



ABC Submission to Prominence Proposals Paper

February 2023



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1. Introduction

The ABC welcomes the opportunity to contribute to the development of a prominence framework by responding to the Proposals Paper ‘Prominence framework for connected TV devices’ issued by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts. The Corporation has previously made submissions in relation to the need for a prominence framework, including in its response to the 2019 Media Reform Green Paper. It has also contributed to discussions of a possible prominence framework through its participation in the Future of Broadcasting Working Group.

As a national broadcaster and a major part of Australia’s broadcasting system, the ABC contributes to a range of social and cultural outcomes, including supporting democracy, social cohesion and national identity, by providing Australians with trusted, independent public-interest journalism and telling Australian stories. The Corporation is a major investor in Australian audiovisual content, contributing to the health of the Australian media production industry. Its ability to play this role is directly related to the ease with which its content and services can be found and accessed by Australians.

The ABC believes that there is an urgent need for regulatory guarantees of prominence for broadcasters’ services on smart TVs and other connected-TV platforms, which are becoming a new type of gatekeeper for Australian media services and content.

As the Corporation has previously noted, both the presence and prominence of app icons on smart TVs and aggregated search facilities on connected-TV devices can shape viewers’ use of services. They represent a potential public policy risk, as they may make it more difficult to discover Australian content, including ABC programs for which audiences have already paid.

The ABC welcomes the Government’s continued commitment to implementing a meaningful prominence framework that would seek to ensure local TV services are easily found on TV devices (Proposals Paper, p 5). The ABC considers that a robust prominence framework will benefit the Australian broadcast industry and deliver public policy outcomes in a changing media landscape.

The ABC recognises that this work is but one part of a broader media reform program and looks forward to contributing to other aspects of reform in due course.

In preparing its response, the ABC has consulted with SBS and Free TV Australia. It supports in principle the approach proposed in the Free TV Australia submission. That submission represents an agreed industry view on the preferred approach to implementing a prominence framework and the broad principles that should underpin it.

This submission adopts the acronyms and glossary as outlined in the Proposals Paper.

2. Necessary elements of a prominence framework

The ABC believes that any future prominence framework must ensure that Australian audiences using connected-TV devices can easily access and find content and services provided by the national broadcasters and free-to-air television (FTA) broadcasters licensed under the *Broadcasting Services Act 1992* (BSA). In this, it should properly account for:

- the pre-loading and prominent on-screen display of icons or other interface elements representing broadcasters' streaming apps on connected devices
- appropriate prominence for broadcasters' services on remote controls and voice-based interfaces for controlling connected-TV devices
- ensuring the prominence and discoverability of broadcasters' content in results returned by search and recommendation algorithms
- adaptation to future technological developments in connected-TV devices and services.

The framework should ensure that broadcasters are not charged for implementing these prominence and discoverability requirements.

To enable this, the framework should impose mandatory obligations on manufacturers and be overseen by a regulator sufficiently empowered to enforce them.

The ABC's responses to the proposals set out in the Proposals Paper reflect this position.

In addition, the ABC would welcome future consideration of comparable regulatory mechanisms to ensure the prominence of radio broadcasters' audio-on-demand services. This need is particularly apparent in the context of internet-connected cars, which adopt similar icon-based interfaces for accessing audio applications. While radio does not form a part of the current consultation, the Corporation believes that the prominence principles and mechanism introduced for audiovisual services should be consistent with, or adaptable to also support, the prominence of audio services.

3. Framework proposals

3.1. Local TV services

With regard to the definition of a 'local TV service' (Chapter 5), the ABC supports a prominence framework in line with proposal 5.2, 'linear FTA broadcasts and BVOD applications'.

This definition would ensure that linear FTA broadcasts of national, commercial and community television broadcasters are included in the framework, as well as any associated BVOD applications. Importantly, proposal 5.2 includes and extends proposal 5.1, which would provide the benefit of ensuring that TV devices fitted with a radiofrequency tuner default to linear TV broadcasts when no other input is selected.

As the Proposals Paper notes, Australians are increasingly choosing to consume content and programming through VOD applications. This is a trend the ABC is also observing. The Corporation's internal research into VOD markets found that, in 2022, the proportion of Australians reporting use of VOD services in the previous week (78%) was greater than the weekly reach of broadcast television (70%). Moreover, between 2019 and 2022, use of smart TVs to access

VOD services rose from 48% to 59%, while the use of digital media devices, such as Apple TV, Google Chromecast and Amazon Fire Stick, rose from 19% to 31%.

Given this trend, local broadcasters will not only continue to offer BVOD applications, but will likely increasingly depend upon them as a means of providing their services to Australian audiences into the future. By addressing this, proposal 5.2 provides a sensible model for a prominence framework that can remain effective as the media environment continues to change. The model also appears to be most aligned to the underlying policy intent of implementing a prominence framework, particularly as Australian audiences change their viewing habits.

