COPYRIGHT TRIBUNAL OF AUSTRALIA

Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited

[2012] ACopyT 1

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| Citation: | | *Audio-Visual Copyright Society Limited v Foxtel Management Pty Limited* [2012] ACopyT 1 |
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| Parties: | | **AUDIO-VISUAL COPYRIGHT SOCIETY LIMITED v FOXTEL MANAGEMENT PTY LIMITED** |
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| File number(s): | | CT 1 of 2010 |
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| Tribunal: | | **JAGOT J (PRESIDENT)**  **DR HUGH SIBLY (MEMBER)** |
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| Date of judgment: | | 1 June 2012 |
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| Catchwords: | | **COPYRIGHT -** equitable remuneration for retransmission of free-to-air (FTA) channels by respondent – where Tribunal previously determined equitable remuneration payable by respondent for retransmission of five FTA channels and two multichannels – application by collecting society for determination of amount of equitable remuneration for nine new multichannels – determination of amount to be paid |
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| Legislation: | | *Broadcasting Services Act 1992* (Cth)  *Copyright Act 1968* (Cth)  *Copyright Amendment Act 2006* (Cth) (Act No 158 of 2006) |
|  | |  |
| Cases cited: | | *Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* (2006) 68 IPR 367; [2006] ACopyT 2 |
|  |  | |
| Date of hearing: | 30 January, 1-3, 6-7, 9-10 February, 21 May 2012 | |
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| Place: | Sydney | |
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| COMMONWEALTH OF AUSTRALIA | |
| *Copyright Act 1968* | |
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| IN THE COPYRIGHT TRIBUNAL | CT 1 of 2010 |

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| BETWEEN: | AUDIO-VISUAL COPYRIGHT SOCIETY LIMITED  Applicant |

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| AND: | FOXTEL MANAGEMENT PTY LIMITED  Respondent |

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| TRIBUNAL: | JAGOT J (PRESIDENT)  DR HUGH SIBLY (MEMBER) |
| DATE OF ORDER: | 1 JUNE 2012 |
| WHERE MADE: | SYDNEY |

THE TRIBUNAL ORDERS THAT:

1. The application be listed for directions on a date to be allocated in consultation with the parties.

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| COMMONWEALTH OF AUSTRALIA | |
| *Copyright Act 1968* | |
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| IN THE COPYRIGHT TRIBUNAL | CT 1 of 2010 |

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| tribunal: | JAGOT J (PRESIDENT)  DR HUGH SIBLY (MEMBER) |
| DATE: | 1 JUNE 2012 |
| PLACE: | SYDNEY |

**REASONS FOR DETERMINATION**

# THE APPLICATION

1 By an application filed on 16 February 2010 the applicant, Audio-Visual Copyright Society Limited (trading as **Screenrights**), seeks a determination of the equitable remuneration that the respondent, Foxtel Management Pty Limited (**Foxtel**), should pay to Screenrights for retransmission of broadcasts of nine free-to-air multichannels known as Seven HD, One HD, One SD, ABC HD, SBS HD, Seven 2, Nine HD, Go! (also known as Go!99) and ABC 3.

# BACKGROUND

2 On 3 May 2006 the Copyright Tribunal of Australia (**the Tribunal**) determined equitable remuneration in response to an earlier application by Screenrights against Foxtel and other retransmitters of free-to-air television channels (*Audio-Visual Copyright Society Ltd v Foxtel Management Pty Ltd (No 4)* (2006) 68 IPR 367; [2006] ACopyT 2) (referred to in these reasons for determination as **the 2006 decision**). The scope of the 2006 decision is in dispute in this matter. For present purposes it is sufficient to say that the Tribunal made this determination on 30 August 2006:

…the amount of equitable remuneration payable by each Respondent in respect of retransmission by it of all five FTA channels (including the multichannels) is 22.5 cents per subscriber per month.

3 In this determination FTA means free-to-air (an abbreviation also used in these reasons). It is also convenient to note here that HD means high definition and SD means standard definition, terms which identify the image resolution of the broadcast. Reference should also be made here to EPG which means electronic program guide. These abbreviations are used frequently in the evidence discussed below.

4 Certain uncontentious facts can also be stated here, as they will assist in explaining the issues in dispute between the parties in this matter.

5 First, certain provisions of the *Copyright Act 1968* (Cth) (**Copyright Act**) oblige a person who retransmits a FTA broadcast to undertake to pay the relevant collecting society “equitable remuneration”, either as agreed with the collecting society or, failing agreement, as determined by the Tribunal.

6 Second, at the time of the 2006 decision, the Tribunal described the then existing FTA channels in these terms (at [52]):

The FTA channels are ABC, SBS and Channels 7, 9 and 10. The first two are national broadcasting services and the last three, commercial broadcasting licensees. In addition, there are two “digital multichannels”, ABC 2 and SBS News. ABC 2 is broadcast by the ABC, and SBS News is broadcast by SBS.

7 Third, subsequent to the 2006 decision, nine new multichannels have been broadcast in addition to the two multichannels which were being broadcast at the time of the 2006 decision (that is, ABC 2 and SBS News) – being Seven HD, One HD, One SD, ABC HD, SBS HD, Seven 2, Nine HD, Go! (also known as Go!99) and ABC 3.

8 Fourth, Foxtel retransmits to at least some of its subscribers the full suite of available FTA channels including all multichannels. It also retransmits part of this suite to other of its subscribers. The availability of the FTA channels through Foxtel depends on whether the Foxtel subscriber has a particular form of Foxtel set-top box (referred to as STB in some of the evidence) and whether the subscriber receives their Foxtel service through cable or satellite.

9 Fifth, pursuant to the 2006 decision, by application of CPI (consumer price index) increases, Foxtel now pays Screenrights 26.95 cents per subscriber per month (**pspm**) for “all five FTA channels (including the multichannels)”.

10 Against this background, Screenrights contends that Foxtel should pay Screenrights a sum of money over and above the 26.95 cents pspm for retransmissions of the nine new multichannels. By reference to a particular formula, Screenrights has calculated what it says is equitable remuneration in the sum of 48.08 cents pspm for the retransmission of all nine new multichannels. Foxtel contends that: – (i) no additional sum is payable as, by the 2006 decision, the Tribunal determined equitable remuneration for the five FTA channels and all multichannels to be 22.5 cents pspm (now 26.95 cents pspm by reason of the CPI increases), (ii) even if the Tribunal did not so determine, the reasoning of the 2006 decision discloses no rational basis for the payment of any additional sum by Foxtel for the nine new multichannels, and (iii) in the alternative, if this Tribunal is persuaded that equitable remuneration requires any additional payment, the additional payment should be no more than about 2.3 cents pspm.

# STATUTORY SCHEME

11 Provisions for the determination and payment of equitable remuneration for retransmissions of FTA broadcasts are contained in Pt VC and Pt VI of the Copyright Act.

12 Those provisions include certain defined terms as follows (s 10(1) of the Copyright Act):

"**broadcast**" means a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* . For the purposes of the application of this definition to a service provided under a satellite BSA licence, assume that there is no conditional access system that relates to the service.

"**free-to-air broadcast**" means:

(a) a broadcast delivered by a national broadcasting service, commercial broadcasting service or community broadcasting service within the meaning of the *Broadcasting Services Act 1992* ; or

(b) a broadcast delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992* that does no more than transmit program material supplied by National Indigenous TV Limited.

"**retransmission**", in relation to a broadcast, means a retransmission of the broadcast, where:

(a) the content of the broadcast is unaltered (even if the technique used to achieve retransmission is different to the technique used to achieve the original transmission); and

(b) either:

(i) in any case - the retransmission is simultaneous with the original transmission; or

(ii) if the retransmission is in an area that has, wholly or partly, different local time to the area of the original transmission - the retransmission is delayed until no later than the equivalent local time.

13 Other relevant definitions are set out in s 135ZZI of the Copyright Act including:

"**collecting society**" means a body that is, for the time being, declared to be a collecting society under section 135ZZT.

"**delayed retransmission**”, in relation to a free-to-air broadcast, means a retransmission of the broadcast in an area that has, wholly or partly, different local time to the area of the original transmission and that is delayed until no later than the equivalent local time.

"**relevant collecting society**", in relation to a remuneration notice, means a collecting society for owners of copyright in the same kind of work or other subject-matter as that to which the remuneration notice relates.

"**relevant copyright owner**" means the owner of the copyright in a work, a sound recording or a cinematograph film, but does not include a new owner of the copyright in a sound recording of a live performance within the meaning of Subdivision B of Division 5 of Part IV.

"**remuneration notice**" means a notice referred to in section 135ZZL.

"**retransmitter**" means a person who makes a retransmission of a free-to-air broadcast.

14 Section 135ZZK identifies circumstances in which the retransmission of a FTA broadcast does not infringe copyright:

(1) The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the retransmission of the broadcast if:

(a) a remuneration notice given by, or on behalf of, the retransmitter to the relevant collecting society is in force; and

(b) the free-to-air broadcast was made by a broadcaster specified in the remuneration notice; and

(c) the retransmitter complies with section 135ZZN.

(2) The copyright in a work, sound recording or cinematograph film included in a free-to-air broadcast is not infringed by the making of a copy of the broadcast for the sole purpose of enabling a delayed retransmission of the broadcast to be made.

…

15 At this point it is relevant to note that copyright in the broadcast itself (as set out in s 87 of the Copyright Act) is not material for present purposes as s 212 of the *Broadcasting Services Act 1992* (Cth) (**Broadcasting Services Act**) excludes an action for infringement of copyright in the broadcast in circumstances where (amongst other things) s 135ZZK of the Copyright Act applies.

16 Section 135ZZL deals with remuneration notices. It provides that:

(1) A retransmitter may, by notice in writing given to the relevant collecting society by, or on behalf of, the retransmitter, undertake to pay equitable remuneration to the society for retransmissions of free-to-air broadcasts by specified broadcasters, being retransmissions made by, or on behalf of, the retransmitter while the notice is in force.

(2) A remuneration notice must specify that the amount of equitable remuneration is to be assessed on the basis of the records to be kept by the retransmitter under section 135ZZN.

(3) A remuneration notice comes into force on the day on which it is given to the collecting society, or on such earlier day as is specified in the notice, and remains in force until it is revoked.

17 Section 135ZZN, referred to in s 135ZZL(2), specifies the required records to be kept by a retransmitter including these provisions:

(1) If a remuneration notice is given to a collecting society by, or on behalf of, a retransmitter, the retransmitter must establish and maintain a record system.

(2) The record system must provide for a record to be kept of the title of each program included in each retransmission made by, or on behalf of, the retransmitter of each broadcast made by each broadcaster specified in the remuneration notice.

18 The amount of equitable remuneration payable is regulated by s 135ZZM as follows:

(1) If a retransmitter gives a remuneration notice to a collecting society, the amount of equitable remuneration payable to the collecting society for each retransmission made by, or on behalf of, the retransmitter while the notice is in force is the amount determined by agreement between the retransmitter and the collecting society or, failing such agreement, by the Copyright Tribunal on application made by either of them.

(2) If a determination has been made by the Copyright Tribunal under subsection (1), either the retransmitter or the collecting society may, at any time after 12 months from the day on which the determination was made, apply to the Tribunal under that subsection for a new determination payable to the collecting society by the retransmitter for retransmissions made by, or on behalf of, the retransmitter.

(3) For the purposes of subsection (1), different amounts may be determined (whether by agreement or by the Copyright Tribunal) in relation to different classes of works, sound recordings or cinematograph films included in retransmissions.

19 Collecting societies are regulated by Div 3 of Pt VC of the Copyright Act. For present purposes it is sufficient to note that Screenrights is the relevant collecting society for the purposes of the FTA retransmissions by Foxtel.

20 Section 153M of the Copyright Act deals with applications to the Tribunal as provided for in s 135ZZM. It is in these terms:

(1) The parties to an application to the Tribunal under subsection 135ZZM(1) for the determination of the amount of equitable remuneration payable to a collecting society by a retransmitter for the making, by or on behalf of the retransmitter, of a retransmission of a free-to-air broadcast are the society and the retransmitter.

(2) On an application to the Tribunal under subsection 135ZZM(1), the Tribunal must consider the application and, after giving the parties an opportunity to present their cases, make an order determining the amount that it considers to be equitable remuneration for the making of retransmissions of free-to-air broadcasts.

(3) In making an order, the Tribunal may have regard to such matters (if any) as are prescribed.

(4) An order may be expressed to have effect in relation to retransmissions of free-to-air broadcasts made in reliance on section 135ZZK before the day on which the order is made.

(5) In this section, collecting society and retransmitter have the same meanings as in Part VC.

# THE 2006 DECISION

21 As part of the current dispute between the parties concerns the scope and effect of the 2006 decision it is necessary to explain the genesis and basis of that decision in greater detail than might otherwise be the case.

## Overview

22 As explained at [4] of the 2006 decision, Foxtel (the only retransmitter relevant to the current matter) served on Screenrights on 4 March 2001 a remuneration notice undertaking to pay equitable remuneration for the retransmission of FTA broadcasts by the broadcasters specified in Sch 1 to the notice while the notice is in force. Schedule 1 to the notice specifies FTA broadcasters/channels, channel call signs and regions. The terms of Sch 1 were summarised by the Tribunal in the 2006 decision in these terms at [4] of its reasons:

**Foxtel Management Pty Ltd (remuneration notice dated 4 March 2001)**

|  |  |
| --- | --- |
| **Broadcaster** | **Region** |
| Channel 7, Channel 9, Channel 10, Australian Broadcasting Commission (ABC), Special Broadcasting Service (SBS) | Sydney, Brisbane, Melbourne, Adelaide, Perth, Gold Coast |
| NRTV, NBN, PRIME | Gold Coast |

23 At [52] – [53] of its reasons the Tribunal described the FTA channels in these terms:

[52] The FTA channels are ABC, SBS and Channels 7, 9 and 10. The first two are national broadcasting services and the last three, commercial broadcasting licensees. In addition, there are two “digital multichannels”, ABC 2 and SBS News. ABC 2 is broadcast by the ABC, and SBS News is broadcast by SBS.

[53] Operators of multichannels can broadcast two or more channels of television programs at the same time (because digital signals carry more data than analogue signals). The ABC and SBS (but not the commercial broadcasters) are permitted to do this by cl 5A of Sch 4 of the BS Act [the Broadcasting Services Act] (which was added to the BS Act by the *Broadcasting Services Amendment (Digital Television and Datacasting) Act* 2000). The ABC and SBS are thereby able to broadcast a large variety of programs, including regional news and current affairs, and educational, science, religious, health, arts, cultural, children’s and foreign language programs. The evidence was that subscribers cannot receive the multichannels via their terrestrial aerials without purchasing their own FTA digital set-top box.

24 The position as at 2006 in relation to retransmissions by Foxtel included the fact the Tribunal recorded at [104] as follows (which is no longer the case):

Foxtel does not retransmit any FTA channels in HD format. All retransmitted programs are limited to SD format. However, there was evidence that it is possible that, in the future, SBS and Channel 9 programs will be retransmitted in HD format.

25 At [487] the Tribunal also explained that Foxtel retransmitted only three channels to its digital satellite subscribers, ABC, SBS and 9. The Tribunal noted that Foxtel submitted that it be given a further opportunity to be heard if the Tribunal determined equitable remuneration “for the full bundle of five FTAs” (at [489]) to be higher than the amount of 10 cents pspm Foxtel was advocating for during the hearing.

