

**COMMUNICATIONS
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**ATTORNEY-GENERAL'S CONSULTATION PAPER ON
REVISING THE SCOPE OF THE SAFE HARBOUR
SCHEME IN THE *COPYRIGHT ACT 1968***

**COMMUNICATIONS ALLIANCE SUBMISSION
22 NOVEMBER 2011**

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 www.commsalliance.com.au.

Introduction

Communications Alliance welcomes the opportunity to comment on the proposal in the Consultation Paper released by the Department of the Attorney-General in October 2011 entitled "Revising the Scope of the Safe Harbour Scheme" in the *Copyright Act 1968* (Act), and which canvassed the potential extension of the application of the safe harbour scheme to a wider range of entities providing network access and online services.

The lack of a safe harbour for the range of service providers contemplated by the *Australia-United States Free Trade Agreement* (AUSFTA) is a threat to Australia's ability to fully realise the benefits of the digital economy, attract foreign investment and to fulfil its international obligations.

While it is understandable that the drafters of the original safe harbour scheme relied on the definition of 'carriage service provider' as used in the *Telecommunications Act 1997*, it is clear that the range of internet intermediaries who might need legitimate recourse to the safe harbour scheme is now much broader than the CSP sector.

Many legitimate internet activities – such as data transmission, search engine and e-commerce facilitation - where service providers do not control, initiate or direct the users' online activities are currently not covered by the scheme. Providers of these services do not currently have the protection of the copyright safe harbour that is available to Australian Internet service providers, who typically are also CSPs

Therefore Communications Alliance supports the proposal to introduce the alternative term 'service provider', to ensure that legitimate online intermediaries have certainty to continue their legitimate online operations, innovations and investment.

Expanding the Scope of the Safe Harbour Scheme

As noted in the consultation paper, Division 2AA of Part V of the Act – Limitation of remedies available against carriage service providers - sets out safe harbours to protect four categories of activity:

- Category A – providing facilities or services for the transmission of copyright material;
- Category B – caching (via an automated process);
- Category C – storing copyright material at the direction of a user; and
- Category D – referring users to an online location using information location tools.

In extending the application of the safe harbours from only CSPs to all online service providers, it is important that all those who provide services in these categories are contemplated.

The definition of Service Provider set out in the AUSFTA achieves this purpose. That definition is:

"service provider, in relation to a Category A activity, means a provider of transmission, routing, or connections for digital online communications without modification of their content between or among points specified by the user of material of the user's choosing".

"service provider, in relation to a Category B, C or D activity, means a provider or operator of facilities for online services or network access".

In the view of Communications Alliance, adopting this same definition would be an appropriate way to extend the application of the safe harbours. It achieves appropriately extended application and is consistent with the AUSFTA and comparable international schemes.

The Consultation Paper suggests the following definition to describe the service providers proposed to be covered by an extended safe harbour scheme:

A person who provides services relating to, or provides connections for, the transmission or routing of data; or operates facilities for, online services or network access, but does not include such person or class of persons as the Minister may prescribe in the Regulations.

Communications Alliance believes that the scope of the definition is appropriate, as it appears to be similar to that used in the AUSFTA.

Communications Alliance is uncertain, however, whether it is appropriate to include a specific power to enable the Minister to exclude a person or class of persons from the safe harbour scheme through Regulations.

A key policy rationale for expanding the application of the safe harbours is to encourage investment and innovation in Australia's digital economy. This means that regulation in Australia should have the goal of making Australia *attractive to foreign investors*, allowing Australian businesses to attract and retain a *digitally skilled workforce* and enabling Australia to remain internationally *competitive*.

There is a risk in the view of Communications Alliance that a Ministerial power to exclude people from the safe harbours could be a disincentive to any technology or innovation-oriented company contemplating establishing operations in Australia – particularly given that the power of exclusion typically does not exist in many comparable overseas markets – e.g. USA, EU New Zealand, UK and Japan.



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