AUSTRALIAN INDUSTRY

GROUP

AUSTRALIAN INDUSTRY GROUP SUBMISSION

Convergence Review – Interim Report

13 February 2012

EXECUTIVE SUMMARY

The Australian Industry Group (Ai Group) welcomes the opportunity to provide a submission to the *Convergence Review – Interim Report* (the *Review*).

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing; engineering; construction; automotive; food; transport; information technology; telecommunications; call centres; labour hire; printing; defence; mining equipment and supplies; airlines; and other industries. The businesses which we represent employ more than 1 million employees.

Ai Group's interest in the *Review* reflects both its high proportion of members in the technology sector and its involvement in key economic policy issues across the wider economy. The *Review* represents the start of a process to reform Australia's communications regulatory framework to position Australia as a global digital economy leader and ensure that the regulatory framework supports growth, innovation and productivity. Such opportunities for wholesale reform of a regulatory framework are rare and it is important that these opportunities are used wisely. While the need for reform in the communications and digital economy sectors is acute, it is still essential to allow for proper scrutiny of proposals to ensure that the optimal reforms are implemented and that any new regulation is necessary, effective and efficient.

POLICY CONTEXT

The productivity and competitiveness of Australia's economy depends upon an efficient and low cost regulatory environment that promotes investment, entrepreneurship and dynamic flexibility so that businesses can take advantage of emerging opportunities. This is particularly important in the context of the *Review* because as the National Digital Economy Strategy notes, the digital economy "is essential to Australia's productivity, global competitiveness and improved social wellbeing."[1]

Ai Group welcomes the Interim Report's acknowledgement that the sector is overregulated and that a new regulatory framework is required to promote open access, competition and innovation. However, it is important to ensure that any replacement framework includes only regulation which is necessary, effective and efficient. Ai Group is looking to the Committee's Final Report to clearly outline how the Committee's proposals are consistent with these principles.

Ai Group and its members support a 'light touch' regulatory environment that devolves significant responsibility to consumers (to manage their access to content) and to service providers (to produce and deliver content). Preference should be given for industry self-regulation wherever feasible. In a global, online world, previous regulatory models are unlikely to prove effective, particularly in dealing with cross-border issues. Previous regulatory models should not be applied to a current or future context without careful consideration as to their fit with new and innovative markets, business models and technologies.

Productivity and Regulation

The Ai Group's recent *National CEO Report, Business Regulation* found that despite the efforts of governments across Australia, the burden of regulation is rising and that business regulation is acting as a barrier to growth, innovation and productivity. The survey found:

[1] Department of Broadband, Communications and the Digital Economy, *National Digital Economy Strategy*, p. 12.

- the average Australian business spends close to 4 per cent of total annual expenditures on complying with regulation;
- close to 70 per cent of businesses have experienced a rise in compliance costs over the past three years;
- around 75 per cent expect a rise in compliance costs in the next three years; and
- two-thirds of respondents reported that waiting for regulatory decisions is associated with the greatest costs.[2]

These findings underscore the importance of establishing regulatory frameworks that encourage innovation, growth and competition and relieve rather than contribute to the regulatory burden already facing business.

Reducing the regulatory burden is also important to boost productivity as Australia's recent productivity performance has been weak. Both labour productivity and multi-factor productivity have slowed substantially in the 2000s compared with the 1990s. In the ten years up to 2009/10, labour productivity grew at an average annual rate of 1.4% compared to average annual rate of 2.1% in the previous decade. Multi-factor productivity growth for the Australian economy was static in the 2000s compared with a growth rate of 1.6% in the 1990s.[3]

This slowdown in productivity has been broad-based, affecting most industry sectors measured by the Australian Bureau of Statistics (ABS). While the Grattan Institute estimates that productivity in the information, media and telecommunications sector generally outperformed most other sectors in 2009-10, productivity in this sector has still declined over the last decade.[4] The reforms instituted as a result of the *Review* will play an important role in determining future drivers of productivity and growth in the digital economy and the wider economy in Australia.

REGULATORY PROCESS

Ai Group acknowledges that the *Review* Committee faced a challenging task in reviewing the adequacy of the existing communications regulatory framework and identifying significant reform options in just a year. Ai Group also acknowledges that the purpose of the Interim Report is to present the Committee's vision and foreshadow the Committee's major recommendations ahead of the completion of the full report in March. Therefore, it does not provide a detailed explanation of the proposals under consideration by the Committee.

While Ai Group appreciates the Committee's intention in releasing the Interim Report, the lack of detail means that there is insufficient information to properly evaluate the impact of the proposed reforms. A number of proposals in the interim report were not publicly canvassed in any detail at earlier stages of the Review. In some cases, the rationale for regulatory intervention is not explained and there is little or no discussion of alternative options, particularly those that do not require regulatory intervention. Consequently, these key proposals will not be subject to detailed analysis or substantive industry consultation prior to the completion of the Final Report.

