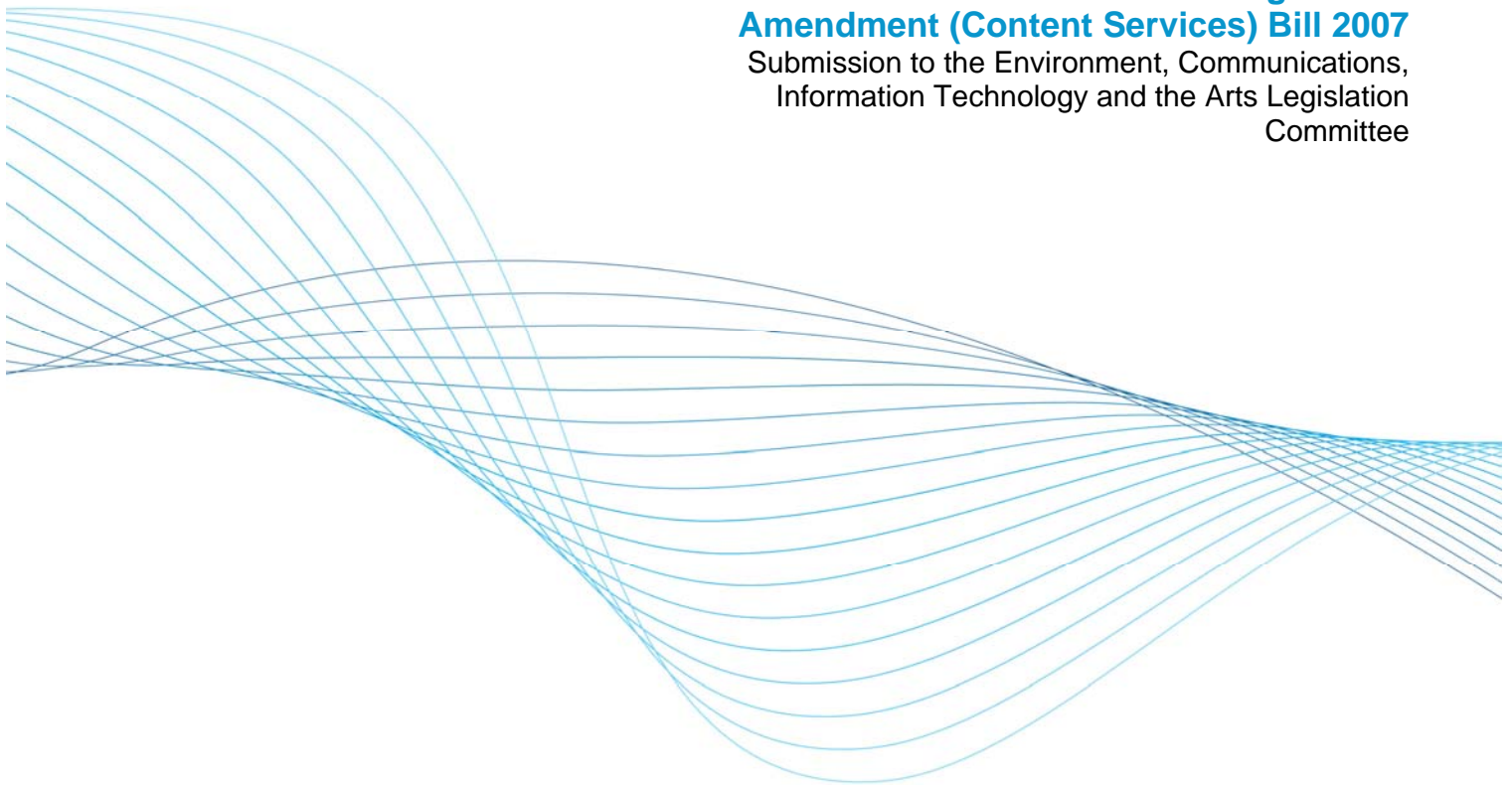




**Senate Inquiry into the provisions of the  
Communications Legislation  
Amendment (Content Services) Bill 2007**  
Submission to the Environment, Communications,  
Information Technology and the Arts Legislation  
Committee



28 May 2007

The Secretary  
Senate Environment, Communications,  
Information Technology & the Arts Committee  
Parliament House  
CANBERRA ACT 2600

By email: [ecita.sen@aph.gov.au](mailto:ecita.sen@aph.gov.au)

Dear Dr Holland

## **COMMUNICATIONS LEGISLATION AMENDMENT (CONTENT SERVICES) BILL 2007**

ASTRA appreciates the opportunity to provide comment on the Communications Legislation Amendment (Content Services) Bill 2007 (the **Bill**) as part of the Senate Environment, Communications, Information Technology & the Arts Committee's (the **Committee**) inquiry into the provisions of the Bill.

