

**SBS RESPONSE TO THE SENATE ENVIRONMENT AND COMMUNICATIONS
LEGISLATION COMMITTEE
INQUIRY INTO THE COMMUNICATIONS LEGISLATION AMENDMENT (PROMINENCE
AND ANTI-SIPHONING) BILL 2023**

JANUARY 2024

I. KEY POINTS

- The Special Broadcasting Service (**SBS**) welcomes the opportunity to submit to the Senate Environment and Communications Legislation Committee's inquiry into the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023 ('**the Bill**').
- SBS, and the broader free-to-air (**FTA**) television sector, has expressed the urgent need for availability/presence and prominence requirements for connected televisions consistently and for some time. We welcome the introduction of the Bill as a progressive and crucial step towards addressing serious public policy harms.
- The public interest in regulating for presence and prominence is clear – regardless of distribution platform, Australian taxpayers should have unimpeded and easy access to public broadcasting content and services which they have funded, including access without limitation to SBS content.
- There are clearly defined developments and practices that are present or emerging in market which are restricting equitable access to apps, including those apps provided by SBS. These restrictions have a detrimental impact on audience access to public interest content, as well as SBS's capacity to earn or retain commercial revenue (which in turn funds more content and services for the Australian community).
- Regulatory intervention is therefore strongly welcomed and clearly justified.
- However, SBS is concerned that the regulatory framework put forward in the Bill will not adequately ensure the presence and prominence of FTA broadcaster apps, and is unduly cautious and restricted in design and impact.
- Of primary concern is the unjustifiable 18-month delay in commencement of the prominence provisions, which appears to be based on a misunderstanding of likely compliance lead-times. Adopting this unwarranted timeframe will significantly compromise the effectiveness of the Bill and unduly delay the benefits to Australian audiences that it seeks to deliver.



- The clause implementing this timeframe should be removed from the Bill and replaced with a power for the Minister to make regulations regarding the appropriate timeframe for each prominence requirement, which must be no longer than 6 months from assent. The obligations should also be able to be complied with in respect of sets already manufactured.
- SBS is also concerned that key details of the prominence framework are yet to be made publicly available, given they will be implemented via regulations. Further scrutiny and consultation on this framework are required.
- SBS also supports amendments to the Bill to ensure that search and discoverability are included in the prominence regime.
- These amendments are critical to ensuring the Bill effectively addresses the negative audience impacts arising from existing and emerging commercial practices and industry settings.
- Anti-siphoning: SBS also welcomes the Bill's expansion of the anti-siphoning scheme to paid online platforms.
- However, additional measures are required to ensure the anti-siphoning provisions more effectively meet public policy objectives, and to future-proof the scheme.
- Whilst SBS welcomes the extension of the acquisition restrictions to paid streaming platforms, this only ensures partial future-proofing of the scheme.
- Extension of the scheme to also protect free online rights is essential to ensuring the scheme appropriately reflects contemporary content consumption patterns, and will maximise audiences' access to reliable, free and ubiquitous coverage of listed events. It would best accommodate further audience shifts to online viewing, potentially avoiding the need for regulation to be revisited in the near future.
- The anti-siphoning list should also be expanded to include additional events of significance and importance to Australians – the Tour de France, the Tour de France Femmes, and full FIFA World Cup finals tournaments (men's and women's).
- The proposed extension of the automatic delisting period from 6 months to 12 months is unwarranted and unworkable and should be removed from the Bill.
- SBS supports passage of the Bill, subject to amendments to address these concerns.

II. RECOMMENDATIONS

1. Remove clause 24 of the Bill, which links the commencement of the provisions to a period 18 months after manufacture. The timeframe should be reduced to no longer than 6 months from assent, with shorter periods to be specified in the regulations for various requirements.
2. Ensure the inclusion of search results in the prominence framework – FTA broadcaster services and content must have prominent treatment in any search, recommendation or discoverability tools.