The scale and importance of these reforms means that they must be subject to a rigorous cost / benefit analysis and industry consultation process to enable the Government to respond to the *Review's* report. As the Treasury submission to the Detailed Discussion Papers states, regulation must

[2] Australian Industry Group, *National CEO Report, Business Regulation*, (2011), available at: http://www.aigroup.com.au/portal/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/LIVE_CONTENT/Publications/Reports/2011/10259_ceo_survey_web.pdf, p. 4.
[3] Saul Eslake, 'Productivity', paper presented to the annual policy conference of the Reserve Bank of Australia,(August 2011), available at: http://www.grattan.edu.au/programs/productivity.php, downloaded 5/2/2012, p. 2.
[4] Ibid, pp. 9 – 11.

be "necessary, effective and efficient in achieving a well defined policy objective…Treasury would encourage the Committee in its Final Report to justify any proposed regulation by articulating the benefits of that regulation and clearly outlining why such benefits outweigh the costs to Government, industry and consumers."[5] The Ai Group strongly supports this position.

Ai Group acknowledges that the Committee's Final Report will contain substantially more detail and discussion compared with the Interim Report which will enable a more meaningful level of consultation with industry. Ai Group therefore proposes to reserve its assessment of the proposals until the Final Report is completed. However, some key proposals from the Interim Report are discussed below in order to indicate the type of information and discussion that would be useful in the Final Report and subsequent industry consultations to enable that assessment to occur.

REGULATOR FOR THE DIGITAL ECONOMY

The Interim Report proposes the establishment of a new regulator for content and communications. It envisages that the regulator would have broad and flexible powers within a policy framework established by the Parliament.

The Explanatory Memorandum to the Australian Communications and Media Authority Bill 2004, which established the Australian Communications and Media Authority (ACMA) through the merger of two regulators, notes that "the formation of the ACMA is a response to convergence within the communications industry" and that it was intended to provide "a holistic response to convergence."[6] Given the Parliament intended that the ACMA would be able to respond to the challenges of convergence, it would be useful for the Final Report to outline why the Committee considers that a new regulator is required for a convergent communications environment. The Final Report should also outline different options for regulatory arrangements including retaining the ACMA in its current form, supplemented by new industry or self-regulatory structures; amending the ACMA's powers if a problem with the existing arrangements can be identified; and establishing a new regulator to replace the ACMA.

Ai Group acknowledges that the ACMA was created along a minimal change model, in that it largely inherited regulatory frameworks from its predecessor organisations. However, it is not always clear from the Interim Report whether the impetus for calling for a new regulator is due to limitations with the regulatory framework that the ACMA administers (and which has been acknowledged by the ACMA itself[7] and by many participants to the *Review*) or limitations with the ACMA's own powers or ambit. If the limitations arise largely from the Acts that the ACMA administers, then reforming the legislative framework may address the Committee's concerns without the need to establish a new regulator. If there is evidence that the ACMA's powers are too limited, it would be helpful for the Final Report to identify the nature of these limitations and explain why the Committee considers it preferable to establish a new regulator rather than amend the ACMA's existing powers.

The Interim Report does provide examples of the new regulator's potential range of expanded powers and responsibilities. These include 'the promotion of Australian industry'. While this is an important function, the Ai Group notes that it is already performed by a number of Government agencies including the Department of Broadband, Communications and the Digital Economy, the Department of Industry, Innovation, Science, Research and Tertiary Education, and Austrade. It would be inefficient to require a new regulator to perform functions that are already undertaken by

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[5] The Treasury, *Convergence Review: Response to the Discussion papers*, available at: http://www.dbcde.gov.au/__data/assets/pdf_file/0015/143241/The_Treasury.pdf, downloaded 30/1/2012, p. 3.

[6] Explanatory Memorandum, Australian Communications and Media Authority Bill 2004, available at: http://www.comlaw.gov.au/Details/C2004B01784/Explanatory%20Memorandum/Text, downloaded 30/1/2012.

[7] Australian Communications and Media Authority, *Broken Concepts: The Australian communications legislative landscape*, (2011), available at: http://engage.acma.gov.au/wp-content/uploads/2011/08/ACMA_Broken-Concepts_Final_29Aug1.pdf, downloaded 30/1/2012.

other areas of Government. The Final Report should therefore identify why these expanded functions are necessary and note that they would need to be performed in close coordination with existing government agencies and non-government bodies such as the Ai Group to avoid duplication.

Creating a new regulator will incur costs and create substantial uncertainty and disruption amongst the industry and community at a time when there are already a number of commercial, regulatory and technological changes. The Ai Group requests that the Convergence Review's Final Report provides a more substantial discussion of these considerations.

