

Regulation Impact Statement

Remaking the *Broadcasting Services*
(*“Broadcasting Service” Definition – Exclusion*)
Determination 2019

September 2022

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Current regulatory arrangements

The *Broadcasting Services Act 1992* (BSA) establishes the framework that regulates broadcasting services in Australia. Relevantly, this includes the definition of a ‘broadcasting service’ under subsection 6(1) of the BSA. Services that fall within the definition of a broadcasting service are subject to the applicable elements of the BSA and any instruments that have been made under the Act.

Section 6 defines a broadcasting service to mean:

‘A service that delivers television programs or radio programs to persons having equipment appropriate for receiving that services, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means.’

However, section 6 also provides a number of exclusions from this definition. These exclusions cover:

- 6(1)(a) – a service (including a teletext service) that provides no more than data, or no more than text (with or without associated still images);
- 6(1)(b) – a service that makes programs available on demand on a point-to-point basis, including a dial-up service; or
- 6(1)(c) – a service, or class of services, that the Minister determines, under subsection (2), not to fall within this definition.

On 21 July 2000, the then Minister for Communications, Information Technology and the Arts, Senator the Hon Richard Alston, announced the then Government’s decision that internet services such as audio and audio-visual streaming that do not use the broadcasting services bands should not be considered broadcasting services under the BSA. This decision was implemented through a Ministerial determination under paragraph 6(1)(c) of the BSA, titled the *Determination under paragraph (c) of the definition of “broadcasting service” (No. 1 of 2000)* (commonly referred to as the ‘Alston Determination’). The operative provisions of the Alston Determination read as follows:

“I, RICHARD KENNETH ROBERT ALSTON, Minister for Communications, Information Technology and the Arts, under paragraph (c) of the definition of “broadcasting service” in subsection 6(1) of the *Broadcasting Services Act 1992*, determine that the following class of services does not fall within that definition:

a service that makes available television programs or radio programs using the Internet, other than a service that delivers television programs or radio programs using the broadcasting services bands.”

This meant that services that provide television and radio programs via the internet, including online live simulcast streams of commercial television and radio broadcasters’ channels, live radio streams, live subscription streams, or live sports streams offered by mobile service providers, were not considered to be a ‘broadcasting service’. As such, these services were not, and are still not, subject to broadcasting regulation.

The language of the exclusion differentiates services by their distribution method. In this regard, the exclusion provided in paragraph 6(1)(b) of the BSA – noted above – covers on-demand services (likely to include Stan, Netflix and commercial free-to-air television ‘catch-up’ services). As a result, to the extent that programs are pre-recorded and available on-demand, these services are unlikely to be impacted by the Determination.

The Alston Determination commenced on 27 September 2000 and operated until 17 September 2019, when it was repealed by the *Broadcasting Services (“Broadcasting Service” Definition – Exclusion) Determination 2019* (the 2019 Determination). The 2019 Determination effectively remade the Alston Determination, in the same terms, for a period of 36 months (3 years). The making of the 2019 Determination was supported by a targeted stakeholder consultation process. The time-limited duration of the instrument was intended to provide industry with stability and certainty while the then Government considered a broader media regulatory reform process. However, regulatory reform providing an ongoing solution to the regulation of live-streaming services did not come to fruition during the 2019 Determination’s 3-year duration.

1. What is the policy problem?

The regulatory definition of a ‘broadcasting service’ has been unchanged since 27 September 2000. This is despite broadcasting, streaming and related media services having changed significantly over the intervening period.

- Audiences are increasingly able to access streaming and broadcasting services on the same device: a connected television; a smart phone; or an internet-enabled car radio, among others. Mobile phones are now the primary medium Australian adults use to access the internet, with email, web browsing and watching videos being the most popular activities performed online.¹ This was not the case in the past where the device was integrally linked to the distribution method and (in turn) the content available on the device: television content on a television set; audio content on a radio; and internet services on a desktop or laptop computer.
- The consumer offering on streaming services is comparable with television and radio in terms of technical quality (screen resolution or audio quality) and content (the genres and diversity of content available). With increasing broadband take-up and the rollout of 4G and 5G mobile networks, there is little to distinguish an audio or audio-visual offering provided over the internet from similar content broadcast via radiofrequency spectrum.
- The previous distinctions between online and broadcast content are breaking down at a consumer level. Consumers increasingly hold consistent expectations for audio-visual content regardless of whether it is technically a broadcast service or an online service. The Australian Communications and Media Authority (the ACMA) affirmed this in its position paper *What audiences want—Audience expectations for content safeguards*. The paper draws on findings from the ACMA’s regulatory compliance activities, including observations about consumer complaints, findings in recent investigations, and research into consumer habits and market trends. Australians expect that consumer safeguards should apply consistently to professional content, where that content is ostensibly serving the same purpose and providers exert similar levels of control and influence over the programming of content—regardless of platform.²

While the market is rapidly evolving, the regulatory arrangements governing broadcasting and online services have remained largely unchanged.

The 2019 Determination and its predecessor (the Alston Determination), are a key part of these arrangements. The need for systemic and lasting reform of the regulatory arrangements for media services has been identified through a number of previous review processes. These include the Final Report of Digital Platforms Inquiry undertaken by the Australian Competition and Consumer Commission. Among a range of matters, the Inquiry Report recommended the harmonisation of media regulation between traditional media outlets and those delivering services over the internet.

