

7 September 2022

Screen Producers Australia's submission to Remaking the Broadcasting Service Exclusion Determination

About Screen Producers Australia

Screen Producers Australia (SPA) was formed by the screen industry businesses representing large and small enterprises across a diverse production all forms and formats of screen content.

As the peak industry and trade body, we consult with a membership of more than 840 production businesses in the preparation of our submissions. This consultation is augmented by ongoing discussions with our elected Council and members. Our members employ hundreds of producers, thousands of related industry practitioners and drive between \$1 billion and \$2 billion worth of annual production activity from the independent sector.

SPA's members are drawn from all elements of the Australian production ecosystem, including emerging and established producers, production businesses, services and facilities. Our members vary in size from large internationally owned entities, to partnerships, to sole traders and other corporate entities, and are found in every region, state and territory of Australia.

On behalf of these businesses, we are focused on delivering a healthy commercial environment for the entire screen industry through ongoing engagement with elements of the labour force, including directors, writers, actors and crew, as well as with broadcasters, distributors and government in all its various forms. This coordinated dialogue ensures that our industry is successful, employment levels are strong and the community's expectations of access to high quality Australian content have been met.

Screen Producers Australia welcomes the opportunity to make a submission to the *Remaking the Broadcasting Service Exclusion Determination* consultation.

For further information about this submission please contact [REDACTED]

Executive Summary

Screen Producers Australia welcomes recognition by Government that Australia regulation of audiovisual laws have not kept pace with the dramatic changes to the global media landscape and that consultation on the *Broadcasting Service Exclusion Determination* (the “Determination”) is part of a broader program of work to establish an updated regulatory framework to address this deficiency.

SPA is particularly concerned with the gap in the regulatory framework between live-streamed and on-demand services. SPA recognises the need for certainty, consistency and a level playing field for all audiovisual platforms.

For the reasons outlined below, SPA supports the extension of the *Determination* for 3-5 years to provide stability for the sector and to enable Government to progress broader reforms to modernise Australia’s media regulatory landscape.

Recommendation

- SPA recommends that the current Determination be extended for 3-5 years.

Introduction

As is set out in the Consultation Paper, the *Broadcasting Services (“Broadcasting Service” Definition—Exclusion) Determination 2019* (the “Determination”) has operated to exclude certain types of online media services from regulation including online television simulcasts, online radio stations, and live-streaming on social media and other digital platforms. These services are specifically.

A Determination to this exclusionary effect has therefore been in operation for around twenty-two years. During this period, the audiovisual platforms have undergone significant change. Twenty-two years ago, streaming video-on-demand did not exist in Australia or elsewhere.

There is no doubt that the audiovisual landscape has changed dramatically since the time of the ‘Alston Determination in 2000 and that it is well overdue to bring Australia’s broadcasting legislation up to date.

SPA Submission

Background

As is set out in the Consultation Paper, the *Broadcasting Services (“Broadcasting Service” Definition—Exclusion) Determination 2019* (the “Determination”) has operated to exclude certain types of online media services from regulation including online television simulcasts, online radio stations, and live-streaming on social media and other digital platforms. These services are specifically excluded from the definition of ‘broadcasting service’ in the *Broadcasting Services Act 1992*.

As outlined in the Department's *Consultation Paper*, the 2019 Determination was an extension of the precursor instrument known as the 'Alston Determination' (*Determination under paragraph (c) of the Definition of 'Broadcasting Service' (No. 1 of 2000)*).

A Determination to exclude audiovisual services delivered online over the internet has therefore been in operation in Australia for around twenty-two years. During this period, these online platforms have undergone significant change and grown significantly in prominence. Currently, they have overtaken terrestrial broadcasting in prevalence and popularity.

The effect of the Determination is that services delivered over the internet have not been subject to broadcasting regulation in the same way as traditional broadcasting services are. Instead, Australia's media regulation follows service-specific networks and devices. The anachronism arises because delivery of content to audiences now takes place across an array of technologies from tablets to mobile phones and an array of other screens.

