



Australian Government

Department of Communications

Senator Anne Ruston
Chair, Senate Environment and Communications Legislation Committee
PO Box 6100
PARLIAMENT HOUSE ACT 2600

Dear Senator Ruston

**Re: Senate Environment and Communications Legislation Committee – Inquiry into the
Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014**

I refer to the letter from Christine McDonald, Secretary, Senate Environment and Communications, Legislation Committee, of 6 November 2014, inviting the Department of Communications to make a submission, addressing in particular the proposed removal of auditing requirements for annual reports issued by participants under the new eligible drama expenditure scheme (Schedule 3 to the Bill) and proposed amendments to captioning (Schedule 6 to the Bill).

The Department's submission to the inquiry is enclosed for your consideration.

Yours sincerely

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10 December 2014

Contents

1. Introduction.....	2
2. Government’s deregulation agenda.....	2
3. Eligible drama program expenditure audits.....	3
Background.....	3
Proposed amendments	3
4. Captioning	5
Background.....	5
Proposed amendments	6
Conclusion	10

1. Introduction

This submission discusses amendments to the New Eligible Drama Expenditure (NEDE) scheme and captioning proposed by the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (the Bill). The submission aims to explain existing regulation, describe the amendments and their effects, and outline the rationale for making the amendments.

On 30 October 2014, the Senate referred the proposed amendments to the NEDE scheme (Schedule 3 to the Bill) and captioning (Schedule 6 to the Bill) to the Senate Environment and Communications Legislation Committee (the Committee) for inquiry and report.

The Department of Communications is making this submission to the Committee to describe the relevant policy grounds for the proposed amendments and explain how the provisions will work.

2. Government's deregulation agenda

The Australian Government's deregulatory agenda aims to boost productivity by easing the regulatory burden and reducing costs to industry, not-for-profits and individuals. In late 2013 the Minister for Communications invited stakeholders to provide advice on areas where regulation could be improved or was unnecessary.

The Minister received a number of submissions that highlighted areas where regulation could be better targeted, many of which are available from the Department's website. The Department has also been involved in ongoing discussions with stakeholders about potential areas of reform. The Bill addresses two particular elements of this feedback by introducing amendments to remove the audit requirement for annual reports under the NEDE scheme (Schedule 3), and to provide greater flexibility and reduced administration costs for broadcasters in respect of their captioning obligations (Schedule 6).

In relation to captioning requirements, stakeholder submissions highlighted that while the captioning regime is working well in ensuring access to high quality television services for hearing-impaired audiences, there are a number of improvements that could be made to streamline reporting requirements and to increase flexibility for broadcasters in the way they are able to meet their captioning obligations. The captioning reform proposals in the Bill have been discussed with industry and media access stakeholders.

To support the Government's deregulation agenda, the Australian Communications and Media Authority (ACMA) has analysed compliance and reporting requirements across the broadcasting sector and has advised the Government that the requirement for NEDE scheme annual reports to be audited is unnecessary in light of the high compliance by the industry and existing compliance incentives in the *Broadcasting Services Act 1992* (BSA).

3. Eligible drama program expenditure audits

Background

Division 2A of the BSA requires certain subscription television licensees, channel providers and part-channel providers to spend at least 10 per cent of their total programming expenditure on new Australian or New Zealand drama productions or co-productions ('new eligible drama expenditure' or NEDE). NEDE participants are required to submit their return on an approved form, which must be accompanied by a certificate from a registered auditor that states, in the auditor's opinion, the return is correct (subsections 103ZA(1) (b) and 103ZB(1)(b)). NEDE participants must submit their annual expenditure reports within 60 days after the end of each financial year (subsections 103ZA(1) and 103ZB(1)).

The approved form for annual returns require NEDE participants to report to the ACMA on:

- how much expenditure was incurred on eligible programmes during the compliance period,
- the name of the eligible programmes,
- the type of expenditure (script development, acquisition of programmes or programme material, production or pre-production of programmes or programme material and investment in programmes or programme material),
- the nominated amount of that expenditure to acquit any make-up expenditure obligation,
- their total programme expenditure relevant to each drama channel, resulting in the current year expenditure obligation,
- any expenditure nomination in relation to the current year obligation, and
- any expenditure nominated as carry-forward expenditure.

The NEDE scheme accommodates the dynamics of production schedules by allowing subscription television licensees and channel providers to operate under an accrual expenditure model over three years (previous year, current year and future year). Where eligible drama expenditure for a given year is under 10 per cent, an amount that equals the shortfall must be spent in the next financial year. Where eligible drama expenditure is over 10 per cent (and any existing shortfall expenditure) the excess may be nominated as 'carry-forward expenditure' and used in the following financial year. The minimum expenditure requirement for a compliance period is to fully acquit the pervious period's shortfall.

The ACMA currently issues compliance certificates as soon as practicable after its assessment of Scheme returns (subdivision 1 of Division 2A). Each certificate states if there has been a shortfall or excess in expenditure and the amount of the shortfall or excess accrued.

