



**Submission to the Convergence Review Committee in response to the
Committee's Interim Report**

10 February 2012

1. Introduction

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Convergence Review Committee's Interim Report.

2. 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.

The STV industry is the undisputed leader of digital broadcasting in Australia. 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.

The STV sector contributes to the Australian economy in a variety of ways, both directly (in terms of the value it adds to national GDP and employment) and indirectly through providing greater product innovation and consumer choice. The direct economic contribution of STV to the Australian economy in 2009-10 is estimated at approximately \$700 million and over \$5 billion since its inception, employing 7,410 people (including platform outsourcing) in 2010.

In 2010, STV platforms and channels invested \$578.4 million into Australian content, an increase from \$541.4 million in 2009, contributing an estimated \$223 million to the Australian economy.

3. Overview/general comments

The Convergence Review has provided a unique opportunity for a holistic re-assessment of the existing regulatory frameworks for media and communications in an increasingly converged environment. While ASTRA supports the direction the Committee has attempted to take with some of its recommendations, the review process appears to have left largely unexamined some highly significant features of the existing regulatory regime such as anti-siphoning and the moratorium on additional commercial television broadcasting licences. Additionally, consideration of other issues that have been raised by the Committee, such as the future use of unassigned broadcast spectrum, appear now to have been deferred to separate ongoing or upcoming Government reviews.¹

In ASTRA's view, the exclusion of these issues means that the Committee's analysis of the regulatory environment for media and communications is not complete and could not be considered a holistic assessment of the current and future regulatory framework. As ASTRA stated in its submission to the Discussion Papers, commercial FTA broadcasters currently occupy a distinct or "special" place in the Australian media sector, enjoying a continuing

¹ ASTRA notes that, with the enactment of the *Broadcasting Services Amendment (Review of Future Uses of Broadcasting Services Bands Spectrum) Act 2011* on 5 December 2011, the review regarding the allocation of additional commercial television licences that was scheduled to occur before the 1 January 2012 has been scrapped, to be replaced by a broader review of the future use of broadcast spectrum, to be undertaken before 1 January 2013.

significant degree of influence through universal penetration into Australian homes. The existing regulatory framework gives commercial FTA broadcasters guaranteed access to public spectrum (including additional spectrum for digital switchover at no additional cost) and exclusive access to sports content, as well as restricting the entry of new commercial television operators in broadcast spectrum. The diagram at Attachment A demonstrates the balance of regulatory obligations and benefits under existing regulatory frameworks.

While ASTRA notes the Committee's previous acknowledgement of the balance of regulatory benefits and obligations that apply to the FTA sector,² ASTRA submits that the Committee has developed a range of recommendations that would have the effect of increasing regulatory intervention generally across all sectors – except for FTA television broadcasters – while addressing only a portion of the regulatory imbalances that continue to give these operators significant competitive advantages. As such, ASTRA registers its strong opposition to the Committee's recommendations for:

- A body other than the Australian Competition and Consumer Commission (ACCC) to deal with content-related competition issues;
- The concept of 'Content Service Enterprise', to the extent that it does not take into account existing regulatory imbalances or community expectations regarding how different services should be regulated;
- An expansion of the 'number of voices' rule to services not currently subject to regulation, including STV;
- The introduction of a 'public interest test' on media mergers, which would be inherently subjective and be vulnerable to political influence;
- New rules to regulate competition issues in content and communications markets;
- Increasing Australian content requirements for the STV sector, and expanding Australian content requirements generally, while retaining a number of regulatory benefits and protections for the FTA sector;
- An approach to implementation that would appear to favour changes in the short term likely to give regulatory relief to FTA broadcasters, increasing the competitive advantage these broadcasters already enjoy.

Also, while ASTRA recognises that the Interim Report is deliberately pitched at a high level, with the expectation of more explanatory material in the final report, by releasing generalised and sparsely detailed recommendations for reform (with potentially highly significant impacts on many media and communications organisations) the Committee has not given stakeholders or the community at large the opportunity to understand the considerations that have led to its conclusions. Little or no evidence is presented in the Interim Report to justify or inform the Committee's recommendations. Rather, we are left to assume the weight or otherwise that the Committee has given to the range of inputs made during the Review. This approach limits the extent to which submitters are able to provide meaningful and informed comment on the Committee's conclusions.

Notwithstanding our significant concerns with the parameters of the Review and the recommendations of the Interim Report ASTRA does support, in principle, the following recommendations of the Committee:

- moves towards a market-price approach to the allocation of broadcast spectrum, noting that the value of licence fees currently paid by commercial television broadcasters is considerably less than the market value of the spectrum they use;

² Convergence Review Emerging Issues Paper, pp.19-20.

