

**ABC submission on the provisions of the
Communications Legislation Amendment
(Prominence and Anti-siphoning) Bill 2023**
January 2024



ABC submission on the provisions of the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023

January 2024

1. Introduction

The Australian Broadcasting Corporation (ABC) welcomes the opportunity to provide the Senate Environment and Communications Legislation Committee with comments on the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023.

The Corporation strongly supports the principles underlying the legislation, namely that Australians should be able to easily find and view free local television services on connected-TV devices (prominence) and that significant sporting events should remain freely available and accessible by Australian audiences (anti-siphoning). The ABC believes that the Bill represents a solid foundation for codifying these principles in an evolving media and technology environment. However, the Corporation believes that there are ways in which the Bill could be made more effective. These are set out below.

The ABC has participated in the Government's consultation processes in relation to both aspects of the Bill. It refers the Committee to its past submissions in relation to the need for an effective prominence framework and anti-siphoning list.¹

2. Prominence

The need for an effective prominence framework reflects the rise of internet-connected TVs and related devices, which have become the dominant way in which Australians access video-on-demand (VOD) services. The ABC believes that there is an urgent need for regulatory guarantees of prominence for local broadcasters' services on smart TVs and other connected-TV platforms, which are becoming a new type of gatekeeper for Australian media services and content.

As a national broadcaster and a major participant in Australia's broadcasting system, the ABC contributes to a range of social and cultural outcomes, including supporting democracy, social cohesion and national identity, by providing Australians with trusted, independent public-interest journalism and telling Australian stories. The Corporation is a major investor in Australian audiovisual content, contributing to the health of the Australian media production industry.

The ABC's ability to play this role is directly related to the ease with which its content and services can be found and accessed by Australians. As audience behaviours have changed over recent decades, the Corporation has increased the range of technologies and platforms it uses to

¹ In relation to prominence, see the ABC's submission in response to the [2020 Media Reform Green Paper](#) (pp 38–41) and its submission on the Government's [2022 Proposals Paper "Prominence framework for connected TV devices"](#). The ABC's most recent submission in relation to the anti-siphoning regime was its response to the Government's [2023 Proposals Paper "Review of the anti-siphoning scheme"](#).

achieve its public broadcasting remit and ensure its content and services remain available to all Australians. Its video-on-demand (VOD) service, ABC iView, was the first on-demand video streaming service in Australia.

As noted, smart TVs and other connected-TV devices have become the dominant way in which Australians access video-on-demand (VOD) services. A nationally representative survey conducted in December 2022 by researchers at RMIT University found that two-thirds (67%) of Australian households had a smart TV and/or another connected-TV device.² This accords with the ABC's own research, which shows that between 2019 and 2022, use of smart TVs to view VOD services rose from 48% to 59%, while the use of digital media devices, such as the Apple TV, Google Chromecast and Amazon Fire Stick, went from 19% to 31%.

Access to streamed content on smart TVs and related devices is via dedicated apps. The presence of such apps and the prominence of on-screen icons or "tiles" representing them have a significant effect on the likelihood of viewers choosing to use a media service and its content offering. The RMIT University study found that Australians had varying levels of skill at managing their devices and that a quarter (26%) were unable to add or rearrange apps on their devices so that their connected-TV experience remained the default experience provided by the manufacturer.³

Initially, manufacturers of connected-TV devices and platform providers were willing to pre-load ABC iView and to give it prominent placement on their devices' home screens. However, as these devices have increasingly become the dominant vehicle for accessing streaming services, a number have begun to act as gatekeeper and demand fees for both inclusion and placement. The Corporation cannot meet what are essentially new, additional costs to perform its public broadcasting role in a reliable fashion. As a result, ABC iView is no longer pre-loaded on many devices and no longer featured as a home-screen launch icon on others.

Moreover, when ABC iView and other broadcaster video-on-demand (BVOD) apps are loaded onto devices, their icons are often displayed after those for channels operated by the manufacturers and international and domestic subscription video-on-demand (SVOD) services.

Connected-TV devices also provide access to programs via search and recommendation algorithms that allow the user to discover content available through the video apps currently present on the device. The ABC believes that these mechanisms will become an increasingly important part of the way in which Australians discover content on their connected-TV devices, particularly as the devices support more personalised viewing experiences and sophisticated voice search functions improve the user experience.

