**Access to the Internet Submission to *ALRC* *IP 46***

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This submission is directed to issues arising in respect of the *need* to *recognise and support* *access to the internet* for all Australian residents and citizens. As such it addresses the following questions only:

**Questions 2-1** What general principles or criteria should be applied to help determine whether a law that interferes with freedom of speech is justified?

**Question 2-2** WhichCommonwealth laws unjustifiably interfere with freedom of speech, and why are these laws unjustified?

The focus of IP46 is to ascertain the extent to which Commonwealth laws “*encroach* on common law rights, freedoms and privileges”. Encroach is defined by the Oxford English Dictionary to mean to *“intrude on a person’s territory, rights, personal life etc”,* that is tointerfere with that person. In Chapter 2, *freedom of speech* is articulated to include the freedoms of *communication*, and to *engage in the political process* *and society*. If a law interferes with these freedoms then the individual’s rights are encroached.

In the context of the internet, there is little if any *internet-specific* common law rights, freedoms and privileges.However, this does not mean that none are applicable or that law, or a lack thereof, does not encroach on our ability to access the internet. Therefore it is submitted that the **criteria that should be applied to help determine whether a law (or lack of a law) is justified** in respect of the freedom of speech *à propos* the internet is first to consider relevant international policy and obligations; and second, the impact of the domestic law (or lack of law) in practice.

The essential nature of the ability of the individual to self-determination and participation in social, political and economic life are recognised by Articles 1,[[1]](#footnote-1) 3[[2]](#footnote-2) and 25[[3]](#footnote-3) of the *International Covenant on Civil and Political Rights 1966*.[[4]](#footnote-4) These rights are not restricted to activities and engagement in the ‘real world’. The United Nations’ Human Rights Council’s *Resolution on the Promotion and Protection of Human Rights on the Internet* of July 2012 affirms that individuals have the same rights *online* as *offline* (Article 1).

The Council emphasized that access to the internet also is essential. At Article 3 the Council:

Calls upon all States to promote and facilitate access to the Internet and international cooperation aimed at the development of media and information and communications facilities in all countries

In the digital economy therefore it is submitted that freedom of speech includes freedom to *access the internet*, both *per se* and as the means of enabling other freedoms.[[5]](#footnote-5) This submission is directed to what may be done to assist individuals gain access to the internet while we work towards the recognition of access to the internet *per se* as a right in and of itself.

This submission is premised on the basis that in the digital economy access to the internet *per se* is a fundamental human right and must be recognised as such.[[6]](#footnote-6) In that context, any policy (and related law/s) that may or can impact upon access to the internet should be developed with reference to the OECD’s 2011 *Council Recommendations on Principles for Internet Policy Making.*[[7]](#footnote-7)The principles of particular relevance being:

1. Promote and protect the global free flow of information
2. Promote the open, distributed and interconnected nature of the internet
3. Promote investment and competition in high speed networks and services
4. Promote and enable the cross-border delivery of services

10. Maximise individual empowerment

11. Promote creativity and innovation[[8]](#footnote-8)

Where a law is silent regarding rights, freedoms and privileges, whether by design, oversight or merely changing social circumstances, this can adversely impact upon those rights, freedoms and privileges and personal life. In this way, it is submitted, a law’s silence, or inaction, in respect of a matter may amount to as much an encroachment as where it specifically but adversely regulates or restricts the individual. Relevant to the issue of silence is the fact that technology has overtaken the *Universal Service Obligation* (‘USO’),[[9]](#footnote-9) in ways the current access regime has failed, and continues to fail, to address. The consequence is that the telecommunication regime *encroaches* upon individuals’ right to access the internet.

Enacted to benefit consumers by affording users a ‘provider of last resort’ for telephony services, the current USO arguably is of limited assistance to the individual in the digital economy.[[10]](#footnote-10) Despite the ongoing rollout of high speed broadband and the accompanying debates, (for example those of cost and infrastructure construction) the USO continues to apply *only* to *voice* (or voice equivalent) telephony services and does not extend to impose upon any party similar obligations with regard to broadband (or any other means of accessing the internet) or access to the internet *per se*. It is submitted that this is short-sighted as it fails to appreciate that in order to have a fully functioning digital economy, the maximum number of individuals must be enabled to – and in fact – operate in that economy.[[11]](#footnote-11)

The ability to access internet content and services is essential for work, and play and everyday life. For those with disabilities or located in remote areas internet services can enable a level of engagement with information, friends and government that otherwise is not possible. It is through use of internet services therefore that other fundamental human rights are enabled. However, in order for the internet to be an enabler of those other human rights, access to the internet first must be enabled.

