



Response to the 'Media Reform Green Paper – Modernising television regulation in Australia'

31 May 2021

1. Executive Summary

- ASTRA welcomes the opportunity to respond to the Australian Government discussion paper, *Media Reform Green Paper – Modernising television regulation in Australia* (the **Green Paper**), dated November 2020.
- As international streaming services make their mark on Australian audiences, and industry participants adapt to increasing production costs alongside burdensome regulation, television broadcasting regulation is at a critical point in its history. The *Broadcasting Services Act 1992* (Cth) (**BSA**) and associated laws are in pressing need of reform to ensure a level playing field for all industry players.
- Consequently, ASTRA is disappointed with the Green Paper's focus on free-to-air television (**FTA**) regulatory relief, with little consideration of broadcasting regulation more generally and, without any consideration of the subscription television (**STV**) broadcasting sector.
- ASTRA's strong view is that government support is needed not only for the Australian FTA sector, but also other Australian media businesses, including ASTRA's members, to ensure that the STV industry is able to effectively compete with incoming global competitors.
- The emergence of digital technology has also resulted in audience viewing habits becoming increasingly fragmented. The current regulatory approach does not adequately reflect this change in the media environment and the move to platform neutral viewing, resulting in ASTRA members not having the required flexibility to effectively compete for viewers' attention.
- Furthermore, subscription television broadcasting licensees and channel providers remain the most heavily regulated media businesses in Australia. The anti-siphoning regime, Australian content expenditure obligation and significant captioning requirements are just some examples of the extensive regulation which our members must factor into their day-to-day operations.
- ASTRA therefore supports a holistic review of television broadcasting regulation which is inclusive of the subscription television industry. This is with a view to achieving purpose-fit regulatory approaches for a modern media sector in Australia.
- Specifically, ASTRA is seeking reforms to the anti-siphoning scheme, captioning requirements, NEDE spend obligation and electoral advertising blackout laws. The subscription television industry has made important cultural and economic contributions to Australians and the Australian production industry. With these reforms, ASTRA is confident that we can make even greater strides.
- Economic analysis which considers the economic contribution of ASTRA members is attached to this response (**Attachment A**).

2. ASTRA

ASTRA is the peak body representing the subscription television and radio industry in Australia. ASTRA's members include television operators, independent content companies, technology companies and the industries that support them. ASTRA manages codes of practice and represents the industry with regulators and Government.

ASTRA was formed in 1997 with the purpose of providing businesses an opportunity to come together to represent the subscription broadcasting industry. ASTRA's membership is varied, and members range from subscription-funded distribution platforms that deliver screen-based content over cable, satellite and the internet, to independent content providers, media sales agencies, technology and communications companies as well as small domestic channel groups and community-based organisations.

3. Subscription television industry regulatory reform should be considered in the Green Paper

ASTRA is disappointed by the prominence which the Green Paper affords to only one sector of the television broadcasting industry, even though the Digital Platforms Inquiry recommendation was for platform neutral media reform.¹

We are also concerned with the underlying premise of the Green Paper's FTA reform proposals – being the transfer of spectrum which the FTA sector already has protected access to, in exchange for significant financial and regulatory relief. We argue that this is but one of many examples of undue protection being granted to FTA broadcasting – others include the 2012 decision to limit FTA broadcasting licences² and the abolition of broadcasting licence fees in 2016/2017, granting the FTA sector approximately \$150 million in licence fee relief.

