

SBS RESPONSE TO PROMINENCE PROPOSALS PAPER

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Key Points

- The Special Broadcasting Service (**SBS**) welcomes the opportunity to comment on the *Prominence framework for connected TV devices Proposals Paper* (**the Paper**) and is pleased that this issue is being prioritised.
- SBS also strongly welcomes the confirmation in the Paper that the Australian Government is committed to legislating a prominence framework to ensure local TV services are easy for Australian audiences to find on connected TV devices.
- This commitment appropriately recognises the importance of ensuring local free-to-air television services are present and easy to find into the future given their essential role—including providing trusted news and information (including in times of emergency, as seen during the COVID-19 pandemic) and reflecting Australian stories that underpin Australian public and cultural life. It is a matter of equity that these free services be universally available.
- The imperative is especially true for public broadcasters. Australians must be able to readily access the services of the public broadcasters which they have funded, and which are delivering valued services to the community in line with their respective Charters.
- It is critical that well-designed and effective regulation is introduced in a timely fashion to ensure that Australian audiences can continue to easily find and access public interest television content across connected devices – noting also that content on these devices is delivered to households via taxpayer funded NBN infrastructure.
- In designing a regulatory framework for presence and prominence, SBS supports the proposal detailed in the submission from Free TV Australia (**Free TV**).
- The proposal is for the Minister for Communications to require the development of a mandatory Code of Practice, applicable to device manufacturers and setting out a range of requirements for devices which will comprehensively ensure the presence and prominent availability of free-to-air (**FTA**) broadcasters' content and services.
- The proposed Code would address the availability of live terrestrial services as well as broadcasters' free streaming apps, in terms of access to these services on a device's primary access point and on remote controls. There would also be protections to ensure free-to-air broadcasters' content and services are equitably included in search and discoverability features, and on remote controls.
- The proposal provides a strong foundation on which to ensure free of charge priority placement for live terrestrial TV function and BVOD apps, and importantly, offers a pathway towards timely and efficient implementation of a new regulatory framework.



- SBS supports the implementation of this proposal as a matter of urgency.
- SBS does not support proposals in the Paper which would implement alternative models, in particular, those involving a reporting-only framework, or a fair bargaining framework.
- Certain of the proposals relating to the scope of the framework (which services are included, which devices are included, where obligations lie) are also problematic.
- If implemented, these proposals would lead to a regulatory framework which falls short of ensuring continued audience access to free-to-air television services.
- Only a framework which compels both the availability and prominence of free-to-air television services on connected devices will adequately meet policy objectives for presence and prominence.



About SBS

SBS's role and function is unique in the broader Australian market for entertainment, news and information services.

SBS's principal function is to provide multilingual and multicultural radio, television and digital media services that inform, educate and entertain all Australians, and in doing so, reflect Australia's multicultural society. SBS has been proudly serving Australia and our multicultural communities for more than 45 years. Along with our principal function, our purpose is to inspire all Australians to explore, respect and celebrate our diverse world, and in doing so, contribute to a cohesive society. SBS's distinctive services deliver great value to the Australian community; from our commissioned documentaries and dramas that tell stories of Australia that no other media is telling, to the provision of news and information in more than 60 languages.

SBS's contribution to public interest journalism, and hence Australian democracy, is unique in the Australian media landscape. SBS is one of Australia's most trusted broadcasters, evidenced by our commitment to independent, impartial and balanced news and current affairs. SBS has rigorous editorial standards and a Code of Practice in place which underpin the delivery of all of its independent and balanced news, information and current affairs services.

SBS's deep connections and experience with multicultural, multilingual and Aboriginal and Torres Strait Islander communities enable SBS to cover news and tell the stories of those communities through the perspectives and voices of these communities. In particular, the news, current affairs and information services provided by SBS inform and promote understanding among all Australians of different cultures, and maximise opportunities for people from diverse backgrounds to engage in social, political and cultural discourse. For example, SBS recently launched its own Arabic and Mandarin TV news services – made by SBS by bilingual journalists, providing those language speakers with trusted, accurate news, covering stories of interest in Australia, together with news from around the world. These services are available on linear free-to-air television, and on SBS On Demand.

