



***Content and Access:
The future of program standards and captioning
requirements on digital television multi-
channels (Discussion Paper).***

December 31, 2009

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1. Overview

This submission is prepared in response to the Government's Discussion Paper, *Content and access: The future of program standards and captioning requirements on digital television multi-channels (Discussion Paper)*.

The structure of this response is as follows:

1. It outlines ASTRA concerns with the approach in the Discussion Paper.
2. It proposes a policy approach to captioning/content on multi-channels.

2. Executive Summary

ASTRA welcomes the opportunity to comment on this paper.

The key points ASTRA makes in response to the Discussion Paper are as follows.

ASTRA believes that there are some significant problems with the approach adopted in the Discussion Paper. Specifically these include the below.

- The Discussion Paper has not undertaken sufficient analysis of the rise of the digital economy, the fundamental changes in the way Australians consume media and the impact of this on traditional media business models and regulatory approaches.
- The Discussion Paper has not taken into account the fact that current media policy settings substantially favour the old television networks. It recommends some policy changes that would substantially advantage the old television networks without due regard to the extensive regulatory protections the old networks already enjoy.
- The Discussion Paper has not analysed the inter-relationship between media policy settings and the fact that it is not possible to change one media policy setting in favour of one section of the media without a detrimental impact on other parts of the media.
- The Discussion Paper has not adequately dealt with the fact that the old television networks are using their multi-channels in direct competition to subscription television. It does not therefore sufficiently assess the competitive impact of changes to regulation.

There is a significant danger that policy made without taking into account these facts will have unintended consequences that may advantage a section of the media over others, undermine incentives to invest and ultimately be detrimental to media companies generally and consumers.

ASTRA therefore proposes the following:

- **Comprehensive Review** – the Government make it clear that it will look at captioning and content obligations on the multi-channels as part of a comprehensive review of all media policy settings. The Government already flagged the need for such a review in its paper on

regulatory setting that could apply as part of the NBN roll-out.¹ We note the Government's intention to conduct this review in 2011. It must be finalised well ahead of analogue switch-off in metropolitan areas.

- **Transitional arrangements** – ASTRA accepts that due to the switch-off time table up to 15 non-metropolitan licence areas will be subject to captioning and Australian content obligations that it may be difficult to meet if major metropolitan broadcasters (on which they rely for programming) are not yet required to meet such obligations.

For these broadcasters ASTRA proposes there be a temporary exemption from captioning and Australian content obligations pending the Comprehensive review.

If in this broader review the Government decides to keep in place the current Australian content and captioning obligations that currently apply after switch-off to metropolitan broadcasters then these obligations must flow through to regional broadcasters.

Any temporary exemption from captioning and Australian content obligations for regional operators must not be taken as a precedent for what will apply to the old networks generally after full switch-off.

¹ National Broadband Network: Regulatory Reform for the 21st Century, April 2009

3. ASTRA and the Subscription TV Industry

The subscription TV industry is the undisputed market leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, it is received nationally by 32% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues. It is the future of broadcast entertainment and is represented by ASTRA.

ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to underpin and propel the new era in competition and consumer choice that these new services have brought to broadcasting, communications and entertainment in Australia.

Subscription broadcasting and open and subscription narrowcasting services were new categories of broadcasting services introduced by the Broadcasting Services Act 1992 (Cth) ('BSA'). These new services added to the mix of existing categories of service, those being the national broadcasting services; commercial broadcasting services (commercial television and radio); and community broadcasting services.

ASTRA's current membership includes the major subscription TV platforms as well as the many channels that provide programming to these platforms. Other members include communications companies such as OPTUS and Telstra. A complete list of ASTRA members can be found at www.astra.org.au/members.asp.

Today, subscription TV channels provided by ASTRA members are broadcast on the FOXTEL, AUSTAR and OPTUS subscription TV platforms. These channels are available to over two million residential subscribers² and are directly accessible by more than seven million³ people.

Since its inception, over \$A9 billion dollars has been invested in infrastructure, capital, facilities, productions, programs and services in order to establish and develop the subscription TV industry. ASTRA's members are responsible for the bulk of this investment which has been distributed throughout metropolitan, regional and remote markets. Consequently, the sector has created an enormous number of jobs, investment, infrastructure and production content throughout Australia.

The industry continues to invest heavily in its own growth and the growth of the Australian film and television broadcast sectors including the continuing investment in television programming and production.

² XYZ Basic Subscribers, 30 June 2009

³ OzTAM NatSTV UEs, 2009Q2

4. Overall concerns with Discussion Paper

Rise of the digital economy

ASTRA believes that a deficiency with the Discussion Paper is that it does not sufficiently put captioning and Australian content obligations within the broader context of what is happening with the rise of the digital economy and the rapid technological developments and implications driven by the impending roll-out of the NBN.