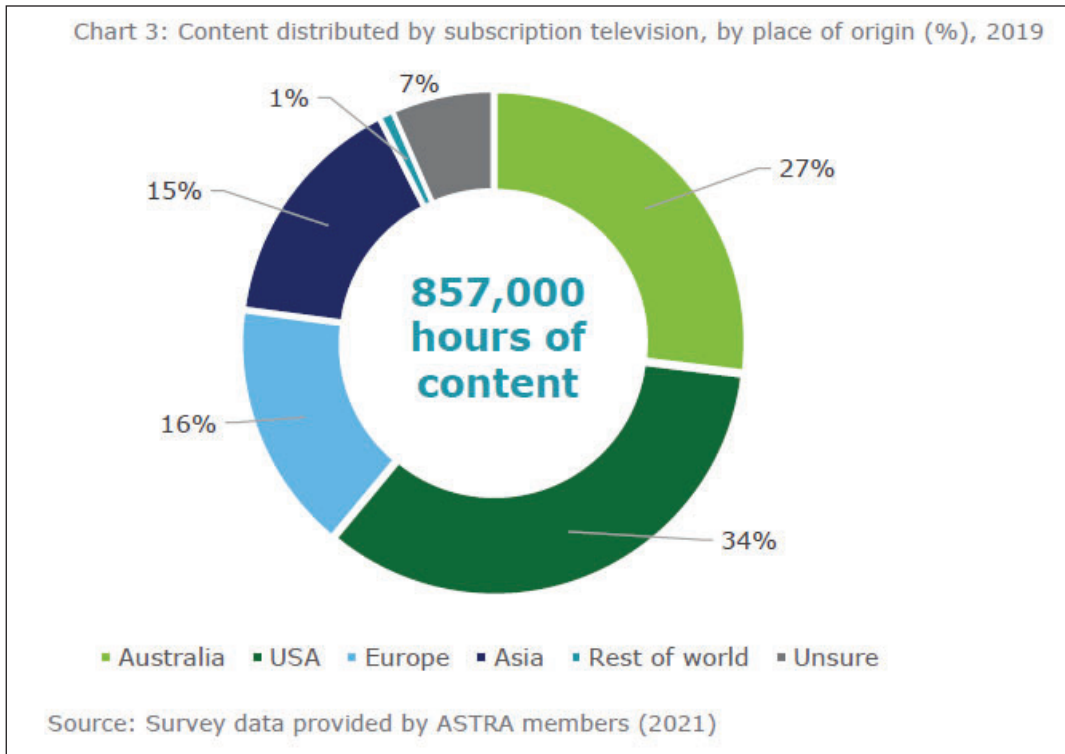
The subscription television industry is a significant cultural and economic contributor to the film and television production sector in Australia. In 2019 subscription media members directly supported over 3,800 jobs in Australia, many being highly skilled occupations and for every person employed by subscription media members, four more were employed elsewhere in the economy.³ Also in 2019, the total economic contribution of the industry to the Australian economy was approximately \$3.0 billion. In terms of cultural contributions, 857,000 hours of content from both local and international sources was distributed by subscription media members.⁴

¹ Australian Competition and Consumer Commission, *Digital Platforms Inquiry – Final Report* (Final Report, June 2019) 31.

² (Former) Senator Stephen Conroy, 'Government moves to ensure quality Australian content stays on Australian television' (Media Release, 30 September 2012) <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2085065/upload_binary/2085065.pdf;fileType=application%2Fpdf#search=%22media/pressrel/2085065%22>.

³ Deloitte Access Economics, *Economic contribution of Australian Subscription Television and Radio Association members* (May 2021) 10.

⁴ *Ibid* 9.



Source: Deloitte Access Economics, *Economic contribution of ASTRA members*, 9.

The subscription television sector has also invested significantly in distribution of its services via satellite and cable, without any government support. However, the STV industry is also impacted by changing viewership patterns, ad revenue decline and competition from large internet services including social media platforms and subscription video on demand (SVOD) services.

The reform urgency identified in the Green Paper is no less significant for subscription television broadcasting. Given the pressures on broadcasting in Australia and to ensure a level playing field, regulatory parity reforms to our industry's regulation should be considered at the same time as other industry sectors. Considering these factors, ASTRA supports a holistic review of television broadcasting regulation, which includes the subscription television industry.

This section briefly outlines (i) the shifting competitive landscape within which our members operate, (ii) ASTRA's broader economic and cultural contribution – both locally and overseas, and (iii) the impact of regulatory disparity on the subscription television industry.

