free tv
AUSTRALIA

Submission to ACMA

Implementing Australia's TV prominence framework

October 2024

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1. Executive Summary

- Free TV Australia appreciates the opportunity to respond to the ACMA discussion paper, **Implementing Australia's TV prominence framework - Call for submissions and evidence**, released on 24 September 2024.
- The TV prominence legislation is not about pre-loading five apps onto new TVs. Its goal is to safeguard the public interest in the continued availability of free, ubiquitous audiovisual information and entertainment services, which can be relied on to provide trustworthy information and tell Australian stories, and which are accountable to Australians.
- It addresses a serious misuse of market power by TV set manufacturers and user interface providers, which systematically disadvantages Australian TV broadcasters in favour of globally scaled SVOD and BVOD services.
- To restore prominence to Australian television services, the ACMA must allow the new law, and the finalised regulations, to do their work of mandating real changes in the appearance and functionality of TV and streaming device user interfaces. Regulated broadcasting services must move to a conspicuous place on the first static screen with no scrolling required, that is, the screen viewers are presented with, which Free TV Australia and its members believe to be the intended interpretation of the Primary User Interface.
- As devices and user interfaces continue to evolve, the ACMA's powers to clarify key terms in legislation will be vital to ensure the scheme functions into the future to safeguard Australian broadcasters.
- However, the use of these powers before the laws take effect is discretionary. The 18-month transition period recognises that implementing the government's policy decisions will require material change. Free TV is concerned the ACMA is re-interpreting already accepted and clear definitional advice provided by the Government in its primary legislation.
- In relation to the definition of 'primary user interface', in section 130ZZL, we believe there was no question that manufacturers and user interface providers will have to make changes to ensure all regulated television service apps appear on the static home page of regulated television devices. If these changes are not made Australian free-to-air television apps will remain less conspicuous (not prominent) and harder to find than global SVOD, FAST or BVOD apps and the whole purpose of the policy and the legislation will be undermined.
- The government's draft regulations signal a minimum objective of parity between local services and the most conspicuous global television apps, including size and location. The ACMA's preliminary disposition to redefine the home page as 'a virtual space that may extend beyond the bounds of the screen' does not reflect the intent of the policy or subsequent legislation and therefore would defeat one of its main objectives.
- Favoured global media brands would remain prominent on the first/primary screen presented to viewers, whereas access to local broadcasters would continue to require scrolling or other viewer actions. Once they have met the minimum requirements, manufacturers would be free to obtain commercial benefit from local free-to-air media in return for greater prominence, as they are today.
- In support of its preliminary view, the ACMA says only that requiring larger changes 'may' raise practical or contractual difficulties for manufacturers. These practical issues were extensively canvased during development of the prominence legislation. In recognition, parliament has already given manufacturers 18 months to move to compliance.

- In the interests of good policy, the ACMA should review its preliminary position and deliver on the objective of prominence for regulated television services. If it is not minded to do so, further consideration should be given to whether the proposed re-definition of the home page is within power.
- Free TV reaffirms the television industry's strong expectation that regulated television service apps must be present and visible at start up on the primary user interface (static main screen) of regulated television devices, without the need for scrolling or any other action.
- The ACMA paper also canvasses whether a new type of user interface, which aggregates content on the home screen but does not feature particular apps, should be subject to different obligations than user interfaces that display apps on the home screen.
- Making different rules for 'pure' content aggregation home pages would simply incentivise more widespread adoption of this format to 'game' the prominence rules requirements.
- Whether there is an app rail or just content, the free to air Live TV app and BVOD apps should appear on the static first page of the TV screen, regardless of what other graphics are carried on this page. These apps need to be present at this primary point as it promotes the objectives of the legislation. The content tiles and graphics on pure content landing pages are mostly content promotions that have been paid for and should not interfere with pursuing the objective of ensuring Free to Air services are prominent on TV devices. Consumers are, of course, entitled to move them if they wish.
- As with other regulatory requirements in other sectors, including food product packaging, disability access for buildings, the commercial television industry's local content quotas, and privacy requirements for the use of data, the TV manufactures will need to redesign their products to comply with their regulatory responsibilities.
- If regulated TV services are to exist, their BVOD apps need to be prominent, regardless of whether there is content aggregated on the static user interface (which should be regarded as the primary user interface).
- The ACMA's articulation of a five-phase 'implementation timetable', co-extensive with the transition period, is likely to shift the focus of manufacturer preparations away from doing the work needed to comply with the prominence rules from January 2026, to lobbying the regulator to minimise the need for change. There is a real danger of undermining the extensive policy development phase the government has already undertaken.
- The '5 phases' should be reviewed and differently expressed. For example, designing the enforcement framework ('Phase 4') should start now and be independent of whether or not clarifications are made to the current definitions in law.
- Turning to the 'primary purpose' test in section 130ZZJ, the ACMA's clarificatory powers will be important to keeping the regime current. The ACMA should foreshadow a regular (2-3 yearly) review, to examine consumer product changes and any gaming or avoidance behaviour arising from previous ACMA determinations or guidelines.
- In the short-term, while most consumer equipment is plainly in or out, clarifying the status of a small number of 'edge case' devices would be helpful.
    - Smart projectors are clearly marketed for television viewing and should be regulated as such.
    - As smart monitors overlap with television sets in size and use cases, excluding all smart monitors would open a major loophole in the scheme. While recognising the wide range

of use-cases these devices can support, any decision to exclude a sub-set of smart monitors should be approached with great caution.

