18. Retransmission of Free-to-air Broadcasts

Contents

Summary

18.1 Subscription television companies and other media content providers retransmit free-to-air television and radio broadcasts to their own customers. Retransmission, in this context, means providing the content contained in broadcasts by other means, such as cable or satellite transmission, in a simultaneous and unaltered manner.

18.2 The *Copyright Act* and the *Broadcasting Services Act 1992* (Cth) effectively operate to provide, in relation to the retransmission of free-to-air broadcasts:

- an unremunerated exception in relation to broadcast copyright;
- a remunerated exception in relation to underlying works or other subject matter ('underlying rights'), which does not apply to retransmission that 'takes place over the internet'; and
- an unremunerated exception in relation to copyright in underlying rights, applying only to retransmission by non-profit self-help providers.

18.3 This chapter examines these exceptions and whether they are adequate and appropriate in the digital environment. This raises complex questions at the intersection of copyright and communications policy. Options for reform are largely dependent on assumptions about matters not within the scope of the ALRC's Inquiry.

18.4 The ALRC nevertheless recommends that, in developing media and communications policy, and in the light of media convergence, the Australian Government consider whether the retransmission scheme for free-to-air broadcasts should be repealed (other than in relation to self-help providers).

18.5 Removing the retransmission scheme would promote copyright law that is technologically neutral, rather than favouring some retransmission platforms over others. Reform would be based on a view that retransmission no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs can be left to be determined by market mechanisms.

18.6 Importantly, removing the retransmission scheme would avoid the need to consider the extension of the scheme to the internet. The fact that extending the scheme to internet retransmission would be problematic suggests that it is not fit for the future. Policy makers should, therefore, be considering how it might be phased out.

18.7 If the existing retransmission scheme is retained, the ALRC recommends that the scope and application of s 135ZZJA of the *Copyright Act*, which provides that the remunerated exception does not apply in relation to retransmissions 'over the internet' (the internet exclusion), should be clarified.

The current retransmission scheme

18.8 A retransmission is defined in the *Copyright Act* as a retransmission of a broadcast, where the content of the broadcast is unaltered and either simultaneous with the original transmission or delayed until no later than the equivalent local time.[1] Retransmission without the permission of the original broadcaster does not infringe copyright in broadcasts, by virtue of provisions contained in the *Broadcasting Services Act*.

18.9 The *Broadcasting Services Act* states that no 'action, suit or proceeding lies against a person' in respect of the retransmission by the person of certain television and radio programs.[2] The retransmission must, however, be within the licence area of the broadcaster or, if outside the licence area, with the permission of the Australian Communications and Media Authority (ACMA).[3]

18.10 In this way, the *Broadcasting Services Act* provides immunity against any action for infringement of copyright that might otherwise be able to be brought by the original broadcaster for retransmission of a free-to-air broadcast.

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1 *Copyright Act 1968* (Cth) s 10.

2 *Broadcasting Services Act 1992* (Cth) s 212.

3 Ibid s 212(1)(b)—in the case of programs transmitted by a commercial broadcasting licensee or a community broadcasting licensee.

18.11 The immunity does not extend to copyright subsisting in a work, sound recording or cinematograph film included in a free-to-air broadcast (the underlying rights) unless the retransmission is provided by a 'self-help provider'.[4]

18.12 A self-help provider is defined to cover entities that provide transmission 'for the sole or principal purpose of obtaining or improving reception' in particular places.[5] Briefly, self-help providers include non-profit bodies, local government bodies or mining companies, which provide retransmission to improve reception in communities; or other persons providing retransmission by in-building cabling of apartment buildings and hotels. Self-help providers do not have to remunerate either the free-to-air broadcaster or the underlying rights holders.

18.13 The ALRC does not recommend any change to the operation of the unremunerated exceptions applying to retransmission by self-help providers. These exceptions appear to retain relevance, and there has been no indication that they require review.[6] References to the 'retransmission scheme' in this chapter should be read as excluding the provisions applying to retransmission by self-help providers.

18.14 For retransmitters, other than self-help providers, pt VC of the *Copyright Act* provides a statutory licensing scheme for the underlying works. The Act provides that the copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by retransmission of the broadcast, if equitable remuneration is paid.[7] Screenrights collects the licence fees, identifies the programs that are retransmitted and pays royalties to the rights holders. Royalties are generated when free-to-air broadcasts are simultaneously retransmitted by another service. Retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from this remunerated exception by virtue of s 135ZZJA of the *Copyright Act*.

18.15 Essentially, the current retransmission scheme allows the retransmission of free-to-air broadcasts, without the permission or remuneration of the broadcaster, and for equitable remuneration to be paid to the underlying rights holders.[8]

18.16 In relation to this remuneration, the Copyright Tribunal has concluded that the benefits to subscription television consumers of the retransmissions, and therefore the value of those retransmissions to subscription television companies, are best described under the heading of 'convenience'—the advantage to consumers of only having to use one remote control to access subscription and free-to-air channels.[9]

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4 Ibid s 212(2A).
5 Ibid s 212A.
6 In 2011–12, the ACMA issued 417 broadcasting retransmission licences to regional councils and other self-help providers, mainly for television broadcasts: Australian Communications and Media Authority, *Annual Report 2011–12* (2012).
7 *Copyright Act 1968* (Cth) s 135ZZK.
8 Ibid pt VC.
9 *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 (1 June 2012), [188].

History of the retransmission scheme

18.17 The *Broadcasting Services Act*, as originally enacted, contained special provisions for retransmission of programs. These provided an immunity against actions, suits or proceedings in respect of such retransmission, for persons other than broadcasting licensees.[10]

18.18 In 1995, in *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd*,[11] the Federal Court confirmed that a cable television service consisting of multiple channels could take advantage of the immunity under s 212 of the *Broadcasting Services Act* when retransmitting free-to-air broadcasts.

18.19 In 1999, amendments to the *Broadcasting Services Act* changed the operation of the immunity so that it no longer applied to underlying rights, except where retransmission was provided by a 'self-help provider'.[12] This meant that anybody retransmitting programs, other than a self-help provider, would infringe these rights unless retransmission was with the permission and remuneration of the underlying copyright holders.

18.20 The amending bill in its original form would also have required retransmitters to seek the permission of the owners of copyright in broadcasts before retransmitting.[13] In 1998, the Australian Government announced that 'new rules' would be introduced to 'correct an anomaly … which allowed pay TV operators to retransmit free-to-air television or radio signals without seeking the consent of the originating broadcaster'.[14] However, in the face of opposition to this requirement from the non-Government parties in the Parliament, the Government introduced an amendment that had the effect of overriding the requirement pending the resolution of outstanding issues 'through further consultation with industry'.[15]

18.21 The *Berne Convention* specifically allows signatories to implement a statutory licence applying to rebroadcast and retransmission of copyright works.[16] The *Copyright Amendment (Digital Agenda) Act 2000* (Cth) introduced the pt VC statutory

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10 *Broadcasting Services Act 1992* (Cth) s 212(2) as enacted.

11 *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1995) 60 FCR 483; *Amalgamated Television Services Pty Ltd v Foxtel Digital Cable Television Pty Ltd* (1996) 66 FCR 75.

12 *Broadcasting Services Act 1992* (Cth) s 212(2A) introduced by the *Broadcasting Services Amendment Act (No.1) 1999* (Cth).

13 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

14 Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [11.350], quoting a joint media release of then Minister for Communications, the Information Economy and the Arts (the Hon Senator Richard Alston) and then Attorney-General (the Hon Daryl Williams AM QC MP), dated 10 March 1998.

15 Ibid, [9.530], citing Australian Government Attorney-General's Department, *AGD e-News on Copyright No 11* (1999). See, also, the history of the retransmission exception set out in Free TV Australia, *Submission 270*: the retransmission exception 'has long been recognised by industry and government as an unintended anomaly of broadcasting and copyright law'.

16 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972), art 11(bis)(2). Also *World Intellectual Property Organization Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002) art 8.

licensing scheme applying to underlying works.[17] The stated reason for implementing the licensing scheme was that 'it would be impractical for retransmitters to negotiate with individual copyright owners in underlying copyright material to enable the retransmission of free-to-air broadcasts'.[18]

18.22 These provisions were inserted at the same time as the introduction of a new technology-neutral right of communication to the public.[19] This replaced and extended an existing rebroadcasting right, which only applied to 'wireless' broadcasts and not, for example, to cable or online communication.[20]

Scope of broadcast copyright

18.23 The grant of a separate copyright in broadcasts did not occur until the passage of the *Copyright Act* in 1968, and followed Australia's accession to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations* (*Rome Convention*).[21] The *Rome Convention* established a regime for protecting rights neighbouring on copyright, including minimum rights for broadcasting organisations.

18.24 These rights can be protected by copyright law, as in Australia, or by other measures. Under the Convention, broadcasting organisations enjoy, among other things, the right to authorise or prohibit the 'rebroadcasting of their broadcasts'.[22] Broadcasting is defined under the *Rome Convention* as 'transmission by wireless means'[23] and rebroadcasting as the 'simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation'.[24] The *Rome Convention* does not require that broadcasters have an exclusive right to retransmission of their signal by cable.

