



Submission by Free TV Australia

Prominence framework for connected TV devices

Department of Infrastructure,
Transport, Regional Development,
Communications and the Arts

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1. Executive Summary

- Free-to-air television (FTA) plays a crucial role in making Australian content available, thereby supporting the Government’s social and cultural policy objectives to ensure that Australians can freely access quality local content such as entertainment, drama, live sport and trusted news.
- Ensuring that Australians can easily find these services and that these services are displayed prominently on connected TVs and other devices is the single most critical regulatory issue facing our industry and the millions of Australians that rely on our services each and every day.
- The user interfaces on connected TVs and other devices such as set-top-boxes and HDMI dongles are designed by manufacturers to position them as critical gateways to the audience in a way that puts at risk the availability, prominence and discoverability of important free Australian news, entertainment and sports content and threatens the sustainability of the FTA broadcast sector.
- Accordingly, we warmly welcome the Government’s commitment to implementing a regulated prominence framework to ensure that Australians have free, easy and universal access to locally relevant television services.
- Of the models discussed in the Proposals Paper, an industry Code that establishes a must-carry and must-promote prominence framework under the *Competition and Consumer Act 2010* (CCA) is the most efficient and effective process for achieving the Government’s commitment.
- This Code would be drafted by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department) and would be supported by minor changes to the *Broadcasting Services Act 1992* (BSA) and *Customs (Prohibited imports) Regulations 1956* (Customs Regulations).
- This framework would ensure **free-of-charge** priority placement for FTA services, built on three key principles (Prominence Principles):
 1. Free and local terrestrial TV and BVOD services provided by licenced commercial and national broadcasters (**Local TV Services**) must be prominent and universally available for all Australians across all of their devices
 2. Australians must be informed of the Local TV Services that are available to them on devices when making a purchase decision
 3. As new technologies and search and discovery tools emerge on devices, free, prominent and universal access to Local TV Services for all Australians must be maintained through the inclusion of these services in all search, discovery and aggregation tools.
- Alternative models such as reporting or fair bargaining obligations would be ineffective in achieving the Government’s policy commitment of ensuring prominence for Local TV Services. Neither model would guarantee prominence for all Local TV Services, nor would they prohibit manufacturers using their gateway position to demand payment for prominence.
- It is critically important for the success of the framework that immediate compliance with provisions such as app placement and prioritisation, that manufacturers are already actively seeking to negotiate with content providers, is required from the date that the Code takes effect.
- Compliance with other proposed requirements under the prominence framework would be required within 12 months of commencement. From that time, all devices sold in Australia, together with those devices already in-market and that are still supported by manufacturer updates should be compliant with the new framework, subject to a limited exception for existing third party contractual arrangements made prior to the Government’s policy announcement (namely, 7 May 2022).

2. Glossary

This Glossary is provided for ease of reference. Comprehensive definitions of the terms that Free TV Australia proposes will be used in the industry code are included in Appendix 1.

Term	Meaning
ACCC	the Australian Competition and Consumer Commission.
ACMA	the Australian Communications and Media Authority.
Broadcaster	the holder of a commercial television broadcasting licence, the Australian Broadcasting Corporation (ABC) or the Special Broadcasting Service Corporation (SBS).
BSA	<i>Broadcasting Services Act 1992.</i>
BVOD Service	a Local TV Service which is a broadcaster video on demand (BVOD) service (including free live streaming).
CCA	<i>Competition and Consumer Act 2010.</i>
Customs Regulations	<i>Customs (Prohibited imports) Regulations 1956.</i>
FTA	free-to-air.
LCN	logical channel number.
Local TV Service	a free service delivered by or on behalf of a Broadcaster that: <ul style="list-style-type: none"> (a) delivers content to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means; or (b) without limiting paragraph (a) of this definition, delivers, whether by radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, content on a point-to-point or point-to-multipoint basis.
Manufacturer	any corporation that manufactures, produces, processes or assembles Regulated Devices (or component parts of Regulated Devices) or, if that corporation does so solely as a contractor for a third-party corporation or under the direction or control of a third party corporation, that third party corporation.
Primary Access Point	the primary access point to applications on any Regulated Device, including any ribbon or menu system.
Prominence Principles	1. Free and local terrestrial TV and BVOD services provided by licenced commercial and national broadcasters (Local TV Services) must be prominent and universally available for all Australians across all of their devices

	<ol style="list-style-type: none"> 2. Australians must be informed of the Local TV Services that are available to them on devices when making a purchase decision 3. As new technologies and search and discovery tools emerge on devices, free, prominent and universal access to Local TV Services for all Australians must be maintained through the inclusion of these services in all search, discovery and aggregation tools.
prominent	<p>when used in the context of a Primary Access Point, means that the Terrestrial Live TV application (in the case of Regulated Devices with an RF tuner) and the applications for each BVOD Service appear as the first applications on that Primary Access Point, without the need to navigate within the Primary Access Point, and those applications are of the same size and general visibility as other applications that appear on that Primary Access Point for other similar content services. The application for the Terrestrial Live TV function must appear first, followed by those for the BVOD Services presented in order of LCN of the relevant Broadcasters.</p>
Regulated Device	<p>any:</p> <ol style="list-style-type: none"> (i) connected television (or connected projector/monitor); (ii) set top box or similar device, dongle, puck and any other device, including using technology which may be developed in the future, that may be used to make, or assist in making, any Local TV Service available to a member of the public for viewing on a television; or (iii) other device (excluding any device within subparagraph (i) or (ii) of this definition) that is capable of displaying a Local TV Service and which has a Primary Access Point for content that displays applications, where either of the following conditions are satisfied: <ol style="list-style-type: none"> (A) the manufacturer of the device (or any related body corporate of the manufacturer) makes available any online content services (as defined in clause 3 of Schedule 8 of the Broadcasting Services Act 1992); or (B) the manufacturer of the device (or any related body corporate of the manufacturer) has entered into an agreement, of any nature, with a third party for the display of applications on the Primary Access Point of the device, <p>provided that, in any case, at least one Broadcaster makes available for use by members of the public an application which is compatible with the connected television or other device.</p>
streaming service	<p>a content service, other than a BVOD Service, provided by means of the internet on a point-to-point basis.</p>
Terrestrial Live TV (or Live TV)	<p>a Local TV Service broadcast by means of radiofrequency spectrum.</p>

3. Introduction

Free TV Australia is the peak industry body for Australia's commercial television broadcasters. We advance the interests of our members in national policy debates, position the industry for the future in technology and innovation and highlight the important contribution commercial FTA television makes to Australia's culture and economy.



Australia's commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent. Free TV members provide vital local services to all Australians. Commercial television networks spend more than \$1.5 billion on Australian content every year, dedicating over 85% of their content expenditure to local programming.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia*, highlighted that in 2021, the commercial TV industry supported over 16,000 full-time equivalent jobs and contributed a total of \$2.5 billion into the local economy. Further, advertising on commercial TV contributed \$161 billion in brand value. Commercial television reaches an audience of 16 million Australians in an average week, with viewers watching around 3 hours per day.

The commercial television industry creates these benefits by delivering content across a wide range of genres, including news and current affairs, sport, entertainment, lifestyle and Australian drama. At no cost to the public, our members provide a wide array of channels across a range of genres, as well as rich online and mobile offerings.

A strong commercial broadcasting industry delivers important public policy outcomes for all Australians and is key to a healthy local production ecosystem. This in turn sustains Australian storytelling and local voices and is critical to maintaining and developing our national identity.

However, these public policy outcomes can only be achieved if the services provided by licenced commercial television and national broadcasters are available, prominent and discoverable by Australians on their television sets and related devices. That makes acting on the Government's commitment to creating a prominence framework vital.

3.1 Structure of this submission

This submission follows the structure of the Proposals Paper:

- Public policy case for creating a prominence framework (section 4)
- Scope of framework including terrestrial and BVOD services (section 5)
- Scope of Regulated Devices and manufacturers as the responsible party (section 6)
- Must-carry and must-promote models as the only options that meet the objectives (section 7)
- Implementing the framework through a mandatory industry code (section 8)
- Illustrative direction instrument and BSA amendments (Appendices 1 and 2).