In its submission to the consultation process, the Australian Broadcasting Corporation (ABC) stated:

“In the 22 years since the original Determination was made, the market for Internet delivery of live-streamed television and radio programs has matured. However, allowing the Determination to expire without the provision of a comprehensive legislative framework that underpins and encompasses the converged media environment would remove the certainty that the current definition of ‘broadcasting service’ provides.”

¹ ACMA (2020) [Trends in online behaviour and technology use consumer survey](#).

² The core audience expectations outlined in the ACMA’s position paper, [What audiences want—Audience expectations for content safeguards](#) (2022) include accuracy and impartiality, disclosure of commercial arrangements, treatment of distressing high-impact content, emergency information, classification and content guidance, advertising restrictions, treatment of highly offensive and discriminatory material, fair portrayal and privacy.

There are two classes of stakeholders that are, in broad terms, affected by the exclusion provided by the 2019 Determination.

- Directly affected stakeholders include those that provide online live-streamed services, such as television and radio broadcasters. Examples include services provided by Nine (via 9Now and its various radio livestreams) and Southern Cross Austereo (via its LiSTNR digital audio app).
- Stakeholders that are affected indirectly include owners of copyright and those stakeholders whose commercial agreements rely on the exclusion created by the Determination. Examples of the former include education statutory licence holders, and examples of the latter include sporting bodies that have signed commercial arrangements that drawn on the definition of a broadcasting service.

As this regulatory framework underpins a wide range of sectors, it is worth considering the total size of these markets.

- A report commissioned by Free TV, the peak body for commercial television broadcasters, estimated that commercial television broadcasting contributed \$2.5 billion to GDP in 2021.³
- IBISWorld estimates that the total market size for free-to-air television broadcasting is \$5 billion⁴ and the total market size for radio broadcasting is \$1.6 billion in 2022.⁵
- Meanwhile, the Australia Bureau of Statistics estimates that the total information media and telecommunications industry added close to \$37 billion in value in 2021.⁶

A significant portion of this industry would be affected, either directly or indirectly, by changes to the 2019 Determination. This includes content-related services in the telecommunications industry, as outlined by Telstra in its submission to the consultation process:

“[allowing the Determination to expire] would represent a significant change to the status quo and may raise some potentially difficult issues to grapple with.”

Any significant reform of the regulatory arrangements governing Australian media would need to be undertaken carefully and progressively given the disruption and potential impact on consumers and industry. This would be a long-term and multi-year program of work that would require extensive engagement with industry and the development and assessment of various options. The more immediate issue is the impending expiration of the 2019 Determination.

2. Why is Government action needed?

The Australian Government is responsible for the regulation of broadcasting and media services, particularly with respect to the use of public assets including spectrum.

Without other changes to primary or secondary legislation, the expiry of the 2019 Determination on 18 September 2022 would give rise to significant legal, regulatory, and commercial uncertainty for entities operating in the live-streaming environment. This includes, but is not limited to, the following:

- **Broadcast licensing:** live-streamed services may (depending on the service) fall within a category of a broadcasting service and require broadcasting licences. This could potentially trigger nominal breaches of licence area-based rules and obligations (i.e. local content, control and ownership, and licence allocation moratoriums).
- **Supply agreements:** commercial agreements between entities for the supply of content, including sports content, may need to be renegotiated since such contracts have traditionally incorporated a distinction between live-streaming and broadcasting services.

³ Deloitte Access Economics (2022), [Everybody gets it: Revaluating the economic and social benefits of commercial television](#)

⁴ IBISWorld (2022), [Free-to-Air Television Broadcasting in Australia](#)

⁵ IBISWorld (2022), [Radio Broadcasting in Australia](#)

⁶ Australian Bureau of Statistics (2022), 81550D0001_202021 [Australian Industry, 2020-21](#)

- **Copyright and Classification:** there would be significant implications for copyright and classification as the BSA definition of a ‘broadcasting service’ is incorporated into the *Copyright Act 1968* and *Classification (Publications, Film and Computer Games) Act 1995*. This could include impacts on licence agreements, and international and statutory copyright agreements.
- **Regulator:** the ACMA would need to undertake work to identify which additional content providers may be captured under different aspects of the BSA; whether existing instruments and industry codes may need to be reviewed; and whether new instruments and/or industry codes may need to be developed.

The expiry of the Determination, without accompanying reforms, will not have been anticipated by broadcast and live-streaming service providers. This is because the making of the 2019 Determination was framed as a temporary measure that would provide stability and certainty for industry while the then Government considered and consulted on broader regulatory reforms. As stated by the former Minister for Communication, Cyber Safety and the Arts, the Hon Paul Fletcher MP:

“the issue of whether livestreamed TV and radio services delivered over the internet should be regulated under the Broadcasting Services Act needs to be considered under any harmonisation of media regulation...therefore makes sense to extend the Alston Determination for a finite period to allow for a thorough consideration of those issues.”

As a result, live-streaming service providers will not have planned for the eventuality of the Determination expiring without intervention. Moreover, these service providers are unlikely to be able to comply with broadcasting regulations that could be applied to them as a result of expiry.

