14 February 2017

By email: IP.PCInquiry@industry.gov.au

Dear Sir/Madam

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Final Report of the Productivity Commission's Inquiry into Australia's Intellectual Property Arrangements.

About ASTRA

ASTRA is the peak industry body for subscription media in Australia. ASTRA's membership includes the major subscription TV operators, as well as over 20 independently owned and operated entities that provide programming to these platforms, including Australian-based representatives of international media companies, small domestic channel groups and community-based organisations.

ASTRA's members make use of intellectual property arrangements to enable the delivery to consumers of a diverse range of news, information, sport and entertainment programs which convey significant social benefits to a broad cross-section of the Australian community. In 2016, one third of Australian households subscribe, along with millions more who watch subscription content in public venues. Every week more than 1000 hours of first-run locally produced content is broadcast, as well as the best international content.

We refer to our earlier submissions to the Productivity Commission's inquiry, which set out the importance of balanced copyright arrangements for a sustainable local content delivery industry, and in turn, investment in Australian production. A system which permits copyright owners to ensure fair return on investment supports a subscription television industry which last year invested more than $893 million in local content production ($6.5 billion has been invested over 10 years), added $2 billion to the economy, and created jobs for 8340 Australians.

ASTRA also refers to separate submissions from ASTRA members Foxtel, Telstra, Viacom International Media Networks and others, which will set out individual ASTRA members' views on the range of copyright recommendations in the Final Report.

Consultation on the Final Report

ASTRA welcomes the Government's statements that in forming its views on the Commission's recommendations, it will consider all material submitted to the Productivity Commission throughout its inquiry process. We note the invitation to comment relates to issues raised in the Final Report that stakeholders may not have had the opportunity to comment on, and in particular, additional recommendations to those contained in the Draft Report.

To this end, we note that the Final Report contains a recommendation regarding technological protection measures (TPMs), which was not contained in the Draft Report (recommendation 5.1). TPMs are one of the main ways in which rights-holders and content creators enforce territorial licensing, and hence in considering the Final Report, ASTRA has looked at the cumulative impact of the recommendations relating to TPMs and circumvention of territorial licensing together.

The effect of recommendation 5.1 (amending the Copyright Act to make contract terms which override copyright exceptions unenforceable and to permit consumers to circumvent TPMs for the purposes of such exceptions) would be to further exacerbate the destructive impacts of the proposals relating to evasion of territorial licensing (recommendation 5.2). For these reasons, ASTRA would like to make additional comments regarding the cumulative impact of recommendations 5.1 and 5.2.

Please note that the comments in this submission regarding geographic licensing do not represent those of Telstra.

Territorial licensing and TPMs

Recommendations 5.1 and 5.2

ASTRA does not support these recommendations.

As outlined below and in previous submissions, the viability of local media businesses is inextricably linked to territorial licensing (and the ability to enforce that including via TPMs). By encouraging disruption of territorial licensing, recommendations 5.1 and 5.2, if adopted and implemented by the Government, would put the Australian media industry, cultural objectives, highly popular services and thousands of jobs at immediate risk.

The risks of disrupting territorial licensing

In responding to recommendation 5.1 and 5.2, ASTRA makes reference to its submission to the Draft Report and to the submission made by ASTRA member Foxtel. In those submissions, we explained in depth the importance of territorial licensing to the continued production of Australian film and television content.

Australians continue to place a high value on seeing themselves, their culture and national identity reflected back to them via the screen, with Australian television programs dominating the most watched programs each day, week and year. In this way, it is the Australian public which has the most to lose from widespread evasion of territorial licensing. This impact has not been foreseen or acknowledged by the Commission in its Final Report.

As outlined in our earlier evidence, geoblocking and TPMs are crucial to a viable and sustainable Australia media industry. They enable Australian content businesses to acquire relatively inexpensive content from international suppliers and also allow creators of content to secure a fair return on their investment. Securing finance for

Australian productions is increasingly difficult and therefore the industry needs the flexibility to select the most economically effective means of doing this. At this point in time, this involves territorial licensing and without the ability to pre-sell productions on a territorial basis, contributors of finance would not be able justify risking the levels of investment required to produce high-quality programming.