Providing Australians with accurate and impartial information contributes to a successful functioning of democracy. A 2021 Reuters Institute study found SBS is the most trusted network when compared to Australia's commercial broadcasters.¹ An SBS-conducted survey in 2021 also indicated that SBS is the most trusted media organisation amongst Australia's multicultural audiences.²

As noted in the Paper, 90% of the SBS audience believes the organisation helps Australian to be a more successful multicultural nation.³ The Paper also notes that the national broadcasters play a particularly important role in audiences' access to news content⁴, and in the provision of regional and remote programming.⁵

Regulatory intervention to ensure SBS services are available and prominent

Given the Government's very welcome and clear commitment to regulate to ensure presence and prominence of FTA television services on connected devices, this submission does not recount in detail the market conditions and policy rationales which justify regulatory

¹ Reuters Institute Digital News Report 2021 available here:

https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf

² SBS information, online survey, 2021, n = 5405, all participants

³ Page 14.

⁴ Page 15

⁵ Page 19



intervention. However, it is notable that by taking action on this issue the Australian Government would be keeping pace with key overseas jurisdictions who are taking regulatory action, as outlined in the Paper.

In summary, SBS, together with other FTA broadcasters has expressed the need for availability, presence and prominence requirements for connected televisions consistently and for some time.

Formally, SBS has addressed the need for availability and prominence regulation on connected televisions in its submission to the Australian Competition and Consumer Commission's Digital Platform Services Inquiry's March 2021 Report on App Marketplaces⁶, and in its submission to the Media Reform Green Paper in May 2021.⁷

Those submissions argued that Australian taxpayers should have unimpeded access to public broadcasting content and services which they have funded, including access without limitation to SBS content (including essential public interest journalism and distinctive television and radio content that reflects Australia's diverse multicultural, multilingual and First Nations communities). This includes both services carried terrestrially, and over the publicly funded National Broadband Network.

The Australian taxpayer has invested significantly in the National Broadband Network (**NBN**) (over \$50 billion), without which device manufacturers would not be able to promote or deploy the majority of the features and services on their devices. In this way the taxpayer has subsidised global organisations who are now blocking access points between the Australian public and providers of free and local content services.

This is particularly concerning regarding the barriers being imposed between audiences and the trusted, impartial and accurate public interest journalism provided by SBS, which is increasingly important in sustaining robust democracy in an era of misinformation and disinformation.

The earlier SBS submissions also outlined various developments and practices which are present or emerging in market which are restricting equitable access to apps, including those apps provided by SBS.

Key among them has been unacceptable proposals by multinational device manufacturers that SBS should be required to pay, or share Australian-earned advertising revenue, in order to compete for prominence on connected devices with multinational entertainment companies whose budgets would be orders of magnitude greater than that of SBS. In some cases, SBS has even been told that the SBS On Demand app would not be available for download at all on a Smart TV, unless SBS entered in a revenue share arrangement with the device manufacturer.

SBS therefore strongly welcomes the Minister's commitment to regulatory intervention, and supports implementation of this framework as soon as possible.

A regulatory model to ensure free-to-air television services remain prominent and readily available

SBS supports the submission of Free TV, which sets out a regulatory model based on underlying prominence principles, a mandatory Code and supporting legislation. This

⁶ <https://www.sbs.com.au/aboutus/app-marketplaces-issues-paper>

⁷ https://www.sbs.com.au/aboutus/sites/sbs.com.au/aboutus/files/sbs_submission_-_media_reform_green_paper_-_28052021.pdf



proposed model is a robust, comprehensive and effective means of ensuring availability and prominence of free-to-air television services in a timely fashion.

Proposed key principles

The proposed key principles to underpin the regulatory framework (**Prominence Principles**) provide a sound foundation on which to base regulatory design, and address the underlying policy concerns shared by broadcasters in serving Australian audiences. SBS supports the three key principles which will ensure free of charge priority placement for the live terrestrial TV function and broadcast video-on-demand (**BVOD**) apps:

1. Free and local terrestrial television and BVOD services provided by FTA broadcasters must be prominent and universally available for all Australians across their devices.
2. Australians must be informed of the services provided by FTA broadcasters (both terrestrial and BVOD) that are available to them on devices when making a purchase decision.
3. As new technologies and search and discovery tools emerge on devices, Australians should maintain free, prominent and universal access to the content and services provided by licenced commercial and national broadcasters.

Mandatory Code of Practice

In terms of regulatory design, the Free TV proposal is for a mandatory Code, initiated through Ministerial direction, which would contain the primary provisions of the prominence regulatory framework. SBS supports this approach, which will streamline implementation and provide for prompt commencement of the new regulatory framework.

