



Submission to the Department of Communications and the Arts
Draft Report of the Review of the Australian Communications and Media
Authority

10 June 2016

1. Executive Summary

- ASTRA welcomes the release of the draft report of the Review of the Australian Communications and Media Authority (the ACMA) and the opportunity to comment.
- The draft report reveals comprehensive and considered analysis of the fundamental issues regarding the ACMA's role and performance, and has clearly taken stakeholder sentiments into account.
- ASTRA welcomes the proposed improvements to the structure and operation of the ACMA—for example, the introduction of regulator principles to guide the way the ACMA performs its regulatory functions, and better linkages to the competition and consumer regulator—and believes they will help ensure regulation is applied efficiently, thereby reducing the regulatory burden on industry, and ensuring the regulator is well equipped to respond to market and consumer changes.
- ASTRA supports the draft finding that there is a pressing need for comprehensive reform of media regulation. ASTRA believes, however, that reform of the ACMA is an immediate priority that can be implemented ahead of longer-term media reform.
- However, ASTRA is concerned that this is a longer term proposition, especially given the complexity of existing communications regulation.
- The impact of upheavals in the competitive media landscape and the financial pressures being faced by media companies are having their effect now, and the anti-competitive effect of archaic regulation continues to hamper investment and innovation.
- As a result, urgent reform in a number of discrete areas is required to release the regulatory handbrake on Australian businesses at this critical time in the industry's evolution.
- In light of the deregulatory, pro-competitive and minimalist reform principles put forward in the draft report to underpin the large-scale reform project, action taken now to address archaic and anti-competitive regulations will no doubt be consistent with future reform.

2. The draft proposals

ASTRA supports the majority of the draft proposals in the report, and would like to provide specific comments on the following proposals.

2.1 *Draft proposal 4*

Draft proposal:

4. That the Department of Communications and the Arts be responsible for head of delegation roles to key international policy-setting forums, including the World Radiocommunication Conference, and that clear guidance and negotiating parameters be provided by the Department to heads of delegation.

ASTRA agrees that in an environment of increasing demand for spectrum, international fora such as the ITU and WRC are making decisions with far reaching policy impacts. It is therefore sensible and appropriate that the responsibility for head of delegation roles lie with the Department. This is consistent with the findings of the Spectrum Review, which were that spectrum policy and administration roles should be more clearly delineated between the Minister and the ACMA.

2.2 *Draft proposal 7*

Draft proposal:

7. That the Department will undertake further work on the potential to expand the ACMA's remit to include the functions of the Classification Board and Classification Review Board Scheme.

ASTRA's members operate audio-visual services on a number of platforms and support consistency in the assessment and classification of content to be delivered on any platform. ASTRA has previously indicated its support for a single classification regime where content providers are primarily responsible for ensuring compliance with classification and content regulations, as is already the case under the codes of practice developed by ASTRA and registered by the ACMA. The creation of a single source of escalated classification decision-making and/or adjudication would be a welcome step in that direction, and housing this function within the ACMA would be consistent with its existing investigatory function for the classification of broadcast content.

ASTRA supports further work on this proposal being undertaken by the Department, in consultation with industry and other stakeholders. This work could include assessing whether classification decision-making, or at least standard setting or adjudication, might involve constitution of a Content Board within the ACMA, similar to that used by Ofcom, and referred to in the draft report.¹ This may be one way to continue the current

¹ The Ofcom Content Board is mentioned in the Draft Report at page 63. The Ofcom website notes that the Content Board is a committee of the main Ofcom Board, with delegated and advisory responsibility for a wide range of content issues. It sets and enforces quality and standards for television and radio. It has members representing each of the countries in the UK, and includes members with extensive broadcasting experience. See further detail at <http://www.ofcom.org.uk/about/how-ofcom-is-run/content-board/>.

practice of ensuring that membership of the decision making body responsible for content classification is broadly representative of the Australian community.²

2.3 Draft proposal 9

Draft Proposal:

