongoing consideration of these.
- 3.11 The Discussion Paper raises a number of questions around licensing. As a general principle, Communications Alliance believes that licensing should only be implemented where there is a clear and demonstrable need to do so.
- 3.12 Licences are typically not needed purely as a means to impose obligations on market participants. In the telecommunications sector, Carriage Services Providers (CSPs) are not presently licensed, but nonetheless do carry obligations e.g. to participate in the Telecommunications Industry Ombudsman (TIO) scheme, and to comply with the requirement of the ACMA's Do Not Call Register (DNCR). The Government will need to consider whether new obligations on CSPs, including the need to comply with the revised Telecommunications Consumer Protections (TCP) Code and to deal with and contribute to the funding of the new compliance monitoring independent body Communications Compliance, can be adequately dealt with outside of any licensing regime.

APPENDIX 1: CONTENT REGULATION IN THE DIGITAL ECONOMY



IBES
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Broadband-Enabled Society

Content regulation in the digital economy

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Executive Summary

The 26 expert informants, whose views have shaped this research output, all acknowledge the appropriateness of the Convergence Review considering the regulation of content in the convergent media environment. However, additional issues were raised by the informants. The more important recurring themes can be summarized as follows:

- The majority of informants were of the opinion that the immediate concern of regulating content in the convergent environment should be balanced against long-term considerations. Key issues identified were:
 - The need to integrate the regulatory settings related to content with anticipated future uses of the NBN that will rely on two-way communication such as aged-care, online shopping, telehealth; and
 - The need to consider possible changes to legal issues around copyright.
- While informants agreed that it was important to support Australian and local content, there was a concern that the cultural goal of supporting Australian content should be applied in a manner that discriminated against the economic interests of particular sectors. Two clear messages emerged from this research:
 - Of the possible models of content regulation outlined in the Australian and local content discussion paper, the 'business model option' had the most support.
 - Informants supported the expansion of 'Australia content' to include new digital formats.
- Informants overwhelmingly endorsed the support of the Convergence Review Committee for technology-neutral regulation. The following points of agreement emerged:
 - There is also strong support for differentiating between platforms according to the type of relation that they have with end-users. Such differentiation may be useful for approaching the regulation of content aggregators and user-generated content.
 - The *Community Standards* discussion paper raises the issue of proactive review of online content. This report suggests that this complicated issue may be resolved by distinguishing between professionally produced and amateur content.
 - Informants noted that the Committee has the further opportunity to consider how issues raised by public distribution of inappropriate amateur content may already be covered by existing laws of public communication.
- Consumer behavior is a key driver of innovation in convergent content and services. This crucial role means that consumer education about the dangers and opportunities in the convergent environment, and their rights and responsibilities in that space should be a priority.

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1. Framing Issues

This report is based on data and opinions gathered in 23 semi-structured interviews with 26 professionals in key positions in the telecommunications and media industries. The interviews covered a number of topics of import to the telecommunications sector, including the current Convergence Review. Interviews were conducted in person in Sydney and Melbourne, and by telephone between February 10 and May 4 2011.

This report covers the major findings from the interview data. The findings suggest that the Convergence Review Committee’s immediate concern of regulating content in the convergent environment should be balanced with long-term considerations.

Simon Curtis (ASTRA): ‘The terms of reference seem more focused on convergence in terms of content regulation’.

Matthew Lobb (NBN Co.): ‘Given the decision to build the NBN and encourage structural separation through a wholesale-only operator, it is an understandable approach for the government to look at the implications that this has for content’.

There was a broad consensus among the informants that the terms of reference for the Convergence Review were shaped by an immediate concern regarding the regulation of content in the convergent environment. However, the majority of informants believed that addressing the immediate challenge of regulating digital formats and forms of distribution was not the only important task facing the Convergence Review Committee. Many informants pointed to the need to balance immediate issues with the long-term structural changes to the telecommunications and broadcast industries that are anticipated by the Convergence Review.

Teresa Corbin (ACCAN): ‘Future services may not fit into existing media silos’.

A majority of the informants expressed concern that the immediate tasks facing the Convergence Review in resolving issues about the regulation of content would sideline longer term questions and issues about the future use of the NBN. While there was little consensus about what these longer term issues were—questions surrounding aged-care, the digital home, e-education, online shopping, telehealth were frequently mentioned—informants shared a vision of NBN-era communications where two-way communication between parties is a more significant aspect of Internet use than the one-way consumption of digitally distributed content.

Future services may not fit into existing media silos

Teresa Corbin – ACCAN

Peter Rossi (Huawei): ‘The digital home has become one of the hottest topics, and that’s the biggest portion of convergence for the telecommunications industry and potentially the media industry’.

Peter Mercieca (KMPG Australia): ‘The government needs to promote these uses of the NBN more strongly. Distilling these uses to the “man in the street” has not been done to date, and the government has the opportunity to do a lot more in this area’.

