



**Submission to the Environment and Communications
Legislation Committee**

Response to Inquiry into Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023

January 2024

IGEA acknowledges and pays respect to the past and present Traditional Custodians and Elders of this land and the continuation of cultural, spiritual and educational practices of Aboriginal and Torres Strait Islander peoples. We would like to extend our acknowledgments to the indigenous people from countries overseas and recognise their strength, wisdom and creativity.

1. Introduction & Overview

The Interactive Games & Entertainment Association (IGEA) welcomes the opportunity to provide a submission to the Environment and Communications Legislation Committee's inquiry into the Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023.

According to the Explanatory Memorandum to the Bill:¹

"The Bill would amend the *Broadcasting Services Act 1992* (BSA) to introduce a prominence framework to support the availability of free-to-air television services on internet connected television devices, and expand the application of the anti-siphoning scheme to online media. These measures would enhance the ability of Australian consumers to access free-to-air television services. The Bill would also make a number of consequential amendments to the *Australian Communications and Media Authority Act 2005* (ACMA Act)."

The premise behind the prominence scheme is that it would ensure that Australian audiences continue to have access to the local television services and address changes in the Australian media market over the past 10 years including the use of internet connected television (TV) devices to access audiovisual content and impact on the availability and access to free to air TV services.²

Further, the rationale for the anti-siphoning scheme is to prevent media content services from acquiring a right to televise, or otherwise provide coverage of a listed event to audiences in Australia, until a free-to-air TV broadcaster has a right to televise the event on a broadcasting service.³

1.1 About IGEA

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 the most popular 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 (video game consoles).

IGEA also organises the annual Games Connect Asia Pacific (GCAP) conference for Australian game developers and the Australian Game Developer Awards (AGDAs) that celebrate the best Australian-made games each year. IGEA has over a hundred members, from emerging independent studios to some of the largest technology companies in the world.

Video games are a beloved Australian activity and provide significant benefits for Australian game players, the wider community and the economy. Video game developers and publishers are the innovators, creators and business leaders reimagining entertainment and transforming how we learn and play. Two in three Australians play games, mainly for

¹ Explanatory Memorandum to the Bill, p. 2.

² Ibid.

³ Ibid.

enjoyment and relaxation, and games are increasingly being used for serious and educational purposes, including by governments. Video games provide a digital outlet for Australian art, culture, stories and voices, and Australian-made video games are among Australia's most successful and valuable cultural exports. Our medium also brings kids into STEM and helps them build technology skills that will feed Australia's workforce needs.

In terms of supporting local content, the video game industry is a major contributor to the Australian digital economy. According to our data, video games are worth around \$4.21 billion annually in Australia,⁴ while Australian-made games brought in \$346 million in largely export revenue last year.⁵ Moreover, because the video game sector uniquely sits at the intersection of entertainment, the arts and technology, video game companies hire a wide range of artistic, technical and professional roles and are thus a wellspring of high-quality sustainable careers, and are an engine for growth in the Australian national economy. Indeed, Australian game developers are internationally renowned and ours has the potential to be one of Australia's most important future growth industries, as well as an integral component of the Government's vision for Australia to be a top 20 digital economy and society by 2030.

1.2 Overview

Overall, it is our strong view that any prominence framework should be limited to devices capable of and primarily used for linear TV broadcast. It should be unquestionably clear that, in any prominence scheme, video game consoles are out-of-scope since their primary use is for playing video games and not for watching TV content. This exemption should also extend to the anti-siphoning scheme, which inadvertently includes video game consoles. In the Bill's current drafting, inclusion of video game consoles will lead to confusion within industry and the public.

We firmly believe that it was not the intention of the Bill to capture video game consoles. Unfortunately these devices were not explicitly exempted from the scope of the prominence scheme (unlike some other devices). Further, video game consoles have been explicitly identified as an example (at least under the scope of the anti-siphoning scheme), which could then also be widely interpreted to apply in the same Bill to the prominence scheme.

For the purposes of this submission, we particularly focus on these aspects of the Bill, which may create unintended consequences, scope creep and potential regulatory overreach. We strongly encourage the Committee to carefully scrutinise the drafting of this Bill to ensure clear and robust policy intent is properly reflected in the legislation.

