



AUSTRALIA

Submission by Free TV Australia

**Security Legislation Amendment
(Critical Infrastructure)
Bill 2020**

Exposure Draft

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1. Summary

- Free TV appreciates the opportunity to comment on the Exposure Draft *Security Legislation Amendment (Critical Infrastructure) Bill 2020* and the accompanying Explanatory Memorandum.
- Free TV broadcasters play a critical role in the Australian community. This has been evident in the surge in audiences during the recent devastating bushfires, subsequent floods, and the COVID-19 pandemic.
- As critical service providers, we accept that there is a need for robust policies and procedures to mitigate the risk of a loss of services to the community, particularly during times of emergency.
- For this reason, the commercial broadcast sector and its service providers have in place a range of emergency protocols, disaster recovery plans and backup procedures to ensure reliable services are provided to Australians.
- While accepting that broadcasting delivers services that are essential in time of crisis, it would appear premature to include our sector within the *Security of Critical Infrastructure Act 2018* (SOCI Act) provisions without first assessing the existing policies and procedures in place and determining whether there are any deficiencies that would require further regulation.
- This concern is amplified as the Positive Security Obligations that will be contained in sector specific rules have not yet been drafted. These obligations have the potential to increase the administrative, operational and financial burden on the broadcast sector. We consider that it is reasonable for the broadcast sector to understand these likely costs and the proposed compliance and enforcement mechanisms before legislation is considered by Parliament.
- Until such time as these costs are known it is difficult to be definitive on the appropriate threshold to apply to broadcast transmission assets. However, under any scenario it is likely to be appropriate to exclude retransmission or backup sites from the threshold.
- In recognition of the often-complex arrangements on sites where there can be multiple parties sharing equipment and facilities, the threshold should also only include transmission towers, rather than individual transmitters. This will reduce the scope for overlapping regulatory obligations, including placing obligations on individual transmitter owners for matters over which they have no control, for example, restricting site access to accredited personnel.
- In addition, the imposition of any additional compliance costs on regional networks would be unlikely to produce a net public benefit, taking into account the significant financial constraints currently facing those networks.
- Finally, should any “uplift” in security arrangements be required as a result of this legislation, this will need to be matched with a funding deed with the Government in recognition of the driver for these costs being a change in Government policy, rather than changes in best practice asset management.

2. Introduction

2.1 About Free TV Australia

Free TV Australia is the peak industry body for Australia’s commercial free-to-air TV broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial free-to-air TV makes to Australia’s culture and economy.

Free TV Australia proudly represents all of Australia’s commercial free-to-air TV broadcasters in metropolitan, regional and remote licence areas. Our members, in combination, can reach 97% of Australians, wherever they live in Australia.



Our members are dedicated to supporting and advancing the important contribution commercial free-to-air TV makes to Australia's culture and economy. Australia’s commercial free-to-air TV broadcasters provide trusted local news, tell Australian stories, give Australians a voice, nurture Australian talent and create jobs for Australians.

2.2 In times of crisis Australians turn to Free TV broadcasters

Free TV members cover events of national significance, provide critical information in times of emergency, and bring Australians together to witness moments in history, life changing occasions and times of national success.

This has never been more true than during times of crisis, as shown by the audience response during the catastrophic bushfires of late 2019/early 2020 and the ongoing COVID-19 pandemic. The commercial TV broadcasters’ national audience during the 2019-20 bushfire crisis was 23% higher, relative to a year earlier. In addition, at the height of the COVID-19 news-cycle, average audiences in news programming across the primary services within each broadcaster’s channels in both metropolitan and regional Australia were up by over 55% on 2019 levels.

To ensure that they can continue to deliver these important services to Australians, Free TV members already have in place a range of risk mitigation practices, together with disaster recovery plans to deal with critical incidents that may impact on broadcasters. As a result of these measures, network reliability is extremely high and there are effective protocols in place to ensure that when incidents do occur, such as loss of electricity during bushfires, backup arrangements can be in place as quickly as possible.