3. What policy options are you considering?

The Albanese Government has signalled its intent to undertake broader reform of media regulation in Australia:

Rapid technological change has enhanced the range of media content available to Australian citizens and consumers who have embraced online and Internet Protocol-enabled media services over recent years. However, Australia’s regulatory frameworks have not kept pace with these changes and there are inconsistencies in regulatory outcomes for industry and consumers, particularly with respect to safeguards and protections.

This consultation paper [The Broadcasting Service Exclusion Determination Consultation Paper] initiates a program of work to modernise media regulation. The overall goal of this program is to establish a regulatory framework that provides for consistent regulation of audio-visual and audio services that make available content like television and radio, and supports the achievement of key policy objectives with the flexibility to accommodate new and emerging technologies.⁷

In this context, this Regulation Impact Statement considers three options to address the issues associated with the impending expiry of the 2019 Determination.

- Option 1 (status quo): **allow the 2019 Determination to expire**
- Option 2: **remake the 2019 Determination for a time-limited period**
- Option 3: **implement legislative changes ahead of the expiry of the 2019 Determination to exclude online live-streaming from the definition of a broadcasting service**

⁷ Department of Infrastructure, Transport, Regional Development and the Arts (2022), The Broadcasting Service Exclusion Determination Consultation Paper

Option 1 (status quo): allow the 2019 Determination to expire

This option represents the ‘status quo’ for the purposes of this Regulation Impact Assessment, as it represents what would occur if no Government action is taken. It would, however, represent a significant deviation from the regulatory settings that have been in place since 2000.

This option would involve allowing the 2019 Determination to expire on 18 September 2022, with no policy or legislative intervention. This option would require the ACMA to undertake work to determine which online streaming or other services may be considered to be providing a ‘broadcasting service’ and therefore captured under the BSA; whether existing instruments or industry codes need to be reviewed; and whether new instruments or codes may need to be developed. There would likely be financial impacts for the ACMA, as the regulator is not currently resourced to undertake this additional work.

Option 2: remake the 2019 Determination for a time-limited period

This option would involve the Minister for Communications making a new legislative instrument under subsection 6(2) of the BSA in essentially the same terms as the 2019 Determination. The new instrument would be made for a time-limited period (3 to 5 years, or longer, pending stakeholder views).

This option would maintain the regulatory arrangements that have been in place for broadcasting and streaming services for the past 22 years, and provide industry with regulatory stability and certainty while affording Government sufficient time to consider and implement broader regulatory reforms.

Option 3: implement legislative changes ahead of the expiry of the 2019 Determination to exclude online live-streaming from the definition of a broadcasting service

This option would involve the development, drafting, introduction and passage of legislative amendments before the expiry of the 2019 Determination on 18 September 2022. While there are a range of approaches that could be considered, the only approach that is considered to be feasible in the timeframes – with the 2019 Determination expiring on 18 September 2022 – would be to legislate to permanently exclude online live-streaming services from the definition of a ‘broadcasting service’.

More comprehensive and fulsome reform of the regulatory arrangements governing online live-streaming service would require extensive policy development and engagement with affected parties. It would also need to be approached carefully to avoid unintended consequences, given the complexity of the regulatory and commercial arrangements in place for media and broadcasting services in Australia. This approach is not feasible in the current circumstances and is not assessed further in the context of this Regulation Impact Statement.

4. Impact analysis

Option 1 (status quo): allow the 2019 Determination to expire

Allowing the Determination to expire, without policy intervention, would have significant regulatory impacts across the media sector. This option would result in online live-streaming services potentially being subject to obligations from which they have been exempt since 2000.

Regulatory implications

Live-streamed services may (depending on the service) fall within a category of a ‘broadcasting service’ and require licensing. Political, local, and Australian content regulations, captioning requirements, reporting requirements, obligations under standards, and requirements to establish industry codes would potentially apply to them. However, it is currently unclear which provisions of the BSA would apply to which services, and whether changes to these regulatory and co-regulatory arrangements would be needed.

The possible cost of compliance was not quantified by stakeholders that provided submissions to the consultation process, as costs and regulatory burden are complex, novel, and difficult to scope. Live-streaming has effectively been excluded from the BSA since these services were introduced. Every participant in the live-streaming services subsector would need to review and adjust their operating models based on their own legal advice and potential commercial impacts.

In its submission, Paramount Australia & New Zealand stated that:

“suddenly online services may be caught by broadcasting regulation including commercial broadcasting licence restrictions, Australian content quotas, industry codes of practice requirements and closed captioning... Considerable compliance costs would be incurred in assessing the implications of the Determination lapsing and implementing changes to abide by the resultant regulatory regime, as well as potentially renegotiating commercial licensing arrangements.”

The ACMA stated that:

“the existing broadcasting framework in the BSA is underpinned by licensing arrangements and a co-regulatory regime based on codes of practice. In its current form, this framework is not readily adaptable to online services (i.e. live streaming services) that might fall within the definition of broadcasting service, if the Determination was to lapse.”

