

Explanatory Statement

Broadcasting Services Act 1992

Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019

Issued by the Authority of the Minister for Communications, Cyber Safety and the Arts

Authority

The *Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019 (the Determination)* is made by the Minister for Communications, Cyber Safety and the Arts under subsection 6(2) of the *Broadcasting Services Act 1992 (the Act)* for the purposes of paragraph (c) of the definition of “broadcasting service” in subsection 6(1) of the Act.

In addition to the power to make the instrument under subsection 6(2) of the Act, subsection 33(3) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make an instrument of a legislative character, the power shall be construed as including a power exercisable in like manner and subject to the like conditions to repeal any such instrument.

Furthermore, subsection 33(3A) of the *Acts Interpretation Act 1901* relevantly provides that where an Act confers a power to make, grant or issue any instrument of a legislative character with respect to particular matters, the power shall be construed as including a power to make, grant or issue such an instrument with respect to a particular class or to particular classes of those matters. That provision is relied upon to empower the Minister to determine, on a class basis, a particular kind of service does not fall within the definition of “broadcasting service” in subsection 6(1) of the Act.

The Determination repeals and remakes the *Determination under paragraph (c) of the definition of “broadcasting service” (No. 1 of 2000) (the sunseting Determination)*. The sunseting Determination was operating effectively, and continues to be required, and is remade in substantially the same form.

Purpose

The purpose of this instrument is to expressly exclude point-to-multipoint streaming services over the internet from the scope of “broadcasting services” under the Act. For example, 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 such as Telstra or Optus would not be considered to be “broadcasting services”.

This instrument does not relate to on-demand, point-to-point services (for example Stan, Netflix and commercial free-to-air television “catch-up” services) which are already expressly excluded under paragraph (b) of the definition of “broadcasting service” in subsection 6(1) of the Act.

Allowing the sunseting Determination to lapse without a replacement would remove the legal certainty that it currently provides in relation to the definition of a “broadcasting service” to broadcasting, online, copyright and cinematic businesses. This determination is essential for existing and future investment decisions of these operators, as well as the integrity of the operational and licensing schemes, and contractual and international agreements related to screen and radio content. .

The Determination includes a provision to self-repeal after 36 months, which would accommodate consultation with industry and the community to determine a longer term reform strategy for broadcasting and online streaming more broadly, particularly in the wake of the recommendations of the Australian Competition and Consumer Commission’s (ACCC) Digital Platforms Inquiry Report for a harmonised approach to complex issues across these sectors. Any amendments to the overarching definition of “broadcasting service” in subsection 6(1) of the Act would require lengthy consultations with the affected industries, regulators and the community. The implications of amending the Act are broader and more complex, requiring more thorough consideration than the timeframe to remake the sunseting Determination allows.

The notes on the provisions of the new Determination are set out in **Attachment A**.

This instrument is a legislative instrument for the purposes of section 8 of the *Legislation Act 2003*.

Background

The Act provides for the regulation of broadcasting services and certain other electronic communications services. Part 10 of the Act creates offences and civil penalties that apply where a person provides certain types of broadcasting services without a licence.

The term “broadcasting service” is defined in subsection 6(1) of the Act to mean:

‘a service that delivers television programs or radio programs to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, but does not include:

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

Subsection 6(2) provides that a determination made for the purposes of paragraph (c) of the definition of “broadcasting service” in subsection 6(1) is a legislative instrument.

In July 2000, the former Department of Communications, Information Technology and the Arts undertook a statutory review as required by section 216E of the Act into “...whether, in

the context of converging media technologies, streamed audio and video content obtainable on the internet should be regarded as a broadcasting service” (this section has since been repealed following the completion of that review).

The review adopted a broad definition of ‘streamed audio and video content obtainable on the Internet’. It was considered to capture audio and video material made available on the internet in real time as a continuous flow of data that is able to be reproduced by an appropriate receiving device. The review found a number of complexities involved in determining whether streamed audio and video services were broadcasting service within the meaning of the Act, and referred to the uncertainty of the application of the definition of “broadcasting service” under subsection 6(1) of the Act.

The review reached a position that without any intervention, the status of internet audio and video streaming would remain unclear and industry would face continuing uncertainty regarding the regulation of these services.

On 21 July 2000, the Minister announced the Government decision, which emerged from the findings of the review, that internet services such as audio and video streaming outside of the broadcasting services bands should not be considered broadcasting services under the Act. This decision was implemented through a Ministerial determination under paragraph (c) of the definition of “broadcasting service” under subsection 6(1) of the Act.

The sunseting Determination was made by the Minister for Communications, Information Technology and the Arts, and commenced on gazettal on 27 September 2000.

The sunseting Determination has remained in place since that time and while there has been significant evolution in streaming services, until broader and more harmonised arrangements are in place, stakeholders across the industry sectors have agreed that the meaning and intent of the sunseting Determination currently remains fit for purpose, As such, the Determination remakes the sunseting Determination in substantially the same form, albeit with a shorter, time limited duration (36 months). This gives a clear signal that the distinction between broadcasting and streaming services will be considered during future reform processes. Minor amendments have been made to the Determination to reflect current drafting practices.

Consultation

On behalf of the Minister for Communications, Cyber Safety and the Arts, the Department of Communications and the Arts (the Department) undertook a targeted consultation process which focussed solely on the services covered by the sunseting Determination. Stakeholders had already been provided with the opportunity to address many of the Determination issues as well as the broader communications and media sector reform during other consultation processes including the ACCC Digital Platforms Inquiry.