4. The public policy case for action

Broadcasters warmly welcomed the Australian Government’s commitment on 7 May 2022 to legislate a free prominence regime to ensure Australian TV services can easily be found on connected TV platforms. We acknowledge Minister Rowland’s subsequent comments that the current consultation process is to focus on the question of the initial design of a new prominence framework, rather than seeking to re-litigate the clear public policy imperative for prominence regulation.

While we agree with this approach to this consultation process, given the initial response of some stakeholders, we consider that it is pertinent to establish the public policy case for creating a prominence framework at the outset of this submission, prior to turning to the specific proposals posed in the consultation documentation.

4.1 The ongoing critical social and cultural role of screen content

Since the first television broadcasts in 1956, the FTA television sector has served as a central plank of Australia’s media policy. Our sector supports Australia’s democracy by providing Australians with trusted sources of news and current affairs. We contribute to Australia’s sense of identity and culture through telling Australian stories, through both scripted and unscripted entertainment and drama programming. We also bring all Australians together through our live and free coverage of iconic and culturally significant sporting events.

As such, the Government relies on the FTA television sector to deliver on many of its social and cultural policy objectives, as enshrined in the objectives of the BSA. This includes the:

- availability to audiences throughout Australia of a diverse range of radio and television services offering entertainment, education and information
- promotion of broadcasting services in developing and reflecting a sense of Australian identity, character and cultural diversity
- availability to audiences throughout Australia of television and radio programs about matters of local significance.¹

The achievement of the objectives of the BSA² relies on two interrelated factors, namely that:

- consumers can readily find FTA services on widely available consumer equipment
- commercial TV networks are able to raise and retain sufficient advertising revenue to fund the required investment in local content, including news, live sport, entertainment and scripted drama.

However, the actions of the manufacturers of televisions and related devices, and their operating system (OS) providers, are undermining the achievement of these objectives, as we expand on below.

¹ *Broadcasting Services Act 1992*, see 3(1)(a), 3(1)(e), 3(1)(ea)

² *Broadcasting Services Act 1992*, see 3(1)(a), 3(1)(e), 3(1)(ea)

4.2 Market conduct undermining public policy objectives

Televisions and related devices have become very sophisticated, capable of delivering content to consumers across a vast array of applications. Today these devices provide access to a range of video content, streaming, video games, and internet services, as well as traditional terrestrial broadcast services.

However, these service options are not presented to consumers in a fair and impartial manner. Instead, TV manufacturers and OS providers exert control over which options are displayed to consumers, directing viewers to those services that pay the highest price for preferred placement on the Primary Access Point on a device. Other mechanisms to divert traffic come through pre-installing apps and placing streaming-specific buttons on remote controls.

Many manufacturers and OS providers require a share of revenue earned through the apps of Free TV members, or even demand a share of advertising inventory, in order for FTA content and apps to remain prominent and discoverable within their user interfaces. Further, annual payments can be required for apps to be preinstalled on connected TVs and for apps or content to be featured in recommendation tabs, ribbons or rails.

For almost all relevant devices, the user interface and app marketplace is determined by the equipment manufacturer. For example, a Samsung smart TV is inextricably linked to the Samsung Smart Hub app store through its Tizen OS. As such, to the extent that a manufacturer has a significant market share in the hardware market (or the OS market, in the case of Google), it will necessarily have a degree of market power over app developers and providers looking to gain access to the app marketplaces available through the relevant hardware.

The tying of the hardware device to the app marketplace / user interface means that, in order to reach audiences throughout Australia, FTA networks have no alternative other than to seek placement on all platforms. This makes the manufacturers of connected televisions and related devices with any significant market share unavoidable business partners for Free TV members.

When compared to the global subscription-driven streaming service providers, local broadcasters are in a weak bargaining position to negotiate deals with global manufacturing or app marketplace providers as their business models are defined by providing free services to all Australian viewers coupled with free carriage and prominence on the transmitting device. It is self-evident that FTA broadcasters do not have the resources to compete with the increasing number of multinational content service providers (such as Netflix, Amazon and Disney) for prominent positions in app marketplaces and on user interfaces that strike global deals that are hard to negotiate against in local markets.

Taken together, all of these factors have meant that, where Free TV members have been able to negotiate agreements for prominence, those agreements are fundamentally unfair to our members. Significant payments are required to be paid, for little benefit in terms of limited availability, prominence and discoverability rights.

More fundamentally, from a policy perspective, *any* amount paid by FTA networks for these benefits is unjustified. Any payment for availability, prominence or discoverability on televisions and other consumer equipment results in fewer resources being available to continue to invest in local content and services, directly undermining the ability of Free TV members to achieve the objectives established in the BSA.

Free TV is aware of punitive responses by TV manufacturers in situations where FTA broadcasters have refused to meet manufacturer demands, with apps being demoted to the end of the guided installation process or app ribbon/carousel. Further details of this issue have been confidentially provided to the Department by individual networks.

This is analogous to the issues considered in relation to the Food and Grocery Code of Conduct³ and specifically the “gateway” supermarket chains exerting their market power in relation to positioning of goods on supermarket shelves. Rule 16 of the Food and Grocery Code was included to restrict gateway suppliers from requiring a payment to secure prominent placement on shelving.

In addition, in some cases broadcasters are competing for prominence against the services offered by manufacturers and OS providers themselves, such as Samsung which offers an international streamed linear product, TVPlus or Google’s YouTube. In such cases, commercial agreements to provide for appropriate prominence of the services of Free TV members are not able to be negotiated and this has further contributed to the problem that locally relevant, licenced and regulated FTA services are becoming difficult for Australians to find.

A regulated prominence framework, mandated under an industry code, is therefore required for the manufacturers of connected TVs and related devices that provides for the availability, prominence and discoverability of local TV services.

4.3 Prominence regulation supports the UNESCO convention on cultural expression

The UNESCO Convention on the protection and promotion of the diversity of cultural expressions requires Australia to protect and promote the diversity of cultural expressions within its territory.

FTA television services provide an important, and unique, contribution to Australia’s shared culture. Commercial television broadcasters spend around \$1.5 billion every year on Australian content and broadcast more than 25,000 hours of local programming. The investment of the public broadcasters in Australian television content is also significant.

A mandatory code is required to ensure that Australians are able to easily find Australian FTA services, which are currently hidden behind a mass of streaming content on connected devices. Without the Code, investment in Australian content will be compromised, threatening the production of the important and diverse Australian content made available by broadcasters. Implementation of the code will therefore, in addition to giving effect to an election commitment, support Australia’s compliance with the Convention.

³ Competition and Consumer (Industry Codes-Food and Grocery) Regulation 2015.

5. Scope of the prominence framework

5.1 Framework must include terrestrial broadcast and BVOD services

The growth of global media platforms has important implications for Australia’s national and cultural identity, and for our access to local information. A strong local media sector, and the ability for Australians to find locally relevant services, is central to our ability to maintain public participation and trust in democracy and a shared sense of national identity.

It is critical that a prominence framework is established in such a way as to ensure that as a country we can continue to find and enjoy the benefits delivered by a viable and thriving local broadcast industry. Without this, we risk losing our free access to local news, local stories and sport.

While commercial television now needs to compete with a greater range of services than ever before, our recent experiences with bushfires, floods and COVID-19 demonstrate that Free TV members deliver a vital national public service. Australians expect and continue to rely on these services in times of national crisis to make sure they get the facts they need, and to bond with their communities over entertainment viewing.

As recent research undertaken by the Social Research Centre for the Department has confirmed, the majority of Australians who watch FTA television do so through a broadcast signal or antenna.⁴ As such, it is critical that the prominence framework ensures that the live TV function is easy to activate on all devices with an RF tuner and that the Electronic Program Guide clearly presents all licenced and national broadcaster services.

In the modern media environment Australians are increasingly expecting to be able to access their content from FTA broadcasters on the device (and via the technology) of their choice. As demonstrated in the research discussed above, this expectation is being seen by the increasing numbers of Australians accessing FTA services via a BVOD service.