- the separation of content and carriage licences for broadcasting services, where such a reform is part of broader reforms that increase competition for spectrum and access for new commercially-based broadcasting services;
- an increase in the Producer Offset for television production to 40%; and
- a 55% Australian content quota on ABC1, with a smaller target for SBS.

3.1 Regulatory ‘parity’

ASTRA’s comments on specific recommendations in the Interim Report (section 4 below) should be read in the context of our general concerns regarding regulatory balance in the media and communications sector. Any reduction of regulatory burdens on the commercial FTA television sector should only be contemplated in conjunction with reform of the existing regulatory and other privileges that these broadcasters receive. Abolishing content licences, or removing Australian content quota requirements and extending Australian content expenditure obligations, is likely to increase rather than decrease current regulatory imbalances in favour of commercial FTA broadcasters.

Need for a balanced, competitive regulatory framework

Competition in any industry is the driving force for innovation that delivers better quality and choice for consumers. For industries operating within highly complex and prescriptive regulatory frameworks, the application of regulatory privileges or restraints on particular participants can have a profound impact on the ability of those participants to fairly compete, limiting the benefits for consumers and the economy generally.

Where regulatory privileges are complemented by other Government policy initiatives favouring particular industry participants, the public policy justification of those regulatory and other benefits must be continually re-evaluated against the impact on competition, but also against community expectations as to the degree to which different services should have public policy obligations.

Consistent and coherent regulation of different media and communications services does not necessarily mean that all services should be regulated the same. As ASTRA has previously argued, regulatory parity requires a holistic assessment of the entire regulatory landscape, not an assessment of each regulatory issue in isolation. Limiting the scope of the Review has meant the development of recommendations that, in ASTRA’s view, are not fully reflective of existing regulatory privileges against which more comprehensive public policy obligations are currently balanced.

Measures recommended by the Committee that would have the effect of easing the regulatory burden on commercial FTA broadcasters are not complemented by measures to address the competitive advantage these entities receive from preferential access to premium sports content and access to spectrum guaranteeing near universal reach, as well as long-standing financial support from Government for digital switchover. Meanwhile, the Committee has not been given the opportunity to explore measures that would remove existing regulation that stifles competition (such as opening up the commercial FTA broadcasting sector to new entrants).

As ASTRA detailed in its final submission to the Review, analysis by Deloitte Access Economics (DAE) estimated that \$792 million in net government support was provided to the commercial FTA television sector in 2010-11, including broadcast spectrum access valued at \$505 million per year (in comparison, the net amount in licence fees paid by commercial FTA

broadcasters in 2009-10 was \$231.4 million). This support exceeds the level of funding for the Australian Research Council in 2010-11 (\$747.8 million) or the level of drought assistance provided to rural areas in 2009-10 (\$751.7 million).

DAE's estimate was based on a valuation of broadcasting spectrum of \$0.89/MHz/pop (that is, the amount in dollars per MHz of spectrum per head of population) and \$0.22/MHz/pop for spectrum used for electronic news gathering (ENG). On 10 February 2012 the Minister for Broadband, Communications and the Digital Economy determined the value of spectrum in the 800 MHz and 2.3 GHz bands (reasonably equivalent to spectrum currently allocated to commercial FTA broadcasters for television broadcasting and ENG) to be \$1.23/MHz/pop and \$0.03/MHz/pop respectively.³ Based on the Government's valuations, the annual value of spectrum allocated to commercial FTA broadcasters would be an estimated \$612 million, meaning the total value of Government support to commercial FTA broadcasters could be nearly \$900 million per year.

No other commercial sector in the media and communications environment comes close to receiving such financial support from Government. While ASTRA would strongly support reforms that would lead to a balanced and competitive regulatory framework, such a significant public investment in the FTA commercial television sector, in combination with the regulatory benefits and protections enjoyed by that sector, strongly suggest that these broadcasters should continue be expected to shoulder greater responsibility and regulatory obligations to enable the Government to achieve its social and cultural policy objectives.

Community expectations

As ASTRA also argued in its final submission, there are likely to be differing community expectations regarding how certain media and communications services are regulated, particularly in relation to content, depending on the nature of the service and how that content is accessed and used.

