November 5, 2014

Submission to the Media Development Authority of Singapore in response to its Public Consultation on "Review of Consumer Protection Measures in the MMCC"

CASBAA is the apex industry association in Asia for participants in the pay-TV industry. A non-profit Association detached from individual national interests, it is dedicated to the development of the multi-channel pay-television industry across the Asia-Pacific region. Our 120 member organizations include leading pay-TV operators, international content and technology providers, and telecom companies. They are major investors with substantial experience in developing communications industries that now serve more than 500 million pay-TV households in Asia. CASBAA works to promote free and fair markets, the protection of intellectual property rights and the development of thriving and competitive national communications industries in the belief that the ultimate beneficiaries will be hundreds of millions of consumers across our region.

Singapore is home to several dozen CASBAA members, which include both of the leading pay-TV platform operators, many international channel groups and content creators, and numerous technology and service providers. CASBAA members have made significant contributions in establishing Singapore's role as a regional media hub.

We wish to address those issues in the Consultation Paper pertaining to Unilateral Contract Variations, specifically by: (a) changes in the content bundle supplied to consumers under the contracts, and (b) to contractual disclosure of the terms and conditions of service.

Consumer Contract Termination

MDA proposes to give consumers a right to terminate all pay-TV contracts where there is a "material change" in the content provided under that contract. We note firstly that these proposals would introduce a new right unique to consumers of pay-TV services; no analogous rights attach to consumer contracts for telecommunications, other types of media, nor other services within the Singapore economy.

MDA's proposal for industry-specific regulations creating consumer rights with respect only to pay-TV contracts ignores the nature of those contracts: there is no enumeration of the specific programming provided other than in general terms; consumers acquire a large bundle of programming and services for which they pay an established monthly fee. They enjoy a very large variety of quality programming at lower cost (than if individually acquired) by purchasing this bundle for a defined

subscription period. An analogy in the non-electronic media is the newspaper, which is a bundle of different types of content provided for a defined subscription period. Within that period, columnists and features and entire sections may come and go, with no expectation that the details of the publication remain immutable. The value is in the bundle as a whole. If the consumer's appreciation of the value-for-money equation of the content mix turns negative, it is expected he would end his subscription to the journal at the time it expires.

MDA's proposals go farther in the direction of placing burdensome obligations on pay-TV providers than those in place in any other Asian or Australasian economy. In creating a new consumer right that hinges on any "removal of content," MDA would create a special Singaporean consumer privilege, applicable only to the pay-TV industry, which regulators in other Asian/Australasian markets do not generally impose. MDA's proposal – particularly as it affects the content mix within TV channels – is unnecessarily rigid and overly micromanaging; where any material content is removed, consumer contract termination would have to be allowed. This would tilt the balance of consumer rights and obligations in ways that are inconsistent with the realities of content supply in the global pay-TV market.

It is a fact of life in the global marketplace that content supply contracts are not immutable. Renegotiations between content providers and pay-TV platform operators are a constant feature of the business environment. Channels come and go, and rebrandings occur with great regularity. Sometimes it is not possible (for reasons of price, strategy, market focus shifts, or consumer preference changes) to reach agreement on continued supply of a given channel. In the constantly shifting environment, pay-TV operators have to make occasional changes in their channel lineups; sometimes these are anticipated and sometimes not. Other governments recognize this, and allow pay-TV operators to manage their upstream contracting in a reasonable way.

With respect to individual pieces of content, consumers live with programming changes, just as they live with launches and cancellations of new programs on free-to-air TV, or changes in a newspaper's lineup of columnists. MDA should not create the expectation among TV consumers that removal of any significant content, for whatever reason and no matter how replaced, will make them aggrieved!