  - To avoid the obvious danger of encouraging avoidance behaviour, any smart monitor that displays one or more television apps on its primary user interface should be subject to the same requirements as a television set. Given that more and more Australian homes are being built without aerial connectivity capability, and more and more Australians are choosing to watch commercial FTA television services via apps, the role of aerial connectivity in determining if a screen, monitor or display should be regulated is diminishing.

- Finally, the ACMA paper asks whether clarification is required as to when a regulated television service is 'offered'.
- Where possible the ACMA should rely on existing industry practices for determining the circumstances in which a regulated television service is taken to be offered.
- Going forward, however, it will be important for ACMA to ensure any industry practices that are within the control of manufacturers and user interface providers should not be misused so as to hinder or delay regulated television services that have taken reasonable steps to offer services on a particular TV platform. This includes:
  - Any unreasonable notice period required before a regulated TV service app is made available; and
  - Any unreasonable conformance or testing requirements before a regulated TV service app is made available.

2. Introduction

2.1 About Free TV Australia

Free TV Australia is the peak industry body for Australia's commercial free-to-air 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 free-to-air television makes to Australia's culture and economy. We proudly represent all of Australia's commercial free-to-air television broadcasters in metropolitan, regional and remote licence areas.

Australia's commercial broadcasters create jobs, provide trusted local news, tell Australian stories, give Australians a voice and nurture Australian talent.

A report released in September 2022 by Deloitte Access Economics, *Everybody Gets It: Revaluing the economic and social benefits of commercial television in Australia* (the **Deloitte Report**), 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.

Free TV members are vital to telling Australian stories to Australians, across news, information and entertainment. FTA television broadcasters understand and appreciate the cultural and social dividend that is delivered through the portrayal of the breadth and depth of Australian culture on television,

and that Australians prefer local stories. In FY23, commercial television networks spend $1.67 billion on Australian content, dedicating 87% of their content expenditure to local programming.

2.2 Why regulated television services matter

In its December 2022 proposal paper, Prominence framework for connected TV devices, the government cited the ongoing, critical policy roles of free-to-air TV in support of the objective of securing greater prominence for local free-to-air TV services:

> The design and implementation of a legislated prominence framework will not be undertaken in isolation. This forms part of a broader program of systemic regulatory reform and modernisation.
>
> The objectives of media policy are enshrined in the *Broadcasting Services Act 1992* (BSA) and include (among others):
>
> - the provision of Australian content;
> - the availability of a diverse range of services;
> - the provision of news and local content; and
> - protecting minors from harms and upholding community standards.
>
> These explicit objectives are underpinned by an implicit aim of ensuring all Australians have easy access to media services and content.
>
> These objectives remain fit-for-purpose in a contemporary media environment, but the mechanisms used to support and achieve them are increasingly dated and ineffective. The Government is committed to modernising media regulations to fulfil the legitimate expectations of consumers and industry for consistency, transparency and equity in our regulatory environment.
>
> Broadcasting services are, and will remain, important in achieving media policy objectives. The Government's approach to media reform will look to foster a sustainable broadcast industry that:
>
> - provides trusted news and emergency broadcasting, high quality entertainment and information that reflects national identity and cultural diversity;
> - utilises terrestrial broadcasting arrangements and radiofrequency spectrum to deliver services that are accessible, free, stable and ubiquitous, regardless of income or location; and
> - harnesses new technologies to deliver TV services, including via connected TV devices, in line with the objectives of the BSA.

2.3 About the Free TV Business Model

Australian commercial television is constrained to be offered free to the general public, to offer programs intended to appeal to the general public, and must 'usually' be funded by advertising revenue (section 14, Broadcasting Services Act 1992). Their commercial broadcasting licence conditions require Australia's commercial TV broadcasters to comply with a range of special requirements that are not imposed on SVOD, BVOD and 'FAST' providers, including requirements in relation to Australian content, local news and contributing to the provision of an adequate and comprehensive range of services in the geographical areas they are licensed to serve.

While this is key to their appeal as well as the ongoing policy importance of strong local electronic media, it also constrains commercial broadcasters in competing with globally-scaled 'over-the-top' BVOD, SVOD and 'FAST' providers of audiovisual information and entertainment. These operators are either in a superior commercial position to buy prominence on television sets and TV remote controls (Netflix) or are themselves owned by TV set manufacturers (Samsung) or are owned by the makers of streaming devices or TV primary user interfaces (Apple TV; Amazon Prime; YouTube).

For Commercial Free to Air Services to be fully advertiser-funded and deliver important public services to Australians for free while meeting their regulatory obligations, they need to attract audiences at scale. To achieve this scale they need to be easily found, and this requires being prominent on regulated TV devices.