26 After a detailed consideration of extensive evidence, including expert and survey evidence, the Tribunal concluded in these terms (at [519]):

There is no firm evidence guiding us to a particular figure in any way remotely resembling a mathematical calculation. Taking into account all the evidence and recognising that a substantial degree of estimation is involved, and basing ourselves on our own appreciation of the likely value that subscribers, taken as a whole, would see in the benefits of better reception and the single remote control, we have reached the conclusion that the amount of equitable remuneration payable by the retransmitters in respect of the retransmission of all five FTA channels (including the multichannels) is 22.5c pspm.

27 It may be noted here that, given the advent of digital TV, the consideration of better reception is, if anything, of less weight than at the time of the 2006 decision.

## Tribunal’s reasoning

28 For the 2006 decision the Tribunal was presented with a great deal of evidence, particularly survey evidence, much of which it ultimately found unhelpful. The wide ranging evidence supported many submissions which the Tribunal also ultimately found unpersuasive. It appears that the Tribunal’s rejection of the survey evidence in 2006 has caused the parties in the present matter to avoid consideration of the assistance which well-structured and non-tendentious evidence of this character can provide (and would have provided in the present case). It seems to us that in future early consideration should be given by the parties to the range of issues which can be assisted by survey and other expert evidence and raised with the Tribunal. In order to ensure that such evidence is well-structured and non-tendentious (characteristics which the Tribunal did not perceive in the evidence of this nature adduced by the parties in the 2006 proceeding) it may be appropriate in future for the Tribunal, with the assistance of the parties, to consider formulating the issues to be dealt with by the evidence and appointing an agreed single expert or experts at the parties’ shared expense for the purpose of providing this evidence.

29 Given that the dispute between the parties in the current matter extends to the scope and effect of the 2006 decision, it is necessary to explain the process of reasoning which led the Tribunal to its conclusion and consequential determination at that time.

30 The Tribunal identified the orthodox approaches to assessment of equitable remuneration at [130] – [146] of its reasons including, at [131], identifying the approaches in summary form as follows:

• “market rate”, that is, the rate actually being charged for the same licence in the same market in similar circumstances;

• “comparable bargains”, that is, bargains not in the same market but sufficiently similar to the notional bargain next mentioned to provide guidance to the tribunal;

• “notional bargain rate”, that is, the rate on which the tribunal considers the parties would agree in a hypothetical negotiation;

• the rate which the tribunal determines as a result of what, for want of a better term, has been called “judicial estimation”.

31 The Tribunal was satisfied (at [87] of its reasons) that “in so far as it is necessary to characterise the retransmitters, they are engaged in the business of distributing subscription television services, but that, as a very minor or incidental part of that business, they also retransmit FTA broadcasts”.

32 At [153] the Tribunal rejected the notion that equitable remuneration could be materially affected by perceived social benefits. The Tribunal said:

… it is beside the point to attempt to justify the use of a hypothetical bargaining process to quantify equitable remuneration by reference to some more fundamental social good… it is difficult to imagine circumstances in which the tribunal would be justified in modifying the result of the hypothetical bargain by reference to a general concept of “social benefit”.

33 At [161] –[163] the Tribunal noted:

[161] The structure of the notional bargain is unusual. The benefits of retransmission of FTA channels to Pay TV subscribers that have occupied attention in the case are those of a “better reception” and the use of a “single remote control” rather than multiple remote controls. These are benefits, not to the retransmitters, but to their subscribers. The subscribers, however, are not parties to the notional bargain, although the notional bargain will result in the retransmitters having something to sell to them. Unless the notional bargain succeeds, they cannot retransmit FTA because to do so would infringe the copyright in the works, sound recordings and cinematograph films in question. Since the cost to the retransmitters of retransmitting FTA is virtually nil (see [82]), they will be prepared to pay for a licence an amount virtually equal to the value that subscribers place on having FTA retransmitted to them (there would have to be some discount for the broadcast copyright owned by the FTA stations).

[162] Generally speaking, and for the purposes of the notional bargain between the retransmitters and Screenrights, the value of retransmission to the retransmitters is equal to its value to their customers, the subscribers, and the retransmitters’ reserve price is their reserve price.

[163] In considering the position of subscribers, we must assume only that retransmission of FTA is absent, that is, we must assume:

• that the individual is already a Pay TV subscriber or is contemplating becoming one;

• that the individual can already view FTA programs via the terrestrial aerial;

• that, generally speaking, the reception quality via the terrestrial aerial is satisfactory unless the location is in a black spot; and

• that, without retransmission, the subscriber must use two remote controls: one for the FTA channels and another for the Pay TV channels.

34 The Tribunal was not persuaded by the retransmitters’ argument that the copyright owners would greatly benefit by the retransmission. At [175] the Tribunal said:

We think that the benefits of retransmission to the copyright owners are likely to be very small: the evidence does not establish that Pay TV, and the associated retransmission of FTA, increases significantly the viewing of FTA.

35 The Tribunal was not assisted by Screenrights’ survey evidence. At [512] the Tribunal noted that it had such doubt about the reliability of the survey of what subscribers might pay for retransmission of FTA broadcasts that it placed no weight on it.

36 Nor was the Tribunal persuaded by the retransmitters’ argument that international approaches to determining remuneration for retransmission were of much assistance (at [284] – [350]).

37 The Tribunal then considered two issues which had been the focus of Screenrights’ case – improved reception of FTA programs and convenience of a single remote control. As to the former, at [362] – [363], the Tribunal said:

[362] Despite the lack of conclusive evidence, we accept that the prospect of improved reception of FTA may influence some people to subscribe to Pay TV. While regard may be had to that fact when we determine the value to the retransmitters of the right to retransmit FTA programs, the problem is that we do not know what number or proportion of subscribers have been or are likely to be so influenced, or the degree of influence. We note that increasing digital terrestrial transmission means that the factor will be of decreasing importance in the future. (FTA broadcasters are required to match their analogue coverage area with digital coverage as soon as practicable.)

[363] The retransmitters submit that, if retransmission improves the reception of FTA for Pay TV subscribers, it necessarily follows that the number of viewers of FTA programs will be increased, their ratings will rise, and their value to the FTA providers in terms of advertising revenue will rise. There is some force in this argument. Again, however, quantification is a problem.

38 As to the latter, at [370], the Tribunal said:

[370] We are not persuaded that a significant number of people would be influenced in their decision to subscribe or continue to subscribe to Pay TV by the fact that only a single remote control is needed to change between FTA and Pay TV programs. We accept that multiple remote controls are often used and that there will be increasing availability and use of universal remote controls. Once persons subscribe, the ability to access both FTA and Pay TV channels using the one remote control is undoubtedly a convenience to some extent, and to that extent adds to the attractiveness of Pay TV. There may also be some “sticky effect” but this argument assumes that the viewer has subscribed to Pay TV primarily in order to watch the FTAs. It is our firm view that subscribers subscribe in order to watch the Pay TV channels.

39 The Tribunal also was not persuaded by Screenrights’ approach to the cost of retransmission to the retransmitters, but accepted that there must be a marginal cost which would be relevant to determining equitable remuneration. At [384] the Tribunal noted the following:

The retransmitters concede that the value of FTA retransmission to them is at least the marginal cost they incur in retransmitting the FTA signals, but contend that those marginal costs are “minimal”. Mr McGarrity concluded from his analysis of various documents discovered by the retransmitters that they had expended “significant sums” on the retransmission of FTA channels. We do not find his analysis persuasive, however, because we do not accept his full cost approach; rather, we think the marginal cost appropriate. However, we do take into account the fact that there is such a marginal cost that the retransmitters have chosen to incur in order to retransmit FTA.

40 At [400] – [404] the Tribunal rejected Screenrights’ approach to retransmission being a driver of subscriptions to pay TV. The Tribunal said:

[400] This approach of Mr Peters is founded upon the premise that the ability of a retransmitter to retransmit high quality FTA programs is as much an inducement to subscribe as is the availability of the Pay TV channels. This, he says, is reflected in the amount of viewer watching that is revealed by the ratings.

[401] This approach may have a superficial attraction. If subscribers watch more FTA than Pay TV channels, the FTA programs must have substantial value to them and therefore also to the retransmitters. There are, however, problems. First, the question of concern to us is not the value of FTA to subscribers (and therefore to the retransmitters) but the value of *retransmission* of FTA to subscribers (and therefore to the retransmitters), in circumstances in which FTA is already available via the terrestrial aerial.

[402] Second, the retransmitters do not wish to encourage the viewing of FTA programs by their subscribers. An increase in ratings for FTA programs as against Pay TV programs represents a loss for the retransmitters.

[403] A third problem flowing from the method of calculation referred to in [399] concerns the method of arriving at the cost per Pay TV channel. It was on the public record, at the time of the hearing, that only one of the retransmitters had made a profit and that it had done so only in the previous year. Moreover, the real cost per Pay TV channel would have to take into account the capital and other costs that have gone into establishing the Pay TV industry. These considerations suggest a much higher figure than Mr Peters allowed for. Conversely, if the cost per Pay TV channel were to fall, for example, as a result of a devaluation in the US dollar, the amount payable to the FTA providers would similarly fall. This casts doubt on the method suggested as representing the value of retransmitting the FTA programs to the retransmitters.

[404] The ratings approach may have significance to the issue of penetration which is discussed below. We do not, however, consider that it can be used as a method of calculating the value of retransmission of FTA, as Mr Peters seems to have suggested.

[emphasis in original]

41 At [422] the Tribunal recorded its view that retransmission of FTA broadcasts might have some effect on increasing the penetration of Pay TV in the marketplace but “the evidence does not support it as having the impact that Screenrights’ witnesses suggest. On the evidence before us, we do not consider it a major subscription driver or aid to penetration, except where the quality of reception of the FTA signal through the terrestrial aerial is poor”.

42 At [440] the Tribunal noted its conclusions on churn (or subscribers of Pay TV ceasing their subscription). The Tribunal said:

Again, it is difficult to put a monetary value on any reduction in churn that results from the retransmission of FTA… As a subscriber knows that he or she is not giving up access to FTA by discontinuing or not renewing a subscription, we think that the effect on churn must be slight.

43 At [460] – [461] the Tribunal noted the following general propositions:

[460] We are satisfied that upon the establishment of the Pay TV industry, the availability of FTA as part of the subscription package was viewed as a significant part of the new service. The retransmitters set up their equipment to enable retransmission as part of their package, even though they did not know until very nearly the day of first broadcast whether they would be entitled to retransmit the FTA programs at all. Since that time they have, to varying degrees, publicised the availability of the FTA programs as part of their offerings.

[461] We accept that there could be circumstances in the future in which the retransmitters might choose to discontinue retransmitting FTA. However, for present purposes we find that they see an advantage to themselves in continuing to do so, and, indeed, adding to the number of FTA channels retransmitted in the case of satellite transmission.

44 At [462] – [475] the Tribunal recorded its lack of persuasion about the existence of comparable bargains. As to the amount pay TV providers paid for their pay TV channels, the Tribunal said at [464]:

This was urged fairly weakly as a guide, and it does not seem to provide a useful comparison. The negotiation at arm’s length with producers of programs for first viewing on Pay TV channels is very different from the negotiation that would take place in respect of the retransmission of programs that are already being shown simultaneously on available FTA channels.

45 As to an agreement between the Australasian Performing Rights Association (**APRA**) and ASTRA, representing all Pay TV providers, the Tribunal said at [475]:

It is drawing a long bow to extrapolate from the APRA/ASTRA agreement a figure that can be used in fixing the equitable remuneration across the range of works and uses for which Screenrights is entitled to receive equitable remuneration from the retransmitters. We do not find the APRA/ASTRA agreement particularly useful as a comparable bargain.

46 At [476] – [485] the Tribunal recorded the competing submissions as to the amount of equitable remuneration. Screenrights argued for equitable remuneration being within the range of $1 to $5 pspm, and settled for $2.50 as its primary position, with alternatives of $1 pspm and 0.98 cents pspm also being presented on varying bases. At [484] the Tribunal recorded Foxtel’s position (as one of the retransmitters in that case) as follows:

The retransmitters propose an amount of 10c pspm for the retransmission of all five FTA channels.

47 At [491] – [518] the Tribunal summarised its conclusions including the following:

• [492] In that hypothetical bargain, the retransmitters are the only potential buyers of a licence to retransmit; there is no alternative buyer with whom Screenrights can deal or threaten to deal. Australia does not have a must-carry regime: the retransmitters can cease retransmission and threaten to cease retransmission.

• [493] A licence to retransmit is, however, of some benefit to the retransmitters. It gives them something to sell to subscribers. Without it, the copyright owners could compel them to end retransmission. The only source of the licence to retransmit is the copyright owners, represented by Screenrights. In the hypothetical bargain, the copyright owners may refuse, and threaten to refuse, to grant a licence to the retransmitters.

• [494] The value to the retransmitters of the licence to retransmit is generally commensurate with the value placed on retransmission by subscribers. The value of retransmission to subscribers, as the retransmitters perceive that value to be, will govern the amount of licence fee the retransmitters will be prepared to offer in their hypothetical negotiation with Screenrights.

• [496] We do not accept…that retransmission of FTA is today a significant subscription driver.

• [497] The benefit of a better reception of FTA programs may operate on the minds of some people who have poor FTA reception and take FTA to some additional viewers, but in the absence of persuasive evidence, we do not accept that anything more than a small number of people are involved. We proceed on the basis that people subscribe in order to access the Pay TV channels.

• [499] The only two benefits to subscribers that have featured in the proceeding are those of the single remote control and an improved reception of FTA.

• [501] In the hypothetical bargaining situation, the FTA providers are in a weak position:

• they are not incurring costs on account of retransmission for which they would insist on being reimbursed;

• their viewing audience is increased, albeit to some very small extent;

• they do not lose viewers, who would otherwise watch FTA via their terrestrial aerial.

• [502] On the other hand, the retransmitters must think they derive some value from retransmitting FTA, otherwise they would not incur even the small cost involved in doing so, and would not refer to the availability of FTA in their program guides.

• [503] We find it hard to accept that subscribers or prospective subscribers would place a high value on the convenience of being able to move between Pay TV channels and FTA channels by the use of a single remote control.

• [505] …we find it hard to accept that a substantial proportion of viewers have such a poor reception via their terrestrial aerial that they would value retransmission highly, though there may be some people who would do so.

• [513] Our own appreciation of the benefits that retransmission of FTA offers to subscribers is that they are minor and would be viewed by subscribers and prospective subscribers as minor.

48 Following its conclusion at [519] that “the amount of equitable remuneration payable by the retransmitters in respect of the retransmission of all five FTA channels (including the multichannels) is 22.5c pspm” the Tribunal noted at [521] that:

In arriving at the amount mentioned, we have allowed for the contribution that the retransmitters make to the value of retransmission to subscribers, and for the broadcast signal copyright. The figure is net to Screenrights. The figure takes into account the multichannels. We have also taken into account the submission that retransmission enlarges the FTA audience (and the submission that the viewing of retransmitted FTA leads on to the viewing of Pay TV channels), and there is no reduction (or addition) on this account.

# CURRENT CIRCUMSTANCES

49 Certain circumstances have changed since the 2006 decision.

50 After the 2006 decision Screenrights and Foxtel worked out the terms of a deed which they entered into on 1 September 2006 known as the Retransmission Remuneration Deed. By 1 September 2006 it was already apparent that Screenrights and Foxtel disagreed about the effect of the 2006 decision. Recital I to the Retransmission Remuneration Deed records that the parties disagreed about (amongst other things) “the extent to which the Tribunal’s decision covered future Multi-Channels (if any) retransmitted by the Retransmitters”. Recital J records that the deed is without prejudice to the parties’ positions on the matters in Recital I. The term “future Multi-Channels” in recital I is used in distinction from the defined term in cl 1.1 of the Retransmission Remuneration Deed of “Current Multi-Channels” being “the sequence of television programs known…as ABC2 and SBS World News Channel, or, if discontinued, any replacement sequence of television programs”. A future Multi-Channel is a “New Multi-Channel” as also defined in cl 1.1, being a Multi-Channel other than a Current Multi-Channel.

