



## Response to Question on Notice

Senate Environment and Communications Legislation Committee inquiry on the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023

### Question on notice

- On 23 February 2024 the Senate Environment and Communications Legislation Committee inquiry held a hearing on the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023.
- Free TV Australia arranged for Stephen A Cleary, technical expert, to appear as a witness in relation to manufacturing of connected television devices and related industry practices.
- Senator Grogan, Chair of the Committee, directed a question to Mr Cleary to explain the challenges in technology involved in implementing the prominence framework and foreshadowed that his evidence would be put to witnesses representing the manufacturers. Senator Grogan invited Mr Cleary to provide a response to the manufacturers' evidence.
- Senator Grogan's question was:

*I think one of the challenges with technology and technology upgrades is that it's very easy to pull the wool over everybody's eyes in terms of what's going on, so I'd really like you to unpack for us where the different layers are and what the different changes are, because I know you have a great deal of experience in this. If you could step us through that now, then I'll put that to the manufacturers later on. I will then ask you, as a question on notice, to come back to us and respond to what they say.*

- Senator Grogan directed a similar question on notice to the ABC and SBS:

*I will give you one thing on notice, for both of you. There are a couple of sticking points within this legislation, where there are quite different views between different interested parties. I would ask that—particularly in terms of the manufacturers and this idea about software, hardware, how hard it is and how easy it is—once we've spoken with them, you would provide a response to us on how you would interpret their answers.*

### Responses to manufacturers' claims

Free TV, the ABC and SBS make this response jointly. Mr Cleary has considered the issues raised by other witnesses in the hearing and has provided a report responding to the claims (**Attachment A – 'Report'**). This response draws on Mr Cleary's Report.

In summary:

## The future of user interfaces

Claims were made that artificial intelligence will change the way user interfaces operate, making them more adaptive, and providing individuals with personalised screens based on their preferences. As a result, it was claimed, any prominence framework requiring applications (apps) to be positioned on user interfaces will inhibit such innovation in the future.

CESA stated:

*Notably, with the emergence of smarter adaptive-type user interfaces, it may soon become impossible to comply with minimum prominence requirements. Adaptive UIs use AI technology to personalise home screen content to each user's preferences. As a result, home screens will have far more, if not 100 per cent more, programs than apps, and we are already seeing devices with this type of technology. This means home screens may not offer capability to auto-download any streaming apps, whether it's international or local. One essential amendment to futureproof the situation is an exemption from the requirements where a particular model includes no streaming apps on the home screen.*

### **Response**

- First and foremost, all algorithms are programmable through rules that are made by those who write the algorithm. Parliament is tasked with deciding upon some of the rules that will govern the algorithm and should do so in a way that furthers the public and national interest.
- The evidence given by CESA and others regarding the development of non-app based interfaces underlines the necessity for the Bill to enable prominence requirements to be made for search and recommendation functions in the future. As the Bill is currently drafted the Minister has no power to make regulations in relation to these matters. The Committee should recommend that the Bill be amended to enable regulations to be made in these two key areas.

### Background comments

- For manufacturers, content promotion is primarily driven by commercial agreements, not viewers' preferences. To the extent that CESA's members are creating algorithm rules that promote content based on commercial agreements, it cannot be said that they are merely serving the viewer, what they want to see or what is in accordance with the viewer's preferences. Rather, manufacturers are carrying out their obligations under the arrangements they have with content providers which generate significant revenue for the manufacturer.
- If the Senate accepts CESA's assertions about adaptive user interfaces transitioning to content rather than apps, this confirms how critical a broad prominence framework is to protect every Australian's right to access their free-to-air services in a rapidly revolutionising digital world.
- CESA presents a bleak future where TV screens are sold to Australians that deliberately make it difficult to find local TV services channels and apps. A world that prefers content that is profitable to TV set providers, regardless of whether it is in the national interest. The only way to prevent this is through rules requiring manufacturers to make local, free content easy to find and discover.
- It is clear from CESA's statements that without prominence rules, TV sets will not serve free content that is easy to find and discover on their own. Content aimed at smaller cohorts of

Australian audiences, like local city or state-based news bulletins, would almost certainly become impossible for such local viewers to find.