Since the 2012 *Convergence Review*, Governments have regularly been in receipt of reports highlighting the need for an updated legislative framework and adopt a 'platform-neutral', 'principles-based' approach to regulation.

The *Convergence Review Final Report* outlined the regulatory challenge as follows:

"Given the ongoing changes in technology and in the way Australians use media, legislation would be more effective if it focused on creating a framework of principles within which an independent regulator could apply, amend or remove regulatory measures as circumstances require. This approach is used in comparable countries, such as the United States, the United Kingdom and Canada. It would enable the new communications regulator to adjust rules to respond quickly to changes in the industry. The regulator, when exercising its powers, would need to act in accordance with the principles set out in the legislation and be able to justify its decisions under administrative, parliamentary and judicial scrutiny. This model is the best approach to a changing landscape and would lead to more independent, open and consultative policy making in the media and communications sector.¹

Seven years later, this issue was examined again by the Australian Competition and Consumer Commission (ACCC). Their policy conclusions are described in the 2019 ACCC *Digital Platforms Inquiry*² as requiring a shift from the vertical, sector-specific approach to a horizontal, layered approach.

Further, the ACCC found that "the pervasiveness of broadband services and the use of Internet Protocol as a delivery format for content and carriage services has blurred the boundaries between telecommunications services and the digital platform services, and the boundaries between traditional broadcasting services and internet content delivery."³

Unfortunately, despite the succession of strong evidence to Government, in 2019 the then Minister chose to renew the Determination and delay much needed regulatory reform to the audiovisual sector.

¹ Convergence Review Committee, Final Report, 2012, page xiii

² ACCC, [Digital Platforms Inquiry](#), 2019, p, 174

³ *ibid*

For these reasons, the acknowledgement of the need for wholesale reform by the Minister for Communications and the intention to finally tackle the changed media and communications landscape, is warmly welcomed by SPA.

How the Regulatory Gap affects the sector

This regulatory gap between terrestrial service delivery and online delivery affects the capacity of the industry regulator, the ACMA to apply consistent public interest principles, particularly those that pertain to audience expectations, for the audiovisual sector.

SPA believes that the performance of the ACMA is hampered by the lack of clear objectives for the sector in the *Broadcasting Services Act 1992* (BSA) with which it is charged with applying, particularly around the distinction between broadcasting, telecommunications and internet services, at a time when these services are increasingly converged.

SPA believes that the ACMA would be a stronger institution that would better serve the screen sector if the BSA was re-written for the contemporary converged media environment. Subsequent clarification of the objectives of the ACMA would benefit the whole communications sector and provide a better capacity to effectively regulate across the communications sector.

For many years, SPA has advocated for regulation to ensure major new streaming platforms invest a minimum percentage of their Australian revenue into newly commissioned Australian stories. This principle of requiring commercial free-to-air broadcasters is well established in Australia. However, rather than progress towards consistency between the delivery of content to audiences, the previous government introduced measures and proposals to entrench the regulation of these different channels.

SPA has made a number of submissions to consultations and Parliamentary inquiries on this matter.

In an April 2022 submission on the previous Government's *Streaming Services Regulation Discussion Paper*, SPA noted that the regulation proposed in that paper had the effect of entrenching the "silo" approach to media regulation in Australia, and that it was, regrettably, a step away from achieving the desired consistency of regulation across the audiovisual landscape. The new opportunity afforded to move regulation in the right direction is positive news for the sector.

SPA believes that Australian audiences will be best served by a consistent approach to regulation of the media content industry.

Determination Extension

For the reasons outlined above, SPA supports the extension of the Determination for 3-5 years to enable the Australian Government sufficient time to engage further with stakeholders on a broader reform agenda.

The opportunity to harmonise media regulation is of critical importance to the sector and one that previous governments have failed to tackle.

SPA welcomes the opportunity to engage with Government and stakeholders on this process in future years.