Free TV stated:

“The BSA was not designed to apply to online services, as evidenced by the inclusion of Schedules 5 and 8, which have been added to the BSA on specific issues relating to these platforms. As such, an in-depth analysis of how BSA provisions would apply to online services would need to be undertaken, and content providers not previously covered by the BSA would require substantial time and resources to meet the extensive range of regulatory requirements.”

The expiry of the Determination, potentially bringing internet simulcasts of television and radio within the BSA’s definition of a ‘broadcasting service’, would be likely to have implications for the BSA’s licence area restrictions. The BSA and the regulatory scheme it established are developed on the concept of licence area-based broadcasting services. Broadcasters are licensed to operate in a particular geographic area and those licences confer particular rights and obligations which are also licence-area specific.

Unless internet simulcasts of television and radio services were limited to viewers and listeners within the relevant licence areas (i.e. the licence areas in which particular services are authorised to be provided), then the effective redefining of a ‘broadcasting service’ to include online simulcasts would likely result in broadcasters breaching licence conditions.

Additionally, making broadcasting services available in areas in which they are not licenced may also result in licensees breaching the prohibition on providing a broadcasting service without a licence, which is an offence subject to civil penalty provisions under Part 10 of the BSA. The costs and penalties associated with such breaches are discussed below.

Submitters to the consultation process raised a number of related points. Nine's submission noted that its online services:

“potentially would not be able to stream live content inside or outside Nine's television and radio broadcast licence areas.”

Commercial Radio Australia (CRA) noted that:

“if broadcasters' online content would be classified as a broadcasting service, the commercial radio industry would face the substantial regulatory burden of applying for and maintaining a separate commercial radio broadcasting licence in respect of its online services, including online simulcasts.”

If internet simulcasts were included in the definition of a 'broadcasting service', this may also have implications for a number of the control and media diversity provisions in Part 5 of the BSA. The control and ownership rules operate to limit the number of commercial broadcasting licences and associated newspapers that a person may control in particular licence areas.

Assuming that commercial broadcasters would not, or would be unable to, effectively geo-block their simulcasts, any content provided online would potentially be available in any licence area around the country. Therefore, bringing simulcast services within the definition of a 'broadcasting service' may undermine the relevance of these control and ownership rules where viewers in a given licence area are able to receive all commercial broadcasting services provided by licensees operating across the country.

These concerns were noted by a number of submissions to the consultation process.

- CRA's submission noted that expiry would create unacceptable uncertainty for industry in relation to breaches of regulatory restrictions over control and ownership obligations.
- Australia New Zealand Screen Association (ANSZA) stated that expiry of the Determination would have significant commercial and compliance implications and, over the longer term, have knock-on negative effects on the diversity of content, content quality, and consumer choice.

Impacts on industry

The following businesses are likely to be impacted by the expiry of the Determination.

- Businesses that were previously exempt from the definition of a 'broadcasting service', which may include:
 - social media platforms and other digital platforms with live-streaming functions (for example, users can watch live-streamed news, sports, gaming, and other programs on YouTube);
 - online live simulcast streams of commercial television and radio broadcasters' channels (for example, ABC, SBS, and Nine each operate services that allow users to live-stream content that is simultaneously being broadcast on television or radio);
 - live subscription streams (for example, Paramount+ offered by Paramount); and
 - live sports streams offered by mobile service providers (for example, Telstra manages a range of mobile sports apps that provide access to video content including live-streaming of specific events).

- Businesses and organisations operating in spaces that are governed by legislation that relies on the definition of a ‘broadcasting service’, such as copyright and classification. For example:
 - Copyright Advisory Group to the Australian Education Senior Officials Committee;
 - Phonographic Performance Company of Australia (PPCA);
 - Screenrights;
 - Australian Copyright Council;
 - Australia New Zealand Screen Association (ANZSA); and
 - Australian Performing Right Association and Australasian Mechanical Copyright Owners Society (APRA AMCOS).
- Businesses party to contracts for the supply of media content, which commonly differentiate between live-streaming and broadcasting rights. Copyright industries (and some sporting bodies) licence their content on the basis that the right to broadcast content and right to simulcast content are separate rights carrying separate entitlements to licence fees/royalties. Removing the distinction would disrupt existing licence deals, require review of arrangements, remove value from intellectual property rights and reduce owner rights to existing licence fee and royalty structures.

These potential industry impacts are examined in further detail in the following sections.

Costs to industry

Impacts on the broadcast licensing framework

As outlined above, expiry of the Determination could potentially trigger nominal breaches of licence area-based rules and obligations (i.e. local content, control and ownership, and licence allocation moratoriums).

Telstra stated that:

“Expiry 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.”

In order to address the implications on licence area-based rules and obligations, broadcasters may employ ‘geo-blocking’ technology to prevent access to internet simulcasts by users located outside of their licence areas. However, it is not known whether this technology would be used to accurately and consistently ‘block’ users on a licence area basis. Such technology is not generally employed as part of the existing simulcasts provided by broadcasters, and may be costly and difficult to implement.

While the ACMA is able to permit out of area broadcasting, it can only do so if it is satisfied that this occurs in ‘exceptional circumstances’ (as per paragraphs 7(2A)(c), 8(3)(c) and 9(2A)(c) of Schedule 2 of the BSA), or if the out of area broadcast is required to provide adequate reception for viewers or listeners located within the licence area (as per paragraphs 7(2A)(d), 8(3)(d) and 9(2A)(d) of Schedule 2 of the BSA). These criteria would be unlikely to apply to internet simulcasting.

