

21 February 2023

Online Safety, Media and Platforms Division  
Department of Infrastructure, Transport, Regional Development,  
Communications and the Arts  
GPO Box 594  
Canberra ACT 2601

Dear Online Safety, Media and Platforms Division

## Introduction and summary

We thank the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) for the opportunity to respond to its prominence proposals paper.

As the Department is already aware, the Interactive Games & Entertainment Association (IGEA) is the industry association representing and advocating for the video games industry in Australia, including the developers, publishers and distributors of video games, as well as the makers of gaming platforms, consoles and devices. Of most relevance to our engagement on this topic, our members include the manufacturers of devices for the playing of video games (consoles).

We have been closely involved in the Government's prominence framework design, having had consultations with the Department and provided a substantive response to its background paper last year. We are pleased to be able to further contribute to the design of the Government's prominence framework and look forward to further opportunities to shape this work.

Our submission focuses on the chapter 6 proposals regarding the framework scope as it applies to regulated TV devices, being the section of the proposals paper of most relevance to our sector. However, we also respond to the proposals in the other chapters where they are relevant.

**In summary, it is our strong view that any future prominence framework should be limited to devices capable of and primarily used for linear TV broadcast. However, we also consider the 'primary use' approach (proposal 6.2) to be a reasonable alternative. Either way, it should be clear under any future prominence framework that consoles are out-of-scope since their primary use is for playing video games and not for watching TV content.**

## Response to chapter 6 proposals (framework scope - regulated TV devices)

### Recommendation 1: 'TV devices' should be limited to linear TV broadcast devices

Our primary recommendation is that the definition of 'TV devices' used in this chapter and elsewhere in the paper is inappropriately broad and must be narrowed.

Specifically, we disagree with the inclusion of "devices that are connected to the internet and capable of displaying broadcast television content, or facilitating the display of television content (i.e. gaming consoles, sticks, pucks, dongles, laptops, tablets, mobile phones) transmitted via the internet" within the definition of 'TV devices' on page 9. This definition specifically encompasses devices that are not commonly referred to or understood to be 'TV devices' such as laptops, tablets, phones and consoles. Their inclusion will lead to confusion within industry and the public.



Further, this unnecessarily broad definition is also likely to cover a range of other devices that should similarly be out-of-scope of a prominence framework, including in-car screens, smart computer monitors, digital photo albums, e-readers, AR-enabled glasses, digital billboards and an increasing range of internet-connected smart home appliances. As consumer technology and electronic devices continue to evolve, there will increasingly be a lack of clarity around the devices that are inside or outside of the scope of any future prominence framework, leading not only to unclear regulation but to a significant burden on the Department to administer the framework.

While we understand the theoretical basis behind the use of a broad definition of 'TV devices' in the two chapter 6 proposals discussed in the following sections, we believe that the definition will in practice erode the usefulness and credibility of the framework. Instead, the definition of TV services should be limited to devices both capable of and primarily used for linear TV broadcast.

### Recommendation 2: Adopting the 'primary use' model (proposal 6.2)

Subject to our recommendation above, we support the adoption of the 'primary use' model for regulated TV devices under a future prominence framework (proposal 6.2).

As the proposals paper itself acknowledges, the 'all TV devices' model (proposal 6.1) significantly extends the scope of the prominence framework to practically any internet-enabled device that can theoretically display TV content. This would have a significant impact on the manufacturers of these devices and in our view would unreasonably extend the reach of the framework. Proposal 6.1 is therefore not a viable or realistic option either in theory or in practice.

In contrast, the 'primary use' model (proposal 6.2) provides a more sensible and workable solution by, as the proposal's name implies, overlaying a crucial 'primary use' test to the framework. Under this test, a device would only be subject to the framework if the primary use of the device is "to facilitate television viewing by Australian audiences". As the proposals paper notes, the 'primary use' model provides a range of benefits over the 'all TV devices' model by enabling flexibility and discretion to be exercised and limiting unintended or unreasonable regulatory impacts.

We agree with the proposals paper that under this approach, guidelines may need to be developed to provide certainty to industry regarding certain devices where it may be unclear (or where there is dispute) whether they are within the framework or not. Any such guidelines should be subject to public consultation and must address dispute resolution and appeals processes.

### Recommendation 3: Confirm that consoles are out-of-scope of regulation

Video game consoles clearly are not a TV device and would not satisfy the 'primary use' test set out in proposal 6.2 since they are designed solely or primarily for playing video games. Any TV or video-playing functionalities that they may have are ancillary or secondary functions only. To ensure that there is no risk of ambiguity in the future, any future prominence framework should provide confirmation or clarity that consoles are outside of its scope.

We believe the rationale for consoles being out-of-scope is clear and includes the following:

- It is in the name - video game consoles are for the playing of video games. Consoles are designed and optimised for gameplay, from their processing power to their menu interface, the design of their parental controls and the shape of their controllers.