18.25 In Australia, however, the *Copyright Act* provides that copyright in relation to a broadcast includes the right to 're-broadcast it or communicate it to the public otherwise than by broadcasting it'.[25] This applies to both wireless and wired transmissions and, therefore, provides broadcasters with broader rights than required internationally. In this regard, the Explanatory Memorandum to the Copyright Amendment (Digital Agenda) Bill 1999 (Cth) explained that the amendment to broadcast copyright was

> intended to extend the current re-broadcasting right which only applies to wireless telegraphy to include the cable transmission of broadcasts and the making available online of broadcasts. The new right will therefore allow broadcasters to control the

17 *Copyright Amendment (Digital Agenda) Act 2000* (Cth); *Copyright Act 1968* (Cth) pt VC.
18 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [6].
19 *Copyright Act 1968* (Cth) s 87.
20 Ibid s 87(c), as enacted.
21 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964).
22 Ibid art 13(a).
23 Ibid art 3(f).
24 Ibid art 3(g).
25 *Copyright Act 1968* (Cth) s 87(c).

retransmission of their broadcasts irrespective of the means of delivery of the service.[26]

Copyright and communications policy

18.26 The Terms of Reference specifically directed the ALRC to take into account the recommendations of the Australian Government's Convergence Review.[27] In particular, the Convergence Review suggested that the retransmission provisions be reviewed as part of the ALRC's Inquiry.[28]

18.27 The ALRC faces challenges in making firm recommendations for the reform of the retransmission scheme—and the broadcast exceptions discussed in Chapter 19. The technologies by which people access audiovisual and, in particular, television-like services, are changing rapidly both in Australia and overseas. At the same time, the future shape of communications and media policy in Australia is in a state of flux, following the Convergence Review and in the absence of an Australian Government position on reform.

18.28 If the recommendations of the Convergence Review were accepted, broadcast regulation in Australia would look very different, with wide-reaching implications for the *Copyright Act*. The Convergence Review recommended the abolition of the system of licensing commercial broadcasters, with regulation instead to be applied to 'content service enterprises'—enterprises delivering professional content to a large number of Australian users and deriving a high level of revenue from the delivery of these services to Australians.[29] The Convergence Review also envisaged limits being placed on control of content by copyright owners to address competition concerns, recommending that a new communications regulator should have the power to investigate content-related competition issues and promote fair and effective competition in content markets.[30]

18.29 Implementing the Convergence Committee's recommendations would require significant rewriting, and perhaps rethinking, of Australian copyright law. Links with the *Broadcasting Services Act* would need to be removed from the *Copyright Act* and decisions made about extending copyright protection and exceptions beyond licensed broadcasters—for example, to all 'content service enterprises' otherwise subject to communications and media regulation.

18.30 In this context, the ALRC carefully considered whether its Inquiry was an appropriate forum to make recommendations concerning retransmission.[31] While some stakeholders considered that there was no reason the ALRC should not consider reform

26 Explanatory Memorandum, Copyright Amendment (Digital Agenda) Bill 1999 (Cth), [116].
27 Australian Government Convergence Review, *Convergence Review Final Report* (2012).
28 Ibid, 33.
29 Ibid, 2.
30 Ibid, ch 3.
31 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

of the retransmission scheme,[32] others felt that the central importance of communications policy issues meant that the 'incidental' copyright issues should be left to other policy-making processes.[33]

18.31 The AIG argued, for example, that the ALRC Inquiry was not the appropriate forum 'to determine issues related to the treatment of retransmission of broadcasting signals under the Act because any reform to current arrangements would have impacts beyond copyright policy and should not be made in isolation from these broader effects'.[34]

18.32 AIG observed that in July 2013, the Senate Environment and Communications References Committee, in its report on radio simulcasts, recommended that the Minister for Broadband, Communications and the Digital Economy and the Attorney-General 'fully and urgently address in a comprehensive and long-term manner all of the related broadcasting and copyright issues identified in numerous reviews, and by many stakeholders, following receipt of the ALRC [copyright] review'.[35]

18.33 COMPPS stated that, before making any changes to the retransmission scheme, the 'communications, convergence, competition and other similar legal and policy considerations and impacts would need to be considered' and these areas were outside the ALRC's Terms of Reference—making it impossible for the Inquiry to 'properly review and make recommendations' on retransmission.[36]

18.34 Free TV stated that retransmission should be the subject of a further review, which should 'take as its starting point the acknowledgement that broadcasters should be accorded retransmission consent'.[37]

18.35 The retransmission scheme raises significant communications and competition policy questions. These should not necessarily be determined by decisions made about copyright law, but in the context of a more comprehensive review of issues at the intersection of copyright and broadcasting—including in relation to the concept of a broadcast as protected subject matter, as an exclusive right and in exceptions.

18.36 In the absence of clear directions on communications and media policy reform, the ALRC is not in a position to make detailed recommendations regarding reform of the retransmission regime. However, given the significant engagement of stakeholders with the issues surrounding retransmission, the ALRC considers that it is appropriate to

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32 For example, Music Council of Australia, *Submission 269*; ARIA, *Submission 241*; Australian Copyright Council, *Submission 219*; ABC, *Submission 210*; NSW Young Lawyers, *Submission 195*.

33 For example, Free TV Australia, *Submission 865*; IMW Media Services, *Submission 757*; ASTRA, *Submission 747*; Australian Film/TV Bodies, *Submission 739*; Australian Industry Group, *Submission 728*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; NRL, *Submission 257*; Foxtel, *Submission 245*; SBS, *Submission 237*; News Limited, *Submission 224*.

34 Australian Industry Group, *Submission 728*.

35 Ibid; Parliament of Australia, Senate Environment and Communications References Committee, *Inquiry into the Effectiveness of Current Regulatory Arrangements in Dealing with Radio Simulcasts* (2013), Rec 2.

36 COMPPS, *Submission 634*.

37 Free TV Australia, *Submission 865*.

express some views on this matter, while recognising that communications and competition policy factors may ultimately dictate other conclusions.[38]

Background and assumptions

18.37 The Discussion Paper described how options for reform of the retransmission scheme are dependent on assumptions about matters not within the scope of the ALRC's Inquiry, including:

- the scope of the exclusive rights covered by broadcast copyright, or other protection of broadcast signals;
- the extent to which retransmission of free-to-air television and radio broadcasts still needs to be facilitated in a converging media environment; and
- the extent to which it remains important to maintain geographical limits on the communication of free-to-air broadcasts.

18.38 Reform raises threshold questions about what exclusive rights should be covered by broadcast copyright. In Australia, broadcasters are provided with broader protection than required internationally. The *Rome Convention* provides only limited protection and does not require that copyright cover broadcasts. The *Rome Convention* permits exceptions to broadcast protection, including: private use; the use of short excerpts in connection with the reporting of current events; ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts; and use solely for the purposes of teaching or scientific research.[39] Signatories may also provide for the same kinds of limitations with regard to the protection of broadcasting organisations as domestic law provides 'in connection with the protection of copyright in literary and artistic works'.[40]

18.39 From this perspective, options for reform can be seen as relatively unconstrained, in copyright policy terms, because the *Rome Convention* does not require broadcast copyright, and allows a series of exceptions not found in the *Berne Convention*.[41] Arguably, the nature of broadcast rights can justify anomalous exceptions—that is, exceptions that do not apply to other subject matter.

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38 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [228], Question 38.

39 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15. International protection of broadcasting organisations has been discussed at length at the World Intellectual Property Organization, by the Standing Committee on Copyright and Related Rights (SCCR). The issue of providing legal protection for broadcasting organisations against unauthorised use of broadcasts, including by retransmission on the internet, has been retained on the Agenda of the SCCR for its regular sessions: World Intellectual Property Organization, *Program Activities, Broadcasting Organizations* <www.wipo.int/copyright/en/activities/broadcast.html> at 24 April 2013.

40 *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations*, 26 October 1962, ATS 29 (entered into force on 18 May 1964) art 15(2).

41 *Berne Convention for the Protection of Literary and Artistic Works (Paris Act)*, opened for signature 24 July 1971, [1978] ATS 5 (entered into force on 15 December 1972).

18.40 The scope of broadcast copyright has long been tied up with debates regarding communications policy, including 'the facilitation of the subscription television industry, ensuring access to broadcasts in remote areas, and the introduction of digital and high-definition technologies'.[42] Associate Professor Kimberlee Weatherall has observed that the 'desire to promote these goals of broadcast policy has led to broadcasters being denied certain rights they might, as copyright owners, expect to have'.[43]

18.41 Copyright law has longstanding links with communications regulation, which has tended to emphasise the 'special' place of broadcasting in the media landscape. The *Copyright Act* contains, for example, many unremunerated and remunerated exceptions that take the circumstances of the broadcasting industry into account, including the statutory licensing scheme for radio broadcast of sound recordings and other broadcast exceptions discussed in Chapter 19.