51 Clause 2.2 of the Retransmission Remuneration Deed provides that:

**2.2 Entire agreement**

Subject to clauses 2.3, 2.4 and 3.2 this Deed shall constitute the full and final agreement on the terms of payment of Equitable Remuneration for the Retransmission of Broadcasts made by the Retransmitter for the Term and neither party, nor any party related to them, nor any party assisted by them, shall make an application to the Copyright Tribunal in relation to these matters during the term.

52 Clause 3.2, to which cl 2.2 is subject, is in these terms:

**3.2 New Multi-Channels**

Despite clause 2.2, the parties agree that, failing agreement between them, either party may make an application to the Copyright Tribunal to determine the amount, if any, to be paid by the Retransmitter in respect of the Retransmission of any New Multi-Channels provided such application is not made before the day 12 months after the Commencement Date.

53 The competing positions of the parties on New Multi-Channels are set out in cl 3.1 as follows:

**3.1 Acknowledgment**

The parties acknowledge that they each hold a different view of the effect of the Copyright Tribunal’s decision in relation to New Multi-Channels which may be transmitted, and in particular that:

(a) Screenrights believes that the remuneration determined by the Copyright Tribunal in its decision of 3 May 2006 to be paid in respect of the retransmission of a Television Broadcaster’s programs was limited to the Retransmission of programs broadcast or to be broadcast by Current Multi-Channels and that the Retransmission of programs to be broadcast by New Multi-Channels should attract additional remuneration; and

(b) the Retransmitter believes that the remuneration determined by the Copyright Tribunal in its decision of 3 May 2006 to be paid in respect of the Retransmission of a Television Broadcaster’s programs should encompass all programs broadcast or to be broadcast by the Television Broadcasting and retransmitted by the Retransmitter, including New Multi-Channels.

54 Clause 7.3 deals with the situation where only some of the FTA channels are retransmitted. It is in these terms:

**7.3 Partial suite of Broadcasters**

Where a Retransmitter retransmits fewer than the signals of five Television Broadcasters the amount payable shall be calculated by Screenrights according to the following formula:

X = ((N/5) x (R x (1-S))) x MR

Where:

X = the Equitable Remuneration for a partial suite of Television Broadcasters

N = the number of Broadcasters in the partial suite of Television Broadcasters

S = the function of the total amount to be allocated equally (one-third)

R = the ratings of the Television Broadcasters in the bundle relative to all five Television Broadcasters

MR = the Monthly Rate

For example, in the case of a Retransmission of Nine, ABC and SBS, the combined ratings for which are 51.1 per cent:

X = ((3/5) x 1/3) + (0.511 x 2/3)) x 22.5 cents per Subscriber per month

= (0.200 + 0.341) x 22.5 cents per Subscriber per month

= 0.541 x 22.5 cents per Subscriber per month

= 12.2 cents per Subscriber per month

55 For the purposes of the Retransmission Remuneration Deed there are New Multi-Channels, being the nine channels referred to above (Seven HD, One HD, One SD, ABC HD, SBS HD, Seven 2, Nine HD, Go! (also known as Go!99) and ABC 3).

56 Foxtel currently retransmits all nine new multichannels (as well as the five FTA channels), although not to all of its subscribers. Access to the nine new multichannels through the Foxtel service depends on the type of service (cable or satellite) and the type of Foxtel set-top box the subscriber has.

57 As noted, by reason of CPI adjustments the current amount Foxtel pays Screenrights pursuant to the 2006 decision is 26.95 cents.

58 Changes in other circumstances are dealt with through the discussion of the evidence.

# THE EVIDENCE – AN OVERVIEW

## James Dickinson

59 Mr Dickinson is Screenrights’ Licensing Executive. Mr Dickinson’s evidence included a number of propositions.

60 Mr Dickinson said that, at the time of the hearing leading to the 2006 decision, multichannels were insignificant parts of FTA broadcasting relative to their role today. The two existing multichannels at that time were either recently launched (ABC 2) or had narrow audience appeal (SBS World News).

61 Mr Dickinson also said that:

Screenrights’ distributions are not paid to the broadcaster of the program. Rather, the funds are allocated to the owners of the underlying copyright and only in approximately one third of cases is the broadcaster an owner of an underlying copyright (being the copyright in the cinematograph film and the copyright in the literary work which is the script). Even then, very often the broadcaster is only a part owner. In the majority of cases, the copyright is owned by third parties. Typically, each program included in a broadcast will have multiple rights owners and it is these rights owners (and not the owners of copyright in the broadcast) who are the beneficiaries under Part VC of the Act.

62 Due to the amount of equitable remuneration determined by the 2006 decision and the number of copyright owners eligible for distribution Screenrights developed a policy identifying an “efficient amount per day”. Mr Dickinson explained:

In essence, the policy applies a minimum amount per day for retransmission that can be distributed efficiently (**Efficient Amount Per Day**). The distributable amount for a channel is divided by the Efficient Amount Per Day to calculate the number of distribution days. This number of days is then randomly selected over the relevant year, and the entire distributable amount for the channel is allocated to that sample of days.

63 Mr Dickinson gave this evidence:

It is my understanding that, if the Tribunal were to make a determination along the lines Foxtel is proposing, Screenrights would not be entitled to any further remuneration for the retransmission of the nine New Multi-channels. I have calculated the impact of that on the distribution for 2010 using the methodology above (in the 2010 distribution year, the Efficient Amount Per Day was $1,000).

The effect of Foxtel’s approach is that very small amounts would be distributable to the New Multi-channels. This would lead to few days being able to be efficiently distributed to the relevant copyright owners.

I consider that it is likely that such a distribution would lead to a considerable number of copyright owners whose programs were retransmitted on the New Multi-channels not receiving any remuneration at all under Part VC. If, to compensate for this concern, Screenrights were to reduce the Efficient Amount Per Day, this would increase the numbers of copyright owners paid but would also increase the expense of the distribution and reduce the amount distributed.

64 Mr Dickinson also said:

The analysis above can also be considered from the perspective of the payment made by Foxtel for the primary channels. Again, under Foxtel’s approach, as I understand it, no additional equitable remuneration would be payable by Foxtel for the retransmission of any of the New Multi-Channels, giving rise to the distribution issues previously outlined.

It also has the effect that for each additional New Multi-Channel that Foxtel retransmits, Foxtel pays less equitable remuneration for the primary channel of the New Multi-channel.

65 Mr Dickinson described Screenrights’ position as involving the application of a formula based on the approach in the Retransmission Remuneration Deed to reflect equitable remuneration for the new multichannels. He said:

The formula can be expressed as follows:

|  |  |  |
| --- | --- | --- |
| Let | NMCz = | Equitable remuneration per subscriber per month for the retransmission of a given New Multi-channel transmitted by broadcaster Z; |
|  | ER = | Equitable remuneration per subscriber per month for the retransmission of the full suite of five channels (including that of broadcaster Z) as determined in the 2006 Decision; |
|  | Rz = | The ratings of the primary channel of broadcaster Z (expressed as a percentage of the total ratings of all primary channels); |
|  | Cz = | The proportion of separate and enhanced content broadcast on the New Multi-channel transmitted by broadcaster Z relative to broadcaster Z’s primary channel. |

The value of equitable remuneration for the retransmission of a New Multi-channel of a broadcaster Z can then be expressed as follows:

NMCz = access fee + premium

NMCz = (033 x ER / 5) + (0.67 x ER x Rz x Cz)

Applying this formula to the New Multi-channel broadcast by Channel Nine, Go!, I calculate as follows. ER in 2011 is $0.2603; ratings for Channel Nine (Rz) are 33.5%; and the proportion of separate and enhanced content on Go! (Cz) is 100%. The formula then produces the following rate of equitable remuneration (NMCz) for the retransmission of the New Multi-channel, Go!:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| NMCz | = | access fee | + | premium |
| NMCz | = | (0.33 x 26.03 / 5) | + | (0.67 x 26.03 x 33.5% x 100%) |
| NMCz | = | 1.72 cents | + | 5.85 cents |
| NMCz | = | 7.57 cents per subscriber per month | | |

66 Mr Dickinson noted that:

Applying the formula in this way, the total amount for the nine New Multi-channels in 2011 would be 48.08 cents per subscriber per month.

One effect of the formula is that equitable remuneration for a New Multi-channel would be capped at the equitable remuneration rate for the primary channel calculated in accordance with the Retransmission Remuneration Deed.

67 Mr Dickinson also identified other agreements which Screenrights relied upon as comparable bargains including an agreement with TPG Telecom Ltd (**TPG**), FetchTV, divisions of Telstra Corporation Ltd (**Telstra**) and Vodafone Hutchison Australia Pty Ltd (**VHA**).

## John Ford

68 Mr Ford is a consultant to media groups and a member of Screenrights’ board, being its Deputy Chairman since 2006. Over a lengthy career Mr Ford has negotiated a number of significant program supply agreements.

69 In Mr Ford’s opinion the amount of equitable remuneration determined by the 2006 decision (which he defines as **the Rate**) is “a very modest cost compared to the typical cost of buying channels for subscription television” (examples of which he provided, based on the evidence of Mr Delany described below). Mr Ford continued in these terms:

In my opinion, based on my experience as outlined above including my experience in valuing program content, including channels, the Rate significantly undervalues the value of the retransmitted channels to FOXTEL regardless of the fact that they are also broadcast on free-to-air television. In particular, the rate does not reflect the fact that the right to retransmit is subject to a statutory licence. If, as I suspect, free-to-air networks pay at least a proportion of the cost of retransmission – for example, satellite costs – in order for their channels to be included on the subscription platform providers of subscription television services are, in effect, being subsidised by the free-to-air networks.

70 Mr Ford also said:

It seems to me that FOXTEL’s ARPU [average revenue per user] of at least $94 represents an extraordinarily high amount when compared to the cost of retransmission, especially considering that 45.5% of subscribers are watching free-to-air television. In other words, based on the Rate, FOXTEL is presently paying an amount equivalent to less than 0.3% of its ARPU to attract 45.5% of its viewing audience. Compared to the cost to FOXTEL of its other channels, including those referred to above, it appears to me that this is a significant disproportionate benefit having regard to the cost involved.

71 Mr Ford recorded that:

In my view, the Rate does not reflect:

(a) FOXTEL’s very high levels of profitability compared to the position at the time of the 2006 Determination.

(b) the extent of viewing of retransmitted free-to-air television channels in subscription television homes – which is evident from the ratings of Multi-channels…;

(c) the price paid by FOXTEL for its other programming…; and

(d) the fact that free-to-air broadcasters cannot withhold their retransmission rights and whose only entitlement to remuneration for retransmission arises as owners of the underlying rights.

72 Mr Ford concluded in these terms:

In my opinion, based on my knowledge of subscription television and my experience of acquiring program content in the industry, the amount of 48.08 cents PSPM is a fair sum to be paid by FOXTEL for the retransmission of the nine New Multi-channels.

As I understand Screenright’s calculation, it is based on the Rate and on the agreement between Screenrights and FOXTEL which implements the administrative arrangements for the application of the Rate – the Retransmission Remuneration Deed, dated 1 September 2006.

In my view, 48.08 cents PSPM is, in fact, less than the true value to FOXTEL of the retransmission of New Multi-channels.

## David Briggs

73 Mr Briggs is a principal of Galaxy DP Pty Limited, a market research consultancy. Mr Briggs reviewed certain documents produced by Foxtel (called the Foxtel Research Documents). From those documents Mr Briggs drew a series of conclusions which he expressed as follows:

• The Foxtel Research Documents confirmed the importance to Foxtel of extending the number of Foxtel channels and targeting specific groups.

• In general, the Foxtel Research Documents show that in order to compete with the perceived threat of free-to-air television, Foxtel has invested in technology.

• The Foxtel Research Documents show clearly that Foxtel regards programming as an important component of the Foxtel offering. The Documents contain extensive research on movies, sport, documentaries and drama and how to best package and communicate the Foxtel product offering in each of these areas.

## Christopher O’Mara

74 Mr O’Mara is a television industry consultant. He has worked in FTA television for over 30 years including as Network Programme Director and Head of Production for the Seven Network.

75 Mr O’Mara said:

My experience of free-to-air television is that it is an extremely competitive industry, in the sense that there are only three commercial free-to-air broadcasters and two government funded broadcasters. All compete vigorously for viewers and, in the case of the commercial broadcasters, advertising. There is also fierce competition between the free-to-air television networks and providers of subscription television (principally FOXTEL). The prime focus of this competition is to maximise the number of ‘eyeballs’ watching each platform and the ability of each to maximise advertising sales. In the case of the ABC, the competition is for maximising viewers and relevance in the marketplace.

76 Mr O’Mara also noted:

Until 2001, each free-to-air television network broadcast one channel – their primary channel – in each broadcast area.

This changed in 2001 with the advent of Multi-channels:

(a) ABC launched ABC Kids and Fly TV in August 2001;

(b) SBS launched World News Channel in 2002; and

(c) Channels Seven, Nine and Ten launched HD only channels in September 2007.

From 2009, commercial broadcasters were allowed to transmit an alternative standard definition channel. On 26 March 2009, Channel Ten launched ONE, its SD multichannel as a 24-hour sports channel. ONE is also broadcast on Ten’s HD channel, replacing Ten HD. Nine later launched GO!, as a general entertainment channel skewed towards younger viewers in August 2009. Seven launched 7TWO on 1 November 2009.

77 Mr O’Mara noted further that:

Because the Multi-channels tend to be programmed for niche audiences it is inevitable that some of the programming will appear across the Multi-channel and subscription television platforms. Examples of programming that appears on both FOXTEL and Multi-channels are:

|  |  |  |
| --- | --- | --- |
| *“24”* | 7Two | FOXTEL: W, W2 and WHD |
| *“A Touch of Frost”* | 7Two | FOXTEL: UKTV, UKTV+2, UKTV HD |
| *“Seinfeld”* | GO! | FOXTEL: TV1, TV1+2 |
| *“Hell’s Kitchen”* | GO! | FOXTEL: Lifestyle, Lifestyle+2 |
| *“The Simpsons”* | 11 | FOXTEL: Fox8, Fox8+2, Fox8 HD |

78 He also described the Foxtel iQ device and said:

The FOXTEL iQ device is a Personal Video Recorder (PVR) that allows the viewer to record up to 60 hours of programmes and play back at a later time; the viewer can pause live television, rewind up to 60 minutes, fast forward and view in slow motion. The iQ also comes with two tuners, so the viewer can watch and record at the same time or record two channels at once…

By retransmitting free-to-air broadcasts, a subscription television provider is able to offer its subscribers access to programs not generally available on subscription television channels. For “My Kitchen Rules”, produced and broadcast by the Seven Network is only available through Seven. However, by retransmitting the Seven broadcast, FOXTEL is able to provide its viewers with the ability to watch “My Kitchen Rules” and also record it on FOXTEL’s iQ device. The same is true for “The Big Bang Theory” broadcast on Nine and GO! The retransmission of these channels allows FOXTEL viewers to watch the show and record it on their FOXTEL iQ.

