

**ABC submission on the ACMA's
paper on implementing Australia's
TV prominence framework**

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1. Introduction

The Australian Broadcasting Corporation (ABC) welcomes the opportunity to respond to the Australian Communications and Media Authority (ACMA) paper “Implementing Australia’s TV prominence framework”, which seeks feedback on the ACMA’s preliminary views on the possible exercise of its discretionary powers within the prominence framework established under Part 9E of the *Broadcasting Services Act 1992* (BSA).

The prominence framework is an important response to Australia’s changing media environment. It reflects the rise of internet-connected TVs and related devices, which have become the dominant way in which Australians access video-on-demand (VOD) services, and the way in which such devices now function as gatekeepers for Australian media services and content.

The framework establishes a means for ensuring that broadcasting and broadcasting video-on-demand (BVOD) services, including those of the Corporation, are visible and prominently displayed on connected-TV devices so that Australians can easily find and access them. These services include news and information programming that support democratic debate and participation, content that reflects and promotes Australia’s diverse culture and national identity, and matters of local, regional and national significance.

As an adviser and potential arbiter on aspects of the prominence framework, the ACMA has an important role in ensuring the visibility and accessibility of regulated television services on regulated television devices by Australian audiences.

The ABC notes that this consultation is occurring without the Minister having published regulations establishing minimum prominence requirements for regulated television devices under s 130ZZO of the BSA. In making its submission, the ABC has relied upon the exposure draft of the Broadcasting Services (Minimum Prominence Requirements) Regulations 2024 (“Draft Regulations”) that were issued by the Minister on 6 February 2024.¹ The Corporation would welcome the opportunity to provide further feedback to the ACMA if the minimum prominence requirements set out in the final regulations materially differ from those in Draft Regulations.

In developing its response to the ACMA’s paper, the ABC has consulted with SBS and Free TV Australia. It is aware of the Free TV and SBS submissions and supports the broad thrust of the arguments they contain.

2. Framework implementation

Chapter 1 of the paper sets out the ACMA’s proposed approach to developing possible initial guidelines and/or instruments and designing a monitoring and enforcement framework to support the prominence framework.

¹ <https://www.infrastructure.gov.au/department/media/publications/broadcasting-services-minimum-prominence-requirements-regulations-2024-exposure-draft>

The ABC believes that the objectives and requirements of the prominence framework are clear and, as a result, there is minimal need for the ACMA to exercise its discretionary powers at this stage. Instead, the ACMA should prioritise completing stakeholder consultations quickly in order to allow manufacturers the greatest possible time to adapt their products to the requirements of the prominence framework.

In addition, the Corporation suggests that the design of a monitoring and enforcement framework, currently slated for Phase 4 of the ACMA's proposed process, could potentially be carried out earlier and in parallel with the development of any guidelines or instruments. The effectiveness of the ACMA's approach to monitoring and enforcement will be vital to the success of the prominence scheme. The ABC would welcome further information on how the ACMA proposes to monitor and enforce manufacturers' compliance with the prominence framework.

3. Defining regulated television devices

The ABC considers regulated television devices to be generally well-defined, particularly when s 130ZZI(1) of the BSA is read in conjunction with the Revised Explanatory Memorandum (REM) issued by the Minister.² There can be no question that smart televisions and smart media streaming devices are regulated television devices. (The Corporation assumes that the list of example smart media streaming devices on p 6 of the paper is intended to be non-exhaustive, as it does not include the Foxtel iQ or Google TV Streamer devices.)

The ABC has previously argued that the scope of the prominence framework should extend to devices such as tablets, game consoles and laptops, all of which used by Australians to watch VOD services. However, it acknowledges that the "primary use" requirement in s 130ZZI(1)(a)(ii) would ordinarily exclude such devices.

The power granted to the ACMA under ss 130ZZI(2) and 130ZZI(3) to determine that specific reception equipment is or is not a regulated television device for the purposes of the prominence framework is likely to be important in coming years as consumer technologies evolve. Initially, however, it should only be required in the context of a small number of identified "edge cases".

The paper sets out the ACMA's preliminary approach to assessing such edge cases, including the factors that it proposes to take into consideration. In relation to these factors, the ABC believes that it is important that the ACMA takes considerable care in its decisions not to establish precedents that might enable future avoidance behaviours by manufacturers. For example, devices marketed or seen as falling within a "prosumer" category that includes both professional users and higher-end consumer enthusiasts, should be presumed to be domestic consumer devices, rather than professional devices manufactured primarily for business or institutional use.