The focus on content, while important, deals with a more immediate challenge than the long-term impact that convergence will have on how Australians live. While it may be more appropriate to examine fundamental changes such as the digital home, or the role that the NBN might play in future aged-care, health care or schooling in a later review, it is important that the Convergence Review takes the opportunity to earmark future issues.

A significant minority of the informants also noted with concern the exclusion of copyright from the remit of the Convergence Review Committee. The core of this concern was that, due to current legal uncertainty regarding the role of copyright law in the regulation of content this crucial concern for the convergent environment would remain ambiguous until the iiNet/AFACT case, presently before the High Court, is resolved. An additional issue was raised by Simon Curtis, who pointed out the need for clearer copyright protection for subscription broadcasters in the convergent environment.

Julie Flynn (Free TV): 'Historically, telcos are not content providers and they do not have a good record to date on being content providers. They consider themselves pipes that are not responsible for content'.

Julie Flynn points to a contentious issue in the regulatory unification of the telecommunications and broadcast industries. Broadcast industries are used to being regulated in terms of content, whereas telecommunications companies and Internet service providers have not been so thoroughly regulated in terms of content. This difference in regulatory history is the source of some of the difference in opinions among the informants as to how the issue of content regulation in the convergent environment should be handled.

2. Australian Content

One of the challenges faced by the Convergence Review Committee is to examine the ongoing viability of the regulation of Australian content and adjust the current settings in order to ensure that it remains sustainable.

Deanne Weir (AUSTAR): 'If our aim is to support and promote Australian identity and culture, then what's the regulation that really impacts on that? The regulation that impacts on funding, which is about what we fund and what we don't fund. Different sectors have different obligations: free-to-air and Pay TV have different sets of obligations. But how does IPTV fit in? What are their obligations? What about the ABC and SBS?'

If our aim is to support and promote Australian identity and culture, then what's the regulation that really impacts on that?

Deanne Weir – AUSTAR

Traditionally, Australian content has been supported through a range of mechanisms, including production subsidies, training and broadcast quotas. The majority of the informants supported the idea of protecting and supporting Australian content but did not necessarily agree that a content quota would continue to remain an effective regulatory instrument.

Iarla Flynn (Google Australia): 'I would expect the government continues to have an objective to ensure that good quality Australian content is made and is available. That is a perfectly valid and legitimate policy objective. But the question for the Convergence Review then is: if that is our objective, how do we go about doing that?'

Flynn's point highlights the issue of legacy regulation.¹ Broadcast quotas emerged in the historical context of spectrum scarcity, and functioned to ensure that the privilege of holding a scarce public resource was off-set by the requirement to contribute to public policy aims, including widespread availability of Australian content. In this respect it is important that the Convergence Review Committee keep in mind that the quotas that have been effectively implemented in television and radio, will not necessarily continue to be as effective in a convergent environment. Even assuming that television services continue to be delivered across broadcast spectrum, future digital broadcasting will allow up to 60 channels.² Subscription services, including cable and direct satellite broadcast, further increase consumer choice, as does the growth of Internet-based services including IPTV and video-on-demand. This means that, even if the current Australian content quotas are continued, the effect of this mandate is likely to be diluted. This will occur in two ways: first, the overall percentage of Australian content available on all screens is likely to diminish; second, the total audience of free-to-air television is likely to shrink.

I would expect the government continues to have an objective to ensure that good quality Australian content is made and is available. That is a perfectly valid and legitimate policy objective. But the question for the Convergence Review then is: if that is our objective, how do we go about doing that?

Iarla Flynn – Google Australia

¹ Apperley, T. (2011). *Regulation in the digital economy: Convergent regulation for the digital economy*. University of Melbourne.

² Department of Broadband, Communications and the Digital Economy (2011). *Convergence Review—Discussion paper: Spectrum allocation and management*. Page 22.

Two further points follow:

1. It is impractical to extend the existing quota system for Australian content across all screen services. Given the volume required, this would demand an unsustainable level of funding.
2. If the audience of free-to-air television shrinks, the amount of funding available to produce Australian content may be reduced, as advertising revenue migrates elsewhere.

Australian content needs to be supported by principles that clearly distinguish between objectives and the regulatory instruments used to achieve those objectives.

2.1 Cultural resources vs. market protection

In particular, informants were concerned that cultural objectives were not achieved in ways that distorted the market by favoring particular sectors or business models.

Alister Montgomery (KPMG Australia): 'Because those subtle differences that give a certain advantage or disadvantage to one group or another, ripple across and impact on other industries and converged services'.

Many informants who agreed with the idea of government support for Australian content were concerned that the manner in which the government did support content would give some businesses unfair advantages or disadvantages, which could have widely felt ramifications. The deliberations of the Convergence Review on the issue of Australian content provide an opportunity to consider that in both the broadcasting and telecommunications industries there is a very real concern that government intervention at the content level can entrench or create market inequalities.

