



AUSTRALIA

Submission by Free TV Australia

Remaking the Broadcasting Service Exclusion Determination

September 2022

1. Summary

Free TV supports remaking the instrument in the same terms as the Broadcasting Services (“Broadcasting Service” Definition – Exclusion) Determination 2019 (the Determination).

The significant implications of allowing the Determination to sunset would require substantial time and resources, both from policy makers, regulators and the content providers. As such, Free TV considers that there is no workable alternative to remaking the Determination at this time.

The remaking of the instrument for a period of 5 years would provide industry with regulatory certainty and allow time for a review of the underlying policy matters.

2. Introduction

Free TV Australia is the peak industry body for Australia’s commercial television broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA television makes to Australia’s culture and economy.



Australia’s commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluating the economic and social benefits of commercial television in Australia*, highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of \$2.5 billion into the local economy. Further, advertising on commercial TV contributed \$161 billion in brand value. Commercial television reaches 16 million in an average week, with viewers watching around 3 hours per day.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. Free to air television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television, and Australians prefer local stories. Commercial television networks spend more than \$1.5 billion on Australian content ever year, dedicating over 85% of their content expenditure to local programming.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings.

The 2022 Deloitte Access Economics report found that while the internet is widely used in Australia, it is not universal, the quality and access varies significantly, and it is not free. At least 5.6 million (22%) Australians cannot access live streaming and video on demand (VOD).

A strong commercial broadcasting industry delivers important public policy outcomes for all Australians and is key to a healthy local production ecosystem. This in turn sustains Australian storytelling and local voices and is critical to maintaining and developing our national identity.

3. Responses to Consultation Paper

Question 1: Should government make an instrument under subsection 6(2) of the BSA in effectively the same terms as the Broadcasting Services (“Broadcasting Service” Definition—Exclusion) Determination 2019, which excludes services that provide live-streamed content online from being considered a ‘broadcasting service’?

Free TV supports the making of an instrument in the same terms as the existing Determination. The potential implications of allowing the Determination to sunset, which are outlined in further detail below, are so significant that the industry would require substantial time and resources to prepare for a change of this type. Recognising the Government’s commitment to reviewing the regulatory settings across the media industry in coming years, the making of an instrument in the same terms as the Determination is the best interim solution.

Question 2: If the instrument is made, in an effort to provide certainty and stability to industry while broader regulatory reforms are developed and progressed, should it be remade for a duration of 3 years, 5 years, or alternative period of time?

Free TV supports the remaking of the instrument for a period of 5 years.

Question 3: If the instrument is made for a duration of 3 to 5 years, what would be the regulatory and financial impact on your business?

The remaking of the instrument for a period of 5 years would provide commercial television broadcasters with certainty on their regulatory requirements across the areas outlined below.

Question 4: If the Determination expires on 18 September 2022, with no interim solution in place, how would this impact your business or area of industry? What regulatory and financial costs do you estimate your business would incur in this scenario?

Impact on commercial linear broadcasting

As noted above, should the Determination expire on 18 September 2022, the regulatory and financial impacts on commercial television broadcasters would be significant. Figure 5 in the Consultation Paper outlines four main areas of impact: broadcast licensing; supply agreements; copyright and classification; and work for the regulator in determining the content providers covered by the *Broadcasting Services Act 1992* (the **BSA**). These are extensive issues which cut across content production; content acquisition; intellectual property; and accessibility.

The BSA was not designed to apply to online services, as evidenced by the inclusion of Schedules 5 and 8, which have been added to the BSA on specific issues relating to these platforms. As such, an in-depth analysis of how BSA provisions would apply to online services would need to be undertaken, and content providers not previously covered by the BSA would require substantial time and resources to meet the extensive range of regulatory requirements.