In a similar vein, the Corporation believes that the way in which devices are marketed should be accorded relatively less weight than other factors. Indeed, if appropriate data is available, the ACMA should instead consider how devices are perceived and used by purchasers. In addition, if information about the ways in which new products are used by consumers is not available, the ACMA should be open to reviewing guidance or determinations if such data becomes available and contradicts its initial findings.

² [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:"legislation/ems/r7132_ems_91a284af-591d-4063-95f5-e0ef6ed45e0e"](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:)

The paper sets out the ACMA’s preliminary reasoning in relation to two specific edge-case examples — smart projectors and smart monitors — on which guidance has apparently been sought by the Consumer Electronics Suppliers Association (CESA).

The ABC believes that projectors and smart monitors should be presumed to be regulated television devices unless it is clear that they lack key functionality or are not readily available to non-professional users. In particular, if such devices are provided to consumers with smart-TV operating systems or bundled with VOD apps — or if the manufacturer provides consumers with information on how to easily install such systems or apps — those factors should strongly militate in favour of considering them to be regulated television devices.

4. Defining a primary user interface

Section 130ZZL of the BSA defines the term “primary user interface”. This is a key concept for determining how the minimum prominence requirements set out in clause 6 of the Draft Regulations will operate, as the Draft Regulations require that broadcasters’ apps must be visible on the primary user interface of a device.

As s 130ZZL(1)(a) sets out, a “primary user interface” is the interface that is either or both of the following:

- (i) the home screen or main screen of the device; or
- (ii) the main interface most commonly used to provide access to applications that make audiovisual content available on demand using a listed carriage service.

The ABC notes that s 130ZZL(3) gives the ACMA the discretion to describe an interface and/or determine requirements relating to an interface. If the ACMA exercises this discretionary power, then an interface must also meet the description or requirements determined by the ACMA in order to qualify as a primary user interface.

However, it is clear that this power is discretionary and not mandatory, and that the prominence legislation is capable of operating without the ACMA exercising its discretionary power under s 130ZZL(3). In fact, the words “(if any)” in s 130ZZL(1)(b) indicate that the drafters contemplated that the ACMA might not exercise this discretionary power at all.

The ABC believes that the definition of “primary user interface” set out in s 130ZZL(1)(a) is sufficient for the minimum prominence requirements to operate as intended. While there may be a case for the ACMA to exercise its discretionary powers under s 130ZZL(3) in the future if the need arises, at present the ABC believes that there is no need for the ACMA to do so, as the wording in s 130ZZL(1)(a) is sufficient to ensure that BVOD apps, including the ABC iView app, will be displayed on the home screen or main screen of the device, as intended by the legislation.

It is clear from the paper, however, that the ACMA is not only considering exercising its power to describe the primary user interface, but to do so as a “virtual space” that extends beyond the bounds of the page on which VOD apps appear and allows scrolling (horizontal, vertical or “paged”). The Corporation believes this approach would significantly undermine the intent of the prominence legislation and the Draft Regulations, as it would allow device manufacturers to place some or all of the broadcasters’ BVOD apps off the screen — and thus not visible to users — while still complying with the prominence legislation.

Instead, the ABC believes that the correct interpretation of the requirement in clause 6(3)(c) of the Draft Regulation that BVOD services’ applications “must be visible on the primary user interface of the device” is that the icons for such services must be visible on the home screen when the user

first turns on the device. Indeed, the ABC’s strong preference would be for the icons for BVOD applications to be listed first wherever applications are displayed.

The paper (p 10) suggests that the ACMA’s consideration of the possibility of a primary user interface that includes off-screen elements flows from testimony from CESA that it might not be possible for some current user interfaces to display the icons for the five BVOD applications.

In this context, the ABC observes that the reason the minimum prominence requirements will only come into effect 18 months after the legislation enabling the prominence framework achieved royal assent was to give manufacturers sufficient time to make any necessary technical adaptations to accommodate the requirements of the prominence framework.

That timeframe contrasts with the findings of industry expert Stephen Cleary, who examined the changes required to implement Australian prominence requirements on regulated television devices. Mr Cleary’s report found that such changes could be achieved exclusively in software.³ Further, he concluded that most changes would be achievable within one month, while only more significant changes, such as adding additional “rails” to accommodate BVOD apps on the home screen, should be expected to take no more than six months.

With these timeframes, there is no reasonable basis to believe that manufacturers would not be able to adapt the primary user interfaces of their devices so that they are able to prominently display broadcasters’ BVOD apps in such a way that they are visible to the user on the home screen without scrolling.

