

1 May 2014



Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Secretary

Re: Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to comment on the Classification (Publications, Films and Computer Games) Amendment (Classification Tools and Other Measures) Bill 2014 ('the Bill'), which amends the *Classification (Publication, Films and Computer Games) Act 1995* (Cth) ('the Classification Act').

Our comments are confined to the proposed new section 8AA of the Classification Act (Schedule 6 of the Bill). New section 8AA is intended to create offences for unauthorised commercial use of determined markings.

Goods: Under subsection 8AA(1), a person will commit an offence if the person, in trade or commerce, uses a determined marking in relation to goods unless the goods are: a publication, film or computer game; or goods used to promote a publication, film or computer game that has the classification for that marking.

Services: A person will commit an offence under subsection 8AA(2) if the person, in trade or commerce, uses a marking in relation to a service that is not for the purposes of the classification system provided for by the Classification Act.

Section 8AA(1) - Goods

We note that TV programs are classified on broadcasting and online services under the provisions set out in relevant codes of practice as opposed to under the Classification Act. We understand that it is the view of the Government that television programs provided by broadcasting services and online would be exempt from the prohibition in subsection 8AA(1) by virtue of the fact that television programs would fall under the definition of a "film" for the purposes of the Classification Act, and thus would be one of the categories of goods or services exempt from the prohibitions under new section 8AA. The definition of "film" under section 5 of the Classification Act includes "...a cinematograph film, a slide, video tape and video disc and any other form of recording from which a visual image, including a computer generated image, can be produced (together with its sound track)."



Section 8AA(2) – Services

Under subsection (2), we believe there is a risk that the provision has the unintended consequence of prohibiting the use of classification markings on certain television content provided via online services, such as content provided through Foxtel's Internet delivered service "Play".

We note that Section 92 of the Classification Act excludes "broadcasting services" from the operation of the Classification Act. As such, it is clear that licensed subscription television services are exempt from s 8AA. However, this exemption will not apply where the "service" in question is not a broadcasting service. Our concern therefore is the use of classification markings on television content provided through Internet delivered services. Under the "Internet Determination" made in 2000, the then Minister determined that "a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands" is a class of service that does not fall within the definition of a broadcasting service.

Subsection (2) provides that the prohibition does not apply where the marking is used "for the purposes of the classification system provided for by the Classification Act". Classification of television content provided by subscription television providers is regulated under the relevant broadcasting Codes of Practice, not under the Classification Act. As such, there is the potential that the new subsection 8AA(2) will prohibit the use of determined markings for television programs, or promotional material for television programs, provided online.

Proposed solution

ASTRA appreciates that it is not the intention of the Government to capture television services provided online under the prohibitions in new section 8AA. We understand that subsection 8AA(2) is not intended to capture services which involve the provision of goods to which subsection 8AA(1) applies, ie if the markings are being attached to goods (television programs) which happen to be supplied by the service (online television service) then this is not a use of the markings by the "service" to which s 8AA(2) applies. If our understanding is correct, we request that a statement is added to the Explanatory Material relating to s 8AA(2) which clarifies this point. This will put the issue beyond doubt and provide us comfort that online television services provided by ASTRA members are not caught by s 8AA(2) by default.

Please feel free to contact me or Simon Curtis (Policy and Regulatory Affairs Manager)

Yours sincerely

Andrew Maiden
CEO