ASTRA notes that the ACMA *Digital Australians* report demonstrated differing community expectations about how content delivered by different services should be regulated. For example:

- Most participants saw an ongoing role for current policy mechanisms (time zone classification, consumer advice and content warnings) for protecting children from unsuitable content broadcast on free-to-air television;
- a significantly greater number of people (80%) believed it was important to have consumer information for children's viewing on free to air television compared to other media/communications platforms (including STV, Internet and online gaming (60-65%)).⁴

Furthermore, consumer research commissioned by ASTRA demonstrates that:

- nearly 90% of Australians are unaware of the level of Government support provided to commercial FTA broadcasters, with 80% believing such support should cease or be reduced;

³ Radiocommunications (Spectrum Access Charges) Direction 2012 (made under subsection 294(2) of the *Radiocommunications Act 1992*).

⁴ ACMA, *Digital Australians—Expectations about media content in a converging media environment*, October 2011, pp.20, 65.

- 74% of Australians believe that, if commercial FTA broadcasters continue to receive Government support, they should have social and cultural obligations such as investing in Australian content;
- Around 80% of Australians agree or strongly agree that FTA television broadcasters should continue to have specific social policy obligations such as time-zone classification.⁵

3.2 Increased regulatory intervention

ASTRA also submits that the likely overall impact of the recommendations would be to increase regulatory intervention across all sectors of the media and communications industry (particularly in relation to media ownership and control, content acquisition and Australian content) while retaining regulatory privileges that benefit just one of those sectors (the FTA commercial broadcasters). Regulatory intervention would be increased in relation to the following:

- New industry-specific rules for content-related competition issues;
- A new ‘super-regulator’ with broad powers and with overlapping jurisdiction with the ACCC on competition issues;
- A broader number of voices rule encompassing services and platforms not currently subject to media ownership and control rules, as well as a new ‘public interest test’; and
- Expanded Australian content expenditure obligations, with quota obligations to be removed from commercial FTA broadcasters in the long-term.

Implementing these recommendations would represent a substantial increase in regulatory intervention across the entire media and communications sector, and would directly contradict the first principle of the new regulatory framework as laid out by the Committee in its Emerging Issues Paper (that “where regulation is required, it should be the minimum needed to achieve a clear public purpose”). As ASTRA and numerous other submitters to the Review have argued, markets are effective in encouraging the development of content and services that consumers want. Only where the public interest clearly cannot be achieved through the market should regulatory measures be contemplated. Where regulation may be required, primarily reliance should be on co-regulatory approaches.

Moreover, many of these proposed changes are unnecessary due to the increasing number, range and diversity of digital content services available to consumers. As discussed below, the ACCC already has sufficient powers to address media diversity concerns.

Meanwhile (as demonstrated by the “examples of redundant regulation” listed in Appendix One of the Interim Report), the Committee’s recommendations would represent a substantial reduction in regulatory obligations on FTA commercial broadcasters with no equivalent reduction in existing regulatory benefits.

3.3 Issues not addressed in the interim report

Copyright

Convergence has the potential to create synergies across once separate industry sectors to drive innovation in the media and communications environment. However, this potential cannot be fully realised if content producers and distributors are not able to effectively monetise the

⁵ ASTRA Media Release, 9 February 2012.

content they produce or acquire. A regulatory framework that gives assurance and certainty to rights holders in their capacity to extract fair monetary returns for their investment in developing or acquiring content is essential for the ongoing sustainability of media and communications enterprises and for continued investment in Australian content production and Australian jobs in the production sector.

The regulatory framework for a converged media and communications environment cannot be examined in isolation from copyright issues. ASTRA acknowledges that in September 2011 the Government announced an intention to provide the Australian Law Reform Commission (ALRC) with a reference on the adequacy and appropriateness of existing copyright regulation in the digital environment, and notes the subsequent announcement on 2 February 2012 of the appointment of Professor Jill McKeough to head the ALRC Inquiry, with Terms of Reference to follow shortly. While ASTRA welcomes the upcoming opportunity to review current copyright regulatory settings, we reiterate our position that copyright should be considered as part of the Convergence Review process.

Technological advances in the digital era have enabled significant increases in copyright infringement, posing a significant threat to the viability of content production and distribution. Protection against illegal use and distribution of digital content is already a very significant issue for the subscription television industry and content providers generally, and will only intensify in a converged media environment.

