



**Submission by
Free TV Australia Limited**

Senate Standing Committee on
Environment, Communications and the Arts

Broadcasting Legislation Amendment
(Digital Television) Bill 2010

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1 Executive Summary

- Australians place a very high value in their free-to-air television services. Overseas experience shows that digital television reception issues, and how they are managed, are key to the success of the digital switchover project.
- The new free-to-air satellite service will deliver a much improved television service for those viewers unable to receive adequate terrestrial signals, providing the full range of Freeview services and access to local news bulletins.
- The satellite service, combined with broadcasters' commitment to fund digital terrestrial in-fill and conversion at over 100 sites Australia-wide, will deliver the best outcome for all Australians.
- Whilst the Bill provides a suitable licensing and access structure, there are a number of amendments required to ensure the service operates efficiently and as intended.
- Amendments are required to the parts of the Bill which facilitate the provision of local news, as they appear to inadvertently capture more material than originally intended.
- This would result in a requirement to rebroadcast non-news material that would not meet the relevant policy objectives. Carriage of this content would significantly increase costs without materially increasing the amount of timely and relevant local news available on the new satellite service.
- Amendments are also required to protect the new satellite licensees, and the existing broadcasters who will be required by law to supply content, from inadvertent breach of the existing, licence-area based regulatory framework, and to acknowledge that content will be provided across State and Territory jurisdictions.
- The services carried by the new satellite licensees are intended to be rebroadcasts of the existing remote area services (the remote area broadcasters being shareholders in the new satellite licensee companies).
- The Bill will require metropolitan broadcasters to provide their programming to the relevant satellite licensee if requested by the satellite licensee.
- In practice, such requests are only likely to be made in the unlikely circumstance that a remote area broadcaster is unable to comply with its separate licence condition obligations to provide its programming to the relevant satellite licensee.
- In the unlikely event a request for content is made directly of a metropolitan broadcaster by a satellite licensee, commercial negotiation for fair value will be the starting point.
- If these negotiations fail, Free TV submits that an independent third-party should be given the power to decide equitable remuneration, with reference to all relevant circumstances, including existing content affiliation agreements.
- The fall-back mechanism outlined in the Bill with respect to the provision of metropolitan signals is overly complex and inappropriate. Free TV has consistently expressed concern regarding the adequacy of the retransmission scheme that already exists as regards free-to-air signals on pay TV and is opposed to any legislative provisions which would replicate such a scheme.
- Urgent legislative amendments are required to ensure that the existing regulatory framework for captioning on multi-channels does not start to expire with analogue switch-off in Mildura in June this year.
- Free TV has also identified a range of other drafting issues which should be addressed as part of Government amendments to the Bill.

2 Introduction

Free TV Australia represents all of Australia's commercial free-to-air television broadcasters. Free TV welcomes the opportunity to comment on the Broadcasting Legislation Amendment (Digital Television) Bill 2010 ('the Bill').

The importance of free-to-air television broadcasting services to the Australian public remains high. On any given day, an average of more than 13.4 million Australians watch free-to-air terrestrial television.

Free-to-air television reaches 99.7% of Australian households and over 70% rely exclusively on free-to-air television. Virtually all Australian households rely on free-to-air television for some of their television services. The majority of households (68%) have two or more TVs.

Overseas experience demonstrates that the quality of digital television reception after switchover is the key factor for Governments and broadcasters in delivering a smooth and successful switchover process.

Free TV broadcasters are working closely with Government to ensure a smooth transition to digital services for all viewers within the agreed switchover timetable in a way that minimises the impact on the public and ensures a viable future for free-to-air terrestrial television broadcasting in Australia.

The Government's announcement of a fully-funded satellite service for viewers who are unable to receive digital terrestrial signals will deliver a much improved free-to-air television service. Free TV broadcasters have also offered to fund digital upgrades to a substantial number of self-help facilities and install additional gap-fill transmitters in population growth areas. These sites have been chosen following extensive and careful study of the adequacy of existing infrastructure, future population growth and the commercial viability of new infrastructure.

Together, the new satellite service and expanded terrestrial network will provide the best outcome for all Australians, delivering free-to-air television services to almost every Australian home.

Whilst the majority of the Bill is consistent with the objectives proposed for the new satellite service, there are key elements of the Bill which either exceed the Government's service description or which do not provide sufficient regulatory protection for the satellite service and the broadcasters who will be required by law to supply the content.

