



TELSTRA CORPORATION LIMITED

Submission to Dept of Communications Remake of the Broadcasting Service Exclusion Determination

Public Submission

7 September 2022



01 Introduction

Telstra welcomes the opportunity to respond to the consultation on the **Remake of the Broadcasting Service Exclusion Determination** being undertaken by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the **Department**).

For the reasons discussed below, we support the Department's proposal to remake the *Broadcasting Services ("Broadcasting Service" Definition—Exclusion) Determination 2019* (the **Determination**) for a time-limited period. Our preference is for the duration to be five years. As the consultation notes, remaking the Determination would provide certainty and stability for industry while broader regulatory reforms are developed and progressed.

We set out below our responses to each of the consultation questions posed in the Department's consultation paper.

02 Telstra's live-streaming and on-demand content offerings

Telstra currently offers a range of content-related services to customers. These include:

- **Mobile sports apps:** We manage a range of mobile sports apps (AFL, NRL, Netball and My Football) which provide access to video content including match replays, highlights, live-streaming of specific leagues (AFLW, State League and U18 Competitions) and other associated content (e.g. news, scores and statistics). Access to the apps is available to all iOS and Android users for free.
- **Telstra TV Box Office:** Telstra TV Box Office (formerly BigPond Movies) is Telstra's transactional on-demand video service. It allows customers to rent or buy movies and television programs on an on-demand basis. Customers do not pay an ongoing subscription fee to Telstra to access this service; they simply pay each time they rent or buy a movie, television program or series.
- **Foxtel from Telstra:** We offer "Foxtel from Telstra" through a re-seller arrangement with Foxtel. Foxtel from Telstra is a subscription service which provides linear programming through a set-top box. It also provides access to Foxtel GO, which allows customers to stream live or on-demand the channels included in their subscription. Telstra manages "Foxtel from Telstra" subscriptions and customers, while Foxtel determines the content included on the channels and in the packs we re-sell to our customers.
- **Third party entertainment:** Telstra has several third-party entertainment partners including Netflix, Foxtel Now, Disney+, Binge, Kayo, and others. These parties offer subscription services to access live-streaming and/or on-demand content including movies, television programs and sports. Telstra customers can "add-on" one or more of these services to their plan and pay for the service via their Telstra bill. In each case, Telstra is effectively acting as an agent for the third-party entertainment partner – we provide a sales channel for their service and collect subscription fees on their behalf, but the third-party entertainment partners are responsible for managing subscriptions and delivery of content streams to subscribers.
- **Telstra TV:** Telstra TV is a set-top box which facilitates access to a wide range of entertainment, sports, and news apps by making those apps available on a single distribution platform or user interface. Telstra TV 2 and 3 also include a Free-to-Air (**FTA**) television tuner, allowing customers to switch between online content and live FTA television. The apps available through Telstra TV



include Telstra TV Box Office, as well as a wide range of third-party apps which provide live-streaming and/or on-demand content, some for a fee and others free of charge. Telstra TV is simply a content aggregation and distribution platform through which apps can be accessed, which means the app providers are responsible for managing customer relationships and content delivery to those customers. The Telstra TV set-top box itself can be purchased outright or on a 24-month contract, but there are no other fees for use of the platform.

- **Fetch TV:** Telstra has completed the acquisition of a 51.4% controlling interest in Fetch TV as of 2 August 2022 following regulatory clearance. However, Fetch TV will continue to operate as a standalone business and Telstra will look to offer its customers Fetch-based products in 2023. Telstra TV will continue to be supported for all existing customers in line with consumer rights under Australian Consumer Law.

As this list demonstrates, Telstra is involved in supplying live-streaming content and, as a result, we could be affected if the current exemption were to sunset on 18 September 2022. The clearest impact would be in relation to our mobile sports apps, which we are responsible for developing and which include the delivery of some live-streamed sports matches to customers' mobile devices.¹ If the current determination was allowed to sunset without a new determination being made in the same or similar terms, delivering these sports matches via live-stream might be a "broadcasting service" for the purposes of the *Broadcasting Services Act 1992* (Cth) (**BSA**).

03 Responses to consultation questions

Q1: 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'?

Yes, we consider the best course of action is to remake the Determination.

Q2: 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?

We recommend five years is a suitable timeframe for a new determination, as it will provide industry certainty while allowing time for the broader regulatory reforms to be developed and progressed. We also note that, if additional time were required, the determination could be re-made at the end of the five-year period, with a better sense at that point of the additional length of time required in light of the progress being made towards media and broadcasting reform.

¹ We note Telstra TV Box Office is an on-demand service, which is separately excluded from the definition of "broadcasting service" for the purposes of the BSA, by virtue of paragraph (b) of the definition. The other live-streaming and on-demand content we are involved in supplying is third party content (third parties produce and manage the delivery of the content).



Q3: 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 existing instrument does not impose any regulatory burdens or compliance costs on Telstra. This is because the instrument limits the application of the BSA by exempting from the definition of “broadcasting service” any services that make available television or radio programs using the internet.

If the determination is remade without significant amendment, it would effectively represent a continuation of the status quo. In that sense, the re-making of the determination would have a minimal impact on Telstra, as we would simply continue to operate as we currently do in relation to the supply of content services to customers.

Q4: 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?

Allowing the Determination to expire would result in regulating live-streaming services as “broadcasting services”. This would represent a significant change to the status quo and may raise some potentially difficult issues to grapple with. As noted in the Department’s consultation paper, the BSA imposes a range of obligations on suppliers of “broadcasting services”, including to hold an appropriate broadcasting licence and to comply with specific broadcasting provisions including around ownership and control, geographic restrictions, content regulation, quotas and captioning, industry codes and complaints handling. In addition, we note that regulating live-streaming services as “broadcasting services” may be more challenging than regulating “traditional” broadcasters, given the broadcasting provisions of the BSA were not framed with live-streaming services in mind, and the application of those provisions to the range of live-streaming services available today may not necessarily be straight-forward.

For example, if the broadcasting provisions of the BSA were to apply to Telstra’s live-streamed sports content, there would be a range of issues and implications to consider, including whether we would need to acquire any additional broadcasting licences, whether any restrictions would apply to our live-streaming services, how the content regulation and captioning requirements may apply to our live-streaming services (noting these services are specifically designed to offer only one type of content (i.e., sports), and that captioning for sports typically relates to associated commentary rather than the matches themselves), and how various industry codes and standards may apply to our live-streaming services.

Adding to the challenge, it is only a matter of weeks until 18 September 2022, which would leave live-streaming service providers very little time to prepare for the application of the BSA to their businesses, in circumstances where they have relied on the existence of the determination for over 20 years.

Q5: What are your views on the alternatives to remaking the Determination?

We do not support either of the two proposed alternatives canvassed in the consultation paper, namely 1) allowing the existing Determination to expire; and 2) implementing legislative changes to amend the definition of “broadcasting service” under section 6 of the BSA, to expressly exclude streaming services.

We have outlined our concerns with allowing the existing Determination to expire (alternative 1) in our answer to Question 4.

We agree with the Departments’ observations about other instruments such as the *Copyright Act 1968* and of course the BSA that rely on the definition of ‘broadcasting service’. Amending the definition of



'broadcasting service' without systematically working through all the instruments that rely on this definition risks unintended consequences, and we consider there is insufficient time remaining before the current Determination expires to conduct this work.

With all this in mind, we believe the sensible course is to re-make the determination for five years, so that live-streaming service providers can continue to operate as they always have, while broader industry reform – including a consideration of how best to regulate online streaming services – takes place.