3. The Minister should release draft prominence regulations as a matter of priority and prior to further Parliamentary consideration of the Bill (without unduly delaying Parliamentary consideration of the Bill).
4. The anti-siphoning scheme to be extended to also protect priority FTA access to free online rights to listed events.
5. The proposed anti-siphoning list to be extended to include the Tour de France, the Tour de France Femmes, and full FIFA World Cup Finals tournaments (men's and women's).
6. Proposed new section 146V(2), extending the automatic delisting provisions from 6 months to 12 months, should be removed from the Bill.

III. 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 multicultural communities for nearly 50 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 trusted 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 Australia's most trusted broadcaster, 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 services, regardless of distribution channel.

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 FTA television, and on SBS On Demand.

Providing Australians with accurate and impartial information contributes to a successful functioning of democracy. A 2023 Reuters Institute study found SBS is the most trusted news brand.¹ An SBS-conducted survey in 2021 also indicated that SBS is the most trusted media organisation amongst Australia's multicultural audiences.²

¹ The 2023 Digital News Report: Australia by the Reuters Institute for the Study of Journalism and the University of Canberra News and Media Research Centre found SBS News is the most trusted (equal with ABC News) and least distrusted news brand.

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



As noted by the Government in its December 2022 *Prominence framework for connected TV devices Proposals 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

IV. PROMINENCE

Overview of policy problem and impact on audiences and SBS

The public policy problem that the Bill seeks to address, and its impact on Australian audiences, has been extensively articulated and demonstrated by FTA broadcasters in recent years. We welcome that the Government has clearly understood these concerns, and has responded with a proposed regulatory framework that seeks to address them.

In light of this, this submission does not seek to recount in detail the market conditions and policy rationales which justify regulatory intervention. However, we do emphasise that the conditions which justify the Bill are impacting audiences and broadcasters now, and that it is crucial that a well-designed regulatory response comes into effect as soon as possible.

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 Marketplaces*⁶, and in its submission to the *Media Reform Green Paper* in May 2021.⁷ SBS has also made submissions to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts in relation to the development of a regulatory response.⁸

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 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 in orders of magnitude greater than that of SBS. In some cases, SBS

³ Page 14

⁴ Page 15

⁵ Page 19

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

⁸ <https://www.sbs.com.au/aboutus/2023/03/01/prominence-proposals-paper/>



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.

With significant consumption of streamed content from Australian broadcasters, including SBS, occurring on connected TVs, it is now a matter of policy urgency to ensure that these large international technology firms play their part in ensuring Australian audiences have ready access to content and services funded by their taxes to reflect Australian culture.

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 already 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 effect of the above scenarios is to substantially subvert the effective achievement of the Government's public policy settings for public interest broadcasting and content services. Successive governments have invested substantial amounts of public money, and established carefully calibrated regulatory settings, with the intention of maximising the public's access to key cultural content, sporting content, news and information, and emergency information. It is unacceptable from a public policy standpoint that the effectiveness of these interventions is being diluted as a result of commercial arrangements which inhibit the public's access to public interest content (including the public broadcasting services which they have funded).

Key issues

The Bill is a welcome, progressive and crucial step in addressing serious public policy harms

SBS welcomes the introduction of the Bill and its inclusion of key provisions which will ensure the following:

- The SBS On Demand will be required to be pre-loaded onto regulated devices
- Manufacturers will be prevented from requiring payment or consideration in return
- Manufacturers will be prevented from altering or interfering with SBS content on regulated devices
- There are powers to regulate the placement and positioning of FTA apps
- National broadcaster services are explicitly included in the framework
- The regulatory obligations attach to manufacturers, which is in line with previous industry proposals
- The scheme includes flexibility to adapt to future technological, market and consumer conditions through the inclusion of determination and regulation-making powers.



These elements of the Bill will ensure key aspects of the public policy problem associated with prominence of FTA services are addressed. SBS supports the underlying mechanism/structure of the Bill.

However, there remain a number of material concerns with the Bill, including:

- The unjustifiably long lead-time for the commencement of requirements and the lack of application to sets already manufactured
- The exclusion of search and discoverability
- The lack of visibility of key aspects of the framework at this time.