BVOD services are playing a crucial complementary role to Terrestrial Live TV, both in terms of the content and functionality offered to viewers, and in terms of the viewer demographics that use each service. Only FTA networks can offer the Australian community the best of a ubiquitous terrestrial broadcast network and streamed content via our BVOD apps—providing a seamless experience as audience preferences evolve.

It is critical that the prominence framework support this evolution by ensuring that Australians can easily find FTA services via both terrestrial and BVOD services.

In addition, as highlighted in section 4.1, the achievement of the Government’s communications objectives relies on Free TV networks raising sufficient advertising revenue to fund the required investment in local content, including news, live sport, entertainment and scripted drama. As advertisers recognise the trend of audiences to also access FTA content via BVOD services, they are increasingly partnering with FTA networks to advertise in innovative ways across this platform. BVOD services are therefore a vital part of the commercial proposition for networks and a key factor in the future sustainability of our sector.

⁴ Social Research Centre (2022), Television Consumer Survey, reported to the Australian Government Department of Infrastructure, Regional Development, Communications and the Arts, p. 26. Unpublished.

The prominence Code must include BVOD services to reflect evolving consumer preferences, future proof the framework and to ensure the long-term commercial viability of commercial TV services that are directly linked to the achievement of the Government’s policy objectives.

Accordingly, we propose a definition of Local TV Service that would include:

- Broadcasting services provided by commercial television licensees
- Broadcasting services delivered by the ABC and SBS
- BVOD services (both free live streamed content and free content on-demand) of both commercial television licensees, the ABC and SBS.

5.2 Content obligations are a poor measure of social and cultural importance

The Proposal Paper suggests that one option for the Government may be to link the prominence of services to local content obligations. Under this approach, prominence would be afforded to those services if they are subject to regulated requirements for Australian content.

This option should not be supported.

The importance of commercial television broadcasters (and on a different but also important basis, the national broadcasters) to the Australian public is not reflective solely of regulatory obligations or content quotas. Local TV Services provide a diverse range of programming to all Australians including free news and current affairs, live sport, entertainment, lifestyle and drama. In the case of commercial TV broadcasters, these services are required to be advertiser funded and free to viewers. Free TV members are also bound by accessibility requirements, local news service obligations, advertising restrictions and fairness and impartiality requirement for news broadcasts, to name just a few of the elements of the regulatory compact. Free TV members must also pay for spectrum.

However, the programming that makes commercial and national TV services central to the lives of Australians is not quota driven. This point is noted in the Proposals Paper, where it highlights that such an approach would prioritise the provision of Australian content, but downplay other forms of content that support important policy outcomes such as news and emergency warning announcements.⁵

As such, a link to content obligations is an overly simplistic and crude measure of the relationship between services and the achievement of Government policy objectives and does not appropriately recognise the value of the Local TV Services delivered to the Australian viewing public.

Further, any future introduction of Australian content expenditure obligations on streaming services would presumably provide access to the prominence framework for all these services. This would fundamentally undermine the very intent of the prominence framework—to ensure that Australians can find and easily access locally relevant TV services. Given that the global streaming services currently enter commercial arrangements for prominent placement, extending the prominence framework to these streaming services would provide them with preferred placement for free, placing the local media sector at a comparative commercial disadvantage to the status quo.

Finally, the fact that the national broadcasters would have to be deemed to be eligible under this approach again underscores what a poor metric content obligations are for whether a service is important to the achievement of Australia’s social and cultural policies.

⁵ Prominence framework for connected TV devices, Proposals Paper, pg 29

6. Scope of regulated devices and responsible party

6.1 Code should include objective definition of devices

The definition of a “Regulated Device” in the Code that will be implemented under the proposed new regime should include connected televisions, set top boxes, smart projectors and monitors, games consoles, dongles, pucks and any other devices, including using technology which may be developed in the future, that may be used to make, or assist in making, Local TV Services available to a member of the public.

The first limb of the definition would include connected TVs and any device used to make Local TV Services available for viewing on a television. The definition should also include a second limb. Under that second limb, where a device that may be used to view Local TV Services is not a connected television, and is not used to facilitate viewing those services on a television (that is, where the device does not fall within the first limb), one of two additional criteria would be required to be satisfied before the device fell within the definition of a Regulated Device. These are:

- the device has a Primary Access Point and either the manufacturer or any of its related entities make available streaming services; or
- the manufacturer (or any of its related entities) has entered into an agreement with a third party for the display of one or more apps on the Primary Access Point of the device.

This second limb, which would apply only in limited cases, supports the underlying policy rationale of the regime, which is to ensure that Local TV Services are easily available to Australians. Where a Manufacturer provides its own streaming content, or has entered into an arrangement to promote the content of third parties, there would be a risk that Local TV Services may not be easily accessible through that device.

The definition should also require that, in any case, compliance with the prominence framework would only be required for devices for which a compatible app to deliver a Local TV Service was available to the Manufacturer.

Given the cost of development, BVOD app variants will only be made available where there is a material audience reachable through that device. BVOD apps for ‘edge cases’ such as washing machines (as raised in the Proposal Paper) will likely not be developed as the cost of development would likely exceed the revenue opportunity. This commercial consideration, together with the confined scope of the definition outlined above, will ensure that the reach of the new regulatory regime is not inappropriately broad.

6.2 Primary use test would be subjective and too narrow

Overlaying a “primary use” test would introduce uncertainty through a subjective test that would need to be interpreted by the regulator. This subjectivity and the need for regulatory oversight and involvement is correctly noted in the Proposals Paper.

There is a clear risk here that a primary use test would inadvertently and inappropriately exclude devices, such as gaming consoles, that may not be said to have the primary use of facilitating television viewing by Australian audiences, but are nonetheless important gateways to television content. Free TV notes that the Social Research Centre survey finds a ‘net use’ of games consoles to access FTA

television of 49 per cent, highlighting that while it would be arguable as to whether the primary use of a games console was access to FTA content, it is still a regularly used gateway.

In our view, the second limb of Free TV's suggested definition (as outlined above) is a more appropriate, and objective, test to ensure that devices that are not typically used for accessing content are excluded from the new regime.

6.3 Manufacturers to be responsible for prominence framework compliance

In our proposed framework, it is the party who is ultimately responsible for the overall manufacture of the Regulated Device that is responsible for compliance with the prominence framework. In most cases, the responsible corporation will be the owner of the brand applied to the device when it is sold to the end consumer.

It is important to distinguish between component manufacturers and the ultimate operating party. For example, in the case of Kogan that holds contracts with third parties for the construction of various components (or entire devices), the obligation to ensure that the device, in its final fully assembled form, is compliant with the prominence framework would remain with Kogan.

This approach ensures there is clarity regarding the entities that must comply with the regulatory obligations, regardless of the level of vertical integration of the supply chain from hardware vendor, OS provider and user interface implementation. For example, manufacturers like Samsung and LG develop their own hardware, OS and implement their own user interface. Other manufacturers like Sony, develop their own hardware but licence an OS from a third-party (Google) and develop their user interface on that third-party OS. Google acts as both a licensor of an OS to other manufacturers as well as developing its own Regulated Device hardware, using its own OS and user interface (for example Google TV).

As noted in the Proposals Paper, any form of split accountability model risks creating a situation where it "may be difficult or impossible for the regulator to apportion responsibility for any failure to meet a prominence obligation."⁶

6.4 Other definitional points

The Proposals Paper notes that the obligation on device manufacturers could be constructed with an exception for liability where an app had not been provided by any Broadcaster. As discussed in Section 6.1, and set out in more detail in Appendix 1, our proposed definition of Regulated Device would require that for a device to fall within that definition, and therefore be subject to the prominence framework, at least one Broadcaster would have to make available for use by members of the public an application which is compatible with the connected television or other device. This achieves the same outcome as the exception for liability in the Proposals Paper.

⁶ Ibid pg 34

7. Prominence framework models

A free right to prominent placement for Local TV Services must be embedded in Australia’s regulatory framework.