The principles behind regulating Australian content were not in question: rather the ongoing effectiveness of the quota-based regulatory instrument in the new convergent environment was challenged.

Matthew Lobb (NBN Co.): 'Supporting Australian content can be counter-productive if it is done through reactive and protectionist policies. For example, the protectionist approach to book importation has resulted in unnecessarily high prices for book in Australia and limited assistance to the local publishing industry and local authors. Non-protectionist methods for fostering local content need to be explored'.

The most commonly used over-the-top content providers are not Australian enterprises. Imposing regulatory obligations on them, by asking them to conform to Australian specifications, is difficult without the possibility of effective sanction.

Tim Watts – Telstra

Tim Watts (Telstra): 'The most commonly used over-the-top content providers are not Australian enterprises.³ Imposing regulatory obligations on them, by asking them to conform to Australian specifications, is difficult without the possibility of effective sanction. The Committee needs to be very aware of the fact that if they're trying to impose obligations on content with an Australian connection, that by necessity Australian content is competing with these international providers. Australian content providers could easily be put at a competitive disadvantage to international providers'.

The effectiveness of a quota system in a international and global convergent media environment is questioned by some of the informants, primarily because of the difficulty of imposing such a system on internationally based content providers, and that as a consequence

³ For example: Hulu, Netflix, YouTube.

the responsibility might fall on Australian-based content providers who would then potentially suffer a disadvantage in relation to their international competitors.

In the discussion paper *Australian and local content*, the Committee outlines several possible options for 'how content regulation might be applied to traditional and newer platforms'.⁴ The informants who were concerned with the ongoing viability of the current quota system and offered suggestions for alternatives indicated a preference for both the 'subsidy only option' and the 'business model option'.⁵

The business model option was supported by a number of informants, who particularly emphasized the need to provide settings that foster innovation in content creation. They advocated distinguishing between professional and amateur content, and according to the extent that any platform was an open aggregator as opposed to a curator of content. This position is explained at greater length in the following section of this report.

A smaller minority suggested that Australian content could be funded directly. The 'subsidy only' model is similar to that currently employed in the film sector where various forms of production subsidy support Australian content production, but there is no formal guarantee of distribution. Informants acknowledged that this would involve a considerable restructure of content funding, but suggested that this would have the advantage of removing bias (or the perception of bias).

Rene Summer (Ericsson): 'The relation between economic regulation and media regulation in

⁴ Department of Broadband, Communications and the Digital Economy (2011). *Convergence Review—Discussion paper: Australian and local content*. Pages 11-12.

⁵ Department of Broadband, Communications and the Digital Economy (2011). *Convergence Review—Discussion paper: Australian and local content*. Page 12.

national or cultural interests needs to be very clear. One challenge for the Convergence Review is to balance between economic regulation and media policy goals—and in that of course I include editorial responsibility, impartial reporting of current affairs, democracy values, national identity, religious aspects, etc. The relation between those two concerns needs to be clarified in the process. If there is a need to promote certain forms or categories of content that needs to be very clear and transparent, when and why is that done, and definitely it should be applied symmetrically to all audiovisual media service providers irrespective of technologies. Transparency in this area is essential to avoid the appearance of perks and fringe benefits'.

The relation between economic regulation and media regulation in national or cultural interests needs to be very clear.

Rene Summer – Ericsson

Summer's observation identifies the need for the Convergence Review to carefully consider a symmetrical and transparent application of any principles that are derived to support Australian content in order to avoid any perception of bias.

2.2 Opportunities for Australian Content

Sean Casey (NBN Co.): 'Maybe there will be a much higher distribution of Australian content, if everyone is a content creator'.

Steve Dalby (iiNet): 'The ABC allows us to redistribute their content, on the condition that we make it freely available to our customers. Whereas the commercial channel and studios require some form of revenue from it. They don't really care if we're going to charge our customers or not, as long as they get paid for it'.

Sean Casey: (NBN Co.): 'We have a niche in the mass market that could be a big opportunity to drive Australian content globally. So you kind of create this profile or demand for Australian content, because now you can go find it. You can go search for Australian content. You can seek it out even if it's not being broadcast'.

Several informants pointed out that the convergent environment creates opportunities for creation and distribution of Australian content that did not previously exist. Three opportunities were identified:

Maybe there will be a much higher distribution of Australian content, if everyone is a content creator.

Sean Casey – NBN Co.

Borderless digital forms of content distribution also create opportunities for Australian content to be viewed by a much wider international audience;

Digital content increases the economic viability of niche programming; and

User-generated content had the potential to greatly increase the amount of Australian content available in digital formats.

