24 November 2014

Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Review Panel

Response to Competition Policy Review Draft Report

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Draft Report of the Competition Policy Review (the Draft Report) released in September 2014.

This submission builds on the comments ASTRA provided in response to the Review's Issues Paper in June 2014, where ASTRA noted that consumers are best served by an open and competitive marketplace that encourages investment and innovation. To achieve this aim ASTRA advocates reducing the amount of sector specific and market distorting regulation to a minimum.

This submission responds to the Panel's views on media-specific regulations that distort competition, as well as content competition and intellectual property findings and recommendations that are relevant to our subscription television (STV) members. We also respond in brief to draft findings and recommendations on key issues of general competition law that are relevant to our members in the broader operation of their businesses.

Media ownership and anti-siphoning rules

The Draft Report notes that competition and diversity in media sectors is affected both by explicit regulatory interventions and market developments. The Panel makes a number of pertinent observations about the outdated nature of existing sector-specific rules—which are fully supported by ASTRA.

The Panel notes that explicit regulatory interventions in media ownership and control, as well as other interventions such as Australian content rules, are designed to achieve public policy objectives which are separate to those of competition law (namely media diversity and the reflection of Australian culture through the production of Australian content). Nonetheless, it is correctly observed in the Draft Report that:

> *[i]n a rapidly evolving technology landscape, inflexible regulatory provisions are unlikely to be sustainable or remain relevant over time*.[1]

Media ownership and control rules, as well as laws restricting access to sporting content (the 'anti-siphoning' laws), are now more than 20 years old and reflect another era. This was an era before (largely unregulated) internet services were integrated into Australians' lives as a central source of news, information, sport and entertainment. It was an era before sporting codes could provide coverage of their matches direct to fans via internet-enabled smartphone and tablet apps (including for a fee), unencumbered by the anti-siphoning restrictions that impede the STV broadcast sector alone.

[1] Draft Report, page 108.

The anachronistic nature of these rules has been recognised by the Panel which observes that as a result of the provisions of the *Broadcasting Services Act 1992* (BSA) being:

> *built around existing market structures and participants at the time legislation [was] passed, they almost by definition lag developments in a rapidly evolving marketplace.*[2]

While STV is not drawn directly into media ownership and control rules (which apply to commercial free-to-air television and radio and newspaper operators), ASTRA strongly supports broad reforms to these rules so long as they are packaged with reforms to the anti-siphoning scheme. By privileging free-to-air broadcasters over STV licensees, the anti-siphoning scheme is not only anti-competitive, but it also diminishes consumer benefit because it reduces the amount of sport on television and starves sporting codes of the revenue they need for grassroots activities and business development.

There is growing agreement among Australian media companies for a package of reforms which would see the abolition of outdated restrictions on media ownership and reach rules as well as reform of anti-siphoning. ASTRA encourages the Panel to make explicit recommendations in support of these reforms.

While the Draft Report notes that these matters are already slated for consideration in the Communications Portfolio as part of the Government's deregulation agenda, ASTRA considers that this debate would be greatly assisted by independent and expert recommendations from the Panel which would bring to a sector-specific review the benefit of economy-wide insights and expertise.

Panel recommendations in relation to market-based pricing for all radiofrequency spectrum, as well as lifting the legislated ban on further competition in the commercial free-to-air television sector, would also be welcomed notwithstanding acknowledgement that detailed consideration of these matters is conducted within the Communications Portfolio.

While not discounting the historical public policy aims of these regulations, ASTRA submits that it is particularly important that the Panel shed full light on the consumer detriment that can arise, and economic opportunities that are forgone, when regulation is allowed to persist which stifles innovation and protects some sectors over others. Cultural considerations are important, but it must also be clearly enunciated that the national interest is best served by promoting rather than restricting evolution, competition and innovation in all sectors.

Specific recommendations in this regard would build on the Panel's welcome proposal that all Australian Governments review regulations to ensure that unnecessary restrictions on competition are removed (recommendation 11).[3]

Content competition

By contrast to the positive observations the Panel has made in relation to media ownership regulation, ASTRA does not agree with the implication in the Draft Report that the Government should be concerned about content competition in the Australian media sector.[4]

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[2] Draft Report, page 106.