7.1 Reporting and bargaining framework options will not deliver prominence

It will not be sufficient to require reporting on prominence arrangements, or to implement a voluntary code. The commercial incentives that exist for manufacturers and OS providers to provide prominence to other services, preference their own services and to advantage their own emerging advertising businesses means that the only course available to address this significant policy issue is by mandating the desired policy outcome. We submit that the most administratively straightforward approach to regulating a prominence framework is to create a mandatory code under Part IVB of the CCA, as we expand on below.

A reporting framework would do little to advance the status quo as it would not compel any change to the current practice of manufacturers and OS providers charging for prominence, nor would it guarantee the availability and prominence of all Local TV Services. As correctly noted in the Proposals Paper this option “would do little to enhance the prominence of local TV services available to Australians”.⁷ We strongly agree with the statement in the Proposals Paper that this option would not be consistent with the election commitment given by the Government.

A fair bargaining framework would effectively entrench the expectation for payment by the providers of free Local TV Services for carriage or prominence, which would undermine the public policy objectives of a free universal service.

Further, as noted in the Proposals Paper, a fair bargaining framework would not preclude manufacturers from continuing to extract payment for prominent placement on user interfaces. As we set out earlier in the submission, the extraction of any revenue (in-kind, inventory shares or up-front payments) has a direct impact on the funds available to invest in local services, products and Australian content. A key objective of the prominence framework must be to ensure that the gateway position of manufacturers and OS providers must not be used to extract rents from the local media sector. A fair bargaining framework would merely formalise the use of this gateway position.

As set out earlier in this submission, the use of the gatekeeper position of manufacturers and OS providers to extract payment threatens the feasibility of the advertiser funded business model of our members and limits their ability to deliver on the social and cultural policy objectives through their investment in the important local content relied upon by Australians.

7.2 Must-carry and must-promote obligations are required

Free TV submits that the only option included in the Proposals Paper that addresses all of the public policy issues identified and meets the Government’s commitment is a framework that includes both ‘must-carry’ and ‘must-promote’ elements.

This is the only option that guarantees that Australians can access all local TV services by ensuring that these services are available and prominent on all relevant devices. Such a framework also limits the

⁷ Ibid pg 36

ability for gateway manufacturers and OS providers to use this position to extract payment from local TV service providers at the expense of investment in local content and services.

The remainder of this section sets out how a must-carry and must-promote framework can be readily applied to ensure that Australians have access to local TV services, are aware of the availability of these services when making a purchase decision and can find local content when using search and discovery tools on their devices.

7.3 How we define “prominent” in a must-promote framework

Our glossary of terms in section 2, and the definitions section in Appendix 1, set out our proposed definition of “prominent” in the context of Primary Access Points. That definition is critical to achieve the Government’s objective of ensuring that Local TV Services (as also defined in the glossary and Appendix 1) are easy for Australians to find. The definition makes clear that these services must be displayed in the first five tiles or, where a Regulated Device has an RF tuner, the first six tiles, of the Primary Access Point on each Regulated Device, without the need to navigate or scroll within the Primary Access Point. To ensure that intent of this obligation is not circumvented, we also propose that the size of the tiles representing the Local TV Services be as generally visible and of the same size as other applications that appear on the Primary Access Point.

These tiles should remain in place unless the consumer takes direct and positive action to change the placement of the tiles. The application of algorithms to alter the appearance or placement of BVOD Service applications would not constitute a direct and positive action of a consumer.



7.4 Carriage and inclusion in EPGs of all live TV offerings

The prominence framework must ensure that Live TV offerings provided by Broadcasters are available and easy to find on devices. For devices that include an RF tuner, the Code should require:

- Access to the Terrestrial Live TV function is prominently displayed on the Primary Access Point
- The live TV function must default to Terrestrial Live TV services provided by Broadcasters
- When no external source is selected (eg. HDMI inputs), devices must default to the Terrestrial Live TV function, displaying the last selected broadcast channel.

Illustrated example: Terrestrial Live TV function prominence



For all Regulated Devices that provide a list, register or Electronic Program Guide (EPG) of live TV offerings, whether delivered via Terrestrial Live TV or any other means, the device must:

- (for devices with an RF tuner) include all available Terrestrial Live TV channels offered by Broadcasters, presented in order of their LCN⁸
- include each BVOD Service which provides a linear stream of content that is offered by the BVOD Service in any products that list, register or otherwise aggregate live linear streaming services, with these services presented in the LCN order of the equivalent Terrestrial Live TV service.

7.5 Carriage and prominent placement of BVOD Services

The prominence framework must ensure that BVOD Services are available from the first instance setup of devices and subsequently prominent on the Primary Access Point. The Code should require:

- During the first instance setup of a Regulated Device, or following a factory reset of a Regulated Device, each BVOD Service must either be installed onto the Regulated Device automatically or be pre-selected for download and installation when the Regulated Device is first connected to the internet
- Each BVOD Service must be directly accessible from the Primary Access Point on the Regulated Device unless the consumer has taken direct action to alter the appearance or placement of those

⁸ Except in the case of cable/satellite linear set-top-boxes made available by subscription television licensees where Broadcaster services are offered with other services delivered via a subscription television service. This exception would not apply to streaming service aggregation products offered by subscription television licensees.

applications (the operation of algorithms to alter the appearance or placement of BVOD Service applications does not constitute a direct action of a consumer).

Illustrated example: BVOD app prominence



7.6 Must promote - access via remote and voice controls

Manufacturers are increasingly providing streaming companies the opportunity to purchase a button on remote control devices to allow easy access to these services. The Code should require that where a remote control is provided with a device, Local TV Services can also be accessed.

Accordingly, the Code should require that:

- where the Regulated Device has a RF tuner, a single dedicated button that activates the last selected Terrestrial Live TV channel should be provided on the remote control
- if one or more dedicated buttons for streaming or related services are provided on the remote control, a dedicated button must also be provided that activates a menu within the Primary Access Point, where only BVOD Services can be selected.

In addition, where voice commands are available, Local TV Services must be able to be launched by voice command (in addition to the inclusion of Local TV Services in voice search tools as discussed below). This is important to address the current inconsistent results achieved by attempting to launch Local TV Services via a voice command. For example, Google Assistant voice commands to play 7Plus should result in 7Plus being played, not YouTube search results with content featuring 7Plus.

Illustrated example: Access to Terrestrial Live TV and BVOD Services included on remote controls



7.7 Inclusion in search and discovery tools

Content search and discovery tools provided by the Manufacturer must be covered by the framework. These tools are increasingly becoming a critical part of the relationship between the viewer and the content, with manufacturers and OS providers seeking to disintermediate the relationship between content providers and the viewer. This includes tools like voice activated searches, text-based searches and algorithmically driven content recommendations.

Further, given the importance of Local TV Services to the community and the social and cultural policies that they underpin, we submit that the must-promote framework must also apply a “free content first” principle to the discovery of content on Regulated Devices.

Importantly, these requirements must cover not only the search and discoverability tools that are available today, but also those that are developed in the future and ensure that inclusion in these tools is made available to Broadcasters free of charge.

Therefore, the Code should require that where a Regulated Device includes any content search, discoverability or prominence tools each of those tools must provide that:

- each Local TV Service is included in each tool and given prominence. If a consumer searches for content that is made available by a Local TV Service, the tool must provide prominence to the content provided by the Local TV Service
- the content from each BVOD Service must be made prominently available in any aggregated “Continue Watching” or similar services offered through the tool.

7.7.1 Future proofing as services evolve

Technology and services in content delivery are rapidly evolving. This includes the technology that manufacturers and OS providers are using to guide the content delivery journey for consumers through personalised recommendations for the individual in front of the relevant device.

To ensure that the Government’s prominence framework remains relevant and effective as these tools evolve, the prominence Code should require that each Manufacturer includes every Local TV Service in search, discoverability or other prominence features that are developed in the future, including the

use of biometrics for personalised content discovery, for any other Regulated Device or streaming application developed by the Manufacturer. Further, the Code should prohibit the making of agreements that provide for favourable treatment in search, discoverability or prominence tools ahead of Local TV Services. This should include ensuring that where developer apps for streaming services are hard-coded (are unable to be uninstalled or moved by the consumer) the same treatment is afforded to Local TV Services.