As is widely accepted, rapid technological change and the rise of the digital economy are fundamentally affecting consumer behaviour. Audiences are fragmenting, consumers are demanding greater personalisation and control over what they watch, and traditional business models are under threat.

Price Waterhouse Coopers has examined such consumer trends both globally and in Australia and identifies these trends as follows:

The core driver of the new behaviour is consumer's growing demand for greater control over the content they want. From mobile internet to online communities and from movies on demand to the uploading of self generated content advances in digital technology are increasingly enabling that control....Consumers nowadays want to decide for themselves what they consume, as well as how, when and where they consume it.⁴

These new forms of technology and changing consumption habits are reflected in the revenue forecasts for different forms of media. For instance Price Waterhouse Coopers has forecast that over the 2011-2013 period the compound annual growth in advertising revenue (CAGR) for the old networks will be 2.3% while for magazines it will be 4.2%, for internet 12.2% (on top of healthy growth of 14% over 2009-10) and 7.5% growth for subscription televisions⁵. These differential growth rates do not represent a contrivance against the old television networks but rather reflect the changing technology and the consumption patterns of consumers expressed each day.

While the old television networks will retain strong operating margins going forward and remain the vehicle for programming of broad appeal, ASTRA does not believe that Australian content obligations can be considered in isolation of these fundamental shifts in media in Australia.

These shifts in media consumption will be accelerated by the deployment of the NBN and the technological capabilities that it will deliver. ASTRA believes that a holistic approach to media and broadcasting policy needs to be taken within the context of the new digital economy and NBN.

⁴ PricewaterhouseCoopers' Global Entertainment & Media Outlook 2009-2013

⁵ Ibid (NB the growth figure for subscription television only includes advertising revenue)

Current media policy settings are not considered

A significant deficiency in the Discussion Paper is that it does not sufficiently consider content and captioning obligations on the multi-channels in light of the overall media policy settings which favour the old networks.

All independent bodies such as the Productivity Commission and the ACCC agree the current regulatory framework favours the terrestrial networks and discriminates against new entrants such as subscription television.

- There is a prohibition on a 4th commercial terrestrial network – extended five years by the previous Government to 2013.
- The terrestrial networks were each gifted 7Mhz of spectrum in 1998 – a gift the previous Government extended another five years to 2013.
- Two free blocks of spectrum can only be used to provide restricted services – which protects the terrestrial networks advertising streams.
- Over 1300 sporting events are reserved first for the terrestrial networks under the anti-siphoning list – the longest such list in the world.
- Some of these concessions – such as the gifted spectrum - were provided to the terrestrial networks on the basis that the networks would drive digital television take up so that the Government could switch off the analogue television signal by 2008. The old networks have not delivered.

These broader policy settings and protections afforded to the old networks together with the “degree of influence” they hold must be considered in the context of any review of their regulatory obligations.

Media policy settings inter-related

Another issue with the Discussion Paper is that it considers content and captioning obligations in isolation from other media policy settings and therefore does not properly consider the follow on effects that changes to one media policy setting can have for other operators in the media landscape.

Multiple bodies have pointed out that such an approach to media policy setting is far from optimum. The ACCC has said that, “various regulations applying to the pay TV and FTA sectors should not be considered in isolation but should be considered in the context of a comprehensive review.”⁶

The danger of conducting a review in isolation without looking at the inter-relationships between overall policy settings is that it risks an uncoordinated approach, which does not take into account the flow on effects to other sectors in the media sector and consumers more generally.

ASTRA therefore believes that any review of the content and captioning obligations that apply to the multi-channels of the old television networks should be conducted within an overall review of media policy settings.

⁶ Australian Competition and Consumer Commission, Emerging Market Structures in the Communications Sector, 2003, Page 62

Old networks using multi-channelling to compete head to head with STV

ASTRA believes that the Discussion Paper has not provided sufficient weight to the extent to which the old television networks – under the Freeview brand – are using their multi-channels to compete against the subscription television sector.

The Discussion Paper fails to recognise the competing nature of these channels and in turn fails to acknowledge the need to ensure a level regulatory playing field. An outcome that delivers lighter or no regulation for the multi-channels of the old networks must then allow for a corresponding amelioration of the regulatory obligations imposed on the multi-channels of the subscription networks. A failure to consider these impacts and tackle these imbalances would be highly detrimental to the competitive nature of the television industry in Australia.

That the old networks are using Freeview to intensify their competition against subscription television is clear from their executive and their behaviour.