Digital distribution and content-sharing partnerships, like the one between ABC and iiNet, allow Australian content to reach new audiences both nationally and abroad. Such developments highlight the key role of publically funded broadcasters, not only in producing, but also in providing avenues for the distribution of Australian content in the convergent environment. Furthermore, digital content will be able to reach people overseas and establish Australia as a strong producer of quality niche content.

Tim Watts (Telstra): 'There is an implicit assumption [about Australian content] that unless you have a mass audience it's not worth supporting. But niche

content can have significant importance and it's not well recognized in our current regulatory structures'.

Alister Montgomery (KPMG Australia): 'There are very successful game development houses in Australia that compete in a global market with the best in the world and they produce Australian content, but Australian content that happens to be computer games. They're huge exports and they don't get this kind of Australian content protectionism'.

The rationale for supporting the production of specific forms of Australian content, including drama, documentary, and children's programming, relies on the distinctive cultural value of these forms of content. A number of informants agreed with the recommendation in the *Australian and local content* discussion paper that the possible merits of expanding the notion Australian content to include a wider variety of genres and platforms should be considered.⁶

Games in particular are now widely recognized to hold significant cultural and educational value,⁷ while cross-platform content is an area of significant activity. The cultural significance of new formats and the growing economic significance of those media sectors support the case for targeted extension of production support mechanisms.⁸

⁶ Department of Broadband, Communications and the Digital Economy (2011). *Convergence Review—Discussion paper: Australian and local content*. Pages 6 & 10.

⁷ See: Bittanti, M & Quaranta, D. (2006) *Gamescapes: Art in the age of videogames*. Milan: John & Levi. Beavis, C., Apperley, T., Bradford, C., O'Mara, J. and Walsh, C. (2009). Literacy in the digital age: Learning from computer games. *English in Education*, 43(2), 162-175.

⁸ See: Apperley, T. (2011). *Regulation in the digital economy: Convergent regulation for the digital economy*. University of Melbourne.

3. The Platform 'Problem'

The majority of informants endorse the Committee's advocacy of a technology-neutral stance demonstrated in the *Emerging issues* paper and the *Discussion paper: Layering, licensing and regulation*. This avoids favoring one particular platform or silo over another, and avoids the unfair competition entrenched by such favouritism. It also avoids the problem of legacy regulation arising from embedding regulations in particular technologies, which is important given that technologies change so fast that they are often ineffective for regulating content.

Simon Curtis (ASTRA): 'The different ways content is accessed and used on different platforms needs to be acknowledged and taken into account in the Convergence Review'.

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Simon Curtis – ASTRA

However, aspects of a technological-neutral approach are recognized as problematic by a sizeable minority of the informants. Even those who advocated it in principle pointed to enduring differences that still existed between types of platforms and content, differences that posed problems for regulatory parity. It is well recognized that regulatory frameworks tend to accumulate in historical layers with regulations for different technologies framed by the dominant policy objectives of the period in which they emerged. Where regulation of the press was centered around freedom of speech, for example, telephony was historically organized around universality of access.⁹ This suggests the need for a graduated approach for realizing the goal of technological neutrality.

⁹ Bar, F. & Sandvig, C. (2008). U.S. communication policy after convergence. *Media, Culture and Society* 30(4), 531-550.

3.1 Problems with Technological-neutrality

Simon Curtis (ASTRA): 'It is important that the Convergence Review takes into account the ways that content is used on different platforms. Even though a particular bit of content is classified the same, irrespective of the platform it is delivered on, it may be used differently. So, accordingly, rules for accessing and using content might be different for different platforms'.

Technological neutrality does not account for the different ways that platforms are used. Not all platforms are equivalent. The Internet, for example, has historically been less tightly regulated than TV and radio. The Convergence Review gives the Committee an opportunity to consider the significance of those histories, particularly in terms of the relationships that particular platforms have cultivated over time. For example, the relationship that pay-TV has to its end-user is based on a subscription model, while free-to-air TV has a different relationship with its end users. Where the subscription model is a direct customer relationship, the free-to-air model is indirect, based more on audience recognition of a brand. The relationship that platforms have with end-users is one way of distinguishing between different platforms.

An important differentiation that the Convergence Review Committee has the opportunity to consider is the degree to which platforms act as curators rather than as open aggregators of content. Such a differentiation might be based on the extent to which a platform exercises strong editorial control by providing or scheduling a menu of professionally-produced content.

Considering the relationship between platform and end-users offers a more sophisticated approach to regulating user-generated content without stifling innovation in the sector. It would be consistent with

the layers model, and offers support for a paradigm of regulation that differentiates between business models. The *Layering, licensing and regulation* discussion paper outlines an expanded vision of the layers model that differentiates between ‘content and application production’ and ‘content and application services’.¹⁰ The possibility of organizing regulation through differentiation within layers in this manner is useful in acknowledging the different relationships to consumers supported by content platforms that are open aggregators of content and content platforms that curate content.