As ASTRA has previously noted to the Committee, current provisions in the *Copyright Act 1968* do not cover key and emerging digital media platforms for the delivery of subscription television services and are severely strained in dealing with illegal distribution of digital content. Industry is less likely to invest in new content production if increasing copyright infringement threatens returns on that investment. The recent decision in the Optus TV Now case has only reinforced the need to consider copyright issues in the context of convergence (ASTRA notes that, in the Attorney-General's view, the decision highlights the importance of the Convergence Review).⁶

Retransmission

ASTRA notes that the Interim Report did not discuss proposals for a 'must carry' regime for the retransmission of free to air television services by STV or other platforms. To the extent that this omission represents a rejection of this proposal, ASTRA supports the Committee's view. ASTRA notes that there was no additional industry support for this proposal, and would refer the Committee to opposition to a 'must carry' scheme in the submissions by Screenrights, APRA/AMCOS and the Australian Copyright Council.

4. Responses to specific recommendations in the Interim Report

4.1 A new regulator for the digital economy

ASTRA supports (subject to the caveats below) the concept of a single regulatory body for media and communications. However, ASTRA does not necessarily see a need for a new regulatory body for media and communications beyond the Australian Communications and Media Authority (ACMA). Any expansion or realignment of the role of the regulator should be able to be achieved through amending the powers and functions of the ACMA as required.

⁶ See G Korporaal, "Footy in a losing position" *The Australian*, 3 Feb 2012.

However, ASTRA is strongly of the view that there is no evidence that would justify the need for a regulatory body outside the ACCC to deal with competition issues relating to media and communications. As discussed in more detail below (see section 4.6) ASTRA believes that general competition legislation, administered by the ACCC, is sufficient to address any competition concerns that may arise in the media and communications environment.

ASTRA also notes that the idea of a 'new regulator' has been raised in the context of the ALRC Classification Review and the Independent Media Inquiry. ASTRA submits that the implementation of recommendations from these reviews and inquiries should ensure that oversight of the media and communications environment does not become split (and/or duplicated) across multiple regulators, nor leads to regulation of matters (such as competition issues) by a communications regulatory, where those matters are appropriately dealt with under existing general legislative frameworks.

Regulatory flexibility

While ASTRA would agree that a regulator for media and communications (however constituted) requires flexible regulatory options, ASTRA submits that self-regulation, co-regulation or direct regulation should not be seen as equally-weighted options in the regulator's 'toolkit', depending on the circumstances. Only where the public interest clearly cannot be achieved through the market should regulatory measures be contemplated, with direct regulation seen as the last resort. ASTRA supports the existing graduated co-regulatory approach that applies to broadcasting under existing legislation and would oppose any recommendations that increase direct regulatory intervention at the expense of industry-focused approaches to public policy concerns.

Independence

ASTRA would support any reforms that ensured a regulator for media and communications (however constituted) had the independence to make evidence-based decisions informed by an overarching principle of regulatory forbearance. Regulatory decision making based on objective and consistent criteria would give media and communications enterprises greater certainty and increased confidence to invest in new innovative services and content for consumers.

In forming the evidence base for regulatory decision-making there is merit in a legislated role for the regulator to conduct and commission independent research of consumer and market conditions.

Complaints processes

ASTRA notes in the Committee's discussion its view that the new regulator "should develop effective procedures for dealing with complaints from the public about service levels or content."⁷ While the Interim Report does not detail what the Committee may recommend in relation to complaints handling, ASTRA would strongly oppose any changes to the existing co-regulatory arrangements that apply to STV.

In ASTRA's view, the handling and resolution of complaints should remain the primary responsibility of industry. An industry-based regulatory framework provides more flexibility and allows content providers to be more responsive to consumer concerns. Industry is best placed to assess – and resolve – complaints in the first instance. In the STV context, the content provider has an existing commercial relationship with its customer and, as in any commercial

⁷ Convergence Review Interim Report, p.2.

setting, it is imperative that the business is the first point of contact regarding customer concerns. This allows the business an opportunity to resolve complaints and, ultimately, retain its customers.

4.2 The removal of content licences

It likely that there will continue to be activities in the media and communications environment that will require regulation. As ASTRA argued in its submission to the Discussion Papers, licensing is likely to remain an effective regulatory tool for achieving certain public policy outcomes such as management of spectrum access and use, and compliance with technical or safety requirements. It would be appropriate, for example, that there continue to be a system of licensing access to and use of spectrum, given that spectrum is a scarce and valuable public resource, and a continuing need for effective management of interference for spectrum users.

The extent to which cultural and social policy objectives can be applied consistently across platforms may determine the extent to which licensing of broadcasting services will remain necessary. Where particular types of services continue to be expected to comply with specific obligations to achieve cultural and social policy objectives, then a licensing system may remain the most appropriate mechanism for regulating those services.

