

Further Submission and Amendments to Bill

From NITV

To the Senate Environment, Communications, and the Arts Committee

Inquiring into

The Broadcasting Legislation Amendment (Digital Television) Bill 2010

Following public hearings on April 16 2010

The Bill aims to ‘equalise’ access to free-to-air TV services – What about NITV

The opening statement from the Department of Broadband communications and the Digital Economy (DBCDE) indicated that the overriding objective of the Bill was the ‘equalisation’ of access to free-to-air television services between the metropolitan areas and various ‘underserved’ regional areas and the remote parts of Australia.

In a prepared written opening DBCDE said “*The service which was announced by the government on 5 January sets a new standard of access and equity for free-to-air television in Australia. It is an important and significant element in the mix of ways in which Australians receive their television and it provides national coverage of digital television channels. The service will carry the full suite of free-to-air television channels to all regions of Australia*”. (But not yet it seems NITV)

Notwithstanding NITV is already:

- part of the digital free-to-air television services of Australia; and
- the 6th biggest broadcaster by potential audience reach (currently it also has a bigger potential free-to-air audience reach than either of the joint venture partners in the newly formed VAST entity with which the government announced an agreement on 14 April concerning funding the new free-to-air digital TV satellite platform in Central and Eastern Australia);

it is not part of this ‘equalisation’ process. Why not?

The truth about NITV being left on the Aurora TV satellite platform

NITV is currently available to everyone utilising the current free-to-air TV satellite platform known as Aurora through the same set-top-box (STB), conditional access, subscriber management and electronic program guide (EPG) systems used by viewers to receive the 2 commercial and 2 National TV services (ABC and SBS) available from that soon to be superseded platform.

Any knowledgeable evaluation of the situation that will develop quickly following implementation of the new free-to-air TV satellite platform must conclude that overwhelmingly TV homes currently watching the Aurora TV platform will convert to the

new one. Why would they stay with the Aurora platform when it provides 4 only commercial and National free-to-air TV services whereas the new one will provide 16?

This begs the questions of:

- why NITV has not been included in the planning for the new free-to-air TV satellite platform;
- why the Bill does not provide some accommodation for NITV becoming part of the new platform; and
- does the commercial agreement struck between the government and the VAST joint venture partners (announced on 14 April) make any provision for NITV becoming part of the new platform?

NITV was disappointed that at the public hearings of the Senate Committee on 16 April some of the 'official' evidence relating to NITV tendered to the Committee, while clinically not untrue, made no real effort to illuminate the real position of NITV (and its current DTH satellite audiences) for Senators.

Nowhere in its submission did NITV indicate that it could not remain on the Aurora TV satellite platform after the advent of the new free-to-air TV satellite platform. Nowhere did NITV indicate that viewers would not be able to continue to watch NITV from the Aurora platform after the advent of the new platform.

What NITV did say was that its current Aurora viewers would almost certainly move to the new platform. Accordingly only if they were willing to:

- maintain their current Aurora STB;
- duplicate cabling (one cable for the new platform services and one for Aurora's) from their STBs to every TV set and recording device likely to be used to watch or record NITV; and then
- utilise 2 separate remote controls

could they practically switch from watching any one of the new 16 commercial and National free-to-air services to NITV and vice versa.

The NITV submission predicted what was likely to be 'officially' said on the above matter to the Senate Committee on Friday wherein it said "*while NITV is available on the Aurora platform people could say that if homes wish to continue to access NITV after they have acquired reception equipment to watch the new free-to-air TV satellite platform they will be able to. Lest Senators be misled by such statements only people without TV experience or with a disingenuous view of the future of the NITV service and its indigenous and other audiences could make such a suggestion*".

The impact on NITV viewers starts with Mildura

The issue outlined by NITV is not something that should be left to a later review. The Bill should address our access concerns now, particularly since NITV has been provided with new funding for 2010 / 2011 and the new satellite platform is due to start around 1 June 2010.

As part of the conclusion to the NITV submission and to provide some practical imminent focus for NITV Aurora audiences we said *“a final anomaly to relate is that some homes in Mildura which currently watch all their free-to-air TV services DTH through the Aurora platform will actually be paid to convert to the new satellite platform (under the Digital Switchover Household Assistance Scheme). Hence, unless things rapidly alter the government will actually spend money to assist people to move from one satellite platform to another and at the same time facilitate such homes either losing their current access to the government paid for NITV service (or at the very least making such access impossible, expensive and unlikely – because of the need to maintain completely dual satellite reception systems to every TV set and recording device in the home likely to watch NITV”*.