Amendments are required to address the scope of the local news and information programs regional broadcasters will be required to provide to the satellite licensee for re-broadcast and to address the regulatory issues which arise from the broadcast of material across jurisdictions and timezones.

The provisions which deal with the determination of equitable remuneration for the supply of metropolitan broadcast signals also require amendment as they are unnecessarily complex and likely to be very expensive if ever invoked. It is unlikely that these provisions will be needed in practice, as the satellite licensee will be provided with programs from Remote Area Broadcast (RABs) licensees. In the unlikely event that the satellite licensee has to deal directly with the metropolitan broadcasters, commercial negotiation will be the most effective way to ensure agreements are reached on fair and equitable terms, and this is reflected in the Bill. Where those negotiations fail, there should be a process for referral of the matter to an independent 3rd-party who can resolve the dispute with reference to all relevant circumstances, including comparable affiliation agreements.

The Bill's proposed fall-back mechanism is based on a retransmission-style scheme and will not be appropriate. Free TV has consistently expressed concerns regarding the ability of the existing retransmission scheme to deliver fair value for use of FTA broadcast signals. The Bill would also refer the issues to the Copyright Tribunal for resolution in the case of dispute, which could result in unnecessary complexity and delays and significant legal costs.

Our submission also notes the urgent need for amendments to the captioning and content provisions applying to digital multi-channels after switchover in a licence areas. Free TV has consistently raised the need for these amendments, which would prevent more onerous content and captioning obligations applying to regional broadcasters' multi-channel streams in early switchover areas than apply to the metropolitan broadcasters who supply that content.

This submission outlines the key parts of the Bill requiring amendment:

Section 3 – Local news on the satellite

Section 4 – Legal and regulatory impacts

Section 5 – The provision of metropolitan program streams

Section 6 – The conditional access scheme

Section 7 – Content and access requirements for multi-channels.

3 Local news on the satellite service

In developing the satellite broadcasting model, broadcasters have acknowledged the need for regional viewers reliant on satellite to still have access to their local news – typically delivered by way of an evening bulletin or shorter multiple bulletins in some areas. To meet this objective, broadcasters have developed a unique model which aggregates these daily news bulletins from all regional broadcasters into a series of repeating news channels providing access at viewers' convenience. It is contemplated that these services will be arranged by broadcaster and by region and accessed by an intuitive interactive application in the satellite set top box. This is a new and unique service which provides an innovative solution to delivering localism of services to viewers spread over many licence areas.

However, the provisions in the Bill do not appear to capture the parameters of the proposed satellite news service. As noted above, the satellite news service has been developed to deliver the evening news bulletin, or shorter multiple bulletins, that would otherwise have been available to viewers from their local terrestrial news service.

On our reading, the provisions of the Bill go further than this, requiring the carriage of any material which meets the (much broader) local content licence conditions which apply to regional commercial broadcasters (refer to item 38 of the Bill, inserting new subsection 43A(3A)-(3C) and item 41 of the Bill, inserting new subsection 43AA(1)-(7)). This includes a wide range of material other than the local news bulletins which the satellite news service is intended to provide.

These broader requirements would significantly increase costs without materially increasing the amount of timely and relevant local news available to regional viewers reliant on satellite services for their digital television.

3.1 Amendments required

We suggest amendments to the Bill at item 38 and item 41 to bring the definition of the news content to be provided to the S38C licensee as follows:

1. a long form local news program produced and broadcast by a Regional Commercial Television Licensee; or
2. multiple short form local news programs (if the relevant Regional Commercial Television Licensee does not produce a long form local news program),

but does not include:

1. short segments or headline updates that have the purpose of promoting an upcoming local news program; or
2. short segments or headline updates that repeat news content that has previously been broadcast; or
3. any other;
 - a. material of local significance; or
 - b. local content or local information

that is not a news program.

4 Legal and Regulatory impacts

As well as providing a licensing framework for the satellite service, the Bill must also ensure the new satellite licensees are protected from inadvertent breach of the existing licence-area based regulatory framework. The Government must ensure that in setting up a new style of broadcasting service, it has also adequately addressed the regulatory implications of the new service for the satellite broadcaster as well as the broadcasters who will be required by law to provide their content to the new service. This issue is particularly pronounced with respect to the proposed local news service.

4.1 Background

For more than forty years, the delivery of broadcast services in Australia has been on the basis of controlled reach of services, through the licence area model and the natural limits of terrestrial delivery. Accordingly, broadcasters have developed many operational and commercial practices which reflect the fact that different broadcast services are delivered in different areas. In addition, a significant proportion of the broadcasting regulatory framework (particularly as regards content regulation) is based on the delivery of localised services.

