

20 August 1999

Mr Charles Spence
Department of Communications, Information technology
And the Arts
GPO Box 2154
ACT 2601

By Facsimile: 02 62711000
Number of Pages: 2

Dear Mr Spence

I refer to the Departmental Review of the Retransmission on Pay TV Services of Digital Television Broadcasting Services, and in particular the publication of the Discussion of Options Paper on 19 July 1999. That Discussion Paper called for further comment by 6 August 1999. I apologise for the delay in preparing this response. I trust that at this late stage the Department finds this follow-up submission to be of use.

I note that Screenrights made a submission on 3 June 1999 to the Department in the lead-up to the preparation of the Discussion Paper. In light of the Discussion Paper, Screenrights reiterates that which was put in the earlier submission. I will, however, expressly re-iterate one aspect of that submission below.

The Discussion Paper, under the heading "Simulcast Period" states:

It may not be feasible to impose mandatory retransmission of DTTB on pay TV operators, while also requiring pay TV operators to compensate rights holders for that retransmission.

This observation is misconceived to the extent it is derived from applying *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* (1993) 176 CLR 480 to the issue of copyright liability for a "must carry" retransmission.

As previously explained in our earlier submission (at paragraphs 5.2 to 5.5) Screenrights has tendered to the Department a written opinion by David Catterns QC on this issue. This opinion states that legislation providing for the payment of such a statutory copyright licence fee, even in a "must carry" setting, ought not be characterised as a tax because:

- valuable consideration would be received for the payment of the royalty, in the form of the right to retransmit without infringing copyright; and

- there would be a discernible relationship between the acquisition of the right and the amount of the fee payable.

Further, as also explained in our earlier submission, the proposed scheme which Screenrights and the Australian Subscription Television and Radio Association ("ASTRA") jointly endorse, explicitly deals with the relationship between the acquisition of the right and the amount of the fee payable. The amount of any fee is determined, in part, by "*whether the subscription program provider would not cause or would not have caused the retransmission but for legal obligation compelling the retransmission under the Broadcasting Services Act 1992*". This largely overcomes any concerns that may exist that "must carry" retransmission rules introduced by reason of the advent of Digital Broadcasting will give rise to "double-payment" by pay TV operators.

Screenrights is anticipating the imminent introduction into Parliament of the *Digital Agenda Bill*. We continue to support the enactment of a statutory copyright licence for underlying rights holders which delivers them effective remuneration for retransmission. We note our opposition to the drafting of the licence contained in the Exposure Draft of the Digital Agenda Bill. We continue to press for the adoption of a statutory model proposed jointly by Screenrights and ASTRA on 11 May 1999.

Please feel free to contact me in respect of any matter raised herein or in our earlier submission to this Review.

Yours sincerely,

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Chief Executive

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