

SUBMISSION TO THE SENATE ENVIRONMENT AND COMMUNICATIONS COMMITTEE INQUIRY INTO THE BROADCASTING SERVICES AMENDMENT (IMPROVED ACCESS TO TELEVISION SERVICES) BILL 2012

Introduction and overview

The Australian Subscription Television and Radio Association (ASTRA) welcomes the opportunity to make a submission to the Senate Environment and Communications Committee Inquiry into the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012 (the Bill).

ASTRA supports the objective of increasing access to media services through increased captioning of television programs. Since captioning was introduced to subscription television (STV) in 2004, the STV sector has steadily increased captioning at a commercially sustainable pace to the extent that captioning is now provided on 70 channels, with steadily increasing annual captioning rates on most of these channels.

While ASTRA acknowledges amendments made during the exposure draft process in relation to captioning obligations on STV providers up until 30 June 2015, we have very serious overriding concerns in relation to the Bill:

- **Increased red tape:** the Bill proposes captioning targets reaching 100% on all channels, including a range of channels where captioning will never be viable, and then provides a highly bureaucratic and potentially costly application process for exemption orders or rate reduction orders. Licensees and channel providers would be required to make separate applications for individual channels on an annual basis for exemptions or rate reductions as increasing captioning requirements materially threaten the commercial viability of these channels. ASTRA's recommended amendments (detailed below) would remove the need for constant applications for channels that would either receive the exemption or rate reduction, or else would cease to be provided if the application was refused.
- **Threat to media diversity:** STV provides a number of narrowly targeted but important services whose commercial viability would be threatened by captioning requirements under this Bill. Any requirement to caption international news services such as CNN, BBC World News, Aljazeera, Bloomberg, CCTV News, and CNBC – provided on a 'pass-through' basis – would seriously jeopardise the commercial viability of delivering these services in Australia, leading to a significant loss of respected international news sources being available to Australian viewers. Similarly, increased captioning on Sky News (now considered Australia's pre-eminent news provider) or on important public and community interest services such as the Weather Channel and A-PAC (which includes live coverage of Parliamentary proceedings) would similarly threaten the commercial viability of providing these highly valued services.
- **Insufficient understanding of the STV business model:** the Bill as drafted does not sufficiently acknowledge the realities of the STV business model, and in particular does not recognise that, beyond those channels directly provided by STV licensees themselves, the STV sector in Australia is built on channels provided by a range of local and international channel providers independent of the STV platforms that deliver those channels to the

public, and that regulatory compliance costs, including costs associated with captioning, are ultimately borne by those channel providers.

In this context, our submissions against the three general issues referred to the Committee examination are as follows:

Implications for the long-term viability of services provided by subscription television, primarily international pass-through channels such as BBC World News, CNN and Aljazeera

ASTRA represents a selection of news and sport channels where the business model is supported by producing a single channel for multiple countries or regions. For example the same BBC World News channel is supplied to all countries outside the United Kingdom. ASTRA understands that in many markets these types of channels are required to pay in order to gain access to distribution platforms. Where live news and sports channels are produced solely for markets outside of the US and UK, the international version of the channel is commonly distributed without any captions in any market. A number of such channels are available in the Australian market and there is no opportunity for local insertion by those entities that provide those channels. For these international “pass-through” channels, Australian STV licensees are no more than transmission platforms for services received directly from international sources.

These international news and sport channels are important as they provide diversity in both news coverage and exposure to international sporting events. Under the Bill, a number of these channels will be subject to captioning requirements (including Aljazeera, BBC World News, Bloomberg, CCTV News, CNBC, CNN, Eurosport, Eurosportnews) within the next ten years.

There is no likelihood of the captioning of these channels being commercially viable for the foreseeable future. Any insertion of captions into these channels will be required to occur locally. This is an expensive process and will significantly add to the cost of delivering these services into Australia. This is then likely to mean that it will become unviable to offer those services into Australia, resulting in a loss of differentiation.

A general exclusion would avoid the costly and time-consuming process of making an exemption application for each service as they lose their exempt status under section 130ZX. This will significantly reduce the regulatory burden and bureaucracy relating to the applications process in a manner that should have no material impact on the objectives of the Bill.