There is no certainty that the new free-to-air satellite platform will be accessible to service providers like NITV

NITV understands that the conditional access, subscriber management and smart card systems covering the commercial and National free-to-air TV services on the platform will be under the control of those broadcasters (most probably the VAST joint venture partners). Without access to those systems even if NITV could acquire relevant satellite transponder capacity from Optus (apparently the satellite transponder capacity provider to VAST) its programs would not be accessible by the new satellite platform STBs.

Further even if NITV was able to purchase relevant transponder capacity sufficient for a single channel (probably less than 1/12th of a transponder) its service would need to be multiplexed (gathered together and transmitted to the satellite) along with other commercial or National services available from the new satellite platform.

Effectively it is an almost certain technical and commercial fact that the Bill together with what NITV imagines is in the commercial agreement struck between the government and the VAST joint venture partners establishes a government funded, but not controlled, monopoly free-to-air DTH satellite delivery platform in the sky.

Could NITV be refused access to the new platform?

Without seeing the commercial agreements between:

- the government and the VAST joint venture;
- the VAST joint venture and Optus; and
- any agreements that may be entered into between various commercial and National TV service providers to VAST and Optus

NITV cannot even say who it would need to approach in order to ensure it was able to be received through the same STB as will be used to receive commercial and national free-to-air services from the new platform.

It may be the VAST joint partners themselves or it may be the Conditional Access Association (to be established by regional commercial free-to-air TV broadcasters pursuant to the Bill). NITV just does not know.

NITV has no current reason to believe that the VAST joint venture partners would refuse NITV access to the platform. NITV also has no reason to believe regional and remote commercial TV service providers or the ABC and SBS would move to prevent NITV from having access to the new TV platform. However because NITV is an organisation able to sell air time to advertisers and sponsors pursuant to the licence conditions of a TV open narrowcast service and the relevant Codes of Practice registered by ACMA, there is no doubt that it is a potential competitor to regional and in particular remote commercial TV services in respect of revenue earning.

Generally in monopoly type situations (and particularly those funded by government) it would be intolerable for a Bill and/or any of the various commercial agreements mentioned above to result in regional, remote or metropolitan commercial TV licensees having any say as to whether NITV, a potential competitor, could take its place on the new free-to-air TV satellite platform and be accessible through same STBs used to receive commercial and National TV services.

It is important to note that, when discussing the capacity of the new satellite platform to accept yet to be developed commercial and National free-to-air TV services, sub Clause 7E of the Bill (described on page 55 of the Explanatory Memorandum) clearly indicates that there could be technical (EG transponder capacity availability) reasons for such new free-to-air TV services to be unable to be carried on the platform.

Hence the government is already acknowledging there can be capacity issues (even in respect of the 'equalisation' of commercial and National free-to-air channels) and has specifically exempted the satellite broadcasting licensees from carrying yet to be developed commercial and national free-to-air services from their obligation to carry provided ACMA indicates there is a technical (really capacity) reason for not doing so.

Clearly as night follows day the same capacity reasons could apply to NITV attempting to be on the new satellite platform quite regardless of whether or not the managers of the new platform were willing to let NITV into the EPG and conditional access, subscriber management and smart card systems.

NITV is not the only current or future entity with access concerns

It is not just NITV in the above unknown access situation. As the Committee has seen from 2 other submissions, the Rural Health Education Foundation (RHEF) and the customers of Westlink (a company run by the West Australian Department of Regional Development and Lands) are similarly affected.

One of the backbones to their successful operation is that their training, education and government information material is able to be received by individual homes through the same satellite STB used to receive the relevant commercial and National free-to-air TV services.

Further in the future there will be other free-to-air TV services which would be valuable to viewers of the new free-to-air TV satellite platform to receive and which currently would have no definite access to the platform.

For example the A-PAC service of Sky (a company owned by the Seven and Nine Networks and the News Ltd controlled BskyB) and currently run on the Foxtel, Austar and Optus subscription TV platforms may seek to use the new free-to-air satellite platform to provide its service free-to-air to the 250,000 TV homes the Minister says may access the new platform.

Sky has already indicated it would like to have the service transmitted free-to-air (see Foxtel's submission to the Government's Digital Dividend Green Paper and refer to Sky's discussions with Broadcast Australia, the Government and ACMA to have the service transmitted in digital free-to-air form in Sydney on the Broadcast Australia trial datacasting platform).

Given that this service is seen as competitive to the ABC's developing 24 hour news service and that Sky and the ABC have in the past competed for the government's international TV service tender, would it be safe practice to allow the VAST joint venturers and/or the ABC to have any influence on whether the A-PAC channel could gain access to the new free-to-air satellite TV platform?

