

Advocacy Report

APRIL 2015

ASTRA ACTIVITY

- **Digital Television Regulation Consultation Paper** – The Department of Communications released a Consultation Paper examining the regulation of FTA television in light of the completion of digital switchover and rapid changes in technology and consumer behaviour.

For a description of the positions put forward in the paper, see the [February 2015 Advocacy Update](#). The proposals in the paper, when taken together, would represent significant policy decisions regarding the media industry as a whole.

ASTRA's submission to the Department highlighted the significance of the proposals put forward in the paper and their potential to impact on the overall competitive balance in the industry.

For this reason, ASTRA raised strong concerns that the Consultation Paper's proposals were put forward in isolation of any consideration of the existing regulatory privileges FTA broadcasters enjoy, the wider industry impact and the impact on the Australian public. ASTRA set out the issues it believes must form part of a holistic deregulatory recalibration of broadcasting industry policy and regulatory settings.

ASTRA also provided comment on the reform proposals in the Consultation Paper which, when taken together, would gift additional spectrum capacity to FTA broadcasters, and would enable them to use that additional capacity to launch as many new services as would be economic. ASTRA opposed these proposals in the strongest possible terms.

The Consultation Paper also addressed the possibility of migration to more efficient broadcasting technologies, such as MPEG-4. This would allow the existing range of FTA services to be delivered using less spectrum. This could be as much as 84 MHz of valuable public spectrum which should be returned to Government for sale in an open market. The opportunity cost to Government of allowing FTA broadcasters to keep additional spectrum capacity freed up through new technology could run into the hundreds of millions of dollars.

There is no published timeframe for the completion of the Government's review process.

The full ASTRA submission is available [here](#).

The Department's Consultation Paper is available [here](#).

- **Draft Commercial Television Industry Code of Practice** – FTA industry body Free TV Australia recently released a proposed new Commercial Television Industry Code of Practice for public comment. The review is a regulatory requirement and a public consultation phase precedes lodgement of the Code with the ACMA for its consideration.

The proposed new Code takes a deregulatory approach, seeking to simplify the existing technically complex Code and remove redundant and duplicative provisions.

However, substantial changes are proposed to classification timezones. Under the new Code, PG content could be broadcast at any time, M rated content could be broadcast from 7.30pm

(previously 8.30pm) and MA15+ content from 8.30pm (previously 9.00pm). These changes would also affect when certain classes of advertising could be shown (such as alcohol advertising).

ASTRA made a submission on the proposed new Code, supporting the deregulatory approach taken and the efforts to simplify and modernise the regulatory framework. However, ASTRA's submission also raised strong objections to the inclusion of a clause which would exempt promotions for the FTA platform from being counted towards advertising time limits.

Previously, a clause exempting Freeview promotions from ad time limits was justified as helping to promote digital switchover. With switchover now complete, there is no public policy justification for further exemption from ad time limits.

Submissions to the new Code have now closed. The next steps are for Free TV to assess public feedback and lodge the proposed new Code with the ACMA. This would be followed by private negotiations between Free TV and ACMA until the ACMA is satisfied the Code adequately addresses community safeguards.

The proposed new Code is available [here](#).

ASTRA's submission is available [here](#).

- **Independent National Security Legislation Monitor Review of the impact on journalists in the operation of section 35P of the ASIO Act –**

The Independent National Security Legislation Monitor's (INSLM) role is to review Australia's counter-terrorism and national security legislation on an ongoing basis. This includes considering whether the laws contain appropriate safeguards for protecting the rights of individuals, remain proportionate to any threat of terrorism or threat to national security or both, and remain necessary.

The INSLM has sought public submissions on any impact on journalists in the operation of section 35P of the *Australian Security Intelligence Organisation Act 1979* concerning offences for the disclosure of information relating to a 'special intelligence operation'.

ASTRA has endorsed a submission prepared by the Australia's Right To Know coalition of major media companies which comments on section 35P and its impact on journalists. The submission argues that the review should also be taking into account other provisions in the Crimes Act which also address 'unauthorised disclosure' of information in relation to terrorism and security operations.

Consistently with recent Right To Know coalition submissions on anti-terrorism legislation (see the [February](#) and [March](#) Advocacy Updates), this latest submission expresses concern about the provisions that limit freedom of the media separately and in aggregate. These provisions make it increasingly difficult for news gathering and reporting in the public interest.

Further information regarding the inquiry is available [here](#).