7.8 Australians must be made aware of the availability of the services provided by Broadcasters

It is important that consumers are made aware of the availability of services provided by Broadcasters. As such, the Code should require that information is included on the packaging and associated marketing collateral for each Regulated Device that indicates the compatibility of the Regulated Device with a RF tuner and the availability of BVOD Services.

In addition, where the availability of a streaming service on a Regulated Device is advertised at Point-of-Sale, the availability of Local TV Services should also be prominently advertised.



7.9 Prohibition on altering content

As outlined above, the ability of Free TV members to continue to invest in local content and services is dependent on their ability to continue to adequately monetise content across all the various platforms on which they make programming available. However, manufacturers and OS providers are increasingly looking to leverage this content for their own advantage through the development of their own advertising products and the creation of their own advertising inventory around third-party content. This gatekeeper behaviour will have an increasingly negative impact on our ability to monetise our own content, to the detriment of the services we are able to provide.

Accordingly, the Code should provide that no Manufacturer will, in connection with any Regulated Device:

- insert ads over-the-top of any Broadcaster’s content, including within or around the EPG
- alter any Broadcaster’s content to be able to insert its own advertising around any Local TV Service
- obscure, in any way, any content guide made available by any Broadcaster, or collectively on behalf of all Broadcasters, including the EPG
- insert an advertisement between a direct request by the consumer for a Local TV Service (for example, through a remote control action or a voice command) and the serving of that content.

7.10 Disclosure of content promoted due to commercial agreements

Manufacturers are increasingly redesigning their user interfaces to include a significantly greater amount of “recommended” content inventory. These spots are generally available for purchase by content service providers.

However, it is not always clear to the viewer that a piece of content is being offered to them as a result of a commercial arrangement. This is supported by research recently undertaken by RMIT that revealed that 55 per cent of connected TV users “could not correctly distinguish between a paid advertisement and a personalised recommendation on a smart TV home screen.”⁹

In the same way that web-based internet searches offered by Google, Bing and DuckDuckGo all tag search results that are driven by commercial relationships, the same transparency should apply to content being surfaced on Regulated Devices.

⁹ <https://if.com.au/smart-tvs-need-smart-regulation/>

Sony and Samsung Primary Access Points – content suggestion examples



7.11 Data separation requirement

Consistent with [submissions](#) that Free TV has made to the Australian Competition and Consumer Commission's (ACCC) Digital Platform Services inquiry, we consider that there is a need for data separation regulation of dominant vertically integrated service providers. In this context, the public policy issue is the collection of consumer behavioural data by manufacturers (and the underlying OS provider) who then use this data to compete against advertiser funded content service providers. That is, manufacturers and OS providers use their gatekeeper position in one market to gain a competitive advantage in separate digital advertising markets.

Given that the use of this gatekeeper position directly impacts the ability of commercial television broadcasters to invest in local content and services, it is appropriate that bespoke data separation requirements be included in the proposed mandatory industry Code.

8. Framework implementation

8.1 Speed of implementation critical to choice of framework

A critical consideration in determining the appropriate mechanism to implement the prominence framework is the speed with which it can be established and operationalised. As noted in the Proposals Paper, progressing amendments to the BSA and then drafting the required delegated legislation would be a complex and slow process. Importantly, it is not clear that such a process would yield a preferable regulatory regime.

Conversely, a Code struck under the existing CCA approach would utilise a ready-built enforcement framework, while a new bespoke framework would need to be created to enforce the prominence regime under the BSA.

Therefore, in the absence of a demonstrably preferable regulatory framework being achieved, the most efficient process for addressing the policy result should be supported. In our view, that is a Code under Part IVB of the CCA.

8.2 Code to be drafted by the Department

Under our proposed model, the Code formulation process would commence with a Direction from the Minister for Communications to the Department to draft an industry Code under Part IVB of the CCA. This ensures that the scope and intended outcomes of the Code are determined by the Department with portfolio responsibility for the achievement of the Government's communications policy objectives. An illustrative draft of a direction is at Appendix 1.

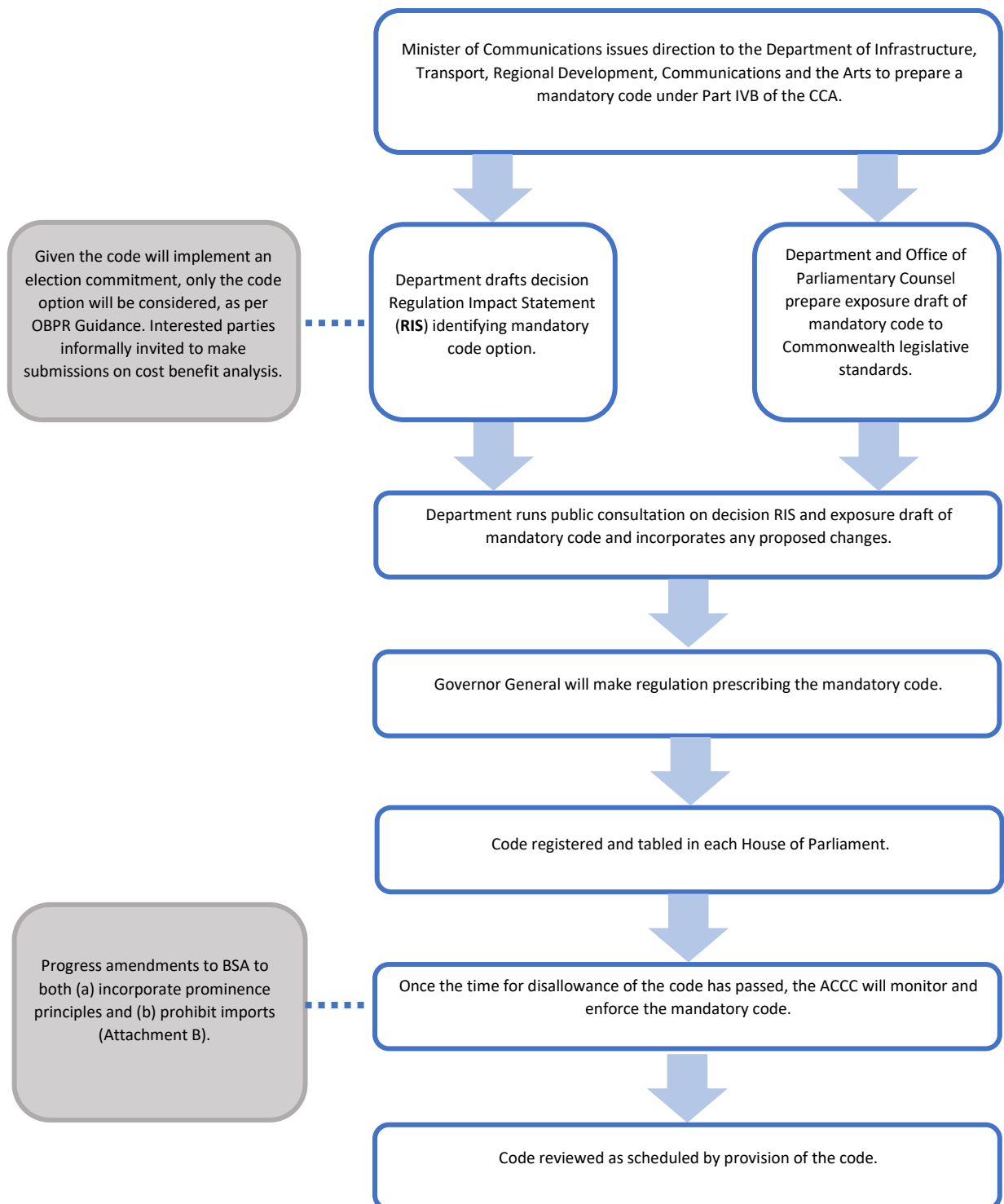
Once the Code is registered by the Treasurer, enforcement of the Code becomes a matter for the ACCC. We acknowledge the Department's comments in the Proposals Paper regarding the appropriateness of the general competition regulator administering a Code that deals with communications sector issues. However, at its core, the cause of the public policy issue to be addressed is the use of market power by manufacturers and OS providers to extract payment for the availability and placement of local TV services. While the use of the market power threatens the achievement of the Government's social and cultural policy objectives, as issues borne of competition harms, remedies using existing competition law are appropriate. The ACMA would have a role in providing any advice that the Department sought in the drafting of the Code, in addition to making technical standards for the purposes of import restrictions (see section 8.4).