9. That the current institutional arrangements for economic regulation of the communications sector be retained.

In its submission to the Issues Paper, ASTRA argued that the current division of broadcasting powers and responsibilities between the ACMA and the Australian Competition and Consumer Commission (ACCC) remains appropriate. We therefore support the draft findings which favour the status quo. The proposal to improve cross-appointment arrangements between the two bodies (draft proposal 10) provides an appropriate solution to the need to bring independent sectoral perspectives to ACCC decision making, as well as ACCC perspectives to ACMA decision making.³

2.4 Draft proposal 14

Draft proposal:

14. That the skill set to be covered by Authority members be outlined in legislation to ensure an appropriate and diverse mix of abilities to respond to the future needs of the ACMA.

ASTRA strongly supports the proposal to incorporate the required skill set for Authority members in legislation. However, the draft report does not include proposals as to what those skills should be. ASTRA reiterates its support for a requirement that appointees demonstrate substantial experience or knowledge in the communications or media industry, business or financial management or corporate governance areas. Favourable consideration should also be given to candidates with experience in the private sector in regulated entities. Requirements of this kind should be included in legislation.

2.5 Draft proposal 15

Draft proposal:

15. That all members of the Authority be appointed on a full-time basis and that the Authority consist of a Chair, a Deputy Chair and at least three other full-time members.

ASTRA's view differs from this proposal in that we believe that continued use of part-time members is desirable. It can be argued that part-time members are more likely to

² Currently, the *Classification (Publications, Films and Computer Games) Act 1995* requires that, in appointing members of the Classification Board, the Governor-General is to have regard to '...the desirability of ensuring that the membership of the Board is broadly representative of the Australian community' (s.48).

³ For example, greater involvement of the ACCC in ACMA registration of consumer codes may avoid the risk that regulatory instruments dealing only with the media and communications sectors duplicate matters already adequately dealt with in economy-wide regulations like the Australian Consumer Law.

bring contemporary private sector experience to the ACMA, as well as an enhanced sense of independence.

2.6 Draft proposal 16

Draft proposal:

16. That the existing arrangements are maintained where the Chair is the Accountable Authority with an ability to delegate powers, duties and functions, to the extent permitted by the PGPA Act, to a CEO.

In its submission to the Issues Paper, ASTRA strongly supported the separation of the CEO and Chair roles, as a matter of good governance. We acknowledge the draft report's explanation that designation of functions to a CEO is already a possibility under the current Commission model. ASTRA reiterates its strong support for this functionality to be utilised.

2.7 Draft proposals 18, 19 and 20

Draft proposals:

18. Legislate the following four regulator principles in the ACMA's enabling legislation, proposed draft:
 - > *The ACMA have regard that its regulatory settings do not unnecessarily hinder competition, innovation or efficient investment.*
 - > *The ACMA should apply a risk-based approach to regulation, compliance and enforcement activities. Regulatory intervention should be targeted, evidence-based and commensurate with risk.*
 - > *The ACMA should implement continuous review of regulation to reduce burden and streamline approaches where the benefits exceed the costs.*
 - > *The ACMA should be transparent in its actions and clearly indicate the priorities and objectives which inform its decision-making to regulated entities and the broader public.*
19. That the Minister provide the ACMA with an annual Statement of Expectations and the ACMA respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.
20. That the Minister provide the ACCC with an annual Statement of Expectations and the ACCC respond by publishing a Statement of Intent outlining how it will seek to deliver on the Government's expectations.

ASTRA strongly supports the inclusion in legislation of regulator performance principles. This is in line with ASTRA's earlier submission, which argued for the inclusion in legislation of key performance indicators.

The four principles proposed in the Draft Report are sound. However, in line with our earlier submission, we would support additional principles including legislating a

preference for co- and self-regulatory models and, as noted earlier in relation to consumer protection, ensuring that regulations imposed by the ACMA do not duplicate those imposed by other laws. A further principle could be that all regulatory interventions, where warranted, should be time-limited (either by automatic expiry or required review).