The importance of territorial licensing in the content creation ecosystem is well described by the European Broadcasting Union in its recent comments on the key findings of the European Commission's Preliminary Report on the E-Commerce Sector Inquiry:

> "As a rule, the production of quality content requires significant investment in terms of funds, time, facilities and other resources. Moreover, digital audiovisual content is a product that is subject to a highly uncertain consumer demand; the success of a film or a TV series depends on viewer preferences that are not easy to predict. Therefore this is a high-risk market with low demand predictability; short product lifecycles; low substitutability; and a short, focused marketing burst at time of launch. While for most products the socially optimal price is considered to be its marginal cost, it would be impossible to recover programme and film production costs on this basis.
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> "This requires differential pricing, which is recognised and enabled through the copyright and licensing regime, including the ability to choose to licence and offer services on different territorial bases and on different platforms in different windows within each territory. In fact, this flexibility allows producers and distributors to experiment with different release combinations in a way that balances financing demands with evolving audience expectations and the opportunities provided by new technologies.
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> "In the event that rights holders are prevented from exclusively licensing the content they produce on a country-by-country basis, the cumulative value of the rights concerned would be significantly reduced in terms of both viewership and revenues because the flexibility to design optimum distribution in each territory would be lost. Many productions would either be of lower quality […] or simply would not be made at all."[1]

We refer to ASTRA's and Foxtel's earlier submissions which set out in more detail the ways in which territorial licensing sustains a viable Australian industry.

The Productivity Commission's discussion of TPMs, including the related discussion on contracting out, seems oblivious to the real world implications of its proposals. TPMs are part and parcel of how the subscription media industries distribute their products. The subscription TV industry's ability to innovate new methods of distribution and implement different business models is currently dependent on execution through TPMs. It is impossible to separate circumvention of TPMs from our businesses.

As a practical matter, it is obvious that if circumvention services and technology are widely available, along with a widespread belief in a right to circumvent, the rule will be circumvention of TPMs – meaning evisceration of geo-blocking and the

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[1] http://ec.europa.eu/competition/antitrust/e_commerce_files/european_broadcasting_union_en.pdf pp 6-7

distribution models made possible by TPMs. Indeed, there a number of examples of Australian video products and models that would not exist without reliable TPMs, including subscription video on demand services such as Stan, and catch-up video on demand services such as ABC iView, Seven's Plus7, SBS On Demand and similar services from the other free TV broadcasters, all of which require the use of robust and effective TPMs.

The impact on local businesses and jobs

We are also disappointed that in considering evasion of geo-blocking, the Commission has not acknowledged the importance of Australian productions as a cultural output, and further, has not considered the impact of its recommendations on local jobs and long-term industry sustainability.

The proposals would have a negative impact across all of ASTRA's members, including both local broadcasters and distributors, and local representatives of larger international companies.

Foxtel has outlined the impact that disruption of territorial licensing would have on its business as both an acquirer/distributor of content, and as a creator of Australian content:

- Foxtel relies on purchasing relatively inexpensive content from international suppliers to subsidise the cost of investing in local production.
- If territorial licensing (and enforcement via TPMs) were not possible, rights holders are likely to sell rights on a pan-continental or global basis, which will increase the cost of Foxtel acquiring those rights. It is unlikely Foxtel will have the resources to acquire global distribution rights to international content.
- At the same time, removing Foxtel's ability to geographically licence its own content for overseas distribution will prevent Foxtel from maximising its return on its investment in Australian content.
- Both of the above factors will negatively impact Foxtel's ability and incentive to fund the creation of premium Australian content.
- Therefore, the recommendations 5.1 and 5.2, if implemented, are likely to lead to a dramatic reduction in:
    - the amount of premium overseas content on Foxtel services; and
    - original Australian programming commissioned and broadcast on Foxtel, which in turn will have a significant impact on Australia's production sector.

Fox Sports notes the following impact from increased evasion of geographic licensing:

- Sports rights-holders divide and sell rights into regions or single territories to maximise revenue in each territory. Global deals are rare. Broadcasters and others compete and pay a premium to acquire the exclusive rights to that content for their region. Fox Sports predominately acquires rights only for Australia. If viewers in Australia can access the same content from outside Australia, this removes any incentive to retain or purchase a subscription to an Australian based subscription service.

- Encouraging Australian viewers to circumvent geographic licensing would mean Australian advertisers would lose more audiences to overseas content, further exacerbating the pre-existing loss of advertising spend from broadcast to online. Australian advertisers are then likely to buy advertising space from overseas content providers and platforms rather than Australian content providers.

- Fox Sports often acquires rights that are sublicensed on to free-to-air broadcasters in Australia. If viewers can obtain the same content Fox Sports acquires from outside Australia, free-to-air broadcasters will pay less to Fox Sports for the content, or not acquire the content at all. Without the free-to-air broadcasters' contribution to the cost of acquiring that content, the cost for Fox Sports would become prohibitive and Fox Sports would not be able to provide that content to Australian viewers.

- Revenue from Fox Sports' channel supply agreement with platform-provider Foxtel would be reduced due to the 'churn' created by subscribers leaving Foxtel and accessing content from offshore content providers.