Australia has three standard time zones and five different time zones during daylight savings periods. Many broadcasting regulations are based around the time at which certain content is shown. These rules would be consistently breached if the same service was broadcast simultaneously into markets in different time zones. Free TV notes the Bill has included provisions to address this issue.

However, broadcasters must also comply with a range of restrictions on the reporting of legal and criminal proceedings, which may apply at a city or state-level and Free TV is concerned the Bill does not include sufficient protection against inadvertent breach of these restrictions.

News coverage is often subject to state-based suppression orders which prevent some details of a court matter from being reported. Severe penalties may apply for breaching a suppression order, or otherwise being in contempt of court such as heavy fines and/or imprisonment if an individual is found to be in contempt of court.

Further, different states have different legal frameworks in areas such as the identification of children involved in criminal proceedings and the identification of an accused in sexual offence cases. Each local news bulletin is pre-vetted to ensure it complies with the relevant legal requirements for that market. Broadcast of that bulletin across multiple states and territories could inadvertently breach the legal framework in a jurisdiction for which it was not originally intended. The existing licence and market area differentiation of broadcast feeds has so far enabled compliance but this will not be possible with the new satellite service which will be broadcast across different jurisdictions.

In addition to news bulletins a criminal trial may prevent a program being broadcast in one market but not in the other markets (for example, *Underbelly* could not be shown in Melbourne due to a pending trial). Consideration must also be given to local market advertising. Many national advertisers provide different offers, prices or services in different markets and therefore cannot run the same advertisement nationally without risking a breach of the *Trade Practices Act 1974*.

Advertising restrictions also prohibit the broadcast of election material in the days immediately prior to polling day for any election. Particularly in the case of a localised by-election, or a state or territory election, political material approved for broadcast in another area, and rebroadcast on the satellite service, could breach the 'election blackout' period in the local area about to go to the polls.

The Code of Practice also permits a small amount of additional advertising during election periods in the area the election is being held (refer to clause 5.6 of the Commercial Television Code of Practice 2010) and a satellite broadcaster may inadvertently breach these provisions.

4.2 Amendments required

Free TV notes that the Bill includes amendments to protect the satellite licensees from breach of classification timezone requirements and these appear to be adequate.

However, the Bill does not appear to provide adequate protection for satellite licensees against breach of state-based restrictions on the reporting of legal issues. Broadcasters have consistently emphasised the need for immunity from suit for satellite service providers to address cross-jurisdictional broadcasts.

The Bill should be amended to provide the necessary protection and to ensure satellite licensees are protected from breach of state-based election black-out provisions.

These protections must also apply to all broadcasters in the 'supply chain' to the satellite broadcasters. It is not sufficient to simply protect the new satellite licensee by shifting the liability to the underlying Regional Commercial Licensee, or to the originating Metropolitan Commercial Licensee. As the Government is requiring the supply of the local news service, none of the broadcasters should be held liable for any breach arising from the legislated re-use of content in a manner at odds with the purpose for which it was intended and created and originally broadcast, so long as that original broadcast was not in breach.

To achieve this, the following amendments should be made to the Bill:

1. No action, suit or proceeding lies against a commercial television broadcasting licensee or its related bodies corporate in respect of the provision of programs in accordance with section 43A(3A), section 43AA, section 43AB or section 43AC to a section 38C licensee or in respect of the broadcast of those programs by a section 38C licensee.
2. No action, suite or proceeding lies against a section 38C licensee in respect of the broadcast by that licensee of any program provided to it in accordance with section 43A(3A), section 43AA, section 43AB or section 43AC.
3. Clause 3A of Schedule 2 of the *Broadcasting Services Act 1992* (BSA) does not apply to the rebroadcast by a section 38C licensee of any program provided to it under section 43A(3A), section 43AA, section 43AB or section 43AC.

5 The provision of metropolitan program streams

Proposed new section 43AB (item 41 of the Bill) would impose a licence condition on metropolitan broadcasters to provide program content upon request from a section 38C licensee.

This ensures that the section 38C licensee has a means of sourcing the content they are required to provide under the proposed new licence conditions set out in item 72 of the Bill (proposed new clauses 7B and 7C of Schedule 2 to the BSA). However, it is expected that this provision would only need to be relied upon in rare circumstances (for example, if a RABs broadcaster is unable to comply with its separate licence condition obligation to provide its programming to the satellite licensee).