- Consoles do not have any radiofrequency capabilities for receiving broadcast transmissions and do not connect to TV aerials. Consoles typically do not have remote controls like TVs do and some handheld consoles do not even connect to TVs.
- Within households with consoles, these consoles will almost certainly be connected to a smart TV and/or a TV that is already connected to a video device such as a stick or dongle, making any regulation of the apps carried on consoles unnecessary and duplicative.
- Consoles typically must be sold at a high price point due to the significant processing power needed for playing games, ensuring that they are only marketable as primarily gaming devices and are unlikely to ever become primary devices for watching videos.
- While consoles may offer some non-gaming apps, including some video streaming apps, the range of apps available compared to the range of games available is negligible and these apps often have limited functionality.
- The Australian TV sector has largely ignored video game platforms and most have not bothered to create BVOD applications for the current generation of consoles.

The above arguments are reinforced by data showing that Australians do not use consoles to watch TV. As the proposals paper concedes at page 33, only 8 per cent of Australians used consoles to view online video content at home in 2020-21. According to data collected by the ACMA, gaming consoles were the least common type of device (out of eight) used by Australians to watch online video content at home.<sup>1</sup> The percentage of Australians using consoles to watch video content is also falling, having dropped from 12% in 2020 to 8% in 2021.

Finally, we are pleased that the proposals paper confirms our position that the playing of TV content is not a primary function of video game consoles, recognising instead at page 21 that any set-top-box capabilities that video game consoles may have are “a secondary function”.

### Video game consoles are not ‘edge cases’

We object in the strongest terms with the contention on page 33 of the proposals paper that video game consoles may be an ‘edge case’ with uncertainty around their ‘primary use’.

As discussed above, the proposals paper has already confirmed clearly at page 21 that the capability to watch TV shows on video game consoles is “a secondary function”. Consoles are unquestionably devices primarily used for playing video games and we therefore do not understand why they have been listed as a potential ‘edge case’, except as an error.

Consoles are certainly no more of an edge case than PCs, laptops, tablets or mobile phones, and arguably are far even less so. While consoles may be connected to TVs, so can each of the four devices above. Further, these four devices can commonly be connected to TVs via various ‘screencasting’ capabilities, a functionality that consoles generally cannot do. Most compellingly,

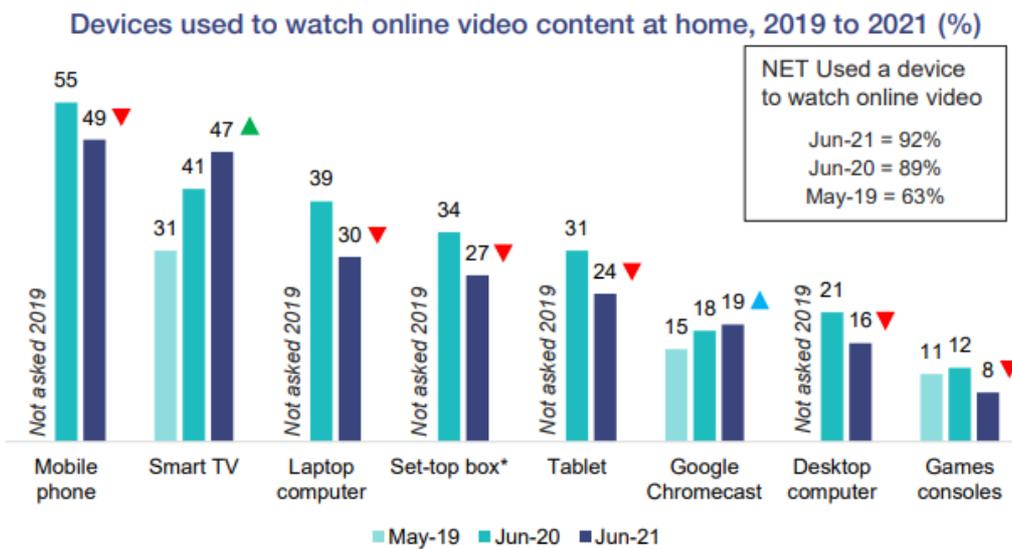
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<sup>1</sup> ACMA, *Communications and media in Australia: Trends and developments in viewing and listening 2020–21*, June 2022, [www.acma.gov.au/sites/default/files/2022-07/Trends%20and%20developments%20in%20viewing%20and%20listening%202020-21.pdf](http://www.acma.gov.au/sites/default/files/2022-07/Trends%20and%20developments%20in%20viewing%20and%20listening%202020-21.pdf), p.11



the Government’s own data shows that consoles are far less commonly used for watching TV content than these devices.

