



Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

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Online Submission

Dear Committee Members,

SUBMISSION IN RELATION TO THE COMMUNICATIONS LEGISLATION AMENDMENT (PROMINENCE AND ANTI-SIPHONING) BILL 2023 (the “BILL”)

The Consumer Electronics Suppliers Association (**CESA**) welcomes the opportunity to make a submission in relation to the Bill to amend the *Broadcasting Service Act 1992* (**BSA**), more specifically the provisions to establish a prominence framework for certain internet connected television devices (“**regulated television devices**”).

Introduction

CESA is the premier national, industry body representing major suppliers and retailers of consumer electronics in Australia. CESA members include all the major television brands in Australia.

This submission represents the position of those major television suppliers in Australia (**CESA TV Members**).

CESA has been involved in the Government’s prominence framework design, having participated in previous consultations conducted by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (**Department**) and provided a substantive response to its proposal paper in February last year.

As noted in previous submissions, regulatory design of a prominence framework is complex and successful implementation must take into account the:

- (i) technical capabilities of connected TV devices, their interfaces, operating systems as well as the device development process and timeframes;
- (ii) design constraints and compliance burden imposed on local suppliers who are not the ‘actual’ ‘manufacturers of the device or operating system and in relation to matters which are largely out of their control;
- (iii) adverse cost implications with and consumer impacts of developing ‘bespoke’ devices and user interfaces for the Australian market which accounts for only 1% of the global television market; and

- (iv) need for commensurate obligations on the regulated television service providers to provide, update and support the regulated television service apps at their cost and in accordance with manufacturers' device development specifications.

Overview of the Bill

It is intended that the Bill would insert a new Part 9E in the BSA to legislate a 'must carry' prominence framework for '**regulated television services**' comprising Australian free-to-air linear broadcast (**free-to-air television**) services, Australian free-to-air broadcasting video on demand (**BVOD**) services and the BVOD services of certain related bodies corporates of commercial free to air broadcasters (collectively "**broadcasters**"). The prominence framework requires manufacturers to ensure that regulated television devices meet a minimum set of prominence requirements to be set out in regulations yet to be released ("**proposed regulations**") which would apply to devices manufactured and supplied on or after the day that is 18 months from the date that the Act receives Royal Assent.

The Bill and proposed regulations will (based on the Explanatory Memorandum and December 2023 Ministerial/Department briefing) impose minimum prominence obligations including:

- (a) a single live tile or link to the free-to-air linear television services of all Australian public, commercial and community free-to-air broadcasters must be displayed on the primary user interface (**PUI**) of regulated television devices;
- (b) a separate app, tile, tab or link of each Australian public and commercial free-to-air BVOD service (or commercial related body corporate where a different group entity to the broadcasting licensee owns the app) must be pre-installed or auto-installed on the primary user interface of regulated television devices with no exact positioning requirement but specifications about the same tile size as non-regulated services;
- (c) Minimum compliance obligations endure until the earliest of any of the following occurs:
 - (i) user modifies the home screen configuration; or
 - (ii) software is no longer provided, updated or supported by the manufacturer; or
 - (iii) the regulated television service is no longer offered by the broadcaster.

Notably the prominence framework proposed in the Bill goes well beyond the approach in the recently introduced UK Bill which: covers public service broadcasters only; allows parties to enter arrangements not as prescriptive as auto/pre installation positioning on a primary user interface and includes requirements that such arrangements must not disproportionately restrict innovations in how users can select and access internet program services and content.

Summary

CESA TV Members support easy availability of Australian free-to-air television services and BVOD services on regulated television devices.

Our members in fact already provide this availability and accessibility to free-to-air television services via a range of access points including:

- Display of a "Live TV" tile on the home screen; and/or
- One click entry to the EPG menu that includes free-to-air programming; and/or
- Access to channels using the remote control number pad or shortcut buttons

CESA TV Members also currently provide availability and accessibility to BVOD services (where these are made available by the regulated television service provider). This is delivered in a variety of ways and includes via App Store and other homescreen search functions.