The extent to which these are addressed will determine the overall effectiveness of the framework and the extent to which the public interest is appropriately protected.

The implementation timeframe is unjustifiably prolonged and will blunt the effectiveness of the Bill

Of primary concern to SBS is the proposed 18-month delay in the effective application of prominence provisions to connected televisions, and the lack of application to sets already manufactured. This delay is not justified, and we recommend the Committee closely consider and interrogate the Government's reasons for this approach.

The delay arises from clause 24 of the Bill, which provides that the prominence provisions will apply only to sets manufactured on or after the day which is 18 months after the commencement of the Bill. When combined with the time taken for the Bill to proceed through Parliament, it is therefore likely that the provisions will not apply to newly manufactured sets for approximately 2 years.⁹

The only apparent justification for such a lengthy delay would be if compliance with the prominence requirements necessitated hardware changes in manufactured sets. However, this is not the case, as is acknowledged by the Government in the Explanatory Memorandum to the Bill (emphasis added):

*under this option, there would be a compliance burden on device manufacturers who would need to make changes to the operation of their device interfaces to comply with the framework. However, it is expected that this **would not require hardware modifications** as changes to the user interface of regulated TV devices should be able to be implemented via software updates.¹⁰*

SBS refers to the submission made by Free TV Australia, which includes an expert opinion regarding the timeframes required by manufacturers to operationalise the minimum prominence requirements. SBS notes that for the majority of the minimum requirements (notably requirements that FTA BVOD apps are pre-loaded onto primary interfaces), implementation is possible by way of server configuration or software redesign. The expert opinion states that none of the minimum prominence requirements require hardware or physical changes.

Changes of this kind do not require a lengthy lead time for implementation. Indeed, set manufacturers are able to move rapidly and nimbly to update their platforms in order to ensure

⁹ This is despite the issue of prominence being a part of public policy discussions for at least 3 years

¹⁰ Explanatory Memorandum, p 60



timely introduction of new services, or for the priority placement of services, for which they have entered into commercial agreements.

The Free TV expert evidence suggests that compliance could be assured for all sets still receiving software updates (i.e., including those already manufactured and sold) within 6 months.

In addition, it should also be noted that providers of apps, such as SBS, are often called upon by set manufacturers to rapidly update the software supporting their apps in order to ensure their ongoing compatibility with updated operating systems on connected televisions. In these circumstances, app providers are not provided with an 18-month lead time in order to make such updates.

Indeed, given the fact that the prominence requirements will be able to be largely complied with via software updates, a retrospective application of the provisions is warranted where software updates are still being provided for the device.

This is an important consideration in ensuring the effective application of the prominence requirements – prominence requirements that only apply to newly manufactured sets will mean that a substantial proportion of Australians (those who are not due to update their equipment in the near future, and those who rely on older sets as a second set in the home) will miss out on the benefits of the prominence requirements.¹¹ This will substantially dilute the effectiveness of the prominence framework.

Accordingly, clause 24 of the Bill should be removed and compliance should be required within a period no longer than 6 months from assent, with shorter periods to be specified in the regulations for a number of requirements.

Key prominence requirements are yet to be released and will require further scrutiny

SBS notes that pursuant to proposed new section 130ZZO, key aspects of the prominence framework will be set down by regulations. At the time of writing, draft regulations had not been released, which impedes our assessment of the overall proposed regulatory framework.

SBS notes that its views on the adequacy of the Bill may evolve upon review of the draft regulations and reserves an ability to make further comment at a later time.

Search and discoverability requirements are crucial to protect access to public interest content

A key feature of contemporary user interfaces on connected TVs are content search and discoverability tools. Users are able to enter keywords or request content via spoken input, and the operating system installed on television will deliver curated results, which in effect, direct and drive a user's access to content. Search results often appear alongside algorithmically driven content recommendations, which provide further potential for manufacturers and platform providers to disintermediate the relationship between viewers and providers of content.