As is clear from the table below, consoles are by far the least common type of device used for watching online video. Consoles are being used to watch online video far less commonly than PCs, laptops, tablets and mobile phones. In fact, they are used for watching online video (8%) at half the rate of even the next least-common device type (desktop PCs at 16%). Compared to smart TVs (47%), consoles are around six times less likely to be used for watching online video.



Source: ACMA (see footnote 1)

It is also clear from the precedent set by the UK Government’s approach to prominence that it does not consider consoles to be ‘edge cases’ but instead to be out-of-scope of regulation. The UK Government’s April 2022 vision white paper for the broadcasting sector states that gaming consoles are unlikely to have a place within the scope of any future prominence framework.<sup>2</sup> In that paper, the UK Government states that a new principle-based framework would be restricted to ‘designated TV platforms’ that are “used by a significant number of UK viewers as a main way of watching television content on demand”. Consoles have also not been included in the white paper’s list of devices and platforms that might be covered by a future prominence framework.

This omission is deliberate. In its final report of its review of prominence for public service broadcasting, Ofcom explicitly highlighted the risks of imposing prominence requirements on devices that do not have a main purpose or a business model of carrying TV content, with

<sup>2</sup> UK Government, *Policy paper: Up next – the government’s vision for the broadcasting sector*, April 2022, <https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector/up-next-the-governments-vision-for-the-broadcasting-sector>, section 3.2

consoles mentioned as the sole example.<sup>3</sup> Ofcom recommended that any prominence framework should “focus on services that a significant number of viewers use as one of their main ways of watching TV content”, with consoles omitted from the list of devices that might be within scope.<sup>4</sup>

### Impact of a prominence framework on gaming consoles

Here we will also highlight five key consequences that would occur should consoles purposefully or inadvertently fall within the scope of a prominence framework, with a focus on the impacts of any requirement for the pre-loading of regulated devices with BVOD apps, which we expect would be one of the requirements of a future framework.

First, there would be major disruptions to our industry’s ability to supply gaming consoles to Australians. The Australian gaming consumer market is small and as gaming consoles for Australians are sourced from global supply chains, there is presently no ability to manufacture an ‘Australian’ version of a console pre-loaded with Australian BVOD apps. Any impact on the ability to supply latest-generation gaming consoles will be highly detrimental to Australian consumers.

Second, the imposition of regulation in the form of the pre-loading of consoles with BVOD apps would not only be a burden on existing suppliers but would result in a significant barrier to entry for new companies. There have been significant innovations occurring in the gaming device market, including the recent and planned launches of several new handheld, headset and ‘plug-and-play’ devices by a range of companies, including some that are making their first such device. The development of new devices already comes with high investment costs and business risks and the prospect of additional regulation creates further challenges for potential new suppliers.

Third, a requirement for consoles to be pre-loaded with Australian BVOD apps, especially if paired with mandatory visibility requirements for the prominent display of those apps, will significantly impact on video game developers by sacrificing the available screen space for the display of video games apps in order to accommodate BVOD apps, despite video game apps being the sole or primary reason for players powering on their devices. It will also make it harder for users to locate and open their console’s digital storefront or gaming subscription portal, again creating an additional unnecessary barrier between players and game developers. This impact on game developers will unfortunately affect the local Australian game development industry disproportionately, with many Australian games reliant not only on the console market but also on the ability to find early Australian players that can be critical to generating later global success.

Further, the provision of a third-party app on a device like a gaming console necessarily requires a licensing arrangement for commercial, quality and risk control and other important reasons. A requirement for such devices to carry BVOD apps as a requirement completely interferes with the commercial relationship between these parties and between device manufacturers and other

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<sup>3</sup> Ofcom, *Review of prominence for public service broadcasting: Recommendations to Government for a new framework to keep PSB TV prominent in an online world*, July 2019, [https://www.ofcom.org.uk/data/assets/pdf\\_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0021/154461/recommendations-for-new-legislative-framework-for-psb-prominence.pdf), para 6.16

<sup>4</sup> Ofcom, para 2.14



parties. It also fundamentally interferes with the basic principle that devices and platforms have the right and responsibility to determine the content that they should or should not carry.

Finally, we believe that including consoles in any future prominence framework would incur the above costs and risks without providing any worthwhile benefit to Australian consumers or local TV - but instead have a negative impact on consumers. Given that the ACMA's own data shows that the overwhelming majority of consoles are not being used to watch online video, any requirement for consoles to be preloaded with BVOD apps would inevitably lead to frustration for Australian console users who, upon turning on their devices, would immediately see their menu screen cluttered with BVOD apps that they did not ask for, would not naturally expect to see and have no intention of using.