79 In Mr O’Mara’s opinion the factors relevant to the value of a television program are:

(a) the number of viewers, as indicated by the ratings – in my view, this is by far the most important factor;

(b) in exceptional cases, such as “*Master Chef*”, the value of the revenue written by express reference to the program;

(c) the longevity of the program;

(d) its exclusivity; and

(e) whether the program defines the network and can pull viewers to other programs broadcast on the network.

80 Mr O’Mara gave evidence about ratings in these terms:

Ratings play a very important role in the business of television. I have had regard to ratings data throughout my career, and as a result of my activities in my various roles discussed above I have come to be familiar with the way in which such data is collected, how it is used in the industry and what may be drawn from it.

Ratings data is collected by means of devices called ‘people meters’. These are installed in viewers’ homes by ratings agencies, OzTAM and RegionalTAM, as applicable. In the case of free-to air broadcast, these are rated by OzTAM in the five mainland capital cities: Sydney, Melbourne, Brisbane, Adelaide and Perth (SMBAP). Viewers are selected so as to be representative of the general viewing public. The viewing data is collected automatically and is downloaded by OzTAM (and, in regional centres, RegionalTAM) every morning at 2.00 am. OzTAM compiles and analyses the data and prepares reports for its customers. These include all the free-to-air and subscription television networks, as well as advertising agencies and others.

81 Mr O’Mara analysed ratings data for the period 6 February 2011 to 5 March 2011 for viewing in homes with and without Foxtel and for the period 4 January 2009 to 26 February 2011 in homes with Foxtel (being a period after the introduction of the nine new multichannels). From this analysis Mr O’Mara said:

(a) during January and February 2009, approximately 40% of viewers in Subscription Homes watched free-to-air television (this includes primary and Multi-channels);

(b) during June to September 2009, free-to-air viewing grew to an average of 42% of all viewing in Subscription Homes; and

(c) during the corresponding periods in 2010, which includes ratings for 7Two, 7Mate, GO!, Gem, ONE, ABC2, ABC3, ABC News 24 and SBS 2, free-to-air viewing grew to an average of 46% of all viewing in Subscription Homes.

82 Mr O’Mara concluded in these terms:

It seems to me that notwithstanding the position adopted by the subscription television operators in relation to the introduction of Multi-channels, there is value to subscription operators, such as FOXTEL, in having Multi-channels on their platform. In particular, subscribers are able to watch all of their television, including the Multi-channels, through the FOXTEL set-top box. This increases the likelihood that a viewer of free-to-air television, watching free-to-air television through their FOXTEL set-top box, will stay on the FOXTEL platform and, sooner or later, watch a program broadcast by a FOXTEL channel.

Viewers who subscribe to the FOXTEL iQ and watch free-to-air television through their FOXTEL set-top box are also able to record free-to-air programs retransmitted on subscription television (as I have descried in paragraph 49 above). This is a most desirable convenience for viewers who want to record all forms of television on one device.

## Peter Smart

83 Mr Smart is a technical consultant to Foxtel. He was employed by Foxtel as its Chief Technical Officer until August 2011.

84 Mr Smart explained the process by which Foxtel retransmits the FTA broadcasts through its digital cable platform. Each new multichannel is retransmitted using the same bandwidth already allocated to the relevant FTA broadcaster. To achieve retransmission a Foxtel technician logs into the Foxtel headend system and changes the configuration of the headend, allocates a channel number to the new multichannel and incorporates the program information from the FTA broadcasters (received through Foxtel’s TV guide service provider) and incorporates it into the Foxtel Electronic Program Guide by an automated reception process. This takes the technician about an hour. The cost to Foxtel of doing this is equivalent to the technician’s time as the multichannels are retransmitted using the same bandwidth already allocated to the relevant FTA broadcaster. In terms of retransmission via Foxtel’s satellite platform, Foxtel requires the FTA broadcaster to reimburse it for the full cost of the new transponder capacity required for each new multichannel.

## Anthony Fitzgerald

85 Mr Fitzgerald is the Chief Executive Officer of Multi Channel Network Pty Limited (**MCN**). MCN sells advertising products for subscription television including a service known as the Multiview Audience Measurement System (**Multiview AMS**). Mr Fitzgerald explained the Multiview AMS in these terms:

Multiview AMS provides reports based on tuning and viewing behaviours captured within a representative sample of homes of FOXTEL and AUSTAR subscribers (the Multiview Panel). The Multiview Panel is recruited in proportion to the geographic, STB [set-top box] type (for example, standard, iQ or iQHD) and tier distribution across all FOXTEL and AUSTAR subscribers. Panellists are drawn randomly from FOXTEL and AUSTAR subscriber lists. At present, the Multiview Panel for the FOXTEL Service consists of approximately 6,500 homes across all areas in which the FOXTEL Service is available. Of those homes, data is received from approximately 4,000 homes, approximately 3,500 of which are in the Five City Metropolitan Areas.

86 Mr Fitzgerald also observed that:

When households are recruited for the Multiview AMS panel, they are also surveyed to determine how many working televisions they have in their household. Using this information, in conjunction with FOXTEL subscriber account information, it is possible to determine the number of working televisions in a subscriber’s home that do not have a FOXTEL STB attached.

87 Mr Fitzgerald analysed OzTAM ratings data for Sydney, Melbourne, Adelaide, Brisbane and Perth for the second quarter of each year (Q2) since 2004 to determine:

(a) the average hours viewed per day of FTA Channels by people in all households;

(b) the average hours viewed per day of FTA Channels by people in households that subscribe to FOXTEL (using the subscription television homes reported by OzTAM as a proxy for FOXTEL homes); and

(c) the average hours viewed per day of FTA Channels by people in households that do not subscribe to FOXTEL (again, using the subscription television homes reported by OzTAM as a proxy for FOXTEL homes).

88 Mr Fitzgerald described the results of his analysis as follows.

***All homes***

The analysis revealed that in 2011, across the Five City Metropolitan Areas, people in all households watched 2.5 hours (that is, 2 hours and 30 minutes) per day on average of FTA Channels. The graph shows that FTA Channel viewing experienced a downward trend between 2004 and 2007 with viewing declines of 9% across the period. Since 2007, FTA Channel viewing has maintained a stable viewing level of approximately 2.48 hours per day, with minor fluctuations of 4% across the period.

This data was then broken down by FTA Channel to determine the average FTA Channel minutes viewed per day per channel by people in all households. Tab 6 of Exhibit ASF-1 contains a graph produced following this analysis.

The graph reveals that in the vast majority of cases, while the time spent viewing the Multi-Channels is increasing, the time spent viewing the Primary Channels is decreasing.

***Foxtel homes***

The analysis revealed that in 2011, across the Five City Metropolitan Areas, people in FOXTEL homes watched 1.72 hours per day on average of FTA Channels. In Quarter 2 of 2004, people in FOXTEL homes watched 1.72 hours per day on average of FTA Channels – precisely the same amount of time as for 2011. In Quarter 2 of 2005, when the Previous Proceedings were heard, people in FOXTEL homes watched 1.75 hours of FTA Channels.

The graph shows that FTA Channel viewing by people in FOXTEL homes has experienced relatively minor fluctuations of a maximum of 10% across the last 7 years with no significant trend in growth. The maximum variance in viewing time per day across the last 8 years has been approximately 0.17 hours per day.

This data was then broken down by FTA Channel to determine the average FTA Channel minutes viewed per day per channel by people in FOXTEL homes. Tab 9 of Exhibit ASF-1 contains a graph produced following this analysis.

The graph reveals that while time spent viewing the Multi-Channels by people in FOXTEL homes is increasing, the time spent viewing the Primary Channels is decreasing. In simple terms, since I gave evidence in the Previous Proceedings, on average, the average time spent viewing the FTA Channels in total among people in FOXTEL homes has not increased but the amount of time spent viewing individual channels has changed with the introduction of the Multichannels.

***Non-Foxtel homes***

The analysis revealed that in 2011, across the 5 City Metropolitan Areas, people in non-FOXTEL subscriber households watched 2.92 hours per day on average of FTA Channels. The graph shows that FTA Channel viewing by non-FOXTEL subscribers has experienced relatively minor fluctuations of a maximum of 10% across the last 8 years with no significant trend in growth. It also reveals that the maximum variance in viewing time per day across the last 8 years has been approximately 0.17 hours per day.

This data was then broken down by FTA Channel to determine the average FTA Channel minutes viewed per day per channel by people in non-FOXTEL subscriber households. Tab 11 of Exhibit ASF-1 contains a graph produced following this analysis.

The graph reveals that while the time spent viewing of Multi-Channels is increasing, the time spent viewing the Primary Channels is decreasing.

89 Mr Fitzgerald expressed his overall conclusions as follows:

Since the Previous Proceedings there have been some changes in the collection and use of rating data, which need to be taken into account when analysing this data. I discuss some of the changes below. They include:

(a) the inclusion of 7 day time-shift viewing in ratings data;

(b) changes to the OzTAM panel composition;

(c) the introduction of Multiview AMS which measures viewing via subscription television services specifically; and

(d) the growth of the Australian population.

Based on the ratings data which is available to me I believe that despite the introduction of new Multi-Channels since the hearing of the Previous Proceedings that:

(a) a significant proportion of FTA Channels in FOXTEL homes is viewed other than through the FOXTEL STB;

(b) the viewing of FTA Channels by subscribers to the FOXTEL service has not increased since the introduction of the new Multi-Channels; and

(c) that while the viewing of Multi-Channels increased there has been a corresponding decrease in the viewing of the Primary Channels in FOXTEL homes.

## Patrick Delany

90 Mr Delany is the Chief Executive Officer of Premier Media Group Pty Limited (**PMG**). Before July 2011 he was employed by Foxtel as Executive Director - Sales and Product Development.

91 Mr Delany explained that:

In 2005, when the Previous Proceedings were heard, the FOXTEL Service was in the process of changing from analogue to digital transmission. The digital service at that time comprised 109 channels, including 30 audio channels, 10 time-shift channels and 31 channels that provided “near video on demand” services.

“Time-shift” channels are channels (with their own channel number) where FOXTEL takes one of its original channels and broadcasts it at a later time; for example 2 hours later. This is done by storing the original channel on a server and later re-broadcasting it on a different channel number. FOXTEL regards these channels as distinct channels, as they offer a separate opportunity for the subscriber to view the programming at a time which is convenient for the subscriber. At the time when the Previous Proceedings were heard, FOXTEL was not required to pay any additional licence fees to channel providers in order to re-broadcast these channels on a time-shifted basis. This is still the case.

92 He also noted that:

At the present time, the FOXTEL Service provides over 180 channels including:

(a) 94 standard definition (SD) channels;

(b) 21 high definition (HD) channels;

(c) 22 time-shifted channels;

(d) one 3 dimensional (3D) channel;

(e) 32 audio channels; and

(f) 19 FOXTEL On Demand channels.

93 In addition, he said that Foxtel “retransmits each of the Primary Channels by cable and satellite and each of the Multi-Channels by cable (and in some areas by satellite)”.

94 For convenience, the table identifying the primary channels and multichannels presently retransmitted by Foxtel is set out below.

|  |  |
| --- | --- |
| **Network (primary channel)** | **Multi-channels** |
| Seven Network (7) | 7Two 7mate (previously known as Seven HD) |
| Nine Network (9) | Go! GEM (previously known as Nine HD) |
| Network Ten (10) | One HD Eleven (previously known as One SD) |
| ABC (ABC1) | ABC 2 ABC 3 ABC News 24 (previously known as ABC HD) |
| SBS (SBS1) | SBS HD SBS 2 |

95 Mr Delany expressed his overall conclusion about the factors that drive Foxtel subscriptions as follows:

In my view, the services which differentiate FOXTEL’s offering from those of the Commercial and National Broadcasters’, and are therefore critical in convincing people to subscribe, and continue to subscribe, to FOXTEL include: the availability of up to 21 channels in stunning HD; programming which is exclusive to subscription television; movies shown advertisement-free on FOXTEL’s dedicated movie channels; live uninterrupted sport shown in HD; and access to customer friendly technology like the iQHD…, which allows FOXTEL subscribers to obtain maximum value from their FOXTEL subscription. I refer to these features in more detail later in my affidavit. I do not consider that FOXTEL’s retransmission of the Primary Channels or the Multi-Channels is a differentiating factor.

96 Mr Delany described Foxtel’s principal services to its subscribers in these terms:

The installation fee for a standard metropolitan installation is $100. In addition, there is a one-off equipment fee of $100 (rising to $150 as of 1 November 2011) for a FOXTEL iQHD...

There is also a monthly service fee of $10 per month payable by subscribers who have a FOXTEL iQ or iQHD...

Subscribers are then able to choose from a number of packages offered as part of the FOXTEL Service. Subscribers can either build their own package from a number of channel packages or they can choose a Value Package or a Platinum Package. Value Packages and Platinum Packages include the monthly iQ or iQHD service fee.

The packages offered as part of the FOXTEL Service have changed over the years of FOXTEL’s operations. However, there is always a basic package, which is acquired as part of the customer’s subscription, and other channel packages (also known as tiers) which can be added for additional amounts.

The channel packages that subscribers can choose from when building their own package, together with the cost per month of those packages, are:

(a) “Get Started” package (34 Channels, 9 time-shift and 32 audio) – $44 per month ($45 from 1 November 2011);

(b) Sports package (10 channels, 1 time-shift as well as access to Sky Racing+ for an additional fee) – an additional $16 per month;

(c) Movie packages:

(i) Movie Network (7 channels, 2 time-shift) – an additional $16 per month;

(ii) Showtime movies (7 channels, 2 time-shift) – an additional $16 per month;

(d) Kids and Music (12 channels) – an additional $16 per month;

(e) Drama and lifestyle (10 channels, 6 time-shift) – an additional $16 per month.

(f) Knowledge and adventure (12 channels, 3 time-shift) – an additional $16 per month; and

(g) HD (up to 21 HD channels, and access to one 3D channel) – an additional $10 per month;

(together the **Channel Packages**).

97 He also said that:

The FOXTEL Service includes an EPG, which sets out information about each channel (and each programme on each channel) available on the FOXTEL Service, including start and finish times, classifications (PG, M, MA, etc), additional features (widescreen, captions, etc) and a short synopsis.

98 Mr Delany further noted that:

FOXTEL also offers what it calls “FOXTEL iQHD” (previously known as the iQ2). The FOXTEL iQHD was introduced in May 2008. This is an upgraded version of the FOXTEL iQ STU [set top unit, otherwise known as a set top box] tailored for HD programming, which allows subscribers to access HD channels and HD pay-per-view content.

If a subscriber wishes to view [FOXTEL] content in HD, the subscriber will need to have a HD television and a FOXTEL iQHD. Also, if a cable subscriber (or satellite subscriber in the case of ABC News 24) wishes to view a HD Multi-Channel through their FOXTEL STU, he or she will need a FOXTEL IQHD.

99 Mr Delany explained how Foxtel obtained its content including program licences, output arrangements with program-makers and distributors, direct commissioning of program-makers and distributors, in-house production and sourcing channels. He provided a table setting out a simplified explanation of Foxtel’s costs for its channels on a pspm basis.

100 Mr Delany also said:

At present, FOXTEL retransmits all Primary Channels and Multi-Channels of the Commercial and National Broadcasters by cable throughout Australia wherever the FOXTEL service is accessible by cable. It also retransmits by satellite:

(a) all channels of the ABC network;

(b) SBS1 and SBS2;

(c) the Primary Channels of the Seven Network, the Nine Network and Network Ten in Sydney, Melbourne and Brisbane;

(d) the Seven Network’s 7Two Multi-Channel and the Nine Network’s Go! Multi-Channel in NSW, Victoria and Queensland,

in the areas where FOXTEL provides a satellite service to its subscribers.