- As a general statement, prominence of free television services, that are easily accessible and available to all Australians without payment, is an enduring concept. The need for prominence will remain relevant well into the future, even as interfaces evolve and as consumer habits change over time. People will continue to expect easy access to their free local TV services and the quality content they provide.
- The legislation reflects this enduring aspect of prominence, by establishing a broad framework requiring compliance with the obligations in the Bill and a set of expectations, with further detail set out in the regulations. The framework is designed to be adapted over time through the ability for the Minister to make regulations, and for the ACMA to provide advice and information on market developments.
- As user interfaces evolve, the power to make regulations will be critical, as it will allow requirements to be adjusted over time to ensure prominence continues regardless of the form it takes.
- In a future where user interfaces transition away from the presentation of apps and towards the presentation of content, the inclusion of search and discoverability in the prominence regime becomes even more crucial if the framework is to continue to meet its policy objectives.
- Adaptive interfaces can be expected to employ search and recommendation algorithms to recommend content to users. As a result, it is imperative that the regulations be able to include search and recommendations if they are to remain relevant over time. Hence, we propose that search and recommendations be included in the list of matters the Minister is empowered to make regulations regarding (s 130ZZO of the Bill).
- Indeed, if future user interfaces do become app-free, as Foxtel and others have proposed in their submissions and evidence, then without regulation of search and recommendations, the prominence framework will likely become ineffective at delivering the public policy outcome of ensuring discoverability and ease of access. As such, Government must include a power to make regulations with respect to search and recommendations, or risk the framework becoming redundant. Inclusion of search and recommendation in the framework will effectively future-proof the framework, and avoid the need for Parliament to consider these issues again in the near future.
- If a platform is not paid to promote BVOD content, and in the absence of regulation, it is unlikely to do so. If platforms control all the personalised programs offered to the user, without any option to select free services through apps, there is a serious risk that viewers will not be presented with the content offered by the free BVOD apps.
- Although the removal of apps may be presented as an innovation that will benefit the viewer, there is a conflict between the business objective of optimising Average Revenue Per Unit (ARPU) and maximising user experience. The removal of apps may be less about benefiting the user's experience and more about incentives to present paid content.
- Insofar as there are user interfaces which currently feature no apps, we note that s 130ZZL(4), allows ACMA to describe or determine requirements for primary user interfaces differently for different regulated TV devices. However, in such instances there must be a mechanism by which

free television services are featured prominently, including prominence in search and recommendation results.

### Customising User Interfaces

Claims were made that manufacturers should be able to customise the home screen to reflect viewer preferences, and that the scheme will prevent them from offering features like “up next” and “recommended for you”.

Foxtel stated:

*... the drafting doesn't reflect the policy intention to allow device manufacturers to customise the home screen to reflect viewer preferences. This may prevent manufacturers from offering features such as 'up next' or 'recommended for you' to reflect viewing history and choice. The second is that the drafting doesn't fully reflect the commitment to not mandate positioning of tiles or apps. We've made some drafting suggestions in our submissions which we believe would fix these issues.*

### Response

- Prominence for free services will not impede manufacturers' capacity to customise the home screen over time, or to offer recommended content based on user preferences.
- The regulations simply require the inclusion of the five free BVOD apps on the primary user interface and located in the same area as other VODs that appear there. It does not preclude additional material such as “up next” or “recommended for you” in addition to the content required by regulation.
- As set out in Mr Cleary's Response, typical user interfaces feature many more than five apps.
- The Bill seeks to ensure that free television services are easily discoverable by, and not hidden from, viewers by ensuring that free BVOD apps appear with equal prominence to other featured apps.
- Viewer preferences will be able to be easily accommodated, as there are no restrictions in the Bill on a user's ability to customise their interface, including by moving or deleting BVOD or other apps.
- The UK has recently passed legislation with similar requirements for prominence. The UK Media Bill passed its third reading in the House of Commons in February 2024. Debate has commenced in the House of Lords and the Bill is expected to come into law mid-2024.

### Commercial arrangements

Claims were made that the requirement to include free BVOD apps on primary user interfaces is not possible on all TVs as there is not enough space without disturbing commercial arrangements.

CESA stated:

*Under the draft regulations, TV manufacturers must auto-download a separate app tile on the home screen for each of the five Australian free-to-air broadcasters. This is not possible on all current TV home screens as there simply isn't enough space to accommodate the five apps—possibly more, if you include community broadcasters and children's television apps—with*

*disturbing existing commercial arrangements. This is why CESA is seeking alternative positioning options and a two-year lead-time to implement.*

- Free television services delivering benefits to audiences should take precedence over positioning of paid services that not all Australians can afford to use.
- Most standard commercial agreements make provision for the agreement to be subject to local regulations in any relevant territory.
- The Bill recognises that the public interest benefit of ensuring prominent availability of free, local services for all Australians outweighs the commercial interest arising from global manufacturers' gatekeeper position.
- As set out in Mr Cleary's Response (at page 5), typical user interfaces currently feature many more than five apps.

