



ASTRA Submission to: Consultation on Proposed Amendment to the Anti-terrorism (Narrowcast Television) Standards

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Introduction

ASTRA welcomes the opportunity to comment on the proposed amendment to the Anti-terrorism Standards by the ACMA in its Investigation report on Al-Manar Television programming, dated December 2010 (the "Proposed Standards").

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. These include a number of narrowcast channels including World Movies, the Adult Channel, Sky Channel, Main Event, and a variety of non-English channels.

Comment on the Proposed Standards

ASTRA strongly supports the principle that programming should not advocate the doing of a terrorist act. However, ASTRA does not believe that the Proposed Standard that applies to the *Broadcasting Services (Anti-terrorism Requirements for Subscription Television Services) Standard 2008* (the "Standard") is an appropriate mechanism for dealing with this issue, and, as such, could place the continued broadcast of certain subscription television narrowcasting services in jeopardy, thereby limiting the voices that are available to members of the public who choose to subscribe to subscription television services.

Narrowcast Codes of Practice

ASTRA disagrees with the ACMA's conclusion that the Subscription Narrowcast Codes of Practice (the "Codes") do not adequately deal with the application of terrorist material "that is easily apparent". The Codes include a statement that clearly prohibits broadcasting any program which is likely to incite or perpetuate hatred, or vilify, any person or group on the basis of ethnicity, nationality, race or religion (among other prohibitions). The Codes are currently the subject of review by the ACMA; if the ACMA does not believe that the Codes adequately deal with the issue of terrorism material, then ASTRA believes that this matter is best dealt with in a revision of the Codes that would prohibit the broadcasting of any program that advocates the doing of a terrorist act, as that term is defined in the *Criminal Code*. ASTRA further believes that, in circumstances where a broadcaster located in Australia is interposed between the viewer and the channel supplier (as opposed to open broadcast channels, which may originate and have no connection to Australia or a provider in Australia) and the viewer has a contractual relationship with the broadcaster, then it is more appropriate for the broadcaster to handle any complaints relating to programming in the first instance. Broadcasters have direct relationships with their channel suppliers, and are best placed to handle inappropriate content, particularly where there is real doubt as to whether the relevant program has breached the Codes.

Application beyond Narrowcasting Television Services

ASTRA is also concerned with the inequity of the Proposed Standards and the application of the Standard generally. We note that there is no proposal to implement the Proposed Standards or the Standard itself on other media sectors, in particular the radio sector, other television sectors or by Internet Service Providers ("ISPs"). In a convergent media world, limiting the scope of the Standards and the Proposed Standards, and in particular the strict liability provisions of the Standards, to open narrowcasting and subscription narrowcasting television services places a far higher burden on narrowcast broadcasters than on providers of media services via other mediums. While ISPs will be subject only to take down procedures in place for restricted content, subscription television narrowcasting licence holders are subject to strict liability offences for

breaches of the Standard (and, although not clearly stated, may be similarly liable in the Proposed Standards), even though such licence holders are no more responsible for the content of these channels than ISPs are responsible for the content delivered over the Internet.

Comment on wording of Proposed Standards

In light of above comments, ASTRA makes the following comments in relation to the wording of the Proposed Standards:

General Comments

As identified above, ASTRA believes that the matters raised in the Proposed Standards would be better dealt with in revisions to the Subscription Narrowcasting Codes of Practice than in their incorporation into the Standards. This is particularly the case where the ACMA determines to include language as broad as that drafted in the Proposed Standards.

Incorporation into Standards

From the wording of the Proposed Standards it is not clear whether the amendment to the Proposed Standards is intended to be incorporated within an existing section of the Standards, or is a new, additional section to the Standards. The Standards presently contain two primary anti-terrorism requirements: prohibition on broadcasting programs that can be reasonably understood to directly result in the recruitment for a listed terrorist and prohibition on broadcasting programs that would reasonably be understood as financing terrorism. A breach of either of these prohibitions is a strict liability offence. ASTRA has previously provided to submissions to the ACMA objecting to the strict liability attaching to breaches of these prohibitions, and reiterates and maintains this objection.