4.3 Content Service Enterprises

As argued in our final submission to the Review, ASTRA supports, as a starting principle, regulatory consistency across services and platforms. Economic and/or competitive protections afforded to particular sections of the media and communications industry should be removed unless a clear public policy objective in maintaining these protections can be identified. Regulation that is inherently anti-competitive must only be contemplated where the public interest benefits cannot be adequately achieved through other means, and where those benefits clearly outweigh the impact on competition.

However, there appears to be a continuing public interest rationale for some level of differentiated regulation on different parts of the media and communications sector, either in response to continuing community expectations regarding the obligations that should be placed on particular services, or where specific public policy obligations reflect continued regulatory benefits and protections enjoyed by particular sectors (as detailed in section 3.1 above). As such, ASTRA does not believe that the Committee's concept of a 'Content Service Enterprise', as outlined in the Interim Report, is an appropriate regulatory construct for a converged media and communications environment. Not all media and communications services are the same, and content is viewed, accessed or consumed in different ways and with differing expectations regarding the extent to which those services should be subject to particular regulatory obligations and constraints.

ASTRA notes that the recommendation as outlined in the Interim Report only gives very general indications of the regulatory boundaries that would define a CSE. This lack of detail makes it difficult to assess the practicalities of introducing the CSE concept, particularly in the NBN world.

The Interim Report states that a CSE would be "determined by threshold criteria relating to the scale and nature of operations in supplying content services" with criteria that "might include" viewer or subscriber numbers; the service originating in Australia or being intended for Australians; the provider having the ability to exercise control over the content; and/or the "operational revenue or commercial scale" of the enterprise. The table below outlines how

existing content services might be categorised and dealt with under the proposed 'Content Service Enterprise' concept:.

Content (example)	Australia's Next Top Model on Fox8	MasterChef Australia on Ten	FS News & views on FoxSports News	TMZ Channel	User generated	Top Gear	A Movie	AFL TV	Indonesia TV
Aggregator	AUSTAR	TEN Network	Fetch TV	YouTube (Owned by Google)	YouTube (Owned by Google)	BBC iPlayer Apps	Apple TV	Telstra BigPond TV	TPG IPTV
Delivery / Technology Platform	Satellite Pay-TV	Digital Terrestrial FTA	IPTV via ISPs	Online TV (i.e. www) via ISPs	Online TV (i.e. www) via ISPs	Tablet App via ISPs	IPTV via ISPs	IPTV via Telstra / Bigpond	IPTV via TPG
Commercial model	Subscription	Ad revenue	Subscription	Ad revenue	Ad revenue	Subscription	Transaction VOD	Included in Bigpond broadband subscription	Included in TPG broadband subscription
Who is the CSE?	AUSTAR	TEN	Fetch	TMZ or YouTube?	YouTube?	BBC	Apple	Telstra	TPG
Can you measure viewers for Aust content contribution?	YES (Assumes content payments are based on subscriber numbers)	YES	YES (Assumes content payments are based on subscriber numbers)	YES based on measuring Aust IP address hits	YES based on measuring Aust IP address hits	YES can measure local downloads	YES	YES	YES
Can you measure local revenue for Aust content contribution?	YES -	YES	YES	Difficult due to overseas revenue reporting and int'l target aud	Difficult due to overseas revenue reporting and int'l target aud	Difficult due to overseas revenue reporting and int'l target aud	Difficult due to overseas revenue reporting and int'l target aud	YES	YES

The table raises a number of questions, for example:

- It is not always clear which entity would be the CSE. For example, the TMZ channel delivered through You Tube provides what would be regarded as 'professional' content. Would TMZ or Google (the owner of You Tube) be regarded as the CSE?
- While it should be possible to measure local audiences, it may not be easy to recoup local revenue levels due to jurisdictional issues. How would this be addressed?
- News media organisations would appear to be regarded as CSEs. If so:
 - Would a service that provides primarily or solely Australian-produced news (including sports news) be regarded as fulfilling Australian content expenditure requirements, or would there still be expenditure requirements for specific Australian content genres (e.g. drama, documentaries, children's content) that all CSEs would be required to fulfil (or else be required to pay into the content production fund)?
 - Should a service that previously had no involvement in the delivery of drama programming be expected to provide Australian drama or pay into an Australian content production fund?

The CSE concept also raises questions relating to content services that may emerge in the future. For example, if a major sports body decides to establish its own IPTV service offering televised coverage of its events direct to the public, does that sports body then become a CSE (given it would be supplying content services to the public) and thus subject to the full range of Australian production expenditure and other obligations?