[3] ASTRA fully endorses the Panel's further suggestion that regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that: they are in the public interest; and, the objectives of the legislation or government policy can only be achieved by restricting competition.

[4] For example, the Draft Report notes that market developments in relation to content *'require close monitoring to ensure that competition concerns do not emerge'* (page 106). It is also suggested that *'media content issues may raise competition concerns over time, particularly in relation to competition in upstream markets for the provision of content'* (page 107).

This is because competition for audiences and subscribers is currently flourishing; and, as a result, competition for content rights to fuel these offerings is also increasing at a fast pace (other than, as mentioned above, competition for sports rights which is restricted by the anti-siphoning scheme). While the process of industry convergence is leading to partnerships between participants from traditionally separate communications and media sectors, the number of content sources is growing, not diminishing.

Australian consumers have never enjoyed a more competitive suite of entertainment and information offerings. For example, ASTRA members Foxtel and Telstra already compete vigorously with strong multi-national brands operating in Australia—such as Apple's iTunes, Google Play and Fetch TV (whose Malaysian parent is Astro All Asia Networks)—in the provision of audio-visual entertainment services in Australia.

Furthermore, in 2015, competition in the subscription video on demand (SVOD) segment in particular will intensify with the launch of the Stan subscription service from Nine Entertainment Co and Fairfax Media and the pending official Australian launch of Netflix. These services will add to existing SVOD offerings from Quickflix and Foxtel's Presto service, not to mention a broad range of national and commercial free-to-air linear broadcast and internet-enabled catch-up services.

With the explosion of new internet delivered services there are a greater number of platforms and channels seeking large quantities of content, which is positive for consumers and suggests that there is no need to adjust existing policy or regulatory settings.

Indeed, the ACCC continues to monitor the state of competition in the market for audio-visual content and has indicated a willingness to intervene where it perceives there is any lessening of competition.

ASTRA submits that the Panel should avoid any recommendations that would see an introduction of regulation specifically applying to content acquisition.

Intellectual property framework

The Panel notes that disruptive digital technologies will foster innovation, which will drive growth in living standards. It suggests that movement into the digital age means that access to and creation of intellectual property (IP) will be increasingly important.[5]

ASTRA fully agrees that reliance on a robust legal framework for IP is, and will continue to be, of vital importance to the development of the Australian digital economy. The STV sector is driven by an entrepreneurial spirit which sees ASTRA's members take risks in producing highly expensive, high quality programming—such as premium Australian drama, which can cost between $1 million and $1.8 million per hour broadcast to produce. The ability for content producers and distributors to extract fair monetary returns for these significant investments is essential for the ongoing sustainability of media and communications enterprises and for the continued investment in Australian content production.[6]

A fair return on investment can only be made when the owners of copyright in content operate within a legal framework that allows them to reasonably control access to that content. This is acknowledged by the Panel where it recognises that IP rights are important for competition and follow-on creations because they allow firms to derive financial benefits from their products (which provides an incentive to further create and innovate).[7]

[5] Draft Report, page 30.
[6] The investment by the STV sector in Australian content is substantial. For example, in 2012-13, the Australian STV industry invested around $700 million in Australian content production, employing 6600 Australians and adding $1.6 billion to the Australian economy.
[7] Draft Report, page 81.

However, the Panel notes that determining the appropriate extent of IP protection is complex. To investigate this issue further, the Panel's draft recommendation is that an overarching review of IP be undertaken by an independent body, such as the Productivity Commission, which would focus on competition policy issues in IP arising from new developments in technology and markets.

It is acknowledged that an appropriate balance of interests must be found in any legislative scheme, however ASTRA submits that this appropriate balance is in fact already found in the current Australian IP scheme. Given the description above of the increasingly competitive range of entertainment services available to Australians, ASTRA seriously questions the need to devote Government and industry resources to an extensive IP competition review. As competition is increasing, not diminishing, we submit that the case for a significant review, and indeed significant change, has not been made. Clear evidence of a problem would need to be identified for this recommendation to be justified.