Figure 1 provides an illustration of the process from Direction from the Minister to the registration of the new Code under the CCA. As the mandatory code will give effect to an election commitment, while a regulatory impact statement (RIS) must be prepared for the proposed Code, the RIS need only consider the election commitment (with reference to the status quo), and the manner in which the commitment should be implemented.¹⁰

This will simplify the initial processes for the development of the mandatory code (and decision RIS), removing the need for the Department to run a public consultation to understand the industry issues and to develop an interim or consultation RIS. This process could be completed in a six-month period.

¹⁰ As described in the OBPR guidance available here: <https://obpr.pmc.gov.au/resources/guidance-obpr-procedures/special-cases>

Figure 1: Process for developing a mandatory code



8.3 Enshrining prominence principles in BSA

While the mandatory industry code can be drafted and registered without the need for any legislative amendment, given the critical importance of the prominence issue we consider that the three Prominence Principles should be enshrined in the BSA:

1. Free and local terrestrial TV and BVOD services provided by licenced commercial and national broadcasters (**Local TV Services**) must be prominent and universally available for all Australians across all of their devices
2. Australians must be informed of the Local TV Services that are available to them on devices when making a purchase decision
3. As new technologies and search and discovery tools emerge on devices, free, prominent and universal access to Local TV Services for all Australians must be maintained through the inclusion of these services in all search, discovery and aggregation tools.

The process for amendment of the BSA should occur in parallel with the process to develop the code.

8.4 Customs regulation and ACMA technical standard

In addition to amending the BSA to include the Prominence Principles, there is also a need to amend the BSA to allow for the imposition of a ban on imports of Regulated Devices that do not meet the requirements of the code.

To achieve this outcome, it is recommended that the BSA should be amended to allow the ACMA to make technical standards regarding Regulated Devices and to include a prohibition on supplying or importing Regulated Devices that do not comply with any technical standard. A technical standard would then be made requiring that Regulated Devices must comply with the requirements of the code. As a second step, to give effect to the import ban on non-compliant Regulated Devices, the banned devices should be included in Schedule 1 of the Customs Regulations. The exact wording to be incorporated in the Regulations could not be drafted until the code was developed. This would require the support of the Minister for Home Affairs, who has responsibility for the *Customs Act 1901*.

An illustrative draft of the proposed amendments to the BSA is attached at Appendix 2.

8.5 Timeframe for compliance with industry code

The television industry and the related device supply chain has had the benefit of an early and clear indication from the Australian Government of its intention to legislate a prominence framework, with the Government making this statement on 7 May 2022:

Labor also wants to ensure our local TV services, which broadcast the Australian content, sports, news and emergency broadcasting Australians rely on, are easy to find on connected TV platforms, like smart TVs.

We will legislate a prominence regime to ensure Australian TV services can easily be found on connected TV platforms.¹¹

¹¹ <https://www.michellerowland.com.au/news/media-releases-communications/albanese-farrell-rowland-media-release-labor-will-support-local-tv-free-sport-in-the-streaming-age-saturday-7-may-2022/>

This follows commitments being made in other countries for similar regulation to ensure that local services are available, prominent and discoverable on modern televisions and other devices.

Accordingly, Manufacturers have already been provided with a significant lead time to begin to develop implementation plans, able to be implemented worldwide, that would ensure that their user interfaces can support prominence frameworks as they are implemented over time by different jurisdictions.

The majority of the requirements that we are seeking to introduce through the mandatory industry code are matters that Manufacturers are already seeking to use as negotiation threats or tactics. For example, the threat of demotion on Principal Access Points is used as a negotiation tactic with content service providers today as part of the efforts of Manufacturers to monetise their gatekeeper position and the real estate on their user interfaces.

Accordingly, we propose a staged approach to implementation that would require Manufacturers to be compliant with the new framework in relation the prominent placement of Local TV Services for all supported Regulated Devices (that is, all such devices that are in-market or have supported software) from the commencement of the mandatory industry code.

Considering the advance notice of the policy position of the Government and the time that will be taken to finalise the proposed mandatory industry code, compliance with all other aspects of the prominence framework should be required within 12 months of the registration of the mandatory industry code under the CCA by the Treasurer.

8.6 Treatment of existing contractual agreements

It is recognised that there are already commercial agreements in-market that may provide for a level of priority placement on Primary Access Points for some content providers, including Broadcasters. Accordingly, Free TV proposes that compliance with some aspects of the prominence framework would not be required if this would breach a commercial arrangement entered into by a Manufacturer with a content provider other than a Broadcaster prior to 7 May 2022. This exception would only be available to those Manufacturers that could substantiate to the code enforcement body (the ACCC) both that a valid commercial agreement was in place prior to 7 May 2022 and that there was no appropriate mechanism by which compliance with the prominence framework could be achieved which did not breach the relevant commercial agreement. This exception would apply only to the clauses of the mandatory industry code that directly conflicted with an existing commercial agreement. Compliance with all other aspects of the Code would be required.

The date of 7 May 2022 is proposed as the relevant date for determining applicable contract rights as, from that date, all Manufacturers have been aware that a prominence framework was to be introduced and an allowance for this should have been included in any commercial arrangements with content providers. Adopting the suggested approach will ensure that all commercial arrangements negotiated and entered into in good faith will be honoured, whilst guarding against opportunistic gaming of the exception by Manufacturers seeking to hurriedly enter long term deals for priority placement.

For existing contracts with Broadcasters, the new framework must recognise the onerous nature of these contracts and the circumstances under which any such contracts have been struck. As we have outlined in section 4.2 of this submission, in some cases Broadcasters have had no choice but to enter into such agreements to obtain limited prominence benefits, at a high cost. The proposed Code will

have little benefit if these agreements with Broadcasters are allowed to continue in full force and effect. Instead, Broadcasters should have the full benefit of the Code, on and from the dates on which the relevant provisions commence. To the extent any existing agreements between any Manufacturer and a Broadcaster are less favourable to the Broadcaster than the Code, those provisions should be void.

Appendix 1: Draft direction to Department of Infrastructure, Transport, Regional Development, Communications and the Arts

Mr Jim Betts

Secretary

Department of Infrastructure, Transport, Regional Development and Communications and the Arts

GPO Box 594

CANBERRA ACT 2601

Dear Mr Betts

Direction to develop prominence mandatory code

I am writing to direct the Department of Infrastructure, Transport, Regional Development, Communications and the Arts to develop a mandatory code under Part IVB of the Competition and Consumer Act 2010 (**CCA**) to provide for prominence of the television services and content offered to Australian audiences by Australia's commercial television broadcasters and national broadcasters.

The mandatory code is required to ensure the prominence of content that is made available by free-to-air (**FTA**) television broadcasters, whether by means of terrestrial television or broadcaster video on demand (**BVOD**) services, and to ensure that Australian audiences have easily accessible means to discover that content. Implementation of a mandatory code addressing prominence will give effect to an Australian Government election commitment.

By ensuring that Australians are able to easily access the services of FTA television broadcasters, who invest significantly in a diverse range of Australian content, the code will also assist in meeting Australia's obligations under the UNESCO Convention on the protection and promotion of the diversity of cultural expressions. That Convention requires Australia to support the creation, production, distribution and access to diverse cultural goods and services.