3.1 *Shifting competitive conditions*

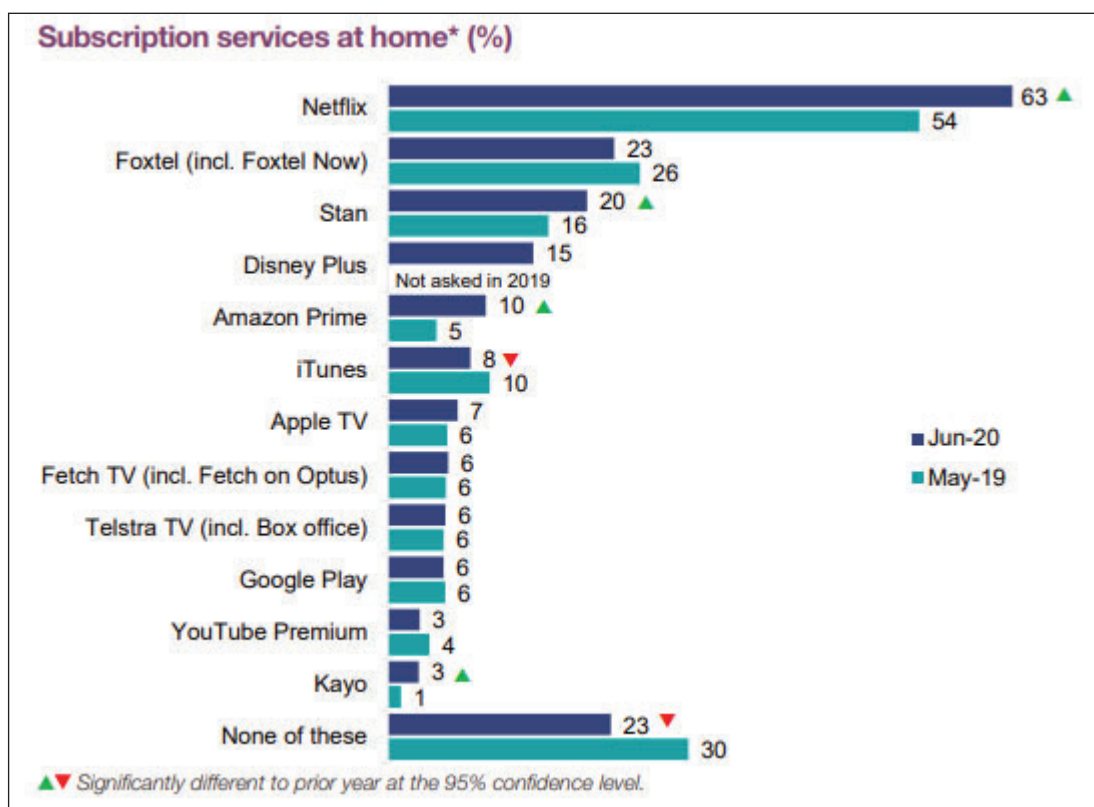
The current media environment has created a particularly challenging time for the Australian media industry. ASTRA has identified the entry of new global competitors, changing consumer viewing habits and regulatory disparity as three main drivers of competitive pressure in the current media environment. ASTRA strongly believes that to overcome these challenges, continued Government support and regulatory reform is imperative.

- a) **New global competitors** - Australia has seen an influx of global competitors in recent years. These competitors sit mainly in the SVOD space and have the backing of large global companies, which typically suggests a greater overall market share and low business costs vis-à-vis domestic like players

By way of example, Netflix operates on a global scale, with 208 million paying members in the first quarter of 2021, providing for substantial economies of scale and enabling Netflix to produce original tv series and movies with an unprecedented budget.⁵

- b) **Changing consumer viewing habits** – The subscription media industry has grown more competitive in the last five years. Audiences are shifting the way they consume subscription media content. 89% of Australian adults are engaging with video content via the internet and in 2020 the average Australian household was subscribed to 1.8 subscription media services.⁶ This highlights the need for continued adaptability to provide accessible content.

New entrants to the sector have created increased competition and led to audience fragmentation. In 2020, 77% of Australian internet users had a subscription and/or pay-per-view service in their household and this increased from 70% in 2019.⁷ The below graph demonstrates the range of subscription streaming services now available to Australians.



Source: ACMA Consumer Survey 2020, 6.

- c) **Regulatory Disparity** - ASTRA's members remain some of the most highly regulated in the media industry which hampers their ability to compete and to compete on a level playing field.

⁵ Ibid 6.

⁶ Ibid 6.

⁷ ACMA, Spending and targets (5 June 2020) <<https://www.acma.gov.au/spending-and-targets-0>>.

While digital disruption and intensified competition does not in itself justify government intervention, we argue that new entrants to the streaming sector have been able to accelerate their shares via “low *regulatory* barriers of entry” and due to current regulatory settings, it is challenging for local broadcasters to match the ability of unregulated new entrants to invest in content.

STV has worked intensively in recent years to create a wide range of consumer options, ensuring the best mix of local and international content is available on a timely basis, on a range of devices, and at attractive price points.