CRA stated:

“the commercial radio industry would face the substantial regulatory burden of applying for and maintaining a separate commercial radio broadcasting licence in respect of its online services, including online simulcasts. It also would not be possible to comply with licence area conditions online if the transmission were to become subject to the standard broadcast licence conditions.”

Nine stated that it would need to expend significant time, money and resources to fully understand the legal and policy implications that expiry would cause. Specifically, it stated that it is unclear how:

“live streaming (of television and radio) [would] be regulated, and in particular, [whether it would] mean that there could potentially be three separate (and potentially inconsistent) forms of regulation for showing the same content (whether it be broadcast, streamed, or on-demand of the same content).”

Impacts on business models

Allowing the Determination to expire may affect the value and operation of existing commercial agreements between broadcasters and content providers. The impact would be particularly great for content providers who sell online rights to provide coverage of events separately from traditional broadcasting rights.

ANZSA stated:

“The market for audio-visual content in Australia is based on the broadcast right and the simulcast or live streaming right in content being separate and granted separately... Removing this distinction would disrupt existing licence deals, require review of existing licence deals to determine the extent of the disruption, and remove value from the rights and therefore reduce the ability of rights owners to retain existing licence fee and royalty structures. This would ultimately have a negative impact on the local production and distribution industry.”

Content providers, including sporting bodies such as the Australian Football League and National Rugby League, routinely sell exclusive rights to provide live coverage of their sports over the internet to online providers. If the Determination were to expire, these providers and bodies would need to renegotiate the terms of all affected contracts allowing the provision of live coverage, which presents a very clear cost to industry.

Telstra stated:

“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.”

Nine stated that because it may be limited from live-streaming content inside or outside its television and radio broadcast licence areas, the network would:

“need to review and renegotiate existing commercial licensing and advertising arrangements, including its copyright licensing arrangements. Nine would also need to review and fundamentally change its business model for its digital streaming and on-demand content platform, 9Now, as well as its various radio streaming services.”

Impacts on copyright

Expiry of the Determination may allow copyright rulings that hinge on the definition of a ‘broadcasting service’ to be reopened, such as *Phonographic Performance Company of Australia Ltd v Commercial Radio Australia Ltd* [2013] FCAFC 11. The effect of that decision was to affirm that a range of rules applying to broadcasting services transmitting content using allocated spectrum do not apply to simulcasts of those services provided over the internet. If radio online simulcasts are considered to be broadcasts, then radio stations and copyright owners may need to alter the way that revenue associated with the online simulcasts is treated, resulting in costs to renegotiate existing agreements and litigation.

Australian Copyright Council stated:

“Any change to the definition of ‘broadcast service’ in *the Broadcast Services Act 1992* (Cth), will have a knock-on effect on Australia’s copyright legislative framework and the systems and commercial arrangements in place for the remuneration of creators and other copyright owners... The expiration of Determination without an interim solution in place, would result in a practical fusion of the broadcasting right and the ‘communication right’ as outlined in the Copyright Act, resulting in the loss the ability to derive (and control) distinct streams of income for creators and other copyright owners.”

The Copyright Act also contains various exceptions from copyright infringement for persons engaged in making broadcasts. In effect, the definitions of ‘broadcast’ and ‘broadcasting’ in the Copyright Act serve to limit the availability of these exceptions to broadcasting services as defined by the BSA. They provide broadcasting services with advantages as compared with other content providers who provide content over the internet.

Consequently, if the Determination were to lapse, then the change in scope of the definition of a ‘broadcasting service’ would have flow-on effects to the Copyright Act, including the statutory licensing schemes set up under the Act.

This includes the education statutory licence through which schools, TAFEs and universities provide remuneration to copyright creators and owners, distributed via collecting societies (s 113P of the Copyright Act). This statutory licence applies to the copying of broadcasts and certain online transmissions of broadcasts for educational purposes. Stakeholders’ views have differed on the impact on the statutory licence on expiration of the Determination:

- In its submission, the Copyright Advisory Group to the Council of Australian Governments Education Council (CAG) noted that any change to the definition of a broadcasting service, as a consequence of the Determination lapsing, would result in an expansion of the scope of the education statutory licence and significant practical and financial imposts for schools, TAFEs and universities. CAG noted that the broadcast component of the educational statutory licence costs schools around \$28.8 million per annum.
- In contrast, Screenrights, the body that administers the broadcast component of the educational statutory licence, indicated that they anticipate such an expansion would be minor, as the Copyright Act already extends the statutory licence to online simulcasts of broadcasting channels. This would leave the online live streaming functions of platforms like YouTube, Twitch, Facebook, or Twitter as potential inclusions in the statutory licence, although it is unclear how much use of such content would fall under the statutory licence or other, direct licences.

The collective licensing arrangements under the statutory licence in Part VII, Division 2 of the Copyright Act that cover government copying of broadcasts may also be affected by any changes to the definition of a ‘broadcasting service’. There would also likely be implications for other minor copyright exceptions.

