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The Hon Malcolm Turnbull MP
Minister for Communications
Parliament House
CANBERRA ACT 2600

Dear Minister

Deregulation: Initiatives in the Communications Sector

Thank you for your invitation to our MD Maile Carnegie to submit comments on reducing the cost of regulation in the communications sector. Google is supportive of the Government's agenda of reducing the regulatory burden for business and the community, and ensuring that Australia's communications regulatory landscape is appropriate in a digital age.

At this stage, Google would like to provide some initial comments on the first two issues identified in your letter: Redundant Regulation and Reducing Regulation: Longer Term. We have also commented on a couple of areas where we believe unnecessary regulation and red tape is being considered by the Government. We would be pleased to work with the Government over time as you consider these complex and critical issues for Australia's media and communications landscape.

A general approach to regulation in the communications sector

Google supports the first principles approach to regulation identified in Attachment 2 of your letter. We also agree with ACMA Chairman, Chris Chapman's, assessment of the existing regulatory framework:

> *'...the Australian communications legislative landscape now resembles a patchwork quilt or the game, Uno Stacko. It is fragmented and characterised by legislative 'band-aid' solutions that lack an overarching strategy, narrative or coordinated approach to regulating communications and media in a digital economy. Regulatory pressure has bitten into core legislative concepts and definitions, creating these strained or 'broken concepts'. Ultimately, their 'elasticity' will expire at which time they will no longer function efficiently or effectively in a converged environment. "*

Google consistently stated the view during the previous Government's Convergence Review process that the policy objectives of ensuring that citizens are able to communicate freely, and that competition and innovation are able to flourish, will best be met by a framework that requires an in-principle rationale for Government intervention and takes into account the realities of each part of the converged communications and media landscape.

In this context, we think the following questions are relevant:

- What clear public purpose is sought to be achieved (eg protection of children, alerting consumers to the possibility being offended, ensuring diversity of voices)?
- Is this purpose already being achieved (eg by market mechanisms, user-regulation, industry self-regulation)?
- If not, how can the purpose be achieved with the *least* amount of government intervention; ie what policy levers apart from government regulation are available to achieve the desired policy outcomes?
- Are there any technical or other obstacles that make it likely that regulation of a particular environment is likely to be ineffective? (eg, is a proposed regulatory solution workable and scalable considering the volume of content involved in online sites such as YouTube and Facebook?)
- How can regulatory objectives be achieved in a manner which will ensure that innovation on the internet continues to flourish?

We also believe that decisions about the regulatory landscape for communications must be taken against the reality that Australia's digital sector supports Australian creators and innovators, creates new distribution and monetisation models, and ultimately opens economic opportunities.

Removing redundant regulation

Google believes that the following aspects of Australia's regulatory landscape should be considered for removal or amendment:

Broadcasting Services Act 1992

Schedule 7 - Content Services

- *Restricted Access Systems Declaration 2007* (made under clause 14 of Schedule 7). Google believes that the content services provisions of the BSA (Schedule 7) and the Restricted Access Systems (RAS) imposed by the resulting ACMA determination operate as a barrier to the growth of digital services. These provisions do not operate in a technologically neutral manner and cannot be complied with by user generated content platforms and other online content providers. Google submits that it is imperative that media regulation operate appropriately for all content delivery platforms in a converged

media environment, and we urge the Government to have regard to the way in which the existing technology specific content services provisions are standing in the way of achieving this.

- Multiple and complex regulatory regimes are created for 'hosting services', 'links services' and 'live content services' as well as 'designated content/hosting services' (see Schedule 7 Clause 2). There is significant overlap between providers who deliver the three categories of service and little justification for the detailed rules applicable for the various definitions as communications services continue to converge. Aspects of the prescriptive and technology-driven approach to regulation are inconsistent with the recommendations of the Australian Law Reform Commission in its report *Classification - Content Regulation and Convergent Media.*

- Prescriptive nature of industry code requirements - (clause 81 and 82 of Schedule 7). This is an example of a prescriptive approach to self-regulation for segments of the content industry which may be able to be less prescriptive. For example, clause 82(3) contains 15 specific examples of matters which *may* be included in an industry code. In Google's view, it is better for regulatory objectives to be stated at a high level and for industry codes left to be developed in a manner that is appropriate given the services and content being delivered over time.