Rather, a more balanced approach to regulation of this issue would help consumers understand the realities of the international marketplace, and use a self-regulatory approach to ensure pay-TV operators understand the necessity to manage their content packages in ways respectful of consumers' interests. The twin elements of a balanced approach would be:

a) Provision of information statements to consumers prior to contract signature which allow them to understand some changes may be inevitable, and to foresee likely changes, before they commit to contract signature. In this context, the pay-TV operators could be required to disclose any major changes in lineups that are foreseeable as of the time of signature. (For example, in Hong Kong the current exclusive distributor of English Premier League programming is PCCW nowTV. In its pre-

signature documentation, nowTV informs consumers that its contract for the EPL programs will expire in the summer of 2016, allowing consumers to make informed decisions about subscribing to sports packages.)

b) Creation of a voluntary Code of Practice or Guidelines for all pay-TV operators to take into account, as they establish their corporate policies. Under self-regulation pursuant to such a code, pay-TV operators could acknowledge the goal of maintaining the value of consumer contracts, and where programming has to be discontinued, using best attempts at offering new options of a similar value to ensure consumer benefits. In the context of such a Code, if MDA has concerns that certain specific programming (e.g. the EPL, or the UEFA Champions League) is of particular significance and value to consumers, it should develop descriptions or a brief list of such programs for inclusion in the Code so that operators can know in advance rather than after ad hoc, case-by-case, a posteriori policy-making, the limited, specific programming where disclosure of contract termination dates would be particularly important. (Such a list would need to be limited and specific; there is a vast amount of individual programming included in channel streams coming to Singapore, and a Code must avoid creating unmanageable burdens and expectations.)

Adoption of this more consultative approach that couples clear indications with self-regulation would also allow MDA to refrain from attempting to control from Singapore upstream insertion of specific pieces of content into channel streams, as the current draft proposes through a prohibition on removing "material content" within a channel, on pain of having to compensate consumers. Even more than channel carriage arrangements, inclusion of individual pieces of content in channel streams is subject to vagaries of upstream negotiations. Whether any given content is available in Asia at all is determined by regional audience demands and Singapore forms only a small part of regional demand. MDA's proposed provisions would hold Singapore pay-TV operators hostage to programming decisions made outside Singapore to meet market conditions outside Singapore. Neither Singapore consumers nor MDA are in a position to dictate content purchasing decisions to international channels which supply Singapore as one of two dozen markets in Asia; it makes no sense to make Singapore's pay-TV platforms responsible for those decisions.

MDA's proposals with respect to trying to influence the detailed make-up of international TV channels represent a substantial enlargement of the role of the regulator which is inappropriate and unnecessary. The international industry hopes for a lighter-touch approach from the regulator of a place that wishes to play the role of an international hub for the content industry. Channel providers will not welcome attempts – no matter how indirect – to tell them how to make their content choices.

In terms of international practice, we are not aware of any other regulator anywhere which attempts to micromanage consumer relationships to the point of trying to require international channel content choices to conform to desired practice – in this case, conformance to the selection on offer when a consumer contract is signed. This is, therefore, a unique "Made for Singapore" approach.

There are substantial risks of unanticipated consequences in trying to design bespoke solutions; in this case we perceive a very substantial risk that the regulatory strictures would act to produce inertia – pay-TV platforms would be uninterested in trying innovative approaches or securing new

programming on a trial basis, for fear it may become a consumer right, and difficult to later shed if the production arrangements fall through, or – as frequently happens – if the content becomes popular and the price rises as a result.

As CASBAA represents both sides of upstream channel supply contracts (pay-TV platform as well as content suppliers), we are aware that both the Singapore pay-TV platforms and the content companies are quite concerned that excessively heavy regulatory constraints will affect contract negotiations, as removing the ability of operators to shift channels in and out of their program packages could alter the commercial dynamic in renewal negotiations.

The platforms are worried that some content providers could regard the platforms as being unable to discontinue channels because of pressure from MDA/consumers, and this would translate into higher prices at contract negotiation time. For their part, the content companies are concerned that increasingly rigid content requirements will impact their ability to offer the same range and quality of content in a cost effective manner.

Reduced content innovation on the part of channel suppliers is also a likely result. The proposed restrictions are likely to dampen content provider enthusiasm for bringing new products to the Singapore market; channels could be reluctant to launch new channels in Singapore or experiment with new content if the platforms seek to shift to them the risk of subscriber churn if the new channel does not turn out to be a success. The proposals fail to recognize that successful channels and programming require experimentation (with its fair share of failure), nurturing and incubation. Such a regime would be anti-competitive for fledgling channels, favoring only those well-established in the market. In sum, the regulatory restrictions may act as a disincentive to a dynamic market, favoring stasis.

International Examples

We noted above several different aspects of the proposed MMCC modifications that are not in keeping with general practice in the regulation of international channel supply feeds.