Ai Group welcomes the Interim Report's proposal that the role of the regulator be more clearly defined. However, the Ai Group also recommends that the Final Report consider the importance of monitoring the effectiveness and efficiency with which the regulator administers regulation. As the Productivity Commission (PC) recently noted, regulatory reform often focuses on the design of the regulatory framework with less attention paid to how the framework is administered and enforced. Yet as the PC observes, "even where new or reformed regulation is appropriate and well designed, poor enforcement practices can risk rendering it ineffective, or unduly burdensome, or both".[8] The United Kingdom approach to enhancing the performance of regulators in administering regulation provides a useful model as it includes measures requiring regulators to minimise costs to business through the Regulators' Compliance Code and ensure their dealings with industry are clear, transparent, proportionate and risk-based.[9]

Content Service Enterprises

One of the most significant proposals in the Interim Report is the introduction of a technology neutral regulatory framework targeted at 'Content Service Enterprises' (CSEs) above a specified threshold. These CSEs would be subject to Australian content, media diversity and community standards obligations.

The Ai Group's previous submission to the *Review* noted that regulatory parity should be a defining element of a pro-competitive economic regulatory framework. However, it also expressed concern at the potential risk that a broad national media policy framework including elements of public interest regulation (such as diversity, local content, editorial responsibility) could distract the *Review* from a pro-competitive economic regulatory framework and regulatory parity. A new regulatory framework can and should be imposed with minimal distortion of the market and value chain.

The CSE recommendations proposed by the Committee would result in substantial new forms of regulation being applied. It is vital that regulation is only imposed where it is necessary, efficient and effective. Ai Group will be looking to the Committee's Final Report to clearly outline how this proposal is consistent with these principles. Additional costs imposed on business by regulation can have the effect of stifling growth, innovation and productivity. Many businesses in the digital economy and communications sectors operate in a global, cross-border context. If regulatory obligations impose too substantial a cost on multi-national businesses, they may decide not to enter the Australian market or to structure the provision of services so as to avoid being caught by the obligations. Imposing higher costs on Australian based businesses may also limit their capacity for investment and innovation and place them at a competitive disadvantage compared with global counterparts. Such impacts would have the opposite effect from the Committee's stated goals of encouraging a competitive, diverse and innovative digital economy in Australia and could limit rather than grow the range of services targeted to Australians.

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[8] Productivity Commission, *Identifying and Evaluation Regulatory Reforms,* December 2011, Appendix H, p. 2.

[9] Ibid, pp. 17, 19 and 27. See also Department of Business Enterprise and Reform, *Regulators' Compliance Code*, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.bis.gov.uk/files/file45019.pdf, downloaded 7/2/2012.

Many types of services that could fall within the CSE category are still emerging in Australia. Until this market is better established, it may be difficult to identify the nature of any regulatory problem. Without this information it is hard to determine whether additional regulation, such as Australian content obligations, is necessary for CSEs. Should the Government conclude that there is a problem, it must consider a full range of options for responding. These should include non-regulatory options, such as self-regulation, industry standards, and monitoring and reporting, in addition to regulatory intervention. Each option should be subject to a cost / benefit analysis. There are, for example, a wide range of measures that could be adopted to address any concerns about the provision of Australian content in addition to the Committee's proposal to impose financial obligations on CSEs.[10] These should each be developed and considered as part of a rigorous cost / benefit analysis to ensure that the most efficient and effective solution is implemented.

The Final Report should also provide a more substantive discussion of the definition of a CSE and the likely thresholds that would be employed. It would be useful for the Final Report to expand on concepts such as the provider 'having the ability to exercise control over the content' as this could apply to range of business models, from full editorial responsibility to content aggregators, not all of which may be intended to be caught by the definition.

Spectrum Allocation and Management

The Interim Report proposes fundamental changes to the way that spectrum is allocated, licensed and managed in Australia. Ai Group's position is that spectrum planning should ensure that there is sufficient spectrum available to allow current terrestrial free-to-air broadcasting services to evolve with new technology, having regard to consumer interests and demand. Spectrum re-allocation to Internet Protocol (IP) and wireless services should also be encouraged and supported given market moves towards such services and significant consumer demand. The market has potential for a growth in the diversity of service providers and their size which would provide national benefit in terms of competition and innovation.

Ai Group is looking for the Final Report to recognise this balance and elaborate on how it will be achieved under the Committee's preferred model.

OTHER ISSUES

Ai Group acknowledges that the Interim Report is unable to canvass every issue that will be dealt with in the Final Report. However, additional issues that the Ai Group would appreciate the Final Report addressing include:

- provision for the national rollout of digital radio services;
- recognising the role of technical standards in a convergent regulatory framework as an alternative or supplement to regulation, particularly in areas such as connected television and IPTV where work is already underway internationally;
- substantive discussion of cross-border issues, including how Australia's domestic policy fits within a globally competitive marketplace and a framework of international obligations.

[10] The European Union, through Article 13 of the Audio Visual Media Services Directorate (AVMSD), requires that video on demand providers promote the production and access of European works, but allows for the obligation to be met by promoting and showcasing European works within the providers' program catalogue. The Ai Group's previous submission also noted the importance of educating Australian audiences about the availability of Australian content and promoting digital literacy.