### **Background**

ASTRA understands that this legislation is in part a response to the live streaming of content delivered over the internet connected to Channel 10's *2006 Big Brother* television series and to on-going reviews of content on mobile telephones and other devices. The legislation takes the opportunity to regulate 'converged content' to the extent that content is available in varying forms on multiple distribution platforms.

ASTRA represents the interests of subscription television operators and channels. A complete list of ASTRA's members is available at [www.astra.org.au/members.asp](http://www.astra.org.au/members.asp).

ASTRA's members create and distribute hundreds of thousands of hours of original audio-visual content via the broadcasting of distinct channels of programming on cable and satellite platforms. ASTRA's members complement this supply by providing content for use on other distribution platforms including mobile telephones and the internet. Some of ASTRA's members are themselves carriage service providers and telephone and internet service providers.

The subscription television industry is generating an increasingly larger slice of the total Australian audio-visual content including sports, news, documentaries, film, drama, infotainment and magazine style programming. ASTRA's members approach to the provision of this content is both innovative and advanced, using the capabilities of digital broadcasting and technology to allow Australians to view and experience entertainment in a variety of sophisticated, and mostly demand-led ways. Without innovative and compelling content, new technologies are slow to be adopted and their development can eventually be stifled. ASTRA has therefore taken a keen interest in the Bill.



## **Introduction**

ASTRA's comments relate to the implications for its members, being the Australian subscription television sector.

Overall ASTRA is pleased with the significant re-draft of the exposure draft of the Bill (2006) and notes that many of ASTRA's concerns have been addressed with the new Bill. In particular, the Bill replaces the impractical strict liability regime with a complaints-based take-down regime similar to that which exists for online content. The proposed Schedule 7 to the Broadcasting Services Act 1992 (the **Act**) is similar to and will operate in addition to the existing take-down notice regime for online services in Schedule 5 of the Act. In addition, ASTRA welcomes the provisions which cover exclusions for broadcasting services and content regulated under the existing broadcasting regulatory framework of the Act.

## **Content Regulation**

ASTRA considers that content regulation should in principle be consistent, regardless of medium of delivery. To that end, classification and assessment of content should be based upon, and consistent with existing rules and processes.

The key elements of content regulation are that adults should be able to watch what they choose and children should be protected from material that may be harmful to them. The protection of children is an object of the Act. It is this object that underpins the codes of practice of the various television and radio sectors in Australia. This principle is also the basis of Australia's classification system for film, computer games and publications.

To that end, ASTRA believes it can be more harmful than good to prohibit certain types of content from being received via legitimate, regulated platforms which offer appropriate access restrictions when prohibited content is easily made available through other means to address unmet demand.

ASTRA's members offer services all of which offer as a feature disabling devices (usually achieved through a pin coded access) to protect children from harmful content. However, it remains the case that R18+ content is permitted only on narrowcast services and X18+ content is not permitted at all.

The Bill's proposed model of co-regulation, via industry codes, as currently exists under the Act, is appropriate. Where existing codes and regulation exist it should continue to operate and care should be taken not to duplicate this successful and effective regulatory regime. This also assists to mitigate the resource and financial costs created by regulatory compliance of differing regimes.

## **The Bill**

As stated, Schedule 7 of the Bill has been significantly re-drafted since the exposure draft. Rather than a strict liability regime the Bill sensibly now contains a complaints-based scheme where the Australian Communications Media Authority (**ACMA**) can issue take-down notices for hosted/stored content, service cessation notices for live content and link deletion notices for links to prohibited/potentially prohibited content. ACMA can issue a notice based on a complaint or on the basis of its own investigations. This is similar to the existing provisions of the Act.

There is also potential for ACMA to issue a special take-down notice or special link deletion notice if an existing notice is in place and a service provider is offering or planning to offer similar content

to that which is the subject of the original notice. A service provider who has received an interim notice can offer a written undertaking to ACMA in relation to the content specified in the notice. An undertaking would supplant any obligations and/or directions contained in the notice. Failure to comply with a take down notice within the specified timeframe (as soon as possible and no later than 6pm the next business day after receipt of a notice) or an undertaking is an offence and/or the civil penalty provisions could apply.

For live content, ACMA may issue a ‘service cessation notice’. However it is unclear whether a service cessation notice would apply to each individual ‘stream’ of live content or the service as a whole. This may require clarification.

### Restricted Access System

The Bill does enable service providers to give undertakings to ACMA in relation to service cessation notices as an alternative to a service cessation notice. Depending on the type of content and the type of notice issued, a service provider is required to bring about a ‘Type A remedial situation’ or a Type B remedial situation’. Essentially Type A is the complete removal of the content or disabling access to the content and Type B is either complete removal or disabling access or ensuring that the content can only be accessed via a restricted access system but effectively an access control system that has been declared by ACMA.