18.42 Historically, regulators have pursued a range of public policy goals in relation to broadcasting, such as ensuring universal public access, minimum content standards (including classification and local content rules), diversity of ownership, competition and technological innovation.[44]

18.43 The retransmission scheme, in facilitating access to free-to-air broadcasts across media platforms, was intended to serve at least some of these public policy goals. The extent to which retransmission remains important may, however, be questioned in light of the convergence of media content and communications technologies. For example, if television audiences fragment across a multiplicity of broadcast, cable and online programming, or there is a move away from licensing media content providers, the case for a retransmission scheme that qualifies ordinary copyright principles may be weaker.

18.44 The retransmission scheme can be seen as favouring certain commercial interests in the communications and media markets. At present, subscription television providers do not need to license broadcast copyright when retransmitting free-to-air broadcasts, which advantages them over internet content providers by removing the need to negotiate rights with broadcasters. Similarly, cable and satellite subscription television providers have an advantage in being able to access the pt VC statutory licensing scheme for the underlying rights.

18.45 Whether the existing retransmission scheme produces good outcomes in terms of communications and competition policy is a matter beyond the scope of the ALRC's Inquiry. Further, many aspects of communications and media regulation are under

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42 K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 254.

43 Ibid, 254. More generally, it has been suggested that the 'main challenges for twenty-first century copyright are not challenges of authorship policy, but rather new and harder problems for copyright's communications policy: copyright's poorly understood role in regulating competition among rival disseminators': T Wu, 'Copyright's Communications Policy' (2004) 103 *Michigan Law Review* 278, 279.

44 K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242, 244.

review, including as a response to the Convergence Review[45] and against the backdrop of the development of the NBN.

The future of the retransmission scheme

18.46 There are some indications suggesting that the retransmission scheme is no longer necessary. The scheme was originally intended to provide for the distribution of free-to-air broadcasts to areas which did not receive adequate reception. The regime facilitated self-help arrangements to enable individuals and communities to access free-to-air broadcasting services where the location or other reception difficulties meant that signal quality was not adequate or the signal was not available.[46]

18.47 With the introduction of subscription television into Australia in 1995, operators began retransmitting the national and commercial television services as 'free additions' to their channels, without the permission or remuneration of either broadcasters or underlying rights holders.[47] While underlying rights holders are now remunerated under pt VC statutory licensing, the agreement or remuneration of the broadcaster is still not required, despite the extension of broadcast copyright in 2000.

18.48 In addition to retransmission by self-help providers, since 2010, rebroadcast by 'satellite BSA licensees'[48] has been authorised, subject to a separate statutory licensing scheme under the *Copyright Act*.[49] Under this scheme, the Australian Government-funded Viewer Access Satellite Television (VAST) service provides free-to-air digital television channels to viewers with inadequate terrestrial reception.[50]

18.49 One possible reason for retaining the retransmission scheme, once it became apparent that subscription television operators could utilise it, may have been to assist in the early development of that industry, and to ensure competition in content provision across media platforms. If so, this rationale may no longer be relevant, given the market penetration of established subscription television services.

18.50 The retransmission scheme may simply provide subscription television platforms with additional content for their offerings at a lower cost than might be the case if a commercial agreement were required. Subscription television providers benefit commercially because they are able to provide free-to-air channels as part of

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45 The Convergence Review Committee was established to examine the operation of communications and media regulation in Australia and assess its effectiveness in view of the convergence of media content and communications technologies. The Review covered a broad range of issues, including media ownership laws, media content standards, the ongoing production and distribution of Australian and local content, and the allocation of radiocommunications spectrum: see Australian Government Convergence Review, *Convergence Review Final Report* (2012).

46 Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth).

47 Ibid.

48 A 'satellite BSA licensee' means the licensee of a commercial television broadcasting licence allocated under *Broadcasting Services Act 1992* (Cth) s 38C: *Copyright Act 1968* (Cth) s 10.

49 *Copyright Act 1968* (Cth) pt VD.

50 Successive Australian Governments have 'invested many hundreds of millions of dollars since 2001 to ensure universal access to digital FTA television by terrestrial means, or by satellite where terrestrial reception is not feasible': ASTRA, *Submission 227*.

their subscription packages without having to negotiate a commercial fee, or conditions, with broadcasters.[51]

The unremunerated exception to broadcast copyright

18.51 Free-to-air broadcasters submitted that retransmission should be allowed to continue only with broadcasters' permission because the rationale for the unremunerated exception for broadcast copyright no longer exists.[52] That is, the retransmission scheme was introduced specifically to allow retransmission by self-help providers, and was never intended to allow new services to retransmit free-to-air broadcasts without authorisation.[53]

18.52 Stakeholders also questioned the justification for recognising underlying rights but, effectively, not copyright in the broadcast itself.[54] Commercial Radio Australia, for example, submitted that both the broadcast and the underlying works or other subject matter are creative products and there is no 'reasonable basis for the current distinction between the protection of the underlying content and the broadcast'.[55]

18.53 Free TV observed that broadcast copyright acknowledges the 'creative and economic value of broadcasts' and the 'endeavours of a broadcaster in promoting, arranging and scheduling programming in a competitive commercial environment'.[56] The retransmission scheme is seen to allow free-to-air television broadcasts to be exploited by competitors of the relevant broadcasters. Free TV stated that the business of subscription television providers

> has been built around carriage of the commercial free-to-air television services, which account for over 50% of total prime time viewing in Pay TV homes. While a small fee is payable through Screenrights for the separate underlying rights, free to air broadcasters have not received any compensation for the commercial exploitation of their broadcast signal.[57]

18.54 However, support for repeal of the unremunerated exception appears to be predicated on the continuation of the pt VC statutory licence and, to some extent, on the introduction of 'must carry' obligations on retransmitters.

The remunerated exception

18.55 If the unremunerated exception for broadcast copyright were repealed, so that the permission of the broadcaster would be required for retransmission, this has implications for the operation of the remunerated exception—the statutory licensing scheme in pt VC of the *Copyright Act*. If the unremunerated exception were repealed, the pt VC scheme would only come into effect if a market-based agreement were to be

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51 Free TV Australia, *Submission 270*.
52 Ibid; Commercial Radio Australia, *Submission 132*; TVB (Australia) Pty Ltd, *Submission 124*.
53 Free TV Australia, *Submission 270*.
54 Ibid; Australian Writers' Guild & Australian Writers' Guild Authorship Collecting Society, *Submission 265*; Commercial Radio Australia, *Submission 132*.
55 Commercial Radio Australia, *Submission 132*.
56 Free TV Australia, *Submission 270*
57 Free TV Australia, *Submission 865*.

reached between a free-to-air broadcaster and a retransmitter. That is, if there were no agreement, there could be no retransmission and the need to remunerate underlying rights holders would not arise.

18.56 If the unremunerated exception were repealed, while underlying rights holders would not directly determine whether retransmission was allowed, in practice, they may be able to prevent it, despite the existence of the pt VC licence. An underlying rights holder may condition licensing of their content for free-to-air broadcast on the basis that retransmission will not occur, or that retransmission only occur on, for example, subscription television but not other technologies, such as mobile networks.

18.57 Significant content owners, such as major professional sports bodies, could impose such conditions in negotiations around the sale of exclusive broadcasting rights. Therefore, although retaining the pt VC statutory licence would mean that the retransmitter would not have to negotiate with all the underlying rights holders over retransmission, the broadcaster may have to negotiate in order for retransmission to occur.

18.58 Further, free-to-air broadcasters might decide to permit retransmission of only some of their channels and, for example, exclude sports channels from retransmission. The situation could also become more complex over time—a broadcaster might agree to retransmission at one point in time, and be placed in a difficult position later when subsequent underlying rights holders refuse to licence retransmission.

18.59 Rather than facilitating retransmission, retaining pt VC may simply make negotiating retransmission more complicated. These problems may mean that, if the unremunerated exception were repealed, the remunerated exception for underlying rights should also be repealed, and retransmission left to be determined entirely by market mechanisms.

18.60 The MPAA supported the repeal of the pt VC statutory licence, stating that issues surrounding retransmission should be left to marketplace negotiations about the terms and conditions of retransmission. The MPAA stated that statutory licences 'inevitably harm copyright owners by limiting their control over their works and denying them the market level of compensation for their exploitation' and should be 'avoided or strictly limited to situations in which there is a demonstrable market failure'. Rather, the public interest in promoting access to content would be best served by

> enabling copyright owners, broadcasters and retransmitters to develop the appropriate transactional framework for such dissemination in a free market environment. Such private licensing is already working effectively in many markets for scores of new distribution channels for audiovisual content, including over the Internet. MPAA knows of no reason why it would not deliver the same benefits in Australia.[58]

58 Motion Picture Association of America Inc, *Submission 573*. However, the retransmission of free-to-air broadcasts by cable and satellite television providers in the US is also governed by statutory licences: see *Copyright Act 1976* (US) ss 111, 119, 122.