Further consultation with the industry, including directly with the impacted networks, is recommended to ensure that Home Affairs has a detailed understanding of the broadcast system and the existing resilience policies and procedures to determine whether there is a material public policy shortfall that requires addressing.

3. Obligations should be known before broadcasting is included

As currently drafted, critical broadcasting assets that either meet a threshold or are prescribed by the rules to be critical transmission sites, will be subject to additional reporting and compliance obligations if the Home Affairs Minister issues a determination under section 51 of the SOCI Act.

Free TV understands that the relevant obligations for broadcasting infrastructure would be:

- Part 2 – Register Obligations: Requirements to include transmission assets in the register of critical infrastructure assets including information on who owns, controls, and has access to critical infrastructure assets, including board structures, outsourcing and offshoring information
- Part 2A – Risk Management Programs: Requirement to have a risk management plan, consistent with yet-to-be-drafted sector specific rules that identify risks and mitigation strategies for all hazards.

- Part 2B – Notifying the Government of cyber security incidents.

Free TV understands that the other tiers of obligations that apply to systems of national significance are not proposed to apply to any broadcasting infrastructure.

While Free TV acknowledges the critical role that the services provided by our members play in the community, we consider that it is premature to include our sector within the scope of this legislation.

Unlike conventional legislative reform processes where the Regulatory Impact Statement establishes the likely costs of additional regulation and weighs this against the public benefit, this legislation is being proposed prior to establishing what costs and obligations will ultimately be imposed upon industry. Indeed, Free TV submits that the Regulatory Impact Statement is incomplete for this reason and the legislation should be delayed until such time as a completed assessment can be included in the Explanatory Memorandum (EM). It should be noted that the original consultation paper did not contemplate the inclusion of the broadcast sector specifically.

3.1 Uncertainty on the sector specific rules that will apply

Our primary concern with the proposed legislation is with the lack of any clarity around the extent of the cost and obligations that the risk management programs will require under the sector-specific rules (section 30AH(1)(c)). Further, it is also unclear how the compliance and enforcement regime associated with the requirements of the risk management programs (Section 30AD) will be administered. In effect, the broadcast industry is being asked to comment on a regulatory framework that has not yet been drafted.

Typically, with the regulation of public safety there is ultimately a trade-off between the marginal cost of additional regulation and the associated marginal public benefit of that additional regulation. This enables policy makers and stakeholders to make an informed judgement about the appropriate scope of proposed regulation and ensures that it is “right sized” commensurate to the public benefit.

As it stands, there has been limited consultation with the broadcast industry that would allow Home Affairs to better understand the nature of transmission, the role of the various assets in the network and the shared nature of some sites on which broadcast transmission assets are located. In the absence of this consultation and understanding of the broadcast network and the parties involved, there has been no clear articulation of why the security of critical infrastructure framework is necessary or appropriate for this sector.

The first paragraph of the EM makes clear the expectation that there be an “uplift” in the resilience of critical infrastructure. That is, there is a clear expectation that there will be additional costs and obligations imposed upon asset owners who meet the threshold. We consider that it is reasonable that these costs and obligations are understood by all relevant parties prior to the legislation being introduced to Parliament.

3.2 Thresholds should be determined after costs and obligations known

Free TV has been asked specifically to comment on the proposed threshold number of sites that an entity would need to own or control as a prerequisite for being subject to the additional obligations under the SOCI Act.

However, without knowing the extent of the costs and obligations that will be imposed on the sector it is difficult to identify the appropriate threshold level. For example, if the sector specific rules do

indeed lead to a material “uplift” in security obligations, it would only be appropriate for a very limited number of asset owners to be subject to the rules. As we expand upon below, in such a situation a grants program would need to accompany the imposition of the rules to fund any uplift to meet the Government’s revised expectations of security arrangements.