While it is not possible to make an accurate estimate of the regulatory and financial costs for commercial broadcasting, given that these regulations impact almost all aspects of the operations of Free TV businesses, the extensive nature of these changes would not be able to be absorbed by commercial television broadcasters in the short term. To the extent that a review of the BSA is planned, this would need to be undertaken over a reasonable period of time, in consultation in industry, to assess the impacts of any changes in relation to online services.

Additionally, the coverage of new online services by the BSA would change the competition dynamic in the market, for example, as new online services may be required to meet advertising restrictions and Australian content quotas.

Impact on online services

The BSA currently defines 'broadcasting services' to mean 'a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means'.

Should the Determination not be remade, online services may be considered as broadcasting services under the BSA, and may be captured by BSA provisions. This would be likely to capture international streaming services, as well as those provided by commercial broadcasters, such as 7Plus, 9Now and 10Play.

Part IV of the BSA contains provisions for commercial television licences, and Part V contains provisions for control of commercial broadcasting licences and datacasting transmitter licences. With the sunset of the instrument, should these provisions apply to the online services of commercial broadcasters, this would have significant impacts on these services, which are currently available across Australia.

Additional considerations on the applicability of BSA considerations to online services may include, but are not limited to:

- Australian content transmission quotas (s121G and s121H)
- Program standards (s122)
- Codes of Practice (s123)
- Program standards developed by the ACMA (s125)
- Technical standards (Part 9A)
- Captioning (Part 9D)
- Primary broadcasting services
- Classification.

Existing regulation for online services in the BSA

As noted above, the BSA already includes provisions which are specific to online services. Schedule 5 considers prohibited content or potential prohibited content on online services. Schedule 8 considers gambling promotional content provided on an online content service in conjunction with live coverage of a sporting event.

The ongoing applicability of these schedules would require review prior to the sunset of the instrument. For the Determination to sunset without this review taking place would lead to duplication of regulation for online services.

Impact on planned regulatory review

The Minister for Communications has made a commitment to reviewing the anti-siphoning scheme which forms part of the BSA. Most recently, on 24 August 2022, the Minister said, ‘The Albanese Government is committed to reviewing the anti-siphoning scheme to give all Australians the chance to enjoy live and free events of national and cultural significance.’ The provision in Schedule 2, Section 10(1)(e) of the BSA states that the licensee may not acquire the right to televise a listed event unless a national or commercial broadcaster has acquired the rights to the event.

The inclusion of online services under the definition of ‘broadcasting service’ would limit Australians’ access to free sport, moving further from the Minister’s stated intention of ensuring that ‘[a]ll Australians should have the chance to enjoy iconic sporting events live and free, rather than those events being behind paywalls. In the context of rising cost of living pressures, where too many citizens still don’t have reliable broadband, access to stable and ubiquitous free-to-air television is important.’¹

Minister Burke, Minister for the Arts, was reported in if.com.au as making the following statements on potential Australian content expenditure requirements for streaming platforms,

Speaking to IF, Burke said he was “very interested” in expanding the quota system to the streaming services and aimed to make a decision before the end of the year as part of the National Cultural Policy rollout, arguing that it came down to a “principal relationship” between the Australian viewer and the screen.

Free TV does not support the imposition of content quotas or investment requirements on SVOD services, the reasons for which are outlined in its submission on the National Cultural Policy.

Sunsetting of the Determination would raise the question of whether online services such as streaming video on demand services (**SVODs**) would be licensed under the BSA. Should this be the case, provisions including the 55% quota for primary channels would need to be considered for these services. This would be substantially higher than the requirements currently being considered under the National Cultural Policy, and would have detrimental effects on the Australian production industry, where costs and infrastructure are already under significant pressure. This would also not allow for any incremental introduction of an investment or quota scheme.

Question 5: What are your views on the alternatives to remaking the Determination?

Free TV does not consider there to be any workable alternatives to remaking the Determination at this time.

¹ <https://www.michellerowland.com.au/news/media-releases-communications/statement-on-afl-media-rights-24-august-2022/>