SBS understands the process for developing a mandatory Code would involve the following steps:

1. The Minister for Communications issues a direction to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to prepare a mandatory code under Part IVB of the *Competition and Consumer Act 2010* (**CCA**).
2. The Department and the Office of Parliamentary Counsel prepare an exposure draft of the mandatory Code.
3. The Department drafts a decision Regulation Impact Statement (**RIS**).
4. The Department conducts public consultation on the decision RIS and the exposure draft of the mandatory Code, and incorporates any changes.
5. The Governor-General makes regulation prescribing the mandatory Code.
6. The Code is registered and tabled in each chamber of Parliament.
7. Once the disallowance period ends, the ACCC monitors and enforces the Code.
8. Code review conducted as per the provisions in the Code.

Supporting legislation

It is proposed that, whilst the mandatory Code can be created without legislative amendment, the Prominence Principles should be enacted into the *Broadcasting Services Act 1992* (**BSA**). This will ensure the Principles endure and provide certainty and clarity regarding the policy framework for prominence regulation.



There will also be a need to prohibit imports of devices that are not compliant with the requirements of the mandatory Code. This will require:

- Amendments to the BSA to enable the Australian Communications and Media Authority (**ACMA**) to make technical standards that require devices to comply with the requirements of the mandatory Code
- A prohibition on supplying or importing devices that do not comply with the technical standard
- Inclusion of banned devices in Schedule 1 of the *Customs (Prohibited Imports) Regulations 1956*

Matters to be addressed in the mandatory Code

SBS supports the Free TV submission's exploration of matters to be covered by the mandatory Code, including the draft instrument which could be used to direct the Department in drafting the Code.

In particular, we support the proposals regarding:

- Application of the Code to manufacturers of connected televisions, set top box or similar devices, dongles, pucks and any other devices, including using technology which may be developed in the future, that may be used to make, or assist in making, services from licenced or national broadcasters available to a member of the public
- The need to ensure terrestrial channels provided by FTA broadcasters are consistently available, presented, and easy to find on devices that include a tuner, including:
 - Access to live terrestrial TV being prominently displayed at the primary access point (including the proposed definition of 'prominent', which will require display in the first five tiles (or, where a Regulated Device has an RF tuner, the first six tiles) of the primary access point, with FTA tiles the same size as other applications)
 - Devices with tuners being required to default to terrestrial TV when no external source is selected
 - The terrestrial live TV function must default to the FTA channel offerings provided by commercial and national FTA broadcasters
- The need to ensure that FTA broadcaster apps are either installed automatically or pre-selected for installation, to ensure they are immediately available following the initial set-up process (ie without the need to be proactively searched for and downloaded)
- The need to ensure FTA broadcaster apps are directly accessible from the primary access point, unless the consumer has altered or removed them
- The inclusion of commercial and national FTA broadcasters in any electronic program guide functionality, presented in order of their logical channel number (being the channel numbering systems already used for terrestrial television and with which audiences are familiar)
- The need to ensure that devices with tuners feature a button on remote controls to activate terrestrial television



- The need to ensure that where remotes feature buttons for streaming services, there is also a button that directs to the availability of FTA broadcasters' apps
- The need to ensure that where voice commands are available, FTA broadcaster apps can also be launched by voice
- Inclusion of information on packaging and collateral regarding the availability of FTA broadcaster services
- Inclusion and prominent treatment of FTA broadcaster services and content in any search or discoverability tools
- Prohibitions on manufacturers inserting advertisements over broadcasters' content or altering broadcasters' content in other ways, and
- Transparency measures regarding content on the device interface which is positioned as a result of a commercial arrangement.

Given the pace of technological development and device innovation, it will be important that the prominence regulatory framework is able to adapt quickly to continue to achieve its policy objectives, despite any changes to the consumer offering by device manufacturers. The mandatory prominence Code should require manufacturers to include FTA services in search, discoverability or prominence features that are developed in the future for any other regulated device or streaming application developed by the manufacturer.

All obligations to provide availability and prominence of FTA services must be provided free of charge to broadcasters, and any form of payment (whether through revenue share or other means), must be explicitly prohibited.