⁴ ['Australians subscribe to video game growth' \(IGEA media release, 8 June 2023\)](#)

⁵ ['Australian game developers pull in \\$345.5 million for local economy' \(IGEA media release, 18 December 2023\)](#)

In summary, we recommend the following:

- **Video game consoles be added to the list of examples of excluded devices under the prominence scheme. This can be clarified in the Bill (as a Note to section 130ZZI) and/or Explanatory Memorandum.**
- **Video game consoles and services more broadly be excluded from the anti-siphoning scheme by deleting the reference to “an interactive computer game service” from section 146U in the Bill and the Explanatory Memorandum.**

2. The prominence scheme

2.1 Primary use of video game consoles

IGEA has been closely involved in the Australian Government’s prominence framework design, having had consultations with the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Department) over the last several years.

In our most recent submission to the Department, we highlighted strong reasons for why video game consoles should be excluded. In summary:⁶

- Primary purpose/function:
 - 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.
 - 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 online video streaming.
- Ancillary and secondary features:
 - 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.

⁶ A copy of our submission to the Department can be found here: <https://igea.net/wp-content/uploads/2023/02/IGEA-submission-in-response-to-prominence-proposals-paper.pdf>

- 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.
- Government evidence:
 - Consoles are certainly no more of an edge case than PCs, laptops, tablets or mobile phones, and arguably are even far less so. According to government policy evidence (i.e. data collected by the ACMA), game consoles were the least common type of device (out of nine) used by Australians to watch online video content at home. The percentage of Australians using consoles to watch video content is also falling, having dropped from 12% in 2020 to 7% in 2023.⁷ (See Appendix below.)
 - There is 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.⁸ 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 consoles mentioned as the sole example.⁹ 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.¹⁰

2.2 Potential impact on video game consoles

In our previous submission to the Department, we explained the potential impact of the prominence scheme on video game consoles if they are not exempted:

- Major industry disruptions: There would be major disruptions to our industry's ability to supply game consoles to Australians. The Australian gaming consumer market is small and as game 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 game consoles will be highly detrimental to Australian consumers.

⁷ ACMA, "Communications and media in Australia: How we watch and listen to content" (December 2023), <https://www.acma.gov.au/publications/2023-12/report/communications-and-media-australia-how-we-watch-and-listen-content>.

⁸ UK Government, "Up next - the government's vision for the broadcasting sector" (Command Paper, 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.

⁹ 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, p. 36, para 6.16.

- Barrier to entry for new companies: 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.
- Not consumer friendly: 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.
- Interference with legitimate commercial contractual arrangements: 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 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.
- No value to consumers or local TV: Including consoles in any prominence framework would incur the above costs and risks without providing any worthwhile benefit to Australian consumers or local TV; instead it would have a negative impact on consumers. Given that the ACMA's own data shows that the overwhelming majority of consoles are not being primarily 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.

2.3 Drafting issues in the Bill

For the reasons discussed above, we believe there has been a material error in the policy design and legislative drafting that does not correctly reflect the policy intent behind the Bill. This has resulted in video game consoles being potentially captured under the prominence scheme, as well as anti-siphoning scheme (discussed in section 3 below), in the Bill. These are discussed in further detail below.

According to section 130ZZI (Regulated television devices) in the Bill:

Meaning of regulated television device

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

(a) 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; or

(b) specified domestic reception equipment that the ACMA determines, under subsection (2), is a regulated television device;

but does not include specified domestic reception equipment that the ACMA determines, under subsection (3), is not a regulated television device.

Note: The ACMA may also make guidelines about regulated television 10 devices: see section 130ZZM.

ACMA may determine specified regulated television devices

(2) For the purposes of paragraph (1)(b), the ACMA may, by legislative instrument, determine that specified domestic reception equipment is a **regulated television device**.

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

(3) For the purposes of subsection (1), the ACMA may, by legislative instrument, determine that specified domestic reception equipment is not a **regulated television device**.

Note: For specification by class, see subsection 13(3) of the Legislation Act 21 2003.

