

14 January 2011

Mr Jason Potkins
Manager
Digital Television Policy Section
Department of Broadband, Communications & the Digital Economy
GPO Box 2154
Canberra ACT 2603

By email to: digitaldividendbill@dbcde.gov.au

National Indigenous TV (NITV) response to Exposure Draft of Broadcasting Legislation Amendment (Digital Dividend and Other Measures) Bill 2011

Dear Mr Potkins

Re: EXPOSURE DRAFT OF 20 DECEMBER 2010

1. Background

As you will appreciate, in the absence of an explanatory memorandum, it may not be possible to properly identify all relevant matters in an Exposure Draft. However, one issue which we wish to raise was one we found extremely difficult to resolve last year in the context of the Broadcasting Legislation Amendment (Digital Television) Bill 2010.

At that time in respect of certain copyright matters, and in particular Subsection 135ZZJA(2) of the Copyright Act 1968 we:

- obtained legal advice;
- consulted with an industry expert entity, Screenrights; and
- on advice from the Minister's office, sought an explanation from DBCDE of the intended effect of the Bill that passed through the Parliament on 24 June (please see attachment).

With respect to the Exposure Draft we noted that Item 53 proposes to:

Repeal the subsection Subsection 135ZZJA(2) (including the note), substitute:

(2) This Part does not apply in relation to a retransmission if:

- (a) the retransmission is a re-broadcast by a satellite BSA licensee; and*
- (b) subsection 135ZZZI(1) or (2) applies to the re-broadcast.*

Our concern is that the amendment has the potentially unintended effect on NITV and the specific allowance in Section 212(1)(c) of the Broadcasting Services Act relating to retransmission of a service which comprises programs provided by NITV Ltd and the consequent effect of Part VC of the Copyright Act in respect of underlying rights arrangements should such retransmissions be undertaken by a subscription TV entity.

The substantive advice from DBCDE was to put forward a response to the Exposure Draft.

2. What NITV wishes to be able to do in the VAST environment (which exactly matches what it currently does in the Aurora environment)

The two relevant things NITV wishes to be able to do are as follows:

- a) to have its service present on the VAST platform (as a result of an arms-length commercial 'carriage' agreement with MSCM, Imparja or Optus) and be integrated with the VAST free-to-air Conditional Access and Subscriber Management System and Smart Card (so as to be available to DTH VAST viewers through the same smart card, dish and STB used to receive National and commercial free-to-air channels on VAST); and
- b) have all third parties (including Subscription TV operators such as Foxtel and Austar) able to pick up such NITV transmissions from VAST and then retransmit them pursuant to Section 212 (1)(c) of the BSA and Part VC of the Copyright Act, i.e. have the statutory rights scheme administered by Screenrights cover arrangements with underlying rights holders.

3. Questions asked of DBCDE concerning the then current situation

Those questions and the responses are set out in the attachment to this letter. NITV requests that the quote from 21st July 2010 correspondence with DBCDE in the attachment should be regarded as being provided in confidence so far as Exposure Draft responses are concerned.

At the time NITV understood from the response in respect of point 2(b) above that existing retransmission arrangements could continue unaffected in the VAST environment.

Presuming that it has achieved access to VAST as per point 2(a) above, NITV requests that the relevant government instrumentalities ensure that Item 53 of the Exposure Draft does not affect NITV's ability to continue to operate in the VAST environment as outlined in point 2(b) above.

Yours sincerely



Michael McMichael
Acting Chief Executive Officer
National Indigenous TV Limited

ATTACHMENT

Q1.

Under the current Bill could either EASB or SCM enter into a retransmission agreement with NITV and carry the service through to the VAST STBs (at whatever cost + fee might be negotiated)? We feel it would be prohibited as an unforeseen NITV related consequence of Section 41CA of the BSA and 135ZZJA of Copyright Act. Such retransmission is a requirement imposed on NITV.

Answer:

Nothing in the Broadcasting Legislation Amendment (Digital Television) Act 2010 changes the ability of a third party (such as EASB or SCM) to retransmit NITV content, as is provided by section 212(1) of the Broadcasting Services Act 1992. However, where that third party is not a self-help group, they would continue to be subject to a possible action, suit or proceeding under the Copyright Act 1968.

The Department consulted the Attorney-General's Department about concerns Screenrights raised in the course of the Senate Committee's Inquiry into the Bill (to which you refer) and it was determined that no further changes to clarify the intended copyright arrangements were required.

Carriage of this content and its associated costs would need to be separately commercially negotiated either directly with the satellite platform provider or the party undertaking the retransmission.

Q2.

Under the current Bill (as amended by the Government amendments of Wednesday) do you believe that any NITV VAST emanating service would be caught by what I understand is a prohibition (caught by technical or legislation issues) on subscription operators retransmitting commercial or other services within the licence area of NITV (which is all Australia)?

If this is the case we signalled (on 6, 16 and 22 April) the need for a specific NITV amendment because frankly NITV would need to use any VAST feed for all its 5 current (and 2 prospective) subscription re-transmitters as and when NITV ceased to use Aurora for distribution. This is a 'die in the ditch' economic issue for NITV.

Answer:

As advised in the answer to Question 1, nothing in the Broadcasting Legislation Amendment (Digital Television) Act 2010 changes the ability of a third party (including subscription television broadcasters) to retransmit NITV content, as is provided by section 212(1) of the Broadcasting Services Act 1992. However, where that third party is not a self-help group, they would continue to be subject to a possible action, suit or proceeding under the Copyright Act 1968.

The Broadcasting Legislation Amendment (Digital Television) Act 2010 does not prohibit the retransmission of commercial or national broadcaster satellite services by a subscription television provider. As a general principle the legislative intention is that any retransmission of section 38C services by subscription television operators would be, as far as practicable, treated the same way as any other commercial television services. As such, the re-

transmission of section 38C services by Austar or Foxtel would be subject to the same regulatory environment as the retransmission of any other commercial television service by them and they would be liable under Part VC of the Copyright Act as is currently the case.

I trust this information is of assistance.