2.4 Securing TV prominence will require substantial change to the appearance of existing primary user interfaces

Australian television, along with domestic broadcasting in other countries, faces an existential threat from the market power of TV manufacturer 'gatekeepers' and the globally-scaled, online video content services to whom they are selling conspicuous positions on TV receivers and remote controls marketed in Australia. The scale of the challenge was well summarised by the Minister herself in her Second Reading Speech to the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023, where she said:

> Over the last decade there has been a fundamental transition in the TV market in Australia. Free-to-air television broadcasting services now exist as one of many content options on connected TV interfaces, and are becoming increasingly difficult for consumers to find. Research has shown that a significant portion of the Australian population lacks the skills and knowledge to install and engage with these services on newer devices.
>
> There is also a change in the way content services are made available on TV interfaces. The space on the home screens of connected TV devices is increasingly being monetised, with the positioning and placement of services often dependent on the payment of fees or other consideration. There is a material risk that free-to-air television broadcasters will be crowded out by the larger, international services operating in the Australian market.
>
> In order for the free-to-air broadcasting sector to continue to support the achievement of important policy objectives, it is imperative that their services are easily available to audiences on the devices that are commonly used to access TV content. This is precisely what the prominence framework aims to do.

The legislation is aimed at changing this situation. Its objects, spelled out in section 130ZZG of the legislation, are to ensure that audiences throughout Australia are able to access free-to-air television content in order to:

> (a) support Australia's representative democracy by informing Australians of issues or events that are relevant to public debate and democratic decision-making; and
>
> (b) ensure that audiences throughout Australia are able to access content that is of public significance at a local, regional or national level; and
>
> (c) contribute to meeting the communications needs of Australia's multicultural society, including ethnic, Aboriginal and Torres Strait Islander communities.

Achieving these objects will require manufacturers to consider whether devices they sell in Australia are covered by the scheme. It will often, though not always, require changes in the design as well as the content of the primary user interfaces of TVs and streaming devices marketed in this country. In recognition that changes are required, the legislation allows a lengthy transition period before sets made for the Australian market are required to comply with prominence requirements.

The remainder of this submission will deal with specific issues raised in the discussion paper.

2.5 The ACMA's overall approach

2.5.1 Issue for comment: Free TV's views on the ACMA's proposed approach

In the longer-term, the ACMA's clarificatory powers will be vital to the success of the prominence rules. The rapid evolution of consumer devices makes the ACMA critical to the maintenance of prominence protections for regulated television services into the future. However, the Executive Summary of the ACMA paper begins with a contestable proposition, namely, that the ACMA is 'responsible for the implementation of various aspects of the [prominence] framework'.

Parliament has already passed the legislation that allows legal requirements to be imposed on TV receiver suppliers. The onus is now on the Minister to finalise regulations that will give substance to the minimum requirements. The only aspects of the scheme that necessitate ACMA action are those relating to compliance work and, if necessary, enforcement action.

During the initial transition period, the ACMA should be educating and assisting TV makers to comply with the scheme the government has passed into law and the regulations under it, not redefining those obligations. The discretionary nature of the ACMA's powers should be the starting point for considering whether to exercise them during the transition period. The ACMA's articulation of a five-phase process during the transition period risks shifting the focus of manufacturer preparations away from doing the work needed to comply with the prominence rules from January 2026, to lobbying the regulator to minimise the need for them to go to any trouble. As the transition period proceeds, arguments that there is insufficient time to make more substantial changes, will only grow more credible.

This risk should be of great concern to the ACMA. It could be minimised by a clearer articulation of the discretionary nature of the regulator's powers to intervene. The ACMA is not responsible for the implementation of the prominence framework and should not be too quick to insert itself between TV makers and the new legal requirements. The ACMA rightly warns that the submissions and evidence it seeks will 'inform our discretion to make determinations and guidelines that may impact the scope and application of the framework'. That 'may' should be at the forefront of its implementation thinking, together with the question 'why?'.

In relation to Phase 1, the onus should be on the parties that must comply with the new law to make the case for ACMA exercise of its clarificatory discretions. It should be clarified that any such case will judged on how well it promotes the objects in section 130ZZG. Phases 2 to 3 should be more clearly expressed to be contingencies. The work of designing the enforcement framework ('Phase 4') should start now and be independent of whether or not clarifications to one, two or more of the current definitions in law are made.

The remainder of this submission will address the ACMA's specific proposals in relation to regulated television devices, primary user interfaces, and the circumstances in which a regulated broadcasting service is offered.

3. Defining a regulated television device

3.1 The ACMA's approach to the 'primary purpose' test

Section 130ZZJ provides that, for the purposes of prominence rules, a ***regulated television device*** means domestic reception equipment that:

> (i) is capable of connecting to the internet and providing access to broadcasting video on demand services; and
>
> (ii) is designed for the primary purpose of facilitating the viewing of audiovisual content.

The section gives the ACMA discretion to bring further domestic reception equipment into scope, to exclude equipment that would (or might) otherwise be in scope, and make guidelines about regulated television devices.