The Explanatory Memorandum explains that:¹¹

- Section 130ZZI(1)(a)(i) of the Bill is “intended to exclude devices such as monitors and other audiovisual display equipment that are not capable of connecting to the internet. Such equipment may have a radiofrequency tuner, but this would not be a requirement for the purposes of this section.”
- Section 130ZZI(1)(a)(ii) is “intended to exclude devices that are not, on balance, designed for viewing audiovisual content (that would include television programs). Such devices may have the capability of viewing such content, but that purpose would be ancillary or secondary to other intended purposes. Indicatively, the types

¹¹ Explanatory Memorandum, Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023, at 10.

of devices that are unlikely to be designed for the primary purpose of facilitating the viewing of audiovisual content would include mobile phones, tablets and laptops.”

- Sections 130ZZI(1)(a)(i) and (ii) “would provide clarity about which devices are regulated under the prominence framework in most cases”. It suggests that in other cases where they are not specified, they could be either “edge cases” or a result of rapid home entertainment technology development. In those instances, those devices would need be determined by the ACMA as to whether these are regulated television devices under sections 130ZZI(2) and (3).

On the one hand, it could be argued that video game consoles may be excluded under section 130ZZI(1)(a)(ii), whereby its primary purpose is for the playing of video games. While we would be supportive of that interpretation, section 146T of the Bill defines “audiovisual content includes television programs”. As section 146T does not provide an exhaustive list, the term “audiovisual” can take a broader dictionary meaning that is not limited to television programs i.e.: “involving or directed simultaneously at the faculties of seeing and hearing”. By this broad interpretation, “audiovisual content” could infer that video game consoles are also captured. While we do not anticipate in practice that local TV would be engaged in video games or that video games should also be given prominence, the wording of section 130ZZI(1)(a)(ii) creates anomalous scenarios.

For reasons explained above, we consider that video game consoles should be explicitly excluded in a similar way that monitors, mobile phones, tablets and laptops have been characterised and identified as examples in the Explanatory Memorandum. This would clarify without any doubt that video game consoles should be excluded from the prominence scheme.

Recommendation: Video game consoles be added to the list of examples of excluded devices under the prominence scheme. This can be clarified in the Bill (as a Note to section 130ZZI) and/or Explanatory Memorandum.

3. The anti-siphoning scheme

IGEA has not historically been engaged in the subject of anti-siphoning laws - we are not aware that the video games industry would be interested in seeking televising broadcasting rights that would be of interest to local TV.

Nevertheless, we note that section 146U of the Bill introduces a new definition for “media content service”, where providers of such a service would be subject to the new anti-siphoning scheme:

146U Media content service

(1) For the purposes of this Part, **media content service** means any of the following:

(a) a broadcasting service;

- (b) *an online information service (for example, a dial-up information service);*
 - (c) *an online entertainment service (for example, a video on demand service or an interactive computer game service);*
 - (d) *any other online service that allows end-users to access content using a listed carriage service;*
 - (e) *a specified service that the Minister determines, under subsection (2), is a media content service;*
- but does not include a specified service that the Minister determines, under subsection (3), is not a media content service.*

(2) *For the purposes of paragraph (1)(e), the Minister may, by legislative instrument, determine that a specified service is a **media content service**.*

Note: For specification by class, see subsection 13(3) of the Legislation Act 24 2003.

(3) *For the purposes of subsection (1), the Minister may, by legislative instrument, determine that a specified service is not a **media content service**.*

Note: For specification by class, see subsection 13(3) of the Legislation Act 24 2003.

According to section 146U(1)(c), a media content service includes “an online entertainment service (for example, a video on demand service or an interactive computer game service)”. The reference to “interactive computer game service” can be widely interpreted to cover video game consoles and services more broadly.

We consider the inclusion of “interactive computer game service” an error in legislative drafting as we are unable to fathom the scenario in which the scheme would apply in practice to the video games industry. It would also create unnecessary confusion to the industry and the public by its inclusion.