101 In addition, in November 2011 Foxtel started retransmission by satellite of Eleven.

102 Mr Delany also gave the following evidence:

 Any member of the public can access the FTA Channels, including the Multi-Channels, on his or her television set provided he or she has a television set with a built-in tuner, or a PVR/DVR or a digital STU. There is no need to subscribe to the FOXTEL Service to do this. As was the case in 2005, to the extent that FOXTEL provides access to the Primary Channels by way of retransmission, it is done as a convenience to its subscribers so that they may switch to and from FOXTEL channels and the Primary Channels without changing remote controls. To the more limited extent that FOXTEL retransmits the Multi-Channels, this service is also provided simply as a convenience to subscribers.

 It is FOXTEL’s practice not to advertise the Multi-Channels in any materials which promote the FOXTEL Service. Multi-Channels are not included in the channel line up contained on the FOXTEL Website. I am aware that since at least 2002 when I joined FOXTEL, FOXTEL has not advertised the Primary Channels and they have not been included in the channel line up contained on the FOXTEL Website. Since they have launched, FOXTEL has not advertised the Multi-Channels. This is because FOXTEL does not regard the FTA Channels as a core part of the FOXTEL Service, nor does it consider providing access to those channels by way of retransmission as a driver of subscriptions to the FOXTEL Service.

 While there are no direct costs to FOXTEL to retransmit the New Multi-Channels by cable, there are costs for retransmission by satellite. For that reason, FOXTEL has entered into Managed Services Agreements with the Commercial Broadcasters under which FOXTEL arranges and pays for the necessary transponder capacity on their behalf and recovers the costs of that transponder capacity from the Commercial Broadcasters.

 Retransmission of the FTA Channels can only be made to the licence area of the channel provider and as such there are multiple signals for each channel of the Commercial Broadcasters...

The position is different with the ABC and SBS, where programs can be transmitted across the whole of Australia. FOXTEL currently retransmits by satellite all the SBS and ABC channels other than SBS HD. The National Broadcasters have direct arrangements with Optus regarding the satellite services for retransmission

103 Mr Delany also said:

FOXTEL only retransmits FTA Channels in the format that they are taken off-air. For example, I recall having a conversation with someone from the Nine Network, although I do not recall who it was with, and in that conversation the person from Nine Network requested FOXTEL to down-convert its HD Multi-Channel, GEM, into SD (which is only available in HD via terrestrial signal) and to retransmit GEM in SD format. I was part of the decision making team at FOXTEL which declined to comply with this request because it seemed to be contrary to FOXTEL’s interests in that:

(a) the effect of down-converting GEM to SD would have been to extend the audience of GEM to those who could not receive the GEM HD terrestrial signals re-transmitted by FOXTEL (that is, FOXTEL subscribers without an iQHD); and

(b) the down-conversion process would have cost FOXTEL money without a commensurate benefit to FOXTEL.

I also recall having similar conversations with Bruce McWilliam at Seven Network and Michael Eheid at the ABC where they requested down conversion which FOXTEL refused.

104 Mr Delany made the following further points:

 FOXTEL is always very conscious of the price sensitivity of its subscriber base. For this reason, price increases by FOXTEL are modest and FOXTEL has continued to innovate and offer additional channels, content and products to provide subscribers with additional value where there have been price increases to reduce the risk that a price increase will increase the rate of churn.

 First, contrary to what Mr Ford says in paragraph 39, ARPU is not a “measure of the profitability of subscription television”. ARPU is a number simply reached by dividing the amount of subscription revenue by the number of subscribers on an annual basis. Profitability depends, in the usual way, on revenues exceeding expenses. Comparing the costs of retransmission on aper subscriber per month (pspm) basis to ARPU is neither informative nor useful.

ARPU is not “typically used as a benchmark in the industry” in relation to profitability.

105 Mr Delany said it was his view that:

(a) the amount of time spent watching Multi-Channels by FOXTEL subscribers does not increase FOXTEL’s subscription revenue. That revenue certainly does not increase if subscribers watch more Multi-Channels;

(b) the retransmission of the Multi-Channels is not a subscription driver;

(c) any increase in viewing of the retransmitted Multi-Channels tends to decrease FOXTEL’s revenue which it derives from placing advertising on the channels in the FOXTEL Channels Group; and

(d) based on my experience at FOXTEL and previously in subscription television, subscribers watching the retransmitted Multi-Channels do not perceive themselves to be watching the FOXTEL Service and, consequently, do not perceive themselves to be deriving value from their subscription to the FOXTEL Service in doing so. Nor does viewing of the retransmitted Multi-Channels add to the value of FOXTEL’s brand.

## Documents

106 The parties relied on a range of other documents. For present purposes it is sufficient to note the following.

107 Foxtel publications show that it first posted a profit of $4 million in 2006. Since then both its number of subscribers and profit has continued to increase and its ARPU (average revenue per user) to improve. Foxtel now has over 1.5 million subscribers albeit using different platforms and varying packages. About 16.2% of all Foxtel subscribers can view the whole suite of FTA channels, including the new multichannels, through their Foxtel service. The balance can view some only of the new multichannels.

108 Foxtel has entered into retransmission deeds with each of the FTA broadcasters. The deeds are confidential. Screenrights sought to rely on certain provisions of the deeds as relevant to the determination of equitable remuneration but did not explain how this might be so. It is clear from the deeds that Foxtel retains the right to cease retransmissions if it is unable to obtain satisfactory reimbursement from the FTA broadcasters – a fact which, if anything, supports Foxtel’s case that the retransmissions are a matter of subscriber convenience.

109 On 14 February 2008, after it reached its retransmission agreement with the Seven Network, Foxtel and the Seven Network issued a joint press release. According to Kim Williams AM, the then Chief Executive Officer of Foxtel:

Today’s retransmission deal with FOXTEL and the Seven Network has been a long time coming and means that FOXTEL now has retransmission agreements with all networks. Consumers will enjoy unequalled access to FOXTEL’s comprehensive range of digital services including the Electronic Program Guide and iQ recording functionalities. FOXTEL will continue to work towards the Government’s digital switchover plans.

110 In a report to Foxtel’s board Mr Williams said:

The Seven Network retransmission agreement was finally completed and signed in early February following five years and one month of regular negotiations between Seven and FOXTEL from the time of the earliest discussions back in the first week of January 2003. It was a welcome announcement and one which was well received by the media and very much more importantly by our customers.

111 On 25 July 2008 Mr Williams made a speech which included the following observation:

We are delighted that all the commercial and public broadcasters have backed the FOXTEL iQ by having retransmission agreements on our platform and inclusion in our EPG which is the beating heart of any PDR. It makes the FOXTEL iQ the clear market leader for choice and that is what PDR consumer satisfaction is all about.

112 We deal with the balance of the evidence in the context of the parties’ submissions.

# SUBMISSIONS

## Screenrights’ submissions

### Overview

113 Screenrights submitted that the nine new multichannels are of value to Foxtel as evident from:

(a) the nature and content of the new multi-channels themselves and their success in terms of audience;

(b) the evidence going to the benefit afforded by retransmission of the new multi-channels, particularly in terms of subscriber “convenience” – reflected in subscribers’ staying on Foxtel’s platform to view and record programs;

(c) the fact that, on Foxtel’s case and by one metric, the new multi-channels have “cannibalised” viewing from the five primary channels (far from indicating that there is no increased or marginal value associated with the new multi-channels, this indicates that there is value associated with them);

(d) the fact that the new multi-channels are part of Foxtel’s overall offering of the free-to-air universe of channels; and

(e) the evidence as to comparable bargains.

114 As to (a) (nature and content of the new multichannels), Mr O’Mara’s evidence identified the separate and distinct content of the new multichannels which are directed at target audiences. Mr Fitzgerald agreed that the new multichannels have developing brands.

115 As to (b) (subscriber convenience), Mr Delany accepted that the capacity to view the new multichannels through their Foxtel service is a convenience for Foxtel’s subscribers. Convenience to Foxtel’s subscribers necessarily involves value to Foxtel, a proposition which Mr Delany also accepted. According to Screenrights:

As a matter of commonsense that convenience is maximised where all of the new multi-channels are retransmitted; it exists but to a lesser extent when fewer channels such as five or four are retransmitted…

116 As to (c) (cannibalising of primary channels), according to Screenrights, the fact that the new multichannels have drawn viewers from the primary channels (to the extent that it occurs, noting that it depends on Mr Fitzgerald’s evidence using minutes viewed) “reflects the fact that there is value in the retransmission of the new multi-channels”. While this might mean the value of the primary channels has decreased that issue is not before the Tribunal.

117 As to (d) (Foxtel’s overall offering), Mr Fitzgerald’s evidence confirmed that a substantial proportion of viewing of FTA by Foxtel subscribers takes place through the Foxtel service. Further, the evidence disclosed that “the ratings of individual retransmitted multi-channels compare very favourably with those of individual subscription television channels”. Ratings, as Mr Fitzgerald accepted, are a proxy for value being used to sell advertising and assess channel performance.

118 As to (e) (comparable bargains), the comparable bargains on which Screenrights relies “provide further evidence of the increased or marginal value afforded to Foxtel by retransmission of the new multi-channels”. For example, Telstra agreed to pay a greater amount for additional multichannels.

### The effect of the 2006 decision

119 Screenrights submitted that the 2006 decision, and consequential determination, relates to “the free-to-air broadcasts then under consideration, being the five primary channels and the two multichannels in existence at the time”. According to Screenrights, the statutory provisions require equitable remuneration to be determined on a “per each retransmission made” basis and not a “per broadcaster” basis. It also cannot be correct that the Retransmission Remuneration Deed extended the effect of the 2006 decision to the new multichannels at least until 2013 as Foxtel suggested. Clause 2.2 (the payment provision) is subject to cl 3.2 (relating to the dispute about the effect of the 2006 decision). In any event, the form of Foxtel’s remuneration notice cannot determine the effect of the 2006 decision. Further, even if Foxtel’s submissions on the construction of the Copyright Act are correct, this application by Screenrights to the Tribunal:

…is in substance an application for the determination of equitable remuneration for the retransmission of free-to-air broadcasts made by the broadcasters specified in the 2001 remuneration notice, made subject to the agreement between the parties as to the amount that should be payable in respect of some of those retransmissions. There is no prescribed form for an application pursuant to s 135ZZM. That application having been made, the Tribunal is required to determine it insofar as the parties have not agreed upon the amount of equitable remuneration, ie in relation to the new multi-channels.

120 In any event, it is apparent that the 2006 decision has its limits. At that time “the Tribunal had no way of knowing how many free-to-air channels would be broadcast” subsequently and “received no evidence as to the nature of the multi-channels or the manner in which the parties expected they might develop in the future”.

### Consideration of the 2006 decision

121 Screenrights observed that “the approach adopted by the Tribunal to the determination of equitable remuneration in the particular case was necessarily a product of the way the case was presented and the evidence before the Tribunal”. The Tribunal rejected Screenrights’ survey evidence, which was the centrepiece of its case. In the present matter, however, Screenrights’ case focuses on “the fact that Foxtel’s retransmission of the new multi-channels involves a use by it of valuable copyright works”. According to Screenrights, this fundamental fact was obscured to the previous Tribunal by reason of Screenrights’ own focus on the convenience of the single remote control. The single remote control, however, was just one aspect of the real value to Foxtel of having all of the FTA channels retransmitted through its service, thus bringing them all within the universe of Foxtel viewing including as part of the Foxtel EPG and as available for recording on the Foxtel iQ and thus enabling seamless transitions from FTA to Foxtel channels.

122 Screenrights submitted that there “have been a number of significant changes to the landscape since the previous Tribunal hearing”. “First, the new multi-channels exist… they are substantive channels and have different content to the primary channels”. “Secondly the features, use and significance of the Foxtel platform are much more prominent than at the previous hearing”. “Thirdly, the new multi-channels are more seamlessly integrated into the Foxtel offering than was the case for the primary channels at the previous hearing”. “Fourthly, Foxtel’s profitability has changed dramatically”. Since 2006 “Foxtel has made a profit in each year… for the year to 30 June 2010 it was $200 million”. Fifthly, despite Mr Delany having given evidence in the previous hearing that if the Tribunal determined equitable remuneration exceeding 20 cents pspm a study would be undertaken to determine Foxtel’s position (that is, whether to continue retransmitting), the evidence makes apparent that “it was an obvious and easy decision for Foxtel to continue to retransmit in the circumstances” so that it “must be the case that Foxtel, acting commercially, readily saw that it was worth at least 22.5 pspm (indexed) for it to continue to retransmit those channels”. “Sixthly, Foxtel, through Mr Delany, now accepts that a decision by it not to retransmit the new multi-channels would have some effect (“a small impact because some people would see the convenience of it”)”. Screenrights also relied on the evidence of Mr Ford, Mr Dickinson and Mr O’Mara in support.

### Other submissions

123 Screenrights acknowledged that FTA broadcasters want their broadcasts to be retransmitted by Foxtel. It is in their interests to do so as retransmission of FTA channels increases the viewing of FTA channels. Screenrights submitted, however, that the FTA broadcasters’ enthusiasm “is irrelevant: as broadcasters they wish to be retransmitted; as relevant copyright owners, they wish to be paid the equitable remuneration to which they are entitled”. In any event, as Mr Dickinson said, FTA broadcasters are copyright owners in only about one third of cases of retransmission. Hence, the position of the FTA broadcasters cannot determine equitable remuneration. Screenrights also relied on the deeds into which Foxtel had entered with FTA broadcasters in respect of retransmission as evidence “that there is a mechanism available to Foxtel to explore the commercial reality of any relevant enthusiasm” of FTA broadcasters (a fact which, as explained above, we consider unhelpful to Screenrights’ case).

124 Screenrights advocated ratings as a metric relevant to the determination of equitable remuneration, albeit not based on the type of evidence which the previous Tribunal rejected. The submission involved the following propositions: – (i) “when Foxtel retransmits its [Screenrights’] members’ copyright subject-matter, Foxtel does, by statutory licence, an act comprised in the copyright …(communicates the work, film or recording to the public)”, (ii) the “number of persons to whom Foxtel communicates the copyright material is reflected in ratings”, and (iii) “whether or not this is “an inducement to subscribe” does not matter; it is a use of copyright subject-matter which has a value and that value, to Foxtel, is centrally relevant to the determination of equitable remuneration for the use”.

125 Screenrights challenged the previous Tribunal’s reasoning in [400] – [402] of its reasons rejecting the relevance of ratings. According to Screenrights, in these paragraphs, the Tribunal “overlooks the fundamental copyright proposition that the retransmission is the exercise of a separate and distinct copyright right” as the fact that “FTA is already available via the terrestrial aerial” is relevant only to the fact that – like much of Foxtel’s programming for which it pays considerable sums – the licence to communicate is not exclusive”. Further, “apart from the question of exclusivity, the fact that this is a “retransmission” (as the Tribunal emphasised) is not relevant”. It is also irrelevant that Foxtel does not wish to encourage viewing of FTA channels as it does retransmit the FTA channels and the benefits to it in so doing “include the convenience to subscribers of being able to view or record seamlessly, the fact that the subscriber stays on its platform and the availability of access to the free-to-air stations via that platform whether exercised at any particular time or not”. Finally, insofar as the Tribunal accepted the relevance of profits (or lack of profits) to equitable remuneration in [403], the position has changed as Foxtel is now highly profitable.