4.4 Spectrum allocation and management

In principle, ASTRA supports a market-based approach to pricing broadcast spectrum and agrees with the Committee that the separation of content and spectrum licences has the

potential for more efficient use of broadcast spectrum. As ASTRA argued in its submission, this would create the preconditions for more efficient use of spectrum by broadcasters and, as noted by the Australian Competition and Consumer Commission, ensure Australian taxpayers receive a fair return for the provision of a scarce public resource.

The separation of carriage and content licences for commercial FTA broadcasters would create a new market for spectrum for commercial FTA or other services that may want to make use of the spectrum that incumbent commercial FTA broadcasters do not require for their digital services, while the potential of new digital transmission and compression technologies (e.g. MPEG-4/DVB-T2) would enable even greater spectrum use efficiencies and potentially release more spectrum for new services. As noted in ASTRA's submission to the discussion paper, more efficient use of existing broadcast spectrum would mean additional spectrum would not be required for FTA broadcasters to make the transition to new digital transmission platforms.

ASTRA further agrees with the Committee that charges to commercial FTA broadcasters for the use of spectrum "should reflect the value of the spectrum". As noted in ASTRA's submission, DAE estimated the value of spectrum allocated to commercial FTA television broadcasters at \$505 million per year, compared to licence fees paid in 2009-10 totalling \$231.4 million. The Government's own estimate of the value of spectrum similar to that used by commercial FTA broadcasters suggests the value of spectrum to FTA commercial broadcasters could be upwards of \$612 million per year.

The Committee proposes a "managed transition" to provide commercial FTA broadcasters with "certainty regarding the use of spectrum into the future".⁸ Further detail is required to enable a full and considered response to this proposal. ASTRA would be concerned if the potential transitional measures to be considered in the final report relating to "licence tenure, pricing and licence reissue arrangements" have the effect of reducing obligations on these broadcasters before they commence paying for spectrum at market rates and before other competitive advantages afforded by the current regulatory regime are removed.

ASTRA recognises that there may be a continued need for the Government to be able to reserve spectrum for the provision of public broadcasting service, however we would question the need for "a comprehensive and explicit set of public interest factors" to be incorporated into a new broadcast planning framework. As ASTRA argued in its submission, price-based allocation of spectrum for commercial use is more likely to encourage the most efficient use of spectrum to provide the media and communications services that consumers want. ASTRA questions the necessity for broadcast spectrum planning powers that extend beyond technical and transmission issues. The extent to which there is a 'demand' for additional services provided on a commercial basis in a particular geographic location is best left for the market to determine.

4.5 Diversity

Diversity of voices rule

As ASTRA argued in its final submission, a regulatory framework that encourages competition and innovation is more likely to encourage increased diversity in the representation of news, information and opinion. The growing number of news and information sources available online would suggest that regulatory intervention to ensure a diverse media is becoming increasingly unnecessary.

⁸ Convergence Review Interim Report, p.6.

As such, ASTRA submits that there is no justification for extending media diversity rules to include platforms such as STV. No compelling evidence was presented to or by the Committee to suggest that convergence threatens to decrease the diversity of views and opinions disseminated to Australians through media and communications services, nor that expanding media-specific ownership and control regulation is more likely to ensure a more 'diverse' media than would otherwise be provided by the market. The proposed 'diversity of voices' rule that would include new platforms and services is likely only to have the effect of stifling innovation and investment in areas that are currently not subject to existing cross-media rules.

ASTRA submits that existing competition law provisions are sufficient to regulate potential issues of market power in the media and communications environment, including regulation of mergers and acquisitions.

Public interest test

As previously argued, ASTRA sees no need or justification for the introduction of a public interest test. Such a test would create significant regulatory uncertainty, be difficult to administer, and likely subject to extended litigation. Such a test would have a chilling effect on future domestic and foreign investment in the Australian media and communications sector, ultimately stifling development of new content services and the diversity such services would bring.

An objective and practicable measure of 'diversity' or 'plurality' would be difficult to devise. As ASTRA noted in its submission to the discussion papers, such difficulties have been experienced in applying the public interest test in the United Kingdom, which (with respect to broadcasting) requires consideration of whether there is 'sufficient plurality' of persons with control of the media enterprises serving every different audience or in a particular area or locality. Ambiguity in the meaning of 'sufficient plurality', with little guidance from the legislation of the standard to be employed, has made application of the concept difficult for UK courts.

