



Submission to the Joint Select Committee on Broadcasting Legislation

9 April 2013

Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to make a submission to the Joint Select Committee on Broadcasting Legislation.

About ASTRA

ASTRA is the peak industry body for subscription television (STV) 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 STV operators, as well as channels that provide programming to these platforms. A list of ASTRA members is attached to this submission.

Overview of the STV Sector

The STV sector gives Australians access to quality, live, original and award-winning international and Australian programming across many genres, including movies, news, children's, documentaries, light entertainment, lifestyle and drama, live local and international sport, music, ethnic language, local weather and pay per view events.

In 2011–12, the Australian STV industry invested \$667 million in new Australian content across all genres of programming, an increase of 13% from 2010–11. Deloitte Access Economics estimates the overall direct contribution made by STV to the Australian economy at \$1.4 billion in 2011–12 and at least \$7 billion overall since the start of STV in 1995.

With over 200 channels (including HD and Plus 2) from over 20 different media companies broadcast on the Foxtel platform and channel packages offered through Telstra T-Box and Xbox 360, the breadth, range and diversity of STV programming remains unsurpassed in the Australian broadcasting environment. Received by 34% of Australians through their homes and over a million more through hotels, clubs and other entertainment and business venues, STV provides 24 hour news, sport and entertainment.

Comments against the Committee's terms of reference

(a) The abolition of the 75 per cent rule, particularly in relation to regional and local news

ASTRA strongly believes that a regulatory framework for media and communications that encourages competition and innovation is more likely to lead to increased diversity in news, information and commentary. The internet and other new media and communications platforms have opened up to consumers a wide array of news and information services from local, national and international sources. A vast range of alternative views and opinions on any topic of public interest are available on a national basis for Australian consumers if they choose to access them. ASTRA submits that existing general competition law provisions are sufficient to regulate potential issues of market power in the media and communications environment, including the ownership and control of media and communications companies.

While ASTRA is not opposed, in principle, to the repeal of the 75% reach rule for commercial free-to-air television (FTA) broadcasters we would, however, submit that any relaxation of the ownership and control provisions for commercial FTA television would be more appropriate if accompanied by further reforms to address the inherently anti-competitive regulatory framework for broadcasting generally, which favours the commercial FTA sector. Ongoing preferential treatment of commercial FTA broadcasters is evidenced by recent amendments to broadcasting legislation that brought a permanent reduction in licence fees (which remain to be set by reference to the revenue—and so success—of a business, rather than market rates for the public spectrum used) and confirmed the prohibition on new commercial television licences.

No other sector in Australia's media and communications environment is afforded the same protection from competition, as well as guaranteed access to spectrum (a scarce and valuable public resource) and continued preferential access to premium sporting content under the anti-siphoning scheme, as the commercial FTA television sector.

(b) Whether the Australian Communications and Media Authority (ACMA) should be required to examine program supply agreements for news and current affairs when determining whether a person is in control of a commercial television broadcasting service

ASTRA submits there is no reason or justification for program supply agreements for news and current affairs programs to be taken into account when determining whether a person is in control of a commercial television broadcasting service.

Determining 'control' of a commercial television broadcasting service (or any other media entity) should, amongst other things, continue to focus on the extent to which a person determines what content is provided to the public by that media entity across its schedule or broad product offering, not just in relation to particular programs produced under a supply agreement.

Involvement by journalists and commentators from one media entity with the news or current affairs programs or content produced or provided by another media entity is not new or novel – it has been common practice for decades. For example, journalists and commentators from Fairfax, News Ltd and other media entities regularly appear across a range of Sky News programs, just as they might appear on the ABC's *Insiders*. There is constant, almost daily, cross-over between television, radio, print and (increasingly) online journalists working for media outlets owned and controlled by different media companies.

The *Broadcasting Services Act 1992* (Cth) (BSA) provides well-established and accepted mechanisms for determining whether a person is in a position to control a licensed broadcasting service or newspaper, based on the extent of that person's ownership of that service or newspaper. While ASTRA may, in principle, question the ongoing relevance of media ownership and control provisions generally, so long as such provisions remain part of the regulatory environment they should remain clear and unambiguous to give certainty to all stakeholders, including the regulator charged with enforcing these provisions.

To add an additional layer of regulatory investigation that delves into the commercial arrangements between broadcasters and third-party providers will do no more than add uncertainty and, most likely, a degree of unnecessary subjectivity into the ACMA's assessment of the controlling interests of media organisations.

(c) On-air reporting of ACMA findings regarding Broadcasting regulation breaches

ASTRA considers it unnecessary to impose an additional obligation on STV broadcasters to report findings of broadcasting regulations breaches on air, and submits that existing provisions in the Subscription Broadcast Television Codes of Practice (SBT Codes), Subscription Narrowcast television Codes of Practice (SNT Codes) and Subscription Narrowcast Radio Codes of Practice (SNT Codes), subject to the enforcement powers already available to the ACMA, are sufficient.

Under the BSA, the ACMA monitors compliance with the Codes and can investigate complaints and take action where breaches occur. The regulatory framework provides the ACMA with appropriate powers to investigate and enforce the Codes, or to develop industry standards where, in the opinion of the ACMA, codes of practice are not working effectively.