Impacts on classification

The classification of content broadcast on television and radio is currently regulated under co-regulatory industry codes, separate from the classification of other audio-visual content on other platforms such as film, DVD, and video-on-demand under the Classification Act. Section 92 of the Classification Act specifically excludes “*broadcasting services to which the Broadcast Services Act 1992 applies.*”

If the Determination were to lapse, the definition of a ‘broadcasting service’ would include online simulcasts of broadcasts and would affect what material is considered under the code-based broadcasting classification process.

SBS stated:

“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.”

Free TV, the Australian Home Entertainment Distributors Association (AHEDA) and ANZSA agreed that classification is an issue that will need to be considered in a broader media reform package.

Live streaming of content via online services (which is not currently subject to industry code classification rules), such as Twitch or YouTube, could also theoretically fall under the broadcast classification framework. This may bring with it the expectation that industry codes of practice should be developed and registered with the ACMA. There is currently not an equivalent streaming or online platform industry body to develop such codes.

Other costs to industry

In its submission, ANZSA stated that removing the certainty created by the Determination would have a chilling effect on investment in new local productions, and may result in services leaving or choosing not to enter the Australian market. If this occurred, it would also represent a cost to the Australian community.

PPCA stated:

“The current simulcast licensing scheme that PPCA has in place with the commercial radio sector is the result of 5 years of litigation. That significant investment from both sectors would be wasted, with adverse consequences for sound recording copyright holders and artists registered with PPCA. The expiration of the instrument would disturb the current licensing frameworks, causing uncertainty and potential litigation.”

Nine stated that:

“failing to remake the Determination will lead to a significant decrease in commercial broadcasters’ ability to compete and should therefore be strenuously opposed. The ACCC has found (in its Digital Platform Inquiry Report, as well as in its subsequent Digital Platform Inquiry Platform reports), that there are significant power imbalances between Australian commercial broadcasters and the digital platforms and other significant international online services. Any increase in the regulatory burden faced by commercial broadcasters is going to exacerbate the challenges which already exist.”

Free TV supported this point, noting that:

“the coverage of new online services by the BSA would change the competition dynamic in the market, for example, as new online services may be required to meet advertising restrictions and Australian content quotas.”

Benefits to industry

During consultation on the proposed making of the 2019 Determination, one stakeholder advocated to allow the Determination to sunset. The stakeholder noted that excluding live-streamed programming from the definition of a ‘broadcasting service’ has had a negative impact on regional television’s revenue and audience share, because it enables commercial television broadcasters to live-stream outside of their authorised licence areas.

Overall impacts on industry

A quantitative assessment of the impact on industry of Option 1 is not possible as it is not known which services would be subject to which BSA provisions, or if new codes/instruments might be needed and what they might entail. However, it is expected that costs would rise across the online live-streaming industry in order to comply with any requirements that are found to apply. This was a point noted by a number of parties that made submissions to the consultation process.

APRA AMCOS stated:

“If the Determination were allowed to expire, without an interim solution, it would have considerable adverse impact upon APRA AMCOS’ business and the livelihood of our members... The financial impacts of such an expiry are difficult to quantify. However, depending upon what alternative arrangements are put in place, we would expect them to be substantial.”

Free TV stated:

“The potential implications of allowing the Determination to sunset... are so significant that the industry would require substantial time and resources to prepare for a change of this type.”

Impacts on the Australian community

There are a range of costs that would be likely to be imposed on consumers under this option.

Any additional costs to industry from the lapsing of the 2019 Determination would, over time, be passed through to consumers through increased in subscription fees or through indirect costs, such as increased data collection and use, and advertising. Free TV noted in its submission that:

“... given that [the] regulations impact almost all aspects of the operations of Free TV businesses, the extensive nature of [the changes that would result from expiry] would not be able to be absorbed by commercial broadcasters in the short term.”

Part 11 of the BSA outlines avenues for consumers to raise a complaint in relation to a broadcasting service. The framework allows a person to make a complaint directly to the ACMA if they believe another person providing a broadcasting service has committed an offence against the BSA (or its underlying regulations), breached a civil provision, or breached a condition of a licence or a class of licence.

If the Determination were to lapse, there would be instances where compliance breaches may occur, but the complaints process would be unclear. Any change to the definition of a ‘broadcasting service’ would disrupt the current understanding of the ACMA’s authority with respect to complaints and cause uncertainty for industry and consumers.

In its submission made during the consultation process, the ACMA stated that:

“If the Determination were to lapse... a number of challenges are likely to arise under the current licensing scheme and in relation to the development and operation of industry codes that are an important feature of the co-regulatory model. Consideration would also need to be given to the application of other aspects of content regulation that are not covered by codes but are set out in legislation or regulatory instruments, such as content quotas, captioning, and associated reporting obligations.”

The ACMA also stated that:

“In the interim, while legislative reform is being developed, we would strongly encourage broadcasters and other content providers to consider applying consistent content safeguards across their platforms, on a voluntary basis. This is aligned with the views expressed by the ACMA in our recently published position paper *What Audiences Want – Audience Expectations for Content Safeguards* which noted that, from an audience perspective, distinctions between platforms that distribute ‘like’ content are diminishing. We also know that Australians are increasingly accessing content online—in 2021, for the first time more Australians watched video content online than via traditional broadcast TV, with 58% viewing content provided by online subscription services in a given week, compared to 54% who had watched live or recorded free-to-air television.”