18.61 Some underlying rights holders, while not favouring any change to the existing retransmission scheme, nevertheless preferred repeal of the retransmission scheme rather than its extension to other forms of communication.[59] COMPPS, for example, stated that it had 'no objection in principle to a retransmission regime which is determined by market mechanisms'.[60] The AFL noted that this position is 'consistent with the principle that owners of copyright should determine where and how copyright material is disseminated'.[61]

18.62 Other stakeholders highlighted the importance of retransmission in ensuring the distribution of free-to-air television content.[62] Ericsson Australia observed that statutory licensing of retransmission 'provides an alternative means for a distributor to acquire rights for retransmission of linear content without the need for a direct licensing agreement with the broadcaster, thereby growing the addressable market which is viewed as a positive outcome'.[63]

18.63 The Internet Industry Association stated that, while repealing the retransmission scheme would be 'platform neutral and consistent with the right of broadcasters to control the retransmission of broadcasts', it could be 'highly disruptive in terms of existing services to the public and existing service providers'.[64] In this context, around four million homes in Australia rely on retransmission to receive some or all of their free-to-air television and radio content, and retransmission to smart phones is the second most popular way for Australians to receive free-to-air television.[65]

18.64 Broadcasters opposed the options for change proposed in the Discussion Paper. Free TV Australia observed that, while leaving retransmission to market mechanisms 'takes into account the right of free-to-air broadcasters to control their broadcast signal', if accompanied by the repeal of the remunerated exception for underlying rights, this would 'make a consent scheme unworkable due to the large number of underlying copyright owners to be consulted in relation to any retransmission'.[66]

18.65 Some stakeholders considered that repeal of the retransmission scheme would likely mean commercial retransmission of free-to-air broadcasts in Australia would cease.[67] Any retransmitter would have to 'engage in two sets of separate commercial

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59 AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.
60 COMPPS, *Submission 634*.
61 AFL, *Submission 717*.
62 For example, Internet Industry Association, *Submission 744*; Fetch TV, *Submission 721*; Ericsson, *Submission 597*.
63 Ericsson, *Submission 597*.
64 Internet Industry Association, *Submission 744*.
65 IMW Media Services, *Submission 757*. The most popular way remains by direct reception of terrestrially radiated free-to-air broadcasts.
66 Free TV Australia, *Submission 865*.
67 Foxtel, *Submission 748*; ASTRA, *Submission 747*;News Corp Australia, *Submission 746*; Screenrights, *Submission 646*; Telstra Corporation Limited, *Submission 602*. Others expressly supported the views of Screenrights on retransmission issues: Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

negotiations—for the underlying content and for the broadcast copyright'.[68] It was considered impracticable to obtain licences from the many underlying rights holders. [69]

18.66 ASTRA stated that, without the statutory licence in pt VC, even if a free-to-air broadcaster sought to have its entire service retransmitted on a subscription television platform it may not be able to, or may be forced to 'black out' certain programs from view on the retransmitted service.[70] Foxtel submitted that repealing the retransmission scheme would be 'practically unworkable and will have the effect of eliminating retransmission in Australia' and have a 'detrimental impact for Foxtel's customers without any corresponding benefits'.[71]

18.67 Fetch TV considered that, as a relatively small player, it was highly unlikely to be able to negotiate the range of licences required to retransmit a free-to-air broadcast. Further, 'given the increasingly concentrated nature of the Australian media landscape, the protection of self interests may make the acquisition of necessary licences impossible'.[72]

18.68 Many stakeholders opposed changes to the current retransmission scheme,[73] including those who favoured extending the scheme to retransmission over the internet.[74] Stakeholders considered that the current scheme facilitates choice for consumers; improves access to free-to-air broadcasts; has no negative impact on advertising revenue for commercial free-to-air television services; and ensures underlying rights holders are remunerated.

18.69 A central argument for retaining the current arrangements is that they benefit consumers through competition in the market, by ensuring that free-to-air broadcasts are available across platforms, so consumers may access these services terrestrially, or via cable or satellite.[75] ASTRA and Foxtel submitted that the existing retransmission regime works well for the benefit of consumers, has ensured access to free-to-air broadcast through commercial negotiation and that there is no justification for legislative reform.[76]

18.70 Foxtel emphasised that retransmission is 'an extremely limited right and the Copyright Tribunal of Australia has accepted that Foxtel retransmits the FTA services for the convenience of [its] subscribers'.[77]

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68 Telstra Corporation Limited, *Submission 602*.
69 ASTRA, *Submission 747*; Fetch TV, *Submission 721*; Telstra Corporation Limited, *Submission 602*.
70 ASTRA, *Submission 747*.
71 Foxtel, *Submission 748*.
72 Fetch TV, *Submission 721*.
73 IMW Media Services, *Submission 757*; Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; Australian Film/TV Bodies, *Submission 739*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; COMPPS, *Submission 634*; Australian Directors Guild, *Submission 594*.
74 Free TV Australia, *Submission 865*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.
75 ASTRA, *Submission 227*; Screenrights, *Submission 215*.
76 Foxtel, *Submission 245*; ASTRA, *Submission 227*.
77 Foxtel, *Submission 748*.

18.71 Generally, it was suggested that the scheme works well and there is no significant demand for reform.[78] Screenrights stated that, from a commercial perspective, 'access to the free to air broadcast channels is very important for a new entrant into the television market in Australia'.[79] In its view, retransmission has fostered competition in the broadcast market and has 'encouraged new and diverse services, that probably were not considered at the time the scheme was created'.[80]

Repeal of the retransmission scheme

18.72 The Discussion Paper presented alternate sets of proposals. The first option was to repeal both the unremunerated exception applying to broadcast copyright and the pt VC remunerated exception in relation to underlying rights.[81] This would effectively leave the extent to which commercial retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

18.73 In theory, allowing retransmission to be determined by consent would provide for the value to broadcasters and subscription television services of free-to-air broadcasts to be established through normal commercial negotiations between the two parties. This would give free-to-air broadcasters control over the commercial use of their signal, while allowing subscription television services the choice of which broadcasts they wish to retransmit, subject to the permission of the broadcaster.

18.74 At the same time, it would provide for the remuneration of free-to-air broadcasters where subscription television services were willing to pay for retransmission, while allowing them to decline to carry free-to-air broadcasts where the price is considered to be too high. In some cases, 'it is possible that carriage of the signals themselves could become the established market price for retransmission'—that is, no remuneration would need to be paid in either direction.[82]

18.75 The ALRC recognises that, without the continuation of the pt VC remunerated exception, some retransmission will no longer be practicable, even with broadcaster consent, because broadcasters will not have a licence from underlying copyright holders to authorise retransmission. The effect of repealing pt VC may even be that retransmission will cease, at least for a time. From a consumer perspective, this would mean that some people who currently rely on cable or satellite subscription television to receive free-to-air television and radio content would have to use other technology (that is, for example, install a digital television signal amplifier).

18.76 This position may be addressed by underlying copyright holders, broadcasters and retransmitters developing new transactional frameworks. The MPAA observed that

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78 For example, Ibid; ASTRA, *Submission 747*; COMPPS, *Submission 634*; Telstra Corporation Limited, *Submission 602*.

79 Screenrights, *Submission 215*.

80 Screenrights stated that these services include 'satellite and cable residential subscription television, mobile television, fibre to the premises services, hospital communication systems and IPTV' and that, in 2010–11, more than 2.25 million households received retransmission: Ibid.

81 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–1, Option 1.

82 See Explanatory Memorandum, Broadcasting Services Amendment Bill 1998 (Cth), 13.

voluntary licensing is working effectively in many markets for the distribution of audiovisual content, including over the internet. Eliminating the retransmission exceptions, after an appropriate transition period, would give rights holders the opportunity to act on incentives to develop new licensing arrangements.[83]

18.77 The ALRC has concluded that repeal of the retransmission scheme is the option most consistent with the framing principles for this Inquiry. Specifically, removing the retransmission scheme would promote rules that are technologically neutral, rather than favouring some retransmission platforms over others.[84]

18.78 Removing the retransmission scheme would be based on the assumption that retransmission is no longer necessary to promote access to content,[85] given the many means by which consumers may now obtain free-to-air television and radio. These include retransmission by self-help providers and the VAST service, which provides free-to-air digital television channels to viewers with inadequate terrestrial reception. In addition, there are new forms of internet and mobile transmission of linear programmed (that is, 'streamed') content and on-demand television.

18.79 Reform would be based on a view that the retransmission of free-to-air television and radio broadcasts no longer needs to be facilitated in a converging media environment, and the extent to which retransmission occurs can be left to be determined by market mechanisms. In contrast with the pt VA and pt VB statutory licensing schemes,[86] there may be no continuing rationale for intervention to address market failure.