#### Complexity in search

Claims were made to the effect that search is complex, as it may involve making inferences about what the viewer is looking for, which can be particularly challenging in cases of ambiguous search terms. Netflix stated:

*... I think there's a few things that are important to understand about this debate. The first is about how people search, why they search and how that happens on a device. Let's say we step right out of TV land for a moment and we think about, say, a google search or a bing search, and we use the words 'Paris Hilton'. Search engines are very, very clever and they know that one of us may be searching for a hotel in Paris—if we're lucky enough to have an upcoming trip—and that others may be looking for a celebrity called Paris Hilton. That's a really simple example of how clever technology is able to differentiate what consumers are thinking about.*

*Let's translate that example to the sorts of devices we have been discussing today. For example, if someone types 'Delta Goodrem' into a search tool, one of us may be thinking: 'I'm in the middle of an amazing binge of The Voice, I love Delta and I'm wanting the next episode of The Voice.' Some of us might be wanting to watch Delta Goodrem's hit movie on Netflix—which we invested in—Love is in the Air, a movie that was very popular in Australia and reached the top 10 in many markets around the world. What we want to make sure is that the device is able to match what the consumer is searching for. It may well be that the device becomes clever, because we know what that consumer, that viewer, has been watching in the previous week or the previous couple of months. For example, Fisk—as Mr Cox mentioned—we have that; it's on ABC iview and also on Netflix. So you would hope that, if someone types 'Fisk', both the ABC and Netflix versions come up.*

#### Response

- We accept that search functionality is an evolving technology but that does not mean that it should be omitted from the prominence rules altogether.
- The issue with the Bill as currently drafted is that it is not possible to make any regulations in relation to search functionality. While the issue may be complex and require further consideration, given the increasing reliance on search as the primary content discovery tool in the future, it is critical that the Bill enables regulations to be made in respect of search when the best approach can be determined.

- Otherwise, there will be a significant legislative gap, particularly in light of the contention from CESA and others that user interfaces will move away from presenting apps and towards presenting individual pieces of content from those apps curated by that TV manufacturer or user interface developer.
- We also note that manufacturers are currently able to control search results which support commercial agreements to prioritise certain content, which demonstrates that control and prioritisation of search results is possible.
- The regulation-making process will be an appropriate avenue to allow consideration of the complexities involved in addressing prominence through search.

### Alternatives to apps on interfaces

CESA proposed alternatives to presenting apps on the primary user interface. One option was to include a single tile for all free BVODs. Another option was to give priority placement to free BVODs in the app store. CESA stated:

*Alternative positioning options include a shared home screen tile for all local free-to-air streaming apps, which could then include community broadcasters and children's TV apps. This approach would be better, as it would provide users with a convenient, one-stop access point for these services. Alternatively, manufacturers should be able to position the five free-to-air streaming apps at the very top of their app store pages. This would be better, as it would provide broadcasters permanent priority, not subject to deletion or removing from the home screen by consumers.*

### Response

- Free TV, ABC and SBS do not support the proposal to require local TV apps to be placed behind a single tile or given priority positions in the app store. Neither option effectively implements the policy intent of the Bill, which is to ensure prominent positioning of free, local services in a manner that makes them easy to find for all consumers.
- A separate tile providing immediate one-click access to each BVOD service is far more convenient for the user than a single aggregated tile, which would require viewers to perform additional navigation in order to find free-to-air services.

### ***Single tile alternative***

- A single tile is simply another way to hide the BVOD apps of Australian broadcasters. It is designed to create another barrier, another disincentive to find local TV apps, while providing ongoing, easy and prominent display of the big streaming apps. This can be equated to being on the second page of a standard internet search rather than the first page.
- Branding of BVOD apps plays a key role in assisting users to identify their free services. If the services are not easily recognisable, this will place further barriers between consumers and the free-to-air services.
- For a single tile to exist, either manufacturers would need to build a new interface specifically for broadcasters' apps, or broadcasters would need to build an entirely new shared app and brand. Either way, this would add cost, time and complexity. In contrast, an app for each BVOD service is simple and can be implemented with existing technologies and approaches.

- A user may delete the single tile, inadvertently deleting all five free BVOD apps.

#### ***App Store alternative***

- The intent of the Bill is to ensure viewers can access BVOD apps easily, without lengthy navigation and input journeys. Navigation to an app store requires familiarity with the interface and further input and action on the part of the user. This proposal would frustrate that policy intent.
- The study provided to the Committee by RMIT researchers, as referenced in the Second Pass Impact Analysis by the Office of Impact Analysis, showed that 33% of Australians do not know how to download apps onto their Smart TV. BVOD apps available only through app stores would be invisible to these people, regardless of any priority placement. Further, 56% do not know how to change the order of the apps on their devices; for them, downloaded apps will always remain on the far end of any app rail. The researchers noted that those with the lowest levels of user interfaces literacy were likely to be older users.<sup>1</sup>
- From a consumer perspective, one click to access each BVOD service is far more convenient and accessible than navigating to an app store.

#### **Consumer experience with BVOD apps**

Some of the evidence given was that viewers' difficulties with accessing the free BVOD apps are not that they cannot locate the apps, but issues with the BVOD apps themselves, such as signing in, using passwords and creating accounts.