CESA TV members further support legislative minimum prominence requirements for availability of free-to-air TV services and BVOD apps of regulated television services via:

- a single easy to locate Live TV tile on the home screen containing free-to-air television services (as per the proposed regulations) although consideration should be given as to whether this is necessary as BVOD service apps incorporate both linear (Live) TV and BVOD services, and
- App Store search functions delivering availability and accessibility of BVOD services (subject to regulated television service providers' backend work to develop and ensure their BVOD app works at all times)

However, our members **do not support the proposed minimum prominence requirement for a separate pre or auto installed app, tile, tab or link** of each Australian public and commercial BVOD service on the primary user interface of regulated television devices (**Individual BVOD Homescreen Positioning**). This is because:

- There is no evidence that consumers find it difficult to navigate to BVOD apps or local content in the first place.
 - Evidence from the Department commissioned 2022 Television Consumer Survey in fact indicates to the contrary that “The main reasons that respondents gave for finding it difficult to navigate to free-to-air TV (either live or on-demand, across devices) were that they had problems with [the BVOD app’s own functionality in] signing in, passwords, or creating accounts”¹not because they could not locate the BVOD app on the TV’s App Search function
 - Deloitte’s, Consumer and Media Insights Report 2023 found that 79% of those surveyed feel they had sufficient access to Australian movies and TV shows².
 - The Department commissioned 2022 Survey also found that the net main and essential reason for watching free-to-air TV was that it is easy to access with televisions being ranked as the easiest device to navigate for both free-to-air TV and BVOD services³.
- More importantly **Individual BVOD Homescreen Positioning will radically impact Australian consumers access to latest models and innovations, interfering with their preferences and stifling innovation and user experience into the future** (see next heading for further detail on these impacts)
 - These consumer impacts in part stem from the cost of the major redesign, software update and testing of standard global user-interfaces (UIs) required (separately) for every single make and model and again for every single update of every single model to achieve the proposed BVOD service minimum requirements just for Australia. Depending on what is expected to meet the pre/auto installation requirements of BVOD service apps, there are also potential associated with changes of chipset (means new model development) and hardware modification costs for these Australia-only changes for some manufacturers, having the greatest impact on entry point

¹ Social Research Centre (2023), The 2022 Television Consumer Survey – Summary Report, reported to the Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts, p.49.

² Deloitte’s, Consumer & Media Insights Report, p. 24

³ Social Research Centre (2023), The 2022 Television Consumer Survey – Summary Report, reported to the Australian Government Department of Infrastructure, Transport, Regional Development, Communications and the Arts, p.46 and p. 47

models. That is, contrary to the (mis)understanding among some stakeholders, there is not necessarily just a simple one-off software or firmware change to satisfy the proposed minimum prominence obligations.

If BVOD service positioning requirements are maintained, they should be adapted to allow alternatives with far fewer consumer impacts than Individual BVOD Homescreen Positioning (as outlined in options below) and to allow manufacturers to select which option they will apply.

CESA maintains that a series of Further Amendments to the Bill and proposed regulations are also required, irrespective of the form of any positioning obligation, to clarify certain matters, address unintended consequences and better achieve the expressed policy objectives of this prominence regulation.

Amongst other things, these Further Amendments should introduce commensurate obligations on regulated television service providers to:

- remove the problematic login requirements of their BVOD apps (evidenced in the above Department commissioned 2022 survey)
- promote local and public interest content on the ‘front page’ of the content promotion rows of the areas that they control
- at their own cost and within manufacturer required timetables, do the technical backend work to ensure their apps remain functional across each make and model and each manufacturer update if they are to be considered as offering a BVOD service, and
- deal with any consumer complaints regarding the operation and functionality of their apps, and fix any operation and functionality issues, both within a reasonable specified timeframe.