¹¹ For example, in a survey conducted by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, only 9% of respondents said they had bought a new TV in the past 6 months.
<https://www.infrastructure.gov.au/sites/default/files/documents/TV%20Consumer%20Survey%202022%20-%20Final%20Report.pdf>



It is increasingly common for these search results to be driven by commercial arrangements or imperatives, with the result that paid versions of content otherwise available for free (and, potentially, produced with public funding support), are promoted in search results. In some cases, this includes where a user may have already installed the app for the free service – for example, a search for streaming the Logie-winning SBS/NITV kids program *Little J and Big Cuz* will recommend audience members view the content via YouTube or Netflix, rather than the SBS On Demand app.

The same public policy imperatives that support regulatory intervention in relation to the availability of FTA BVOD apps, also support regulatory intervention to ensure that the content provided on those apps is prioritised, or at the least, not disadvantaged, in search and discoverability tools.

This could be effected by including search and discoverability in proposed new s 130ZZO(1) as one of the matters about which prominence requirements could be made.

V. ANTI-SIPHONING

Overall comments on the Bill

SBS welcomes those parts of the Bill which will expand the application of the rights acquisition to subscription streaming services. This is a progressive step which will help modernise the scheme so that it reflects the contemporary industry and consumer landscape. It will ensure the enduring policy objectives of the anti-siphoning scheme continue to be achieved and the public interest safeguarded.

SBS's position is informed by the strong alignment between SBS's public interest purpose in contributing to social cohesion, and the continuing potential for the scheme to maximise free coverage of sporting events which bring diverse Australian communities together to explore a shared sense of national identity.

The decision not to protect access to free online coverage is a missed opportunity

In consultation with Government in preparation for this legislation, SBS supported a model which would extend the scheme to prevent the acquisition of any type of right to provide coverage of an iconic sporting event by a content service provider until an FTA broadcaster has both a right to televise the event on a broadcasting service *and* a right to provide coverage of the event on an online content service.¹²

SBS supported this approach as the most effective means of amplifying the audience benefit of the anti-siphoning scheme and fulfilling the scheme's underlying policy objectives.

This approach would maintain the foundational architecture of the scheme, which has proven to be effective over time, but also extend it to reflect the modern realities of consumer behaviour and service provision.

SBS is therefore concerned that the Bill does not adopt this approach, and recommends the Bill be amended to more appropriately reflect the evolution of audience viewing habits and maximise the public policy benefits of the scheme.

¹² <https://www.sbs.com.au/aboutus/2023/09/15/anti-siphoning-review-proposals-paper/>



If the scheme intends to afford free coverage of listed events to viewers, then the scheme should rightly also reflect the changed ways in which Australian audiences consume free content.

Free content is no longer exclusively available on the broadcast platform, and audiences are increasingly expecting to be able to access FTA services on other platforms, with an increasing number of Australian households not installing an aerial and/or accessing services via broadband.¹³ There are also increasing numbers of new dwellings where an aerial is not included in construction. Australians living in these homes should have the same access to free, culturally significant sporting events as Australians who rely on a broadcast signal.

As an additional benefit, FTA broadcaster coverage of listed sporting events on their BVOD offerings can extend beyond that which is possible on the broadcast platform, offering additional choice, simultaneous coverage and extended hours of coverage.

SBS's recent experience with coverage of the 2022 FIFA Men's World Cup demonstrated a more rapid than expected audience migration to the free online SBS On Demand platform for coverage of games. On average there were 900k active watchers on SBS On Demand on most days, with over 1 million on days with Australian games.¹⁴

Importantly, FTA television services are unique in terms of their provision of free online content services, in an environment crowded with subscription-based services. These factors mean that the FTA platform remains the most appropriate and effective means of delivering on the policy objectives of maximising free audience access to priority sporting and cultural events.

The potential upside for consumers weighs heavily in favour of such an approach, which "would provide a high likelihood of live and free coverage [of] listed events on both broadcasting services and online" and "mitigat[es] the risk of audiences being subject to direct costs to access this content."¹⁵ Without this amendment, an audience member without an aerial would need to sign up to three or four subscription services to access all the listed sporting events that would otherwise be available for free on terrestrial services.