This view is supported by the Panel's reference to the view of the Australian Competition and Consumer Commission that in the vast majority of cases the granting of an IP right will not raise significant competition concerns:

> *[R]ights holders are entitled to legitimately acquire market power by developing a superior product to their rivals, and pursuant to the policy purpose of IP regulation, the temporary market power from an IP right provides the very incentive to invest in the production of new IP. Such innovation is also a key goal of competition law. In this respect, IP and the competition law are for the most part complementary, both being directed towards improving economic welfare.*[8]

ASTRA notes the Panel's recommendation that the current exception for IP licences in the *Competition and Consumer Act 2010* (CCA) be repealed (recommendation 8). To avoid unintended consequences ASTRA recommends further detailed consideration be given to this proposal.

ASTRA further notes and supports the Panel's recommendations in relation to international trade agreements that incorporate IP provisions (included in recommendation 7):

- That consideration is given to the development of clear and transparent principles and processes for the Australian Government when establishing negotiating mandates.
- That trade negotiations be informed by an independent and transparent analysis of the costs and benefits to Australia of any proposed IP provisions.

If implemented, these steps would greatly assist affected Australian businesses understand the impact on their operations of IP provisions of treaties such as the Trans-Pacific Partnership Agreement, which is currently being negotiated.

However, in ASTRA's view these recommendations could be directed to the relevant Government agencies without the need for them to be further considered by an additional independent Productivity Commission review. We suggest an amendment to the draft recommendation to this effect.

Geographic content licensing

The Draft Report addresses the issue of geographic content licensing where it examines the issue of international price discrimination—the practice of a supplier charging different prices for goods or services according to the country in which the products are sold.

[8] Draft Report, page 82.

This issue has also been recently discussed in the context of the public policy debate about online copyright infringement where interest groups such as CHOICE have been critical of territorial licensing arrangements for entertainment content, with the implication being that such arrangements are self-evidently unjustified.

ASTRA wishes to rebut this assumption. It is the view of our members that content owners have a right to licence their content how they see fit:

- firstly, so they can make an appropriate return on their investment—to further invest in original productions; and
- secondly, taking into account the specific economic conditions of each territory and taking into account the size of each population.

The economics of the content business depend on licensing rights in different windows on different services and at different prices in different territories. Producers grant program rights by territory, language, platform and amount of usage, so as to maximise their return on investment. This is a reasonable approach—as noted above, maximising returns allows a producer to continue to invest and to innovate and create. This has both economic and cultural benefits.

It is questionable whether a program such as *Game of Thrones*—which can cost between US$6 million and $8 million per episode to make—would be financially viable if the windowing process was abandoned and a single per-episode international price was set.[9] Similarly, if Australian media companies are not able to rely on acquiring and exploiting rights to international content which are limited to this territory then their business model will be undermined, with serious adverse impacts on Australian jobs, ability to create new Australian content and ability to offer services tailored for Australian audiences.

Furthermore, as our members have previously stated, the idea that Australia would unilaterally decide to change the way in which IP rights are managed globally is unrealistic at best.

Given these views, ASTRA notes the Panel's finding that price discrimination can be of benefit to consumers.[10] ASTRA supports the Panel's key draft findings that existing provisions of the law can adequately deal with any instances of anti-competitive price discrimination that may arise; and, that a specific price discrimination prohibition should *not* be introduced to Australian law. In particular, ASTRA agrees with the Panel that:

> *[a]ttempting to legislate against international price discrimination could result in significant implementation and enforcement difficulties and risks negative unintended consequences.*[11]

However, ASTRA is concerned about a number of other observations made about territorial licensing in the Draft Report, particularly the Panel's proposal to endorse the use of virtual

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[9] It is also important to understand that the so-called 'Golden Age of Television' arose because of the subscription bundle model which is used around the world, including by HBO in the US (the makers of programs including *Game of Thrones*). Without the subscription bundle—under which the attraction of 'blockbuster' content helps underwrite the production of premium niche content—many channels and programs would become economically unviable. Even original Netflix programs like *House of Cards* and *Orange is the New Black* are supported by a subscription model. By contrast, iTunes does not produce original programming. Producers can get a better financial return on their investment when they offer subscription TV providers hold backs on content before selling it to digital platforms to retail on a per-episode basis.

