

Submission in response to proposal to remake *Broadcasting Services Determination 2019*

XX September 2022

1 About us

1 This submission is made on behalf of the Australia New Zealand Screen Association (ANZSA). ANZSA's core mission is to advance the business and art of filmmaking, increasing its enjoyment around the world. We seek to protect and promote the safe and legal consumption of movie and TV content across all platforms. Our members are proud participants and contributors of the film and television industry that contributed \$9.2 billion to the Australian economy and supported an estimated 54,818 FTE workers in 2017-18¹, and include Walt Disney Studios Motion Pictures Australia; Fetch TV; Netflix Inc; Motion Picture Association; Paramount Pictures Australia; Sony Pictures Releasing International Corporation; Universal International Films, Inc.; Village Roadshow Limited; and Warner Bros. Pictures International, a division of Warner Bros. Pictures Inc.

2 General comments

- 2 We thank the Department of Infrastructure, Transport, Regional Development, Communications and the Arts for the opportunity to provide comments on the proposed remaking of the *Broadcasting Services ("Broadcasting Service" Definition – Exclusion) Determination 2019* ("the Determination"). ANZSA member companies produce and distribute film and TV content that is simulcast over the internet in Australia. These arrangements will be greatly impacted by any changes to the terms of the Determination.
- 3 On 21 July 2000, Richard Alston, the then Minister for Communications, Information Technology and the Arts, announced that following a review, the government had decided that audio and video streaming over the Internet should not be regarded as a broadcasting service for the purposes of the *Broadcasting Services Act 1992* ("the Act"). This "Alston Determination", the precursor instrument to the current Determination, was made to provide legal certainty as to whether a streaming service that makes programs available on the internet falls within the terms of paragraph (b) of the definition of "broadcasting service" in subsection 6(1) of the Act.
- 4 We understand the Government is putting forward a proposal to remake a new Determination, which will have terms identical to those of the current Determination, which will be subject to sunset after a period of time. ANZSA supports the remaking of the Determination for five years, which will provide legal certainty to ANZSA member companies.
- 5 Please find below answers to the questions set out in the consultation paper.

¹ Olsberg SPI, *Study on the Economic Contribution of the Motion Picture and Television Industry in Australia*, November 13, 2019. <https://anzsa.film/wp-content/uploads/2020/02/Study-on-the-Economic-Contribution-of-the-Motion-Picture-and-Television-Industry-in-Australia_Final-Report.pdf>

3 Should government make an instrument under subsection 6(2) of the BSA in effectively the same terms as the *Broadcasting Services (“Broadcasting Service” Definition – Exclusion) Determination 2019*, which excludes services that provide live-streamed content online from being considered a ‘broadcasting service’?

- 6 ANZSA supports the government’s proposal to make such an instrument as outlined above. The Determination has been successful in achieving its intended objective of legal certainty and stability for the industry. This success is demonstrated by the emergence of a major market for online audiovisual content, where there is strong competition between dozens of services that millions of Australians use regularly.² This legal certainty has helped a multiplicity of business models to emerge, including advertising, subscription and transactions-based services. New services continue to enter the market, providing fierce competition within the industry. For example, Paramount Global (formerly known as ViacomCBS), owner of Network 10 and Nickelodeon Australia, recently launched its SVOD service Paramount+ in Australia. Choices of entertainment for audiences are expanding, contributing to a well-functioning ecosystem of producers and consumers and providing better value for the Australian viewer. The subscription market alone recorded an estimated 19.4 million paying Australian subscribers.³ Underlying these services are content licence agreements that specifically grant broadcast rights separately from live streaming or simulcast rights, which in turn are granted (and priced) separately from other online rights (e.g. on-demand rights, catch up rights, digital rental rights).⁴
- 7 Allowing the Determination to sunset would pull the rug out from under this success by disrupting established market arrangements and practices. Moreover, allowing the Determination to sunset would create legal uncertainty for several ANZSA member companies who have launched, or are planning to launch, direct-to-consumer streaming services. This 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.
- 8 We also note that were the Australian Government to allow the Determination to sunset, this would be out of step with international best practice. Governments around the world have acknowledged the distinction that the Determination implements, namely that broadcast services are fundamentally different to online audiovisual services and, consequently, that the regulatory environments are distinct. Broadcasting services in Australia are regulated under the Act, in part, because they are afforded access to spectrum, a

² See Appendix A for details.

³ https://media-partners-asia.com/AMPD/Q3_2021/Australia/PR.pdf

⁴ An example is the 2013 Program Supply Agreement between Channel Nine and WIN, which was found by the NSW Court of Appeal to have granted only the broadcast right in the licensed programs, and not the right to live-stream broadcasts of those programs over the internet: *WIN Corporation Pty Ltd v Nine Network Australia Pty Ltd* [2016] NSWCA 297

public asset. Online audiovisual services do not make use of a public asset in a like manner and on-demand audiovisual services are ill-suited to broadcast regulation.

