

## **BROADCASTING SERVICE EXCLUSION DETERMINATION CONSULTATION PAPER**

### **CRA SUBMISSION**

#### **SEPTEMBER 2022**

Commercial Radio and Audio (**CRA**) is the peak industry body representing the interests of commercial radio broadcasters throughout Australia. CRA represents the entire Australian commercial radio industry, with 261 member stations, of which 220 are in regional and remote areas.

CRA welcomes the opportunity to respond to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts' Consultation Paper on the *Broadcasting Services ("Broadcasting Service" Definition – Exclusion) Determination 2019 (Determination)*.

The commercial radio and audio industry strongly supports the re-making of the Determination in its current form for a period of at least 5 years.

The expiration or amendment of the Determination would create unacceptable uncertainty for the industry in relation to:

- the regulatory status of commercial radio stations' online services;
- the commercial radio industry's copyright licensing arrangements;
- the status of commercial agreements that distinguish between online and broadcast services; and
- breaches of regulatory restrictions such as local content, trigger event and control/ownership obligations.

This would be highly damaging to an industry that is currently dealing with disruption caused by digital platform dominance, Covid19 and natural disasters.

CRA submits that the Determination must be remade for a period of 5 years or longer to ensure:

- proper consideration of the impact of proposed broader reforms;
- that there are no inadvertent consequences arising from the amendment or expiry of the Determination; and
- establishment of protective legislation to ensure the long term sustainability of the Australian commercial radio and audio industry. A key element of such reform will be prominence for radio in cars and on smart speakers and other connected devices.

## **Recommendations**

- 1. The Determination should be remade in its current form. This will ensure that a service that makes available television or radio programs using the internet will not fall within the definition of a ‘broadcasting service’.**
- 2. The Determination should be remade for a period of at least 5 years.**

### **1. Background**

The Determination was originally made in 2000 for a 10 year period, following a review in which the Government concluded that internet streaming should not be classified as a broadcasting service under the *Broadcasting Services Act 1992* (**BSA**).

The Determination was remade in 2019 for a 3 year period by the Hon Paul Fletcher MP, then Minister for Communications, Cyber Safety and the Arts. It is due to expire on 18 September 2022.

Under the Determination, services that make radio or television programs available using the internet are expressly excluded from being classified as ‘broadcasting services’, even when those programs are simulcast contemporaneously with analogue broadcasts.

This interpretation of the Determination was confirmed by the Full Federal Court in the proceedings between Commercial Radio Australia and the Phonographic Performance Company of Australia Ltd (**PPCA**) in 2013<sup>1</sup>.

### **2. Remaking of the Determination**

The commercial radio industry submits that the Determination should be remade in its current form for the reasons outlined below.

- a) If the Determination were to expire, commercial radio stations’ online communications may become ‘broadcasting services’ under the BSA and therefore subject to additional regulatory requirements.**

Broadcasters’ streaming services and other online activities may become regulated as broadcasting services under the BSA if the Determination is permitted to sunset.

The BSA defines a ‘broadcasting service’ to include:

*A service that delivers television or radio programs to persons having equipment capable for receiving that service, whether the delivery uses the radiofrequency*

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<sup>1</sup> *PPCA Ltd v Commercial Radio Australia Ltd* [2013] FCAFC 11)

*spectrum, cable, optical fibre, satellite or any other means or a combination of those means ...*

The term 'radio program' is not defined in the BSA. However, the Full Federal Court has previously adopted a broad approach and observed that a broad range of content might be blended together from various sources.<sup>2</sup>

It seems likely that, if this approach were taken, a broadcaster's online content would be classified as a broadcasting service.

In such circumstances, 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.

This would be an unacceptable outcome for the commercial radio industry.

**b) The commercial radio industry has made long term business decisions – particularly in copyright and commercial agreements - based on the existence of the Determination.**

Allowing the Determination to expire would give rise to significant commercial uncertainty for the commercial radio and audio industry.

The BSA definition of 'broadcasting service' is incorporated into the *Copyright Act 1968*. Any change to that definition could impact on the copyright licensing arrangements under which the commercial radio industry operates. This has the potential to cause significant uncertainty and potentially increased operating costs.

Commercial agreements, such as broadcasting rights agreements and advertising agreements, frequently differentiate between online and broadcast platforms. The expiry of the Determination would have the potential to affect these agreements, causing confusion, uncertainty and additional costs for the industry.

**c) There is no strong policy rationale for making broadcasters' online services subject to the broadcast licence conditions.**

The policy rationale for the broadcast being subject to licence conditions imposed by the BSA is that broadcasters who are permitted to use a scarce public resource (i.e. spectrum) should be required to meet certain conditions.

No such policy rationale appears to exist in respect of the broadcasters' online services,

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<sup>2</sup> PPCA v Commercial Radio Australia Limited FCAFC 11 (at [9] – [10]).

which are run on the broadcasters' own infrastructure and at their own cost.

#### **d) Drafting changes would be confusing for industry**

CRA submits that the Determination should be remade in its current form.

While the drafting of the Determination is perhaps not quite as clear as it might be, at this stage CRA does not believe that any drafting amendments would be helpful.

The meaning of the Determination has been clarified through custom and litigation and should now be left unchanged. Even minor drafting changes may lead to different interpretations and implementation, potentially causing expensive and time consuming discussions.

### **3. Duration for which the Determination should be remade**

CRA submits that the Determination should be remade for a period of at least 5 years.

A period of 5 years or more will ensure that Government can properly assess the impact of removing or altering the Determination, as well as setting up protective legislation to ensure the long term sustainability of the Australian commercial radio and audio industry. A key element of such reform will be prominence for radio in cars and on smart speakers and other connected devices.

The expiry of the Determination will have a substantial impact on the regulatory and commercial environment in which broadcasters operate and must not be undertaken without a significant period of analysis of the consequences of any proposed reform.

CRA notes the Government's intention to commence a '*program of systemic regulatory reform and modernisation*'.<sup>3</sup> The industry urges Government to approach any such reform carefully and sequentially, to ensure that consequences are well understood and addressed as part of the reform process.

CRA agrees with the Consultation Paper's conclusion that the reforms should be '*sequenced and progressive*' and '*any such reforms will need to be implemented progressively to avoid unintended consequences, given the extent to which the definition of "broadcasting service" is embedded in the commercial and regulatory landscape for media services in Australia*'.<sup>4</sup>

CRA's view is that a period of less than 5 years will not be adequate to perform such work. Accordingly, the Determination should be remade for a period of 5 years or more.

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<sup>3</sup> Consultation Paper, page 5.

<sup>4</sup> Consultation Paper, page 13.

Please contact Sarah Kruger, Head of Legal & Regulatory Affairs at CRA, to discuss any of the above issues in more detail.

**Commercial Radio & Audio**

**8 September 2022**