Proposed amendments

Schedule 3 to the Bill proposes a number of amendments to the existing NEDE regulatory framework provided for in Division 2A of the BSA.

Repeal audit requirements on NEDE participants (clauses 2 and 3 of Schedule 3 to the Bill)

The proposed amendments will amend subsections 103ZA(1) and 103ZB(1) of the BSA by removing references to obtaining certificates from registered auditors. This amendment will remove audit requirements on licensees that provide one or more subscription television drama services (subsection 103ZA(1)), as well as channel and part-channel providers in relation to one or more subscription television drama services (subsection 103ZB(1)). The Bill does not propose any changes to NEDE requirements in terms of the obligation and to whom the scheme applies. Participants will still be required to submit annual returns in the approved form.

For the 2013-14 reporting period, the five licensees¹ that participated in the NEDE scheme provided 30 qualifying drama channels on subscription television services. The 30 channels were packaged by six channel providers and three pass-through providers.^{2 3} NEDE participants spent \$36.8 million on eligible drama programming for this reporting period, which acquitted the \$18.06 million minimum obligations for the financial year.⁴

The 2013-14 reporting period continued the subscription television sector's high level of compliance with the NEDE obligations. Minimum obligations have been successfully met by NEDE participants in the five most recent reporting periods. When NEDE participants have failed to acquit minimum obligations for a reporting period, expenditure shortfalls have been minor in nature and were generally met in the next reporting period. For example, for the 2006-07 reporting period, licensees failed to meet \$22,300 of the \$10.5 million minimum obligation, which was successfully acquitted in the next reporting period, as well as the \$13.9 million subsequent obligation. Licensees' continued high level of compliance with NEDE obligations has been evident since the scheme became mandatory in 1999.

The ACMA has advised that the existing auditing obligations are financially burdensome, costing an estimated \$15,000 per licensee and channel provider per year, against little compliance benefit. Compliance data indicates that the audit requirements do not guarantee mistake free annual reports. However, NEDE participants have been forthcoming in informing the ACMA of reporting errors, while still meeting minimum expenditure requirements where minor mistakes have been included in an annual return.

There are alternative mechanisms available to the ACMA to retain a high level of confidence in industry compliance. The ACMA will maintain compliance strategies including the judicious use of its power to make inquiries into the correctness of reports received from licensees and channel

¹ The five licensees which participated in 2013-14 were Austar, Foxtel, Optus, Telstra and TransACT.

² The six channel providers were BBC Worldwide Australia, Fox International Channels Australia, Foxtel Management, Nickelodeon Australia, The Walt Disney Company Australia, TV1 General Entertainment Partnership. The three pass-through providers were Turner Broadcasting System Asia Pacific, NBC Universal Global Networks, Kidsco Limited.

³ Pass-through providers are channel providers that do not carry on business in Australia by means of a principal office or branch.

⁴ Public information on NEDE reporting results is published by the ACMA on its website at: <http://www.acma.gov.au/Industry/Broadcast/Television/Australian-content/new-eligible-drama-expenditure-scheme-results-i-acma>.

providers (as provided for in section 103ZC of the BSA). The BSA also makes it an offence for any licensee, channel provider or part-channel provider to intentionally contravene its reporting requirements (subsections 103ZA(2) and 103ZB(2)). NEDE obligations will remain a licence condition for subscription television licensees.

In light of the industry's high compliance with the NEDE scheme and existing compliance incentives in the BSA, the need for additional auditor checks cannot be justified against the expense borne by NEDE scheme participants. In this context the repeal of the audit requirement is consistent with the Government's deregulation agenda to remove unnecessary or inefficient regulation.

Repeal requirements to provide compliance certificates (clause 4 of Schedule 3 to the Bill)

The proposed amendments will repeal subdivision I of Division 2A to the BSA. This subdivision deals with matters relating to compliance certificates and as the Bill removes requirements on the ACMA to issue compliance certifications, the whole subdivision will be redundant and as such should be repealed.

The amendments are unlikely to result in less certainty with regards to the accuracy of reports published by NEDE participants. As noted above, the ACMA will maintain compliance strategies including the judicious use of its power to make inquiries into information received in reports from Scheme participants in order to retain a level of confidence in industry compliance. Given the changes to the audit requirements on NEDE participants, the requirement on the ACMA to provide compliance certificates can be removed. The ACMA has indicated that it intends to continue to publish summary information on NEDE expenditure on its website.

4. Captioning

Background

Captioning supports access to a range of services, including television services, by people who are hearing-impaired. To enhance access to captioning for this audience the *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* introduced Part 9D to the BSA, which mandates targets for captioning of free-to-air and subscription television programs, and sets out a framework for determining captioning quality.⁵ Compliance with the Part 9D captioning obligations is a licence condition for commercial free-to-air and subscription broadcasters.⁶

Part 9D replaced the previous exemption orders process administered by the Australian Human Rights Commission under the *Disability and Discrimination Act 1992* (DDA). With the introduction of Part 9D (which is prescribed under the DDA), broadcast licensees are exempt from further action for unlawful discrimination under the DDA. This prescription creates a level of regulatory certainty for broadcasters and viewers as the television captioning obligations are administered by the one body, the ACMA.