- 9 We also note that Australia is a party to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). Under this treaty, member states are obliged to protect (and hence regulate) broadcasting organizations. Both the Rome Convention and the “Working Document for a Treaty on the Protection of Broadcasting Organizations”⁵ do not extend “broadcast” to “include transmission of such a set of signals over computer networks”. Therefore, the Determination is in keeping with Australia’s obligations under the Rome Convention. In addition, the expiration of the Determination may cause Australia to be in breach of its obligations under Article 14^{bis}(1) of the Berne Convention and Article 8 of the WIPO Copyright Treaty.
- 10 ANZSA therefore strongly recommends the government make an instrument under the Act that would have identical terms as the Determination.

4 If the instrument is made, in an effort to provide certainty and stability to industry while broader regulatory reforms are developed and progressed, should it be remade for a duration of 3 years, 5 years, or alternative period of time?

- 11 ANZSA agrees with the government’s objective to provide stability to the industry, which will give time and scope for the government to engage with stakeholders on a broader agenda of reform for the media industry. To that end, ANZSA recommends the instrument be remade for a duration of 5 years, which will grant an important measure of certainty to the screen sector.

5 If the instrument is made for a duration of 3 to 5 years, what would be the regulatory and financial impact on your business?

- 12 Should the Determination be remade for 5 years instead of being allowed to expire, this will have a significant beneficial impact on the operations of ANZSA member companies. Companies in the media sector will have the legal certainty to make investments in the marketplace, and to forecast and implement longer-term plans, including licensing arrangements that may extend over a longer time horizon, and investments in new local productions. This confidence to invest and grow on the part of companies is an important contributor to overall economic growth.

⁵ https://www.wipo.int/edocs/mdocs/copyright/en/sccr_27/sccr_27_2_rev.pdf

- 13 This will also provide the Government with time and scope to separately consider a broader, more holistic suite of regulatory reforms for the media sector, including in response to the National Cultural Policy consultation, the National Classification Scheme, the Australian Competition and Consumer Commission's Digital Platforms inquiry, and a review of the anti-siphoning scheme. ANZSA welcomes the Government's intention to closely consult with industry on these measures.

6 If the Determination expires on 18 September 2022, with no interim solution in place, how would this impact your business or area of industry? What regulatory and financial costs do you estimate your business would incur in this scenario?

- 14 ANZSA member companies would be severely impacted were the Determination to sunset on 18 September 2022. As introduced in paragraphs 6 and 7 above, the market for audiovisual 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. This significant legal, regulatory and commercial uncertainty would have a chilling effect on investment in new local productions and be detrimental to service standards for Australian consumers. It may result in some services leaving, or choosing not to enter, the Australian market.

7 What are your views on the alternatives to remaking the Determination?

- 15 ANZSA supports remaking the Determination without significant amendment. ANZSA does not recommend any particular alternatives, especially since (as the Consultation Paper itself notes) it is highly unlikely there will be sufficient time to develop and secure Parliamentary passage of any new legislative amendments to the definition of 'broadcasting service' under section 6 of the Broadcasting Services Act 1992, before the expiry of the Determination on 18 September 2022.
- 16 We would further add that the terms of the Determination remain fit-for-purpose. 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. Allowing it to sunset, on the other hand, would impose significant regulatory burdens and compliance costs, outlined above. The language of the current instrument is also clear and well understood by the market, and has stimulated clear licensing arrangements.

- 17 Finally, we note that Australia has entered into binding obligations with respect to audio-visual services under the Australia-United States Free Trade Agreement (AUSFTA) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Any decision to propose an alternative to the Determination must take into account these obligations.

8 Conclusion

- 18 ANZSA supports the remaking of the Determination for a period of 5 years, which in addition to its beneficial effects on the industry, will also allow time for the Government to engage closely with stakeholders on its broader media reform agenda, and update media regulations for the digital age.
- 19 ANZSA thanks the Government for this opportunity to provide comments. We are happy to meet to discuss these comments with the Department, and appreciate any opportunities to further engage with the Government on holistic reform of the media sector.

Appendix A: The explosion of consumer choice in the Digital Age

	TRADITIONAL (early 2000's)	DIGITAL (2019)
NO FEE/ AD-SUPPORTED		<p>Multichannel: </p> <p></p> <p></p> <p>Catch Up TV: </p> <p>AVOD: </p> <p>Others: </p>
SUBSCRIPTION		<p>QIT: </p> <p>SVOD: </p> <p>hayu, prime video, Kayo, Animal, ACORN TV</p> <p>Coming Soon: </p>
TRANSACTIONAL HOME ENTERTAINMENT	<p>Rent: </p> <p>Buy: </p>	<p>TVOD: </p> <p></p> <p>EST: </p>
CINEMAS		<p>The Explosion of Consumer Choice in the Digital Age</p>

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