In this context it is important for the Government and all stakeholders to understand that manufacturers have faced many issues and complaints from users due to the regulated television service providers not maintaining or quickly rectifying issues with their own BVOD apps and due to their problematic BVOD service login/password requirements and (non) functionality.

Consumer Impacts of Individual BVOD Homescreen Positioning

Individual BVOD Homescreen Positioning carries dire consequences for Australian consumers. These include the following:

- Australian consumers will pay more for TV’s and likely miss out on latest models and innovations. This is because globally designed TV user interfaces will need to be re-designed and reconfigured just for Australia and there is a separate process/cost to this for each model. Given we are only 1% of the global market it is unlikely this process will occur for every new model
- Australian consumers will likely miss out on latest homescreen, experiences (UX’s) and innovations that the rest of world gets e.g. UI’s/UX’s that build in AI to deliver content individualised to the consumer versus apps. This is because there may not be room or scope to include these innovations on a primary user interface on top of 5 or more compulsory app tiles
- As traditionally early technology adopters Australian consumers will resent not being able to access these latest models and UI/UX innovations
- Australian consumers will also no longer have easy access to their favourite apps. They will at scale have to move or delete auto- downloaded apps off their homescreen to make way for those they want most. This will result in a high level of consumer complaints given studies

overwhelmingly show consumers watch and configure their TV home screens with what they find most engaging (e.g. [Deloitte media consumer survey 2022](#))

- TV manufacturers may abandon current home screen UXs entirely if they become irrelevant and annoying to customers
- Australian consumers will bear the brunt of regulation that goes well beyond the rest of the world. For instance, the recently introduced UK Bill:
 - covers public service broadcasters (PSB's) only. Although this includes some UK commercial PSB's they are more akin to ABC and SBS in terms of public service requirements and delivery
 - provides a bargaining framework that allows manufacturers and broadcasters to enter arrangements together versus prescriptive positioning requirements such as those in the proposed regulations, and
 - specifies those arrangements must not “disproportionately restrict how [manufacturers] may make innovations in the ways that users may select and access internet program services or programmes [i.e BVOD apps and content]”⁴. The Australian Bill contains no similar provision and, as above, it is already known that by locking in 5 or more homescreen app spaces, Individual BVOD Homescreen Positioning will restrict innovation in UX for Australian consumers.

Key Comments and Recommendations

The following changes are needed to the Bill and proposed regulations to avoid the adverse consumer impacts noted above and to better deliver on the public policy intentions of the legislation:

1. Alternative Positioning options to Individual BVOD Homescreen Positioning with Manufacturer discretion to select:

If Individual BVOD Homescreen Positioning remains a requirement in the regulations, then the following alternative options must be included and in a way that enables manufacturers to choose the option that is feasible and sustainable for them and which least impacts consumers (the main concern).

That latter discretion of manufacturers to select permitted options is necessary to correct how the following current components of the Bill would otherwise interact to remove the ability of manufacturers to select the best option for their consumers' UX/sustainability and to give ACMA powers not just to select one positioning location/option but potentially several:

- The current definition of “primary user interface” includes several different potential locations which meet the definition but says that interface can be “one or more” of those locations), however
- ACMA can ultimately determine whether auto/pre-install should be on more than one of those potential locations for a particular make and model.

Option 1:

Individual BVOD App Store page Positioning requiring BVOD service tiles to appear first in the top row of the App Store page (which is the main place consumers go to access BVOD apps and is one click from the homescreen via an App or App Store tile). If one of these BVOD service tiles was

⁴ s362AM(1)(c) UK [Media Bill](#)

then clicked on by a user, it would open a page which would prompt the user to click to install the relevant BVOD service app.