ASTRA also supports the proposal for a Ministerial Statement of Expectations, followed by an ACMA Statement of Intent. ASTRA has in the past been concerned that the ACMA has drifted into the policy space (which is more appropriately the purview of the Minister and the Department). These governance improvements have the potential to ensure the ACMA remains focused as a regulatory body.

2.8 Draft proposals 21 and 22

Draft proposal:

21. That timeliness of decision-making be established as a key area of focus and accountability for future cycles of the ACMA's regulator performance framework, and Government consider legislative amendment to support more timely decision-making, where necessary.

Draft proposal:

22. That the ACMA publish information on the steps it takes to ensure stakeholders have a clear understanding of the relationship between its actions and its compliance and enforcement policy.

ASTRA acknowledges the efforts of the Authority and its staff to date to promote timely processes and provide transparency. However ASTRA supports the Draft Report's proposals for further improvements in this area as a means of improving industry confidence and aiding in industry risk management.

2.9 Draft proposal 23

Draft proposal:

23. That the ACMA publish a report to the Minister every two years on initiatives undertaken to identify and reduce regulatory burden on industry and individuals.

ASTRA supports any measure which creates practice and instils a culture which is intrinsically oriented towards deregulation. ASTRA's overriding concern is to ensure a de-regulatory bias in rule-making, an equitable regulatory playing field and open competition in the provision of consumer services. These are the preconditions for further investment, innovation and job creation in the communications sector.

2.10 Draft proposal 25

Draft proposal:

25. That it would be timely to review the policy objectives of revenue collection from the communications sector and evaluate whether new business models and OTT services are contributing appropriately.

Further explanation of the rationale behind draft proposal 25 is required. As set out in the draft report, the implication is that new business models and OTT services should be taxed or levied in some way, such that they could “contribute appropriately” to revenue collection in the communications sector.

Whilst ASTRA does not oppose a review to determine if the current apportionment of revenue collection is appropriate, targeting new business models and services with additional regulation is a sure way to inhibit innovation and disadvantage consumers.

ASTRA acknowledges there is a lack of regulatory parity between media services which use legacy networks (terrestrial, satellite and cable broadcasting) and services provided over IP networks (streaming and on-demand services). However, the key to addressing the regulatory imbalance that exists across these services is to deregulate to enable incumbents to compete. The answer is not to seek to level the playing field by imposing old-world regulatory interventions on new business models. A deregulatory solution to regulatory imbalance will ensure local operators can compete fairly and will spur greater investment, innovation and job creation.

As noted above, ASTRA is not opposed to the proposed review of the policy objectives of revenue collection in the communications sector. However, we do not support the starting point of that review being the idea of collecting revenue from new OTT services.

3. Draft proposal 27 – regulatory reform

Draft proposal:

27. To enable the communications sector to reach its full potential as an enabler of innovation and productivity, the Government commence a coordinated programme of regulatory reform to establish a contemporary communications regulatory framework.

ASTRA supports the draft findings of the review that there is a pressing need for comprehensive reform of the existing regulatory regime (and the link between regulatory frameworks and regulator performance). Rapid developments in technology and changes in consumer behaviour have rendered the existing, platform-based regulatory framework almost obsolete. Legacy regulation is distorting competition and holding back innovation and investment in ways which will inhibit the long term viability of local businesses.

ASTRA also supports a holistic approach to reform, rather than selective, operator-specific deregulation, as was seen in the Broadcasting Legislation Amendment (Media Reform) Bill 2016. This Bill would simply entrench the competitive advantages enjoyed

by free-to-air (FTA) television networks, thus skewing investment towards the oldest business models and least innovative technology in broadcasting. This will dampen innovation, diminish diversity and deny to Australia the jobs and growth that can be unleashed if reform is applied to the entire industry in an operator-neutral way.