Wherever possible, the Corporation provides data about the programs on ABC iView to connected-TV platforms to improve their discoverability. However, it has no control or visibility over how those programs will be displayed in search results or if its programs will be treated equally in more generalised searches, such as by genre. For example, a search for the popular children's program *Bluey* on different devices may yield links to paid options for viewing the show before the

² Lobato R, Scarlata A and Schivinski B (2023) "Smart TVs and local content prominence", submission to the Prominence Framework for Connected TV Devices Proposals Paper, RMIT University/ADM+S, <https://apo.org.au/sites/default/files/resource-files/2023-02/apo-nid321605.pdf>, accessed 18 January 2024.

³ Ibid, p.10.

free episodes on ABC iview or even links to YouTube clips, none of which will be full episodes of the program and some of which may not be child-appropriate.

Both the presence and prominence of app icons on connected-TV devices and inclusion in aggregated search functions can shape viewers' use of services. Conversely, their absence can effectively render broadcasters' content and services invisible, particularly among less technically skilled users. The ABC has already observed a decline in the use of ABC iview in households with smart TVs that do not load and display the app by default. This makes it less likely that audiences will discover Australian content, including ABC programs for which they have already paid. More broadly, the lack of visibility for Australian content produced by free-to-air broadcasters undermines the long-standing media-policy objective of promoting Australian culture and local sources of news and information.

For these reasons, the Corporation has strongly advocated for the introduction of an effective prominence framework that will ensure the presence and discoverability of broadcasters' services and content on connected-TV platforms. It has welcomed the Government's commitment to legislate a framework that ensures the prominence of broadcasters' services on connected-TV devices. The Bill and the proposed minimum prominence requirements described in the Explanatory Memorandum (EM) substantially create such a framework.

However, there are a small number of aspects of the Bill and the proposed requirements that undermine its effectiveness and can be expected to have a significant negative effect on broadcasters and, by extension, the public that they serve through the delivery of content showcasing Australian culture, entertainment, news and information.

First, given the impact that the lack of pre-loading and display of ABC iview on some devices is already having on the discoverability of ABC content, the Corporation believes it is important that the prominence framework be enacted quickly and that, where possible, be applied to connected-TV devices already in Australian homes. As the Bill is currently drafted, however, the prominence framework would not come into effect for a number of years and would only apply to future devices. This will effectively entrench the current arrangements, which make broadcasters' difficult to find, in the majority of Australian homes. Moreover, it is unnecessary, as the changes to connected-TV devices needed to implement the proposed framework can be made quickly in software and applied as updates to most of the devices already in the market today. Where a simple software update is not possible, the ABC suggests offering device manufacturers the opportunity to apply for an exemption due to substantial technical issues.

Second, the Government's decision that the framework will not include requirements in relation to search and recommendation mechanisms on connected-TV platforms (see, e.g., EM, p 7) is likely to reduce the effectiveness of the framework as a means for ensuring the discoverability of local broadcasters' content and services given the continued trend towards user-controlled and personalised media experiences.

Third, while the implementation of the minimum prominence requirements through regulation is intended to allow adaptation in response to future audience and/or technology changes, the Bill constrains the possible elements of the requirements in a way that does not allow for the possibility of other, unanticipated future changes.

These concerns and means of addressing them are described below.

In addition, the ABC notes that the Government has yet to release a set of draft of the regulations that will set out the minimum prominence requirements. As a result, it is not possible to judge how effectively those requirements will translate the policy objectives underlying the Bill and the proposed features of the prominence framework (see pp 75–76 of the Explanatory Memorandum) into actual requirements. It is possible that the Corporation’s assessment of the effectiveness of the framework may change when the draft regulations become available.

2.1. Commencement

The Bill specifies that the prominence framework will apply to all regulated television devices manufactured or supplied on or after the day that is 18 months after the commencement of Schedule 1 (cl 24), which will be the day after the Act receives Royal Assent (s 2(1)). Allowing for the anticipated time that it will take the Bill to pass Parliament, this means that the prominence framework will likely only come into effect in late 2025 or early 2026. Further, it will only apply to connected TVs and devices manufactured or supplied after that date.