The ABC considers that proposal 5.1 does not extend far enough to meaningfully deliver the public-policy benefits of a prominence framework, as it would confine the definition of ‘local TV services’ to FTA broadcasts and would not encompass BVOD applications. The proposal would not represent a significant departure from the current situation, where many TVs default to local FTA services when no other input is selected. It would not address the need to ensure the prominence of BVOD services in a changing media environment.

In contrast, the Corporation considers that the other proposal, 5.3, would go too far. Proposal 5.3 would broaden the scope of those who would benefit under a prominence framework to include all service providers that are subject to content quotas, rather than just local FTA broadcasters.

When read in conjunction with other policy settings, Proposal 5.3 would make most, if not all, content services eligible for prominence. The recently released National Cultural Policy, *Revive: a place for every story, a story for every place*, reiterates the Government’s intention to legislate content quotas for SVOD services. If such content quotas are legislated, affected SVODs would automatically reach the threshold for being considered a ‘local TV service’ and accorded prominence under Proposal 5.3. Likewise, as pay-TV services are subject to an Australian content quota applying to drama channels under Part 7, Division 2A of the BSA, they would likewise appear to satisfy the requirements to be granted prominence under Proposal 5.3.

Logically, by deeming all services to be prominent, this proposal would mean that no service is actually prominent. Proposal 5.3 would effectively render meaningless any prominence regime that it was a part of.

Further, by setting a low threshold for services to qualify for inclusion within the prominence regime, Proposal 5.3 fails to acknowledge the breadth of the public-policy outcomes delivered by FTA broadcasters like the ABC. This includes Australian news services that help sustain democracy and provide emergency information, and high volumes of content by, for and about Australians. In contrast, Proposal 5.2, which prioritises Australian FTA broadcasters, implicitly recognises these public-policy contributions.

The ABC does not believe that including SVODs, or SVODs by means of a content requirement qualifier, in this prominence framework will have the intended policy outcome of ensuring that ‘local TV services are easy for Australian audiences to find on connected TV devices’ (Proposals Paper, p 5).

The ABC notes that the Proposals Paper (p 29) refers to Australia’s obligations under ‘relevant free trade agreements’ and the need to consider hardware requirements in light of these obligations. It is unclear whether the development of a prominence framework would be impacted by any obligations. If hardware requirements did impact any relevant Australian free-trade agreement, this would significantly hamper the ability for a useful prominence framework to be delivered. The

ABC notes this concern at this point of its submission, as it may adversely affect the ability of a regulator to enforce any prominence framework, or to even establish one, and may limit the other options as offered in the Proposals Paper. The Corporation would welcome further information from the Department on this question.

3.2. Regulated TV devices

Chapter 6 offers two proposals for defining the range of devices to which the prominence framework would apply. Neither is ideal.

Proposal 6.1 would apply to ‘all TV devices’, which would maximise the scope of the framework, but potentially extend to some devices which would not be reasonably or usefully regulated under a prominence framework. The ABC notes that exempting devices for which broadcasters are unwilling to adapt their BVOD applications would likely eliminate many of those problems, as FTA broadcasters are unlikely to develop versions of BVOD applications for some internet-enabled devices, particularly those that are unable to display media content.

Proposal 6.2, the ‘primary use’ approach, would explicitly limit the scope of the framework to devices that are understood to be primarily used for consumption of TV content. This would be expected to include smart TVs, set-top boxes and various dongles, pucks and other peripherals used to make, or assist in making, local TV services available to Australian audiences. The ABC would expect it to include, among other things, Apple TV, Google Chromecast and Amazon Fire TV Stick devices. However, as described in the Proposals Paper (p 32), a primary-use model would be inherently subjective, particularly in relation to “edge case” devices, such as games consoles, that are frequently, but not necessarily primarily, used to access TV content.

The ABC proposes that the prominence framework instead include a set of objective criteria for identifying the devices that it covers. Doing so would provide certainty and remove the need for intervention by the regulator to adjudicate on edge cases. The definition of a ‘Regulated Device’ proposed in Free TV Australia’s submission would serve this function. It would make clear that the framework applies to all connected TVs and any device used to make local TV services available for viewing on a television, as well as setting out some specific criteria under which the framework would extend to additional devices consistent with the underlying policy rationale of the regime.

