

15 February 2021

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Digital Platforms & Online Safety
Department of Infrastructure, Transport, Regional Development and Communications

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Online Safety Bill

Thank you for the opportunity to provide comments on the *Exposure Draft Online Safety Bill 2020* (draft Bill).

Free TV has welcomed the proposal to streamline and modernise existing online online safety measures. We have also welcomed the recognition that, while television broadcasters are tightly regulated in the public interest and subject to a rigorous co-regulatory framework, that is not the case for online services.

We are therefore pleased that it is proposed that the draft Bill exclude broadcasters' online content from its provisions. This is critical to ensuring that broadcasters' services are not subject to duplicate regulatory rules, and so that inappropriate blocking or take-down of public interest broadcast content does not occur.

We note in this regard that broadcast content, whether on free-to-air television or on broadcasters' online services is:

- Highly moderated.
- Complies with either the Commercial Television Industry Code of Practice (Free TV Code) or an equivalent code such as the Independent Media Council Code of Conduct or the Australian Press Council Standards.
- Complies with rigorous rules in relation to accuracy and fairness, as well as impartiality and privacy in the case of news and current affairs content.
- Is classified under either the Free TV Code or the *Classification (Publications, Films and Computer Games) Act 1995*, in the case of other program content.

As broadcast content is therefore completely different in nature to unmoderated content on websites and social media sites, which is not subject to these rules, our view is that it should be wholly excluded, regardless of whether or not it has first been broadcast on free-to-air television or whether or not the content has been modified for online.



On our reading of the draft Bill, it:

- Excludes broadcasting services from the definitions of ‘relevant electronic service’ and ‘social media service’; and
- Excludes certain ‘on-demand services’ including services that provide material that is ‘*identical to a program that has been, or is being, transmitted on; a commercial television broadcasting service provided under a commercial television broadcasting licence*’ (s 14(1)(e) and s 18(1)(b)(i)), from the definition of ‘designated internet service’.

However, in relation to the exclusion for ‘on-demand services’, we are concerned that as drafted, the Bill does not effectively exclude broadcaster’s on-demand content because there are common differences between online and FTA content (other than technical differences, watermarks and insignia which are recognised at ss18(2) and (3)), which will mean that much online content will not be captured by the exclusion.

Advertising content

In particular, the fact that advertising content online is never ‘identical’ to advertising content in the same program on FTA, risks rendering the exclusion entirely ineffective.

This issue has been highlighted in the context of a recent ACMA investigation which interpreted the equivalent exception in the Online Gambling Rules at clause 4 of Schedule 8 to the BSA. In ACMA’s Investigation report no. BI-506, it held that an online stream will **not** be considered ‘identical’ to the transmitted broadcast if it does not include identical advertising content to the broadcast transmission or if it has additional features that were not available in the broadcasts such as allowing advertisers to ‘Learn More’ about some advertisers by clicking on advertisements to access their websites. The ACMA concluded that these differences were not attributable to technical characteristics nor were they attributable to watermarks or insignia. However, this interpretation means that most if not all on-demand content will not fall within the scope of the exclusion.

Other modifications

In addition to containing different advertising content, on-demand content may simply be modified for an online format in ways that may not strictly fall within the existing definition of ‘technical characteristics of the provision or transmission’ of content (s 18(2)) however we understand is intended to fall within the scope of the exclusion. For example, if a program which has been broadcast on FTA is cut to make a shorter online version, that may not be a modification strictly attributable to technical characteristics. Again however, this is a frequent occurrence and should be recognised as broadcast content that should not be captured by the draft Bill.

On-demand content that has not been broadcast

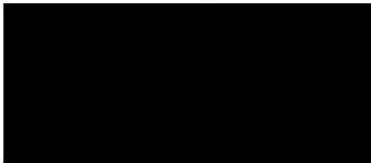
Broadcasters also have some content on their online sites which has not been broadcast, but which nevertheless complies with a code of practice or has been classified under the Free TV Code or legislation. In such cases, the content should be treated as broadcast content and excluded in the same way as content that has been broadcast over the free-to-air platform.

Recommendations

In Free TV's view, the Online Safety Bill should be amended so that broadcasters' online content is wholly excluded and to ensure that:

- Online broadcast content will not fall within the scope of the Online Safety Bill simply because it has different advertising to the equivalent FTA content.
- Online broadcast content will not fall within the scope of the Online Safety Bill simply because of modifications to adjust programs to an online format.
- Online broadcast content will not fall within the scope of the Online Safety Bill, even if it has not first been broadcast on FTA, provided that either:
 - The content is subject to professional editorial standards in either the Commercial Television Industry Code of Practice, the Independent Media Council Code of Conduct, the Australian Press Council Standards of Practice or an equivalent code or internal editorial standard; or
 - The content has been classified either under a code, the BSA or the Classification (Publications, Films and Computer Games) At 1995.

Yours sincerely



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