Existing Government interventions into the production sector were predicated on certain industry conditions and viewer choice and behaviour. Given the level of disruption currently faced by the industry. It is sensible to review Government interventions to ensure they continue to meet the desired objectives.

We argue that it is only through holistic and platform neutral regulatory reform that broadcasters can achieve competitive parity, which will have flow on economic and cultural benefits for the Australian content industry and audiences. We recognise that our members bear the responsibility to innovate and respond to market conditions. We suggest that the Government, too, plays a critical role to ensure that healthy, fair competition is preserved, and regulatory conditions remain fit for purpose. We argue that removal of redundant and anachronistic regulation is the most effective method for achieving constructive regulatory reform.

4. Regulatory action required

ASTRA supports extensive reform of the current regulatory system to create a platform neutral environment that allows healthy competition between players in the sector.

We strongly support the following statement from the Government’s Supporting Australian Stories discussion paper:

As the ACCC’s DPI report indicated, continuing to heavily regulate a sector under pressure while allowing a booming sector to remain unregulated does not represent a level-playing field. Urgent consideration should therefore be given to updating government support measures and regulatory interventions to appropriately reflect the contemporary context.⁸

This section outlines the regulatory reforms we argue are needed to create the optimal environment for subscription television services to compete on a level playing field with both the FTA sector and unregulated international streaming services.

ASTRA argues that for Australian media regulation to be modernised in a manner that enables the STV industry to effectively compete with new and existing entrants in broadcasting. The Government needs to undertake significant STV deregulation to this end. This is particularly necessary in the context of the Green Paper, as assuming the FTA networks elect to move to the new model, this will exacerbate current regulatory disparity between those networks and the STV industry.

Below we list those reforms which we argue are required as a matter of priority.

⁸ *Supporting Australian stories on our screens* (Options Paper, 15 April 2020) 9.

4.1 Anti-siphoning

One of the most prejudicial examples of subscription television regulation in Australia is the anti-siphoning scheme.

The anti-siphoning scheme was introduced in the early 90s when subscription television first launched in Australia, to ensure that events of national importance and cultural significance were made available to the public free of charge. ASTRA argues that the scheme now provides a legislated competitive advantage for the FTA sector, who are handed a privileged position at sports rights negotiations, rather than meeting its intended purpose of protecting the interests of consumers.

Our position is that the appropriate way to alleviate the anti-competitive and discriminatory impact of anti-siphoning is to abolish the scheme. The reasons for this are outlined below.

Discriminatory and anti-competitive

The anti-siphoning scheme discriminates against STV broadcasters which acquire sports rights and essentially only applies to one player in a crowded sports rights acquisition sector – Foxtel. No regulation of any kind is in place to prevent any new unlicensed local or overseas entrant, or any telecommunications provider, from acquiring exclusive rights to any event on the anti-siphoning list and placing them behind a paywall.

The scheme's underlying purpose is about protecting consumer access to significant sporting events, not to provide FTA networks with access to those events, and it is not intended to protect the bargaining position of the FTA sector for the sake of those networks.⁹ However, due to the changing nature of content delivery across the world, the scheme now operates to protect FTA access to sports broadcasting rights, in contradiction with the scheme's intention.

This is echoed in the Productivity Commission's (**PC**) major inquiry into broadcasting in 2000, in which it found that the anti-siphoning scheme directly limits competition between FTA and STV broadcasters and gives FTA broadcasters a "*competitive advantage over subscription broadcasters*".¹⁰ In that inquiry the PC also concluded that the anti-siphoning scheme:

- reduces competition in rights acquisition negotiations, affecting the price and nature of broadcast rights;
- restricts the audience share that listed events and sports receive;
- is likely to distort the comparative prices of broadcast rights to listed vs non-listed events; and
- is restrictive compared with those used in other countries including in the US where no such restrictions exist.¹¹

In 2009 the PC's annual review of regulatory burdens on business sustained these conclusions stating:

The anti-siphoning list was introduced with the objective of ensuring broad access to television coverage of major sporting events. However, it appears to be a blunt,

⁹ Revised Explanatory Memorandum, Broadcasting Services Bill 1992, 56.