Meanwhile, a more prescriptive public interest test (with, for example, detailed quantitative criteria for measuring 'plurality') would likely be incredibly complex and prove administratively burdensome for both regulators and the industry. Such criteria may lack the flexibility necessary to encompass the variety of existing content services and media organisations, or be able to adequately include new and emerging forms of content delivery.

ASTRA also notes the potential for political interference in the implementation and administration of a public interest test. While ASTRA recognises the Committee's recommendation that 'the regulator' administer the public interest test, we note that the public interest test in the UK is ultimately a decision for the Secretary of State with the regulator OFCOM playing only an advisory role.

4.6 Competition

ASTRA has previously argued that convergence will drive an increasingly competitive media and communications environment that encourages the development of a more diverse range of new content and innovative services for consumers, from an ever increasing number of service providers on different platforms. In such an environment, there is no need for new powers to regulate content-related competition issues.

The Interim Report provides no evidence that new, additional regulation is necessary to address content-related competition issues, and ASTRA does not believe that any compelling evidence to support additional regulation was provided to or by the Committee during the

review process. As ASTRA argued in its submission, there is currently no problem with exclusive rights contracts in Australia because (other than for sport under the anti-siphoning regime) the market for acquisition of content is highly competitive, and is likely only to become more competitive in the future. This is evidenced by the *de minimis* investigations conducted by the ACCC. So, a fundamental threshold question to ask in respect of this recommendation is: what would this regulator actually do?

ASTRA believes that existing Australian competition laws are more than sufficient to deal with any potential content-related competition issues that may arise, and that the existing competition regulator, the ACCC, is best placed to oversee content-related competition issues.

In addition, a bifurcation of competition law oversight between the ACCC and the proposed super-regulator is likely to cause confusion and uncertainty for business about responsibilities (including the informal arrangements already established by the ACCC) and require multi-layered dealings with regulators.

4.7 Promoting Australian content

The Interim Report states that it is clear from submissions to the review that “Australian content remains important to our society” and that “there is an ongoing need for government intervention to support the production and distribution of Australian content”. The Committee also states that it is clear that current regulatory arrangements “will not support Australian content objectives in the medium to long term”.

ASTRA does not disagree that adjustments in policy settings in relation to Australian content production may be necessary in the long term. However, the Committee’s conclusions as to what Australian content objectives should be, and how those objectives should be implemented, appear to be built on an assumption that a long term solution must necessarily involve an increase of regulatory obligations on entities other than commercial FTA television broadcasters and/or an expansion of obligations to services not previously subject to Australian content requirements.

As the Committee itself acknowledged in its Emerging Issues Paper, future Australian content obligations must be considered as part of the broader regulatory paradigm.⁹ While it is true that the current Australian content regime places more comprehensive Australian content requirements on commercial FTA television broadcasters, this is because these obligations have traditionally been connected to the regulatory benefits and protections provided to these broadcasters. These benefits continue to give commercial FTA broadcasters a competitive advantage against other sectors in the media and communications industry. Moves towards a ‘uniform’ scheme for Australian content should not be considered while commercial FTA broadcasters continue to enjoy additional regulatory privileges.

ASTRA submits that, in particular, there is no justification for either an increase in the level of expenditure requirements in relation to a STV drama-based service, nor an expansion of those requirements to genres other than drama. While ASTRA notes that a number of submissions recommended increases to Australian content expenditure requirements, and/or expansion of those requirements to documentaries, we submit that no compelling evidence was presented to the Review Committee to justify an increase in Australian content obligations on the STV sector. Under existing regulation, STV platforms and channels invested \$578.4 million into Australian content in 2010, an increase from \$541.4 million in 2009. This investment contributed an estimated \$223 million to the Australian economy. STV services regularly

⁹ Convergence Review Emerging Issues Paper, August 2011, p.20.

exceed their Australian drama expenditure obligations, with the sector leading the development of compelling, high-quality Australian content (e.g. *Cloudstreet*, *Love My Way*, *Killing Time*, *Spirited*, *Tangle*).

ASTRA reiterates that the important long-term policy objective should be that Australian content continue to be made, and be made attractive to both local and international content providers, distributors and audiences. As ASTRA stated in its submission to the Review, the continuing growth of alternative domestic and international sources of content would suggest that the amount of Australian content consumed by Australians, as a proportion of the total content available to them, may fall as the content pool grows. Analysis undertaken by DAE for ASTRA states that maintaining a sustainable Australian content production industry is likely to require greater emphasis on generating sufficient funds for investment in new content over the longer term.

