

26 May 2015

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: competition@treasury.gov.au

Dear Sir/Madam

The Australians Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Final Report of the Competition Policy Review (the **Final Report**) released 31 March 2015.

This submission builds on the comments ASTRA provided in response to the Review's Issues Paper in June 2014, and the Review's Draft Report in November 2014, in which ASTRA advocated in favour of an open and competitive marketplace that encourages investment and innovation.

This submission responds to the Panel's views on the content competition and intellectual property (IP) findings in the Final Report that are relevant to ASTRA's members. ASTRA also states its view on a selection of general competition recommendations which are relevant to our members in the broader operation of their businesses.

Intellectual Property

ASTRA is not opposed to recommendation 6 insofar as it relates to an inquiry focussing on intellectual property provisions in international trade agreements. However, ASTRA's members are firmly of the view that the proposed 12 month overarching review of competition policy issues in IP is unnecessary and unjustified (Recommendation 6).

In its submission to the Draft Report ASTRA argued that the case for an overarching IP review had not been adequately made and that there was no clear evidence of a problem that would justify the Government taking up this recommendation.

As noted in ASTRA's submission to the Draft Report, technological and business innovation means that competition is increasing, not diminishing. In light of the increasingly competitive range of entertainment services available to Australians, ASTRA believes it would be an unjustified diversion of Government and industry resources to establish the proposed review at this time.

ASTRA also remains concerned that the Final Report implies that content industries may evolve in such a way as to raise competition concerns that will require ongoing monitoring by the Government. As ASTRA has previously set out, the increasing competition for audiences and subscribers arising from new providers and platforms means that competition for content is intensifying, rather than diminishing.

For example, existing services provided by ASTRA members Foxtel and Telstra compete vigorously with international competitors such as Apple's iTunes, Google Play and Fetch TV. In 2015 we have seen the launch of highly competitive subscription video on demand services Stan and Netflix, going up against the existing offerings of Quickflix and Presto and well-established free-to-air linear broadcast and internet-enabled catch-up services.

All these platforms are content-hungry, driving competition for audiences and content in a way that should assure the Government that current policy and regulatory settings are working well.

Mechanisms for subverting geographic content licensing

ASTRA wishes to restate its very strong concerns regarding the Final Report's endorsement of consumer action to subvert geographical content licensing.

The ability for content producers and distributors 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 the continued investment in Australian content production.

A fair return on investment can only be made when the owners of copyright in content are allowed to reasonably control access to that content. It is ASTRA's view that content owners have a right to licence their content how they see fit, including by taking into account the specific economic conditions of each territory and the size of its population.

As ASTRA has previously set out, the economics of content creation and distribution businesses depend on licensing rights in different windows on different services and at different prices.

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 – maximising returns allows a producer to continue to invest and to innovate and create. This has both economic and cultural benefits.

It is extremely unlikely that the economics of content distribution will divert from this model in the near future. 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.

Removing the ability to licence programming by territory would also make it very difficult for Australian producers to control the exportation of Australian stories in a

way that maximises their returns (they would no longer be able to control when, where and at what price Australian programs are sold overseas).

It is therefore of great concern that the Final Report encourages consumers to adopt methods which subvert this economic model, as such activity undermines the viability of Australian content businesses, which, rather than empowering consumers as the Panel suggests, will ultimately rob consumers through diminished choice and reduced levels of local production.

Definition of 'market'

ASTRA supports the Final Report's Recommendation 25, that the current definition of 'competition' in section 4 of the CCA should be expanded to include competition from goods imported or capable of being imported. This is a very important recognition of the international context in which ASTRA's members do business and it is appropriate that regulators take this into account. ASTRA recommends the Government accept this recommendation.

3rd line forcing and competition test

ASTRA previously welcomed the draft recommendation that a competition test be introduced in relation to the third-line forcing provisions in the *Competition and Consumer Act 2010* (CCA).

The Final Report notes that third-line forcing can be beneficial for consumers and that businesses should be able to package goods or services in ways which meet consumer demand. This flexibility is becoming increasingly important as businesses face intensified competition from new media entrants and must find new ways to improve the customer proposition. ASTRA supports the view that third-line forcing is unlikely to be anti-competitive in the vast majority of cases.

ASTRA therefore supports Recommendation 32 to amend the third-line forcing provisions to move away from a per se prohibition towards a competition test. ASTRA submits that amendments of this kind would accord with the Government's deregulatory agenda, in that they would remove the need for businesses to go through the costly and burdensome notification process.

Effects test for misuse of market power

In line with its earlier submissions, ASTRA's view remains that the misuse of power provisions of the CCA should not be amended to introduce an effects test. ASTRA is therefore opposed to Recommendation 30 and submits the Government should not progress this proposed legislative amendment. ASTRA remains of the view that the introduction of such a test would introduce significant uncertainty into business decision-making, given the difficulty in reliably predicting or controlling the effect of business conduct.

Not only would this have the consequence of constraining legitimate business activity, it would also have a detrimental impact on consumers, who could miss out on otherwise compelling offers, discounts or rebates because of such uncertainty.

Implementation

ASTRA notes the Final Report includes a timeframe for legislative reform that proposes legislative amendments to the CCA be finalised within 12-18 months. ASTRA urges the Government to commit to this timing to ensure the benefits of reform flow through to business in a reasonable timeframe.

With the review being announced in December 2013, this means that by the time legislation is drafted and finalised, the reform process would have been running for over three years (this timing assumes a Government response to the review within 6 months of the Final Report). Whilst it is acknowledged that the review has been wide-ranging and that the complexity of the issues has required careful consideration, every effort should be made to ensure the economic benefits of reform are realised in a timely manner.

Please feel free to contact myself or Holly Brimble, Policy and Regulatory Affairs Manager on (02) 9776 2688 if you wish to discuss anything further in the above.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Maiden', with a stylized flourish at the end.

Andrew Maiden
CEO