Review of the Code

The Free TV proposal includes a provision for review of the mandatory Code every 2 years. SBS strongly supports this part of the proposal, given the rapid nature of developments in terms of technology, consumer offerings and market behaviour.

For example, SBS is aware of developments which may allow a terrestrial channel listing to also include IP-delivered versions of channels to be interspersed into an EPG or channel line-up. Developments such as these may require provisions regarding the availability of live terrestrial services to be reviewed in future.

It is also possible that device manufacturers will develop additional methods of seeking to monetise services offered by FTA broadcasters that are not currently envisaged. It will be important to ensure the mandatory Code continues to operate effectively to appropriately regulate these scenarios as they develop.

Comment on proposals under consultation

Scope – definition of services included in the regulatory framework

SBS supports proposal 5.2, in which the framework would apply prominence requirements in relation to the linear TV broadcasts of FTA broadcasters and the BVOD applications of FTA broadcasters.

Proposal 5.1, in which only the linear FTA services are in scope is not preferred, as it fails to recognise the importance of FTA broadcaster BVOD services to broadcasters and audiences. As demonstrated by evidence set out in the Paper, BVOD services now form a critical part of the overall FTA television ecosystem, and are an important means for audiences to access



public service content on a free-to-use basis. Indeed, BVOD apps are increasingly a means for viewers to access the linear services of FTA broadcasters and the public service content they provide, noting there are many households that no longer have aerials to support terrestrial receivers.

The public service content available on terrestrially delivered television SBS services is also available to livestream on SBS On Demand, and the public policy rationale for ensuring the prominence of linear services is replicated for SBS On Demand (and FTA broadcaster BVOD services more generally).

In addition, proposal 5.3, in which the threshold for inclusion in the scope of the framework would be whether the entity is subject to regulated requirements for Australian content, is not preferred. If the intent of regulatory intervention is to ensure the presence and prominence of socially and culturally important services on devices, proposing to measure that importance with reference to the existence of regulated Australian content obligations could have implications which undermine the intent of the prominence regulatory framework. SBS should be included because everything it does is in service of social and cultural policy objectives, as underpinned by its enabling legislation which includes its Charter.

We reference the release of the Government's National Cultural Policy, in which it committed to introducing legislated Australian content obligations for subscription video on demand (**SVOD**) services. Implementation of proposal 5.3 would presumably then open up the scope of the prominence framework to SVOD services, once the promised regulations are in place. This would appear inconsistent with the intent of the prominence regulatory framework to ensure that Australians can find and easily access local FTA television services, especially given it is FTA services which provide news and information which underpin civic participation, emergency services and information. It also would dilute the intended beneficial effects of prominence for FTA broadcasters if the scope of included services is broadened in this way.

Whilst the Paper notes that national broadcasters would be 'deemed' to be within the scope of this approach, it should instead be explicit in the framework that national broadcasters are included.

Scope – definition of devices included in the regulatory framework

SBS supports the proposal contained in the Free TV submission that the scope of the framework apply to connected televisions, set top box or similar devices, dongles, pucks and any other devices, including using technology which may be developed in the future, that may be used to make, or assist in making, services from licenced or national broadcasters available to a member of the public (defined by Free TV as a 'BSA Service').

This is a comprehensive and objective approach, which will ensure the framework encapsulates the full range of devices on which Australians are accessing the content services delivered by licenced FTA and national broadcasters.

Proposal 6.2, which would apply the framework to devices with a 'primary use' of facilitating television viewing by Australian audiences, is not preferred. As noted in the Paper, such an approach would introduce an element of subjectivity in that it would require oversight and involvement by the regulator (which would also be required to issue guidance and make binding determinations).

There is also the potential for inadvertent exclusion of devices, such as gaming consoles, which may not satisfy the 'primary use' test, but which are nevertheless used by audiences as means of accessing television services and content.



If the Government retains a view that an additional test regarding the purpose of a device is required, it would be preferable for that additional test to be objective in nature, and be structured so as to ensure that secondary uses for a device are able to be factored in. Any additional test should involve mandatory criteria for the decision-maker to take into account (these should be developed in consultation with key stakeholders).

Scope – responsible parties

SBS supports a framework in which device manufacturers ensure compliance with any prominence obligations on regulated TV devices. As noted in the Paper, "[a]lthough a single TV device may feature different partnerships of hardware and software providers, device manufacturers typically have a degree of control over the way the device operates." As the Paper also notes, device manufacturers are the final entity in the supply chain, and the "party most often responsible to retailers and consumers for the operation of the device." It is reasonable that these manufacturers then be expected to contract their suppliers to enable fulfilment of regulatory obligations required by law.