Today, a significant number of connected-TV devices in Australian homes did not ship with ABC iview and other BVOD services preinstalled, effectively rendering those services invisible in the absence of deliberate and sometimes cumbersome user action. This represents a significant challenge for the ABC in performing its public service role, as the inaccessibility of ABC iview in Australian homes is adversely affecting the audiences for that service. Over the more than 18 months that it will take for the prominence framework to come into effect, the proportion of households where BVOD services are invisible in this way will only continue to grow, deepening this problem. Moreover, if the framework only applies to devices supplied after that time, it will do nothing to address it — ABC iview and other BVOD services will remain essentially invisible in the many households that have purchased connected-TV devices before the commencement of the prominence scheme. In policy terms, this will undermine the objectives that the national broadcasters and the obligations on commercial broadcasters under the *Broadcasting Services Act 1992* (“BSA”) are intended to achieve.

The Explanatory Memorandum (EM) to the Bill says that this provision is intended to acknowledge and accommodate “the lead times associated with the design, development, manufacture and distribution of electronic goods, which typically involve global supply chains” (p 41). These sorts of lead times may make sense in the context of modifications to chipsets and other hardware.

However, all of the changes required to implement the prominence framework can be made via software modifications, rather than changes to hardware, and can be expected to be achieved in significantly shorter periods. This is effectively acknowledged in the EM (p 81).

Moreover, such software-based changes can be made available on many smart TVs and connected-TV devices already in Australian homes, either through changes made on the servers that feed data and program streams to the devices or as part of the periodic over-the-air software updates that manufacturers send to their products. As a result, there is no need to limit the scope of the prominence framework to devices manufactured in the future. Instead, it can and should be applied to all television devices in the country that are still receiving software upgrades. This will maximise the policy benefits of the framework by ensuring the accessibility and discoverability of free, local BVOD services in the greatest possible number of Australian homes.

The ABC is aware of and has reviewed the expert technical report by Stephen A. Cleary that accompanies the submission Free TV Australia has made to this inquiry. The expert report provides a detailed account of the requirements and timeframes for implementing the elements of the prominence framework.

The expert report confirms that all of the proposed requirements of the prominence framework can be implemented by server configuration changes or software implementation and that none of the requirements necessitate hardware, system-on-a-chip, mechanical or physical changes.

The report advises that many of the required changes can be achieved at the server level and could realistically be achieved within one month, including time for quality assurance and testing of apps. Changes of this kind would include loading or updating broadcasters' BVOD apps and adding tiles or icons for those apps to existing on-screen "rails".

According to the expert report, the remainder of required changes would require updating the software in connected-TV devices. These are essentially changes that introduce new interface designs or elements, such as adding an additional row of app icons, adding a "Live TV" icon or tile to device interfaces that do already have one, or ordering broadcast channel by logical channel number in an electronic program guide (EPG). These changes could be applied to devices already in the market via an over-the-air update. The report states that collective implementation of such changes would take up to six months, including designing, building and testing. It notes that manufacturers may prefer to roll out such changes over an 18-month timeframe, but concludes that that reflects a business preference, rather than any technical constraint that would prevent more rapid implementation. The ABC notes that German prominence legislation set a six-month timeframe for manufacturers to implement prominence for the national public broadcasters and commercial public-value content providers on their devices.

To enable the prominence framework to come into effect at the earliest possible date, the ABC believes that the Bill should be amended to remove the 18-month timeframe set out in clause 24 of Schedule 1. Instead, the Bill should include a power for the regulations to establish timeframes by which the minimum prominence requirements apply, including distinguishing between requirements that will apply after one month and requirements that will apply after six months. Moreover, the requirements should apply to all regulated television devices for which manufacturers are still supplying software updates.

The prominence framework should commence from the date of Royal Assent.

Acknowledging that some edge cases may exist, the modified Bill should provide for manufacturers to seek an exemption from individual requirements for particular models of regulated television devices that have already been supplied, if they can demonstrate to the ACMA that implementing the required changes is not possible.

2.2. Search and recommendations

While many viewers access content on connected-TV devices using the tiles or icons, search is also a critical means of discovering and accessing content from among the vast array available through contemporary media devices. As the volume of content continues to grow, so will the importance of search as a discovery tool for audiences. Further, there is a growing trend towards

offering audiences more relevant and personalised media experiences. Search and recommendation algorithms play a central role in delivering such experiences.

As described above, the ABC provides data where it can to help ensure that audiences can find its content in on-device universal search tools. However, on devices where the ABC services are not included in a universal search, it is invisible to that function and viewers searching for ABC content are instead directed to services such as YouTube or to paid services carrying episodes of programs that are available for free via ABC iview. In some cases, such as Apple TV, the Corporation has also observed pay-per-view or subscription versions of shows being prioritised over the free service offered by the ABC, even when the ABC iview app is installed on the device.