18.80 Importantly, removing the retransmission scheme would avoid the need to consider the extension of the scheme to retransmission over the internet or the scope of the internet exclusion. As discussed in detail below, the fact that the extension of the retransmission scheme to internet transmission is problematic provides another reason to suggest that the scheme is not fit for the future and policy makers should be considering how it might be phased out.

18.81 In contrast, continuing the scheme would be based on the assumption of a continuing need to facilitate the retransmission of free-to-air television and radio broadcasts—either to ensure access to free-to-air broadcasting or to facilitate market entry by television platforms—and that it would be impracticable for retransmitters to negotiate the retransmission of free-to-air broadcasts.[87] The extent to which the convenience of retransmission on subscription cable and satellite television outweighs copyright and competition policy concerns is a matter that communications and media policy makers are better placed to advise upon than the ALRC.

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83 Motion Picture Association of America Inc, *Submission 573*.

84 See Ch 2, framing principle 4.

85 See Ch 2, framing principle 3.

86 See Ch 8.

87 The retention of pt VC would also retain the only statutory source of remuneration for directors because, under s 98 of the *Copyright Act*, directors are entitled to licence fees for retransmission. The Australian Directors Guild expressed concern about the limited scope of directors' copyright in films: Australian Directors Guild, *Submission 226*.

Recommendation 18–1 In developing media and communications policy, and in responding to media convergence, the Australian Government should consider whether the retransmission scheme for free-to-air broadcasts provided by pt VC of the *Copyright Act* and s 212(2) of the *Broadcasting Services Act 1992* (Cth) should be repealed.

Note: This would effectively leave the extent to which retransmission occurs entirely to negotiation between the parties—broadcasters, retransmitters and underlying copyright holders.

A remunerated exception for broadcast copyright

18.82 The second option proposed in the Discussion Paper was to continue the existing retransmission scheme while providing some recognition for broadcast copyright by introducing a remunerated exception, similar to that which applies to the underlying rights.[88]

18.83 One model for such a scheme is pt VD of the *Copyright Act*.[89] Unlike the pt VC licence, the pt VD licence extends to the copyright in the broadcast itself. For the satellite BSA licensee to be able to rely on the statutory licence to use that copyright there must be an agreement, Copyright Tribunal order or an undertaking covering payment to the broadcast copyright owner.[90] A similar scheme could apply to broadcast copyright in relation to retransmission.

18.84 There was little support for any new statutory licence from stakeholders[91]—and this support was predicated simply on preferring a new statutory licence over repeal of the retransmission scheme entirely.[92]

18.85 The ACCC considered that a remunerated exception for broadcast copyright might mitigate the potential for free-to-air broadcasters to exercise their market power over retransmission, but stated that it would be important to consider 'the value and costs of retransmission to various parties' before any final view was reached.[93]

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88 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–1, Option 2.

89 Part VD was introduced in 2010 as part of the changeover from analogue to digital television broadcasts: *Broadcasting Legislation Amendment (Digital Television) Act 2010* (Cth). A new service was implemented to transmit television by satellite to remote reception areas. As the new satellite service would mainly rebroadcast, pt VD provided a statutory licence to allow this without infringing copyright.

90 *Copyright Act 1968* (Cth) s 135ZZZI. See Thomson Reuters, *The Law of Intellectual Property: Copyright, Designs and Confidential Information*, [12.225].

91 Internet Industry Association, *Submission 744*; Optus, *Submission 725*; ACCC, *Submission 658*.

92 For example, ABC, *Submission 775*; Fetch TV, *Submission 721*.

93 ACCC, *Submission 658*.

18.86 Fetch TV stated that it would not oppose the replacement of the pt VC scheme with a statutory licence which set 'reasonable licence fees for both broadcasters and underlying rights holders, taking into account that each are remunerated through other means'.[94]

18.87 Screenrights stated that it could not 'foresee any difficulties in including broadcast signal copyright within the Part VC scheme in the same manner as other copyright subject matter', but did not express a view on the desirability or otherwise of an additional statutory licence.[95]

18.88 Stakeholders opposing the idea of a new statutory licence for broadcast copyright included those representing both free-to-air and subscription broadcasters.[96] ASTRA observed that free-to-air broadcast signals are universally and freely available in Australia. Therefore, where broadcasts are retransmitted on a subscription television platform, which just provides another way of 'navigating' to channels that are otherwise already able to be received, 'there is no case for imposing new cost and administrative burdens' by introducing an additional licensing scheme.[97]

18.89 ASTRA submitted that no evidence has been provided to show any loss of advertising revenue or potential audience reach as a result of retransmission of commercial television services on subscription platforms. Rather, commercial broadcasters were seen as effectively seeking an additional revenue stream from subscription television consumers 'for television services that are required to be both freely available and usually funded by advertising, and where those customers can already receive those services without payment'.[98]

18.90 Foxtel considered that introducing a statutory licensing scheme for broadcast copyright would be 'purely about establishing an additional revenue stream for services that are required to be freely and universally available' when broadcasters already receive remuneration as underlying rights holders.[99] In any case, the administrative costs of such a licensing scheme would 'outweigh what we expect to be very modest distributions for broadcast copyright based on Screenrights' current practices'.[100] News Corp Australia agreed with Foxtel's views and also observed that free-to-air broadcasters have been the beneficiaries of significant government investments in programs to ensure universal access to the Australian population.[101]

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94 Fetch TV, *Submission 721*.

95 Screenrights, *Submission 646*. Also Arts Law Centre of Australia, *Submission 706*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*.

96 Free TV Australia, *Submission 865*; Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; Telstra Corporation Limited, *Submission 602*; Motion Picture Association of America Inc, *Submission 573*; SBS, *Submission 556*.

97 ASTRA, *Submission 747*.

98 ASTRA, *Submission 227*.

99 On Foxtel's estimate, free-to-air broadcasters 'are underlying rights holders in approximately one third of Screenrights distributions and, additionally, the commercial FTA broadcasters are remunerated for Foxtel's retransmission through advertising revenue': Foxtel, *Submission 748*.

100 Ibid.

101 News Corp Australia, *Submission 746*. See also ASTRA, *Submission 227*.

18.91 The idea of a statutory licence for broadcast copyright was not supported by free-to-air broadcasters either. SBS favoured 'direct remuneration of SBS's broadcast signal'.[102] Free TV stated that a licence fails to take into account the right of free-to-air broadcasters to control their broadcast signal and that it 'opposes any right to retransmit broadcast television without the consent of the broadcaster'.[103] In Free TV's view, the retransmission regime

> allows exploitation of the free-to-air broadcasters' copyright in a manner that can be highly damaging to their strategic interests. The benefit received by Pay TV from the retransmission right cannot be compensated by a statutory scheme that simply places a dollar value on the broadcast copyright. This is because in addition to being a question of copyright ownership, the issues … are also about the integrity of the services provided by packaging the various copyright works and subject matter that make up a broadcast stream, including the skill and expertise in developing that packaged content.[104]

18.92 The ALRC has concluded, above, that the Australian Government should consider the repeal of the retransmission scheme for free-to-air broadcasts. If the scheme is retained, however, the ALRC does not consider that any new remunerated (or, at least, remunerable) exception should be introduced.

18.93 Broadcasters already receive remuneration in other ways. Commercial broadcasters are ultimately remunerated for retransmission through higher ratings, which have a role in determining advertising revenue; and are often underlying rights holders and receive remuneration under pt VC.[105] In any case, from the perspective of broadcasters, it appears that control of broadcasts rather than remuneration for retransmission is the major concern.[106] That is, broadcasters would like to have the ability to refuse permission for retransmission in certain situations—and to require retransmission in others.

Internet retransmission

18.94 An exclusion from the retransmission scheme is provided by s 135ZZJA of the *Copyright Act*. This provision states that the pt VC statutory licensing scheme 'does not apply in relation to a retransmission of a free-to-air broadcast if the retransmission takes place over the internet' (the internet exclusion).

18.95 In practice, free-to-air broadcasts are generally not communicated on the internet, except in simulcasts by broadcasters themselves, because of the barriers involved in licensing the broadcast and underlying rights.

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102 SBS, *Submission 237*.
103 Free TV Australia, *Submission 865*.
104 Ibid.
105 Foxtel, *Submission 245*. ASTRA stated that free-to-air broadcasters currently receive a 'substantial proportion of the remuneration payments made under Part VC': ASTRA, *Submission 227*.
106 See, eg, Free TV Australia, *Submission 865*; SBS, *Submission 237*; Commercial Radio Australia, *Submission 132*.

18.96 The discussion below proceeds on the basis that the existing retransmission scheme remains in place. If the retransmission scheme were repealed, the extent to which internet retransmission occurs would remain determined by market mechanisms. That is, if a broadcaster wished to enter agreements to permit internet retransmission, the broadcaster would have to acquire the relevant rights from all the underlying right holders. If the underlying rights holders only have rights that are defined territorially, then the broadcaster would not be able to confer rights to wider communication. Any retransmission would be confined to territories in relation to which the retransmitter can obtain rights.