This option avoids the consumer impacts above and is superior for regulated television service providers in delivering permanent priority positioning not subject to user re-ordering/deletion of their BVOD service apps off a homescreen. OR

Option 2:

One combined BVOD service tile for all BVOD service apps on the homescreen (instead of 5 or more separate tiles) – as per the option outlined in the Department’s initial Discussion Paper but with variations to conditions as per CESA’s submission on that Paper.

In the UK, Ofcom noted in its recommendations that *giving identical prominence to all public service broadcaster services may not be practical or possible in light of the limits to how many applications or tiles can fit within the same area of a home screen*⁵. To address this, *Ofcom suggested that all public service broadcaster applications be accessed from a single tile on the user interface. This single access point would similarly ensure prominent positioning, streamlined content access and easy navigation to all BVOD services in Australia. OR*

Option 3:

One combined tile on the homescreen for all regulated television services (free-to-air TV services and BVOD services).

This combined tile will serve as a ‘one stop’ access point; is highly streamlined and easy for users to navigate when compared to individual tiles. They also better align with Deloitte’s, Media and Consumer Insights report 2023 finding that consumers (73%) would like “one place to search and discover content”⁶.

2. Pre Installation not provided for any BVOD apps/should be removed and Auto Installation must be defined

- (a) Currently no manufacturer pre-installs any BVOD app (neither Australian free-to-air BVOD service apps or international BVOD apps) and pre-installation of BVOD service apps is technically problematic because BVOD service apps reside on the ‘app owners’ (regulated television service providers) or operating system provider servers and are updated from time to time, and
- (b) If BVOD service apps were pre-installed on regulated television devices; depending on when the device is supplied, the pre-installed app may not be the latest version and would require an update inconveniencing consumers.

For that reason, any reference to pre-installation should be removed from the Bill and proposed regulations.

⁵[recommendations-for-new-legislative-framework-for-psb-prominence.pdf \(ofcom.org.uk\)](#)

⁶ Deloitte’s, Consumer & Media Insights Report, p. 22

With respect to proposed automatic installation requirements, there needs to be a definition of “automatic install” and “apps”. While for some manufacturers any BVOD app positioned in the launcher menu will install without anything required from the user the first time the TV is connected to the internet, for other manufacturers auto install encompasses the user clicking on a BVOD app tile with metadata which when clicked on takes the user to a page to install the relevant BVOD app skin – this is only required on initial set up.

For this reason, the definition of “automatic install” must:

- (1) allow for these different standard ways for BVOD service apps to be installed and
- (2) make clear the **minimum** requirement does not include installation of the app itself, but instead requires a tile for the relevant BVOD service app which when clicked on takes the user to a page to install the relevant BVOD service app.

3. Further Amendments:

Irrespective of whether the regulations ultimately require/allow Individual BVOD Homescreen Positioning or the Options above, the Bill should clarify and require the following elements:

a. Positioning for public broadcasters only

Positioning obligations for BVOD services should be **limited to public broadcasters** (ABC and SBS) only. They carry and promote local and public interest content far more than commercial free-to-air broadcasters and are more akin to “public service broadcasters” (PSB’s) in the UK Media Bill. Even if those UK PSB’s include commercial entities they are still subject to public service/public interest requirements beyond those of Australian commercial free-to-air broadcasters.

b. No obligation for auto/pre install where this is not provided for any BVOD app outside a manufacturer’s own

Where the “primary user interface” of a regulated television device removes BVOD apps altogether (or does not include them), then no minimum homescreen app positioning should be required. That is where there is no “automatic installation” (as defined) of any BVOD apps or BVOD app tiles – whether global/non-regulated or otherwise, then neither Individual BVOD Homescreen Positioning nor the Options should apply in those circumstances.