126 As to the non-exclusive nature of retransmission Screenrights said:

As a matter of law and logic there is no reason why a licence to communicate a retransmitted program is worth less than a licence to communicate a Foxtel program except to the extent that the latter licence is genuinely and practically exclusive to Foxtel. The evidence showed that much of its programming is not.

127 Screenrights thus compared the new multichannels in terms of ratings with Foxtel channels and the amount that Foxtel would pay for the new multichannels on its approach with the amounts Foxtel paid for Foxtel channels. This showed that Screenrights’ approach would involve Foxtel in paying far less for the new multichannels than it paid for its own channels which rated less well than the new multichannels.

128 Screenrights also submitted that its formula (dividing access and premium payments) was appropriate. According to Screenrights “the fact of access to each of the multi-channels that Foxtel chooses to retransmit has a value additional to the ratings of particular channels”. Screenrights submitted that the proposed access fee “reflects the fact that it is valuable to Foxtel to include a channel in its program lineup”. Screenrights said that it is of “vital significance that internally Screenrights distributes on this basis”. Screenrights’ board involves major players in the industry who have all accepted distribution on this basis. Screenrights also submitted that the 2006 decision, in effect, valued access (as disclosed by the “single remote” and related convenience points the Tribunal accepted) but, by reason of its rejection of the evidence, omitted any valuation of the premium – the equitable remuneration for “the value of the right exercised, as reflected in ratings”.

## Foxtel’s submissions

### Overview

129 Foxtel’s primary submission was that:

…both by reason of the task before the 2006 Tribunal, and by force of the 2006 Tribunal’s reasoning, the amount determined in 2006 for retransmission of the FTA broadcasts of the five FTA broadcasters is the amount that remains equitable remuneration for such retransmission today.

### The effect of the 2006 decision

130 Foxtel’s argument involved the following propositions: – (i) “a remuneration notice is given in respect of a “specified broadcaster”. It is not given in respect of a specified channel or call sign”, (ii) Foxtel gave such notice on 4 March 2001, (iii) “the effect of the notices…is to identify broadcasters”, as the statute prescribes, (iv) Screenrights’ previous application was for the Tribunal to determine equitable remuneration under the notice as given, (v) the defence in s 135ZZN(1) “applies in respect of [all] “free-to-air broadcast(s) made by the broadcaster specified in the remuneration notice”, (vi) there “is no reference in Div 2 of Part VC (or indeed anywhere in Part VC) to channels, or call signs”, (vii) the fact that Foxtel “has notified Screenrights of the commencement of retransmission of multichannels cannot affect the statutory force of the 2001 notices”, and (viii) by the Remuneration Retransmission Deed “the determination of that remuneration is not to be reopened until after, at the earliest, December 2013”.

### Consideration of the 2006 decision

131 Foxtel submitted that, in any event:

(a) there has been no change to the nature of the value to FOXTEL of retransmission of FTA channels which remains convenience and to an extremely limited extent, improved reception of FTA by some FOXTEL subscribers; and

(b) because of the nature of these elements of value, there is no incremental benefit to FOXTEL of retransmission of the FTA New Multichannels, or alternatively, there is no incremental benefit which can be valued.

132 Foxtel also submitted that:

Screenrights seems to appeal to an unfounded principle of statutory benevolence to the effect that just because an application has been made to the Tribunal, some further remuneration should be given. That is not so. Any remuneration must be justified by evidence that it is equitable and reasonable. The evidence before the Tribunal does not do so.

133 According to Foxtel:

Screenrights’ appeals to differences in the way in which it presents its case now are either an illusion, or an illustration of how – having previously brought a (failed) case on evidence – it thinks that it can do better if it now brings its case based merely on assertion.

134 As to convenience, Foxtel said: – “This was previously a case about the remote control. Screenrights now says that its over-emphasis on the remote control led the Tribunal astray. Now, instead, it emphasises the EPG. But the EPG is just the graphic representation of what is being done with the remote control”.

135 As to programming costs, Foxtel said: – “Screenrights says that in 2004-2006 the case on programming costs was run “far too mathematically through Mr Peters”. That is, the case was then run on evidence. On what is it to be run now? The answer is: mere assertion; which is no substitute”.

136 As to retransmission as a subscription driver, Foxtel said: – “Screenrights brought a case in 2004-2006 that retransmission was a subscription driver, and led detailed evidence before the 2006 Tribunal; it failed to establish that case on the evidence. Having failed on the evidence, it now proposes to succeed merely on assertion”.

### Other submissions

137 Foxtel stressed the limited nature of retransmission for the purposes of the Copyright Act. As Foxtel put it:

The statutory limitations on the retransmission right described above, have the following practical effects on FOXTEL’s use of the FTA broadcasts it retransmits:

(a) it cannot retransmit them other than simultaneously (whether to suit FOXTEL’s programming agenda or otherwise);

(b) it cannot advertise on them – not even to superimpose a FOXTEL logo on them (assuming it wanted to; and it is plain that it does not); and

(c) it has absolutely no input into the programming on the FTA channels.

138 According to Foxtel the “very way in which retransmission occurs, with both content (and for that matter “enhancement” in relation to HD content) being entirely outside the control of Foxtel, tends strongly against any notion that an amount paid for retransmission (e.g. of a New Multichannel) would be set by reference to the percentage of non-simulcast content or the percentage of HD content”. For example, “the mix of simulcast and “separate” content on any one of the other NMCs [new multi-channels] could change” without any involvement of Foxtel. Foxtel submitted that the nature of retransmission itself strongly suggests “a global amount (either for all retransmissions via specified broadcasters, or for all retransmissions by a specific broadcaster) is the proper approach for the Tribunal to take, taking into account, as the 2006 Tribunal took into account, global factors”.

139 Foxtel challenged Screenrights’ submission comparing the non-exclusivity of FTA retransmissions and of some of Foxtel’s own programs. Foxtel submitted (based on Mr Delany’s evidence) that “much of the exclusivity of FOXTEL’s offering lies in the exclusive compilation of programming into channels”. As the Tribunal said in its reasons for the 2006 decision the “negotiation at arm’s length with producers of programs for first viewing on Pay TV channels is very different from the negotiation that would take place in respect of the retransmission of programs that are already being shown simultaneously on available FTA channels” (at [464]). Foxtel also emphasised that the “evidence of Screenrights’ own witnesses with backgrounds in the FTA industry was that the fact of retransmission of certain channels does not erode the “exclusivity” of deals done by programme suppliers to those FTA networks – nobody says they would pay less because the programmes are being retransmitted”. Foxtel described this as “further, powerful evidence that retransmission is simply not seen as a “use” in the same way as” transmission of a broadcast not available elsewhere.

140 Foxtel also challenged the derivation and substance of Screenrights’ proposed formula. Foxtel acknowledged that it had “agreed to a formula in the Remuneration Retransmission Deed, but for a very different purpose which was not a rate-setting purpose”. Foxtel submitted that the “raison d’être of the formula in the Deed was as a means of discounting from the rate determined by the 2006 Tribunal where less than the full suite of FTA broadcasts was retransmitted. It started with equitable remuneration; it does not produce equitable remuneration”.

141 Foxtel addressed factors which Screenrights said demonstrated the value of the new multichannels.

142 As to convenience, Foxtel noted the factor “is raised in several guises – the single remote, the EPG, “seamless” switching and the “all within the FOXTEL platform” notion”. In Foxtel’s words the “iPhone app, the iPad app, the android app and the ability to access the EPG through the FOXTEL website amount to nothing greater than (more remote) remote controls and therefore are part of the same “convenience” value. While they may well add to the quality of the FOXTEL offering to its subscribers, they yield no additional value in terms of retransmission of New Multichannels”. Further, cheap alternatives are available to consumers. The 2006 decision, moreover, took into account the convenience factor in circumstances where, by its very nature, “the convenience value to FOXTEL does not increase simply because there are more FTA channels being retransmitted”. This is demonstrated by the fact that only 16.2% of Foxtel subscribers receive all FTA channels “and therefore convenience value is inherently patchy”. It is also relevant that, if anything, consumers are now more savvy about technology than in 2006 so the convenience of accessing FTA channels through a single remote is likely now to be of less value to Foxtel subscribers than it was in 2006.

143 As to ratings, they remain irrelevant as found in the 2006 decision. According to Foxtel:

Ratings remain irrelevant, because ratings are fundamentally about advertising and the purpose of this proceeding is not to assess advertising value of programming, but the incremental value (if any) to FOXTEL of the ability to retransmit the FTA New Multichannels.

144 Foxtel noted that even the Retransmission Remuneration Deed did not use ratings for the purpose of assessing equitable remuneration. It used ratings purely for the purpose of distribution of the equitable remuneration as determined by the Tribunal.

145 As to Foxtel’s conduct, Foxtel said the relevant facts are: – (i) only 16.2% of subscribers currently have access to all of the new multichannels (if Foxtel valued retransmission as highly as Screenrights suggests it could be expected to have taken steps to ensure retransmission of the full suite of FTA channels to all subscribers), (ii) Foxtel makes no additional charge to its subscribers for retransmission of additional FTA channels, (iii) Foxtel offers no discount for a subscriber’s inability to access FTA channels, (iv) Foxtel does not advertise the new multichannels, or retransmission of them, as part of its service, and (v) Foxtel has taken significant steps to improve its offering in order to compete with FTA television, including the bundling of FTA channels under the rubric of “Freeview”.

146 As to alleged comparable bargains, the agreements on which Screenrights relied are not comparable or, indeed, relevant as: – (i) the subject of the agreement with VHA is use on mobile TV, which is TV on mobile phones and “unlike retransmission to a television screen, it is not otherwise available to consumers for free”, (ii) “TPG has engaged in minimal retransmission and only to computer screens and not to televisions”, (iii) FetchTV has engaged in no retransmission at all but merely has proposed to do so, and (iv) any deal done with Telstra in relation to hospital screens in a handful of hospitals in South Australia, cannot assist the Tribunal, particularly in circumstances where no payments have been received by Screenrights.

147 According to Foxtel the most comparable bargain for retransmission is Foxtel’s own + 2 channels. Foxtel initiated the idea of + 2 channels (which show the same programs as a main channel but 2 hours later) and pays no additional amount for these channels.

148 As to alleged difficulties in the distribution of small amounts, Foxtel submitted:

Questions of distribution, or of an “Efficient Amount Per Day”, have no role to play in determining the quantum of equitable remuneration. They are issues that require consideration by Screenrights, as with all collecting societies, once equitable remuneration has been determined. Only then can an appropriate distribution model be adopted.

149 If the Tribunal is of the view that the new multichannels have some incremental value to Foxtel then Foxtel submitted that:

Using Mr Fitzgerald’s figures of viewing through the FOXTEL STB in quarter 2, 2011 the aggregated average FTA minutes viewed of the New Multichannels as a percentage of average minutes viewed of all FTA channels was approximately 7.46% of total retransmitted FTA viewing time by FOXTEL subscribers. On that basis:

7.46% x 26.95¢ = 2.01¢

An additional 2.01¢ over and above the existing rate of 26.95¢ would be the absolute ceiling for a total of the 9 New Multichannels.

150 Foxtel also provided an alternative calculation based on Screenrights’ figures of audience share through the Foxtel set-top box expressed as a percentage and the sum of the percentages of audience share of the new multichannels compared to viewing of all FTA channels through the Foxtel set-top box to calculate a sum of an additional 2.39 (in fact, 2.37 on our calculations on the same basis) cents pspm for the new multichannels.

# DISCUSSION

## The 2006 decision

151 Foxtel’s case that the Tribunal determined equitable remuneration for all multichannels (irrespective of when they might come into existence) in the 2006 decision is not persuasive. It may be acknowledged that, by its remuneration notice of 4 March 2001, Foxtel undertook to pay equitable remuneration “for retransmissions of free-to-air broadcasts by specified broadcasters”. The fact remains that, at the time of the 2006 decision, those retransmissions did not include the nine new multichannels.

152 By the 2006 decision the Tribunal determined equitable remuneration for the retransmission of the FTA channels then being retransmitted. So much is apparent from the terms of the Tribunal’s determination on 30 August 2006 that “the amount of equitable remuneration payable by each Respondent in respect of retransmission by it of all five FTA channels (including the multichannels) is 22.5 cents per subscriber per month”. In context, “the multichannels” must be understood as a reference to the multichannels then in existence. It is also apparent from the terms of the Tribunal’s reasons including: – (i) the Tribunal’s description of the FTA channels at [52] of its reasons (“The FTA channels are ABC, SBS and Channels 7, 9 and 10…In addition, there are two “digital multichannels”, ABC 2 and SBS News”) and (ii) the references to “the multichannels” in the Tribunal’s conclusions about equitable remuneration at [519] and [521] of its reasons.

153 It follows that there has been no determination of equitable remuneration for the nine multichannels that Foxtel is retransmitting. Because those multichannels are FTA broadcasts within the scope of Foxtel’s remuneration notice of 4 March 2001, Foxtel has undertaken to pay equitable remuneration for those retransmissions. Moreover, Screenrights is entitled to make this application as it has not been able to agree equitable remuneration with Foxtel as provided for in s 135ZZM(1) of the Copyright Act. The Retransmission Remuneration Deed is immaterial. It is clear from the terms of that deed that Screenrights may make this application for the determination of equitable remuneration for the nine new multichannels. In any event, and as Screenrights submitted, the debate on this point is largely moot given s 135ZZM(2) of the Copyright Act. Even if the 2006 determination had determined equitable remuneration for all multichannels irrespective of when they might come into existence, s 135ZZM(2) operates according to its terms – any time after 12 months from the day on which the determination was made either party may apply for a new determination. As Screenrights submitted, nothing in the statutory provisions indicates that a remuneration notice must relate to all broadcasts by an FTA broadcaster, any more than the Tribunal’s decision must relate to all such broadcasts.

154 We also do not accept Foxtel’s submission that the reasoning of the 2006 decision necessarily leads to the conclusion that no additional remuneration is required in order to fulfil the statutory remit of equitable remuneration. Key aspects of the Tribunal’s reasoning included the following: – (i) the Tribunal’s conclusion that “the value of retransmission to the retransmitters is equal to its value to their customers, the subscribers” at [162], (ii) the required assumptions the Tribunal identified at [163] including that the subscriber can “already view FTA programs via the terrestrial aerial”, (iii) the Tribunal’s “firm view” at [370] that people subscribe to pay TV to watch pay TV channels, (iv) the Tribunal’s observation at [384] that Foxtel has chosen to incur a marginal cost in order to retransmit FTA broadcasts, (v) the Tribunal’s (in our view, correct) characterisation of its task at [401] that “the question of concern to us is not the value of FTA to subscribers (and therefore to the retransmitters) but the value of retransmission of FTA to subscribers (and therefore to the retransmitters), in circumstances in which FTA is already available via the terrestrial aerial”, and (vi) the Tribunal’s overall conclusion at [513] that “[o]ur own appreciation of the benefits that retransmission of FTA offers to subscribers is that they are minor and would be viewed by subscribers and prospective subscribers as minor”.