History of the internet exclusion

18.97 One government objective of the reforms leading to the retransmission scheme was 'technological neutrality insofar as retransmission was not confined to any particular means'.[107]

18.98 In the face of concerns about the potential harm caused to copyright owners by internet retransmission,[108] the Government retained the technology-neutral language in pt VC, but introduced the 'over the internet' exclusion in s 135ZZJA.[109]

18.99 The concerns about internet retransmission included fallout from controversy involving a Canadian company, iCraveTV, which had commenced internet retransmission of US television signals, resulting in successful litigation by US film studios and broadcasters to prevent it.[110] This highlighted the possible consequences of extra-territorial internet retransmission.

18.100 Concerns about internet retransmission were also reflected in art 17.4.10(b) of the *Australia–US Free Trade Agreement* (AUSFTA). This provides that 'neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorisation of the right holder or right holders, if any, of the content of the signal and of the signal'.[111]

18.101 The need for future renegotiation of this provision was anticipated. By mutual side letters, the Australian and US representatives agreed that if, at any time, 'it is the considered opinion of either party that there has been a significant change in the reliability, robustness, implementability and practical availability of technology to effectively limit the reception of Internet retransmissions to users located in a specific

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107 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

108 See, eg, Parliament of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Copyright Amendment (Digital Agenda) Bill 1999* (1999).

109 See the legislative history summarised in D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8.

110 See Ibid, 26.8.

111 No such restriction applies to radio, and the US has established a statutory licence for internet retransmission of radio broadcasts: *Copyright Act 1976* (US) 17 USC ss 112, 114. The ability to do so was preserved by *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005) art 17.6.3(c). See also K Weatherall, 'The Impact of Copyright Treaties on Broadcast Policy' in A Kenyon (ed) *TV Futures: Digital Television Policy in Australia* (2007) 242.

geographical market area', the parties would negotiate in good faith to amend the agreement in this regard.[112]

Retransmission and the internet

18.102 The reason for excluding internet retransmission from the scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.[113]

18.103 Given media convergence and other developments such as the NBN, the ALRC examined whether the pt VC scheme should apply in relation to retransmission over the internet and, if so, subject to what conditions. Many stakeholders favoured reform in this direction.[114] Media convergence was seen to have rendered the internet exclusion 'increasingly absurd from a consumer's perspective, as television services over the internet are often indistinguishable from those not over the internet'.[115]

18.104 The ACCC noted that, as technology continues to develop and consumers become increasingly able to view many 'different forms of broadcast on different platforms', it is likely that the pt VC scheme will become even more restrictive. Therefore, the ACCC submitted, amendments to the retransmission scheme need to be considered.[116]

18.105 In the Discussion Paper, the ALRC proposed that the internet exclusion should be repealed and the retransmission scheme amended to apply to retransmission by any technology, subject to geographical limits on reception.[117]

18.106 A number of stakeholders supported the idea that the retransmission scheme should be extended to retransmission over the internet, at least in principle.[118] This view was based on a recognition that copyright law should, ideally, be technologically neutral.[119]

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112 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005), side letter dated 18 May 2004, [2].

113 Australian Law Reform Commission, *Copyright and the Digital Economy*, IP 42 (2012), [226]. See, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.8, 26.9.

114 See, eg, SPAA, *Submission 281*; Music Council of Australia, *Submission 269*; Internet Industry Association, *Submission 253*; SBS, *Submission 237*; Telstra Corporation Limited, *Submission 222*; Australian Copyright Council, *Submission 219*; ABC, *Submission 210*; NSW Young Lawyers, *Submission 195*; Optus, *Submission 183*; Commercial Radio Australia, *Submission 132*. Some stakeholders stated that they were not opposed in principle to such reform, but considered it a matter of broadcast rather than copyright policy: Australian Directors Guild, *Submission 594*; Foxtel, *Submission 245*; News Limited, *Submission 224*.

115 Screenrights, *Submission 215*.

116 ACCC, *Submission 165*.

117 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–2.

118 Free TV Australia, *Submission 865*; Optus, *Submission 725*; ABC, *Submission 775*; Internet Industry Association, *Submission 744*; ACCC, *Submission 658*; Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.

119 For example, Communications Alliance, *Submission 653*; Telstra Corporation Limited, *Submission 602*; Ericsson, *Submission 597*; SBS, *Submission 556*.

18.107 Telstra, for example, stated that, 'in the era of media convergence, retransmission platforms should be treated in a technology-neutral way'—but that any extension of the scheme ought to be implemented in a way which addresses the legitimate concerns of rights holders.[120] Some stakeholders highlighted that extending the scheme to retransmission over the internet would ignore important communications law and policy differences between broadcast and internet transmission.[121] Fetch TV, for example, stated:

> Delivery via the open, public internet is significantly different to delivery by other forms of transmission and involves significant risks for copyright owners as well as significant challenges for broadcasting policy.[122]

18.108 An extension of the retransmission scheme was seen as being of possible benefit to content providers and the public. The Internet Industry Association stated that internet retransmission would 'benefit the broadcasters and create technological neutrality between those media organisations able to deliver programmed services over cable and those who wish to do so over the internet'.[123]

18.109 Free TV stated that, in association with the introduction of a must carry regime, content providers 'delivering linear programmed content by cable, satellite, internet, IPTV or mobile platforms' should be covered by the retransmission scheme, subject to some 'reasonable threshold test'.

18.110 Importantly, Free TV submitted that the operation of the pt VC statutory licence should only be available to retransmitters that observe the licence area obligations set out in the *Broadcasting Services Act*:

> Free TV acknowledges that internet retransmissions would require sufficient technological restriction, including geoblocking, in order to observe licence area restrictions. However, the concept of area based licensing is fundamental to the operation of the [*Broadcasting Services Act*] and to Free TV's members, and its removal would create serious disruption to the industry.[124]

18.111 Many other stakeholders submitted that internet retransmission should be required to be subject to some form of 'geoblocking',[125] including to restrict transmission to the relevant broadcasting licence area.[126] The ABC considered geographically-based limits on transmission as necessary because retransmission should do 'no more' than retransmit:

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120 Telstra Corporation Limited, *Submission 602*.

121 Fetch TV, *Submission 721*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

122 Fetch TV, *Submission 721*.

123 Internet Industry Association, *Submission 744*.

124 Free TV Australia, *Submission 865*.

125 Geoblocking refers to the practice of preventing internet users from viewing websites and downloading applications and media based on location, and is accomplished by excluding targeted internet addresses: Definition of 'geo-blocked' PC Mag, *E-encyclopedia* <www.pcmag.com/encyclopedia> at 25 February 2013.

126 ABC, *Submission 775*; Internet Industry Association, *Submission 744*; ARIA, *Submission 241*; SBS, *Submission 237*; Telstra Corporation Limited, *Submission 222*; Screenrights, *Submission 215*.

> That is, the internet retransmitter should not value-add to the retransmission nor affect the editorial integrity of the content being retransmitted nor impose any editorial content or advertising around the retransmission.[127]

18.112 The extension of pt VC to internet retransmission was opposed by many other stakeholders,[128] primarily because of adverse effects on the commercial interests and existing licensing practices of underlying rights holders.[129]

18.113 Screenrights expressed concern that, while including internet retransmissions in pt VC 'may fix some anomalies in the scheme for consumers', it would potentially cause new problems for rights holders:

> In particular the sporting bodies are concerned that valuable rights for internet retransmission of events could be undermined by retransmission of these broadcasts over the internet in reliance on an amended Part VC. Such a retransmission would severely undermine the market for a voluntary licence of internet rights for this content. This would be an impediment to the development of digital services for online content.[130]

18.114 These concerns were echoed by sporting bodies themselves.[131] COMPPS stated that extending the retransmission scheme to the internet would 'allow unlicensed third parties to unreasonably benefit from the valuable copyright content of COMPPS members'. Such a reform would, it was said, allow third parties to 'free ride' on copyright content and unfairly prejudice the ability of rights holders, such as Cricket Australia, to sell international media rights.[132]

18.115 The NRL expressed specific concerns about the negative commercial impact of internet retransmission on rugby league rights, especially given that games are shown at different times in different states to maximise potential television audiences.[133] The impact of 'anti-siphoning' legislation',[134] which requires sporting bodies to make much of their content available on free-to-air television, was also emphasised. The NRL stated that, under an extended retransmission scheme, the NRL would be required to make its content available 'across all platforms, irrespective of its wishes or the commercial consequences'.[135]

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127 ABC, *Submission 775*.

128 NRL, *Submission 732*; ARIA, *Submission 731*; Fetch TV, *Submission 721*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; Screenrights, *Submission 646*; COMPPS, *Submission 634*; Motion Picture Association of America Inc, *Submission 573*.

129 For example, NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; PPCA, *Submission 666*; APRA/AMCOS, *Submission 664*; Australian Copyright Council, *Submission 654*; Screenrights, *Submission 646*; COMPPS, *Submission 634*.