Otherwise, the ability of manufacturers to shape their homescreens and user interfaces to the latest innovations and what consumers want is unduly limited into the future. For example, there is already discussion across industry about homescreens using AI for personalisation and future global homescreens/user interfaces could potentially seek to remove BVOD apps altogether and instead offer consumer favoured content.

c. “Must Offer” Requirement on regulated television service providers

The majority of CESA TV Members are concerned to ensure that the legislation does not create an uneven playing field with some manufacturers bearing the cost of compliance and that proper market competition / price competitiveness is maintained. Therefore, this majority of CESA TV Members considers a ‘must carry’ obligation on manufacturers must be accompanied by a reciprocal ‘must offer’ obligation on the regulated television service provider so that if a regulated

television service BVOD service app is offered to one manufacturer it must offered to all manufacturers. This is necessary to ensure that the prominence framework is equitable.

d. Commensurate obligations and responsibilities of the regulated television service providers:

Positioning in any form should be contingent on the following, with no obligation on manufacturers unless these obligations are met by the regulated television service provider/BVOD service owner:

- **Must develop, maintain and manage BVOD apps at their own expense and do backend integration work for every make and model in accordance with manufacturer timetables and requirements**

The Bill does not contain any obligations on the regulated television service provider to provide, update and support the apps. It should do so and include the following obligations:

- Must conform with manufacturers' device development specifications and be ready in accordance with the manufacturers device development schedules/timetables noting that delayed delivery of BVOD service apps and QA testing issues would otherwise prevent the supply of devices resulting in serious business risk (loss of profit and market share) for manufacturers.
- Must conform with the consumer guarantees under Australian Consumer Law.
- Development and ongoing availability and maintenance of the regulated television service app must be at the broadcasters' sole cost.
- Upgrades for an app must follow the same procedure as a new app and must include communication of any changes to the app to manufacturers and consumers prior to implementation.
- Satisfactorily address consumer complaints regarding the operation and functionality of the regulated television service app, and fix any operation and functionality issues, both within a reasonable specified timeframe.

- **Must remove sign in to apps and promote local and public interest content**

To give effect to the ease of access and promotion of local/public interest content policy objectives of this prominence legislation, the Bill should include obligations for any regulated television service provider with positioning to:

- remove the sign in to their apps identified, at page 49 of the Department commissioned 2022 Television Consumer survey (and extracted in Summary above), as the main reason that consumers find it difficult to navigate regulated television services; and
- promote local public interest content on the 'front page' content promotion rows of the areas that they control.

e. Circumstances in which a regulated television service is 'offered' or 'not taken to be offered'

Certain technical and operational pre-conditions must be met for a regulated television service to be offered namely that the regulated television service provider must ensure that the service app:

- Meets the manufacturers' minimum specification for integration into the device (noting that it is the app that must be designed to be compatible with the device not vice versa).
- Passes the manufacturers operating system conformance testing.
- Has met the manufacturers device development schedule.

Circumstances in which a regulated television service is not taken to offered should include where the regulated television services:

- The regulated television service is not offered to all manufacturers – (refer to (c) above); and
- Where the regulated television service app is not maintained or is not compatible with the device or operating system.

f. Statutory Indemnity for Manufacturers

Related to the first point under d. and e. above, the Bill should include a statutory indemnity by the regulated television service providers in favour of manufacturers for any claims, loss or damage (including consequential loss) arising from a breach of their obligations to provide and maintain their BVOD app. This is to deal with cases where remedial action is required by the manufacturer to rectify an issue with the app or a potential breach of the consumer guarantees under the ACL by the manufacturer if that remedial action is not taken.

g. Transition period

It is important that a reasonable transition period of at least 2 years is afforded to industry to allow sufficient time for adaption of planned user interfaces and app development and integration. The development cycle time for devices can take 2-3 years, and the user interfaces for 2025 televisions are currently being finalised with development of 2026 television scheduled to commence soon thereafter. The most cost-effective way to introduce new requirements is at the start of a development cycle. If the App Auto-Installation and Individual BVOD Homescreen Positioning requirements are maintained without alternatives then a much longer period of 3-4 years is needed to not just re-design UIs, but potentially upgrade chipsets and television hardware.

