

Australian Media Law Reforms: The Regulatory Agenda for 2021

Alison Manvell, Special Counsel, and **Claudia Berman**, Associate, Baker McKenzie, comment on the media reform package proposed by the Federal Government in November.

As 2020 draws to a close, the Federal Government's staged media regulatory reform process continues to unfold with numerous reviews underway on aspects of both the Broadcasting Services Act 1992 (Cth) (**BSA**) and other related laws.

On 27 November 2020 the Australian Government released a Green Paper proposing a number of significant reforms namely:

- an option for commercial free-to-air television broadcasters to make a one-time irrevocable transition to a new form of broadcasting licence involving a reduced regulatory burden in return for a transition to using less radiofrequency spectrum in coming years
- if sufficient broadcasters take up the new licence, there is a proposed program for industry-wide rationalisation and reallocation of spectrum (including the ABC and SBS)
- a portion of the proceeds from resulting spectrum auctions would be used to create two funds to support content delivery - the Public Interest News Gathering Trust (**PING**) and the Create Australian Screen Trust (**CAST**)
- the introduction of Australian local content spend requirements for SVOD and AVOD services, as well as new Australian content obligations for the national broadcasters

Submissions are due by 7 March 2021. These changes form part of the broader staged reform process for media regulatory reform in Australia, which will continue into 2021.

Background

The Australian Competition and Consumer Commission's (**ACCC**) Digital Platforms Inquiry Final Report was published on 26 July 2019 making 23 broad ranging recommendations covering competition, consumer protection, privacy, copyright and media regulatory reform.

The Government responded to the Final Report at the end of 2019 with an implementation roadmap for reform activity in relation to those recommendations supported by the Government.

Amongst other things, the Government's response contained an immediate commitment to commence a staged process of media regulatory reform with the aim of achieving an appropriately platform-neutral regulatory framework.

As anticipated in the roadmap, the first stages of that reform process have this year included both a classification laws review process as well as changes to Australian local content obligations and the support framework for Australian content.

The consultation process regarding changes to the Australian content framework kicked off in April this year with the release of an Options Paper authored by the Australian Communications and Media Authority (**ACMA**) and Screen Australia.

The changes now proposed in the Green Paper relate to both Australian content reform and other aspects of the media regulatory agenda. They follow closely on from, and will operate in parallel with, changes to Australian local content obligations and Australian content support mechanisms previously announced in September.

Previously announced changes supporting Australian content (September 2020)

As part of its 2020-21 Federal Budget, the Australian Government announced a \$53 million funding package to support the development and production of Australian content, alongside a variety of legislative changes.

Key takeaways

Funding:

- From 1 July 2021, the Australian Children's Television Foundation will receive \$20 million over 2 years for the development, production and distribution of Australian children's content
- From 1 July 2021, Screen Australia will receive \$30 million over 2 years to support Australian drama, children's and documentary film and television production
- Screen Australia will also receive \$3 million over 3 years, to encourage Australian screenwriting and script development

Key changes to obligations included:

- Harmonising the Producer Offset rebate rate to 30% for all domestic film and television content, and other threshold amendments across the three film tax offsets
- Simplification of the Australian content obligations on commercial television broadcasters, with more flexibility given to broadcasters to choose the relevant mix of Australian drama, children's and documentary content to meet quotas
- Reducing the Australian content expenditure obligations on subscription broadcasters from 10% to 5%, for eligible drama spending, by mid-2021

In early November, the Minister issued the Broadcasting Services (Australian Content and Children's Television Standards) Direction 2020 to direct the ACMA to make necessary standards to implement the changes to obligations outlined above, with effect from 1 January 2021. Consultation on the resulting draft Broadcasting Services (Australian Content and Children's Television) Standards 2020 closed on 7 December 2020.

In addition, larger streaming video service providers will be asked to report to the ACMA on their level of investment in Australian content from the start of 2021.

Green Paper

The Green Paper seeks submissions on four main proposals:

New commercial FTA licence

Currently, commercial free to air (FTA) television broadcasters pay the commercial broadcasting tax in return for use of relevant radiofrequency spectrum.

Under the new proposal, FTA broadcasting licensees would be offered a one-time irrevocable choice to move to a new form of licence. It would not be mandatory for FTA broadcasters to transition to the new licence - broadcasters could choose to remain under the current arrangements. If licensees moved to the new form of commercial television broadcasting licence:

- that would commit them to pursuing a path towards use of less radiofrequency spectrum
- the licence holder would no longer have to pay a tax in return for use of spectrum
- other regulatory obligations would be reduced, such as removal of the Australian content transmission requirement for multichannels. However, it is proposed that other 'core' obligations would remain - for instance:
 - the Australian content primary transmission requirements for primary channels and the new flexible sub-quota arrangements

- the majority of the standard conditions of licence in Schedule 2 of the BSA
- the co-regulatory model for content regulation under industry codes of practice
- requirements for regional broadcasters to provide material of local significance

Submissions are sought on the list of regulatory obligations to be retained.