130 Screenrights, *Submission 646*.

131 NRL, *Submission 732*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*.

132 Cricket Australia, *Submission 700*.

133 NRL, *Submission 732*. See also AFL, *Submission 232*.

134 *Broadcasting Services Act 1992* (Cth) s 115; sch 2, cl 10(1)(e); Broadcasting Services (Events) Notice (No. 1) 2010.

135 NRL, *Submission 732*.

18.116 More broadly, the MPAA opposed any extension of the retransmission scheme on the basis that voluntary licensing was the 'optimal and preferred model' for managing internet retransmissions and for encouraging new channels for content dissemination. Extending statutory licensing 'would be a step backward, and an unjustified curtailment of market principles in an area where there is simply no evidence of market failure'.[136]

18.117 Screenrights observed that broadcasting services commonly simulcast their free-to-air channels over the internet and that this is 'currently managed effectively through voluntary licence arrangements, with broadcasters acquiring additional rights from underlying rights holders to enable web transmission of their broadcasts'.[137]

Removing the internet exclusion

18.118 The ALRC has concluded, above, that the Australian Government should consider repeal of the retransmission scheme for free-to-air broadcasts. An important reason for this recommendation is that the retransmission scheme currently favours some players in the subscription television market over others, depending on the technological platform used (that is, cable and satellite over internet).

18.119 At present, cable and satellite subscription television providers have an advantage over internet content providers in being able to access the pt VC statutory licensing scheme for underlying rights. Ideally, retransmission platforms should be treated in a more technology-neutral way.

18.120 Technological change, including that brought about by the NBN, may make forms of internet retransmission of broadcasts more feasible. If communications policy makers decide that it is important to facilitate the availability of online television, then it would be logical to consider extending the pt VC statutory licence to internet retransmission.

18.121 However, extending the retransmission scheme to the internet raises problems, particularly if geographically limiting retransmission of broadcasts remains an aim of communications policy. The ACMA observed that to extend retransmission to the internet

> sets up a potential point of conflict between a geographically-defined licensing scheme under the [*Broadcasting Services Act*], and the global delivery models for content transmitted over the internet that are not bounded by such geographic limitations.[138]

18.122 At the same time, the future of geographically-based broadcasting licences is unclear. The Convergence Review concluded that, given the increasing availability of internet broadband, content services can be delivered over the internet across Australia and the world and, therefore, it is 'no longer efficient or appropriate for the regulator to

136 Motion Picture Association of America Inc, *Submission 573*.
137 Screenrights, *Submission 215*.
138 ACMA, *Submission 613*.

plan for the categories of broadcasting service for different areas and issue licences to provide those services'.[139]

18.123 In the ALRC's view, the internet exclusion is primarily a matter of communications and media policy, rather than copyright. The Convergence Review noted that emerging platforms, including internet protocol television (IPTV), are not covered comprehensively by existing content regulation and the availability of internet content on smart televisions means that viewers can move easily between 'regulated broadcast content' and 'unregulated internet content'.[140]

18.124 In this context, there are unresolved questions about how IPTV and other television-like online content should be regulated under the *Broadcasting Services Act* or successor legislation for the purposes of, among other things, imposing content standards and obligations with regard to Australian content. The Convergence Review recommended that new content services legislation should replace the *Broadcasting Services Act*; and communications legislation should be reformed to provide a technology-neutral framework for the regulation of communications infrastructure, platforms, devices and services.[141]

18.125 Extending the pt VC scheme to retransmission over the internet would also require Australia to negotiate amendments to the AUSFTA.[142] Arguments may be made that excluding the internet from the retransmission scheme is no longer the best means of controlling the reach of retransmission, and that the conditions precedent for renegotiation on this point have been met.[143]

18.126 While arguments may be advanced that, in a converging media environment, the internet exclusion should be removed and replaced so that retransmission platforms are treated in a more technology-neutral way, such a reform faces a number of barriers. It could also cause significant disruption to existing business models—especially as there is a tension between territorially-based copyright licensing and internet dissemination.

18.127 In view of the need for further Government consideration of the issues beyond copyright that such a reform may raise, and possibly to renegotiate provisions of the AUSFTA, the ALRC does not make any firm recommendation about extending the retransmission scheme.

18.128 However, the complexities discussed above reinforce the ALRC's view that the retransmission scheme is not fit for the future and policy makers should be considering how it might be phased out, rather than extended to other forms of communication.

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139 Australian Government Convergence Review, *Convergence Review Final Report* (2012), viii.
140 Ibid, 40.
141 Ibid, 106–107.
142 *Australia-US Free Trade Agreement*, 18 May 2004, ATS 1 (entered into force on 1 January 2005).
143 Screenrights, *Submission 215*.

Clarifying the internet exclusion

18.129 As discussed above, retransmission of a free-to-air broadcast that 'takes place over the internet' is excluded from the remunerated exception by virtue of s 135ZZJA of the *Copyright Act*. There is some uncertainty over the meaning of this phrase and, in particular, its application to IPTV.[144]

18.130 It appears that whether retransmission by an IPTV service 'takes place over the internet' may depend on functional characteristics of the service[145] that should have no relevance in deciding whether or not retransmission should be facilitated. For example:

> Foxtel is not provided over the internet to a Foxtel set top box but it is provided over the internet to the Foxtel X-box service. But to a consumer, they are more or less the same. Similarly, IPTV services such as Fetch TV and Telstra T-Box are also impossible to distinguish but one happens to be over the internet, while the other is not.[146]

Interpretation of 'over the internet'

18.131 Some IPTV retransmission may fall within the operation of the pt VC scheme because, 'while the retransmission occurs over infrastructure shared by an Internet connection, as a direct feed from [internet service provider] to customer at no point is connection to the Internet by either ISP or customer necessitated'.[147]

18.132 Other IPTV retransmission may not fall within the scheme—for example, where the retransmission is so-called 'over the top' television (OTT TV).[148] OTT TV in this context means a television-like service where content is delivered over an unmanaged network such as broadband internet, for example, through Telstra T-Box—rather than over a closed managed (or private) network. As a result, some current subscription IPTV services are able to offer access to free-to-air broadcasts only because they include built-in digital TV tuners in their set top boxes.

18.133 In the Discussion Paper, the ALRC proposed that, if it were retained, the scope and application of the internet exclusion should be clarified, and asked how it should be clarified in its application to IPTV in particular.[149]

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144 For the purposes of this discussion, the term IPTV includes TV-like services where content is delivered by internet protocol, whether over the content provider's own network or 'over the top' of existing infrastructure; and only includes streamed and not on demand content.

145 See, eg, D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.1.

146 Screenrights, *Submission 215*.

147 D Brennan, 'Is IPTV an Internet Service under Australian Broadcasting and Copyright Law?' (2012) 60(2) *Telecommunications Journal of Australia* 26.1, 26.9.

148 Adapting language used by Broadcast Australia: Broadcast Australia, *Submission 133*.

149 Australian Law Reform Commission, *Copyright and the Digital Economy*, Discussion Paper 79 (2013), Proposal 15–3; Question 15–2.

18.134 A number of stakeholders agreed that clarification of the internet exclusion is desirable.[150] FetchTV, for example, stated that the lack of a definition of 'the internet' introduces 'uncertainty into the retransmission exception both in the copyright and broadcasting contexts'.[151]

18.135 Different policy formulations were suggested. COMPPS and other sporting bodies supported an amendment to confirm that IPTV is included in the scope of the internet exclusion.[152] The AFL, for example, stated that:

> any internet related delivery, including IPTV howsoever defined, should be captured by the internet exclusion contained in section 135ZZJA of the *Copyright Act*. The AFL welcomes clarification of that section to confirm that the retransmission provisions do not apply to transmission over IPTV.[153]

18.136 In contrast, Free TV considered that the retransmission scheme should cover any form of delivery of 'linear programmed content', including by 'cable, satellite, internet, IPTV or mobile platforms'.[154] Ericsson Australia observed that the 'internet' as it is known today will continue to evolve with high-speed networks such as the NBN likely to attract new forms of content delivery such as 'broadband broadcasters':

> These entities may well decide to deliver content and services not over the public internet or 'over the top', but rather over dedicated distribution networks, in much the same way today that cable networks deliver both subscription TV as well as internet access … [T]he two services are independent and not reliant on 'internet' access for delivery.[155]

18.137 The ACMA stated that differences 'between modes of internet transmission, such as IPTV and internet video, would be difficult to translate into legislation as they are essentially differences in service models', and that legislative boundaries applied around the different service models 'would be unlikely to remain relevant over the long-term as technologies and service models evolve'. The ACMA also noted that the *Broadcasting Services Act* does not currently differentiate between different types of internet transmission and

> proposals that would introduce such a distinction are likely to introduce further complexities into the regulatory treatment of broadcast material. This risks a further fragmentation and overall loss of coherence for content regulation, In the ACMA's view a coherent regulatory framework for content is a preferable solution to further incremental and piecemeal changes to legislative definitions.[156]

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150 Free TV Australia, *Submission 865*; ABC, *Submission 775*; Optus, *Submission 725*; Fetch TV, *Submission 721*; AFL, *Submission 717*; Cricket Australia, *Submission 700*; COMPPS, *Submission 634*; Ericsson, *Submission 597*.