The commercial and regulatory implications on broadcasters of making compliance with these captioning obligations a condition of a commercial television broadcasting licence, a subscription television broadcasting licence, and a class licence

For a number of STV channels it is highly likely that, because of their niche nature and limited reach, captioning will never be commercially viable. The consequence would be a loss of those channels being provided through STV platforms. Further, for a significant number of channels that are captioned, captioning levels as contemplated under the Bill may reach a point within just a few years that would also threaten their commercial viability.

While we recognise the capacity to apply for an exemption order or a reduction rate order under section 130ZY, the gradual reduction in exempt services under section 130ZX and the

requirement for an application process for each individual service under section 130ZY will inevitably lead to costly and exhaustive applications for exemptions or target reductions being undertaken by STV licensees and affected channel providers on an annual basis. The combination of:

- extensive compliance requirements under subsection 130XY(5);
- the lack of certainty as to whether such services would receive an exemption or target reduction order; and
- the potential for a failure to comply with captioning obligations to be a breach of a licence condition for a STV licensee;

could well mean an STV licensee and/or channel provider would make a commercial decision to avoid a potentially costly and lengthy application process for such narrowly-targeted, niche market services, and simply choose not to supply those services to the public within Australia.

ASTRA proposes that there should be amendments to the Bill that would identify those particular categories of STV services that we believe would:

- (a) inevitably be subject to an exemption order or target reduction order; or
- (b) would otherwise cease to be made available by the STV licensee and/or the channel provider were that service not granted an exemption order or target reduction order (as the case may be);

and to remove the need for an STV licensee to make a specific, detailed application in relation to each of these services as they cease to be exempt by the operation of section 130ZX. Such amendments would remove unnecessary and expensive bureaucratic application processes without impacting on the intentions of the Bill.

Exemption orders and target reduction orders (s 130ZY)

There are some categories of channels delivered by STV providers where captioning is either not commercially feasible, or where the incremental captioning rate increases under the current Bill would be unsustainable. Under the existing provisions, these channels would lose their exempt status under section 130ZX during different financial years, with licensees required to make detailed applications for each channel individually as the exemption for a particular service lapses.

We request amendments that would enable the ACMA to identify specific characteristics or circumstances that apply to the delivery of one or more STV services that would mean that any STV service whose delivery is consistent with these circumstances or characteristics could be made subject to an exemption order or target reduction order under section 130ZY (as the case may be). This would mean the licensee (along with the channel provider) would not be required to make a separate application for a particular channel against the criteria under subsection 130ZY(5).

The amendments should have the effect that, where the ACMA has made a declaration for a particular category of STV service, then a service that qualifies under that category would be exempt from captioning requirements or be subject to a reduced captioning target (as the case requires).

The amendments should also recognise that captioning obligations impact on organisations that supply channels to STV platforms, as well as (or in some cases rather than) an STV licensee, by:

- enabling channel providers to apply to the ACMA to make a request for an exemption or target reduction order; and
- specifically requiring the ACMA to have regard to the impact on channel providers when considering an exemption or target reduction order application.,

Examples of services for which these amendments could apply include:

- Music channels: the short life span and high turnover of music videos would mean significantly more material would need to be captioned for services generally catering to narrowly targeted, niche audiences. The recognition of music channels as a category to which a rate reduction target should apply, rather than an application being required for each individual channel, would do more than reduce unnecessary compliance obligations while ultimately achieving the same outcome in terms of captioning levels on those channels.
- High text services: STV offers a selection of genre based news and information channels (such as Fox Sports News and the Weather channel) delivering extensive live coverage. These services are heavily supported by two elements of textual support: both are produced with heavy on screen news tickers, graphics and headlines; both channels have supporting detailed interactive applications. Both channels contain predominantly short form segments that are constantly being refreshed throughout the day. If these channels were required to comply with captioning targets they may be put into the position of high repeat cycles. As a consequence channels may reduce the frequency that bulletins are updated, impacting on the quality and timeliness of information presented to viewers.
- Niche interest channels: One of the key benefits offered by STV is the ability to offer increasingly niche and specialised channels. Channels such as the Aurora Community Channel, Australian Christian Channel, and Australian Public Affairs Channel deliver programmes that the Commercial and National Broadcasters are unable to offer. Most of these Channels attract a limited number of viewers and have a very low share of viewing; however, they provide a vehicle for community and other groups to deliver key messages to a national audience. Ofcom in the UK has exempted shopping channels such as TVSN and Expo channel from any obligations to caption and has also exempted channels with less than a 0.05% share of viewing. A number of the channels on STV would fall into this category. ASTRA believes that a number of these channels may no longer be able to operate in this market if these channels are required to comply with captioning targets as proposed in the Bill. At the very least it will restrict the range of programming that these channels will be able to offer.