It is important that all members of society are enabled to participate in the digital economy and the increasing number of services that are more easily enabled via the internet. Those with access are able to engage with government, business, and family and friends more easily, which can lead to an improved standard of living. For those without access to the internet, however, this can be socially isolating.[[12]](#footnote-12)

Current regulatory frameworks are inadequate to address this issue. The regulation of Australian telecommunication services and providers is governed by an array of federal legislation enacted variously to address matters such as access to infrastructure, competition issues, and what is appropriate content. In addition, there are a variety of industry codes, standards and rules enforced on a self-regulatory basis. This regulation, while ultimately impacting on individuals in their engagement with ISPs, services and content, is not specifically targeted to *enabling* them or *protecting* or otherwise *promoting* their access to the internet. In circumstances when everyday more communications, and government and business activities and services are moving online,[[13]](#footnote-13) such existing regulatory frameworks are inadequate.[[14]](#footnote-14)

The level of individuals’ access to the internet is directly relevant to the health of the Australian digital economy, which in turn is directly relevant to its ‘real world’ economy.[[15]](#footnote-15) In order for Australia’s digital economy to function properly it will require an increase in the number of Australians who have the necessary skills to participate in it[[16]](#footnote-16) *and* who have the necessary financial capacity. While more and different types of services are becoming available online, the same information / services are less readily available offline.

Quite simply – the internet, and high-speed broadband, are *“essential services”* and *“should be treated as any other utility service”.*[[17]](#footnote-17) This fact is one that the UK House of Lords has most recently recognised and as a consequence has called for the UK government to *“define the internet as a utility service that is available for all to access and use.”*[[18]](#footnote-18)

Some jurisdictions have already taken the initiative to extend their USO to the internet and not all of these are first world countries, Brazil is one example.[[19]](#footnote-19) Several countries also have separate broadband USO policies. These include Chile and India;[[20]](#footnote-20) Jordan, Malaysia and Pakistan;[[21]](#footnote-21) the United States[[22]](#footnote-22) and Spain.[[23]](#footnote-23) Australia is not yet one. It is suggest that, with an appropriate transition period, this is something that could be achieved within the term of the current government. While such extension of the USO would, undoubtedly, be at a cost, this appears to be one cost that many Australians would support.[[24]](#footnote-24)

As yet there is no requirement to provide a USO equivalent for the internet *per se*. The limited obligations imposed upon the NBN Co, in the current realties of its roll-out, are ineffective to assist with promoting Australia’s digital economy *or* to protecting freedom of speech *à propos* the internet.

If the Australian government wants a fully functioning digital economy then they must take very basic measures to make this a reality instead of worrying about the cost of the cables. In the digital economy, restrictions on access to the internet are not justified. The extension of a USO to internet access *per se*, and not merely as a means of using voice telephony services, will mean that all individuals, irrespective of location, will be able to attain and maintain a level of physical access to the internet and that the financial cost of that access will not inhibit their future access and use.

**Recommendation**

That:

the Australian Universal Service Obligation be extended to access to the internet *per se.*

1. *All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.* [↑](#footnote-ref-1)
2. *The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth ...in the present Covenant.* [↑](#footnote-ref-2)
3. *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:*

*(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;*

*(c) To have access, on general terms of equality, to public service in his country.* [↑](#footnote-ref-3)
4. Australia became a signatory to the Covenant on 18 December 1972, noting:

*"Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise."* [↑](#footnote-ref-4)
5. Noting freedom of speech ‘on/over’ the internet is different to ‘to it’, my focus is regarding the impact of laws on *access* to the internet. Without first addressing this issue, what you may or not do on the internet is moot. [↑](#footnote-ref-5)
6. Cradduck, Lucy. *Individuals, Innovation, and the Internet: Why Access is Essential* (Common Ground Publishing, 2015). [↑](#footnote-ref-6)
7. Organisation for Economic Co-operation and Development. 2011. *OECD Council Recommendation on Principles for Internet Policy Making*, November 13, 2011. Paris: OECD Publishing. [↑](#footnote-ref-7)
8. For a more detailed discussion of the relevance of these principles see – Cradduck above n 6, Chapter 11. [↑](#footnote-ref-8)
9. *Telecommunications (Consumer Protection and Service Standards) Act 1999*:

*6(1) …* ***standard telephone service*** *is a reference to a carriage service for each of the following purposes:*

*(a) the purpose of voice telephony; …*

*9 (1) For the purposes of this Act, the* ***universal service obligation*** *is the obligation:*

*(a) to ensure that standard telephone services are reasonably accessible to all people in Australia (other than people in designated STS areas) on an equitable basis, wherever they reside or carry on business; and*