This proposed approach would not necessarily prevent other media providers from offering coverage of events, as long as the acquisition restriction has been complied with, or the event has been automatically or manually delisted. The current scheme has operated to enable subscription television to acquire extensive coverage rights to a wide range of listed events and this capability would remain unaffected.

Whilst there are some potential competitive impacts of this approach, these are outweighed by its effectiveness in ensuring continued access to free coverage of important events for all Australians.

The proposed extension of the automatic delisting period is unjustified and potentially harmful

The Explanatory Memorandum for the Bill states that the purpose of the proposed extension of the automatic delisting provisions is to "bring the delisting period more in line with the commercial reality of media rights acquisition, where media rights deals are typically settled more than a year in advance of the event taking place."¹⁶

¹³ 2022 Television Consumer Survey – Prepared by the Social Research Centre for the Department of Infrastructure, Transport, Regional Development, Communications and the Arts – February 2023

¹⁴ Source: SBS internal data.

¹⁵ DITRDCA Anti-Siphoning Proposals Paper, p 45

¹⁶ Explanatory Memorandum, p 46



However, the delisting period is more relevant to circumstances where the rights have not been acquired. This is because if the rights to a listed event have been acquired, the acquisition restrictions in the anti-siphoning scheme are automatically lifted (see proposed new s 146W(2)), negating the need for automatic or manual delisting of that event.

We therefore query the reference in the Explanatory Memorandum to the settlement of AFL media rights in 2022 for the period of 2025 to 2031, as justification for the proposed increase of the automatic delisting period.

Whilst large events, such as the AFL and NRL, may settle rights packages years in advance, this is not always the case. There are instances in which rights negotiations continue and are not concluded until very close to the event. Sports federations prefer to create a competitive market in which to sell rights, in order to attract the greatest rights fees. Sellers almost always go through a bidding/tender process where both FTA and subscription services are given the chance to make simultaneous bids – subject to local law – and usually allow for bids from all parties where sellers can obtain offers for either FTA exclusive, pay exclusive, or FTA/pay combined offers.

Sellers will usually test the market prior to any sale of rights by asking potential bidders to identify their preferred timing for the rights acquisition process / window. The seller may then specify a timeline for a sale process. Their decision as to when to conduct the sale process will include an analysis of the correct timing to maximise the sale price – this typically results in sellers timing the sale of rights to suit pay operators, given their greater capacity to pay.

Extending the delisting period in these circumstances will greatly favour pay operators in terms of influencing when sellers will conduct the sale process, likely resulting in a reduction of FTA operators' capacity to purchase.

It is likely that sellers could leverage the longer delisting period to their advantage by waiting until events are delisted to start the selling process – which would effectively mean that the rights sale process would create more competitive tension between potential FTA and pay buyers. This would enable sellers to extract more value from pay buyers or otherwise force FTA buyers to pay an inflated price to beat any pay offers.

The existing 6-month delisting period is adequate and should be retained.

Whilst the proposed additions to the anti-siphoning list are welcome (see below), the effect of the extension of the delisting period may be to give paid platforms a greater opportunity to acquire the newly added events to their catalogues on an exclusive basis. This is because the types of services that need a high volume of programming to support their 24/7 sport platforms will target the added sports to secure exclusive rights. Where some of the added sports have a lower commercial value, FTA platforms are less likely to strike deals for these events well in advance, generally opting to pick up some rights closer to the event taking place, where they may have gaps in their broadcast schedules, or room in their acquisition budgets after securing key programming for the financial year.

If the automatic delisting period is extended, it must be regularly reviewed (each 12 months) to assess the impact on the free availability of sport.