Captioning level increases over time for sport, news and music channels

The Bill proposes annual increases for news, sport and music channels of 5% per financial year from 1 July 2015, up from 2.5% per financial year increases for the period of the 2012-13 financial year to the 2014-15 financial year for news and sport, and a steady 5% per financial year captioning rate for music channels. The significant rate increase from 1 July 2015 will quickly add significant costs to the operation of these channels.

News and sports channels

The large proportion of live broadcasting on news and sports channels means captioning on these channels faces particular technical and financial challenges. The only method of captioning for live programs (including live sport and magazine programs) is 'online' captioning which involves a stenocaptioner manually transcribing spoken words in real time. This is also the case for programs that are completed so close to broadcast that online captioning is the only form of captioning available.

The costs involved in stenocaptioning are significant, which makes captioning of live programs more expensive than programs where caption files are already available or able to be created, for example, from a program's scripts. In addition, the captioning costs for broadcasting live sport can be increased by additional charges associated with program changes, because of the

unpredictable nature of the timing of sporting events. Live sport coverage of a sporting event may run longer than scheduled, requiring unscheduled extended coverage resulting in additional captioning costs. Alternatively, the event may be cancelled or end early, potentially resulting in cancellation fees, even though there is no captioning output.¹

Another factor which can increase costs is that while live broadcast of sporting matches may require discrete captioning for short periods of time, the first hour of captioning is more expensive than second and subsequent hours – so short events can be more expensive per hour to caption.

Moreover, as detailed above, services such as Sky News and FOX SPORTS News have heavy text-based support, and both contain predominantly short form segments that are constantly being refreshed throughout the day. Overly burdensome captioning obligations may lead to a reduction in story turnover, impacting on the quality and timeliness of information presented to viewers.

Given these inherent difficulties, we suggest that the 2.5% increase per year on news and sport channels,² rather than the 5% proposed in the Bill, would be appropriate beyond 2014-15, provided that these channels would be entitled to apply for an exemption for reduced targets in circumstances where the targets that applied at the relevant time would make the continued provision of live captioning for the live content commercially unviable. We request that section 130ZV be amended such that the formula for sports and news channels would be equivalent to a 2.5% per annum increase, rather than 5%.

Music channels

Music channels have a high rotation of video clips, many of which are on air for only a short time (reflecting music chart popularity). Accordingly, many captions are only in use for a short period, and maintaining captioning at a particular level is very expensive compared to channels which show longform programming. Any significant increase in captioning requirements will mean significant cost increases in providing these services, to the extent that their continued provision would be questioned. As such, we request amendments that would maintain captioning rates for music channels at 5% beyond 1 July 2015.

Captioning on the same channel provided by different STV licensees

The provisions as drafted may have the unintended consequence of different captioning obligations on different STV broadcasting licensees providing the same channel, as well as for channel providers that provide channels for more than one STV broadcasting licensee. For example, under sections 130ZV-ZW, Transact (a STV broadcasting licensee providing services in the ACT and regional Victoria) would have the following number of services in each service category:

Movies	5
General Entertainment	16
News	6
Sport	4

¹ For example, the broadcast of a cricket test match may be scheduled to continue for five days but conclude in four days. If that content is being captioned by a caption provider, FOX SPORTS would need to keep its booking for live captioning on the fifth day, so the replacement programming on that day would then be captioned – even if the program is not something that would necessarily attract the same interest or require live captioning. If FOX SPORTS cancelled its booking rather than captioning the replacement programming, it would incur a significant cancellation fee.

² This is consistent with the incremental increases for the first 3 years under the Bill (2012-13 to 2014-15) as well as the increases which apply under the DDA exemption orders agreed with the Australian Human Rights Commission earlier this year.

Music	1
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As Transact has less than 18 general entertainment services, all general entertainment services on Transact would be Category A subscription general entertainment services (per subsection 130ZW(1)), however many of the same channels would be Category B or Category C general entertainment services on FOXTEL, meaning different minimum captioning levels would attach to the same channel depending on the STV licensee that provides it, including for:

- Animal Planet
- Boomerang
- Discovery Home & Health
- Discovery Science
- Discovery Turbo
- TLC

At the same time, a number of channels with no captioning obligations when provided by FOXTEL would be subject to captioning requirements on Transact, including the Australian Christian Channel.