The Corporation notes that, in a practical sense, the primary difference between the two proposals in the Paper relates to their treatment of devices such as laptops, tablets and phones, which would be included in the all-TV-devices approach but excluded under a primary-use model. The ABC does not believe it would be reasonable to impose TV-specific prominence requirements on all such general-purpose devices. However, many tablets, laptops and phones are used for media consumption and it is clear that they represent a significant portion of audiences for local TV services, including the ABC’s. An internal ABC VOD survey found that, in 2022, 37% of audiences watched ABC content on laptops, 24% on tablets and 43% on phones. Similarly, the Proposals Paper notes that 19% of audiences used a BVOD application through a device other than a TV, such as a smartphone or laptop (p 32).

Such computing platforms often provide device-wide search and recommendation functions at the operating-system or application level. This is, for example, the case with Apple’s iOS and Google’s Android OS operating systems, which usually ship with aggregated search applications that allow the user to search for content available through any of the video apps that are currently present on the device. The ABC provides data about the programs on ABC iview to these platforms

to aid discovery. However, it has no way of ensuring that its free versions of programs will be most prominently displayed in search results or that its programs will be given any particular prominence in more generalised searches, such as by genre.

Where such platforms are deployed on connected-TV devices, such as Apple TV hardware or TV sets using the Android operating system, the framework should ensure that they are required to promote local TV services in search results and recommendations (see 3.4, below). The ABC would welcome future consideration of alternative mechanisms to support the discoverability of local TV content at the software level. This might be a topic for consideration in a review of the prominence framework after its first year of operation.

3.3. Responsible parties

The ABC considers that Proposal 7.1, obligations on device manufacturers, is the most suitable option for an effective prominence framework. Requirements under the framework should apply to devices that are imported to, manufactured, sold or supplied in Australia. This is the simplest approach and would ensure that ultimate responsibility lies with the party that has a significant degree of control over the device.

Depending on the proposal adopted regarding regulated devices, Proposal 7.1 would afford manufacturers an exemption from liability where a relevant local TV service has not provided a suitable BVOD application that meets the needs of the relevant device. As noted above, if the framework were to apply to all ‘TV devices’ (Proposal 6.1), it is unlikely that local TV services would develop and supply a BVOD application suitable for internet-enabled, HDMI-equipped washing machines (Proposals Paper, p 31), for example.

Comparatively, Proposal 7.2 is unlikely to be suitable, as it places an onus on too many parties to comply with the framework, increasing complexity and creating opportunities for parties to avoid responsibility by asserting that it resides elsewhere. Ensuring compliance for a large number of parties would be too arduous on the regulator to enforce, and could also lead to protracted implementation of a prominence framework.

3.4. Framework model

The ABC considers that the only proposal that would deliver the intended policy outcome of a prominence framework would be Proposal 8.4, a ‘must-promote’ framework. This proposal most accurately reflects the policy intent of a prominence framework: to ensure that ‘local TV services are easy for Australian audiences to find on connected TV devices’ (p 5).

Assuming that Proposal 5.2 is adopted, 8.4 would ensure that local TV services and associated BVOD applications are prominently positioned on the interface of TV devices, and receive positive discrimination in recommendation and search functions of regulated TV devices.

As the ABC has noted in previous representations on prominence, there is no way for it to ensure that free versions of its programs will be most prominently displayed in search results or that its programs will be given any prominence at all. The ABC considers that ensuring the discoverability of local TV services’ content through searches and algorithmic recommendations is vital to a successful prominence framework.

An important feature of this model compared to the others proposed is that prominence and discoverability would be at no cost to local TV services. As the use of smart TVs or internet-

connected devices have increasingly become the dominant vehicle for accessing streaming services, a number have begun to demand fees for inclusion and/or placement on their devices' home screens. The ABC strongly believes that the framework should explicitly prohibit manufacturers from seeking access fees, in-kind or contra payments, data-sharing or other forms of commercial or other arrangements in relation to the prominence and/or discoverability of broadcasters' content and services. This is of particular importance to the ABC, as Australians have already paid for much of the content available through its linear FTA broadcast and ABC iview. The ABC cannot justify paying for what are essentially new, additional costs to perform its public broadcasting role, as doing so would require it to redirect funds away from content activities. Additionally, as the ABC operates within a fixed funding envelope, a fee requirement for prominence would limit the ABC's capacity to compete with other local TV services.

A necessary feature of this model is that local TV services must not be altered. This feature should expressly prohibit any altering of the content of local TV services which appears on regulated devices, including inserting advertisements before, after or within programs. This is particularly important for the ABC, as it has legislative restrictions around broadcasting advertisements.¹ Any framework that would allow regulated devices or manufacturers more broadly to embed advertisements, or to otherwise change any ABC content, could facilitate a breach of the ABC Act.

The other models proposed would not provide the same benefits or protections under a prominence framework as 8.4 would.

Proposal 8.1 would merely require regulated parties to report on any prominence systems and processes in place. There is no reason to believe that this will address the issues that a prominence framework should seek to resolve.