In justifying the proposed changes, the Consultation Paper cites international examples of consumer protection legislation affecting variations in contracts. We are not familiar with the terms of European consumer protection rules, but with respect to the two Asian/Australasian examples cited by MDA (Australia and Hong Kong), we would make the following observations:

-- In neither Australia nor Hong Kong are there specific regulations applying to pay-TV contracts alone. The Australian legislation and implementing rules are generic, and apply to all consumer contracts in all sectors. The Hong Kong Code of Practice for Communications Service Contracts mentioned by MDA applies to the entire communications industry, including mobile and broadband providers and equipment suppliers; indeed that Code was originally issued under the provisions of the Telecommunications Ordinance, not the Broadcasting Ordinance.

-- With respect to the Hong Kong Code of Practice, MDA correctly notes that the code is voluntary; it "encourages" telecommunications companies to pledge adherence to the standards of the

Code. It embodies fundamentally a self-regulatory approach and is therefore not a precedent for the prescriptive regulatory approach proposed by MDA in the Consultation Paper.

-- With respect to Australia, the law has in fact not been interpreted to give consumers an automatic and absolute right to terminate contracts when "they are affected by unilateral variations in contracts," as MDA implied. The Australian Competition and Consumer Commission's guidelines on the law1 state that unilateral variations in contracts "may be justified in some circumstances…such terms (of consumer contracts) must be used in a manner which is reasonably necessary in order to protect the legitimate interests of the party advantaged by the term, will not cause a significant imbalance in the parties' rights and obligations, and will not cause detriment to one of the parties."

Within these legal parameters, there is self-regulation. If a consumer disagrees with the operator's implementation of the law, he/she has recourse to the courts, which judge the merits of the complaint using the same standards employed across the entire Australian economy[2].

<u>The Burden of Regulation</u>

The Pay-TV industry is literally fighting for its life against fierce competition from content supplied (legally and illegally) over the internet. Typically governments regulate the legitimate, licensed, local pay-TV industry with considerably more energy than they do the offshore, internet-based content industry. This problem of a "tilted playing field" is serious, and it is growing worse.

MDA's proposed approaches in the MMCC Consultation Paper would add substantial burdens to the load borne by Singapore pay-TV operators, and would further tilt the playing field in favor of offshore content suppliers.

In this regard, we are particularly concerned that:

-- The proposed requirement that marketing materials be retained for three years is wildly disproportionate, when the maximum length of consumer contracts in this industry is two years. We are also concerned that the imprecise language used in this connection (e.g. "call centre scripts") could be read to require retention of all call centre transcripts of calls for three years.

-- The proposed requirement that retailers "bring to consumers attention" the "specifics on price, channels and material content" could be read to require extremely detailed descriptions of the content makeup of several hundred television channels, along with details of "specific periods of availability and/or expiry of any complimentary service, channel and/or material content and applicable charges thereafter." While we support making sure consumers have access to the necessary

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[1] "A Guide To the Unfair Contract Terms Law," published at http://www.consumerlaw.gov.au/content/the_acl/downloads/unfair_contract_terms_guide.pdf

[2] The "Guide to Unfair Contract Terms" notes that "Although regulators will ask businesses to co-operate by removing terms considered to be unfair, it is not the role of any regulator to endorse contract terms or to state categorically that they are unfair. Only a court can determine whether a term of a standard form consumer contract is unfair."

information about key issues (cf our comments about the English Premier League, above), we think most consumers neither have the time nor the desire to sit through long explanations of the content available on channels – even a limited universe of complementary "free trial" channels that might one day disappear. A requirement for such explanations is impractical, and will greatly decrease consumer satisfaction by lengthening the process of signing up for a service. Adding huge amounts of legalistic blather to the contracting process will not benefit consumers; it will antagonize them.

Conclusion

We appreciate the opportunity to comment on these proposals, and thank MDA for its transparent and reasoned discussion of the issues. We will be happy to provide additional information about international best practices and examples if MDA would find that useful. In addition, we note that the international content/channel providers represent a substantial stakeholder group in this regulatory exercise, whose interests did not seem adequately covered in the first round of consultations. We would suggest that MDA would find it useful to meet with content providers on these issues, and we would be happy to organize such a meeting at a mutually convenient time.