For instance, Nine Network executive Les Samson has said “(Freeview) would be in competition with FOXTEL and other subscription television services... the fact we are able to give all these extra choices”.⁷

And Kim Dalton, Director of ABC Television recently proclaimed, “Our shared future lies in the fragmenting digital environment that is threatening all the traditional revenue models underpinning the production of Australian content while providing opportunities for ever increasing levels of foreign content to be available to Australian audiences.”⁸

Similarly, the Freeview tag line on their web site pits Freeview against subscription television saying, “Why pay for TV when Freeview digital television gives you more shows and better pictures for free”.⁹

More over the ability of the old networks to use their multi-channels to compete against subscription television was significantly enhanced by the ACMA’s decision to effectively grant the old television networks additional commercial advertising time in November 2008 to advertise Freeview.

The Freeview Code of Practice section 5.5.11 states “a promotion, announcement, or information segment which is broadcast without charge or consideration by the licensee and which promotes digital television services, provided that no specific product or brand is promoted or endorsed (unless that product or brand is Freeview). Such a digital promotion, announcement or information segment may include reference to or depictions of a specific program, programs or channel broadcast by the licensee, provided that the primary focus of the spot is the promotion of digital television 5.5.11.1 for the purposes of clause 5.5.11 “**Freeview**” means Freeview Australia Pty Limited, the company formed by the Australian free to air television broadcasters to promote the digital free to view platform.”¹⁰

This has enabled the old television networks to run a series of advertisements – worth tens of millions of dollars – that promotes Freeview against subscription television – without foregoing normal advertising revenue

⁷ The Advertiser, 5 September 2008

⁸ SPAA National Conference Plenary Address by Kim Dalton Director of ABC Television, 19 November 2009

⁹ <http://www.freeview.com.au/>

¹⁰ Freeview Code of Practice, <http://www.freeview.com.au/>

According to the Commercial Economic Advisory Service of Australia (CEASA) figures, advertising on Free TV represents 28 per cent of the total \$11.5 billion spent on advertising in main media during the period July 2008 to June 2009.¹¹

Therefore, it is imperative that consideration of changing obligations on the multi-channels take into account the competitive flow-on effect that this has on our sector. This is particularly so given the old networks are using their multi-channels to compete much more intensely against subscription television

¹¹ Free TV 2009 Year in Review, page 43

5. Policy Proposal

ASTRA's overall view then is that in assessing the question of obligations that apply to the multi-channels it is critical to take into account:

- The implications of the rise of the digital economy and the roll-out of the NBN
- The broader media policy settings of the old networks including the protections afforded to them
- The fact that media settings are interrelated
- Multi-channelling is competing against subscription television and a level playing field is required in the context of setting future regulation.

ASTRA does not believe that the Discussion Paper has adequately addressed these issues to enable detailed or rigorously enough analysis of various policy options to be undertaken or sufficiently considered the follow on effects of changes to the competition position of our sector.

There is a significant danger then that policy changes made without taking into account these facts will have unintended consequences that may be detrimental to broadcasters, content providers and consumers.

In light of this ASTRA therefore recommends the following:

- **Comprehensive review** – the Government make it clear that it will look at captioning and content obligations on the multi-channels as part of a comprehensive review of all media policy settings. The Government already flagged the need for such a review in its paper on regulatory setting that could apply as part of the NBN roll-out.¹² We note the Government's intention to conduct this review in 2011. It must be finalised well ahead of analogue switch-off in metropolitan areas.
- **Transitional arrangements** – By 2011, ASTRA understands that 15 Switch-over areas will have had their analogue television signals switched-off under the Government's switchover timetable and therefore be subject to the same content and captioning obligations as the main channel, in the absence of changes to the *Broadcasting Services Act*.

ASTRA agrees with the Discussion Paper that the economics of such regional networks meeting Australian content and captioning obligations on their multi-channels in the absence of the metropolitan broadcasts meeting these obligations are very challenging.

We therefore accept that such networks – if they do roll out a multi-channel – should be exempt from Australian content and captioning obligations in the interim until the more comprehensive review is undertaken.

If in this broader review the Government decides to keep in place the current Australian content and captioning obligations that currently apply after switch-off to metropolitan broadcasters then these obligations would need to flow through to regional broadcasters.

Any temporary exemption from captioning and Australian content obligations for regional operators must not be taken as a precedent for what will apply to the old networks generally after full switch off.

¹² National Broadband Network: Regulatory Reform for the 21st Century, April 2009

6. Conclusion

As ASTRA has stated, we believe a holistic approach to media and broadcasting policy is required which recognises the many competing interests and services available to consumers for media consumption today.

A piecemeal approach to the setting of new regulation in this sector without acknowledging the rise of the digital economy; the impact of the National Broadband Network (NBN); the current policy settings and existing protections for the old television networks; and the increasing competitive nature of television services will be detrimental to the future success of the industry.

We urge the Government to undertake a comprehensive review of these issues as part of its wider review of broadcasting policy over the next 2 years.

A failure to consider these impacts and tackle these imbalances would be highly detrimental to the competitive nature of the television industry in Australia.