An exception from liability in circumstances where a relevant local TV service has not provided a suitable application sounds reasonable in the first instance, however, this may be unnecessary. The proposed definition of 'BSA Device' under the Free TV proposal would require that for a device to be subject to the prominence framework, at least one FTA broadcaster would have to make available for use by members of the public an application which is compatible with the connected television or other device. Compatibility is an appropriate threshold test.

SBS does not support additional regulation which would compel broadcasters to develop and provide apps ('must offer') to all available devices and platforms, given the natural incentives in play to make BVOD apps available for as many devices as possible.

The complexity of administering a system whereby obligations are placed on multiple parties means that proposal 7.2 is not supported by SBS. Clarity and certainty in this regulatory environment should be pursued as a priority given the complexity and varying degrees of vertical integration in the supply chain. A system which requires a regulator to make judgments regarding the apportionment of responsibility would introduce an undesirable level of uncertainty.

Framework model

SBS does not support the proposals relating to a framework model based on reporting only, or a 'fair bargaining' model. These approaches would fail to address the market imbalances and behaviours which have given rise to the underlying policy problem the Government seeks to address. The only effective means of compelling a change in the behaviour of device manufacturers is a strong and comprehensive regulatory intervention of the kind put forward by broadcasters.

As noted in the Paper, a reporting only model would "do little to enhance the prominence of local TV services available to Australians" and would represent a significant lost opportunity to intervene decisively to implement the Government's stated aims, and would mean that Australia would fall behind internationally. This model would likely result in a status quo or deterioration of the prominence issue and is strongly opposed by SBS.

Similarly, a 'fair bargaining framework' is also unlikely to achieve the Government's stated policy objectives and would introduce a lengthy and cumbersome approach which may yet still fail to result in the presence and prominence of FTA services on connected devices.



As noted in the paper, a fair bargaining framework may still result in device manufacturers extracting payment, fees or other consideration for the prominence of FTA television services. This would represent an unfair outcome for Australian taxpayers who have paid for the National Broadband Network to which the device manufacturers' products connect; and, who, in the case of SBS, have significantly funded the Australian content in question.

SBS submits that the prominence regulatory framework must address the gatekeeping role device manufacturers currently hold and must ensure that the manufacturers cannot impose monetary or other imposts on broadcasters for making their services available and prominent. A bargaining framework would not address these key considerations. SBS strongly opposes this proposal for these reasons.

Implementation considerations

SBS reiterates the urgency associated with intervention to address prominence and presence, and is therefore strongly supportive of a regulatory model which can be implemented rapidly and efficiently. The proposal contained in the Free TV submission for a Code enacted through the CCA offers the benefits of utilising an existing enforcement framework, and would avoid the need to draft a new framework into the BSA.

We note the Paper states that a CCA Code is not typically used to achieve particular policy outcomes, such as promoting the availability of certain media services, and is more usually deployed to support the efficient and competitive operation of markets. Acknowledging this, we note that underlying the prominence policy problem is the use of market power by device manufacturers to establish a gatekeeping position and to extract payment for the availability of FTA television services. A regulatory response rooted in competition law is therefore entirely appropriate.

Whilst additional changes will require legislation (to enshrine prominence principles in the BSA, to amend the BSA to enable the ACMA to make technical standards and to implement changes to Customs Regulations), a Code under the CCA offers the best opportunity for timely implementation.

Conclusion

Regulating for prominence and presence of SBS services on connected televisions and other related devices remains a primary focus for SBS, crucial to our ability to continue to effectively and efficiently serve the Australian community by fulfilling our public service Charter and legislated purpose.

SBS is pleased that the underlying policy rationale for regulatory intervention has been recognised and accepted by Government, and that the Paper is inviting comment on the design of that regulatory intervention.

The Free TV proposal offers the benefits of comprehensively addressing the availability and prominence of terrestrial and streamed broadcaster services and content and does so in a timely way that would lead to a simplified implementation pathway.

We look forward to working closely with Government and industry stakeholders as we move quickly through the implementation process.

SBS is also interested to ensure related issues regarding prominence of radio services in car interfaces and smart speakers are considered expediently.