NITV suggested amendments

In the attached suggested amendments to the Bill NITV is suggesting two options to overcome its 'access to the new satellite platform' concerns.

The first option is generic and probably structurally more difficult at this time for the Bill. This would set up an access regime that – subject to sheer transponder capacity being available – TV open narrowcasters like NITV could get access on equal terms to the relevant transponder capacity, the EPG and conditional access and subscriber management smart card systems and hence the STB's used to receive the ABC, SBS and commercial TV services from the new platform.

This may be conceptually a difficult proposition for the government to accept because in evidence to the committee on Friday 16 April DBCDE was at pains to say "*the government is not involved in anything other than funding and setting performance parameters for the new satellite platform.*"

For the Government to now set comprehensive access rules may mean further formal intervention and probably some significant rewriting of the commercial agreement under which the government is paying the VAST joint venture partners \$82.5m over the next 10 years and three months. Clearly however the government would have ensured there was a condition precedent clause in this agreement (announced on 14 April) allowing for any necessary changes occasioned by the passage of the Bill through the Parliament.

The second option, which would satisfy NITV, would be to make it a licence condition for the new satellite broadcasting licensees to carry NITV - just as it is a licence condition for those licensees to carry at least 6 standard definition and 3 high definition commercial TV services in each of the 3 satellite broadcasting licence areas.

As the Financial Impact Statement of the current Bill says “*the existing Bill has no financial implications of itself*” - by definition such mandated NITV carriage amendments would carry with them no financial impacts of themselves either.

NITV would also make a commitment to provide access to its service to the satellite broadcasting licensees for free and meet any underlying rights or other copyright payments that might be involved in the satellite broadcasting licensees meeting this new NITV carriage obligation.

Such an amendment is relatively simple although it would need to be carried through to the Codes of Practice and program classification time zone aspects of the Bill (wherein the satellite broadcasting licensees can choose one of several time zones to which they would adhere to the commercial TV Codes of Practice program classification time zones). In the case of NITV an amendment would need to relate to the TV open narrowcast Codes of Practice program classification time zones.

This option could be achieved by NITV being directly “rebroadcast” by the satellite broadcasting licensees (as envisaged by the current Bill for the 6 standard definition commercial and 3 HD commercial TV services each is required to carry in each licence area), or as envisaged below (under the following heading “retransmission amendment concern”) as a retransmission, just for the NITV service, pursuant to Section 212(1)(c) of the current BSA. The unique “rebroadcast” regime established by the Bill is required for the commercial TV services because fair commercial payments are expected to be made to entities supplying the commercial TV services to the satellite broadcasting licensees. This is not an issue with NITV.

Retransmission amendment concern

At the end of its evidence to the Senate Committee on 16 April NITV pointed out some concerns regarding the current ‘prohibition’ of the satellite broadcasting licensees being able to “retransmit” NITV pursuant to Section 212 (1)(c) of the BSA. Currently NITV operates almost exclusively in a “retransmission” environment.

This prohibition on “retransmission” should be removed if an NITV retransmission rather than a “rebroadcast” regime is favoured in the context of the 2nd NITV Option above and as set out in detail in Attachment 1.

Further at the same time NITV alerted the Committee, government and Parliament in general that if changes in the retransmission or rebroadcasting elements of the Bill are to be made as a result of discussions with, or considerations of Screenrights and Free TV evidence in particular that there should not be any diminution of what NITV sees as the Bill’s current allowance for self-help entities retransmitting program services available from the new satellite platform. Indeed NITV requests that no technical impediment should be put in place by the managers of the new platform to restrict such self-help entities from so operating.

Pat Turner

Attachment 1

NITV Amendments to the Bill

NITV Option 1 amendment

To provide a comprehensive access regime to all classes of free to air broadcasters providing services by free to digital terrestrial or DTH satellite means to at least one discrete existing commercial TV licence area to have equal and fair access to the new free to air satellite platform the establishment of which is facilitated by:

- **the Bill; and**
- **the Governments actual and prospective commercial and funding arrangements with VAST; WIN and Prime TV in WA; and ABC and SBS.**

Amendments to achieve such a result are likely to need to be drafted consistent with other comprehensive access regimes dealing with monopoly distribution and transmission platforms for other voice, data and audio visual service delivery to domestic homes.

Further the introduction of such a concept when DBCDE said, on behalf of the Government on Friday 16 April at the Senate Committee hearing, that “the Government is not involved in anything other than funding and setting performance parameters for the new satellite platform” may be complex; affect the already existing agreement with the VAST joint venture partners; and need to be referenced in many places within the voluminous and complex BSA.