Free TV agrees the explanatory memorandum to the new law provides a useful start for assessing which domestic reception equipment is likely to satisfy the elements of the statutory definition. The explanatory memorandum also provides helpful guidance as to when or why the ACMA might intervene and exercise its clarificatory powers:

> It is intended that the definitions provided by subparagraphs 130ZZI(1)(a)(i) and 130ZZI(1)(a)(ii) would provide clarity about which devices are regulated under the prominence framework in most cases. However, there are likely to be 'edge cases' where it is unclear whether a certain device meets the primary purpose limb set out in subparagraph 130ZZI(1)(a)(ii). Moreover, home entertainment technology develops rapidly and it is possible that future innovations will make the application of either limb of the definition unclear in specific cases.

In essence, the powers are there to enable future action by ACMA as home entertainment technology evolves away from the device categories familiar to the authors of the legislation. The exceptional circumstance that might warrant early clarification is an 'edge case,' that is, a device where it is arguable either way whether the primary purpose is facilitating the viewing of audiovisual content.

3.2 Keeping abreast of future innovation

The primary purpose of ACMA's powers in section 130ZZJ is to prevent the prominence regime sliding into irrelevance, as innovation in the consumer electronics market blurs the boundaries of today's device categories.

The ACMA should foreshadow regular examination of how the definition of a regulated television device is faring.

- The reviews would be an opportunity to address emerging new 'edge cases' where clarification would be desirable.
- As discussed further below, determining that a device category falls outside of the definition may create incentives for future avoidance behaviour. Widely spaced but regular reviews

should examine whether existing ACMA instruments under section 130ZZJ should be revised to take account of whether some or all devices in category, previously excluded from the definition, are now commonly marketed or used primarily for facilitating the viewing of audiovisual content.

In terms of frequency, the first re-examination should coincide with the review of the prominence laws required by section 130ZZV. Further reviews, at intervals of 2-3 years, would inform the potential use of the ACMA's clarificatory powers and take appropriate account of the typical life-cycle of consumer products used to watch television.

3.3 Addressing potential 'edge cases'

Turning to the ACMA's Table 1 (Summary of device types), the lists of devices that are 'in scope' and 'out of scope' appear uncontentious. However, the ACMA invites industry views on the status of two 'edge cases, as follows.

3.3.1 Smart projectors

Free TV agrees these should be included in scope. Reasons for such a clarification include:

- Advertising for smart projectors makes clear that the enjoyment of audiovisual content is their primary intended purpose, with terms such as 'home cinema,' 'home theatre' and 'immersive TV' commonly used.
- Their potential utility to support other content, such as games, does not change their primary purpose – noting that smart televisions are also able to be used as displays for content other than mainstream television, such as games.
- Given that smart projectors are a potential substitute for television sets, their exclusion from the definition of a 'regulated television device' would create opportunities to avoid the prominence rules.

3.3.2 Smart monitors

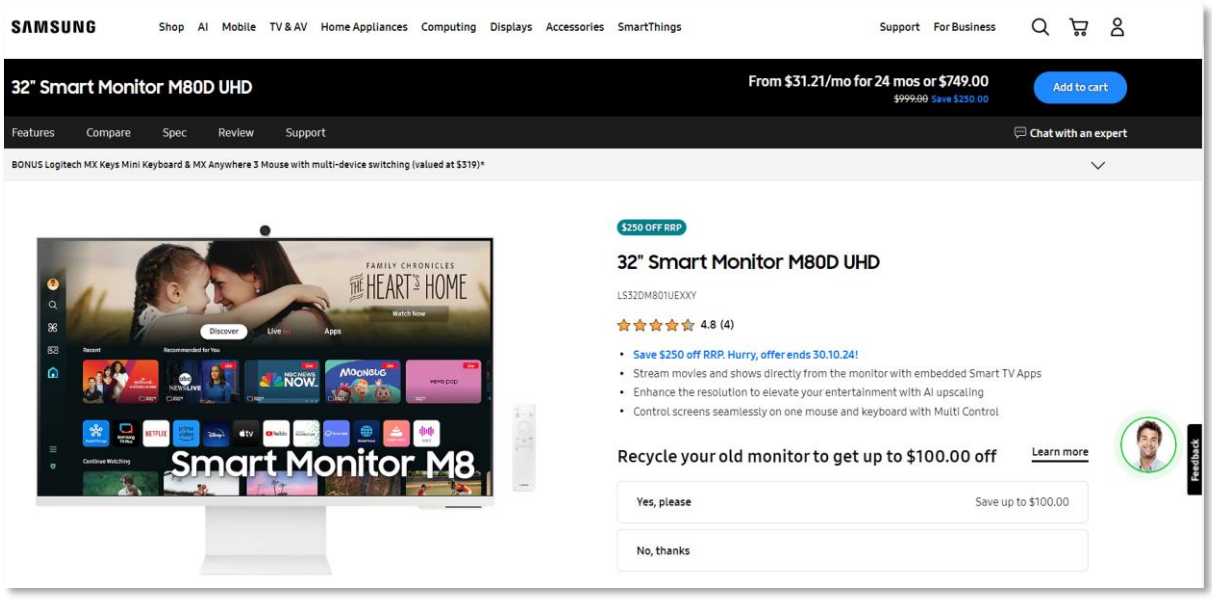
While many smart monitors are not purchased primarily to view audiovisual entertainment, excluding all smart monitors from the prominence regime would open a significant loophole in the prominence rules.