The Bill then sets out a scheme for addressing copyright-related issues with regards to the provision of program content (refer to item 141 of the Bill, which contains proposed amendments to the *Copyright Act 1968*). This is an overly complex scheme.

In the first instance, the emphasis must be on a commercial negotiation, resulting in the provision of content to the satellite licensee on reasonable terms. Free TV acknowledges that the Bill encourages this outcome. Commercial negotiation is the most appropriate and efficient means of securing equitable remuneration for the supply of program content, particularly having regard to the fact that the number of people in digital 'black spots' will be very small.

Free TV agrees there must be a fall-back mechanism for when a commercial agreement cannot be reached, to ensure the provision of content to the satellite platform. However, broadcasters have serious concerns regarding the 'fall-back' scheme proposed in the Bill.

The Bill should provide for referral of the issue to an independent 3rd-party who can determine fair value with reference to comparable affiliation deals and other relevant information.

Unfortunately, the Bill sets down an unnecessarily complex process which may not result in an appropriate valuation of the metropolitan licensees' content.

The Bill would establish a scheme similar to the existing retransmission scheme in the Copyright Act, which enables Foxtel's retransmission of free-to-air signals without adequate compensation being provided to free-to-air broadcasters. Free TV has consistently expressed concerns regarding the inadequacy of the existing retransmission scheme.

Further, the categorisation of the re-broadcast of metropolitan programming as 'simple retransmission' may be erroneous.

The new satellite licensee will retransmit the remote area broadcasting services (noting that 'retransmission' involves the simultaneous and unaltered rebroadcast of content) with the eastern satellite licensee also providing the local news channel (made up of retransmissions of content provided to it by regional broadcasters).

The new satellite licensee will contract with the RABs broadcasters for the content it is required to carry. In the unlikely event that a satellite licensee needs to obtain that content from a metropolitan broadcaster, it is unclear whether it would be provided as a retransmission or otherwise. The Bill creates the potential for the new satellite licensee to alter that content – such circumstances would be more approximate to an affiliation-style arrangement. Given these factors, reliance on the Copyright Act retransmission scheme is not appropriate.

Free TV is also concerned that Copyright Tribunal processes can be extremely lengthy and can give rise to substantial legal costs.

Free TV is willing to work with Government to develop a more streamlined fall-back process which is better able to determine equitable remuneration for the content provided.

6 Conditional Access Scheme

It is vital that the conditional access scheme created to regulate access to the new satellite service is as robust as possible.

In order to minimise the negative impact on existing licensees arising from audience migration to the new service, the conditional access scheme must ensure the service is only available to those viewers who cannot receive one or more of the terrestrial digital television commercial broadcasting services available in their terrestrial licence area.

This is acknowledged in the EM to the Bill, which notes the need to “preserve the integrity” of existing commercial regional and metropolitan television licence areas.

The experience to date with existing out of area satellite services is that some viewers are motivated to obtain the satellite service regardless of the quality of their local terrestrial signals, in order to gain access to the content on that service (in particular, differing sport content).

A migration of viewers from the terrestrial platform to the satellite platform would not only impact on the affected terrestrial licensees (in term of audience loss), but would also impact local businesses which rely on advertising on localised services being able to reach their local communities.

Free TV broadcasters have held constructive discussions with the Government and the Digital Switchover Taskforce regarding the essential components of a viable conditional access scheme. Free TV notes that the Bill implements a scheme which is consistent with those discussions. Free TV notes that much of the detail of the conditional access scheme will be developed following passage of the Bill.

However, one minor amendment is required to address the timeframe for dealing with applications for access to the satellite. Proposed new section 130ZF(2)(c)(iii) and 130ZB(12)(a) (refer to item 64 of the Bill) would require applications to be dealt with within 14 days. This is not realistic and in discussions with the Digital Switchover Taskforce we understood a timeframe of 15 working days would be acceptable.

7 Content and access requirements for multi-channels

Free-to-air television multi-channels are currently exempt from the Australian and children’s program standards which apply to a broadcaster’s primary channel. There is a similar exemption as regards captioning requirements. These exemptions are timed to expire at the end of the simulcast period in a licence area.

With the simulcast period scheduled to end at different times for different licence areas, broadcasters will face differing regulatory requirements across different licence areas. This would not be acceptable or indeed desirable for broadcasters. More onerous content and captioning obligations would apply to the regional broadcasters’ multi-channel streams in early switchover areas than apply to the metropolitan broadcasters who supply that content.