The above 2 paragraphs point out why it is just beyond the resources of NITV (and we suspect the Senate Committee) to draft successful and comprehensive amendments.

Hence what follows is an Explanatory Memorandum like rhetorical outline of what such an access regime should achieve for non commercial and National free to air broadcasters already providing, or in the future providing services by digital terrestrial or DTH free to air satellite means to TV homes throughout at least one discrete existing commercial TV licence area.

Should the Committee feel that such a generic access regime is needed in the circumstances facilitated by the Bill then it can request the Government to use all the Departmental policy and drafting resources at its disposal to carry out what could be an onerous task in the time available.

Amendment intention outline

“Subject only to the physical availability of relevant satellite transponder transmitting capacity from the satellite transponder capacity provider to the Section 38C licensees and the ABC and SBS for the purposes of establishing the new free to air TV satellite platform the Bill ensures that:

- a) non commercial and National free to air broadcasters (IE currently TV open narrowcasters; community TV broadcasters; and datacasters) already providing, or in the future providing services to TV homes by digital terrestrial or DTH free to air satellite means throughout at least one discrete existing commercial TV licence area are, on equivalent terms to the Section 38C licensees and the ABC and SBS, able to:

- Obtain relevant satellite transponder capacity; and
- Be included in the electronic program guide; condition access and subscriber management systems;

such that domestic set top boxes meeting the standards set out for receivers to be used by viewers of commercial and National free to air services on the new platform are also able to receive these free to air services of non commercial and National free to air broadcasters in a non discriminatory way through those same set top boxes.

NITV Option 2 amendments

Requiring the new Section 38C licensees to provide NITV as part of their licence conditions.

Note just as the original Explanatory Memorandum Financial Statement said “the amendments in this Bill (Broadcasting legislation amendment – Digital Television – Bill 2010) will not of themselves result in any direct financial impact on the Government” so NITV can confidently say the same for the following further amendments relating to provision of NITV by the Section 38C licensees.

Apart from the amendments to Section 211A below all NITV amendments are self sufficient and are in black font. In respect of the Section 211A amendments the NITV changes are in red font inserted into the black font of the Bill’s original words.

It should be noted that NITV has borrowed from the wording of the current Section 212(1)(c) of the BSA when describing itself in case readers see such a description as being eccentric.

Further NITV acknowledges that it may not have captured all relevant amendments consequent on the key amendment to add NITV to the satellite broadcasting licensees licence obligation in new Schedule 1 Division 2 sub Clause 7D. There is simply no way that in 4 business days following the Senate Committee hearings that we can do a completely thorough trawl of ‘consequential’. As with the 1st NITV amendment option above, should the Committee accept the general NITV amendment thrust, government departmental and Parliamentary drafting staff could quickly do the comprehensive ‘consequential’ trawl through the BSA. We have done our best to help the Committee in the time available.

Schedule 1 division 1 (page 20) 41CA Services authorised by commercial television broadcasting licences allocated under section 38C

Authorised Services
.....

- (7) A licence allocated under section 38C authorises the licensee to provide a TV open narrowcast service transmitted by National Indigenous TV Limited (NITV) or which does no more than transmit program material supplied by NITV in the licence area.

Schedule 1 Division 1 (page 27) 43AD NITV television programs to be provided to section 38C licensees by NITV

Scope

- (1) This section applies if the licence allocated under section 38C requires carriage of a TV open narrowcast service transmitted by NITV or a service which does no more than transmit program material supplied by NITV in the licence area.
- (2) NITV must provide, without charge to the section 38C licensees, access to its TV open narrowcast service at a location agreed between NITV and the licensee to enable the licensee to meet its licence obligations.

Schedule 1 Division 1 (pages 46 and 47) 211A Time when a television program is broadcast—South Eastern Australia TV3 and Northern Australia TV3 licence areas

Nomination of place—South Eastern Australia TV3 licence area

- (1) The licensee of a commercial television broadcasting licence allocated under section 38C for the South Eastern Australia TV3 licence area may, by written notice given to the ACMA, nominate either or both of the following:
 - (a) a specified place in:
 - (i) the South Eastern Australia TV3 licence area; or
 - (ii) the Northern Australia TV3 licence area;for the purposes of the HDTV multi-channelled commercial television broadcasting services provided under the licence;
 - (b) a specified place in the South Eastern Australia TV3 licence area for the purposes of the SDTV multi-channelled commercial television broadcasting services **and the NITV TV open narrowcast service** provided under the licence.
- (2) The nomination must be expressed to be a nomination under subsection (1).