- **Senate Committee on Rural and Regional Affairs and Transport Inquiry into the Criminal Code Amendment (Animal Protection) Bill 2015** – This Bill requires any person who records an act of animal cruelty or abuse to report it to authorities within one business day. Failure to do so would be a criminal offence.

ASTRA endorsed a submission from the Australia's Right To Know coalition which noted that this is a very draconian approach, unmatched in any other area of law including suspicions of terrorist activity or other significant matters.

The offences are likely to result in people who might otherwise record such material choosing not to do so, or on receiving advice as to their obligation, choosing to conceal and destroy the recordings. The position becomes further complicated if the person is a journalist, or if a journalist is approached by a source who has not so reported the recording, and is then the subject of a police investigation. The overall effect of the Bill is therefore likely to be a lessening of exposure of potential issues of public interest and debate around the treatment of animals.

More information on the Bill is available [here](#).

The Committee is due to report by 13 May 2015.

Copyright - in April a range of significant developments in online copyright enforcement took place, including a landmark court decision, the introduction of site-blocking legislation and the lodgement of a Code of Practice for an infringement notice scheme.

Dallas Buyers Club litigation

The Federal Court recently ruled in favour of the studio behind the movie Dallas Buyers Club, which had brought action against iiNet and other ISPs to gain access to the contact details of customers who had illegally downloaded the movie.

The studio had used software to detect and trace internet accounts which shared the movie online in breach of copyright (torrenting). The court case was to force the ISPs to hand over to the rights holders the identifying details for the holders of those infringing internet accounts. The court has ruled in favour of the rights holders and the ISPs will be compelled to hand over the account holders' information. This is known as preliminary discovery and is the first time an Australian court has ruled on the issue in relation to online copyright infringement.

This is part of a strategy pursue individual infringers by threatening legal proceedings unless they pay settlement fees. This has already occurred in the US where legal action was threatened against account holders claiming they were liable for damages of up to \$US150,000 unless they paid settlement fees of up to \$US7,000. This is known as 'speculative invoicing'. It is unlikely this approach will be taken in Australia as the judge in the Federal Court case has said that any letters to internet account holders would have to be approved by the court.

The court ruling means that about 4700 Australian internet account holders whose service was used to share Dallas Buyers Club on the internet from as early as May 2013 are likely to receive legal letters from the rights holders' Australian lawyers. iiNet has indicated it will not appeal the finding.

Site blocking legislation

The Government has introduced into Parliament the Copyright Amendment (Online Infringement) Bill 2015, which will give rights-holders the ability to apply for certain sites to be blocked if they're deemed to be for the purpose of infringing copyright or illegally distributing copyrighted material.

Under the legislation, rights-holders will be able to ask the courts to block sites hosted outside of Australia under the new legislation, meaning that internet service providers may soon be required to block sites such as The Pirate Bay.

When deciding whether or not to block a site, the Federal Court must take a few things into account. It must test:

- the flagrancy of the infringement or [the site's] facilitation
- whether disabling access to the online location is a proportionate response in the circumstances
- the impact on any person likely to be affected by the grant of the injunction, and
- whether it is in the public interest to disable access to the online location.

The explanatory memorandum for the Bill states that it's an "intentionally high threshold test" for laws that should only be used to block flagrant infringers of copyright.

When introducing the Bill to the Lower House, Communications Minister Malcolm Turnbull said that, in addition to the site-blocking legislation, "the government accepts that [availability of content locally] is important," in reducing online copyright infringement.

The Minister praised rights-holders in Parliament by continuing to make new offerings available to Australian users to give more choice.

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Committee is due to report on 13 May 2015.

Code of Practice for an online copyright notice scheme

In a major development, Australian rights holders and ISPs have jointly developed a code of practice to address online copyright.

The Code creates a scheme under which ISPs and Rights Holders will variously:

- Identify online copyright infringement (Rights Holders)
- Send a series of three escalating notices to infringers (ISPs)
- Facilitate legal proceedings against infringers (ISPs and Rights Holders)

Under the Code, ISPs will accept reports from rights holders which identify IP addresses being used to infringe the online copyright of the rights holder. This is predicated on rights holders independently monitoring unlawful downloading of their copyrighted material. To make use of the notice scheme in the Draft Code, rights holders will need to have had their detection systems independently audited and certified.