Possible options for regulating Australian content outlined in the *Australian and local content* discussion paper include the possibility of recognizing and distinguishing different business models in the regulation of Australian content. This model could also be usefully applied to media platforms in order to distinguish between those that are open aggregators of content (primarily user-generated) and those that primarily curate content. It could also be used to recognize the different conditions of production and commercial aims of amateur and professionally produced content.

It might be appropriate for boutique film to be regulated in a different way from something in the mass media that contained information or services that everyone needs access to.

Teresa Corbin – ACCAN

Teresa Corbin (ACCAN): ‘It might be appropriate for boutique film to be regulated in a different way from something in the mass media that contained information or services that everyone needs access to’.

¹⁰ Department of Broadband, Communications and the Digital Economy (2011). *Discussion paper: Layering, licensing and regulation*. Page 11.

Considering that individual platforms provide different levels of access—particularly two-way communications—the issue of what is essential and/or significant communication may need to be considered. Julie Flynn (Free TV), points out that ‘in the past, platforms were regulated according to their ubiquity’; content in particular was regulated according to the ease of access to that content the particular platform provided. The Committee may wish to take the opportunity to consider how access will factor into any regulations they suggest are implemented.

Martin Mercer (vividwireless): ‘If there was a harmonisation of regulation, such that the existing requirement on free to air television networks to broadcast a certain amount of Australian produced content, suddenly became required of ISPs, that would have a considerable impact which would require a costly change in our business model’.

While convergence does tend to make technologies seem ‘neutral’—as previously separate silos all become possible platforms for a similar variety of services and content—a number of distinct business models currently exist. These business models will continue to define and distinguish between particular platforms. This report recommends that the Committee take the opportunity to consider how their deliberations may impact on the different business models unevenly.

3.2 The issue of impracticality

Alister Montgomery (KPMG Australia): ‘It is almost impossible to enforce quotas, because now end-users can directly choose content, whether it is video on-demand or it’s purchasing these things through subscriptions or whatever else. How can a quota be realistically imposed, unless it is required that individuals have to consume Australian content?’

Iarla Flynn (Google Australia): ‘If government seeks to regulate in a hands-on manner all the blog posts and all the videos uploaded and every comment on a social networking site that regulatory framework could be overrun’.

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Iarla Flynn – Google Australia

While considering the regulation of content, it is also crucial that the Committee takes the opportunity to reflect on the issue of practicality. There is every indication that the convergent environment will vastly expand the number of different content providers, and furthermore that two-way communication—especially the increasing availability of tools that allow people to create and then share content online—also expands the number of possible content creators into the millions. This problem is acknowledged in the discussion paper *Layering, licensing and regulation*.¹¹

Iarla Flynn (Google Australia): ‘Every movie is given a stamp as to age-suitability and that process costs money and takes a number of weeks. Then

¹¹ Department of Broadband, Communications and the Digital Economy (2011). *Discussion paper: Layering, licensing and regulation*. Page 21.

the movie can be distributed. That approach will obviously struggle with an aggregator like YouTube, where 48 hours of content are uploaded every minute.¹² You know there is no physical, practical way of pre-checking, pre-classifying all of those videos going onto YouTube, and that’s just one website’.

Sean Casey (NBN Co.): ‘How do you regulate user-generated content? You’re not dealing with a business entity; you’re dealing with an individual. We aren’t just talking about regulating the content that is distributed through a few broadcasters. How do you regulate 22 million Australians creating content? This focus on top-down broadcast content doesn’t acknowledge that increasingly content is being produced and shared among contributors to a community’.

One way to deal with this massive multiplication of content, which experts consider impossible to pre-check, is to make the aggregators responsible for the content. The Community standards discussion paper reflects on this position briefly,¹³ citing a UK government paper from *2008 Harmful content on the Internet and in video games*. This 2008 report recommended that sites aggregating user-generated content undertook a ‘proactive review of content’.¹⁴ However, the practical implementation of this recommendation was not resolved, with the report recommending that further research was undertaken to investigate the viability of using technical tools to support staff in proactively reviewing content.¹⁵ Furthermore, the report acknowledged that: ‘Even if review of every bit of content is not practical, this

¹² See: http://www.youtube.com/t/press_statistics

¹³ Department of Broadband, Communications and the Digital Economy (2011). *Discussion paper: Community standards*. Page 24.

¹⁴ UK House of Commons. *Culture, Media and Sport Committee. Harmful content on the Internet and in video games*. Page 3.

¹⁵ UK house of Commons. *Culture, Media and Sport Committee. Harmful content on the Internet and in video games*. Page 35.

is not an argument to undertake none at all'.¹⁶ No recommendation was made in the report indicating the crucial content that should be proactively screened. Adopting such a setting in Australia may prevent aggregators from hosting any material that is not premium (professional content), thus stifling creativity and production and making it impossible for hosting services to exist. The informants in this report had a more positive appraisal of community content moderation, but also pointed to a parallel issue that the Convergence Review might useful consider when reflecting on the regulation of content aggregators: the difference between professional and amateur content.

