



8 September 2022

Media Reform
Online Safety, Media and Platforms Division
Department of Infrastructure, Transport, Regional Development, Communications and the Arts
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CANBERRA ACT 2601

By email: Media.Reform@communications.gov.au

Nine's Submission in response to The Broadcasting Service Exclusion Determination Consultation Paper

Nine welcomes the opportunity to provide its submission to the Department in response to The Broadcasting Service Exclusion Determination Consultation Paper. Nine also strongly supports the Free TV and the CRA submissions in response to the consultation paper.

Nine submits that remaking the *Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019 (the Determination)* is essential. Failing to remake the Determination for 5 years or more will result in significant disruption and uncertainty, and ultimately further widen the regulatory imbalance between the digital platforms and commercial television and radio broadcasters.

Recommendation 1: The *Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019 (the Determination)* should be remade in its current form.

Recommendation 2: The Determination should be remade for a period of 5 years or more.

Nine submits that it is critical to remake the Determination for a period of at least 5 years or more. Allowing the Alston Determination to sunset would have wide-ranging legal, commercial and policy implications (the full extent of which Nine would need additional time to consider), including the following impact on Nine's current offering:

- Nine's online services (9Now and its radio livestreams) potentially would not be able to stream live content inside or outside Nine's television and radio broadcast license areas, including live sport.
- If Nine were no longer to stream live content inside or outside of its license area, then Nine would also need to review and renegotiate existing commercial licensing and advertising arrangements, including its copyright licensing arrangements.
- Nine would also need to review and fundamentally change its business model for its digital streaming and on-demand content platform, 9Now as well as its various radio livestreaming services.

- If a new regulatory framework was introduced to replace, extend or reduce the Determination, Nine would need to consider that in light of the current regulation that affects its business, and whether the level of regulation is a barrier to doing business.

Whilst Nine is still working through the legal and policy implications, significant time, money and resources would be required to diligently review these issues and understand the implications. For example, Nine would need to understand the following:

- How would live streaming (of television and radio) be regulated, and in particular, would it mean that there could potentially be three (3) separate (and potentially inconsistent) forms of regulation for showing the same content (whether it be broadcast, streamed or on-demand of the same content)?
- How will the *Broadcasting Services Act 1992* be amended if the Determination isn't extended? Will it be amended to include the requirement that online services require a license to stream or provide on-demand content?
- How would the sunseting of the Determination affect the Anti-Siphoning list?
- How would the sunseting of the Determination affect the current consultations into SVOD quotas and the National Cultural Policy?
- The *Commercial Television Code of Practice* and *Commercial Radio Code of Practice* are currently being reviewed – these may also impact how the Determination is re-drafted or incorporated into new legislation. Nine would need time to consider what effects this may have on our business.

In addition to the above, Australian news media businesses are facing unprecedented unfair competition issues. Nine considers that failing to remake the Determination will lead to a significant decrease in commercial broadcasters' ability to compete and should therefore be strenuously opposed. The ACCC has found (in its Digital Platform Inquiry Report, as well as in its subsequent Digital Platform Inquiry Platform reports), that there are significant power imbalances between Australian commercial broadcasters and the digital platforms and other significant international online services. Any increase in the regulatory burden faced by commercial broadcasters is going to exacerbate the challenges which already exist.

For the reasons set out above, Nine submits that it is critical to extend the Determination in its current form to ensure the ongoing sustainability of commercial television and radio broadcasters.

Please do not hesitate to contact me if you would like any further information or would like to discuss this matter.

Yours sincerely