*(b) to ensure that payphones are reasonably accessible to all people in Australia on an equitable basis …* [↑](#footnote-ref-9)
10. See – DCITA ‘Review of the operation of the Universal Service Obligation 2004 – Terms of Reference’, [*http://www.archive.dcita.gov.au/2009/june/review\_of\_the\_operation\_of\_the\_universal\_service\_obligation\_2004/review\_of\_the\_operation\_of\_the\_universal\_service\_obligation\_-\_terms\_of\_reference*](http://www.archive.dcita.gov.au/2009/june/review_of_the_operation_of_the_universal_service_obligation_2004/review_of_the_operation_of_the_universal_service_obligation_-_terms_of_reference)(accessed 24/06/2009). It was previously accepted that*“the Regional Telecommunications Inquiry (RTI) finding 7.3* [is] *that the USO ‘is not an effective mechanism to provide broad consumer access to an increased range of services into the future’.”*  [↑](#footnote-ref-10)
11. Cradduck, Lucy. *The Future of the Internet Economy: Addressing Challenges Facing the Implementation of the Australian National Broadband Network*, Professional Doctorate thesis (SJD), 2011, Faculty of Law, QUT. [↑](#footnote-ref-11)
12. McLaren, Jennifer, and Gianni Zappala. 2002. “The New Economy Revisited: An Initial Analysis of the Digital Divide among Financially Disadvantaged Families.” *The Smith Family,* Background Paper No. 5. <http://www.orfeusresearch.com.au/web_images/Background_Paper_5_TSF.pdf>; Wise, Sarah. 2013. “Trying to connect: Telecommunications access and affordability among people experiencing financial hardship.” Report, Anglicare Victoria and ACCAN, September 2013. . [↑](#footnote-ref-12)
13. Cunningham, Stuart, 2011, ‘Broadband, the NBN and screen futures’, *Media International Australia,* vol. 140, pp. 16-21; Smart, William., 2012, ‘Bring on the Broadband – Regional Australia’, *Australian Quarterly*, vol. 83, no. 1, Jan/Mar 2012, pp. 4-10. [↑](#footnote-ref-13)
14. Kariyawasm, Rohan. 2007. *International Economic Law and the Digital Divide: A New Silk Road*. Cheltenham: Edward Elgar Publishing Limited. [↑](#footnote-ref-14)
15. Cradduck, above n 11. [↑](#footnote-ref-15)
16. Buckingham, David, 2007, ‘Digital Media Literacies: Rethinking media education in the age of the Internet, *Research in Comparative and International Education,* vol. 2, no. 1, pp. 43-55. [↑](#footnote-ref-16)
17. Cradduck above n 11, p.192 [↑](#footnote-ref-17)
18. House of Lords (2015) “Make or Break: The UK’s Digital Future”, *House of Lords Select Committee on Digital Skills,* Report of Session 2014-15, HL Paper 111, 17 February 2015, p.29 at Paragraph 43:

***We agree with our witnesses who urged that the Government should define the internet as a utility service that is available for all to access and use. This is the bedrock of digital competitiveness.***

Also see p.95 at Paragraphs 305-306:

*305. Objective 1: The population as a whole has unimpeded access to digital technology.*

*306. This includes:*

*(a) facilitation of universal internet access: the internet is viewed as a utility; and*

*(b) removal of ‘not-spots’ in urban areas.*  [↑](#footnote-ref-18)
19. Rauen, Cristiane V., Célio Hirtuka and Paulo S. Fracalanza. 2011. “Universalization of telecommunications services: Public policies in the OECD and in Brazil.” *International Journal of Development Issues* 10(2):108-122. [↑](#footnote-ref-19)
20. Prasad, Rohit. 2013. “Universal Service Obligation in the Age of Broadband.” *The Information Society: An International Journal* 29(4):227-233. [↑](#footnote-ref-20)
21. ITU (International Telecommunications Union). 2012. “Trends in Telecommunication Reform: Smart Regulation for a Broadband World.” Report,May 2012. [↑](#footnote-ref-21)
22. Kruger, Lennard G., and Angele A. Gilroy. 2013. “Broadband Internet Access and the Digital Divide: Federal Assistance Programs.” CRS Report for Congress RL30719. July 17, 2013. [↑](#footnote-ref-22)
23. Síndic de Greuges de Catalunya. 2013. “Broadband Internet Access as a Universal Service: Digital Equality.” Reprot by The Catalan Ombudsman. Accessed August 12, 2014. <http://www.sindic.cat/site/unitFiles/3461/Broadband%20internet%20access%20as%20a%20univesal%20service%20complete.pdf>. [↑](#footnote-ref-23)
24. ‘Internet access is ‘a fundamental right’, 8 March 2010, *BBC News* – *“Australian respondents are among the most firmly convinced that internet access should be a fundamental right, with 85 per cent agreeing that this is the case.”* <http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/08_03_10_BBC_internet_poll.pdf> [↑](#footnote-ref-24)