Smart monitors, or smart displays, were originally a 'thin client' device designed to interoperate with a personal computer. Since that time, devices marketed as 'smart monitors' and devices marketed as TV receivers have both undergone rapid evolution. Smart monitors and TV receivers today share many common or overlapping features.

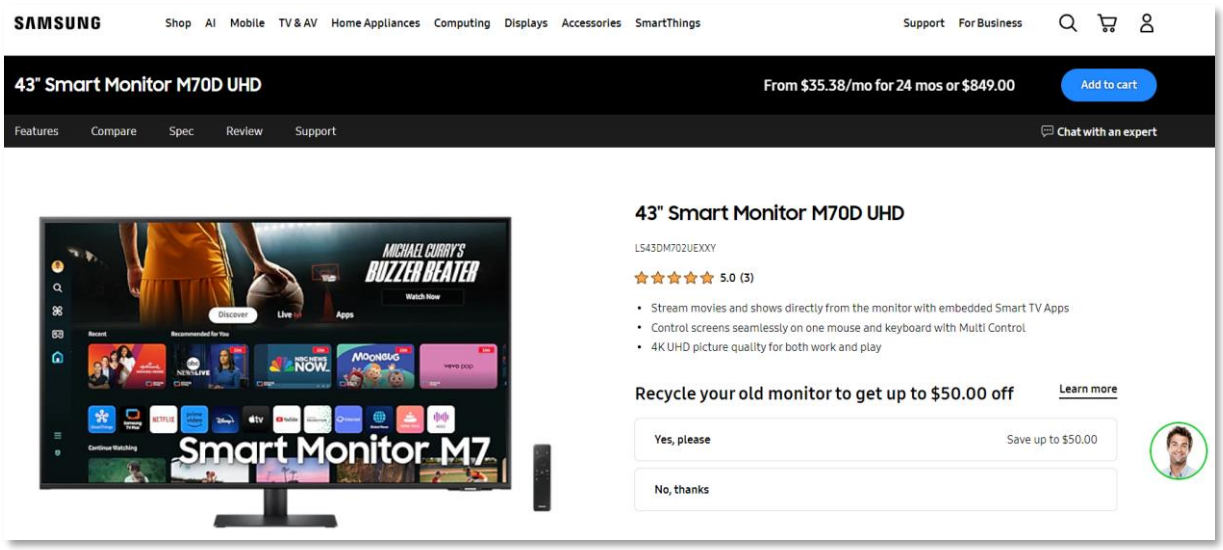
Smart monitors typically differ from smart television sets in several ways.

- Advertising for smart monitors often, though not always, makes clear they serve multiple uses. Touted use cases are characteristic of both PCs (such as computer games, videoconferencing and 'multitasking') as well as TVs (such as viewing television and movies).
- Smart monitors are often, though not always, smaller than television sets, with screens customised for different types of viewing. For example, they may be designed for viewing sitting closer to the screen. A monitor optimised for games might be designed for speed/response times rather than 4K (UHD) TV viewing.

However, the line between smart TVs and smart monitors is not clear-cut. A smart monitor is liable to be called a 'TV' if it is in the living room. Advertising for some smart monitors emphasises their clearly popular use for television viewing, as these advertisements for Samsung products show:



Advertisement for Samsung 32 inch Smart Monitor M80 UHD[1]



Advertisement for Samsung 43" Smart Monitor M70D UHD[2]

Unlike devices such as phones and iPads, smart monitors also overlap in size with devices we would recognise as television sets. Watching television, though not the sole purpose of smart monitors, is one of their primary purposes, and smart monitors, like smart TVs, may have a home screen featuring one or more 'rails' of BVOD or SVOD apps. Smart monitors will often serve as substitutes for smart TVs

[1] Available at https://www.samsung.com/au/monitors/high-resolution/smart-monitor-m7-43-inch-smart-tv-apps-ls43dm702uexxy/.
[2] Available at https://www.samsung.com/au/monitors/high-resolution/smart-monitor-m7-43-inch-smart-tv-apps-ls43dm702uexxy/ .

and many (though not all) smart monitors are purchased for the primary purpose of watching audiovisual entertainment[3]. 'Smart TVs' and 'smart monitors' have so much in common that further delineation would be required before one could be included and the other excluded from the prominence requirements.