Under the SBT Codes, STV broadcasters are already required to make reasonable efforts to correct significant errors of fact in news and current affairs programs at the earliest opportunity.¹ STV broadcasters take their obligations under the code very seriously, and there is no evidence that a new type of sanction is needed under the existing co-regulatory framework. We note that correcting errors is a matter of good journalistic practice, and that the number of complaints regarding news and current affairs programming (and content generally) on STV is extremely small. ASTRA is not aware of any investigations by the ACMA into news and current affairs programming provided by ASTRA members.

Furthermore, when an ACMA investigation does find a breach of a code provision or licence condition by a broadcaster, the ACMA publishes its findings on its website and routinely announces the results of such investigations, ensuring a significant level of publicity is generated in relation to any adverse findings against a licensee.²

Enforceable undertakings accepted by a licensee as agreed to by the ACMA in such circumstances can also include a requirement for the licensee to acknowledge the ACMA's findings on the broadcaster's website. In addition, section 205W(5) of the BSA specifically gives the ACMA the power to publish an undertaking on its website.

While there is no reason why enforceable undertakings could not include an obligation to broadcast an on-air response to an investigation, it may not always be appropriate to require an on-air broadcast of the investigation outcome. Indeed, the ACMA has previously said it will use its enforcement powers in a manner that, in the opinion of the ACMA, is most likely to produce regulatory arrangements that are stable, predictable and deal effectively with breaches of rules.³ In relation to enforcement, the ACMA has noted that it will tailor its response to particular breaches to reflect the individual circumstances of the case—and ASTRA notes that the circumstances may not warrant an on-air statement.⁴

An industry-based regulatory framework for content regulation provides flexibility and allows content providers to be more responsive to changes in community expectations about the suitability of content. Industry is best placed to assess – and resolve – complaints in the first instance.

From a STV perspective, providing appropriate community safeguards and resolving subscriber concerns is also an issue of customer relationship management. A STV provider has an existing commercial relationship with its customers and, being the first point of contact regarding customer concerns allows the business an opportunity to resolve complaints and, ultimately, retain its customers. The direct relationship STV broadcasters have with their customers provides a strong incentive to respond fully to any aggrieved subscriber, including to acknowledge any factual inaccuracies in news reporting or in relation to any other compliance issue.

In 2005, the Australian Government and the ACMA conducted extensive inquiries into the enforcement powers of the broadcasting regulator, including whether the ACMA should be

¹ SBT Codes of Practice, cl 2.2(b)(vi).

² See, for example, the recent ACMA media release regarding a breach of the Commercial Television Industry Code of Practice (4 April 2013): http://www.acma.gov.au/WEB/STANDARD/pc=PC_600194. This release generated significant media coverage – see, for example: <http://www.smh.com.au/entertainment/tv-and-radio/a-current-affair-report-on-olympic-medallist-is-flawed-acma-20130403-2h6tn.html>; <http://www.theaustralian.com.au/media/broadcast/nine-falls-foul-of-code-for-brooks-allegations/story-fna045gd-1226612036654>.

³ ACMA, *Guidelines relating to ACMA's enforcement powers under the Broadcasting Services Act 1992* (2007 ACMA Enforcement Guidelines), para 3.4, available at http://www.acma.gov.au/webwr/assets/main/lib101061/bsa_enforcement_guidelines.pdf.

⁴ 2007 ACMA Enforcement Guidelines, para 1.4. The ACMA has more recently noted that it will tailor enforcement response to the particular circumstances of the case in paras 4.7, 6.3 and 6.5 of its *Broadcasting Services Act 1992 – Enforcement Guidelines of the ACMA* (2011 ACMA Enforcement Guidelines), available at http://www.acma.gov.au/webwr/assets/main/lib101061/bsa_enforcement_guidelines.pdf.

given the power to require the broadcast of on-air statements of investigation findings. After considering all the evidence submitted to these inquiry processes, including from industry, community groups, and media academics, the Government of the day chose not to pursue requiring on-air statements by broadcasters as a specific enforcement option when introducing the relevant legislation in 2006.⁵

As University of Melbourne's Centre for Media and Communications Law noted in its submission to the then Government's 2005 review of the broadcasting regulatory powers of the ACMA, the broadcasting of on-air statements at the compulsion of the regulator raises significant free speech concerns – the role of media in relation to public discussion in Australia would make any such power significantly different from similar powers in relation to the regulation of other sectors of Australian industry.⁶ The principle of free speech requires that editorial content is determined by the media entity, not by the Government or a government agency.

ASTRA submits that circumstances have not changed since 2006 to an extent that would in any way warrant revisiting the approach then taken by Parliament in relation to the enforcement powers of the broadcasting regulator.

⁵ *Communications Legislation Amendment (Enforcement Powers) Act 2006* (Cth).

⁶ Centre for Media and Communications Law submission to the DCITA Review of the broadcasting regulatory powers of the ACMA, p.4, available at: http://www.archive.dcita.gov.au/data/assets/pdf_file/0010/35587/ACMA_powers_CMCL_submission_Dec_2005.pdf

ATTACHMENT: ASTRA Members

Subscription Television Platforms

Foxtel
Telstra

Channel Providers

Aurora
Australian Christian Channel
Australian News Channel
BBC Worldwide Channels Australasia
Discovery Networks
E! Entertainment
ESPN
Eurosport
Expo Networks
FOX Sports
MTV Networks
National Geographic
NBC Universal
Nickelodeon
SBS Subscription TV
Setanta Sports Australia
Sky Racing
Turner International (Australia)
TV1
TVN
TVSN
Walt Disney Company (Australia) Pty Ltd

Associate Members

Ai Media
Ignite Media
Multi Channel Network
BSA