CESA stated:

*Mrs Soud: In terms of the login requirements, that was off the back of the department's 2022 consumer survey, which found that was the main reason that consumers had difficulties accessing these services. So, in order to meet the policy objectives, I think it's reasonable that the legislation addresses that key pain point for consumers. In terms of manufacturers' specifications, there have to be device conformance tests, just to ensure that the apps are fit for purpose and are workable. It's for the app providers to develop their apps to our specifications, so that they will be functional on the various brands of televisions.*

#### **Response**

- The modern advertising market is data-driven. For the commercial broadcasters and SBS, it is imperative to collect data as it is necessary for competition, and as advertiser funded businesses, log-in data is essential to build advertising cohorts to sell segments to advertisers.
- Every major content app found on a TV screen requires a sign-in and registration process. This is not a distinguishing feature of BVOD services compared with any other apps found on connected devices. All BVOD apps have simple, minimal registration processes and never ask for or require credit card details, like other apps do.
- In fact, almost all the major TV brands, whether it be Samsung, LG or a TV that uses Google software, require the owner of a connected TV to step through a complex process including

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<sup>1</sup> 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, p.10

creating a user account and setting up sign-in details before the TV or any content delivered on it will operate.

- Most platforms, including connected TVs, require the user to sign in to use the device or its internet feature (for example, signing in to Samsung). Sign-in delivers a range of beneficial features to users (for example, ‘keep watching’, ‘recommend for you’), as well as enabling customisation of content and advertising dependent on location and other user characteristics. Using news as an example, sign-in ensures that the user of the BVOD app is being served their local news bulletin, instead of one from another state or city or region.
- Sign-in is now an expected feature of the user experience and in most cases, users sign in once and then access the service without further requirements to sign in each time the service is used.
- Removing the ability for broadcasters to require sign-in would diminish BVOD providers’ capacity to offer valuable features and functionality to consumers, thereby disadvantaging broadcasters in the competitive marketplace.
- We have not seen research or data supporting the contention that viewers’ difficulties are attributable to the free-to-air broadcasters’ BVOD apps, or any login processes connected with those apps, as opposed to using connected devices generally. There is, however, research revealing the difficulties viewers have when attempting to locate and place Apps on their devices. As referenced above, the RMIT research indicated that 33% of Australians do not know how to download apps on Smart TVs and 56% don’t know how to change the order.

## Reciprocal obligations

Claims were made to the effect that search and EPGs cannot be done without the provision of metadata.

Fetch TV stated:

*We see that there's going to be a requirement for devices like ours to provide availability, prominence et cetera for the free-to-airs. We're talking about searching et cetera—you need the metadata to do that. It isn't just the EPG, it's the synopsis; it's which actors and directors so that you can search; close captioning; ratings; and all of these things. While it's not a problem now, we'd like to see a reciprocity in the availability and provision of the metadata required to perform those tasks, and for that to be provided free of charge.*

CESA stated, in response to a question from Senator Pocock:

*Senator DAVID POCOCK: Just finally, we just heard from Fetch, and one of the things they said is that they would like to see reciprocity with the must carry obligations, and they would like to see an obligation for free TV to provide good metadata to enable the functions that will be required under the bill. I'm interested if this is something that you would support or that you have looked at?*

*Mrs Soud: It really is a shared responsibility between the broadcaster and manufacturer. The obligations seem to be very one-sided to manufacturers and don't properly deal with what broadcasters are supposed to be doing to deliver prominence—and enable the manufacturers to meet their obligations.*

## Response

- A power in the Bill to enable regulations to be made about search and EPGs will allow issues of data to be worked through in the regulation-making process.
- The responses and concerns raised by other witnesses do not represent the true state of what occurs in the market.
- Broadcasters will provide what is necessary to give effect to the prominence framework. In many cases, the broadcasters are already working closely with manufacturers and their software providers to meet their individual requirements for content data to enable both standard EPG functionality as well as content search and discovery, including for BVOD.
- In addition, as Free TV outlined in its supplementary submission, given the minimum prominence requirements are to be complied with on an ongoing basis, there will need to be significant engagement between manufacturers and the regulated television service providers. The reasonable steps to be taken by the manufacturer, which should occur in good faith, should include engagement with the free-to-air broadcasters, through which process access to data will be facilitated.

## Existing devices and 18-month timeframe

### *Change implementation requirements*

Evidence was given that 18 months are required to configure teams and test programs to efficiently and reliably implement change. Manufacturers asserted that there are risks of issues arising if they

must make such changes on an ad hoc basis. Manufacturers noted that they are currently locked into product development and design for 2025 models and moving into the next phase, that is, pre-production, then certification, energy testing, and product registration. They claimed that implementing prominence sooner than 18 months will require them to go back and re-work business processes, and that teams will need to be pulled off other projects.