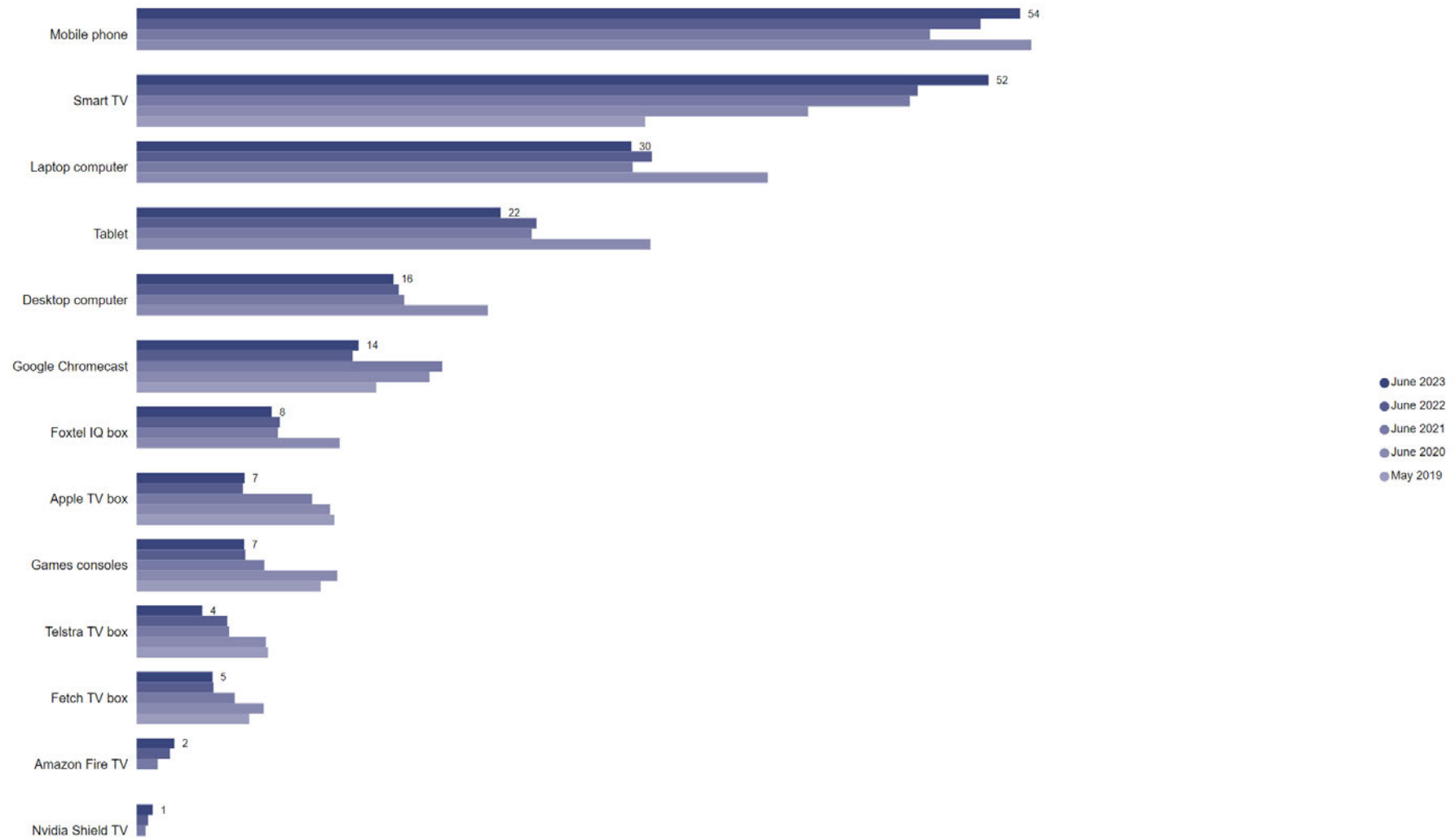
Returning to the prominence scheme in the same Bill, the explicit mention of “interactive computer game service” (under the anti-siphoning scheme), without a specific exemption for video game consoles (under the prominence scheme), might imply an extension of the prominence scheme to video game consoles and services more broadly.

To properly address this issue, we therefore request for section 146U to be amended by deleting the reference to “an interactive computer game service”.

Recommendation: Video game consoles and services more broadly be excluded from the anti-siphoning scheme by deleting the reference to “an interactive computer game service” from section 146U in the Bill and the Explanatory Memorandum.

Thank you for providing IGEA with an opportunity to contribute to the Committee’s inquiry into the Bill.

Appendix: Devices used for online video streaming



Source: ACMA