Any decision to exclude a subset of smart monitors from the definition would also need to be executed with care, to anticipate and mitigate the future risk of avoidance behaviour. Potential avoidance routes might include increased efforts by manufacturers to customise and market larger smart monitors for the primary purpose of viewing audiovisual entertainment – noting some smart monitors are already advertised in this way. Conversely, manufacturers of television sets could be incentivised to remove the VHF/UHF tuner and market them as smart monitors. Unlike the situation with apps belonging to global entertainment brands, manufacturers currently have little, and decreasing, financial incentive to retain VHF/UHF tuning capacity in smart TVs. The legislation has anticipated the risk that some TV makers would seek to avoid the prominence requirements by stripping tuning functionality out of TVs, by ensuring it applies to smart streaming devices as well. The blanket exclusion of smart monitors from the regime would risk reopening this avoidance route, hindering audience access to Australian, trusted and free content and dealing a further blow to TV networks that remain reliant on broadcast television, as well as disadvantaging the providers of regulated television service apps.

Smart monitors should not be exempted as a class, and any sub-set that is exempted should be very carefully delineated from television sets. Any smart monitor that features one or more BVOD or SVOD apps on its primary user interface should comply with the same rules around prominence of regulated television services as smart TVs. Any smart monitor featuring an apps rail and a handheld remote control device will in practice be impossible to distinguish from a 'television set', and to safeguard the prominence scheme, it should be regulated accordingly. Other limitations on any exemption might include restrictions on the maximum screen size of exempt devices (for example, to limit the exemption to devices that are smaller than the smallest television receivers on the market). Conversely, there are arguments for clarifying that smart monitors with certain characteristics (such as the presence of television apps on the home screen) *are* a regulated television device. Finally, it will be critical to examine the outcomes of any attempted delineation, as part of the ACMA's regular reviews of its prominence instruments.

As a final observation, the 'edge case' of smart monitors arguably raises wider questions for the future about the proper construction of 'audiovisual content' and 'primary purpose' in the prominence legislation. These questions may become more important as 'television-like' screens in viewer households acquire more potential uses. A screen, even if optimised technically for television-style audiovisual entertainment, as traditionally understood, may also be useful for computer games and virtual reality, video or conference calls and a range of other use cases. The adoption of broad, rather than narrow, understandings of 'audiovisual content,' and acceptance of the principle that a device may have more than one 'primary purpose', may be important so as not to limit the application and relevance of the legislated prominence requirements to the detriment of local television services.

[3] Support for this proposition can be found in this claim from Samsung for the 'versatility' of its smart monitors: https://www.samsung.com/us/support/answer/ANS00088742/

3.4 The ACMA's questions

3.4.1 Proposed considerations when applying the primary purpose test, and anything else the ACMA should consider

See section 3.1 of this submission.

3.4.2 Is there a device not mentioned in this paper that should be considered?

3.4.3 is a need for the ACMA to clarify whether certain specific domestic reception equipment is, or is not, a regulated television device

See sections 3.2 and 3.3 of this submission.

4. Defining a primary user interface

4.1 The ACMA's preliminary view

Section 130ZZL provides that, for the purpose of the prominence rules, the 'primary user interface' of a regulated television device means the interface of the device that:

> (a) is either or both of the following:
>
> > (i) the home screen or main screen of the device;
> >
> > (ii) the main interface most commonly used to provide access to applications that make audiovisual content available on demand using a listed carriage service; and
>
> (b) meets the description or requirements (if any) determined by the ACMA under subsection (3).

Sub-section (3) empowers the ACMA to describe an interface or determine requirements relating to an interface.

In essence, the ACMA and the Australian government face a binary choice. Either some or all regulated television services will continue to be invisible when television receivers are first switched on, or some or all manufacturers and interface providers will need to make changes to the design of their primary user interfaces and to their existing contractual arrangements.

Unfortunately, the ACMA's preliminary view is that technical and contractual challenges should be treated as insurmountable, and prominence should give way. This position fails to deliver on the government's commitment to ensure prominence for regulated television services. Of particular concern:

- These were issues raised, and extensively canvassed, during the policy development process. This process disclosed no insurmountable barriers, technical or otherwise, to the appearance of all regulated television service apps on the static primary user interface. The issue of how long would be needed to make these changes was also extensively canvassed, and the upshot was parliament's decision to include an 18-month transition period before TV receivers and streaming devices are required to comply.

- It would appear the ACMA has reached its preliminary view prior to any re-exploration or testing of the real practical or contractual challenges in changing the layout of primary user interfaces. The paper merely notes there 'may be' technical and contractual obstacles to ensuring regulated television services appear on the home screen and, at question 7, seeks further information about the contract issue.

The government has promulgated a draft regulation stating that applications belonging to regulated television services must be of a similar size and shape to other applications that:

(i) are displayed on the primary user interface of the device; and

(ii) are designed for the purposes of providing access to a service (other than a regulated television service) that makes audiovisual content available using a listed carriage service;

The draft regulation also states that the application must be located in the same area of the primary user interface as those other applications.

The ACMA is proposing to change the definition of the primary user interface in section 130ZZL in a way that undermines this intention. In place of prominence, the regulation would deliver a right only of being available on TV receivers. Instead of achieving prominence in relation to global BVOD and SVOD apps, the latter would remain conspicuous while Australian broadcasters would continue to be hidden out of sight. Of particular concern, the parliament has given manufacturers and user interface providers a transition window to make any necessary changes to ensure they are compliant with the new requirements. This generous transition window acknowledges there will be changes required to their primary interface (static home screen with no scrolling) to comply. At the outset, the ACMA has chosen to signal a willingness to re-examine the policy case and not to implement the legislation as intended.