After the publication of the Exposure Draft documentation, Home Affairs proposed to amend the threshold to 30 transmission sites, excluding those used for retransmission. As a principle, we agree that it would be appropriate to exclude retransmission from any final threshold. In the broadcast context, a retransmission site is one that receives and retransmits a signal from a high-powered terrestrial parent site. In addition, assets and sites that are maintained as a backup to the main service should be specifically excluded from the threshold.

3.3 Clarity on the responsible party

The legislation appears to be drafted from a perspective of a one-for-one relationship between asset owners, sites, and risk management obligations. However, on broadcast transmission sites, transmitters are typically owned by one or several licensed broadcasters or a direct outsourced provider for one or more of those broadcasters. However, much of the physical infrastructure (buildings, towers, antennas, generators etc.) is usually shared and ownership of those shared assets is often quite complex.

Free TV is concerned that the complexity of these relationships may give rise to overlapping regulatory obligations. This is particularly the case for owners of individual transmitters on sites that may not have control over some of the hazards listed as relevant to the risk management programs, such as physical protection for the site and personnel access requirements.

To minimise the potential for regulatory overlap, the critical broadcast infrastructure definition should not include an individual radio communications transmitter, as suggested by paragraph 65 of the EM. Ensuring that the definition only refers to the owners or operators of transmission sites that meet the threshold will provide clarity over the responsible party for each critical transmission site.

3.4 Clarity on the recognition of existing reporting obligations

Under the *Broadcasting Services Act 1992* (BSA), there are already a range of ownership disclosure obligations that apply to commercial broadcasting licensees. The obligations require the licence holder to disclose ownership and control arrangements directly to the ACMA, for the purposes of monitoring and enforcing the controls within the BSA.

If the Critical Infrastructure Bill is to proceed, there should be an explicit acknowledgement that the Minister’s power to “switch on” the obligations under Part 2 are expressly limited to those entities that are not licensed under the BSA and are therefore already under strict disclosure obligations. This would provide the industry with some certainty that the intent of the “switch on” provisions as described at paragraph 263 of the EM will recognise existing regulatory obligations.

4. Any uplift must be coordinated via a funding deed with the Government

Free TV seeks the Government’s assurance that any costs associated with an “uplift” that is required in security arrangements as a result of this new legislation will be met through a funding deed with the Government.

The broadcast sector operates to an existing set of obligations and industry best practice operation and maintenance requirements. The economics of the broadcasting industry are such that it would be unable to absorb any additional regulatory compliance costs associated with this legislation over and above what is already expected under best practice protocols. In recognition of the fact that additional costs could be imposed on industry as a result of a change in Government policy, these costs should be met by Government.

5. Specific issues with current drafting

5.1 Consultation period on rules inadequate

The proposed 14-day period for consulting on the proposed sector-specific rules is inadequate and must be extended to at least 6 weeks.

As described above, the sector-specific rules that would be drafted under Section 30AH(1)(c), are critical in determining the extent of any additional costs and obligations to be imposed upon industry. Further, the rules themselves can be used to determine transmission sites to be critical under section 12E(2) in addition to those that meet the threshold under 12E(1)(b).

Therefore, adequate consultation on these rules is of critical importance to the industry. The 14-day period included in the exposure draft is manifestly inadequate, considering the materiality of the matters to be determined through the rules. Free TV submits that a mandatory minimum 6-week period is appropriate.

5.2 Ensuring operational decisions are not impacted

Free TV members would be very concerned if there were any additional constraints placed on the operational decision making of commercial operators of transmission sites. For example, a decision to continue to invest, upgrade or to change maintenance cycles is a commercial matter for the networks that must be taken considering the financial sustainability of each licence area.

There should be a protection within the legislation, or at least made clear in the EM, that nothing in the legislation would compel an asset owner to make an uncommercial decision in relation to the maintenance or operation of any transmission site.