For these reasons, the ABC believes and has consistently argued that an effective prominence framework must include aggregated search and recommendation functions on connected-TV devices, both at the level of specific programs and in more generalised searches, such as those conducted by topic or genre.

However, as the EM and the Minister's Second Reading speech have made clear, the Government does not intend to include search and recommendations within the prominence framework.

Failing to include them in the prominence framework in this way will, over time, increasingly disadvantage broadcasters and cut audiences off from their content as search and recommendations play a greater role in the discovery of content on devices offering increasingly personalised media experiences. Moreover, these challenges are likely to deepen over the next few years as text and voice searches evolve using artificial intelligence (AI) technologies.

At the very least, the minimum prominence requirements should specify that broadcasters' content and services must be included in the aggregated or universal search features and recommendation algorithms of all regulated television devices.

Ideally, the requirements should ensure that broadcasters' content is prioritised in search and recommendation algorithms, particularly where it is available to the Australia public for free.

To enable this, search and recommendations should be added to the list of elements that the minimum prominence requirements may cover in proposed section s 130ZZ)(1) of the BSA.

2.3. The regulations

The prominence framework created by the Bill rests on the minimum prominence requirements, which will be set out in regulations established under proposed s 130ZZO(1) of the BSA. This approach will allow the framework to be updated over time in response to technological developments and changes in audience behaviours and the media environment. The ABC regards such adaptability as a necessary feature of any effective prominence framework.

However, proposed s 130ZZO(1) is drafted to be exhaustive and the minimum prominence requirements may only relate to the matters listed in that subsection. This approach effectively locks the prominence framework into regulating variations on the current state of connected-TV devices. The framework would not be able to adapt to new technologies, behaviours or business strategies that may emerge and are not anticipated in the list in s 130ZZO(1).

In order to make the prominence framework truly adaptable, the Corporation believes that the list of possible elements of the minimum prominence requirements in s 130ZZO(1) should be extended to include a final item, “any other relevant matters as determined by the Minister”.

3. Anti-siphoning

The ABC’s role includes delivering valued services that reflect and contribute to Australian society, culture and identity, and informing and entertaining the Australian community. Sport is intrinsic to each of these responsibilities and the Corporation has delivered sports coverage and commentary to the Australian people throughout its more than 90-year history. As the market for television sports rights has become increasingly competitive, the ABC primarily serves Australian sporting audiences on its radio and online platforms, including offering thousands of hours of high-quality audio commentary for AFL, NRL, cricket and other major sports in Australia and from overseas. Nevertheless, the ABC remains interested in televising live sports, if audience and value-for-money considerations can be satisfied.

There is no doubt that Australians continue to love sport. The Matildas’ 2023 World Cup campaign once again demonstrated the ability of sport to bring Australians together. The Corporation strongly supports the principle underpinning the anti-siphoning scheme: that significant sporting events should be freely available and accessible to Australian audiences. The ABC likewise supports updating the anti-siphoning scheme for the contemporary media environment.

Importantly, this includes closing the current loophole that potentially allows major events to migrate behind online pay-walls operated by streaming services and other digital platforms that were not envisaged when the scheme was first created. By closing that loophole, Schedule 2 of the Bill extends the principle of free and equitable access to coverage of iconic sporting events to the contemporary media environment.

The Corporation welcomes the Government’s decision to modernise the anti-siphoning list by including women’s and Para-sport events. In general, it believes that the “expanded list” (EM, pp 122–125) would offer women’s sport appropriate recognition and deliver greater public benefit than the “modernised list” that the Government is proposing to adopt.

As the ABC has said in previous submissions, there is an argument for some modest extensions and additions to the modernised list that would maximise access for audiences to significant and important events. In particular:

- The Netball World Cup: expanding the list to include every match that includes the senior Australian representative team, rather than only finals and semi-finals that involve the senior Australian representative team (in line with the treatment of the FIFA Women’s World Cup tournament in the modernised list).
- The Winter Paralympic Games.

In addition, the Corporation proposes that modernised list be expanded to include the Women’s Big Bash League (WBBL), the Women’s National Cricket League (WNCL), the Super Netball series, and the A-League Women.