Free TV reaffirms the television industry's strong expectation that regulated television service apps must be present and visible at start up on the user interface for it to be considered "primary" of regulated television devices, without the need for scrolling or any other action.

4.1.1 Proper construction of the ACMA's powers in section 130ZZL

The ACMA should also give further consideration to whether its proposal would be a proper exercise of its clarificatory powers. The ACMA's powers under the Act are expressed to concern 'interfaces' rather than the 'primary user interface' (PUI). The definition of a PUI has two 'limbs,' as highlighted below:

Meaning of primary user interface

*(1) For the purposes of this Part, the primary user interface of a regulated television device means the **interface** of the device that:*

(a) is either or both of the following: [First Limb]

(i) the home screen or main screen of the device;

***(ii) the main interface most commonly used to provide access to applications** that make audiovisual content available on demand using a listed carriage service; and*

*(b) meets the **description or requirements** (if any) determined by the ACMA under subsection (3). [Second Limb]*

(2) For the avoidance of doubt, the primary user interface of a regulated television device does not include any ancillary hardware or equipment for the device.

The ACMA's power is secondary to the definition of primary user interface in subsection 1(a):

ACMA may specify **interface** requirements

(3) For the purposes of paragraph (1)(b), the ACMA may, by legislative instrument, do either or both of the following:

(a) describe **an interface**;

(b) determine requirements relating to **an interface**.

(4) Without limiting subsection 33(3A) of the Acts Interpretation Act 1901 , the ACMA may describe **an interface**, or determine requirements relating to **an interf**ace, differently in relation to:

(a) different regulated television devices or kinds of regulated television devices; or

(b) different kinds of things or circumstances.

That is, the ACMA is there to assist in the event that there is a dispute about what an 'interface means' not to define 'primary user interface' more generally.

This is supported by the Revised EM:

Subsection 130ZZL(3) would provide, for the purposes of paragraph 130ZZL(1)(b), the ACMA may, by legislative instrument, describe an interface or determine requirements relating to an interface, for the purposes of the primary user interface definition in subsection 130ZZL(1).

*This power is important as there may be contention about what precisely constitutes the primary user interface **on individual devices. Allowing the ACMA to determine what constitutes an interface, or the requirements relating to an interface, will help to provide a 'circuit breaker' in these cases.***

That is, the power for the ACMA to specify an 'interface' is meant to be a circuit breaker in particular cases.

If the ACMA choses to exercise its discretion to describe or specify requirements relating to an 'interface' it should first be satisfied that doing so is necessary, given that the definition of PUI is already well understood and 'interface' has no ambiguity. Additionally, if it chooses to exercise the discretion, it should place weight on these factors derived from the objects:

- What will support Australia's representative democracy
- What will best ensure access to Australians content of local, regional, or national significance.
- What will contribute to a multicultural society.
- What will support free-to-air television

- What will ensure access to individuals with minimal effort, input or technical skills and knowledge.
- What will ensure free-to-air television broadcasting services are treated no less favourably than other providers of audiovisual content, including those that provide it through search, discoverability and aggregation formats.

4.1.2 User interfaces that display app icons

To our knowledge, almost all current television device user interfaces in Australia display one or more television (SVOD or BVOD) apps on their primary user interface, as currently defined. The ACMA is right to say that some display only small numbers of apps that are visible without scrolling, clicking, or other user action. However, the transition period in the legislation provides adequate time for television set makers and user interface providers to make any changes necessary to ensure that all five Australian network BVOD apps are visible. Indeed, what is arguably a generous transition time was given in acknowledgement of the argument that some changes would be extensive and need time to implement.

In advice tendered by Free TV as an attachment to its February 2024 submission to the Senate Environment and Communications Legislation Committee, industry expert Stephen Cleary indicated that securing prominence requirements (PR):

> … can be done by server configuration changes or software implementation.
>
> - None of the PRs require hardware, system-on-a-chip, mechanical or physical changes.
> - Some PRs can be done by server configuration but some may require software implementation.

As to how long it will take, his view was:

- PRs that can be done by server configuration can be done within 1 month. This includes adding BVOD apps to the currently existing row of apps, placing them on home page positions and auto-installing BVOD apps.
- PRs that require software implementation can be done within 6 months, if prioritised. These include new design or layout of home screen, including additional rows of apps, new user interface design or home screen layout, and if not already implemented installing a “Live TV” tile for linear broadcast services and ordering linear broadcast services in channel number on the EPG.

The onus should be put back on manufacturers and interface providers to show why they cannot comply within the transition period. Manufacturers may also have existing worldwide contracts with some of the global streamers, where these contracts stipulate inclusion of the global apps on the primary user interface. As local laws trump global contractual arrangements, once again the onus should be placed on manufacturers to show why prominence cannot be secured on the first screen without scrolling. It is simply not credible that requiring prominence for five regulated Australian television services and a live TV app will more broadly disrupt television manufacturers in their lucrative, and otherwise legitimate, role as TV viewing ‘gatekeepers’; a simple redesign can accommodate both the lucrative deal and meet their regulatory requirements.