Prominence Principles underlying mandatory code

The Prominence Principles that will underpin the development of the mandatory code are:

4. Free and local terrestrial TV and BVOD services provided by licenced commercial and national broadcasters (**Local TV Services**) must be prominent and universally available for all Australians across all of their devices
5. Australians must be informed of the Local TV Services that are available to them on devices when making a purchase decision
6. As new technologies and search and discovery tools emerge on devices, free, prominent and universal access to Local TV Services for all Australians must be maintained through the inclusion of these services in all search, discovery and aggregation tools.

Prominence, in the context of the Prominence Principles, will require that the terrestrial live TV application, and the applications for each BVOD service provided by any FTA television broadcaster, appear as the first 6 applications on the primary access point of connected and similar devices, without the need to navigate within the primary access point, and that those applications are of the same size and general visibility as other applications that appear on that primary access point for other similar content services.

Core requirements for mandatory code

The core requirements that should be included in the code are set out in the attachment to this direction. In addition to mandating prominence, the code should:

1. Ensure that broadcasters are not required to make any payments, of any nature, to obtain the benefits provided by the code.
2. Prevent manufacturers from interfering with the content of FTA television broadcasters (including electronic program guides), including by restricting the ability of those broadcasters to monetise that content.
3. Provide for appropriate reporting obligations so there is transparency not only as to the effectiveness of the code but also in relation to any non-compliance by manufacturers.
4. Provide for an initial review to occur after 12 months and for subsequent reviews to occur every two years. Each review will consider the operation of the code and whether any amendments to the code are required in light of the ongoing evolution of new technologies that are available to provide access to Australians to Local TV Services.

Timing

The mandatory code must be developed by the Department within six months of the date of this letter.

Yours sincerely

Hon Michelle Rowland MP
Minister for Communications

Attachment: Core requirements for mandatory code

1. Key definitions

- (a) **ACCC** means the Australian Competition and Consumer Commission.
- (b) **Broadcaster** means the holder of a commercial television broadcasting licence, the Australian Broadcasting Corporation (**ABC**) or the Special Broadcasting Service Corporation (**SBS**).
- (c) **BVOD Service** means a Local TV Service which is a broadcaster video on demand (**BVOD**) service.
- (d) **EPG** means electronic program guide.
- (e) **FTA** means free-to-air.
- (f) **Local TV Service** means a free service delivered by or on behalf of a Broadcaster that:
 - (i) delivers content to persons having equipment appropriate for receiving that service, whether the delivery uses the radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means; and
 - (ii) without limiting paragraph (i) of this definition, delivers, whether by radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, content on a point-to-point or point-to-multipoint basis.
- (g) **Manufacturer** means any corporation that manufactures, produces, processes or assembles Regulated Devices (or component parts of Regulated Devices) or, if that corporation does so solely as a contractor for a third-party corporation or under the direction or control of a third party corporation, that third party corporation.
- (h) **Primary Access Point** means the primary access point to applications on any Regulated Device, including any ribbon or menu system.
- (i) **Prominent**, in relation to a Primary Access Point, means that the Local TV Services appear as the first applications on that Primary Access Point, without the need to navigate within the Primary Access Point, and those applications are of the same size and general visibility as other applications that appear on that Primary Access Point for other similar content services. Where a Regulated Device has an RF tuner, the application for the terrestrial television function must appear first, followed by the BVOD Services presented in order of logical channel numbers of the relevant Broadcasters.
- (j) **Regulated Device** means:
 - (iv) any connected television (or connected projector or monitor);
 - (v) any set top box or similar device, dongle, puck and any other device, including using technology which may be developed in the future, that may be used to make, or assist in making, any Local TV Service available to a member of the public for viewing on a television; or
 - (vi) any other device (excluding any device within subparagraph (i) or (ii) of this definition) that is capable of displaying a Local TV Service and which has a Primary

Access Point for content that displays applications, where either of the following conditions are satisfied:

- (C) the manufacturer of the device (or any related body corporate of the manufacturer) makes available any online content services (as defined in clause 3 of Schedule 8 of the Broadcasting Services Act 1992); or
- (D) the manufacturer of the device (or any related body corporate of the manufacturer) has entered into an agreement, of any nature, with a third party for the display of applications on the Primary Access Point of the device,

provided that, in any case, at least one Broadcaster makes available for use by members of the public an application which is compatible with the connected television or other device.

Regulated Devices include any such devices manufactured, produced, processed or assembled prior to the commencement of the Code where the manufacturer continues to control the prioritisation of applications on the Primary Access Point or continues to support the device via software updates at the time of the commencement of the code.

2. **Mandatory Regulated Device requirements**

- (a) No Manufacturer may require (directly or indirectly) any consideration to be provided, whether by payment or in kind, by a Broadcaster for the grant of rights referred to in subparagraphs 2(b), 2(c), 2(d) or 2(e) or paragraphs 3 or 4.
- (b) Each Manufacturer must, in relation to each Regulated Device which may be used by Australian audiences for which it is the Manufacturer, comply with the following obligations:
 - (i) the Manufacturer will ensure that information will be included on the packaging and associated marketing collateral for each Regulated Device that:
 - A. indicates the compatibility of the Regulated Device with a RF tuner and the availability of BVOD Services;
 - B. where the availability of content services other than Local TV Services is advertised at the point-of-sale of the Regulated Device, the availability of Local TV Services should also be advertised;
 - (ii) in the case of Regulated Devices with a RF tuner:
 - A. the terrestrial television function for all Broadcasters must permanently feature as the first application on the Primary Access Point on each Regulated Device and that application must be of the same size and general visibility as other applications that appear on that Primary Access Point for other similar content services. The terrestrial television function must default to the terrestrial channel offerings provided by all Broadcasters;
 - B. the terrestrial television function must be activated by default on each Regulated Device when no other external source (for example, HDMI inputs) is selected by a consumer and that function must default to the

terrestrial channel offerings provided by Broadcasters, displaying the last selected broadcast channel;

- (iii) for all Regulated Devices that provide a list, register or Electronic Program Guide (EPG) of live linear television offerings, whether delivered via terrestrial or any other means, the device must:
 - A. for devices with an RF tuner, include all available terrestrial live linear television channels offered by Broadcasters, and any EPG functionality must only include the terrestrial live linear television channels of Broadcasters, presented in order of LCN, with no interceding third-party content (except in the case of an EPG provided on a cable/satellite set-top-box made available by a subscription television licensee (as defined in the BSA), where the LCN ordering requirement would not apply);
 - B. include each BVOD Service which provides a linear stream of content in any products that list, register or otherwise aggregate live linear streaming services, with these services presented in the LCN order of the equivalent terrestrial service; and
- (iv) during the first instance set-up of a Regulated Device, or following a factory reset of a Regulated Device, each BVOD Service must either be Prominent on the Regulated Device automatically or be pre-selected for download and installation on a Prominent basis when the Regulated Device is first connected to the internet;
- (v) each BVOD Service must be Prominent on the Primary Access Point on the Regulated Device unless the consumer has taken direct and positive action to alter the appearance or placement of applications. The application of algorithms to alter the appearance or placement of BVOD Service applications will not constitute a direct and positive action of a consumer;
- (vi) where a Regulated Device includes any content search, discoverability or prominence tools, each of those tools must provide that:
 - A. each Local TV Service is included in each tool and given priority to any other services available through that tool including by providing that, if a consumer searches for content that is made available by a Local TV Service and another service, the tool must provide first access to the Local TV Service;

For example, if a Regulated Device is voice activated, when a consumer asks for “news”, the consumer must first be offered the Local TV Services that provide news content, with priority given to any such Local TV Services that the consumer has previously accessed.
 - B. the content from each such BVOD Service must be made prominently available in any aggregated “Continue Watching” or similar services offered through the tool, so that the content appears first on any such service;
 - C. the Manufacturer must not enter into any agreement with any person (whether or not a Broadcaster) that provides for the favourable treatment of the services of that person in search, discoverability or prominence tools as compared to the Local TV Services; and