## **Response to chapters 5, 7, 8 and 9 proposals**

### Chapter 5: framework scope - local TV services

Noting that this is not a policy area of direct relevance for our industry, our view is that the most appropriate and sensible scope of 'local TV services' is one that applies to linear TV broadcasts (proposal 5.1) and further, that it should be made explicitly clear that any such prominence requirements will only apply to devices with a radiofrequency tuner. We also agree with each of the points made in this chapter of the proposals paper around the costs to device manufacturers and the resultant impact on consumers of each proposal presented.

In our view, the only potential argument for a prominence framework with any reasonable basis is that local TV services play a certain role in relation to providing local news and emergency information and so they should be readily available on TVs. This is consistent with proposal 5.1. While this argument is also relevant to a prominence framework that is extended to both linear FTA broadcast and BVOD applications (proposal 5.2), or to content services providing Australian programming (proposal 5.3), if such proposals are further considered it is important that its scope only extend to BVOD applications that provide local news and emergency information.

We do not think that a compelling case has been made for extending a prominence framework to BVOD services that simply carry Australian content. Ignoring the fact that Australian content is carried on many SVOD services and that such content would arguably be placed at an unfair competitive disadvantage under a prominence framework, we do not believe that a prominence framework centred around devices should be driven by cultural objectives.

We note that a wide framework of support already exists to achieve these cultural objectives, including significant Screen Australia funding the Australian Screen Production Incentive. In addition, the Australian Government already plans to introduce Australian content quotas for SVOD services, as confirmed in the recently-released National Cultural Policy. We further note that no evidence has been presented in the proposals paper or elsewhere that Australians are watching less Australian content (with some dispute even around this fact) because of 'prominence' rather than because they are simply exercising their personal viewing preferences.

### Chapter 7: framework scope - responsible parties

In our response to this section of the proposals paper, we note that within our industry the manufacturers of consoles are generally also responsible for their operating system. As a result,



there may be little difference to our sector between a model where obligations are placed on device manufacturers (proposal 7.1) and a model with multi-party obligations (proposal 7.2). However, we emphasise the point made in the proposals paper that a manufacturer need an exception from liability under either proposal if a local TV service has failed to supply an application that meets the reasonable technical requirements of the manufacturer's device. This should be expanded to also require local TV services to abide by all reasonable requirements to maintain the quality, reliability and security of the application. Here we again state that most Australian broadcasters have chosen not to develop BVOD apps for current-generation consoles.

## Chapter 8: Framework models

Our preferred framework model for this section of the proposals paper is for a reporting framework (proposal 8.1), but if that is not considered adequate, for a fair bargaining framework (proposal 8.2).

The key benefit of a reporting framework (proposal 8.1) is that it would allow the Government to more carefully and sustainably encourage prominence while gathering data as to whether a more interventionist or regulatory approach is required. This would reduce the risk of adverse industry impacts (some of which have already been identified in the proposals paper such as increased costs to industry and the risk of these costs being passed to consumers) until an evidence-base can be built justifying their necessity. This model would also be the one that is most likely to gain 'buy-in' from both sides of the framework, the broadcast industry and device manufacturers. We suggest an initial 2 or 3 year reporting framework followed by a comprehensive review.

If the Government considers that a reporting framework is inadequate - ideally after a trial and review has been conducted first - a 'fair bargaining' framework (proposal 8.2) that allows device manufacturers to seek appropriate remuneration from the broadcast industry is the only fair regulatory model for imposing mandatory prominence requirements. In contrast, both a 'must carry (access)' framework (proposal 8.3) and a 'must-promote' framework (proposal 8.4) are both unfair and anti-competitive in terms of the advantages that they confer to local TV services.

While the proposals paper outlines many of the risks to the device manufacturing industry and competing TV service providers, as well as the potential downstream costs to consumers, that proposals 8.3 and 8.4 would trigger, all of which we agree with, we particularly highlight the fact that local TV services are, with the exception of the public broadcasters, commercial players with commercial interests. While we do not disagree with the fact that they play a role in providing certain services including local news and emergency information, these are only a small part of their operations and a prominence framework that provides a substantive commercial benefit to local TV services is in our view unjustified and without precedent or analogy in any other sector.

Even in the context of news and emergency information, the reality cannot also be ignored that the Australian public no longer depend on local TV services as may have been the case in the past and today communities have a wide range of highly accessible avenues to access this information.

## Chapter 9: Framework implementation

The most appropriate framework for the implementation of a prominence framework, as already noted in the discussion paper, will depend significantly on the final model selected. We will refrain



from responding to this part of the proposals paper at this stage, but we strongly encourage the Department to consult with all relevant stakeholders again when a preferred option is identified.

## Conclusion

Thank you again for allowing us to further contribute to the Government's design of a prominence framework. We also ask that further consultations are carried out before any preferred proposals are finalised. In the meantime, please do not hesitate to discuss this matter further with us.

Regards,

Ben Au

Director, Policy & Government Affairs