¹⁰ Productivity Commission, *Broadcasting Inquiry Report* (Report No. 11, 3 March 2000) p 435

¹¹ *Ibid* 433-435

*burdensome instrument that is unnecessary to meet the objective of ensuring wide community access to sporting broadcasts.*¹²

Significantly, during that review the PC also anticipated the impact that technological change would have on the anti-siphoning scheme, noting that the migration of major sporting events to internet broadcasting would be likely to decrease the effectiveness of the scheme and that growth in the reach of the STV sector “*reduces the case for maintaining the current anti-siphoning regime.*”¹³ The PC also foreshadowed that “*Attempts to increase the reach of anti-siphoning regulations could exacerbate the anti-competitiveness of the scheme.*”¹⁴

We strongly support these arguments and support the PC’s recommendation that the option to abolish the anti-siphoning scheme should be explored.¹⁵

The ACCC has also previously indicated their concerns with the anti-siphoning scheme. In 2003 in the ACCC’s Inquiry into Emerging Market Structures in the Communications Sector the ACCC found:

*“The Commission has previously expressed some concerns about the current anti-siphoning regulations. It is concerned that by giving FTA broadcasters almost exclusive rights to the listed programming, the anti-siphoning list has substantial anti-competitive effects and is more intrusive than is necessary to achieve the policy objective of ensuring key sporting events are available to viewers on FTA television.”*¹⁶

*“Potential costs of the current anti-siphoning regime include: possible reduction in the number of sports programs that may be broadcast; less consumer choice for consumers; less competition between FTA and pay TV broadcasters in both acquiring rights and at a retail level; and increased barriers to entry for pay TV operators.”*¹⁷

We argue that the anti-siphoning scheme is no longer necessary or effective in meeting its policy objectives as it cannot prevent exclusive access to high profile sports events from being moved behind a paywall. The anti-siphoning scheme delivers a competitive advantage to the FTAs at the expense of sporting bodies, consumers and competition for broadcast rights in Australia. It essentially prevents a small number of the participants in the sports rights acquisition sector from participating on the same basis as all other players including FTA broadcasters, telecommunications providers e.g. Optus and Telstra, SVODs – Stan Sports, and international OTT players e.g. Amazon.

4.2 Captioning

The current captioning rules for subscription television place a disproportionate regulatory and technical burden on the subscription television industry. The current scope of STV captioning regulation also has an impact on the viability of small and niche STV

¹² Productivity Commission, *Annual Review of Regulatory Burdens on Business: Social and Economic Infrastructure Services* (Research Report, August 2009) 155.

¹³ Ibid 156.

¹⁴ Ibid 162.

¹⁵ Ibid 163.

¹⁶ Australian Competition and Consumer Commission, *Emerging Market Structures in the communications sector* (Report, June 2003) 72.

¹⁷ Ibid.

channels which have more limited resources than their FTA multi-channel counterparts.

The STV industry bears the brunt of captioning obligations compared to the obligations held by the FTA channels and streaming services. Whilst Foxtel is required to eventually caption 100% of its content across 100% of its channels:

- FTA networks are only obliged to caption their main channel for 18 hours a day and News and Current Affairs programmes that may appear on their multi-channels and repeats where the original programming had captions; and
- Streaming services are not subject to captioning obligations at all.

In FY20 close to 550,000 hours across close to 100 channels were captioned on the Foxtel platform.

FTA multi-channels escape substantive captioning obligations while STV channels are regulated for the same genres and, per the below example, in many cases with much lower audience shares. In FY 2019, STV channels such as Premiere Movies was required to caption 95% of its content, despite having an audience approximately one third the size of comparable channel 7Flix which was (other than repeats) ostensibly exempt from captioning.

ASTRA notes the Bill¹⁸ currently before Parliament which anticipates reform to the STV captioning rules. This Bill is a very important step in ensuring that some regulatory relief is provided to STV participants, without degrading their commitment to captioning.

As the specific nature of those reforms is yet to be detailed, ASTRA supports reform which incorporates the following proposals and submits that these reforms should be implemented as a matter of urgency even if the current Bill does not pass. These reforms are intended to ensure that the hearing impaired community continues to be supported via maintaining current captioning levels and regulatory parity is achieved between the FTA and subscription broadcasters.

a) An audience share exemption to apply where viewership of a channel is below a defined percentage.

This reform is intended to ensure that captioning obligations are targeted to channels with a reasonable level of viewers.

This reform would ensure that smaller channels (and in particular, those channels with smaller audience shares than the FTA multi-channels), would have an automatic exemption from captioning obligations.