Further, if FetchTV is considered to be a subscription television broadcasting licensee, similar inconsistencies would apply, including a requirement for FOX SPORTS News to be captioned when provided on FetchTV but not when provided on FOXTEL. This is because FetchTV provides only one sports channel, FOX SPORTS News. Given the minimum number of channels provided by an STV licensee to be captioned in the first three years is 7, FOX SPORTS News would not be required to be captioned (at this stages) on FOXTEL but would do so when broadcast FetchTV.

ASTRA requests an amendment to the effect that where the same channel is provided by different STV licensees, the minimum captioning obligations that apply to that channel for all STV licensees would be the least onerous of the obligations that would apply for any STV licensee. This would avoid the need for smaller STV licensees such as Transact or FetchTV (as well as, in practice, the entities that provide those channels) applying for a separate exemption order or target reduction order for each individual channel that appears on its platform where that channel would have lower captioning obligations when delivered by FOXTEL.

Aggregation of captioning across sports channels

Sports channels from the one provider are commonly treated as a single 'block' for the provision of sporting events. The ability to aggregate captioning levels across channels from a single provider such as FOX SPORTS would ensure that the provider continues to have program scheduling flexibility and allow it to deliver captioning on its most popular sports and magazine shows while maintaining overall captioning levels across the group.³

Due to the nature of live sport, the programming schedule for a group of channels from the one provider such as FOX SPORTS is managed dynamically across the range of channels to accommodate scheduling conflicts and last minute changes due to weather, overruns and simultaneous matches in multi-round tournaments, for example. Given that, in terms of the FOXTEL platform, all sports channels provided by FOX SPORTS sit within the sports tier, there would be no detriment if one particular sports channel provided by FOX SPORTS contained more live captioned programming in a given year than the others channels provided by FOX SPORTS as long all the channels combined met the overall aggregated target.⁴

³ The AHRC exemption orders allow live sports channels within the same channel group to aggregate captioning levels provided the combined average total meets the captioning targets for each channel individually.

⁴ We understand that the DBCDE had expressed concern that aggregation within channel groups in the AHRC Application 2010 raised concerns with stakeholders. Those concerns were raised because at the time FOX SPORTS (formerly Premier Media Group) also produced the HOW TO CHANNEL which distorted the aggregation total as it

New channel exemption

As currently drafted, captioning concessions for new channels on an STV platform would be accommodated under the two exemption provisions in sections 130ZX-130ZY. However these channels would quickly fall within captioning requirements as the number of exempt channels decreases over a short period of time to no exemptions at all from 1 July 2022.

ASTRA believes that separate, legislated captioning obligations should apply to new channels, given the need to allow new services to be established (ASTRA notes that the legislated exemption for FTA multichannels is to be continued under this Bill for similar policy reasons).

Programs that are a re-broadcast of an event originally broadcast and captioned live

The requirement under section 130ZZ for captioning for repeats of television programs will be particularly onerous for STV channels providing coverage of a live event with live captioning, as the captions used in the live program would not be able to be used for any subsequent repeats of the program.

For example, when live sporting events are replayed, they are edited significantly (for example, to reduce the duration of the program, remove unnecessary content and insert different advertising breaks). The captions from the original live program will not match up with the edited version (the editing effectively breaks the captions). The captions therefore cannot be re-used for the replays. There are often several different edited versions of a replay of a sporting event, and each version would need to be captioned separately by a stenocaptioner in order to provide captions for that version.

ASTRA requests that section 130ZZ be amended to exclude programs that are repeats of live events that were captioned live.

Channel Termination

We are concerned that there is not a process which deals with the removal of a channel from a genre group during a financial year under the operation of the exemption process in section 130ZX. As an example, it is not clear what occurs if one movie channel (which was included in the movie captioned group) were to cease broadcasting during the year, say due to insolvency, and there was not another complying movie channel available to take its place. Is it the case that all the existing exempt movie channels automatically lose their exemption? We request an amendment to section 130ZX that clarifies that an exemption application could be made to the ACMA in these circumstances.