In a similar vein, the ABC believes that the ACMA should not consider manufacturers’ current contractual arrangements as an impediment to realising the intent of the legislation. First, as a piece of legislation, the prominence regime must take precedence over manufacturers’ contractual commitments. Further, the extended delay between royal assent and the commencement of the prominence framework provides manufacturers not only with sufficient time to make technical adjustments, but to adjust their contractual arrangements to comply with the legislation.

The ACMA should include technical or contractual constraints in its consideration of uncertainties that give rise to the use of its discretionary powers. Indeed, indicating any willingness to do so effectively extends an invitation to manufacturers to explore technical or contractual bases for avoidance of their prominence obligations, rather than devoting time to making the changes necessary to comply with Australian law.

4.1. Content-aggregating interfaces

In its consideration of interfaces, the ACMA considers the possibility of content-centric user interfaces that either do not make use of apps or do not treat them as part of the primary user interface. With the exception of Fetch TV, such interfaces are currently speculative.

Such interfaces can be expected to employ algorithms that purport to offer personally relevant content to users and to be supported by search functionality. Given the Government’s decision to not include search and/or personalisation in Australia’s prominence regime, there appears to be no means for imposing content-based prominence requirements on such interfaces.

³ Stephen A Cleary (22 January 2024) “Prominence In Connected TVs in Australia”, Attachment to Free TV Australia Senate inquiry submission, <https://www.freetv.com.au/wp-content/uploads/2024/02/Free-TV-submission-PA-S-Submission-2024-Final.pdf>.

As a result, the need to secure prominent and visible display of broadcaster’s services is likely to be more acute in content-aggregating interfaces if the objectives that inform the legislation are to be achieved.

To this end, content-aggregating interfaces should be required to ensure that BVOD applications are loaded and prominently displayed on the home screen, regardless of whether other applications are likewise loaded and displayed. If some device manufacturers wish to prioritise discoverability of content and, as a result, have home-screen interfaces that primarily aggregate content rather than display apps, they should still be required to comply with the minimum prominence requirements in section 6 of the Draft Regulations. It should not be open to them to argue for an exemption from complying with such requirements on the basis that they are constrained in how they have to design their home screens.

5. Defining when a service is offered

The processes by which broadcasters submit apps for certification and inclusion in device manufacturers’ app environments and manufacturers communicate changes to their operating systems and other specifications are well established. Any legislative instrument that the ACMA might make in relation to when regulated television services are taken to be “offered” should reflect these current industry practices.

One area of possible concern for the ABC relates to timelines. To date, device manufacturers have tended to provide broadcasters with sufficient advance notice of changes to their platforms. This allows broadcasters to ensure that their applications will continue to function after the system update is deployed and to submit them with adequate time for certification to be completed.

However, the introduction of the prominence framework may create incentives for some manufacturers to introduce requirements or timeframes that make it unreasonably difficult for broadcasters to adapt their applications in a timely fashion. The ABC has no reason to believe that any particular manufacturer or manufacturers might choose to behave in this way. However, it may be advantageous for any legislative instrument in relation to the offering of applications to specify that the timeframes and requirements manufacturers impose on broadcasters for upgrading applications must be reasonable.

6. Calls for evidence

Call for evidence 1 (Images of home screens)

The ABC does not wish to provide example images of home screens.

It should be noted that some home screens now have or allow for personalisation and may appear differently for different users.

Call for evidence 2 (Platforms and operating systems)

A list of devices/operating systems on which ABC iView is available can be found at: <https://help.abc.net.au/hc/en-us/articles/8551325377423-Where-can-I-get-ABC-iView>.

Call for evidence 3 (Certification)

To provide assurance of compatibility with devices and operating systems, ABC apps go through both internal and external certification. They must go through initial certification for the platform

or store, after which the Corporation can typically manage testing and releases itself for updates to the ABC iView app.

The ABC follows updates and cycles for new operating systems as mandated by manufacturers.

The introduction of new requirements or operating system versions/models may require additional certification. The ABC development teams have access to developer portals and software development kits (SDKs) for all of the platforms on which ABC iView is available.

Call for evidence 4 (Lead times)

For smart TVs, the typical lead time for incorporation of an app into a device is 6 months in advance. Certification usually begins in Q3 of the calendar year, and new devices start to go out following Q2 of the next calendar year.

As soon as an operating system is signed off by the manufacturer, apps that have been submitted are certified.

The ABC would estimate that, for an app that is already offered or has been offered in the past, the deadline for pre-installation would be between 3 and 6 months. Onboarding apps is now highly standardised, and most service providers have in-house development teams dedicated to delivering digital products.

Call for evidence 5 (Compliance costs)

The ABC does not wish to provide estimated compliance costs.