The Bill requires ACMA to have a declared ‘restricted access system’ in place for prohibited content that is R18+ and MA15+. It is possible, but not mandatory, for ACMA to declare a different system for R18+ and MA15+. This could potentially cause problems, as on the face of the legislation there is no requirement for ACMA to consult with industry in declaring this system, and no requirement for ACMA to consider declaring a different system for each Provider. There is also no specific prohibition on ACMA declaring more than one system as a restricted access system hence ASTRA understands that entities with restricted access systems may need to request a declaration for each restricted access system they use.

ASTRA supports a flexible approach to the development of restricted access systems, including declaration of existing restricted access systems. ASTRA therefore seeks clarification as to where ACMA is at with the development of the instrument that will define what will be classified as a ‘restricted access system’.

### Industry Codes

Proposed Schedule 7 also requires ‘sections’ of the content services industry (that is hosting providers, live content providers, link providers and commercial content service providers) to develop industry codes. ACMA is required to make reasonable efforts to ensure a code is registered six months after commencement. ACMA may impose an industry standard if its request for the development of a code is not complied with. In view of ASTRA’s experience, six months is an unrealistic timeframe for code development and registration given the need to provide adequate opportunity for public and industry comment and subsequent consultation with ACMA.

Also the Bill does not necessarily address the very real situation where providers are participants in all sections of the industry. ASTRA is of the view that it can develop a relevant and appropriate code on behalf of its members.

### Australian links

The proposed Schedule 7 applies to links with an Australian connection that link to prohibited content or potentially prohibited content. ASTRA understands that this means if a link in Australia directs users to a foreign-based site, the service provider in Australia may have to form views as to the content of the entire foreign-based site. This may require further clarification.

### Clause 20 Prohibited Content Definition

Clause 20 of the Bill establishes five categories of prohibited content. The proposed inclusion of MA15+ audiovisual/moving image content (that is not news/current affairs) without a restricted access system and provided on payment of a fee [sub clause (c)(i)(ii)(iii)(iv)(v)] as prohibited content goes beyond the current provisions of the Act. The Act prohibits RC and X18+ and R18+ which is not restricted in some way (that is not subject to a restricted access system for online content; prohibited on an open or subscription broadcast television service but may be provided on a subscription narrowcast television service).

ASTRA seeks clarification as to why the payment of a fee for MA15+ content without a restricted access system makes such content 'prohibited' when the same content available for free is not prohibited. Under the current provisions of the Act, payment of a fee or subscription is viewed as an inhibiting factor for access, for example payment of a fee has been considered by ACMA as a contributing factor in determining a service as a narrowcast service rather than a broadcasting service.

### Specific ASTRA Issue

Apart from matters for clarification mentioned above, ASTRA has a specific issue which it believes is an unintended consequence of the Bill. The concern relates to subscription TV's 'on-demand' service which is available on the FOXTEL (and OPTUS) digital platform and will be available on AUSTAR (when MyStar – AUSTAR's PVR) after it is deployed.

By way of background and example, FOXTEL's On Demand is a service that is available to all subscribers that subscribe to the basic package and have a set top unit (STU) containing a hard drive (FOXTEL IQ). Programming is played out by FOXTEL in a stream which is downloaded into a portion of the hard drive. This stream of content hits all STU's at the same time and the content is then stored on the hard drive for a designated period. Subscribers can then select when they view particular programs that are made available as part of the On Demand service. This content is the same content that is otherwise made available as part of one of many channels available on the platform. The channels essentially select which particular program they want to showcase as part of the On Demand service for a set period.

There are a number of exclusions to the definition of 'content service' (and consequently, to the definition of 'commercial content service'), including relevantly a licensed broadcasting service and a retransmitted broadcasting service. These terms are defined to have the same meaning as in the Act. This reflects the Government's intention that content regulated under existing broadcasting regulatory frameworks should be excluded from the scope of the Bill.

ASTRA's concern is that the On Demand service is unintentionally caught as it is likely to be classified as a point to point service which means it falls into the definition of a 'content service'. A 'content service' is defined in the Bill as a service that delivers content to persons having equipment

appropriate for receiving that content where delivery is by means of a carriage service and it does not fall into any of the exclusions. As MA 15+ content may be made available as part of this service, it is potentially '*prohibited content*'. This would lead to a very odd situation where content that is made available as part of a broadcasting service must comply with one level of regulation while content made available as part of the On Demand service to its same subscribers is subject to another.

ASTRA understands that this service is not intended to be caught by the Bill and that any necessary amendment should exclude services analogous to broadcasting services and made available by a subscription television broadcasting licensee.

ASTRA would be pleased to provide any clarification of the matters raised in this submission or any further information required by the Committee.

Yours sincerely

A handwritten signature in black ink that reads "Debra Richards". The signature is written in a cursive, flowing style.

Debra Richards  
Chief Executive Officer