CESA stated:

*... it is always much better to include these sorts of software changes or updates as part of the normal development program. You've got the teams configured, you get the input and you've got the full test program happening. It's a much more efficient and reliable way to implement changes.*

*If you're doing it as an ad hoc change and then try to pull in different experts and get them to work on it and then test it in circumstances where maybe test platforms or development platforms may no longer be available, that gives rise to the risk of issues arising. There are a lot of other operational factors as well. You've got manufacturers that are now, at this point in time, locked into their product development and design for 2025 models. They're moving into the next phase, which is preproduction. They will now start to do certification, energy testing and those sorts of registrations in anticipation of launching those products in Q1 or Q2 of next year.*

*To then start to tell them, 'Oh, no, you've got to now go back and pull it together'—those development teams that have worked on those products have now gone and been allocated by overseas manufacturers to work on other projects and are now developing 2026 televisions.*

#### **Response**

- As we have submitted, 18 months are not necessary to give effect to the prominence requirements. The arbitrary 18-month timeframe should be removed from the Bill, with shorter implementation time periods of no longer than 6 months set out in the regulations.
- Manufacturers do what is convenient for them and best suits their pursuit of profit. In this instance, it is understandable that manufacturers would seek as long as possible to implement the changes, notwithstanding what is technically possible. In this sense, 18 months is convenient for manufacturers, but not essential, and will frustrate the policy objectives of the framework by making audiences wait too long for the proposed benefits.
- The reality is, if broadcasters were to offer an attractive commercial agreement in exchange for prominence, it would be implemented within a few short weeks.
- As set out in Mr Cleary's Report (at page 5), the way that teams are constituted and deployed is always changeable as multiple projects evolve, expand and are discontinued. It is not unusual for manufacturers to reconfigure their workforce and project planning.
- Providers of apps are regularly required to update and amend their apps with little to no lead time or notice, whenever a manufacturer changes their interface. To suggest that a software update would require such a long lead time is disingenuous.
- However, if there is a regulatory timeline then manufacturers can be expected to take actions to comply.

We also note that the ACMA voiced concern about a six-month timeframe, and that while it would work with the timetable given, 18 months is preferred.

- A much shorter timeframe should be achieved to ensure audiences benefit from the scheme sooner.
- There have been instances in the past when consultation periods have been truncated in order to meet Government expectations regarding timely implementation.

#### *Low memory devices*

There were claims that some devices have low memory and would require a memory update to include additional apps, which is quite complex. CESA stated:

*... there may be some models that will require memory upgrades. Certainly, for some of our members, that will be the case, particularly for those with lower end products. Lower end TVs usually have pretty basic specs—they're mapped out to a certain amount of memory. If you now wish to download more apps than what that device is capable of, you're going to have to do a memory upgrade, and that's not a simple thing.*

#### **Response**

- We note that devices that are not currently supported with software and configuration updates will not be subject to the requirements.
- In any event, Mr Cleary's Report (at page 6) notes that it is unlikely that new or recent models exist in the market where five apps will exceed the memory available.

#### *Dealings with third party platform developers*

There were claims that manufacturers deal with third party development platforms providers and will be at their mercy as to when they can deliver the prominence requirements, including for existing devices requiring server configuration. CESA stated:

*... lower end models many require a bit more than others but it's fundamentally that we are relying on overseas manufacturers. Our members are relying on third-party system developers to give prominence a priority within their business strategies and development schedules. Those are quite rigid, and all the indicators from those parties are that it cannot be done in one or six months time. They won't put the resources to it to make it happen.*

#### **Response**

- As stated in Mr Cleary's Report (at page 6), if there are regulatory requirements then third parties should be proactive assuming manufacturers have business contractors to support compliance.

#### *Consumer impact*

Evidence was given that, as certain elements of the prominence framework will burden manufacturers, Australians will miss out on new TV models made around the world, and instead be relegated to having only older models. Further, it was claimed, Australians will pay more for their TVs. Various claims were made that the size of the Australian market is small.