- The overarching impact on Fox Sports and the content industry generally in Australia would be:

    - Substantial job losses in Australian subscription television, advertising and media industries;
    - Fewer opportunities for young Australians wishing to work in the media and content business;
    - Multi-national broadcasting companies would downsize their operations in Australia;
    - A substantial loss of advertising revenue to offshore entities;
    - Revenue from syndication of content to free-to-air broadcasters would be substantially reduced;
    - Revenue from the channel supply agreement with Foxtel would be reduced; and
    - Fox Sports would have to reduce its spending on acquisition of rights and production.

Comments on the Final Report's analysis

ASTRA would like to provide some comments on the analysis contained in the Commission's Final Report.

For proposals which could have far-reaching impacts for Australian industry, jobs and cultural outcomes, the Final Report's analysis of territorial licensing and TPMs is disappointingly brief and lacking in substance, evidence and context.

The Final Report posits that "consumers would benefit from clarity in the law". However, it must be made clear that any short-term individual benefit to a person who accesses content not licensed for Australia would be offset many times over by the loss to all Australians which would result from the long-term decline of local Australian media businesses and the production industry generally. The

Commission's recommendations would harm consumers, rather than benefit them, the latter being their stated objective.

Perhaps the most concerning part of the chapter is the Commission's lack of consideration of the extensive evidence provided throughout the inquiry regarding the potentially devastating impacts of disrupting territorial licensing. The Final Report references the arguments of rights-holders, but goes on to dismiss them offering only the following rebuttal:

> "Such arguments typically ignore other factors driving the demand for, and supply of, Australian content. In the audio-visual sector, these include the significant local content requirements imposed on holders of broadcast licenses."

It would appear the Commission has dismissed the evidence of content creators out of hand. Further, the simplistic and dismissive reference to quotas fails to understand that transmission and expenditure quotas are of no effect if there are no viable local businesses to fund and distribute the content that the quotas seek to mandate.

With most broadcasters exceeding legislated minimums, it is also more likely that the fundamental driver behind Australian content production is audience demand. Yet the Productivity Commission has completely failed to appreciate the importance of local content to Australian audiences, advocating measures which could fatally undermine the business case for the continued production of that content.

The lack of meaningful engagement with the arguments of rights-holders means this chapter can be of no use as a tool for policy-makers and the Government.

Continued reference to outdated and irrelevant material

We wish to draw to the Government's attention the continued reliance by the Commission on the 2013 House of Representatives Standing Committee on Infrastructure and Communications report on IT pricing. As noted in Foxtel's submission to the Draft Report:

- The IT pricing inquiry was hampered by a lack of comprehensive data (this was acknowledged by the Commission).
- The findings of the inquiry were based on evidence relating not to television content and film, but to software and digital downloads, music, games and e-books.
- Even if the inquiry had made findings in relation to film and television content, those findings would now be radically out of date, given the emergence of a range of new sources of content and significant changes in product pricing and access in the subscription TV sector.

It is therefore of great concern that recommendations 5.1 and 5.2 appear to be largely based on the findings of the IT pricing inquiry. It suggests the Commission is out of touch with the everyday reality of the content market in Australia. This further degrades the utility of the report as a basis on which to make Government policy decisions.

Pricing and availability of content

ASTRA acknowledges that part of the answer to the circumvention of geographic licensing is to ensure timely and cost-effective access to a broad range copyright protected works, and that this is the responsibility of the content distribution industry.

ASTRA makes reference to its submission to the Draft Report which included a detailed explanation of the ways in which the subscription television industry has responded to competitive pressures by making its content more affordable and timely than ever before.

Since that submission, Foxtel has announced major changes to the content and pricing of its IP-delivered Foxtel Play streaming service. Foxtel Play offers low prices and flexible packages, without the need to sign up to a fixed term contract. Customers who use an IP connection, with their own device are able access five different entry level tiers to match their interests. There are two options for drama priced at $15 per month each or $25 for both. For $10 a month, there is one option for Lifestyle, one for Documentary and one for Kids. In addition, customers are able to take the Sports tier for an extra $29 per month and the Movies tier for an additional $20 per month.

Subscribers have access to all linear channels in the tier along with all of the on-demand, catch up and library content available to that tier plus mobile and tablet access via Foxtel Go.

The industry has clearly moved to address the challenges arising from consumers' demands for affordable and timely content.

However, there is still a need for support from sound Government decision-making in IP policy. We submit that, for the reasons outlined above, the Commission's Final Report should not form a large part of that Government decision-making.

Thank you again for the opportunity to provide comment on the Final Report. If you have any queries in relation to the above, please contact Holly Brimble, Policy and Regulatory Manager (holly.brimble@astra.org.au).

Yours sincerely

Andrew Maiden
CEO