



ASTRA Submission to: Convergence Review Terms of Reference

January 2011

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ABN 16 051 051 003

Introduction

ASTRA welcomes the Government's announcement that it will conduct a convergence review, and welcomes the opportunity to comment on the review's proposed Terms of Reference.

About ASTRA

ASTRA is the peak industry body for subscription television in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription television operators, as well as channels that provide programming to these platforms. Further information on ASTRA, including a list of members, can be found on the ASTRA website at <http://www.astra.org.au>.

The subscription TV industry is the undisputed leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, it is received nationally by 34% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues.

Overview

ASTRA considers that the terms of reference are sufficiently broad in scope to consider a range of relevant issues relating to media policy settings, and to examine alternative regulatory and non-regulatory mechanisms directed towards ensuring a competitive converged communications environment, and to achieve the Government's media and communications policy objectives.

ASTRA supports the general focus on consumer and audience outcomes in many of the terms of reference, and believes this could be further enhanced to ensure that optimal consumer outcomes be paramount in the review's objective. This would include enabling a communications environment which is competitive in nature and not impacted by regulatory imbalance across platforms.

It is imperative that future regulation of the communications environment achieve a balance between promoting the introduction of new and innovative technologies, the equitable delivery of content across different infrastructure, and the protection of copyright as it is impacted by technological convergence. ASTRA argues that balanced competition is more likely to maximise consumer outcomes through increased content diversity and new communications services. Conversely, regulation that distorts competition is likely to hinder new content production and the development of new services.

ASTRA recognises that the terms of reference for the review are, at this stage, very broad in scope. As the review evolves, we would expect that particular areas in need of reform will become apparent. In ASTRA's view, keeping the initial terms of reference wide in scope allows all aspects of media and communications to be considered. While this may have the potential to draw out the review process and delay regulatory and other reforms that may emerge, a broad, comprehensive scope will be advantageous in ensuring that all participants in the communications environment are included at the commencement of the review.

Comments on the draft Terms of Reference

Point 1 – Policy Framework

ASTRA is supportive of a review of the policy framework and options for reform. In particular, ASTRA is supportive of the proposal to consider the potential impact of reforms on industry, consumers and the community.

As the Government has recognised, the media and communications environment in Australia is changing and is likely to be transformed through the rollout of the National Broadband Network. ASTRA contends that the regulatory framework for media and communications needs to reflect these changes in order to maximise the social, economic and cultural benefits of the technological change for the Australian community, and to provide a stable regulatory environment which encourages innovation and investment.

ASTRA supports the broad reach of the proposed terms of reference and considers that developing advice on an appropriate policy framework for a converged environment would need to take into account all relevant participants in the communications environment, including the public broadcasters.

Point 2 – Regard for all relevant legislation and regulatory frameworks

ASTRA is supportive of the proposal to consider all legislation impacting on media, allowing issues relevant to the regulation of both content and different delivery platforms to be considered. However, there are a number of issues that are critically relevant and that ASTRA argues must be included as part of the review:

- *Anti-siphoning*

Anti-siphoning is one of the major regulatory constructs of the broadcasting industry. ASTRA notes that the anti-siphoning scheme was recently reviewed, and that the Government does not propose to explicitly consider further changes to the anti-siphoning scheme in the context of the Convergence Review. However, the recent review was done so without reference to the broader media environment. For instance, some of the changes which the Government has recently proposed will only practically apply in an analogue-digital media environment and will become redundant once digital switchover is completed in 2013.

As ASTRA has previously noted, both the Productivity Commission and the Australian Competition and Consumer Commission have identified the anti-siphoning scheme as anti-competitive. Since its inception the scheme has been highly disadvantageous to the subscription television industry, and the revised scheme will place additional anti-competitive barriers on new media companies. Any holistic review of media and communications regulation must consider the impact that the anti-siphoning scheme has on limiting competition and consumer choice in the broader media environment.

- *Role of the public broadcasters*

ASTRA contends that a review of convergence should consider the ongoing role of publicly-funded broadcasting and whether the current Charters of the national broadcasters need amendment. The activities of the national broadcasters, in particular the ABC, have a significant impact on the converging media environment in Australia and compete directly with media and communications businesses. ASTRA considers that a comprehensive review of communication policy and regulatory frameworks could not be undertaken without taking into account the current and future role of publicly-funded media organisations.

- *Copyright*

Protection against illegal use and distribution of digital content is already a very significant issue for the subscription television industry and will only intensify in a converged media environment. ASTRA notes, for example, that current provisions in the *Copyright Act 1968* do not cover key and emerging digital media platforms for the delivery of subscription television services, and that existing regulatory mechanisms are ineffective for dealing with illegal distribution of digital content. Accordingly, copyright is a critical issue that must be considered as part of the review.

Point 3 – Regulatory Approach

ASTRA considers it imperative that the existing Regulatory Objects underpinning existing communications legislation be re-examined, and supports examination of the effectiveness and efficiency of the regulatory approach in the existing policy framework.