The definition of a ‘broadcasting service’ shapes the application of many parts of Australia’s copyright law, including statutory licences and educational activity exceptions. A shift in the scope of statutory licences under the Copyright Act may have practical and financial implications for Australian schools, TAFEs, and universities. This would represent a cost for both the education industry and for government where costs are incurred by government-funded educational institutions.

Overall assessment

Option 1 is expected to impose significant costs on industry and, in turn, the Australian community. These costs are not expected to be offset by the potential benefit for industry in terms of ‘revenue protection’ for regional broadcasters. Option 1 is expected to impose an overall cost on industry and the Australian community.

Option 2: remake the 2019 Determination for a time-limited period

Remaking the Determination in the same terms as the 2019 Determination for a time-limited period would have no regulatory impacts, and would not impose any costs on industry or the Australian community as it would maintain the regulatory arrangements that have been in place for the past 22 years.

As signalled in the consultation paper, the Government intends to initiate a program of work to modernise media regulation, with the overall goal of establishing a new regulatory framework. As such, this option would involve the making of a time-limited measure to maintain current regulatory settings while broader options for reform are developed in consultation with stakeholders and interested parties. This would avoid the disruption to industry and the imposition of costs on industry and the Australian community as with Option 1.

Regulatory implications

Nil.

There would be no negative regulatory implications from this option, as it maintains the current regulatory arrangements. This assessment was supported by a number of stakeholders.

APRA AMCOS stated:

“If the Determination was remade as proposed above, there would be no regulatory or financial impact on APRA AMCOS during the period that remade Determination remained in place.”

Free TV stated:

“The remaking of the instrument for a period of 5 years would provide commercial television broadcasters with certainty on their regulatory requirements across the areas outlined below.”

The Australian Subscription Television and Radio Association (ASTRA) stated:

“ASTRA members value the certainty provided by the Alston Determination, when coupled with the other elements of the definition of ‘broadcasting service’ contained in the Broadcasting Services Act 1992. When managing regulatory compliance for a diverse range of services, certainty is of particular value. Certainty is also of great value in the development of innovative and new products, as it allows for appropriate business and risk planning.”

Telstra stated:

“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.”

Impacts on industry

While this option would not impose any additional costs on industry, it would extend an increasingly artificial delineation between broadcast and point-to-multipoint online streaming services for a time-limited period. This would allow point-to-multipoint online streaming services to continue to operate without the obligations applicable to more traditional broadcast services (and their associated costs). However, this maintains current arrangements, as online live-streaming services have benefited from this advantage since the Alston Determination was introduced in 2000 (prior to the inception of most modern streaming services).

The Australian Copyright Council stated:

“As creators and other copyright owners and users have developed licensing arrangements based on the 2019 Determination’s existence, continuing the Determination should have little impact.”

DIGI stated:

“this approach would provide continued and necessary certainty to industry and the community, while allowing time for the Government to explore the issue in the context of broader regulatory reforms.”

Paramount stated:

“A duration of 5 years will provide Paramount ANZ with regulatory certainty while reform of the broader media-communications regulatory framework is considered.”

Communications Alliance stated:

“we agree that remaking the Determination in identical form will provide certainty for industry while the broader regulatory reforms are developed and progressed.”

ANZSA stated:

“By design, the Determination does not impose any regulatory burdens or compliance costs on any ANZSA member company involved in, or planning to become involved in, direct-to-consumer video streaming services.”

Telstra stated:

“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.”

Impacts on the Australian community

This option would impose no material impact on the Australian community. This is because this option would effectively maintain the regulatory arrangements that have been in place for the past 22 years for a time-limited period.

AHEDA stated:

“If the Determination was remade for an extended duration, this would provide certainty for AHEDA members and stability in the market place, enabling longer term planning and investment in film acquisition, licensing, distribution and production.”

Overall assessment

Option 2 would not impose additional costs on industry, and therefore it would be expected that no additional costs would be passed onto consumers. This approach would allow Australians to maintain access to services that provide entertainment, sports and news, including emergency announcements at no additional cost.

Stakeholders affirmed that remaking the instrument for a finite period will provide a net benefit to industry, in that it would allow sufficient time to consider the complexities of issues that need to be considered prior to the development of permanent solution.

Option 3: implement legislative changes ahead of the expiry of the 2019 Determination to exclude online live-streaming from the definition of a broadcasting service

There is no prospect of developing, introducing and passing comprehensive reform of the legislation that governs online live-streamed media services prior to the expiry of the 2019 Determination. This would be a multi-year program of work that would require extensive policy development and engagement with stakeholders. The only feasible legislative option at this point – prior to the expiry of the 2019 Determination – would be to introduce a bill that sought to exclude online live-streaming from the definition of a broadcasting service.

This option would be similar to Option 2 (making a new instrument in essentially the same terms of the 2019 Determination), although it would make the proposed exclusion permanent rather than time-limited. As such, the impacts of this scenario are expected to be similar to Option 2 in the short term. That is, no immediate regulatory implications and no broader impacts on industry or the Australian community.

