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DISCOVERY NETWORKS ASIA PACIFIC PTE LTD'S (" DNAP ") RESPONSE TO MDA'S PUBLIC CONSULTATION DATA 24th SEPTEMBER 2014 THE REVIEW OF CONSUMER PROTECTION MEASURES IN MMCC.

To: Ms Lee Ee Jia
Director (Policy)
Media Development Authority of Singapore, (Attention: Ms Alicia Chay)
Email: policy_consultations@mda.gov.sg.

We refer to the proposals enumerated in MDA's Public Consultation issued on 24 September 2014, in connection with certain proposed amendments to the MMCC reviewing consumer protection measures, and set out below our views and comments for your consideration:

1. The proposals, the primary thrust of which entitles the pay-TV subscriber to terminate the entire subscription because a channel or certain material content has been removed by the pay-TV platform operator introduces an express contractual right of termination unique to pay-TV subscribers not currently accorded to other consumers in the telecommunications space and other services in Singapore. Indeed, the law of contract does not go so far as to be so prescriptive on remedies in event of a breach (material or otherwise), leading up to termination. Regulators have respected and resisted the temptation to step into the contractual arena to re-write contracts for parties, even in the name of consumer protection, leaving the courts, provoking the principles of fairness, as the champion of contractual equity.

2. The proposal attempts to i) prescribe what amounts to a material breach , and ii) define the remedy for the material breach ,i.e., termination of the contract, thereby equating a material breach with a fundamental breach, without sufficient regard for:

    a. the basis on which pay-TV subscription fees are calculated. A variety of channels are bundled together and subscribers are able to enjoy a quality programming for a reasonably affordable subscription fee for the fact that they commit to a certain bundle of channels for a particular subscription period (" Term"); as well as

    b. the principles of *quantum meruit* that comes into play in determining remedies and damages in event of a breach. The proposal allows pay-TV subscribers to terminate the pay-TV subscription contract entirely, even though the subscriber may have taken the benefit of quality programming and channels, for a substantial period of the contracted Term. The cancellation of a channel (1 out of several provided by the pay-TV platform operator available to the subscriber) may for various reasons beyond the control of the platform operator, occur in the last few months of the subscription. There is inequity in a principal (not normally upheld in courts of law) that allows the subscriber to terminate the contract after having enjoyed and consumed a large proportion of the benefits of the contract. This is disproportionate and fails to take into account the good and real consideration furnished by the platform operator /channel up to that point.

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3. The proposal's detailed prescription of information that the pay-TV platform operator must retain to counter the subscriber's assertion of its right to terminate requires micromanagement and detailed retention of marketing and other supporting material by the pay-TV platform operator, is yet another attempt to micromanage and rewrite the extensive law on evidence, at incredibly high-cost and expense to the pay-TV platform operator, which experience indicates, would either discourage commercial investments in the pay-TV sector , or be passed back to consumers in the long run, negating the noble consumer protection features in the proposals. The proposals, if taken to their natural end will increase subscriber acquisition cost caused by seasonal pockets of churn, and added cost of subscriber reacquisition for the pay-TV platform operator. High administrative costs will ultimately render the business non-competitive and prove to be a major challenge to the pay television industry already burdened by the challenges of online piracy, and the tilted playing field in favour of offshore (non-taxpaying) Over the Top Television (OTT) players.

4. The end result of such a proposal will have a chilling effect on competition and content diversity, and render Singapore unattractive to potential media investors seeking a based and headquarters for their business in the region.

5. The prescriptive and onerous regime will spawn to an environment that discourages networks from freely introducing international content which has been successful in other territories and cultures, into Singapore, because pay TV platform operators would be nervous and reluctant to experiment with untested programming and channels in the face of subscriber right terminate the entire subscription contract if the new programming/channel has to be cancelled because it turned out to be the successful or unsuitable. The proposals fail to recognise that successful channels and programming require experimentation (with its fair share of failure), nurturing and incubation. The proposals create an environment that penalises creative efforts and disincentivises experimentation.