The Department provided stakeholders with a review consultation paper seeking views on the sunseting Determination’s structure and format as well as on a proposal to remake the Determination without major changes for a period of three years. Stakeholders consulted during this process included the traditional television and radio broadcasting businesses, online and streaming services, digital platforms operators, telecommunications bodies, copyright and screen peak bodies, and the key regulators. Several of the peak bodies also

sought, and were granted, permission to circulate to their members for individual consideration.

The Department received twenty-three submissions with twenty-two in favour of the proposal to remake the Determination. There were differing views on the timing for this, although many acknowledged the importance and necessity of considering this as part of the broader harmonisation of media and broadcasting laws. The only opposing view was from a regional stakeholder which argued for immediate action to mitigate the impact of digital platforms and metropolitan operators in regional broadcasting licence areas.

Regulation Impact Statement

The Office of Best Practice Regulation has assessed that remaking these instruments without substantial changes is not likely to have more than a minor and/or machinery regulatory impact on business, community organisations and individuals. As the Department intends to remake the instrument without significant changes, a certification letter has been provided to the Office of Best Practice Regulation in lieu of the Department preparing a Regulation Impact Statement.

Statement of compatibility with human rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out in **Attachment B**.

Attachment A

Notes on the *Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019*

Section 1 provides that the name of the instrument is the *Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019* (the Determination).

Section 2 provides that the instrument will commence on the day after it is registered.

Section 3 provides that the source of authority for making the Determination is subsection 6(2) of the *Broadcasting Services Act 1992*.

Section 4 sets out relevant definitions for the instrument.

There is a note at the beginning of section 4 of the Determination indicating that a number of expressions used in the instrument are defined in section 6 of the Act, it includes a list of terms that are defined in the Act.

The term *Act* means the *Broadcasting Services Act 1992*.

Section 5 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the Schedule, and that any other item has effect according to its terms. Only one instrument is specified in the Schedule; namely, the sunseting Determination, titled ‘*Determination under paragraph (c) of the definition of “broadcasting service” (No. 1 of 2000)*’.

Section 6 sets out a class exclusion from the definition of “broadcasting service” for the purposes of paragraph (c) of the definition in subsection 6(1) of the Act. Paragraph (a) of this section excludes a service that makes available television programs or radio programs using the internet, other than a service that delivers television programs and radio programs using the broadcasting services bands, from the definition of a “broadcasting service”.

This exclusion is intended to cover a service that uses the internet, even if part of the means of delivery of the service is technology which may not clearly be part of the internet, so long as the service does not deliver programs using the broadcasting services bands. For example, the determination covers services which enable users to access material from the internet using a wireless application protocol device, such as a mobile phone, whether or not the wireless application protocol is itself part of the internet.

It is necessary to specify that the exclusion does not extend to a service that delivers programs using the broadcasting services bands to prevent the exclusion being exploited to deliver a *de facto* broadcasting service using those bands.

Section 7 provides that the Determination will be repealed 36 months (or three years) after the Determination commences. This is less than the usual ten years that would apply by operation of the sunseting repeal rule under section 50 of the *Legislation Act 2003*. The self-repeal provision imposes a timeframe for considering the impact of the broader reform of broadcasting and streaming services on this Determination.

Schedule

The schedule lists one instrument to be repealed, namely, *Determination under paragraph (c) of the definition of “broadcasting service” (No. 1 of 2000)*.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019

This Determination is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Determination

The *Broadcasting Services (“Broadcasting Service” Definition — Exclusion) Determination 2019* (the Determination) is made under subsection 6(2) of the *Broadcasting Services Act 1992* (the Act). The Determination excludes point-to-multipoint streaming services provided over the Internet from the scope of the definition of “broadcasting service” in the Act.

The Determination repeals and remakes the *Determination under paragraph (c) of the definition of “broadcasting service” (No. 1 of 2000)* (more commonly known as the ‘Alston Determination’) (the sunseting Determination), which is due to sunset on 1 October 2019.

Allowing the Determination to sunset would remove certainty currently afforded to broadcasting, online, copyright and cinematic businesses in terms of their existing and future investments, as well as the integrity of the operational and licensing schemes, and contractual and international agreements related to screen and radio content. The sunseting Determination was made for the purposes of alleviating some of the uncertainty around what was captured by the definition of “broadcasting services”. The sunseting Determination is being remade for a shortened period of time, three years, to accommodate broader reform in the communications and media space following recommendations from the final report of the Australian Competition and Consumer Commission’s (ACCC) Digital Platforms Inquiry.

Remaking the instrument for this period will provide the relevant industry sectors with certainty and reduce the likelihood of interruptions to the existing services to which consumers have become accustomed. The communications and media landscape continues to evolve which necessitates a harmonised and well considered approach to reform in consultation with all the relevant industry sectors and other affected parties.

In deciding to remake this instrument, views were sought from a targeted group of stakeholders that are most affected by this instrument, including the traditional broadcasting, online streaming, cinematic and copyright industry sectors as well as the regulators and relevant peak bodies. There was general consensus that the instrument continues to be required pending broader communications and media reform.

The purpose of making this instrument is to provide regulatory certainty to the range of industries providing and/or distributing broadcasting and streaming services as well as regulators and those utilising the definition to regulate and enforce the copyright associated

with these services in anticipation of further reform. The Determination makes the exclusion of the identified of the point-to-multipoint delivered content from the definition of “broadcasting services” for the purposes of the Act clear. Without this Determination, it would be uncertain to stakeholders whether particular widely offered services are subject to certain regulations under the Act, which could affect the ongoing provision of and investment in online live content.

Human rights implications

This Determination does not engage any of the applicable rights or freedoms.

Conclusion

This Determination is compatible with human rights as it does not raise any human rights issues.