155 Contrary to Foxtel’s submissions, the nature of the benefits the Tribunal found in the 2006 decision (encompassed under the description of convenience to subscribers) which led to the Tribunal’s determination of equitable remuneration do not, of their nature, exclude the possibility of incremental increase by reference to an increased number of FTA channels (and thus the number of FTA broadcasts retransmitted). The previous Tribunal accepted that the benefits of retransmission may be characterised as “minor”. It accepted also that the benefits to Foxtel’s subscribers cannot readily be translated into any readily quantifiable value. Nevertheless, and consistent with the principles of judicial valuation, the Tribunal did the best it could on the information available and determined equitable remuneration on the agreed basis of an amount per subscriber per month. In the present case, the Tribunal’s determination in 2006, at least insofar as it relates to the seven channels then in existence, stands. The parties are bound by the Retransmission Remuneration Deed not to challenge that determination to that extent and do not do so. The relevant determination for the present Tribunal, accordingly, is equitable remuneration for the nine new multi-channels in all of the presently identifiable circumstances including: – (i) the continuing retransmission by Foxtel of the seven channels which existed in 2006, and (ii) the retransmission by Foxtel of the nine new multichannels, making a total of 16 channels of FTA broadcasts which Foxtel retransmits. Once this is recognised it becomes apparent that the benefits to Foxtel subscribers which the previous Tribunal identified are not, by their nature, incapable of yielding increased value to Foxtel. Whether they do or not, however, is a question for resolution on the evidence before this Tribunal, as is the question of how those increased benefits, if any, can and should be translated into a value representing equitable remuneration payable by Foxtel to Screenrights for “retransmissions of free-to-air broadcasts by specified broadcasters” (s 135ZZL(1) of the Copyright Act) to the relevant extent (that is, retransmissions of FTA broadcasts via the nine new multichannels).

156 As explained below, many aspects of the reasoning underpinning the 2006 decision apply to the determination of equitable remuneration for the retransmission of the nine new multichannels. In particular the 2006 decision, at [162], recognised that “the value of retransmission to the retransmitters is equal to its value to their customers, the subscribers”. Determining equitable remuneration therefore requires: – (i) an accurate measure of the value of retransmission via the Foxtel STB to Foxtel given its added convenience (and thus value) to Foxtel’s subscribers and (ii) a method for determining the equitable share of this value to be paid to copyright holders. Following the reasoning of the 2006 decision at [136], the share that represents equitable remuneration to the copyright owner allows access to the copyrighted material on reasonable terms and at a reasonable price.

## Screenrights’ formula

157 We are not persuaded that the formula proposed by Screenrights assists in determining equitable remuneration for retransmissions of FTA broadcasts of the nine new multichannels. Screenrights does not offer any methodology supporting the adoption of their formula, arguing instead that it is an adaption of the formula agreed by both parties in the Retransmission Remuneration Deed. It may be that the value to Foxtel (and thereby equitable remuneration as some fraction of that value) is approximated by the “functional form” of formula proposed, as one consisting of the sum of (in Screenrights’ words) an access fee and a premium. However we are not persuaded that there is sufficient evidence to conclude that the “functional form” of the formula is necessarily correct or, even if the “functional form” were correct, that the payments associated with each component are the correct value.

158 First, as Foxtel noted, the Retransmission Remuneration Deed contains a formula agreed between Screenrights and Foxtel for distributing the equitable remuneration determined by the previous Tribunal in circumstances where less than the full suite of five primary channels is retransmitted to any particular subscriber. As the Tribunal determined equitable remuneration on a per subscriber per month basis for the FTA broadcasts comprised in all five primary channels and the two multichannels then in existence, an allocation in circumstances where less than the full suite of primary channels is retransmitted to a subscriber makes sense. The fact that the Retransmission Remuneration Deed was agreed to by both parties, including Foxtel, suggests that the rate specified in the deed is less than the value to Foxtel of having access to each of the then existing FTA channels via the Foxtel STB. The fact that Foxtel retransmits all FTA channels in major metropolitan areas suggest the formula provides a “lower bound” on the value of retransmission of each of the FTA stations covered in the 2006 decision. But it says nothing definitive about the value of retransmission, let alone equitable remuneration of the new multichannels.

159 Second, the fact that the formula now proposed by Screenrights involves two value components does not mean that those components in fact exist. The main difficulty with all of Screenrights’ evidence and arguments in support of that part of the formula styled as “the premium” (including the evidence comparing the ratings of the multichannels and Foxtel’s channels and the price paid for each) is that they fail to confront the fundamental point the previous Tribunal emphasised at [401] of its reasons, namely, that the question was not the value of FTA to Foxtel subscribers (and thus to Foxtel) but the value of retransmission of FTA to Foxtel subscribers (and thus to Foxtel), in circumstances in which FTA is available to those subscribers other than through the Foxtel service. Contrary to Screenrights’ submission, we consider this characterisation of the relevant task apt. Screenrights’ submission that this does no more than identify the non-exclusive nature of Foxtel’s use of the copyright in the FTA broadcast, however, is apt to obscure. Retransmission does pre-suppose a lack of exclusivity. So much is true. But the fundamental point is that each and every Foxtel subscriber who can view the FTA channels (including the nine new multichannels or any one or more of them) through their Foxtel service can view precisely the same broadcast at precisely the same time through their FTA service. To attempt to draw an analogy between these circumstances and the fact that some individual programs on Foxtel can also be seen on FTA channels (such as The Simpsons) is untenable. It is this critical fact – that each and every Foxtel subscriber who can view the FTA channels through their Foxtel service can view precisely the same broadcast at precisely the same time through their FTA service – which is overlooked by Screenrights’ case in respect of the evidence to support the claimed premium value. In other words, the value to subscribers of retransmission cannot arise from the value of viewing the multichannels per se, as this can be done freely.

160 Applying similar reasoning, trying to draw a parallel, as Screenrights does, between the benefit of retransmission of the multichannels and the cost to Foxtel of exclusive channels, for example Fox 8, is untenable.

161 Once these critical facts are appreciated the reason for (and validity of) the approach of the previous Tribunal, specifically its characterisation of the value to Foxtel of the retransmission of the FTA channels as related to the value of the convenience to its subscribers, becomes apparent. In the relevant factual circumstances it is simply not to the point that Foxtel might pay more for some of their channels than Screenrights is claiming in total for all FTA channels (including all multichannels). Unlike FTA channels, a viewer cannot access the Foxtel channel without a Foxtel subscription (except where it is a channel offered by another pay TV provider). They certainly cannot do so for free and in precisely the same form and at precisely the same time as the Foxtel channel. This basic fact cannot be reconciled with this part of Screenrights’ evidence or submissions said to support the premium, as opposed to the access value, of the retransmission of the nine new multichannels.

162 In this regard, to the extent that Screenrights said that the previous Tribunal valued access only, two answers may be given. First, the concepts of access and premium are labels of Screenrights’ making (whether recent or not is immaterial) and played no part in the reasoning of the previous Tribunal. Secondly, whether or not the convenience value of the retransmissions identified in the previous Tribunal’s determination may be said to equate to Screenrights’ concept of access, the approach of the previous Tribunal was sound. Given the nature of retransmission, such value as exists is to be found in Foxtel’s (undoubted) desire to ensure subscriber convenience, howsoever it might be described (be it a single remote, seamless platform, incorporation of all channels into the Foxtel “universe”, the integrated EPG and IQ facilities or so on).

163 The question then becomes whether subscriber convenience is best described by an “access” measure or a “premium” measure. It is conceivable that some component of convenience relates to the ratings of a channel, while another component is independent of the ratings. In this event some method would need to be found to disaggregate the convenience value into these two components. However, as noted above, it is not tenable that the premium value can arise from viewing FTA channels per se. To the extent that Screenrights relied on evidence to suggest otherwise (including that of Mr Dickinson, Mr Ford and Mr O’Mara) we do not accept that any of this evidence confronted the actual circumstances and nature of the activity of retransmission.

164 There are other problems with Screenrights’ formula.

165 The so-called access fee of 1.72 cents is derived from the formula in the Remuneration Retransmission Deed. In the deed, for the purpose of distributing the equitable remuneration as determined by the Tribunal, it was agreed to allocate one third of the amount between the five primary channels. Screenrights’ proposed formula takes that one third of the amount of equitable determination as determined by the previous Tribunal, split between five primary channels, and calls it the access fee said to be payable by each of the nine new multichannels. While the allocation may make sense from the perspective of distribution, it provides no direct logical connection to the value of the retransmission of the nine new multichannels. The previous Tribunal determined a global amount on a pspm basis, as sought by the parties. It did not identify any part of that amount as relating to access. Rather, the global amount constituted equitable remuneration for the complete activity of retransmission of the five primary channels and two multichannels then existing. For the purposes of determining equitable remuneration it is arbitrary to take a part of that global amount and identify it as a part that should be paid for retransmission of each and every new multichannel. Such an approach may risk over-estimating the remuneration which is equitable for some channels. The convenience to subscribers, which is of value to Foxtel, is not necessarily increased in a linear way by retransmission on a channel by channel basis.

166 The premium fee in Screenrights’ formula operates by reference to the ratings of the primary channels, not the multichannels. Even if a premium were justified in the circumstances, the use of the ratings of the primary channels to calculate the premium value, rather than the ratings of the multichannels themselves, is unwarranted. The use of the proportion of the multichannels’ ratings that are separate and enhanced content makes sense in the calculation of the premium value as proposed but not otherwise.

## Changed circumstances since 2006 decision?

167 Screenrights also relied on a series of circumstances it said had changed since the 2006 decision (see above). We deal with each of those circumstances in turn.

168 First, it may be acknowledged that “the new multi-channels exist… they are substantive channels and have different content to the primary channels”. If they did not exist then there would be no occasion for this application for a determination of equitable remuneration for their retransmission. The substance and content of the new multichannels, of themselves, is also immaterial in determining equitable remuneration. Precisely the same substance and content is available to all Foxtel subscribers at precisely the same time via the FTA platform. Viewing the new multi-channels through the Foxtel service is a convenience that Foxtel makes available because, unsurprisingly, it appreciates that its subscribers want convenience. The character of the convenience, its value to subscribers (and thus to Foxtel), arises from the mere fact of retransmission of the new multichannels, not their substance or content.

169 Secondly, Screenrights argues that the “features, use and significance of the Foxtel platform” is “much more prominent than at the previous hearing”. The best example of this is the Foxtel iQ service as now offered. Both Screenrights’ and Foxtel’s submissions addressed the use of the Foxtel iQ and iQHD box as personal video recorders (PVRs). One function of the iQ and iQHD boxes is to allow subscribers to record both Foxtel and retransmitted FTA broadcasts so they may be viewed at an alternative time. In the 2006 decision the Tribunal did not address the function of the iQ box as a PVR. This is perhaps not surprising. At the time of the 2006 Decision, the *Copyright Amendment Act 2006* (Cth) (Act No 158 of 2006) (the **Copyright Amendment Act**) was not in force. Once in force from 11 December 2006, s 111 provided an exception to copyright infringement for the making of a “cinematograph film or sound recording of a broadcast solely for private and domestic use by watching or listening to the material broadcast at a time more convenient than the time when the broadcast is made”. Foxtel also first offered its iQ set-top box in 2005. The iQHD box (with its increased functionality) was not introduced until May 2008. More importantly, it is apparent from the evidence that take-up of the iQ function was slow for at least 6 to 8 months after the initial introduction in 2005, with the service take-up rate increasing slowly for that period and then much more rapidly from about mid 2006 onwards. As a result, when considering the issue of subscriber convenience the Tribunal had no reason in the 2006 decision to weigh up the additional convenience offered by a device that both enabled transmission and recording (as well as other features such as pausing and replaying live transmissions as currently available) for both Foxtel and retransmitted FTA programs. For present purposes the relevance of this is to the value of the retransmission of the new multichannels.

170 In this regard Foxtel’s first point is that the task of the Tribunal is to determine equitable remuneration for the retransmission of the nine new multichannels. By the Copyright Amendment Act the Parliament ensured that copyright could not be infringed by copying solely for private and domestic use. The right, accordingly, has no value. Foxtel’s second point is that the Copyright Amendment Act simply recognised the fact of widespread copying of programs for private and domestic use which a range of PVRs facilitated well before 2006. Screenrights’ response is that the issue is the value of retransmission. The fact of retransmission enables Foxtel subscribers to use their IQ facility to copy the retransmitted FTA channels including, as presently relevant, the nine new multichannels.

171 Foxtel’s characterisation of these matters as conveniences which Foxtel has provided to its subscribers enabling it to better compete with FTA channels may be accepted. The relevant point for present purposes is that Foxtel’s enhancements to convenience may also act to increase the convenience, and thus the value, to Foxtel subscribers of the retransmission of the FTA channels through the Foxtel service. It is apparent from the evidence that a Foxtel subscriber can substitute a Foxtel iQ or iQHD box for the purchase of their own PVR if FTA channels are retransmitted. Foxtel emphasised the range and low cost of other PVRs on the market which perform the same function as the Foxtel iQ or iQHD box. But this makes the point. The capacity to apply the functionality of the Foxtel iQ or iQHD box to all channels including the FTA channels provides greater subscriber convenience than the Tribunal considered in the 2006 decision. Similarly, the value of retransmission may be affected by factors not directly related to retransmission, such as the Copyright Amendment Act which, in effect, enables Foxtel subscribers to use their Foxtel service to record the FTA channels as retransmitted by Foxtel for domestic purposes. The questions then are identifying the magnitude of the overall increased value to subscribers, the fraction of this value which can be attributed to the retransmission of FTA broadcasts, and the fraction of the latter which represents equitable remuneration to copyright holders.

172 Thirdly, it also may be the case that the new multichannels are somehow more seamlessly integrated into the Foxtel service than was the case in 2006. This, however, is a mere variant of the second point. The questions remain as set out above.

173 Fourthly, Foxtel’s profitability (or otherwise) is immaterial. We do not accept Screenrights’ submission that the previous Tribunal relied on Foxtel’s lack of profitability to support its conclusions. The Tribunal’s reasons at [403] do not support this submission. The previous Tribunal referred to profitability for the sole purpose of rejecting specific costs evidence which had been placed before it. It did not determine equitable remuneration by reference to profitability or otherwise. As Foxtel submitted, it is difficult to see how an entity’s profitability could affect the price that might be negotiated in a hypothetical bargain. The unprofitable entity might wish to offer less for a service than it might otherwise but the assumed hypothetical bargain pre-supposes a meeting of minds of both parties about price. The seller of the service will not accept less by reason of the buyer’s poor profit just as the buyer will not pay more merely because it is profitable.

174 Fifthly, Mr Delany’s previous evidence that if the Tribunal determined equitable remuneration exceeding 20 cents pspm a study would be undertaken to determine Foxtel’s position (that is, whether to continue retransmitting) does not seem to us to have the significance that Screenrights appeared to place on it. Nothing in the evidence suggested that the evidence to the previous Tribunal was other than an accurate reflection of Mr Delany’s position at that time. The relevant point is that, after the Tribunal’s determination, Foxtel has continued retransmission and has chosen to retransmit the new multichannels as well. At least insofar as the seven channels that existed at the time of the 2006 decision are concerned, it should be inferred that Foxtel considered it worth its while to continue retransmitting all of those channels at the price the Tribunal determined. The fact that Foxtel chose to do so is a good indicator that Foxtel accepted that such remuneration was less than the benefit to subscribers of retransmission. Beyond this, these circumstances provide no real assistance in determining equitable remuneration for the retransmission of the nine new multichannels.

175 Sixthly, it is true that Mr Delany accepted that ceasing retransmission of the new multichannels would have some, albeit a small, effect on the convenience for its subscribers. This acceptance is consistent with the reasoning which underpinned the 2006 decision. It confirms that the retransmission of the new multichannels is capable of adding to the convenience of Foxtel’s subscribers and thus has value to Foxtel which, in Mr Delany’s view, would be relatively small.

## Equitable distribution?

176 We accept Foxtel’s submissions about the lack of cogency in Screenrights’ position that problems it has and might experience in the distribution of relatively small sums are relevant to the determination of equitable remuneration. As Foxtel submitted, while methods of distribution of remuneration are legitimate considerations for Screenrights in its broader role as a collecting society we cannot see how those considerations would play any role in a hypothetical bargain between Screenrights and Foxtel about the fixing of equitable remuneration for the retransmissions of the multichannels.