ASTRA seeks confirmation from the ACMA as to whether the Proposed Standards are intended to operate as a distinct sub-section to the Standards and that strict liability will not attach to a breach of the Proposed Standards. The wording of the Proposed Standards does not indicate that breaches of the Proposed Standards operate as strict liability offenses and therefore assumes that any breaches do **not** attract strict liability. ASTRA is strongly of the view that the Proposed Standards should not attract such liability, particularly in light of the breadth of the wording contained in the Proposed Standards compared to the wording contained in Sections 7 and 8 of the current Standards.

Wording of Proposed Standards

ASTRA is concerned with the breadth of the wording of the Proposed Standards. In particular, sub-section (2) of the Proposed Standards states that content advocates the doing of a terrorist act if it directly **or indirectly** counsels or urges the doing of a terrorist act or it directly **or indirectly** provides instruction on the doing of a terrorist act (sub-sections 2(a) and 2(b)). Further, sub-section 2(c) states that content advocates the doing of a terrorist act if it directly praises the doing of a terrorist act where there is a **risk** that such praise **might** have the effect of leading a person to engage in a terrorist act.

The wording highlighted above goes far beyond the language that is currently included in the Standard. Section 7 of the Standard requires that a licensee must not broadcast a program that would be **reasonably understood as directly** recruiting a person to join, or participate in the activities of, a listed terrorist. Section 8 of the Standard prohibits the broadcast of a program that would be **reasonably understood as soliciting funds** for a listed terrorist or assisting in the collection or provision of funds for a listed terrorist.

While some degree of subjectivity is required in order to determine what is reasonably understood to be recruiting for a listed terrorist or financing terrorism, the Proposed Standards are far too broad in their ability to

make subjective determinations, particularly in circumstances where a breach of the Proposed Standards would result in a breach of a licensee's licence conditions. ASTRA contends that the word "indirectly" should be removed from subclause 2(a) and 2(b) of the Proposed Standards, so that it provides greater certainty as to what constitutes advocating the doing of a terrorist act. Further, the words "material or serious" should be inserted before the word "risk" on the first line of subclause 2(c) so that a degree of risk must first be achieved before any action could be brought against a licensee.

ASTRA would be particularly concerned about any attempt to apply a strict liability offense to a breach of the Proposed Standards as they are currently drafted. The wording is far too broad in its application, and provides too great a discretion on the part of the ACMA to determine a breach of a licence condition that could result in the loss of a broadcasting licence, or a significant penalty, for content that the broadcaster itself had no part in producing. In order to provide the greatest certainty and fairness in such situations, the wording of the Proposed Standard should be precisely worded to cover specific and clearly defined actions that constitute advocating the doing of a terrorist act, rather than adopting open ended wording that allows for a high level of discretion to be applied by the ACMA in making its determination.

Conclusion

As mentioned previously, ASTRA strongly supports the principle that programming should not advocate the doing of a terrorist act, however ASTRA believes that the Proposed Standards, as drafted, place undue and onerous obligations on open and subscription narrowcast television licensees in comparison to other suppliers of media related services. While Schedule 7 of the *Broadcasting Services Act 1992* (Cth) (the *BSA*) provides for greater scope on the part of the ACMA to issue take down notices for content for which there is a substantial likelihood of being classified refused classification (*RC*) by the Classification Board as opposed to Schedule 2 of the *BSA* which applies to broadcast services and which prohibits content that has actually been classified *RC* by the Classification Board, the remedies for broadcasting or transmitting such content are vastly different. ISPs or content service providers are issued with take down notices under Schedule 7, whereas narrowcast licence holders would be in breach of their licences, with the possible loss of those licences a consequence.

ASTRA recommends that the ACMA adopt an approach that provides for the Proposed Standards to be incorporated into the subscription television Codes of Practice, that the wording of the Proposed Standards be narrowed so that it removes the broad discretion given to what constitutes advocating the doing of a terrorist act.

ASTRA and its member representatives would be happy to discuss the contents of this submission further with the ACMA at the ACMA's convenience.

Yours sincerely



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