3.3 Professional and amateur content

Rene Summer (Ericsson): 'Audio-visual content regulation should never be mixed together with regulation of non-commercial audio-visual content'.

Audio-visual content regulation should never be mixed together with regulation of non-commercial audio-visual content.

Rene Summer – Ericsson

Iarla Flynn (Google Australia): 'What is it that we are addressing here when we talk about content or media or information?'

Tim Watts (Telstra): 'There's not a lot of recognition of the value that these new sources of content generation have in the terms of reference at the moment'.

Another issue with the notion of technology-neutral regulation is accounting for different types of content, particularly professionally produced and amateur non-commercial content. Much of the framing of the Convergence Review suggests a focus on the former, and the Convergence Review

¹⁶ UK house of Commons. *Culture, Media and Sport Committee. Harmful content on the Internet and in video games.* Page 35.

Committee is urged to also consider that new sources of content, particularly user-generated content, are not sidelined—for instance, by overly onerous pre-screening and classificatory requirements. The Committee is also urged to consider that the boundary defined by the different concerns of professional and amateur content may be an appropriate one for establishing differential obligations on platforms.¹⁷

One crucial matter to consider is how well existing laws on personal communication translate to the digital spaces of the convergent environment

Louise Sexton (VHA): 'The government already has quite good regulation to cover the regulation of content that individuals share between each other, they're generic rules that cover all person-to-person communications'.

Rene Summer (Ericsson): 'Many countries have policies in place, both in terms of what you can and cannot say, for example, the statutory provisions that guarantee the right to personal expression and communication and also limitations to such rights. If there is a need in Australia to formalize regulation regarding expression of free speech, it should not be part of a media broadcast regulatory regime. This is because it is different to regulate commercial broadcasting or television-like or multi-platform television services—which are done by professional organizations for remuneration, where there is an editor, and a publisher with editorial responsibility—than it is to regulate private communications. Commercial programming is different from an individual expression, because of issues like editorial responsibility. But regardless of how the regulation of private communication is approached, it should

¹⁷ Department of Broadband, Communications and the Digital Economy (2011). *Discussion paper: Community standards.* Page 14: 'There may also be good reason for different treatment of content because of the nature of the platform and its relative accessibility or influence'.

never be mixed together'.

Several informants pointed to existing legislation governing interpersonal communications as being appropriate for user generated and shared content. Furthermore, there are difficult and problematic issues that may arise from assessing user-generated and shared content according to the same standards as professional content. This may, in effect, vastly curtail a burgeoning form of person-to-person communication if applied.

Tim Watts (Telstra): 'It's a difficult paradigm shift for regulators to deal with... the change from filter, then publish to publish, then filter. It's a difficult shift for policy makers to accept, because there will be things that will be published with this new model that many people will believe are inappropriate for publication. But user generated content communities do develop norms of self-filtering and self-policing. Whether or not government can sign onto that is another matter'.

4. Consumer Behaviour

4.1 Recognizing demand drivers

Sean Casey (NBN Co.): ‘One of the key differences is that with broadcast you can actually control what you deliver, whereas the IP world is user-driven. In some cases consumer demand will pose a challenge for creating effective settings for Australian content’.

Gerard Goggin (University of Sydney): ‘New innovative models of regulation are emerging that are user generated. Governments might be loath to grasp these new models, but they are critical’.

New innovative models of regulation are emerging that are user generated. Governments might be loath to grasp these new models, but they are critical.

Gerard Goggin – University of Sydney

Gary Smith (Optus): ‘The regulatory framework that we work within needs to be forward looking and anticipate the range of areas where services, content and carriage services are going to go. The only way you can get a sensible view on that is to have a view on the way that consumers perceive these services. The way they interact with the services; the devices they use to interact with the services; the flexibility they want; the sorts of content they’re pulling down: the demand drivers’.

A problem recognized by a majority of the informants was the need for regulation to reflect consumer behavior. In the convergent environment consumers have more choice and control about how and where they access content. Restrictions based entirely around a particular technology may drive consumers to seek the same content elsewhere, thus making the regulation counterproductive, and having an unanticipated impact on competition between platforms. In short, consumers want to watch the content or use the services, not worry

about regulation, and will navigate through a repertoire of options accordingly.

Adam Suckling (FOXTEL): ‘The challenge for companies is to make sure that they give consumers the ability to do all the things that they want to do in terms of engaging with their content on a deeper level. In terms of finding what they want, in terms of recommending things to people, clearly recommendation is an important element of the digital economy as it’s a powerful way of people telling each other about something that they like’.