ASTRA is generally supportive of the high level “intervention principles” put forward in the draft report,⁴ in particular:

- That the role of government is to facilitate a competitive market environment, and to only intervene in cases of clear market failure to deliver public policy objectives
- That any Government intervention should impose the minimum cost needed to achieve the public policy goals
- That policy makers should not rely exclusively on ‘black letter’ regulation

ASTRA is also supportive of the proposed “regulatory design principles”,⁵ in particular:

- That regulation should be competitively neutral
- That regulation should make use of co- and self-regulation
- That remedies are proportionate to relevant breaches

The “enduring policy concepts” proposed on page 83 of the draft report are a sound starting point for the proposed reform project. ASTRA supports further work to assess whether these concepts “are likely to remain in the public interest and how best to achieve them.”⁶

3.1 *Urgent need for reform in some areas*

Whilst ASTRA fully supports the large-scale reform project proposed by the draft report, we are concerned that this is a longer term proposition, especially given the complexity of existing communications regulation.

However, the impact of upheavals in the competitive media landscape and the financial pressures being faced by media companies are having their effect now, and the anti-competitive effect of archaic regulation continues to hamper investment and innovation.

As a result, urgent reform is required to release the regulatory handbrake on Australian businesses. All media operators are experiencing pressure on advertising revenue and fragmentation of audiences, and have to compete with the largely unregulated overseas competitors.

It is unlikely that the reforms that are urgently required will be inconsistent with the outcomes of the proposed far-reaching reform project. ASTRA’s reform proposals are deregulatory in nature and are designed to promote open and fair competition, and any sensible longer term reform project will target archaic and anti-competitive regulation.

This is directly aligned with the very first ‘high level intervention principles’ the review recommends guide the proposed reform project:

⁴ Draft Report p 82

⁵ Draft Report p 82

⁶ Draft Report p 84

The role of government is to facilitate competitive market environments as the primary mechanism for achieving public policy goals and then to intervene further only where clear evidence exists of market failure, or if a public policy goal is unlikely to be delivered by the market. (p 82)

This is also reflected in the regulatory design principles proposed by the review:

Regulation should be competitively neutral such that it achieves parity of treatment of different services regardless of the underlying medium or device used to deliver or receive the service, unless there are clearly articulated and compelling reasons to do otherwise.(p 82)

We submit that Government can proceed with some discreet deregulatory projects confident that they will be consistent with the direction and results of the proposed longer term reform project.

3.1.1 Competition for sports broadcasting rights

One of the most significant Government interventions in the media industry is the anti-siphoning scheme which impairs the operation of the market for 1900 sporting fixtures each year. Amongst these are events such as a FIFA World Cup soccer match between North Korea and the Ivory Coast, played overseas in overnight time zones, and watched by as few as 11,000 viewers.

The scheme now operates well beyond its original public policy intentions to the detriment of sports bodies, competitors of FTA broadcasters and, ultimately, to the general public, who are denied the full potential for innovation and choice that would flow from improved competition for sports broadcast rights.

The scheme has been completely overtaken by technological developments. For example, because the scheme only applies to subscription TV licensees, it would not prevent an 'over-the-top' streaming service like Netflix from acquiring exclusive rights to nationally significant sports and charging viewers for access. This is no longer a hypothetical argument, demonstrated by Optus' active participation in the acquisition of sports rights and its stated intention to target further sports rights. This demonstrates how the scheme has become redundant and irrelevant.

ASTRA submits that there is an urgent need to address the anti-competitive impact of this outdated and protectionist scheme, ahead of the proposed sector-wide reform project.

3.1.2 Free-to-air broadcasters' privileged access to spectrum

Much is spoken about the need to level the playing field as between incumbent and new media operators. However, there is substantial work to be done before there is an even regulatory playing field between incumbents.

FTA broadcasters in Australia continue to enjoy lavish regulatory privileges which shelter them from the discipline of competition and skew investment away from new technology and business models.

Key amongst these is guaranteed access for private companies to overly generous amounts of valuable public spectrum at discounted rates.