However, over the longer term, this approach would maintain an increasingly anachronistic and out-of-date distinction between online and broadcasting services that is at odds with the way that media services are made available to, and consumed by, Australians. Some of the potential impacts and implications of this approach are canvassed below.

Regulatory implications

Nil.

There would be no immediate regulatory implications from this option as it would implement in legislation the same arrangements that have been in place, via legislative instrument, for the past 22 years.

Impacts on industry

Nil in the short-term. However, over the longer-term, this option would maintain an artificial delineation between broadcasting and streaming services that no longer reflects the way in which live-streaming and broadcasting services are produced and distributed. As media services continue to evolve, this would reduce the ability for Australia's regulatory landscape to adapt and accommodate new and emerging technologies, and may act to discourage investment and innovation in new media services.

Impact on the Australian community

No overall material impact. However, consumers increasingly hold consistent expectations for audio-visual content regardless of whether it is technically a broadcast service or an online service. This option would mean that consumers' expectations are not reflected in harmonised regulation.

Overall assessment

Option 3 would not impose additional costs on industry, and would have no impact on the Australian community in the short term. It would provide industry with the stability and certainty. However, this option is not conducive to providing more consistent and transparent regulation of broadcasting and media services which has been recommended through various reviews and inquiries, including the Digital Platforms Inquiry conducted by the ACCC.

5. Consultation and implementation of feedback

A public consultation process was undertaken to assess the proposal to make a new time-limited Determination in the same terms as the 2019 Determination.

A consultation paper (the Broadcasting Service Exclusion Determination Consultation Paper) was released on 17 August 2022 that sought feedback on the proposal to remake the 2019 Determination and invited views on the optimal duration of the new instrument (3 or 5 years, or a longer period). The consultation paper also canvassed the alternative options to remaking the Determination and sought views on the impacts of the 2019 Determination either expiring or being remade.

23 submissions were received from a range of stakeholders across the media sector with a variety of experiences and areas of focus. A number of the comments and views of stakeholders have been included in the assessment of impacts in section 5 of this Statement.

All stakeholders agreed that re-making the Determination would provide short-term stability, avoiding immediate legal and financial uncertainty. Many submitters, including Free TV, considered that alternatives to re-making the Determination were not viable at this time.

Communications Alliance stated:

“The alternative solutions proposed in the paper namely, letting the Determination expire, or drafting legislative amendments to the definition of ‘broadcasting service’ are not viable options. The former because of uncertainty for industry, and the latter because there is simply not enough time.”

The bulk of submitters indicated support for the new instrument to have a duration of 5 years. Many stakeholders noted the importance of providing industry with stability through what will need to be a multi-year process of broader media reform. Stakeholders were broadly supportive of the Government's recognition that broadcast regulations have not kept pace with changes in the media landscape. However, most noted that the reform process would be complex and require close engagement with industry.

The views put forward through the consultation process were generally consistent with those noted in the 2019 consultation process. Through the 2019 process, stakeholders supported the making of an instrument in the same terms as the Alston Determination for a time-limited period and urged the then Government to progress with broader regulatory reform. These submissions also recognised the complexity of the issues and the need to progress carefully with reforms given the wide-ranging impacts of potential changes in the way that a broadcasting service is defined.

6. What is the best option from those you have considered?

Informed by the impact analysis in section 5, the option of making a new instrument in essentially the same terms as the 2019 Determination (Option 2) is considered to be the optimal approach. Option 2 will maintain current regulatory arrangements for a time-limited and impose no regulatory burden or costs on industry or the Australian community.

As this option will not introduce additional regulatory burden or costs for industry, no additional costs are expected to be passed onto consumers. This approach will allow Australians to continue having access to entertainment, sport, and news, including emergency announcements, without incurring additional costs.

7. How will you implement and evaluate your chosen option?

Implementation

The Albanese Government has committed to a program of work to modernise media regulations and fulfil the legitimate expectation of consumers and industry for consistency, transparency and equity across the media regulatory environment. As noted by the Minister for Communications in the foreword to the consultation paper, the Government's broader media reform agenda will be sequenced and progressive, and the proposed remaking of the 2019 Determination would be an interim step in advancing this agenda.

Specifically, a new instrument will be made by the Minister for Communications under subsection 6(2) of the BSA for the purposes of paragraph (c) of the definition of 'broadcasting service' in subsection 6(1) of the BSA. This instrument will repeal the 2019 Determination prior to its expiry on 18 September 2022. It will contain the same operative provisions as the 2019 Determination and have a duration of 5 years.

The Government's longer-term reform agenda will involve a number of parallel work streams and include multiple opportunities for interested stakeholders and individuals to contribute to these processes.

Evaluation

The new instrument will be assessed against the objective of providing a stable regulatory environment for media services that facilitates the development of an efficient and competitive media industry. The Government will monitor the operation of the instrument and engage with industry and other parties over its duration as broader regulatory reforms are considered and progressed.

The Determination's operability and effectiveness is also expected to be reviewed before it expires in 5 years, and this review process and its outcomes would be integrated into any broader reforms affecting online live-streaming services. Any future decisions regarding the regulation of broadcasting and media services would be a matter for Government.