It is proposed that such an exemption would apply where viewership for a channel is at or below 0.15% of the average annual national audience share, across both FTA and subscription television in all Australian homes. This is based on a similar exemption in the UK legislation.

b) A genre cap

Last, ASTRA supports introducing a total cap on each genre's captioning target, rather than the current ultimate 100% requirement.

¹⁸ Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021.

The effect of this amendment would be to freeze captioning targets across all genres at FY21 captioning levels. Although this change would provide some relief for our members, it would also still provide an extremely high level of captions on STV, requiring continued substantial investment and captioning levels that well exceed the level of captions on FTA.

4.3 Australian content obligations

Broadcasting Legislation Amendment (2021 Measures No.1) Bill 2021 (the **Bill**)

ASTRA acknowledges and supports the work done by the Government following the release of the Supporting Australian stories discussion paper, to adjust the Australian content regulatory settings, and the Bill recently introduced to reduce the STV NEDE spend obligation from 10% to 5%. However, we also note that on 13 May 2021, the Senate referred the provisions of the Bill to the Senate Environment and Communications Legislation Committee for inquiry and report by 17 June 2021.

The NEDE scheme amendments proposed by the Bill are significant to the STV sector and in addition to assisting our members to respond with flexibility to changing industry conditions, will also ensure regulatory parity between FTA and subscription broadcasters.

Our view is that the NEDE amendments proposed by the Bill are part of a package of relief granted by the Government and it would be inequitable if it is not passed. As part of this package the production sector has been granted relief - including additional funding to Screen Australia and the Australian Children's Television Foundation, and the FTA sector has already been granted substantial relief and are no longer bound by the requirement to air at least 260 hours of children's programs and 130 hours of pre-school programs annually. Instead, via the *Broadcasting Services (Australian Content and Children's Television) Standards 2020*, the FTA sector has been granted more flexibility to choose the relevant mix of Australian drama, children's and documentary content to meet their quotas.

ASTRA argues that passage of the Bill will ensure that the STV industry also receives their portion of comparative relief. The reduction in the STV NEDE spend obligation allows for flexibility of investment on Australian content across a variety of genres. The reduction of the NEDE scheme spend to 5% is an effective mechanism to improve STV's ability to compete.

We also argue that if hypothetically the FTA sector transitions to the new licence model proposed by the Green Paper, such that they no longer have content quotas on their multi-channels, then this presses the case for passage of the Bill even further.

NEDE scheme

The NEDE scheme currently mandates that Australian subscription television broadcasters must spend a minimum of 10 per cent of total program expenditure on new Australian drama. The NEDE scheme is one of the most restrictive pieces of regulation for Australian subscription television broadcasting licensees and channel providers and ASTRA supports the removal of the scheme.

However, in light of the proposed reduction in content obligations for FTAs if they were to move to the new licence model contemplated by the Green Paper, and of the ongoing pressure on the STV industry, our position is that further reductions are needed to the

NEDE scheme and updates are needed to the minimum licence fees for Screen Australia funding.

As stated above, further reduction of the scheme will simply allow STV broadcasters and channel providers the opportunity to adapt and base funding and investment efforts on existing environmental factors.

Minimum licence fees

We also argue that in conjunction with changes to the NEDE scheme, revision of the minimum licence fees for Screen Australia funding is required as a means of bolstering local incentives available to the production sector.

ASTRA's experience is that the current \$440,000 per hour licence fee requirement for drama makes sense for a traditional media structure that caters to mass audiences but does not reflect differing business models across differing platforms. A high licence fee does not make sense for subscription platforms where individual channels and services generally attract lower audiences than FTA broadcasting services.

Our view is that the minimum licence fee requirement should also be expanded to allow broadcasters to utilise the rights on multiple platforms without having to pay additional licence fees.

4.4 Election advertising blackout laws

Last, ASTRA supports proposals to remove Clause 3A of Schedule 2 to the Broadcasting Services Act which stipulates an election advertising blackout for radio and television broadcasters.

This unnecessary requirement obliges all broadcasters to not broadcast any election advertisements (i.e. paid advertisements or programming sponsored by a party or candidate) from midnight on the Wednesday prior to an election until the close of the polling booths. Rather than ensuring such advertising is blacked out during a polling period, the modern effect of this obligation is to shift political advertising expenditure from broadcasting to digital platforms which are not captured by this regulation.

It is both unfair and counterproductive for this regulation to continue to exist.

ATTACHMENT A

[Provided as separate pdf file]