The proposed new anti-siphoning list omits key events of cultural significance

In conjunction with the introduction of the Bill, the Minister has released a draft proposal for a new anti-siphoning list.¹⁷ SBS welcomes the proposed addition of key paralympic and women's

¹⁷ <https://www.infrastructure.gov.au/departments/media/publications/broadcasting-services-anti-siphoning-list-instrument-year>



sporting events. As well as increasing audience access to these events, SBS welcomes the impact the expanded list would have in broadening the construction of nationally important and culturally significant events, through the more inclusive approach.

Inclusive treatment of events notwithstanding the gender or disability status of competitors, aligns strongly with social equity principles and is supported by SBS.

In its earlier submission, SBS also supported the inclusion of full Finals tournaments for the FIFA World Cup (men's and women's), and the Tour de France and Tour de France Femmes. The omission of these events from the proposed new list represents a missed opportunity to safeguard audience access to these significant events.

The unprecedented levels of audience interest in the recent 2023 FIFA Women's World Cup demonstrate a burgeoning mainstream interest in elite women's sport and should provide assurance that such events are of national significance and cultural importance to Australians.

The audience response to the 2022 FIFA Men's World Cup – or the “World Game” as it is colloquially known – provides strong evidence of the Australian public's affinity with this event, and reinforces its status as nationally important and culturally significant:

- Audiences tuned into 80 million Total Consumption Hours for Linear broadcast and BVOD combined, with Linear bringing in 52 million and BVOD totalling 28 million consumption hours (about 3 times the target).¹⁸
- Linear broadcast coverage achieved 9 million reach across the tournament. And BVOD reach was 4.5 million (demonstrating that audience behaviours have changed significantly).¹⁹
- On average there were 900k active watchers on SBS On Demand on most days, with over 1 million on days with Australian games.

The highest rating game was Australia v Tunisia, with a Total TV audience of 1.732m followed by Australia v Argentina with 1.713m. The Final between Argentina and France attracted a total TV audience of 1.012m.²⁰

SBS also supports the inclusion of the Tour de France and Tour de France Femmes, given the strong participation of Australian riders²¹ in these events and their popularity with, and importance to, Australian audiences. For the 2023 race, Tour de France live stages reached an average audience of 174,000 people (on linear),²² and 9.9 million chapter views (SBS On Demand + Tour Tracker App).²³

VI. CONCLUSION

SBS welcomes the Government's commitment to protecting the public interest in the two key areas of prominence and anti-siphoning, through the introduction of this Bill. The Bill includes

¹⁸ Linear Source: OzTAM, Regional TAM, 20/11/22 – 31/12/22, C28 includes all events with the word 'FIFA' for the period selected
BVOD Source: OzTAM VPM data, 20/11/22 – 31/12/22, Activity: Live +VOD, includes all events* (classic, Highlights, extended highlights, mini-matches, Full replay) with the word 'FIFA' for the period selected

¹⁹ Source: OzTAM (Metro, VPM), Regional TAM, Linear reach based on 1 min, BVOD reach based on 15 secs.

²⁰ Linear Source: OzTAM, Regional TAM, C28, TTL PPL | BVOD Source: OzTAM, TTL PPL, 20/11/2022 – 17/01/2023

²¹ 12 men and 12 women from Australia participated in the 2023 race editions.

²² Source - OzTAM (5 City Metro, BVOD - Kibana) & Regional TAM (Combined Agg Markets) | Tour De France (Live Stages 1-21) | 01/07/2023 – 31/07/2023 vs 01/07/2022 – 31/07/2022 | Avg Audience + BVOD Audience (Total Audience) | Consolidated 7 Data, Live BVOD, VOD to 7 Days

²³ Source - Adobe Analytics | 01/07/2023 – 31/07/2023 | Tour De France Content (Live & VOD) | Total Video Chapter Views | Consolidated 7 Data



crucial measures to address clear and pressing policy problems which are impacting on Australian audiences now, and increasingly in the future.

Nevertheless, there are some substantial shortcomings in the Bill which, if passed in its current form, will leave key policy issues unaddressed, and inhibit the overall effectiveness of the prominence framework and the anti-siphoning scheme.