Point 4 – Regulatory Objects

ASTRA supports the development of more appropriate regulatory objects for a converged environment. ASTRA believes the Committee's work should be directed towards developing a regulatory and policy framework that encourages innovation by industry and maximises outcomes for consumers.

Point 5 – Policy Parameters

(a) 'Appropriately' competitive communications and media environment

A competitive communications and media environment will encourage investment and innovation, drive efficiency and effectiveness and ensure the best outcome for consumers in delivering a diverse range of content and services. It would also give consumers the ultimate determinative role in the development and delivery of content and services that consumers want.

It is therefore of concern to ASTRA that the terms of reference state the review Committee must have regard to an 'appropriately competitive' environment. It is unclear what 'appropriately' competitive means and ASTRA believes there would be value in clarifying the objectives expected to be achieved through encouraging competition in the communications sector. The inference would appear to be that some instances of competition may be 'inappropriate', suggesting that there is an expectation or intention for continued regulatory management of competition in the communications and media environment.

ASTRA is concerned that, in steering the Committee towards determining 'appropriate' competition, there is a risk of the review recommending policy and regulatory outcomes that reflect the interests of particular media business models to the detriment of consumers who would otherwise benefit from a truly competitive communications and media environment. As reflected in the Government's Principles of Best Practice Regulation, ASTRA considers that any regulation that has the effect of restricting or distorting competition should only be considered where there is no other alternative to achieving the objective of the regulation.

(b) Regulatory Settings relating to Australian media content

The Australian subscription television industry is a major investor in Australian media content, and recognises the importance of enabling a media and communications environment that encourages the production and distribution of Australian content for Australian consumers. The *Broadcasting Services Act 1992* prescribes that subscription TV licensees that broadcast drama channels, and drama channel package providers, are required to invest at least 10 per cent of their total program expenditure on new Australian drama. Subscription television consistently produces hundreds of thousands of hours of Australian content each year across all genres, not just drama. As a result, its investment in local production far exceeds this regulatory requirement.

ASTRA considers that the appropriateness of existing regulatory and legislative settings relating to the production and distribution of Australian media content should be reviewed and that the Committee be tasked with investigating potential alternative measures that could more effectively achieve the Government's cultural policy objectives.

(c) *Ensure Industry and Government Revenue to Produce and Distribute Australian Content*

ASTRA has serious concerns with a review that is tasked with taking into account industry and policy settings to ensure revenue for commercial businesses sufficient for local content production and distribution. ASTRA considers that the Committee's work should be directed towards developing a regulatory and policy framework that enables a competitive and vibrant media and communications sector that effectively and efficiently achieves the Government's cultural and other public policy objectives. A competitive media and communications environment would encourage industry investment in the production of high quality Australian content that Australian consumers want. Media and communications businesses themselves are best placed to determine revenue levels sufficient to support local content production that meets or exceeds any Australian content requirements that may be imposed. ASTRA considers it would be highly inappropriate for Government to assume a role of determining what 'sufficient' revenue under any circumstance represents.

ASTRA also considers that it would be difficult and impractical for the Committee to make a determination of 'sufficient' revenue levels for the production of local content and to recommend industry and policy settings to maintain those nominal levels, given the fast changing nature of the media environment and the different business models that apply to different and emerging media distribution platforms.

ASTRA is also unclear as to why there needs to be reference to 'Government revenue' in relation to the production and distribution of local content.

ASTRA does not therefore see a need for the Committee to be specifically tasked to take into account "ensuring industry and government revenue sufficient to produce Australian and local market content". Such a focus could unnecessarily distort the review towards options to protect existing media business models that may not necessarily be suited to a converged media environment. ASTRA's view is that the remaining policy parameters in Point 5 are sufficient to address any of the issues that may fall within parameter 5(c), to the extent that any consideration of "ensuring industry and government revenue" is required at all.

ASTRA considers that the policy parameter in 5(c) is unnecessary and should be removed.

(d) *Regulating Content*

ASTRA is supportive of a review of the ways content should be regulated, particularly across platforms. There are numerous different ways for consumers to access the same content, with content provided by established traditional media sources generally more tightly regulated than content on emerging media delivery platforms. ASTRA would welcome an examination of the appropriateness of content regulation differentiated by delivery platforms.

(e) *Reflection of Community Standards*

ASTRA is supportive of Government reviewing regulatory settings to ensure the reflection of community standards and the views and expectations of Australian citizens. There may be value in determining whether there are differing community standards or expectations for content provided on different platforms or accessed and used in different ways.

(f) *Maximise Consumer and Citizen Choice*

ASTRA is of the view that the consumer outcomes should be imperative to the review, and should include examining the potential for enhanced competition to maximise consumer and citizen choice and access to the broadest and most diverse range of content as possible.

(g) *Spectrum Allocation*

ASTRA supports consideration of spectrum allocation arrangements in the context of a converged environment. ASTRA agrees with the Convergence Review Background Paper that broadcasting spectrum is a finite and potentially very valuable resource. ASTRA would welcome a refinement of the terms of reference to emphasise the need for the Committee to take into account not only the appropriate processes for managing allocating spectrum, but also spectrum pricing and the underlying policy rationale for future spectrum allocation.