Reform of FTA spectrum use and pricing is required urgently and cannot wait for the wider reform project. We note that work is continuing within Government through the Spectrum Review and a review of spectrum pricing. ASTRA urges the Government to continue its efforts to consult with stakeholders and conduct a transparent review process.

As noted in ASTRA's submissions to the Spectrum Review and the Digital Television Review, FTA broadcasting spectrum rules should be brought completely into alignment with those that apply to all other spectrum users. This means no special access arrangements (eg, certainty of access) and no special pricing arrangements (ie, pricing should be market-determined).

Incentives also need to be put in place to ensure efficiency in FTA spectrum use. Any efficiencies gained through transition to newer compression and transmission technologies should bring dividends to the public in the form of a return of excess spectrum (ie, spectrum not required to transmit the existing suite of Freeview services). This is as opposed to gifting capacity gains to the FTAs to launch more services, without any additional spectrum cost to them.

A transition to MPEG-4 is possible now, despite misleading claims from the FTAs to the contrary. Indeed, several FTA services are now broadcasting in MPEG4.⁷ The efforts by FTAs to evade an overdue transition to more efficient technologies for all services are just another chapter in a long history of using political lobbying to hold on to as much spectrum as possible. This is done solely to soak up as much spectrum as possible so as to block potential competition in the form of new entrants.

3.1.3 Other pressing regulatory reform priorities

There are other areas where deregulatory reform could take place quickly and efficiently ahead of a wider reform project.

Firstly, ASTRA has developed a set of reforms to the subscription TV captioning regulatory framework which would bring greater transparency and consistency to both consumers and industry. These reforms will result in no change to existing captioning quotas and incremental increases will continue on the same upward trajectory. The reforms are detailed in ASTRA's submission⁸ to the Department's Policy Consultation Paper on the Captioning Regulatory Framework, and have received in principle support from key deafness stakeholder groups. This is a discrete deregulatory reform project that need not be tied to a longer term reform agenda.

Secondly, ASTRA's proposed reforms to Australian production funding and support measures⁹ could be implemented in the short term, and will act to safeguard cultural policy objectives whilst the longer term reform project is pursued. ASTRA has proposed some simple reforms to current support

⁷ This includes 9HD, 7Flix, 7HD, 10HD

⁸ http://astra.org.au/pdf/news/FINAL_ASTRA_Sub_DOCA_Captioning_Reform_110216.pdf

⁹ http://astra.org.au/pdf/news/ASTRA_Policy_Brief_-_Australian_Content_-_February_2016.pdf

measures which would encourage greater investment, creative risk-taking and innovation.

3.2 Transition management

A key aspect of any wide-ranging reform project will be careful transition management. Aside from the obvious need to allow businesses sufficient time to plan and adapt to new regulatory settings, it should be noted that a number of key regulatory issues/reviews are currently taking place, or are set to take place in the immediate future.

For example, ASTRA is due to commence its regular review of its Codes of Practice, a statutory review of captioning regulation is required this year and, as noted above, significant reviews of spectrum regulation are currently underway.

Transparency and consultation will be the key in helping businesses assess risk and plan compliance in the context of an uncertain regulatory future.

APPENDIX 1

About ASTRA

ASTRA is the peak industry body for subscription media in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multichannel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription 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 provide a diverse range of news, information, sport and entertainment programs which deliver significant social benefits to a broad cross-section of the Australian community. In 2016, one third of Australians 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.

The subscription TV industry also makes substantial economic contributions. In 2014/15 ASTRA members invested more than \$796 million in local content production, added \$2.083 billion to the economy, and created jobs for 8370 Australians.

Subscription TV is poised to continue to make great contributions in the new media landscape, growing the economy, creating even more jobs and delivering high-value services to consumers. However, in order to fully achieve our potential and ensure global competitiveness, regulatory imposts must be framed so as to avoid undue complexity and inefficiency, and in a way that ensures a level regulatory playing field across broadcasting sectors.