[10] Draft Report , page 217.

[11] Draft Report, page 217. ASTRA also endorses the views of the American Bar Association (ABA), which are cited in the Draft Report, where it identifies the challenges of regulating international price differences. The ABA notes that it can be very difficult to identify unjustified price discrimination and notes the complex factors that influence pricing decisions in a given territory. The ABA also makes the valid point that without geographic licensing foreign suppliers may choose not to enter a market or abandon a market, and that Australian companies might not enter overseas markets if they cannot licence their products on their terms in those territories – see Draft Report, page 214.

private networks (VPNs) to allow Australian consumers to access content services in other jurisdictions.

Accessing overseas services from Australia may breach the terms and conditions of the overseas service and is unlikely to be consistent with licensing arrangements the service has in place with content suppliers. Leaving aside the contractual issues between these parties, ASTRA submits that the Panel cannot both recognise the role and benefits of territorial licensing (which include allowing Australian program producers to control how, on what terms and where their content is licensed outside Australia—in order to maximise return) and then encourage the subversion by consumers of such arrangements.

As such, ASTRA submits that the Panel should not pursue its proposal to endorse recommendations of the July 2013 report of the House of Representatives Standing Committee on Infrastructure and Communications into IT pricing in Australia which would condone, and furthermore encourage, Australians in circumventing technological protection measures that currently enable geographic market segmentation.

General competition law recommendations

ASTRA acknowledges that the Panel has made a number of draft recommendations in relation to general competition law which are consistent with the views expressed in our earlier submission to the Review.

- **The regulatory approach to markets**: ASTRA has previously noted the international context in which its members do business and recommended that, when examining conduct within a market, regulators should be able to recognise this global context.

  The Panel's recommendation is that the definition of 'competition' be amended to take into consideration competition from goods imported or capable of being imported into Australia and from services supplied or capable of being supplied to Australians from overseas (recommendation 20). ASTRA does not oppose this recommendation.

- **Third-line forcing**: ASTRA previously submitted that third-line forcing provisions in the CCA should be amended to introduce a competition test. ASTRA welcomes the Panel's recognition that the vast majority of third-line forcing conduct is beneficial to consumers and therefore pro-competitive,[12] and its draft recommendation that a competition test therefore be introduced (recommendation 27).

We note that in relation to the other issues of general competition law previously addressed there is a divergence between ASTRA's view and the draft findings and recommendations of the Panel:

- **Resale price maintenance**: ASTRA reiterates its previous submission that resale price maintenance provisions would operate more effectively if they were amended to include a competition test.

  While we acknowledge that Panel has recommended that the notification process should be extended to resale price maintenance (to provide a more efficient exemption process), we recommend that the Panel reconsider its draft finding that the case has not been made for changing the prohibition on resale price maintenance from a per se prohibition.

- **Misuse of market power**: ASTRA's view remains that that the misuse of market power provisions of the CCA should *not* be amended to introduce an effects test. Our members

[12] Draft Report, page 231.

are therefore disappointed that the Panel proposes to recommend that such a test be introduced (recommendation 25).

We reiterate our concern that under such a test it would be difficult to reliably predict or control the effect of conduct (as opposed to identifying an anti-competitive purpose), with negative flow-on effects for consumers (for example, the creation of a risk averse culture resulting in consumers being potentially presented with fewer compelling offers, discounts and rebates).

We are also concerned that the proposed defence is uncertain and will be difficult to advise upon and so will not achieve its stated aim of preventing over-reach.

ASTRA members are also supportive of draft recommendations 22, 23, 24 and 28, insofar as they relate to simplification of the CCA. However, ASTRA does not support the recommended extension of section 45 to 'concerted practices' (recommendation 24).

Please feel free to contact me if you wish to discuss further anything in the above.

Yours sincerely

Andrew Maiden
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