## Comparable bargains?

177 For the reasons given in Foxtel’s submission we are not persuaded that any real weight can be placed on the other agreements on which Screenrights relied as comparable bargains. The differences between the circumstances of those agreements and Foxtel’s retransmissions of the new multichannels do not permit any meaningful comparison as to price. The agreement with VHA involves retransmission to mobile phones, a service which is not otherwise available for free on those devices. As noted, the critical defining characteristic of Foxtel’s retransmissions is that the subscribers can watch the same multichannels at the same time as Foxtel’s retransmission, in precisely the same form, for free through the FTA platform. TPG’s proposed retransmissions are to computer screens and, as Foxtel said, the magnitude of its proposals (even if fulfilled) is insubstantial compared to Foxtel’s retransmissions. The agreements with FetchTV and Telstra, as Foxtel noted, have not as yet resulted in any payment to Screenrights. None of the agreements bear sufficient resemblance in terms of character or scale to any hypothetical bargain as to price that would be reached as between Foxtel and Screenrights for Foxtel’s retransmissions of the multichannels.

178 Foxtel’s reliance on its +2 channels as a guide is also of little real assistance. The bargain Foxtel negotiated – in which it pays no additional amount for its +2 channels – occurred in a particular context which is difficult to compare to the circumstances of any hypothetical bargain as to price that would be reached as between Foxtel and Screenrights for Foxtel’s retransmissions of the multichannels. In particular, the bargain was reached in circumstances where Foxtel was acquiring the rights to transmit the channel for value. The +2 channel is simply the same channel delayed by 2 hours. In any hypothetical bargain as to price that would be reached as between Foxtel and Screenrights for Foxtel’s retransmissions of the multichannels Foxtel is not a buyer of anything but the retransmitted multichannels. The circumstances, accordingly, are not comparable.

## The new multichannels

179 The conclusions which we have reached leave this Tribunal in the same situation as the previous Tribunal, albeit for different reasons. The previous Tribunal had a plethora of apparently tendentious survey evidence as to the contingent value of retransmissions which it thus found of little assistance. We have no such evidence at all. We have provided a suggestion by which both problems may be avoided in the future.

180 As in the 2006 decision, we are satisfied that the “value to the retransmitters of the licence to retransmit is generally commensurate with the value placed on retransmission by subscribers. The value of retransmission to subscribers, as the retransmitters perceive that value to be, will govern the amount of licence fee the retransmitters will be prepared to offer in their hypothetical negotiation with Screenrights” (at [494]), recognising that the relevant retransmissions in the present case are the retransmissions of the new multichannels. While both Screenrights and Foxtel recognise the correctness of [494] in the 2006 decision, we have not been provided with even the most elementary technical analysis to guide our estimation of the value of the benefit of retransmission to Foxtel. As a result, and in common with the previous Tribunal, there “is no firm evidence guiding us to a particular figure in any way remotely resembling a mathematical calculation” (at [519]).

181 Despite this, and in common with the reasoning of the previous Tribunal, we are persuaded on the evidence that the retransmissions of the new multichannels have additional value over and above that of the retransmissions of the FTA channels in existence in 2006. The evidence supports this conclusion. In particular: – (i) as the previous Tribunal found, it must be inferred that Foxtel incurs the marginal costs of retransmission because it considers the activity to be of some benefit to its subscribers and thus to it, (ii) it also must be inferred that Foxtel continued retransmission of the FTA channels in existence as at 2006 at the rate of equitable determination determined by the previous Tribunal because it was worth Foxtel’s while to do so, (iii) in circumstances where Foxtel must be inferred to have been aware that there was a risk that the Tribunal would find that additional equitable remuneration is payable Foxtel has chosen to retransmit each and every multichannel as it has become available to Foxtel, (iv) in other words, Foxtel must be inferred to recognise that the retransmission of the new multichannels is of some benefit to its subscribers and thus to Foxtel, and (v) Mr Delany’s evidence that ceasing retransmission of the new multichannels would have some small effect on subscribers is different from Mr Williams’ communications only in terms of degree – both recognise the reality of what the previous Tribunal found, namely, that retransmission provides Foxtel subscribers with the convenience of being able to access all available channels (both Foxtel and FTA) through the Foxtel service. In the case of the new multichannels the nature of that convenience is incremental in the sense that other FTA channels were already being retransmitted by Foxtel.

182 How, in these circumstances, is equitable remuneration to be assessed? Some approaches are suggested by the parties’ submissions and available material.

183 Foxtel’s primary submissions denied the existence of any additional value. Nevertheless, as a fallback, Foxtel suggested two ways in which such value could be assessed. Foxtel’s first fallback calculation is based on the percentage of viewing on a per minutes basis by Foxtel subscribers of the new multichannels as compared to all FTA channels through the Foxtel service applied to the equitable remuneration determined by the previous Tribunal. As the viewing of the new multichannels by Foxtel subscribers through their Foxtel service (on a per minutes basis) constitutes 7.46% of the total viewing time of all FTA channels through their Foxtel service, the calculation is 7.46% of 26.95 cents or 2.01 cents pspm. Foxtel’s second fallback calculation takes Screenrights’ figures of audience share (or ratings) of all FTA channels through the Foxtel service (25.9%) and the proportion of that share which relates to the new multichannels (2.3%). On this basis viewing of the new multichannels accounts for 8.9% of the total viewing of FTA channels by Foxtel subscribers through their Foxtel service, so the calculation is 8.9% of 26.95 = 2.39 cents pspm.

184 Both approaches, as Foxtel’s case recognised, have shortcomings, not the least of which is the illusion of exactitude which the calculations create. Another shortcoming is that, consistent with the reasoning above (and that of the previous Tribunal), it is unclear what, if any, relationship the metrics of either minutes per day viewed or audience share has with the value of the benefit that retransmissions of the new multichannels (or the FTA channels as a whole) bring to Foxtel – subscriber convenience – and for which Foxtel would be willing to pay in any hypothetical bargain reached between it and Screenrights. Despite this the calculations show that there is a rational basis for inferring that the retransmission of the new multichannels has additional value for Foxtel.

185 It might be thought that another way of approaching the assessment of value of retransmission of the new multichannels is to start from the proposition that, without those channels, Foxtel subscribers (depending on their Foxtel package) would have access to seven FTA channels. With the new multichannels, Foxtel subscribers (depending on their Foxtel package) would have access to 16 FTA channels. In other words the new multichannels are 56% of the total offering of FTA channels. If the remaining 44% of the total offering of FTA channels is equitably remunerated at the rate of 26.95 cents pspm then the equivalent remuneration for the other 56% is about 34.3 cents pspm. One problem with this approach is that it assumes audience share is a proxy for subscriber value and thus value to Foxtel. It does not account for any loss of subscriber value due to cannibalisation of existing FTA viewers to the new multichannels. Another problem with this approach is that it fails to recognise the fact that the relevant value is derived from the convenience (or, more to the point, Foxtel’s perception of the convenience) of the availability of the retransmitted new multichannels through the Foxtel service. In these circumstances it is unrealistic to infer that the subscriber would treat the value of convenience to the subscriber as increasing in some linear way with the number of FTA multichannels being retransmitted. Indeed it might be expected that each additional multichannel has a decreasing value to the subscriber. In this case no hypothetical bargain between Foxtel and Screenrights would be conducted on the basis of the above methodology. A further problem is that it assumes the equitable remuneration determined in the 2006 decision is an appropriate starting point for the required exercise in respect of the new multichannels. While Screenrights does not challenge that determination (as it presently cannot) it does not accept that it represents an appropriate starting point for the exercise. Nonetheless, the above reasoning suggests that the value of all of the new multichannels is substantially less than 34.3 cents pspm.

186 None of these approaches give specific consideration to the functions offered by the iQ and iQHD STB. Foxtel argued that a device capable of recording the FTA channels could be bought for between (the modest amounts) of approximately $50 to $300. The capability of the Foxtel iQ STB as a PVR makes it more comparable to the upper end of this range. A subscriber who utilises the iQ or iQHD STB does not need to purchase a PVR to record the FTA channels if retransmission of FTA channels is undertaken by Foxtel, and thus can save the purchase price of a PVR. This saving of the purchase price of a PVR represents a benefit to any Foxtel subscriber who also views any of the retransmitted FTA channels (and thus might also wish to record a program shown on those channels). If retransmission by Foxtel did not take place, the consumer would need to undertake this expenditure in order to record FTA transmissions. In order to compare the value of the avoided expenditure, assuming a product life of 6 years and discount rate of 7% the purchase of a PVR at a price of $50 now equates with approximately $0.85 pm. Similarly, a PVR purchase price of $300 equates to $5 pm (again assuming a product life of 6 years and discount rate of 7%). This calculation suggests a benefit of retransmission of all FTA channels to such a subscriber using the iQ or iQHD STB in the approximate range of $0.85 to $5 pspm. However, these figures cannot be taken at face value because: – (i) the fraction of Foxtel subscribers who avoid the purchase of a PVR to record FTA transmissions because of their subscription to Foxtel is unknown, (ii) any change in technology and/or the price of PVRs will change this benefit to subscribers, and (iii) the fraction of this benefit which should be attributed to the existing FTA channels and what should be attributed to the new multichannels is also unknown. It should also be kept in mind that the functionality of the iQ and iQHD STB is attributable to Foxtel’s innovations and has nothing to do with the new multichannels.

187 Another approach, and one which also recognises the retransmission of FTA channels other than the new multichannels (in common with Foxtel’s fallback calculations), is to undertake a qualitative assessment of the incremental value that it can be inferred from the evidence Foxtel subscribers would place on the retransmission of the new multichannels. For example, an incremental value of 5% over and above the equitable remuneration of the existing FTA channels (that is, 26.95 cents pspm) equates to 1.35 cents pspm, 10% equates to 2.69 cents pspm and 50% equates to about 13.47 cents pspm. However, this too assumes the equitable remuneration determined in the 2006 decision is an appropriate starting point for the required exercise in respect of the new multichannels.

188 The evidence in the present case leads us to the same conclusion that the previous Tribunal reached that the benefits to Foxtel subscribers from the retransmissions and thus the value of those retransmissions to Foxtel are best described under the rubric of “convenience”.

189 We are reinforced in this view by Mr Delany’s evidence and the fact that Foxtel has not taken steps to enable all of its subscribers to view all of the new multichannels (in fact, only 16.2% of Foxtel subscribers can view all of the new multichannels). As Foxtel said, it is not the point that the equitable remuneration sought from the Tribunal is on a global basis relating to a rate for subscribers accessing all of the new multichannels. The point is that Foxtel could not value the retransmissions of the new multichannels particularly highly as it has not gone to great efforts at its own cost to ensure all of its subscribers can view the new multichannels through their Foxtel service.

190 While the above approaches are informative, they are in no way definitive. As noted, we too do not have “firm evidence guiding us to a particular figure in any way remotely resembling a mathematical calculation” (at [519]). Nonetheless, we must determine a numerical value of equitable remuneration. The only approach remaining is to follow in the footsteps of the previous Tribunal, and estimate the value of equitable remuneration though careful evaluation of all the evidence currently available. For this purpose it is worth summarising the available approaches and the ranges of possible additional value they disclose.

(1) Foxtel’s initial approach that the new multichannels involved no additional value to Foxtel was inconsistent with the evidence and thus may be put to one side.

(2) Foxtel’s alternative approaches equated additional convenience with percentage of minutes of FTA channels viewed per day (an approach not self-evidently rational and persuasive) and yielded an additional value of **2.01 to 2.39** **cents pspm**.

(3) Screenrights’ approach used a formula that appeared likely by reason of its constituent components to overestimate the additional value of the retransmission of the new multichannels and yielded a result of **48.08 cents pspm**.

(4) If the audience share of existing and new multichannels is used and it is assumed that 26.95 cents pspm represents equitable remuneration for the existing channels the new multichannels would yield an additional value of **34.3 cents pspm**.

(5) If every Foxtel subscriber also wished to be able to record all FTA channels with equivalent functionality to the Foxtel IQ system and could not do so because Foxtel was not retransmitting the FTA channels those subscribers would have to incur a cost in buying a PVR approximately equivalent to between **$0.85 and $5 per month** (assuming a product life of 6 years and discount rate of 7%). The subscriber avoids that cost because Foxtel retransmits the FTA channels and enables its subscribers to apply the functionality of the Foxtel iQ offerings to both Foxtel and retransmitted FTA channels for which the subscriber pays a total of a $100 set-up fee and $10 per month.

(6) If 26.95 cents pspm represents equitable remuneration for the existing multichannels (a proposition which Screenrights does not accept) then the added convenience of the new multichannels might be conceived of as incremental value so that 5% over and above the equitable remuneration of the existing FTA channels (that is, 26.95 cents pspm) equates to 1.35 cents pspm, 10% equates to 2.69 cents pspm and 50% equates to about 13.47 cents pspm.

191 All of these approaches have problems. Some appear likely to overestimate the additional value of the new multichannels once it is accepted, as we do, that their value is convenience value to Foxtel subscribers and thus to Foxtel. The avoided cost approach (approximately $0.85 to $5 per month) is likely to involve a significant over-estimate for the reasons given; so too are the approaches based on audience share and Screenrights’ formula. Foxtel’s alternative approach appears to be a significant underestimate. Leaving aside the fact that it assumes the 26.95 cents pspm represents an appropriate starting point, it affords to the nine new multichannels an incremental value of less than 10% of the overall value despite the fact that there are more new multichannels than existing multichannels and the convenience of retransmission of all new multichannels to Foxtel’s subscribers has most likely increased by reason of the increased functionality of Foxtel’s services, particularly its IQ offerings.

192 On this basis we consider it appropriate to adopt a sum of 10 cents pspm as equitable remuneration for the retransmissions of the new multichannels. This figure is to be indexed with increases in the CPI. This is substantially more than Foxtel’s alternative approaches yield but substantially less than those approaches we considered likely to over-estimate the additional value of the new multichannels. It recognises the additional convenience in the retransmission of the new multichannels and the applicability of the enhanced Foxtel services to those multichannels (particularly Foxtel’s iQ offering) to Foxtel subscribers (and thus value to Foxtel).

193 Our final observation is this. In addition to the evidentiary deficiencies discussed above, the exercise we have undertaken in the present case is also affected by the fact that we are confined to the determination of equitable remuneration for the retransmission of the new multichannels in circumstances where at least one party, Screenrights, does not accept (but by reason of the Retransmission Remuneration Deed could not seek a fresh determination of) the equitable remuneration payable for the existing multichannels. A better course, and one more likely to yield a robust result which can effectively govern the dealings between the parties, is one where the question of the equitable remuneration of all multichannels is considered in an evidentiary context which also recognises that additional multichannels may be added in future. We say this because it was apparent during the hearing that on expiry of the term of the Retransmission Remuneration Deed the question of equitable remuneration for the existing multichannels was likely to be raised by Screenrights and, to the extent possible, we think it appropriate to discourage the piecemeal approach which this matter represents.

194 In accordance with the request of the parties we reserve for subsequent consideration the issues of equitable remuneration for subscribers who do not have access to all of the retransmitted new multichannels and payment of arrears. Directions will be made in respect of those issues in consultation with the parties.

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| I certify that the preceding one hundred and ninety-four (194) numbered paragraphs are a true copy of the Reasons for Determination herein of the Tribunal. |

Associate:

Dated: 1 June 2012