6. Such a regime would be anti-competitive for fledgling channels which would not be launched in such an environment, intolerant of initial failure if required to give assurance and indemnification to platform operators. Channels would be equally reluctant to launch new channels in Singapore or experiment with new content if they have to take the heat of subscriber churn if the new channel does not turn out to be a success. The Singapore consumer (and creative industry) would lose out in the long run - in that the Singapore consumer would not receive the full benefit of diverse and refreshed programming content.

7. The proposals makes the assumption that there is a direct linear correlation between marketing and promotional spend, and the materiality of content in a channel. This would have the ironic effect of causing the channels to think twice before they introduce and promote new programmes in Singapore, that have been successful elsewhere in the world , if promotion and experimentation lead to their detriment. Again, the Singapore consumer will lose out in exposure to international diversity of content.

8. Most important of all, the scoping and definition of "material content" fails to take into consideration and carve out seasonal hits and premium hits attraction programming offered by the channels from time to time in a programming year. In the media and programming world content supply contracts are not immutable. Channels and pay-TV platform operators engaged in renegotiations in the constantly changing world record content is king, but subject to the vicissitudes of inflation and escalating production cost. Channels are rebranded, and the fate of less successful channels revisited, repackaged and re-tiered to

ensure that both the channel and the pay-TV platform operator is competitive. This is particularly true of sports content. Sports Channel providers, not being the rights owner are unable to guarantee the continued supply of a given sport or channel due to price, strategy, market focus shifts, or consumer preference changes. The rights owner may for reasons, not attributable to pricing and not within the control of the channel provider, offer the rights to another party with the fact that the content will no longer be available on the channel. This should not entitle a subscriber to terminate his pay-TV subscription with the platform operator. A subscriber may have subscribed to a Sports Channel because of his love for a particular sport, say, rugby when he signed up for the channel. Rugby and only rugby was in his mind and material to him. If asked at point of sign up, he would have said football, cricket and other games would be poor alternatives and unacceptable substitutes. But the reality is rugby is played seasonally and live rugby games are available only during certain periods of the year when the game is at its zenith, and the game goes quiet until the next year. Subscribers should not be allowed to churn, just because the Channel, no longer transmits live rugby games.

9. Programmes are not cancelled or swapped for purely commercial reasons, they may be taken off after an incubation period because the content is unsuitable for local consumption, and yet they may have been somewhat material to the channel and indeed to some enthusiastic viewers. Governments recognize this, and adopt a light touch approach, to allow pay-TV operators to manage their upstream contracting in a reasonable way. We urge the MDA not to create an expectation among consumers that removal of <u>any of their favourite programmes or channels</u> for whatever reason and no matter how replaced, is sufficient reason for them to be so aggrieved as to terminate the subscription.

10. While requiring pay-TV operators to look to consumer rights, a balanced message should be sent to the consumer that it is reasonable for them to take the good with some bad without walking away. By attaching the subscriber right of termination to "removal of material content", the MDA's proposals in our view, place a heavy burden on the pay-TV industry and is unnecessarily rigid. The pay-TV subscriber right to terminate will end up overly micromanaged, allowing consumer contract termination if any material content is removed, tilting the playing field against pay-TV operators and channel investors (pay-TV operators will seek back-to-back indemnification from the channels, and attempt to introduce price mechanisms to counter the cost of managing the new proposals and the subscriber termination right).

CASBAA, will in its response to the MDA consultation, propose what the industry considers more measured steps towards consumer protection, taking into contemplation practices in other countries. In the interest of economy of words, we would add that we support and adopt CASBAA's suggestions and observations

We ask the MDA to allow market forces, supply and demand take its natural course, and reinforce the content providers' discretion in regard of Channel Programming and planning. We voice our concern that the proposals raised in the MMCC Consultation People would add substantial commercial cost burden to the Channels investing in operating legitimately in Singapore, and tilt the playing field further in favour of legal and, ironically ILLEGAL online content operators.

We would welcome the opportunity of a full discussion of the ramifications of the proposals in the Consultation Paper, with the MDA, with the other Channels being present, before roll out and implementation of the proposals. Thank you for your consideration.

Sincerely,

Arjan Hoekstra,
President and Managing Director
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