- (vii) where a Regulated Device includes a remote control device, the remote control device must:
 - A. where the Regulated Device has a RF tuner, provide a single dedicated button to activate the live television function of all of the Broadcasters. When that button is used by a viewer, the device should show the last live television channel accessed on the Regulated Device; and
 - B. if one or more dedicated buttons for specific services (other than as referred to in subparagraph A. above) are provided on the remote control device, a dedicated button that activates a menu within the Primary Access Point, where only BVOD Services are available, must also be provided; and
- (viii) if the Regulated Device allows voice commands each Local TV Service must be able to be launched by voice command; and
- (ix) the Manufacturer will ensure that each program or other content advertisement that appears on the Primary Access Point for the Regulated Device as a result of a commercial arrangement is prominently tagged as an advertisement.
- (c) No Manufacturer will, in connection with any Regulated Device:
 - (i) insert ads over-the-top of the Broadcaster's content, including within or around the EPG;
 - (ii) alter the Broadcaster's content to be able to insert its own advertising around that content, either in the BVOD environment or in relation to live television services;
 - (iii) obscure, in any way, any content guide made available by any Broadcaster, or collectively on behalf of all Broadcasters, including the EPG; or
 - (iv) insert an advertisement between a direct request by the consumer for a Local TV Service (for example, through a remote control action or a voice command) and the serving of that content.
- (d) Each Manufacturer must ensure that each Local TV Service is included in each search, discoverability or other prominence features that may be developed in the future, including the use of biometrics for personalised content discovery, for any other Regulated Device or streaming application developed by the Manufacturer.
- (e) No Manufacturer will supply in Australia, or to any person for on-supply in Australia, any Regulated Device that does not meet the requirements of subparagraphs (b), (c) and (d).

3. Restrictions on use of data

- (a) No Manufacturer will, or allow any provider of an operating system or other software incorporated in a Regulated Device to:
 - (i) use any Regulated Device Data; or
 - (ii) use any Regulated Device Data aggregated with any with data collected from any other service or services,

in either case, in connection with the provision of any digital advertising services or advertising technology services.

For example, a Manufacturer that provided digital platform consumer facing services must not aggregate the consumer data that it collects from its own consumer facing services with the Regulated Device Data in connection with the provision of any digital advertising services or advertising technology services.

- (b) For the purposes of this paragraph 3, **Regulated Device Data** means any consumer data, of any nature including viewing preferences, collected from the use of a Regulated Device by a consumer for the purposes of accessing any Local TV Services.

4. **Complaints and dispute resolution**

The code must provide for an internal dispute resolution process, as well as allow for mediation or arbitration at the option of a Broadcaster, to resolve complaints by that Broadcaster regarding compliance with the code.

5. **Reporting and review requirements**

- (c) Each Manufacturer will be required to report annually to the ACCC on its compliance with the requirements of the code.
- (d) The ACCC will be required to publicly report (on an aggregated and anonymised basis) in relation to the information reported to it under the code on an annual basis.
- (e) A review of the role, impact and operation of the code will be required to be undertaken by the Communications Minister after the first twelve months of operation of the code and, thereafter, every two years. Each review must consider whether any amendments are required to be made to the code to ensure its ongoing efficacy in light of the ongoing evolution of new technologies that are available to provide access to Australians to Local TV Services.

6. **Agreements entered into before 7 May 2022**

- (a) Subject to paragraph 6(c), a Manufacturer will not be required to comply with the obligations under paragraphs 2(b)(ii)A., 2(b)(iii), 2(b)(iv) or 2(b)(v) (excluding paragraph 2(b)(v)D.) for the term of any agreement entered into by it before 7 May 2022 with any content provider other than a Broadcaster (**Contrary Agreement**) where compliance with the relevant obligation would directly breach the Contrary Agreement.
- (b) If a Contrary Agreement allows any content, tile or application, of any nature, to be displayed on the Primary Access Point in a more prominent position than the content, tile or application of the counterparty to the Contrary Agreement, then paragraph 6(a) will not apply in relation to the Contrary Agreement.
- (c) If paragraph 6(a) applies to a Manufacturer and any Regulated Device, the Manufacturer will be required to comply with equivalent obligations to those specified in paragraphs 2(b)(ii)A., 2(b)(iii), 2(b)(iv) or 2(b)(v) (excluding paragraph 2(b)(v)D.), in each case, modified to the extent required to ensure there is no breach of the Contrary Agreement.

For example, if the Contrary Agreement provides that a specific content application will permanently feature as the first application on the Primary Access Point for a Regulated Device, paragraph 2(b)(ii)A. will be modified so that the terrestrial television function for all Broadcasters must permanently feature as the second application on the Primary Access Point on that Regulated Device and the relevant

Manufacturer must continue to comply with the remaining provisions of paragraph 2(b)(ii)A.

- (d) Paragraph 6(a) will not apply in respect of any amendment to, or extension of, any Contrary Agreement entered into on or after 7 May 2022.
- (e) A Manufacturer will not be released from compliance with any obligations under the mandatory code in relation to any Broadcaster where that Manufacturer has entered into an agreement with that Broadcaster before 7 May 2022 that provides rights to that Broadcaster which are inconsistent with, or impose less onerous obligations on the Manufacturer than, the obligations imposed on the Manufacturer under the mandatory code. Any provisions of such an agreement which are inconsistent with, or which impose less onerous obligations on the Manufacturer than, the obligations imposed on the Manufacturer under the mandatory code, will be void.

7. **Penalty provisions**

The code is required to include penalty provisions.

8. **Date of compliance**

Each Manufacturer will be required to be fully compliant with:

- (a) the obligations in paragraphs 2(b)(ii), 2(b)(iii), 2(b)(iv), 2(b)(v)D. and 6 will take effect on the date of commencement of the code; and
- (b) all remaining provisions of the code will take effect on the date that is 12 months after the date of commencement of the code.

Appendix 2: Implementation of import ban on non-compliant Regulated Devices

The amendments to the BSA could be the following illustrative new section 130BC:

130BC Technical standards for Regulated Devices

- (1) The ACMA may, by legislative instrument, determine technical standards that relate to Regulated Devices that may be used to make, or assist in making, any of the following services provided by the holder of a commercial television broadcasting licence or a national broadcaster available to members of the public:
 - (a) commercial television broadcasting services;
 - (b) national television broadcasting services; or
 - (c) without limiting subparagraph (a) or (b), services that deliver, whether by radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, television programs on a point-to-point or point-to-multipoint basis.

Offence

- (2) A person commits an offence if:
 - (a) the person imports or supplies equipment; and
 - (b) the equipment is a Regulated Device; and
 - (c) the equipment may be used to make, or assist in making, any of the following services provided by the holder of a commercial television broadcasting licence or a national broadcaster available to members of the public:
 - (i) commercial television broadcasting services;
 - (ii) national television broadcasting services; or
 - (iii) without limiting subparagraph (i) or (ii), services that deliver, whether by radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, television programs on a point-to-point or point-to-multipoint basis, on a free basis; and
 - (d) the equipment does not comply with a standard determined under subsection (1).

Penalty: 1,500 penalty units.

Civil penalty

- (3) A person must not import or supply a Regulated Device if:
 - (a) the Regulated Device may be used to make, or assist in making, any of the following services provided by the holder of a commercial television broadcasting licence or a national broadcaster available to members of the public:
 - (i) commercial television broadcasting services;
 - (ii) national television broadcasting services; or

- (iii) without limiting subparagraph (i) or (ii), services that deliver, whether by radiofrequency spectrum, cable, optical fibre, satellite or any other means or a combination of those means, television programs on a point-to-point or point-to-multipoint basis; and
 - (b) the Regulated Device does not comply with a standard determined under subsection (1).
- (4) Subsection (3) is a civil penalty provision.

Instruments

- (5) Section 589 of the *Telecommunications Act 1997* applies to standards determined under subsection (1) of this section in a corresponding way to the way in which it applies to an instrument under that Act.

Exemptions

- (6) The ACMA may, by legislative instrument, exempt specified Regulated Devices from subsections (2) and (3).

Note: For specification by class, see subsection 13(3) of the Legislation Act 2003.

Definitions

- (7) In this section:

Regulated Device has the same meaning as in [insert description of mandatory code].

national television broadcasting service has the same meaning as in Schedule 4.

supply has the same meaning as in the Competition and Consumer Act 2010.