Matt Healy (Macquarie Telecom): ‘It comes back to the issue of participation. If that is how people engage with their society and communicate more broadly and find their place in the world, we’ve got to ensure that there is a bedrock of commonality that is underpinned by basic protections’.

Informants pointed out how important two-way and person-to-person communications were for the ongoing development of new digital services. This was framed not just in terms of business models, but also in relation to consumer practices and citizenship rights. The Convergence Review Committee is urged to consider the possible implications for citizens if user-generated content which is shared over the Internet is regulated in the same manner as professional content. The key consideration is not to impose settings that might impact on Australian values of personal freedom and the long-term viability of the digital economy.

Gary Smith (Optus): ‘A considered view of the consumer and the way services will be demanded by consumers—the types and the devices et cetera—should be one of the central themes of the activities of the Convergence Review’.

4.2 Digital literacy

Teresa Corbin (ACCAN): ‘While we talk about convergence, the reality is the applications are actually diverging’.

Corbin states that convergence is accompanied by a massive proliferation of ‘divergent’ applications. While this does create the potential for greater consumer choice it also poses a challenging environment for consumers to navigate.

Iarla Flynn (Google Australia): ‘Industry needs to be doing more to educate people how these particular services work, to show people how individual users and viewers use them and interact with them in order to empower people to determine their own experience, to protect themselves, to protect their privacy, to protect their safety’.

The Committee has already acknowledged the importance of government, industry and consumers working together to maintain community standards.¹⁸ However, a number of the informants argued that more work needed to be done with consumers in order to inform them of the possible services available in the convergent environment, and to educate them about basic issue like online etiquette, safety, and privacy.¹⁹

Matthew Lobb (NBN Co.): ‘NBN Co can anticipate many exciting opportunities that consumers are not yet aware of. Given the ubiquity of the network (and the fact that all Australians will have the capability to take advantage of new broadband opportunities) NBN and the industry are grappling with the fact that consumers need to better understand what is

¹⁸ Department of Broadband, Communications and the Digital Economy (2011). *Discussion paper: Community standards*. Page 21.

¹⁹ Crawford, K. & Lumby, C (2011). *The adaptive moment: A fresh approach to convergent media in Australia*. Page 41: ‘Critical thinking by user-groups is arguably the most effective protection available against the proliferation of harmful content in these spaces’.

coming around the corner’.

Peter Rossi (Huawei): ‘Consumer habit is going to be very, very particular to understand how we help protect them from themselves. In a convergent environment, it will be too easy for them to do whatever they feel like doing’.

Industry needs to be doing more to educate people how these particular services work, to show people how individual users and viewers use them and interact with them in order to empower people to determine their own experience, to protect themselves, to protect their privacy, to protect their safety.

Iarla Flynn – Google Australia

Consumers in many ways rely on service providers both to anticipate future service and products, and to protect them from the consequences of risky online behavior. Peter Rossi points out that knowledge is the key issue for consumers—essentially lack of knowledge about the services available in the convergent environment damages competition—because consumers will not be able to recognize a good service, or price for that service. Consumer ignorance makes them vulnerable, because they will not understand the consequences of risky behavior.

A minority of the informants also argued that it was important that regulation recognizes consumer behavior and that it, wherever possible, avoids criminalizing what is understood to be ‘normal’ use of services. This is not to justify possible contravention of copyright, but to recognize the importance of industry responsiveness in making content easily and conveniently available for consumers.

Chris Hancock (AARNET): ‘A key issue is that a lot more education needs to go on with youth, because there is an issue of their access to content that is via

legal or illegal means’.

Hancock points to a huge generational literacy issue. While younger generation may treat downloading whatever content they want to as ‘natural’ without reference to possible illegality, it must be noted that many other groups, including the elderly, lack the extensive knowledge of the various capacities of digital media that can provide them with reasonable benefits.

Iarla Flynn (Google Australia): ‘There is an opportunity to re-imagine the individual or the citizen and their interactions with media and with content. That is going to be an extremely important dynamic in the converged world and the Convergence Review should consider it carefully’.

This report also urges that the Committee take the opportunity to reflect on the changing role that digital media literacy is having in shaping citizenship and inclusion in the digital economy, particularly in light of Corbin’s point that: ‘As we move towards convergence the divide between the concepts of citizen and consumer becomes less significant’.²⁰

²⁰ See also: Australian Communications and Media Authority (2009). *Developments in internet filtering technologies and other measures for promoting online safety*. Pages 50-52.