CESA stated:

*The higher end products usually have all the bells and whistles that you would expect on a cutting-edge smart TV. The smart UIs and adaptive UIs will generally come in on those higher end models. If we are having to provide app based menus, we are not going to be able to*

*provide them with the smart, adaptive-type technology. Customers will lose out in terms of that technology, because there will be a bigger divergence in where smart TVs are in terms of development and innovation globally and what we will be doing in Australia. There's a greater degree of reconfiguration, customisation and special development work that needs to be done only for the Australian market. That comes at a big cost, because you're basically setting up special project teams to develop product for one per cent of the global TV market—if our manufacturers are even interested in doing that at all.*

In respect of cost, CESA stated:

*We haven't got that costing. I know you've had people this morning that said it could take \$1 million to develop an app. You could work it out from there if you're doing a whole TV. I'm happy to try and get some detail, but a lot of that is detail that the overseas manufacturers or third-party developers have. But, whatever the costs of the goods are to develop—and nothing is free—it will be passed on to suppliers here, who will then pass it on to consumers. The other issue we have with retrospectivity and applying it to existing models is that we've already sold those TVs to consumers. We can't recover those costs. We're going to have to redirect those additional expenses into the prices of new TVs that are coming onto the market and being sold.*

#### **Response**

- As noted in Mr Cleary's Report (at page 4), Australia is a profitable market for manufacturers, which provides an incentive to continue to supply competitive models at competitive prices.
- Generally, the Australian market is relatively profitable for its size, as the models sold are on average higher-end models and as such have a higher marginal profit.
- Given that the proposed changes can be implemented via software update and server configuration, it is not clear why this would impact the supply of hardware into Australia.
- While difficult to evaluate the cost without further information, it is acknowledged that there may be some minimal compliance cost. However, given our content brings users to their product and gives them utility, the commercial value they derive from our services far outweighs any compliance cost arising from these regulations.
- In any event, manufacturers are already used to Australia's unique requirements. For instance, Audio Leveling, Parental Rating, Logical Channel Number sorting, 7MHz channels (as opposed to 8MHz in most other markets) and RF frequencies. These requirements involve similar levels of compliance and have not prevented operation in the Australian market.

# Attachment A

Prominence In Connected TVs in Australia  
On Notice Response

Stephen A. Cleary

6 March 2024

## 1 Introduction

This submission is a follow up to the Environment and Communications Legislation Committee Senate Public Hearing of the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023 which took place on Friday, 23 February 2024. During the hearing the Chair (Senator Grogan) asked that I, as the technical expert from Free TV, issue a response following the hearing testimony by Manufactures (CESA).

*CHAIR: I think one of the challenges with technology and technology upgrades is that it's very easy to pull the wool over everybody's eyes in terms of what's going on, so I'd really like you to unpack for us where the different layers are and what the different changes are, because I know you have a great deal of experience in this. If you could step us through that now, then I'll put that to the manufacturers later on. I will then ask you, as a question on notice, to come back to us and respond to what they say.*

## 2 Response to CESA Submission

During the CESA Testimony they made several statements which I would like to address one by one.

### 2.1 App Ribbon on Home Screen & UI Innovation

#### 2.1.1 Extract of Statement

**Mrs Soud:** Notably, with the emergence of smarter adaptive-type user interfaces, it may soon become impossible to comply with minimum prominence requirements. Adaptive UIs use AI technology to personalise home screen content to each user's preferences. As a result, home screens will have far more, if not 100 per cent more, programs than apps, and we are already seeing devices with this type of technology. This means home screens may not offer capability to auto-download any streaming apps, whether it's international or local. One essential amendment to futureproof the situation is an exemption from the requirements where a particular model includes no streaming apps on the home screen.

#### 2.1.2 General comments on Statement

The above Extract was taken from the CESA Opening Statement. In this Extract CESA are indicating that User Interface is evolving and that future User Interface Innovation will be impeded by prominence regulation, especially that the Home Screen must have Apps.

#### 2.1.3 Rebuttal of Statement.

When a TV Manufacturer/Platform is designing their User Interface, including the initial setup and the Home Screen, there are, at least, two different forces at play, Optimizing the user experience, as well as maximizing the revenue to the Manufacturer/Platform. Sometimes these forces are complimentary such that if a TV has a smooth user experience, then they will possibly sell more TV units. The iPhone would be an example of such a product.

Manufacturers/Platform can help to maximize average revenue per user (ARPU) by optimizing the home screen, as well as the initial setup procedure. If a user subscribes to a subscription service on a TV, then there is generally a reoccurring revenue sharing model between the App Provider and Manufacturer/Platform. Some Apps will also have 'bonus' commercial deals with Manufacturers/Platforms; this is apparent from how particular Apps may get special promotion during the initial setup, or possibly have dedicated buttons on the remote control.

And of course, Manufacturers/Platform earn revenue from the placement of Apps and/or Programs during Content Discovery such as Search and Recommendations. Manufacturers/Platform also have additional earning revenue sharing models with Add Supported streaming content. This is especially the case the Manufacturers/Platform has its own Free Ad-Supported TV (FAST) Service. The more users watch FAST Service the more revenue that is shared. Global FAST revenues will reach \$17bn USD across 138 countries in 2029, up from \$8bn in 2023. [<https://tbivision.com/2023/09/28/pluto-tv-roku-samsung-tv-plus-to-account-for-50-of-global-fast-revenues-by-2029/> ]

Manufacturer/Platforms do not earn any revenue from a user watching live broadcast TV, or from users watching BVOD Content.