151 Fetch TV, *Submission 721*.

152 COMPPS, *Submission 634*.

153 AFL, *Submission 717*; Cricket Australia, *Submission 700*.

154 Free TV Australia, *Submission 865*.

155 'To illustrate, a clear distinction can be made between the network communications protocol TCP/IP, which happens to be used for the internet, as well as for private networks which clearly are separated from the internet': Ericsson, *Submission 597*.

156 ACMA, *Submission 613*. Communications Alliance cautioned against 'attempting to define concepts such as the internet or internet TV protocol in legislation': Communications Alliance, *Submission 653*.

18.138 Screenrights also advised that clarification of the internet exclusion should be approached with caution, because 'it may have the effect of making the provision harder to understand and administer'. In Screenrights' experience:

> the lack of a definition [of 'the internet'] has not prevented companies from using Part VC in the widest possible manner. While non-experts may struggle to differentiate between over the internet versus not over the internet, for practitioners this does not seem to be a difficulty.[157]

Amending the internet exclusion

18.139 If the internet exclusion were to remain, its scope should be clarified. At present, the internet exclusion may give some providers of IPTV services a competitive advantage over others, in being able to rely on the pt VC scheme to carry free-to-air broadcasts, despite services being identical to the end consumer.[158]

18.140 While there are differing interpretations, it seems widely accepted that some forms of IPTV are not considered to take place 'over the internet', for the purposes of the internet exclusion. On the other hand, it seems that OTT TV is considered to be excluded. While the ALRC understands that OTT TV retransmission of high rating free-to-air broadcasts is unlikely to be offered because it would be likely to overload most internet delivery networks, it is possible that small audience free-to-air channels might be retransmitted in such a way.

18.141 In policy terms, the current interpretation may lead to arbitrary distinctions between retransmission platforms that are not based on the underlying purpose of the internet exclusion.

18.142 The development of the NBN makes it important to clarify the position. The intention is that the NBN will enable content providers to retransmit using internet protocol multicasting, in reliance on the pt VC licence.[159] The NBN Co's Multicast feature is being marketed as 'particularly suitable' for IPTV service delivery.[160] There may be difficulties, and cost implications, in enforcing restrictions on the retransmission of free-to-air broadcasts using the NBN.

18.143 The rationale for excluding retransmission 'over the internet' from the retransmission scheme appears to have been to avoid retransmitted content intended for Australian audiences being disseminated globally without the authorisation of the copyright holders.

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157 Screenrights, *Submission 646*. In contrast, the ABC observed that the term IPTV has 'no commonly accepted definition in the industry' and the current legal position of some operators under the retransmission scheme 'is not clear as it might be argued that they are not able to access pt VC legally because they are retransmitting via the internet': ABC, *Submission 210*.

158 Screenrights, *Submission 288*.

159 Screenrights, *Submission 215*.

160 NBN Co, *Multicast—Broadcasting the Future* <www.nbnco.com.au/getting-connected/service-providers/multicast.html> at 2 March 2013. NBN multicasts 'will be accessible from the same physical port on the NBN Co network termination equipment as the accompanying broadband internet connection': Broadcast Australia, *Submission 133*.

18.144 Arguably, if the internet exclusion were to remain, it should be redrafted to reflect its purpose of ensuring that internet retransmission does not lead to retransmission that is geographically unlimited. That is, it should be redrafted to reflect the fact that internet protocol technology can be 'employed in closed, secure distribution systems that offer complete protection against copying and redistribution of programming over the Internet, and that respect the principle of territorial exclusivity'.[161]

18.145 The ALRC has not developed recommendations on how this should be done. As discussed above, the internet exclusion is primarily a matter of communications policy, rather than copyright law. The discussion in this Report is provided as a contribution to that policy development.

18.146 Ideally, the meaning of the phrases 'over the internet' in the *Copyright Act* internet exclusion[162] and 'using the internet' for the purposes of defining a 'broadcasting service' under the *Broadcasting Services Act*[163] should be considered and clarified, if necessary, at the same time.[164] In any case, the ALRC has concluded that the preferable course of action may be to repeal the retransmission scheme entirely rather than to 'tinker' with the internet exclusion the face of rapid technological change in content delivery.

Recommendation 18–2 If the retransmission scheme is retained, the scope and application of the internet exclusion in s 135ZZJA of the *Copyright Act* should be clarified.

Must carry obligations

18.147 Calls to strengthen broadcasters' rights in relation to retransmission have included suggestions that a US-style 'must carry' regime should be implemented. Under such a regime, free-to-air broadcasters have the option of either requiring that free-to-air broadcasts be carried on cable or another platform, or requiring that the free-to-air broadcaster is remunerated where the other platform chooses to retransmit the signal.[165]

18.148 Many jurisdictions have must carry regimes. These were designed primarily to ensure that locally-licensed television stations must be carried on cable providers' systems, mainly to protect local broadcasters from distant competitors and, in Europe,

161 Motion Picture Association of America Inc, *Submission 197*.
162 *Copyright Act 1968* (Cth) s 135ZZJA.
163 As discussed in Ch 16, a ministerial determination, made in 2000 under the *Broadcasting Services Act*, excludes a 'service that makes available television and radio programs using the internet' from the definition of a broadcasting service: *Broadcasting Services Act 1992* (Cth) s 6; *Commonwealth of Australia Gazette—Determination under Paragraph (c) of the Definition of 'Broadcasting Service'*, (No 1 of 2000), Commonwealth of Australia Gazette No GN 38, 27 September 2000.
164 See IMW Media Services, *Submission 757*.
165 Australian Government Convergence Review, *Convergence Review Final Report* (2012), 33.

to protect local language channels. For example, in the absence of must carry obligations cable providers might only carry major capital city channels.

18.149 In Australia, the purpose of a must carry regime would be to provide a framework for commercial negotiations between free-to-air broadcasters and subscription television companies about payments for broadcasts retransmitted by the latter. A must carry regime would also ensure that, in future, free-to-air broadcasters are not forced to pay for carriage on subscription platforms (particularly if IPTV becomes a primary platform with the advent of the NBN) and prevent 'cherry-picking' of channels where subscription television only retransmits some of a free-to-air broadcaster's channels.

18.150 A number of stakeholders addressed the issue of must carry regimes in submissions to this Inquiry. Free TV was in favour of such a regime, under which retransmission of free-to-air television broadcasts would be permitted 'with the consent of, and in accordance with commercial terms agreed with, the broadcaster' or in accordance with a 'must carry' obligation. These issues should, Free TV suggested, be one subject of a further review of 'copyright and broader media policy'.[166]

18.151 The introduction of a must carry regime was opposed by other stakeholders.[167] Screenrights submitted that a must carry regime is not necessary in Australia and that such a regime would be both 'unworkable and anti-competitive' and contrary to the interest of underlying copyright owners.[168]

18.152 Screenrights considered that the context of retransmission in Australia is significantly different from that in overseas jurisdictions that have must carry regimes. First, the Australian retransmission rules effectively limit retransmission of commercial channels to local signals only—removing concerns about retransmission of distant signals.[169] Secondly, for a must carry regime to be applied in Australia, it would have to include existing satellite-based television service providers, such as Foxtel. Screenrights submitted that it would not be 'commercially viable to retransmit local signals via satellite due to the large number of small licence areas'.[170]

18.153 Foxtel also contrasted the US position with that in Australia, suggesting that it would be inappropriate to implement must carry in Australia. It stated that, while the key objective in the US was to ensure that consumers could continue to receive signals in circumstances where cable television penetration was high and consumers did not have access to television signals via aerials, in Australia, almost 99% of the population

166 Free TV Australia, *Submission 865*.

167 For example, Foxtel, *Submission 748*; ASTRA, *Submission 747*; News Corp Australia, *Submission 746*; SPAA, *Submission 281*; Australian Directors Guild, *Submission 226*; News Limited, *Submission 224*;Screenrights, *Submission 215*.

168 Screenrights, *Submission 215*.

169 That is, retransmission generally must be within the licence area of the transmitter: *Broadcasting Services Act 1992* (Cth) s 212(1)(b).

170 Screenrights, *Submission 215*.

has access to free-to-air television and cable and satellite penetration is significantly lower.[171]

18.154 The ALRC has concluded that the Australian Government should consider repeal of the retransmission scheme for free-to-air broadcasts. However, the ALRC makes no recommendation on whether reform should also involve the imposition of must carry obligations on subscription television service providers.

18.155 Essentially, must carry provisions would operate to impose obligations to communicate copyright materials (broadcasts), at the behest of the copyright holder. This issue does not directly concern the operation of copyright exceptions, which are the subject of the Terms of Reference. Further, the policy rationales for must carry regimes are based primarily on communications policy and are not issues that can, or should, be driven by reform of copyright laws.

171 Foxtel, *Submission 245*.