The ABC doesn't believe that Proposal 8.2, a 'fair bargaining framework', represents a basis for an effective prominence framework. This model would enshrine the proposition that broadcasters must pay for loading, prominence and discoverability on regulated devices. The ABC has previously, and in this submission above, advocated against payment from local TV services. Any positive outcome under a prominence framework with this model would be wholly reliant on the amount of funding a local TV service can offer for prominence and discoverability. This proposed model could also result in protracted implementation of any prominence framework.

Proposal 8.3, 'a must-carry framework' would be useful, insofar as it prevented manufacturers from seeking compensation for promoting an application or content over others. However, in contrast to Proposal 8.4, it would only require regulated devices to ensure local TV services and their applications are installed or otherwise available, rather than actively ensuring that they are immediately visible and easily discoverable by users of the devices.

3.5. Framework implementation

The increasing dominance of connected-TV devices as a means of accessing streaming video content gives the manufacturers of major connected-TV devices and platforms considerable power. The ABC notes that currently, and as outlined in this submission and through previous representations, manufacturers are using this power to demand that broadcasters pay a fee to access their platforms. This effectively imposes a cost on the ABC and other FTA broadcasters to meet established public-policy outcomes. Alternatively, where media organisations cannot meet those costs, their presence is removed from these platforms. If, as widely expected, the proportion

¹ *Australian Broadcasting Corporation Act 1983* (Cth) ('ABC Act'), s31.

of Australians using VOD services and aggregated platforms to access video content continues to grow, there is a distinct risk of FTA broadcasters' services becoming 'crowded out' and audiences being presented less often with the option of viewing quality Australian content.

This market imbalance is a major reason for the need for a prominence framework at all. The ABC considers that this power imbalance is a genuine indication that the Australian Competition and Consumer Commission (ACCC) has a role to play in a successful prominence framework.

Further, the ABC believes that it is vital that the framework be implemented as quickly and efficiently as possible.

For these reasons, the ABC believes that Proposal 9.3, an industry code coupled with supporting legislation, would be the most appropriate.

The approach set out in the submission of Free TV Australia provides a model for how this outcome might be achieved. Under that approach, the framework would be implemented as a mandatory code enforced by the ACCC under Part IVB of the *Competition and Consumer Act 2010* (CCA). The code would be drafted by the Department acting under the direction of the Minister for Communications.

A mandatory code of this kind could be introduced rapidly and would employ an established enforcement regime.

As proposed, the code would then be followed by changes to the BSA in the form of a requirement that the ACMA create and enforce technical standards relating to devices. This would make appropriate use of the ACMA's technical expertise.

In addition, the ABC would support the introduction of Prominence Principles along the lines of those set out in the Free TV Australia submission. Such Prominence Principles should be included in the BSA and any mandatory code that is introduced.

In contrast, Proposal 9.2, which would institute the prominence framework solely through amendment to the BSA, would significantly delay the commencement of the framework and require the creation of an entirely new enforcement regime administered by the ACMA. The ABC believes that such a delay is strongly undesirable. Further, there is no benefit in developing a new enforcement and oversight process when the CCA already provides one and the ACCC has considerable experience in applying it.

Proposal 9.1, which calls for the prominence framework to be implemented entirely through an industry code under the CCA, captures all of the advantages of such a mandatory code, but does not make use of the expertise of the ACMA in setting relevant technical standards for devices.

4. Conclusion

The rise of on-demand media services has significantly changed the ways in which Australians choose to consume television and radio content, particularly over the last five years. It is no surprise that connected-TV manufacturers and platform providers have sought to capitalise on audiences' increasing use of VOD experiences.

Both the presence and prominence of app icons on smart TVs and aggregated search facilities on connected-TV devices can shape viewers' use of services. Manufacturers have used this to turn themselves into gatekeepers and used the power it provides to demand fees from FTA broadcasters seeking to continue to reach their traditional audiences.

The ABC cannot justify paying for what are essentially new, additional costs to perform its public broadcasting role, as doing so would require it to redirect funds away from content activities. As a result, the availability and visibility of its BVOD service, ABC iview, is diminished on connected-TV platforms. Other FTA broadcasters face similar challenges. The overall result is that a wide range of Australian content, including ABC programs for which Australians have already paid, is made more difficult for them to discover.

Accordingly, the need for a prominence framework for broadcasters' services on smart TVs and other connected-TV platforms is urgent. Without a framework, the ability of Australian audiences to easily access independent public interest journalism and local Australian content will be compromised.

The new prominence framework should ensure that broadcasters' BVOD applications are pre-loaded and prominent on connected-TV devices and broadcasters' content should be appropriately prominent in results returned by search and recommendation algorithms. The framework should be future-proof and administered by a sufficiently empowered regulator. Broadcasters should not bear the costs of implementing such prominence and discoverability requirements.