ISPs will endeavour to match the IP addresses identified by rights holders to the account holders to which the IP addresses were assigned at the time of the alleged infringements. ISPs will then send a notice to that account holder informing them of the alleged infringement.

The notice scheme escalates – consisting first of an education notice, then a warning notice and then a final notice. If a third infringement using the same IP address is reported within 12

months of sending the initial education notice, the ISP will send the account holder a Final Notice. This Notice will explain that the rights holder could immediately seek a court order that would compel the ISP to reveal the account holder's details to the rights holder. The rights holder could commence a direct copyright infringement action against the account holder.

The Code has been lodged with the ACMA for registration, however negotiations continue between rights holders and ISPs regarding the costs of the notice scheme. If the ACMA is satisfied with the submitted code, it would become a registered industry code under Part 6 of the Telecommunications Act 1997. If an ISP contravened this registered code, then the ACMA could direct the ISP to comply with the code. If the ISP continued to contravene the code, then it could face civil penalties under the Telecommunications Act.

All of ASTRA's publicly available submissions are on the [ASTRA website](#).

NEWS

ACMA Investigation – *Nine News Update*

On 9 April 2015, the ACMA announced its finding that WIN TV had breached the Commercial Television Industry Code of Practice by indirectly identifying the victim of a fatal car accident before authorities notified the immediate family of the victim.

In a segment on a *Nine News Update* aired 23 August 2014, footage was briefly visible of part of a number plate of one of the cars involved in the accident. An ACMA investigation found that the visible part of the number plate, combined with the vehicle's specific make and colour, was distinctive enough to be recognisable to immediate family members.

Clause 4.3.8 of the code provides that 'in broadcasting news and current affairs programs, licensees must take all reasonable steps to ensure that murder or accident victims are not identified directly or, where practicable, indirectly before their immediate families are notified by the authorities'.

As a result of the breach, WIN has undertaken to ensure its news team is aware of the result of the investigation and the ACMA's reasoning and to provide further training to its news teams on how to better handle these types of matters in future. WIN also apologised to the family concerned.

Advertising Standards Bureau findings – ASTRA receives updates from the Advertising Standards Bureau (ASB) when it issues final case reports where complaints about an advertisement have been considered. The ASB issued three reports in April, firstly relating to an advertisement for Actron air conditioning which, according to complainants, included a racist depiction of what it means to be a real Australian.

The ASB upheld complaints against the Actron advertisement concluding the depiction of a man of Asian descent 'trying but failing' to appear Australian did discriminate against a section of the community based on race. The ASB found the advertisement breached the AANA Code of Ethics for this reason.

Secondly, the ASB issued a finding in relation to an advertisement for Westpac home loans. In the advertisement, a young couple is pictured moving into their new home, but are accompanied by an annoying houseguest who is a metaphor for a home loan that won't get out of their lives. The complaint was that the houseguest was depicted as intellectually retarded and was thus discriminatory against people with an intellectual disability. The ASB dismissed the complaint stating that the majority of the audience would not conclude the man was depicted as having an intellectual disability.

A third finding concerned an ad for Holden's Colorado in which a young boy imitates his father in using mildly coarse language. Some complaints also alleged the advertisement depicted unsafe driving. The Board dismissed the complaints, noting that the scenes showing the vehicle being driven depict safe and controlled driving. The Board considered that the use of the word 'bloody' in the advertisement was not aggressive and was lighthearted and ironic.

ASB reports are available to ASTRA members on request.

DISCUSSION PAPERS/REQUESTS FOR COMMENT

Competition Policy Review

The Government has released the final report of the Competition Policy review and is calling for submissions on that report to inform its response to the review's findings.

ASTRA made a submission to the initial consultation round for the review – the ASTRA submission is available [here](#).

The final report does not deal with media policy in any great detail and does not contain any specific recommendations to address existing regulation which has the effect of suppressing competition (such as, for example, anti-siphoning laws).

The report does address issues such as the level of competition in the market for content, the definition of 'market', information gathering by the ACCC, third-line forcing, resale price maintenance and misuse of market power.

Submissions close 10 June 2015.

Senate Education and Employment Committee inquiry into temporary work visas

The Committee is considering the impact of temporary work visas on the Australian labour market and on temporary work visa holders. This review has relevance to the issues raised by ASTRA in its submission on the review of temporary work (entertainment) visas (subclass 420).

ASTRA's submission on 420 visas is available [here](#).

Submissions to the Senate inquiry close 1 May 2015.