Appendix A: List of Informants

Malcolm Alder
KPMG Australia
Partner for the Digital Economy

Petra Buchanan
ASTRA
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Sean Casey
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Broadband Application

Teresa Corbin
ACCAN—Australian Communications Consumer Action Network
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Simon Curtis
ASTRA
Manager for Policy and Regulatory Affairs

Steve Dalby
iiNet
Chief Regulatory Officer

John Doyle
Optus
Manager of Regulatory Policy

Iarla Flynn
Google Australia
Head of Public Policy and Government Affairs

Julie Flynn
Free TV
Chief Executive Officer

Gerard Goggin
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Professor of Media

Colin Goodwin
Ericsson
Broadband Strategy Manager

Chris Hancock
AARNET
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Matt Healy
Macquarie Telecom
National Executive, Regulatory & Government

Matthew Lobb
NBN Co.
General Manager, Industry Engagement

Peter Mercieca
KPMG Australia
Partner, Information, Communications & Entertainment

Martin Mercer
vividwireless
Chief Executive Officer

Alister Montgomery
KPMG Australia
Senior Manager of Economic, Infrastructure and Policy

Emma Rackley
ASTRA
Group Manager, Corporate Affairs

Peter Rossi
Huawei
Chief Technical Officer

Louise Sexton
Vodafone Hutchison Australia
Group General Council & Company Secretary

Andrew Sheridan
Optus
General Manager, Interconnect and Economic Regulation

Gary Smith
Optus
General Manager, Regulatory Compliance and Self Regulation

Adam Suckling
FOXTEL
Director, Policy and Corporate Affairs

Rene Summer
Ericsson
Director and General Manager of Government Affairs

Tim Watts
Telstra
Corporate Affairs Manager

Deanne Weir
AUSTAR
Group Director, Corporate Development

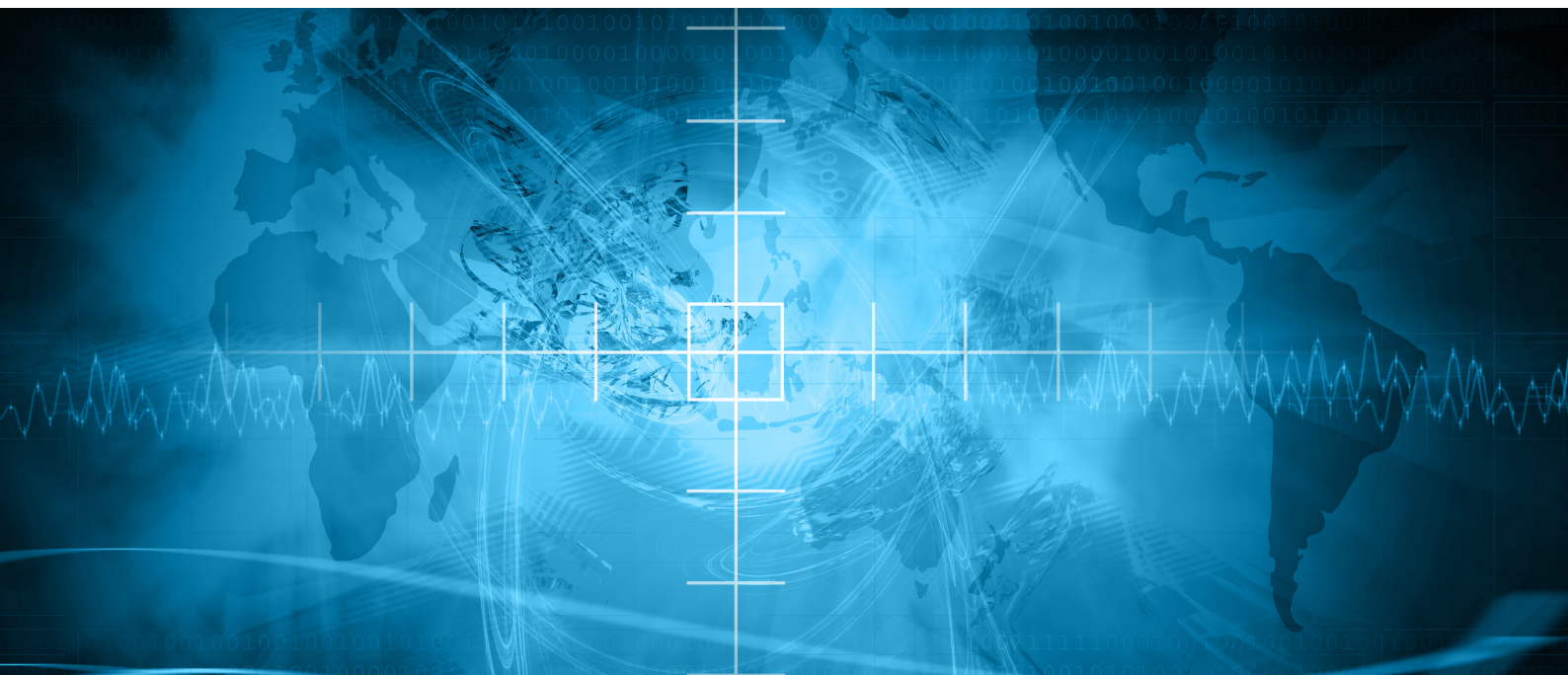


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