

## **SBS RESPONSE TO THE BROADCASTING SERVICE EXCLUSION DETERMINATION CONSULTATION PAPER SEPTEMBER 2022**

### **KEY POINTS**

- SBS supports the remaking of the *Broadcasting Services ("Broadcasting Service" Definition-Exclusion) Determination 2019* (the Determination).
- The remaking of the Determination is warranted given the disruptive impact on a broad range of media sector stakeholders, and audiences, which would arise if the Determination was allowed to expire on 18 September 2022.
- If the Determination was allowed to expire, more onerous broadcasting regulation may apply to certain online services, and online services may simultaneously be regulated by both broadcasting and online services rules. This is likely to be confusing for audiences and impractical for industry, and the full set of consequences has been well identified in the Consultation Paper and in previous industry submissions.
- The underlying uncertainty in media regulation which the Determination is intended to address has been an issue of concern for media sector stakeholders for many years.
- SBS therefore welcomes the Government's commitment, as set out in the Consultation Paper, to a program of systematic regulatory reform and modernisation.
- It is appropriate then that the Determination is remade for a period of at least three years. It would be desirable to remake the Determination for five years, given the extensive consultation, policy development and legislative processes involved in systematic regulatory reform.

### **INTRODUCTION**

The Special Broadcasting Service (SBS) appreciates the opportunity to comment on the Department of Infrastructure, Transport, Regional Development, Communications and the Arts *The Broadcasting Exclusion Determination Consultation Paper* (the Consultation Paper).

SBS supports the proposal to remake the Determination for a period of three to five years, prior to its expiry on 18 September 2022.

### **IMPACT OF EXPIRY**

As noted in the Consultation Paper, there are a range of regulatory and commercial arrangements which are structured around a delineation between broadcasting and live streaming services. If the Determination was allowed to expire, it is expected that certain live streaming services may, in a regulatory sense, be considered to be broadcasting services. This would mean a range of regulatory requirements would start to apply to the live streaming services with little to no lead time for operators of those services to plan and implement



compliance measures, and without consideration of whether (or which of) these regulations should apply to these services.

The range of regulatory requirements that could potentially apply across broadcasting sectors takes in ownership and control rules, rules for minimum levels of Australian content, anti-siphoning restrictions and codes of practice requirements. As a national broadcaster, SBS is not formally subject to all of these requirements, however an impact would primarily be felt in relation to captioning requirements, complaints-handling, election advertising blackout provisions and classification rules. These rules do apply to national broadcasting services and are structured to apply (or not apply) differently to broadcasting and non-broadcasting services.

While the SBS Code of Practice does apply principles of platform neutrality in relation to SBS services, it does recognise and apply differences where appropriate (for example, in relation to time zones for linear television broadcast) and it is likely that review and consequential amendment would be required in the absence of a remade Determination.

In addition to creating confusion and uncertainty for both audiences and in relation to regulatory requirements, the impacts on SBS are likely to be as follows:

- Captioning:
  - If the Determination were allowed to expire, there would be significant uncertainty regarding the application of the captioning rules in the *Broadcasting Services Act 1992* (BSA) to SBS's live streaming services.
  - At present, the captioning rules in the BSA apply only to broadcast services and should they be materially extended to online services SBS would require additional funding to comply.
- Classification:
  - Classification of broadcasting services is currently provided for in codes of practice, whereas online content is subject to somewhat different requirements, as set out in the *Online Safety Act 2021*.
  - If the Determination were allowed to expire, there could be confusion as to which rules apply to SBS's online live streaming services.
- Complaints-handling:
  - Different complaint escalation pathways currently apply to broadcast and online services, but are well understood by audiences.
- Election advertising blackout periods:
  - Digital services are not currently subject to election blackout periods that apply to broadcasting services.<sup>1</sup>
- Gambling advertising:
  - Regulation of gambling advertising during live sporting events has some points of difference between broadcasting services (regulated under codes of practice) and online content (regulated under Schedule 8 of the BSA and the *Broadcasting Services (Online Content Service Provider Rules) 2018*).

There are also potentially significant legal and commercial impacts in relation to content supply agreements, which commonly grant rights to categories of service, and in relation to

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<sup>1</sup> In the case of SBS, section 70C of the SBS Act provides that SBS must not broadcast an election advertisement in relation to an election during the relevant period.



copyright arrangements (such as the statutory licences in place for remuneration of underlying rights).

SBS has not undertaken a detailed costing of the likely impact of an expiry in the Determination, however enough is known regarding this likely impact to inform a position in favour of the extension of the Determination. At the very least, broadcasters and providers of live streaming services would face significant uncertainty regarding their regulatory and legal obligations sufficient to give rise to substantial disruption and unacceptable risk.

SBS takes its regulatory obligations seriously and therefore is concerned to ensure that there is regulatory certainty for both its broadcast and online services.

It would also make little sense to permit the Determination to lapse and allow new regulations to apply to live streaming services (giving rise to considerable compliance costs), when there is an intention expressed to develop and implement widespread reform in the near future. Any regulatory change event can be extremely disruptive, and it is therefore undesirable to subject the industry to more than one such change event in a short period of time.

There are also no public policy justifications for allowing the Determination to expire before steps have been taken to address the underlying uncertainty the Determination seeks to address.

## **DURATION OF PROPOSED NEW INSTRUMENT**

It is appropriate that the instrument be remade for a period of at least three years, and possibly as many as five years.

As noted below, SBS welcomes the Government's intent to undertake progressive and systematic reform of the broadcasting regulatory framework to address the underlying uncertainty which the Determination seeks to address.

Such an undertaking will require extensive consultation and development work, and would also involve potentially lengthy legislative and Parliamentary processes (with the potential for an election to further extend timeframes).

It would be desirable for the sector to have as much certainty and stability as possible throughout this process, which suggests a renewal period of five years may be warranted.

## **LONGER-TERM REFORM**

SBS welcomes the Government's commitment, as stated in the Consultation Paper, to a program of work to modernise media regulations, seeking consistency, transparency and equity in the regulatory environment.

The need for modernisation has been noted by many stakeholders over many years. Previous signalling of the need for extensive reform has created its own uncertainty and risk for broadcasters and other media providers, and a resolution to this uncertainty would be a welcome development for industry and audiences.

There are some reform measures which require urgent action, and to this end SBS welcomes the Government's commitment to legislating a presence and prominence regime for broadcaster services on connected TV platforms as a matter of urgency. Other reforms should be progressed as part of holistic consideration of the regulatory scheme.



## **CONCLUSION**

Renewing the Determination for 3-5 years is an appropriate and sensible measure, given the longer-term intention to formulate new regulatory arrangements across platforms, and given the uncertainty and disruption that expiry would give rise to.

SBS supports the renewal of the Determination and looks forward to engaging constructively in the longer-term reform project.