Implications for commercial networks in breach of the new licence condition if they are unable to provide a captioning service for reasons beyond their control, such as failure by a third party captioning provider to provide the service for reasons beyond the broadcasters control

ASTRA agrees that there are issues for any broadcasting licensee, not just commercial television broadcasting licensees, in complying with a licence condition where that compliance is reliant on the actions of a third party. In relation to captioning, the operational circumstances that apply to commercial television broadcasting licensees equally apply to subscription television broadcasting and subscription television narrowcasting licensees, as all broadcasters

had a higher captioning quota than the FOX SPORTS channels – this is no longer the case as HOW TO CHANNEL ceased operation in early 2011 and has been recognised by the AHRC in allowing aggregation.

use third party providers to deliver captioning services, and will rely on those third party providers to deliver captions in compliance with their licence conditions. As such, if there is to be provision in the Bill that, for example, disregard breaches of captioning obligations that are due to the actions of a third party, this should apply equally to all broadcasting licensees required to provide captioning services, not just commercial television broadcasting licensees.

Other issues

Exemptions for commercial FTA broadcasters – section 130ZUA

We note that, from 1 July 2014, the effect of the legislation for FTA broadcasters would be for a total minimum captioning obligation of no more than 75% of content broadcast on the primary channel. More importantly, the legislation would also continue indefinitely the current exception from captioning for FTA multichannels (except where that program was previously captioned on the primary channel), even though the audience reach on those FTA multichannels is far greater than most channels on STV.⁵ This means an indefinite total minimum captioning requirement for FTA commercial broadcasters of just 25% of all content broadcast across the three channels of each network from 1 July 2014 onwards, compared with an ultimate long-term target of 100% captioning of *all* content broadcast on *all* STV channels provided by an STV licensee.⁶ Given such low captioning expectations for commercial FTA broadcasters in the legislation as drafted, ASTRA cannot see any public policy justification for commercial FTA broadcasters to have recourse to apply for exemption orders or target reduction orders for unjustifiable hardship.

If the review of multichannel captioning and content obligations under clause 60D of Schedule 4 to the BSA (or any subsequent reviews regarding captioning on television) comes to the conclusion that commercial FTA broadcaster multichannels should be subject to captioning obligations, it would make sense to consider the introduction of provisions that enable FTA commercial broadcaster to apply for unjustifiable hardship exemption or target reduction orders at the same time as the introduction of provisions that extend captioning obligations to commercial FTA multichannels. As presently drafted, the Bill would give commercial FTA broadcasters the opportunity to apply for an entire service to be exempt or to be subject to a rate reduction order, even though captioning requirements under the Bill will essentially apply to only one channel broadcast by a commercial television broadcasting licensee, and even then only for up to 75% of the content broadcast on that one channel.

ACMA failure to respond to an application for an exemption order or target reduction order

We note that the effect of subsection 130ZY(8) is that if the ACMA fails to respond to an application for an exemption order or a target reduction order within 90 days of receipt of the application, the ACMA is taken to have decided to refuse the exemption. There are no timing obligations on the ACMA for making a decision on the applications and as such, the deemed refusal where ACMA fails to respond is unacceptable. We request that subsection 130XY(8) be amended such that a failure by the ACMA to respond to an application for an exemption or target reduction order is taken to amount to an approval of the exemption or target reduction applied for.

⁵ We note that for Week 17 2012, GO! (Nine's multichannel) achieved a 3% share; with 3.1% for 7TWO and 2.1% for 7MATE. In comparison, FOX8 achieved a 0.8% share; Starpics a 0.1% share as did FOX SPORTS News and Discovery Science.

⁶ As an example, under the Bill, in the 2014-15 financial year commercial FTA broadcasters would be required to broadcast a combined minimum of 54 hours of captioned content per day (that is a total of 54 hours across the 9 commercial FTA channels). For STV, the requirement will be 665 hours a day. In 2015-16, the FTA level remains at 54 hours a day, while the STV requirement increases to 766 hours a day.

Statutory review of the effectiveness and appropriateness of Part 9D

In announcing the Government's response to the Media Access Review in December 2010, the Minister for Broadband, Communications and the Digital Economy also indicated that there would be a further review of captioning and audio description on electronic media in 2013 to consider the effectiveness of action agreed in 2010. ASTRA submits that this review should be legislated.

ASTRA has drafted amendments relevant to many of the above recommendations, which we would be happy to share with the Committee if requested. Please feel free to contact myself or Simon Curtis, Policy and Regulatory Affairs Manager, on (02) 9776 2686, if you want to discuss further anything in the above.

Yours sincerely

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