Nomination of place—Northern Australia TV3 licence area

- (3) The licensee of a commercial television broadcasting licence allocated under section 38C for the Northern Australia TV3 licence area may, by written notice given to the ACMA, nominate either or both of the following:
 - (a) a specified place in:
 - (i) the Northern Australia TV3 licence area; or
 - (ii) the South Eastern Australia TV3 licence area;for the purposes of the HDTV multi-channelled commercial television broadcasting services provided under the licence;
 - (b) a specified place in the Northern Australia TV3 licence area for the purposes of the SDTV multi-channelled commercial television broadcasting services **and the NITV TV open narrowcast service** provided under the licence.
- (4) The nomination must be expressed to be a nomination under subsection (3).

Note in Section 211A above the font in red represents the NITV amendments

Schedule 1 Division 2 (page 56) 7D Conditions about the provision of the NITV TV open narrowcast service

- (1) A licence allocated under section 38C is subject to the condition that, if there is a TV open narrowcast service transmitted by NITV or by another service which does no more than transmit program material supplied by NITV the section 38C licensee will provide this service.

The insertion of this new sub Clause in what NITV considers to be the appropriate place would mean that current sub Clauses 7 D, E, F, G, H, J, K and L would need to become sub Clauses 7 E, F, G, H, J, K, L and M respectively. NITV notes that 7I is not listed in the Bill.

Possible further NITV amendment considerations concerning Option 2 above and important advice to the Senate Committee concerning “retransmission” and the current workings of Section 212 of the BSA

Option 2 Retransmission by the satellite broadcasting licensees (Section 38C licensees) comments

Section 41 CA of the Bill lists the services which the satellite broadcasting licensees (Section 38C licensees) are authorised to transmit. These do not include “retransmissions” pursuant to Section 212 (1) of the BSA.

Further changes to Section 135ZZJA of the Copyright excludes “rebroadcasts” made by satellite broadcasting licensees (Section 38C licensees) from Part VC of the Copyright Act.

NITV is concerned that the new Bill allows for NITV to be retransmitted pursuant to Section 212(1)(c) of the BSA by satellite broadcasting licensees (Section 38C licensees) should that prove to be a more propitious way to operate than the obligation for satellite broadcasting licensees (Section 38C licensees) to “rebroadcast” NITV pursuant to the amended sub Clause 7D above and the new Part VD of the Copyright Act.

If this avenue was chosen the above new NITV sub Clause 7D for the satellite broadcasting licensees (Section 38C licensees) would probably need to be changed by adding the words “*pursuant to Section 212(1)(c)*” to the end of the sub Clause.

NITV overwhelmingly operates in a Section 212(1)(c) “retransmission” world now and given that it is willing to provide its service at no charge (see Section 43AD(2) amendment above) to satellite broadcasting licensees (Section 38C licensees) – unlike the commercial TV service providers – there is no need for the complex new “rebroadcast” regime and the new Part VD of the Copyright Act to be brought into play for NITV. Further should Free TV be successful in its argument that the whole new “rebroadcast and Part VD” regime is unnecessary and that everything should be achieved via normal affiliation agreements between satellite broadcasting licensees (Section 38C licensees) and their commercial TV service providers, then NITV would only have the pre-existing Section 212(1)(c) available to it.

Should this “retransmission” pursuant to Section 212(1)(c) of the BSA ‘route’ be followed to meet NITV access and carriage concerns (rather than the specific Option 2 “rebroadcast” oriented NITV amendment above) then the changes to Section 135ZZJA of the Copyright would need to exclude such retransmissions of NITV from their operation. Otherwise there may be no certain and practical method of reaching agreement with underlying copyright holders in program material contained in the NITV service.

Retransmission on the ground of services provided by the satellite broadcasting licensees (Section 38C licensees)

Given that both Screenrights and Free TV have commented on the proposed “rebroadcasting” parts of the Bill as it relates to both the BSA and Copyright Acts, NITV wishes to ensure that in any consideration of these organisations’ views that nothing happen that would fetter to any extent the ability of any entity to downlink the NITV service being “rebroadcast” or “retransmitted” and then retransmit it by any means pursuant to Section 212 (1)(c) and Section 212A of the BSA and, where relevant, Part VC of the Copyright Act.

It is important to ensure that such entities as multi unit building distribution system providers and self-help communities etc are able to use the new satellite platform as the source of the NITV service and that entities can retransmit NITV sourced in this way to the relevant local community / residents and or the audiences for their suite of services under the regulatory exemption cover of Section 212 – **as happens now using the NITV Aurora feed.**