Amendments to address these exemptions are required urgently and must be included in the Bill. The current exemptions are timed to expire at analogue switch-off in individual licence areas. This will occur in Mildura in under 3 months.

7.1 Expiry of the exemptions and impact on regional broadcasters and viewers

As noted above, analogue switch-off is scheduled to commence in regional licence areas, progressing through to metropolitan areas in 2013. Regional broadcasters rely almost solely on content provided through affiliation agreements with metropolitan broadcasters.

Without legislative action, regional broadcasters carrying multi-channel content provided via affiliation agreements will be subject to content and captioning obligations which do not apply to the metropolitan broadcasters which supply their content.

The content provided to regional broadcasters under network affiliation agreements can be expected to comply with the regulatory obligations that apply to the metropolitan broadcasters supplying the content, who under the current framework will continue to be exempt through to 2013. Aside from the fact this is a highly unusual regulatory outcome, it would impose an impossible compliance burden upon regional broadcasters.

Regional broadcasters do not have the capacity to produce or fund the additional Australian and Children's content or additional captioning which would be required to ensure compliance.

There are also technical barriers which mean it would be cost-prohibitive for regional broadcasters to interrupt pass-through programming streams received from metropolitan partners. There may also be contractual reasons which prevent regional broadcasters from inserting different program content into the program streams received under affiliation agreements.

Regional broadcasters would not risk regulatory breach and as a result, would have no option but to suspend carriage of distinct multi-channel content.

This would clearly be a poor outcome for regional Australians and would also have a material financial impact for regional broadcasters, who would lose the ability to develop these new business opportunities in the lead-up to ASO, meaning they would have to "start from scratch" in 2013.

These issues were first raised by Free TV in its July 2008 submission to the Department regarding the Legislative Framework for Implementing a Digital Switchover Timetable.¹ Free TV again noted these issues and the need for regulatory action in its October 2008 submission to the Senate Environment, Communications and the Arts Committee Inquiry into the Broadcasting Legislation Amendment (Digital Television Switch-over) Bill 2008.²

The urgent need for legislative amendments was raised further by Free TV in its December 2009 submission to the Department's review of *Content and access: The future of program standards and captioning requirements on digital television multi-channels*.³ The issue was also noted in Free TV's February 2010 submission to the

¹ http://www.freetv.com.au/media/Submissions/2008-0011_SUB_Legislative_framework%20for_implementing_a_DSO_timetable_110708_FINAL.pdf

² http://www.freetv.com.au/media/Submissions/2008-0019_SUB_Digital_Television_Switch-over_Bill_241008_FINAL.pdf

³ http://www.dbcde.gov.au/_data/assets/pdf_file/0008/126197/Free_TV_Australia.pdf

Department's Discussion Report titled *Access to Electronic Media for the Hearing and Vision Impaired – Approaches for consideration*.⁴

8 Other drafting issues

Free TV would also like to raise a number of minor drafting issues with the Committee.

New section 135ZZZI(5) of the Copyright Act requires destruction of copies of eligible programs within 7 days (which include news programs etc provided to the section 38C licensee). This provision may be inconsistent with clause 5 of Schedule 2 of the BSA requiring records of political or current affairs matter to be retained for 6 weeks. If our submissions regarding the removal of the retransmission scheme amendments to the Copyright Act from the Bill are not accepted, this issue will need to be addressed.

As the section 38C licensee is exempt from the ownership and control rules, its constitution should not be required to contain the ownership verification and divestment provisions at paragraph 7(1)(c) of Schedule 2 of the BSA, which will perhaps cause confusion even though they are "dead letter" in this context.

We are concerned about the section 38C licensee being subject to the obligation at clause 7(2)(a) of Schedule 2 to contribute to an adequate and comprehensive range of services, especially as it will likely do no more than rebroadcast services provided by the RABs broadcasters (and the local news services of regional broadcasters). On one view provision to underserved areas of the same service as is already provided by another licensee licensed to serve that area would not be compliant with this licence condition.

New clause 41G(5) requires the Australian Communications and Media Authority (the ACMA) not to declare more than 3 primary services for the section 38C licensee. There could be occasions where the licensee has less than 3 primary services (such as cessation of a service, as other provisions in the new Bill recognise). A more accurate drafting of section 41G(5) would be to add that the ACMA must not declare a service as a section 38C licensee's primary service unless the same or substantially the same service is the core or primary service of a terrestrial licensee.

⁴ http://www.dbcde.gov.au/television/television_captioning/media_access_review/?a=126613