Telecommunications Act 1997

- Section 313 of the Telecommunications Act states that carriers and carriage service providers must do their best to prevent telecommunications networks and facilities from being used in, or relation to, the commission of offences against the laws of the Commonwealth. It appears that this law has been interpreted broadly by various Australian government agencies to include the take down of websites that are deemed illegal. Google believes that section 313 does not contain sufficient safeguards, and could potentially impact significantly on the availability of information and content on the internet through the over-broad blocking of websites. Google submits that it is essential that systems and measures be created to ensure there is a transparent process in place for any removal of websites by government departments and agencies. Consideration should be given to whether s.313 should remain in the Telecommunications Act or whether a similar obligation with sufficient oversight be co-located with other national security powers.

Copyright Act 1968

- Australia's Copyright Act contains multiple, detailed provisions which are not suitable for a digital age. For example, a basic internet function like caching is dealt with in three

separate places in the Act, with three different legal treatments, and it is not possible for an online service provider to operate a cache in Australia with any degree of legal certainty (see sections 43A, 116AB and 200AAA).

- Australia's copyright laws dealing with the digital world cover many pages of complex and detailed regulation which do not work for the internet and the digital economy (for example, basic internet functions such as search indexing and crawling are not covered by a specific exception in Australian copyright law). These issues were recently examined by the Australian Law Reform Commission, which we believe recommended the repeal of over 50 pages of complex and technology specific copyright exceptions with one fair use provision that would ensure that Australian copyright laws could keep pace with the digital world in a manner that continues to incentive creation and protect Australian copyright owners.

We would also like to raise another regulatory issue for your consideration. Although it does not fall within a de-regulation agenda, it is an issue which Google believes is of critical importance for the Australian digital economy - the lack of a clear safe harbour for online intermediaries. The current state of uncertainty with respect to the liability of platforms and other online intermediaries for unlawful conduct by users is a major disincentive for internet industries to operate from Australia. The previous Government undertook a review recommending the expansion of the *copyright* safe harbours to online intermediaries, and Google welcomed this. But the problem extends beyond copyright. Under current Australian law, online intermediaries are potentially exposed to liability for unlawful content published by users (including defamation, hate speech and pornography) regardless of the fact that they have no practical means of preventing the content from being published. Google urges the Government to have regard to the need for clear and robust safe harbours for online intermediaries as a central plank of promoting a flourishing online environment.

Future Regulation

As noted above, we are broadly supportive of the approach to regulation identified in Attachment 2 of your letter. We would also like to note a more general trend we believe is emerging in Australia which would be equally applicable for the communications environment - that of broad, principles based standards supported by self-regulatory mechanisms developed by industry that are suitable for the specific realities of various sectors and technologies.

For example, in the context of privacy regulation, the *Privacy Amendment Act,* to commence in March 2014, contains a set of new, harmonised, privacy principles that will regulate the handling of personal information by both Australian government agencies and businesses. In the context of copyright, the ALRC in its *Copyright and the Digital Economy* discussion paper provided as one of the justifications for a fair use provision its view that law that incorporates such principles or standards is generally more flexible and adaptive than prescriptive rules (Discussion Paper paragraph 4.6).

We believe that the Government should adopt these principles and avoid the introduction of unnecessary new regulation in areas where market or self-regulatory mechanisms already exist. This is particularly relevant in the communications environment in two respects:

- eSafety - at Google we work hard to ensure users have the tools they need to stay safe online. We have 'Safe search' mode on Google and videos that breach our guidelines on YouTube can be flagged for removal. We support further research and education in the safety space but urge caution in the consideration of new regulatory measures on matters where strong self-regulatory measures already exist.

- copyright enforcement - we believe there is significant, credible evidence emerging that online piracy is primarily an availability and pricing problem. Google takes many steps to work with copyright owners to protect the rights of copyright owners online. We would encourage the Government to promote new business models and a free marketplace for legal purchasing of content. We would be disappointed if the Government decided to go down the route of overly harsh regulation to combat piracy without considering the evidence from around the world that this would likely be costly for businesses to implement and with little effect .

We would be pleased to provide further information about any of the issues raised in this letter.

Yours sincerely

Iarla Flynn
Head of Public Policy