Manufacturers/Platform design home screen, and the initial setup procedure to maximize their ARPU. I would posit that removing from the App Ribbon from the home screen is, in part, to maximize revenue and take control of user's choices. If a user has a favorite App, but it is not preferred by the Manufacturers/Platform, then user will never be able to access it or its content on the home screen assuming the user can find it in the App Store.

Without an App Ribbon on the home screen, platforms can more easily promote the recommended content which increases their ARPU, and while users struggle to find the Apps and Recommendation it prefers.

While there may be different innovations coming down the tracks it is imperative that home screens give users choices to watch what they want to watch, and not just what maximizes revenue for the Manufacturers/Platforms.

## 2.2 Australia missing out on Models with increase costs.

### 2.2.1 Extract Statement

*Mrs Soud: The consumer impacts if we don't include these alternative options and amendments are, firstly, that Australian consumers will miss out on the latest TV models, home screens and innovations that other consumers around the world get, including the smart UIs that I've mentioned, which is something Australians, as early technology adopters, will resent; and, secondly, that Australians already facing cost-of-living pressures will pay more for TVs that are launched locally because any bespoke reconfiguration comes with a cost that will be passed on to consumers—noting that we are one per cent of the global TV market.*

### 2.2.2 General comments on Statement

CESA is stating that Australia will miss out on the latest TV Models and innovations due to prominence related regulation and that TV Models will cost more for Australians specifically due to the prominence requirements.

### 2.2.3 Rebuttal of Statement.

There is new country Regulation introduced around the world for ECO, Safety, Broadcast, Accessibility, and various other Compliance reasons on a regular basis. Manufacturers are already dealing with the impacts, and typically will only completely withdraw TV models due commercial reasons such as High Import Duties or Low Sales. All of the main countries around the world have their own regulation or unique requirements. For Example, India adopted IS 18118:2022, and are in the process of issuing regulation which mandates that all TVs must have a satellite tuner.

Australia is a profitable country in which to sell TVs. The TVs sold in Australia are more typically on the Higher End, and as such the Profitability, or Marginal Profit, is higher. Manufactures are highly unlikely to pull out of Australia due to prominence regulation.

Prominence is purely a Software and Server Requirement. This Development effort is primarily a once off Software development cost. Of course, there will be ongoing quality assurance costs, but I would expect the main manufactures are working on minimising these costs through automated testing.

### 2.3 Australia Prominence Requirement are more prescriptive

#### 2.3.1 Extract Statement

*Mrs Soud: Yes, there is a framework in Germany, and I believe the UK Media Bill is being progressed at the present time. Those frameworks or proposed legislation do go further than what is in Australia. The UK bill is a more principle based approach. It allows for innovation to be preserved for users. In Germany, I believe the framework is more to do with content rather than apps. Again, neither of them is as prescriptive as what is being proposed in Australia in terms of prescribing the size, shape, positioning or area in which tiles need to be presented on the home screen.*

#### 2.3.2 General comments on Statement

CESA is stating here that there is at least prominence in Germany and UK. And that the Australian regulation is more prescriptive than both UK and Germany.

#### 2.3.3 Rebuttal of Statement.

In Europe there is Prominence regulation in place or in the process of being passed in UK, France, Germany and UK. Each of the prominence schemes have their own peculiarities

In Germany there is a list of over 200 organization which should be include for prominence as Broadcast and/or BVOD if they are available. Also, each Manufacturer/Platform needs to make a declaration which must be available to the public regarding how they have implemented Prominence regulation, including the algorithm how search and recommendation algorithms work.

France law/regulation references both search and recommendations, and was considering mandating a button the remote control. France already has various other TV regulation such as a regulated Digital Terrestrial TV receiver standard including features such as RF, Parental rating, Program Information and HbbTV.

In the UK the Manufacturers & Public Service Broadcasters are given the chance to mutually agree prominence regime, but if cannot be agreed Ofcom will need to resolve. It is not clear at this point what the outcome of such a failed regulation would be. Such uncertainty will be challenging for Platform/Manufacturers.

The law in Italy states that the regulator shall state how prominence shall be implemented but they have not finalized the outcome yet.

A good reference on the complexity of the EU & UK regulation is the following: [https://cerre.eu/wp-content/uploads/2023/12/CERRE\\_Prominence-of-Media-Content\\_Issue-Paper.pdf](https://cerre.eu/wp-content/uploads/2023/12/CERRE_Prominence-of-Media-Content_Issue-Paper.pdf)

I would not say Australian prominence draft bill & regulation are more prescriptive, but rather I would say that they are unique as are all the different country regulations.