It is vital that the prominence framework begin to apply to regulated television devices (including those already manufactured) as soon as possible.

It is also vital that the anti-siphoning scheme extend to protect access to free online rights, to more appropriately reflect contemporary consumption habits, and to adequately future-proof the scheme.

With the amendments outlined in this submission, SBS supports expedited passage of the Bill as a matter of priority.



APPENDIX

Further comments on the Bill

The duration of operation of prominence requirements

Proposed new section 130ZZN(2)(b) outlines that the requirement on manufacturers to take reasonable steps to ensure a device continues to comply with minimum prominence requirements ceases when “an action by a user of the device results in the device not complying with those requirements.”

This presents as a logical approach, however, SBS is concerned to ensure that what constitutes ‘reasonable steps’ is clearly defined and understood, so as to prevent deliberate or calculated avoidance of the prominence requirements.

In addition, care should be taken to ensure that s 130ZZN does not give rise to opportunities for manufacturers to override the prominence requirements. For example, SBS is anecdotally aware that some operating platforms will, after a routine update consented to by the user, automatically re-order apps on the user interface, notwithstanding any previous selections or ordering undertaken by the user. Circumstances such as these should not provide a backdoor path to overriding the prominence requirements. If a home screen is completely refreshed, without active and purposeful user input, the minimum prominence requirements should again apply.

The definition of ‘regulated television device’

SBS notes that the definition of ‘regulated television device’ makes reference to ‘domestic’ reception equipment. SBS queries whether this definition is broad enough to encompass reception equipment used in non-domestic settings, such as in hotels, hospitals, and venues.

Minister’s discretion

Section 130ZZJ(3) empowers the Minister to determine that a specified service is not a regulated television service. This power is very broadly framed and should be subject to parameters, or at least additional guidance in the Explanatory Memorandum (in addition to the brief commentary already included on this section).

As noted in the submission, Ministerial discretion should be expanded to incorporate the commencement date for various components of the framework.

Exemptions

Compliance with the requirements of the framework are civil penalty provisions, with an exemption where failure to comply is because of circumstances outside of the manufacturer’s control (s 130ZZN(5) and (6)). These provisions should be carefully ‘stress-tested’ to ensure they do not enable avoidance. For example, situations where a manufacturer powers its TV interfaces with software from a third-party, and the third-party makes changes which impact on compliance. The Bill should operate to ensure the manufacturer is under a reasonable obligation to ensure its service agreements are structured in a way that does not enable avoidance.

We note the Explanatory Memorandum includes the following, regarding ‘circumstances outside of the manufacturer’s control’:



These circumstances may include where there is a technical problem with the regulated television service that prevents its installation or operation on a regulated television device, or where there is network failure that prevents the installation of certain regulated television services

The Explanatory Memorandum could be further updated to note which circumstances would not activate the exemption, such as the software provider scenario outlined above.

Regulations

The list of matters to which regulations may relate to under s 130ZZO is currently an exhaustive list. It would provide additional flexibility (which may be required to respond to future developments), if the list was inclusive.

Information gathering powers

Section 130ZZQ provides the ACMA with a broad-ranging power to require information to be supplied by a range of relevant parties, which will include SBS, and which is subject to enforcement provisions.

This section should be amended to ensure the ACMA appropriately protects any commercially sensitive information it acquires as a result of these powers.

Definition of 'regulated television service'

Section 130ZZJ captures the linear broadcasting and BVOD services provided by Australian FTA TV broadcasters. It is important that this definition is not so limited as to preclude future innovations from FTA broadcasters.

For example, whilst FAST²⁴ channels are currently housed within the SBS BVOD app, a question arises if they were housed within their own app or platform, separate to SBS On Demand, whether they would be captured by this definition.

Timing of review

Section 130ZZV requires a review of the provisions 3 years after the commencement of the provisions (which is 18 months from the passage of the Bill). Given the pace of change in the consumer electronics sector, media sector and in audience behaviours, a review should be conducted no later than 2 years from the passage of the Bill.

²⁴ Free advertising-supported streaming television services.