The global challenge manufacturers and over-the-top audiovisual entertainment service providers are currently mounting to the discoverability, and hence survival, of existing local television services is a

problem currently confronting multiple industries in multiple jurisdictions. Recent reported decisions of the Italian Communications Regulatory Authority, AgCom, to mandate prominent positions for multiple tiles or icons leading to local TV services, show that Australia would not be alone in simply requiring local television receivers and streaming devices to offer viewers ready access to Australian television[4].

4.1.3 Content aggregating interfaces

The paper notes that some regulated television devices prioritise the discoverability of content, and do not display a scrollable list of apps on their home screens. It adds:

> We understand that these content aggregating interfaces are growing in popularity among manufacturers, and that the TV prominence framework must be able to accommodate this.

Any move away from featuring app rails needs to be viewed critically through the lens of the government's prominence policy. Manufacturers and user interface providers will continue to offer prominence in line with their commercial interests. The focus of prominence will move to the buttons provided on the viewer's TV remote control and the choice of program content displayed, with conspicuous places made available to related corporations or the highest bidder in the same way as app prominence is decided on most devices today. There will be obvious risks that regulated television service apps will be much harder to find than in the previous 'app rail' environment.

Whether there is an app rail or just content, the free-to-air Live TV app and BVOD should appear on the static first page of the TV screen regardless of what other graphics are visible. These apps need to be present at this primary point as it promotes the objectives of the legislation. The content tiles and graphics on the pure content landing pages are mostly content promotions which have been paid for and should not interfere with pursing the objective of ensuring Free to Air services are prominent on TV devices. Of course, if viewers wish to move them, they are entitled to do so.

As with other regulatory requirements in other sectors, including, food product packaging, disability access for buildings, commercial free to air television local content quotas, and privacy requirements for the use of data, the TV manufactures will have to redesign their products to comply with their regulatory responsibility. Making different rules for 'pure' content aggregation home pages would simply incentivise more widespread adoption of this format to avoid the prominence rules requirements.

Whether to remove app rails from the home screen of TV receivers should not be decided solely by TV manufacturers or user interface providers but is an issue in the first instance for government to consider in light of the prominence law. The government, rather than the regulator, sets the minimum prominence requirements, using the Minister's regulation-making power in section 130ZZO, and there are good arguments that the ACMA should first approach the Minister about the content aggregation PUI issue with a view to informing her in her section 130ZZO role. If the ACMA chooses to address the issue itself, using its clarificatory powers, then the questions that arise will depend on the proposed look and feel of a 'pure' content aggregating interface. They will include whether or not a 'pure' content aggregating interface can ever be consistent with the objects of the prominence regime. There is a case to be made that a conspicuous place for TV network apps is required in order to secure 'prominence' for the 'service', even if individual programs of regulated television services are

[4] *Italy Approves Prominence Guidelines*, Advanced Television, 15 October 2024, available at: https://mailchi.mp/advanced-television/151024-advanced-televisioncoms-daily-news?e=be1a93488f

displayed. Further, as reflected in the primary purpose test, these are television devices and consumers expect them to carry TV services.

4.2 The ACMA's questions

4.2.1 Should the ACMA exercise its discretion to make descriptions or requirements for a device's primary user interface?

The ACMA's proposals for extending the primary user interface beyond the static landing page are premature and would defeat the objective of the legislation and draft regulation. See the comments at 4.1.2, above.

4.2.2 Should content aggregating interfaces be regulated differently from other regulated television devices when describing requirements for the primary user interface?

Please see the comments at 4.1.3, above

4.2.3 To what extent do existing contractual arrangements between device manufacturers (or operating systems) and content services providers (such as SVOD providers) affect the ability to provide prominence to BVOD apps on the primary user interface?

The comments at 4.1, 4.1.1 and 4.1.2 refer.

4.2.4 Call for evidence 1: images of home screens

Freeview staff made a number of videos of home screens of popular TV makes in 2023, showing the ease or difficulty of navigation to local broadcaster apps. Free TV would be happy to make these available to the regulator.

5. When a regulated television service is offered

The ACMA paper asks whether clarification is required as to when a regulated television service is 'offered'.

Where possible the ACMA should rely on existing industry practices for determining the circumstances in which a regulated television service is taken to be offered. Going forward, however, it will be important for ACMA to ensure any industry practices that are within the control of manufacturers and user interface providers should not be misused to hinder or delay regulated television services that have taken reasonable steps to offer services on a particular TV platform. This includes:

- Any unreasonable notice period required before a regulated TV service app is made available; and
- Any unreasonable conformance or testing requirements before a regulated TV service app is made available.

Free TV is open to further discussion of whether there is utility, and if so for whom, in maintaining a standardised and centralised list of applications that are made available across platform and operating systems, providing release dates and contact information for technical difficulties. Similar information products have been developed in the past as Operational Practices maintained by Free TV in consultation with broadcasters, noting this imposes a compliance cost on industry that needs to be outweighed by the benefit.