## 2.4 18 months to 2-year Justification

### 2.4.1 Extract Statement

**Mrs Soud:** *If you're doing it as an ad hoc change and then try to pull in different experts and get them to work on it and then test it in circumstances where maybe test platforms or development platforms may no longer be available, that gives rise to the risk of issues arising. There are a lot of other operational factors as well. You've got manufacturers that are now, at this point in time, locked into their product development and design for 2025 models. They're moving into the next phase, which is preproduction. They will now start to do certification, energy testing and those sorts of registrations in anticipation of launching those products in Q1 or Q2 of next year.*

*To then start to tell them, 'Oh, no, you've got to now go back and pull it together'—those development teams that have worked on those products have now gone and been allocated by overseas manufacturers to work on other projects and are now developing 2026 televisions.*

### 2.4.2 General comments on Statement

The comments from CESA are that the different development teams work is already fixed for development for 2025, and now developing for 2026.

### 2.4.3 Rebuttal of Statement

From my experience leading TV development projects and teams over many years, they never go according to plan. The plans need to be adjusted dynamically. There are new regulations and business requirements coming across the world with varying different timeframes. And development teams need to react. One major example of this was the covid pandemic. Developer teams need to adjust quickly. It was not possible to say, sorry our product development is locked in for 2 years, when a critical part is no longer available, and an alternative part requires a change to Software.

Manufactures will implement the regulation, as Australia is a profitable market.

## 2.5 Not enough Space on Home Screen

### 2.5.1 Extract Statement

**Mrs Soud:** *While CESA supports the proposed regulation mandating a single live TV tile on the home screen, we do seek flexibility on the design of the tile. In relation to the current positioning requirement for free-to-air BVOD apps, CESA cannot support the regulation as currently drafted. Further alternatives and amendments are needed, as an overly prescriptive, one-size-fits-all approach is unsuitable. Under the draft regulations, TV manufacturers must auto-download a separate app tile on the home screen for each of the five Australian free-to-air broadcasters. This is not possible on all current TV home screens as there simply isn't enough space to accommodate the five apps—possibly more, if you include community broadcasters and children's television apps—without disturbing existing commercial arrangements. This is why CESA is seeking alternative positioning options and a two-year lead-time to implement.*

### 2.5.2 General comments on Statement

The comments from CESA are that there isn't enough space to accommodate the five apps without disturbing existing agreements.

### 2.5.3 Rebuttal of Statement

From my experience, it is possible to expand the number of apps on the home screen, especially if manufacturers/platforms are creative. Creativity can sometimes be stifled when creative freedom is limited by revenue generation, but there is always room for improvement.

Each manufacturer may have their own philosophy, but there is always space to expand. One idea would be to add a second Ribbon. Alternatively, it may be possible to expand the number of tiles to the sides, typically to the right. Another alternative might be to alter the size and shapes of the tiles dynamically as the user move the cursor along the tiles.

## 2.6 Not enough Memory

### 2.6.1 Extract Statement

*Mrs Soud: I think there are some assumptions that are made by Mr Cleary in his report. I think, in his evidence this morning, he accepted that there may be some models that will require memory upgrades. Certainly, for some of our members, that will be the case, particularly for those with lower end products. Lower end TVs usually have pretty basic specs—they're mapped out to a certain amount of memory. If you now wish to download more apps than what that device is capable of, you're going to have to do a memory upgrade, and that's not a simple thing.*

*Senator DAVID POCOCK: So lower end TVs couldn't handle an additional seven apps?*

*Mrs Soud: By my understanding—I'm not technical, but I'm happy to confer with members and come back if there's any further detail—you would typically get an error message if you tried to download the app, because the device doesn't have sufficient memory to download it.*

### 2.6.2 General comments on Statement

The comments from CESA are that some devices have low memory and would require a memory update to include additional apps, which is quite complex.

### 2.6.3 Rebuttal of Statement

From my experience, it is unlikely that new or recent models exist in the market where the addition of five apps will exceed the memory available. It would be inconsistent with consumer expectations if TVs were being sold where users could not install 5 apps without running out of memory.

## 2.7 Third party developer inflexibility

### 2.7.1 Extract Statement

*Mrs Soud: I think it varies. As we said, for lower end models many require a bit more than others but it's fundamentally that we are relying on overseas manufacturers. Our members are relying on third-party system developers to give prominence a priority within their business strategies and development schedules. Those are quite rigid, and all the indicators from those parties are that it cannot be done in one or six months time. They won't put the resources to it to make it happen.*

### 2.7.2 General comments on Statement

The comments from CESA are that they rely on third-party developers and their schedules are quite rigid.

### 2.7.3 Rebuttal of Statement

From my experience, if there are regulatory requirements then third parties will usually be proactive assuming manufacturers have business contractors to support compliance. It is in the interest for platform or third parties to have compliant software for both their current and future projects.