Further, the language should be clear that the requirements apply to newly launched models manufactured after the transition period and not to existing models or old stock imported and supplied after the transition period.

A reasonable 'transition' timeframe will also need to be provided if ACMA or the Minister prescribes a new regulated television service as being offered or varies the minimum prominence requirements.

h. Exclusion of related body corporates

Any related body corporate of a commercial broadcaster other than the entity owning the primary app BVOD service should explicitly be excluded from the "related bodies corporate" whose BVOD services are entitled to positioning.

Currently **any** related body corporate of a commercial free-to-air broadcaster "*other than a licensee who holds a licence allocated under section 38C or subsection 40(1) BSA*" must be given Individual BVOD Homescreen Positioning in addition to the five free-to-air broadcasters.

- i. Positioning only applies to the primary BVOD app of the regulated TV service, not secondary or non-primary apps

It should be clarified that it is only the primary BVOD app of the regulated television service provider that must be given the specified positioning (i.e. auto install or other alternatives above), not secondary or non-primary apps of these broadcasters.

Allowing multiple apps would only further magnify the issues and impacts above, not to mention sheer lack of space with no limit to the number of BVOD apps a regulated television service might seek to develop and add with positioning.

- j. Preservation of innovation for users

A provision similar to S362AM(1)(c) of the UK Media Bill (extracted in Summary above) should be added to preserve access to innovation for consumers and avoid the abovementioned consumer impacts.

- k. Explicit clarification regarding the intended scope of the prohibition on fees

Explicit statement in Act that the prohibition on a “fee or charge” (by a TV manufacturer) only applies to a fee or charge for providing the minimum prominence requirements.

That is it should be clarified that this prohibition does not prevent fees, charges or revenue sharing arrangements related to advertising (in app or on home screens) or which pertain to commercial matters other than those related to positioning/auto install to the PUI.

This is in recognition that that there are various other fees, charges and arrangements unrelated to positioning that are charged now, any may be (or continue to be) in future charged to all app providers (whether global or local free-to-air, and whether auto-installed or not).

This is critical to avoid potential arguments in future that manufacturers cannot impose fees, charges or revenue sharing arrangements related to advertising (in app or on PUI) or which pertain to commercial matters other than the legislated positioning requirements.

- l. Explicit clarification in primary user interface definition that “homescreen” includes areas of scrolling.

It should be clarified within the existing “primary user interface” definition that a “home screen” includes areas of scrolling both down and across, not just the area visible on the initial home screen area before scrolling.

This is necessary as there simply may not be room on the initial home screen area in future models to include five auto downloaded tiles.

- m. Clarification on application of obligations to parallel imports

- n. Comments in relation to certain defined terms

The inclusion of the defined term ‘**audiovisual content**’ is overly broad and likely to cause confusion and ambiguity in the context of the definition of ‘regulated television device’. CESA

submits that the additional definition is not required and would submit that reference to television program or program is sufficient. The term ‘**domestic reception**’ should be defined in the section 130ZZH of the legislation. Is this a device for household use only?

o. Explicit clarification regarding exclusion of Smart Monitors and Smart Projectors

It should be clarified in the Bill and/or regulations that Smart Monitors and Smart projectors are not regulated television devices as they currently fall between the two limbs of the definition.

Concluding Remarks

CESA submits that the Bill and regulations should include the alternative Positioning options above (with manufacturer’s able to elect which option) as well as the Further Amendments outlined. For the reasons provided in previous submissions on prominence to the Department, CESA additionally agrees that no requirements should be introduced on manufacturers around content discoverability and app search functionality.

Practical and efficient device integration is critical for the successful implementation of a prominence framework and we appreciate that it is a technical and complex issue. The recommendations outlined in this submission are intended to minimise adverse consumer impact and intrinsic risk with the proposed legislation whilst still giving effect to the policy objectives.