In connection with the above, the ACMA has subsequently commenced a consultation review of the Commercial Broadcasting (Tax) Act 2017 (Cth) consulting on its views as to whether to repeal or amend the legislation. Submissions on that consultation are due by 4 February 2021.

Industry-wide rationalisation and reallocation of spectrum

The path towards use of less radiofrequency spectrum by broadcasters is anticipated to take a number of years, but would require significant take-up of the new licence in order to proceed. At least two of the three commercial FTA broadcasters would need to transition to the new licence in all metropolitan licence areas (with a likelihood that minimum transition levels would also be needed regionally) for the proposed industry-wide rationalisation and reallocation of spectrum to occur.

In addition to the commercial FTA broadcasters, the rationalisation process would also include the ABC and SBS and rationalisation of unused broadcast spectrum, and would involve both spectrum usage reduction and multiplex sharing.

Spectrum no longer required by the FTA sector would be reallocated by means of spectrum auctions.

Timing would depend on the outcomes of the current consultation. However, a potential timeline is provided in the Green Paper:

- May 2021 - final details of reforms proposed in the Green Paper announced

- Second half of 2021 - legislation introduced
- Mid-2022 - elections by commercial FTA broadcasters as to whether to transition to the new licence
- Mid-2022 to Mid-2024 - ACMA to work with industry in planning for restack process
- Mid-2024 - commence restack
- 2025 - spectrum auctions
- December 2025 - completion of restack
- 2026 and later - reassignment of auctioned spectrum

PING and CAST

Some of the proceeds from the spectrum auctions would be used to capitalise two newly established funds:

- PING - to support provision of newspaper, radio, TV and online services in regional Australia
- CAST - to support creation and distribution of Australian content and the production sector. Two funding pools are envisaged - one for projects of cultural significance (funded either via grants or equity investments) and one for commercial investments (equity investments)

Each would be a trust fund established under legislation. CAST would be administered by Screen Australia.

Australian content changes

In addition to the previously announced changes, the Green Paper seeks comment in two areas:

- A proposal to introduce:
 - expectations that SVOD and AVOD services invest a percentage of Australian revenue in new Australian programming (produced under the creative control of Australians) with a potential 5% investment level flagged. Alternatively, SVOD and AVOD services could contribute an equivalent amount to CAST
 - reporting obligations for SVOD and AVOD businesses to enable monitoring by the

ACMA with a power for the Minister to implement formal regulatory requirements if an SVOD or AVOD services fails to meet expectations for two consecutive years

- discoverability obligations for Australian content on SVOD and AVOD services
- A proposal to formalise the role of the ABC and SBS in commissioning and providing Australian content by setting explicit legislative requirements.

The obligations on SVOD and AVOD services would apply to commercial services meeting certain eligibility

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tests. A number of possible tests that could apply on their own, or in combination, are included for comment in the Green Paper including:

- a purpose test (a content service with the primary purpose of providing professionally produced scripted content to Australians)
- an Australian presence test (a service that offers its service in Australia to serve Australian audiences)
- a number of subscribers/registered users test (potentially set at one million SVOD subscribers or AVOD registered users)
- a gross Australian revenue test (with a potential threshold of \$100 million per annum derived from distribution of programming in Australia)

SVOD and AVOD services owned by an existing Australian commercial or subscription broadcaster (already subject to Australian content obligations) would be exempt from the proposed new SVOD and AVOD rules.

The proposals regarding the ABC and SBS acknowledge that they are already "significant commissioners of Australian content and are also important providers of this content

to audiences across the country". The proposal is for a change from the way the public broadcasters' responsibilities are currently described in their respective charters to more prescriptive legislative requirements. Submissions are sought on a number of options in the Green Paper.

Next steps

These consultations will play out across the coming months, in parallel with various other continuing reform work streams including:

- classification and online safety reform
- other reform proposals and regulatory activity arising from the Digital Platforms Inquiry Final Report including introduction of the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020* (Cth) and work to finalise a proposed Disinformation Code for digital platforms

2021 looks to be another busy year for media regulatory reform as these reform activities progress, and Phase 2 of the Government's media regulatory reform agenda commences, including a likely review of advertising regulation across all platforms.

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