In its submission to the Discussion Papers, ASTRA suggested a number of reforms that could be considered to add greater focus, flexibility and transparency to the current content regime and assist in the move towards a more balanced regulatory framework, including:

- tradeable Australian content transmission quotas for commercial FTA broadcasters;
- ensuring the national broadcasters have clear accountabilities regarding Australian content for the funding they receive;
- more flexibility in the funding processes of Screen Australia to better accommodate different content production business models; and
- an increase in the Producer Offset for television programs to the same level as film.

As such, ASTRA welcomes the Committee's recommendation for an increase in the Producer Offset for television programs to 40%. As noted by the Premium Move Partnership's submission to the Discussion Papers:

...firms involved in the production of television programs are more than twice as likely as production firms that are not to be sustainable and to have steady work...High quality narrative television drama provides the best possible return for the Government's investment in Australian production both in delivering cultural value and in maintaining a capable production sector.¹⁰

ASTRA also welcomes the Committee's proposal for Australian content quotas on the national broadcasters. Such a measure would encourage the development of Australian content that may not otherwise be produced. ASTRA would further recommend that accountability measures be attached to funding associated with these obligations.

4.8 Promoting local and community content

ASTRA has no specific comment on this recommendation, other than agreeing with the general principle that access to public spectrum by commercial FTA broadcasters should come with continued public policy obligations.

4.9 Public broadcasting

ASTRA recognises the role that the national broadcasters play in producing Australian content that may not be commercially viable but fulfils important cultural and social policy objectives.

¹⁰ Premium Movie Partnership (Showtime) submission to the Convergence Review discussion papers, pp.3-4.

However, as ASTRA argued in its submission, it should not be the role of the national broadcasters to produce content that is already provided by, and directly competes with, the private sector. There is instead a valid and valuable cultural contribution to be made by Government when market failure of one form or other has occurred. 'Market failure' is a key rationale for public funding of much of the programming and operations of the national broadcasters such that without public funding certain services would not be provided by the market.

ASTRA would support amendments to the charters of the public broadcasters to give commercial operators increased certainty about the boundaries of public broadcaster activities, and submits that such amendments should include a focus on providing services and producing content for audiences and in a form that may not be practical or feasible on a commercial basis.

4.10 Content standards

ASTRA supports the general principle that Australian adults have the right to read, hear, see and produce the content they want, balanced with appropriate protections from offensive content. ASTRA notes that the Committee has refrained from specific recommendations on content standards given the ongoing work of the ALRC Classification Review and the Independent Media Inquiry. ASTRA makes the following general comments regarding appropriate policy objectives and approaches to content regulation.

As ASTRA has previously argued, while we support consistency of classification of the same content delivered on different platforms, there may be different community expectations regarding how the access or use of content should be regulated depending on how that content is delivered. As the ACMA argued in its *Enduring Concepts* paper:

Policy settings should be calibrated to suit particular circumstances – that is, they should be coherent (but not necessarily uniform) across media and communications markets...[P]olicy settings related to the classification of content may need to be calibrated to the particular attributes and sources of that content with coherent approaches adopted to like content.¹¹

ASTRA also notes support for this principle from Seven West:

The context in which an item is viewed or read can...significantly alter the manner in which that item is experienced by the consumer. Intelligent policymaking does not mean ignoring real distinctions and treating everything that seems similar as though it were the same.¹²

Consumer research commissioned by ASTRA found that around 80% of consumers agree or strongly agree that FTA broadcasters should continue to have specific timezone classification obligations, particularly where these broadcasters continue to receive Government support. This research supports findings in the ACMA's *Digital Australians* report that most participants saw an ongoing role for current policy mechanisms (time zoning, classifications and consumer advice and content warnings) for protecting children from unsuitable content broadcast on free-to-air television.¹³

4.11 Legislative structure and implementation

ASTRA is concerned that a phased approach to implementing change may do no more than increase, at least in the short term, the regulatory imbalance in favour of incumbent commercial FTA broadcasters before more the introduction of more substantive structural regulatory

¹¹ ACMA, *Enduring Concepts: communications and media in Australia*, November 2011, p.7.

¹² Seven West submission to the Convergence Review discussion papers, p.22.

¹³ ACMA, *Digital Australians*, p.4.

reforms. In particular, regulatory imbalances that give FTA broadcasters a competitive advantage must be addressed first before any consideration can be given to changes to existing regulatory obligations relating to Australian content and content classification. At the very minimum, ASTRA strongly urges the Committee to recommend that no regulatory changes should be contemplated until the Government has undertaken its review of additional commercial television licences and the future of broadcast spectrum.