Consistent with the Government's deregulation agenda, the amendments to Part 9D introduced by the Bill aim to reduce compliance costs, increase flexibility for broadcasters in the way they meet

⁵ Information on existing captioning requirements for free-to-air and subscription broadcasters can be found at: http://www.communications.gov.au/television/television_captioning

⁶ Clause 7(1)(o) of Schedule 2 to the *Broadcasting Services Act 1992*.

their captioning obligations, and achieve greater administrative simplicity. The proposed amendments are not intended or expected to reduce the amount of captioned content available to hearing-impaired viewers, or the quality of captioning services provided. The Bill also removes or amends a number of spent or redundant provisions in Part 9D, including provisions that relate to captioning targets from previous financial years. Additionally, some aspects of existing legislation are unnecessarily complex as drafted, and the Bill simplifies these.

The Department considers the proposed amendments to be compatible with human rights, as defined in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, which establishes a framework for the examination of legislation to assess compatibility with human rights, and reporting on this to Parliament. The amendments will better support the ability of television licensees to provide captioning services that benefit Australians with a disability, the absence of which would restrict their ability to access television services.

Proposed amendments

Removing annual-reporting requirements relating to captioning compliance for free-to-air television broadcasters

The Bill repeals subsections 130ZZC(1) to (4) of Part 9D, which provide that commercial television broadcasting licensees and national broadcasters must, within 90 days after the end of each financial year, prepare and give to the ACMA a report relating to the licensee's compliance with their captioning obligations. The proposed amendment will have the effect of removing annual report requirements for free-to-air television broadcasters in relation to their compliance with captioning obligations. Compliance arrangements will instead be based on existing mechanisms within the BSA, including sections 147 and 150 of the BSA which enable viewer complaints to the ACMA about alleged breaches of Part 9D, and the ACMA's discretionary powers to investigate broadcasters' compliance with licence conditions along with broadcast content matters generally.⁷

In recent years, captioning requirements on the free-to-air television sector have gradually increased such that it is now required to provide 100 per cent captioning from 6am to midnight on primary channels, which includes all 'prime-time' programming, and for news or current affairs programs transmitted on primary channels at any time. This means it is now clear to consumers when services do not meet captioning requirements on the primary channel enabling compliance to be assessed on the basis of complaints and other existing measures provided for in the BSA, rather than through annual reporting arrangements.

Although to date published results are only available for one reporting cycle, the ACMA reported a high level of compliance with the annual captioning target requirements for the 2012-13 reporting period. For instance, 100 per cent of commercial free to air broadcasters and 99 per cent of subscription broadcasters achieved their annual captioning target. Although limited compliance issues were identified by the ACMA for the first reporting cycle, the extent of non-compliance was

⁷ Note that for captioning complaints about programming on the ABC or SBS, a complainant must write directly to the relevant broadcaster within six weeks of the broadcast. If a complainant does not receive a response within 30 days, or is not satisfied with the response, they can then refer the complaint to the ACMA. Further information on complaints about captioning is available from the ACMA's website at <http://www.acma.gov.au/Citizen/Consumer-info/Rights-and-safeguards/Captioning/complaints-about-captioning-i-acma-1>.

no worse than is normally associated with new broadcasting regulations so soon after their introduction.

There are significant compliance incentives for broadcasters to meet their captioning obligations. The ACMA will investigate genuine captioning complaints and where it identifies issues of concern, including where it sees a systemic problem with the performance of a broadcaster, will consider a range of responses to ensure broadcaster compliance. Responses can include requiring broadcasters to implement additional procedures to improve quality, or formal measures such as enforceable undertakings, and remedial directions.⁸ In severe cases, section 143 of the BSA provides that the ACMA can cancel a broadcaster's licence.

These compliance incentives, increased consumer transparency and high industry compliance rate strongly indicate that the removal of annual reporting requirements for free-to-air broadcasters will not reduce the effectiveness of the captioning arrangements.

Averaging of captioning targets across sports channels supplied by the same channel provider

The Bill repeals existing subsections 130ZV(1) to (4) and replaces these with new subsections 130ZV(1) to (3). The effect of the amendment is to remove spent captioning targets for the 2012 and 2013 financial years, enhance the readability of the provisions and introduce a modified formula in subsection 130ZV(3) for captioning targets for subscription television sports services.

The proposed amendment aims to introduce flexibility for subscription television licensees in meeting their obligations, without changing the number of total hours of captioned programming available to viewers. It operates to allow subscription television licensees to redirect one third of each relevant sports channel's captioning target to another sports channel offered by the same channel provider, for example FOX SPORTS. The amendment recognises that multiple sports channels are delivered as a package, not as individual channels, and would create an incentive for subscription television licensees to caption events attracting larger audiences, for example World Cup-type events, which otherwise may have made broadcasters exceed their quota or choose not to caption the event.

The proposed amendments would also enable subscription television licensees to move captioned programs between channels at short notice, for example when live sports events overrun into a follow-on live event's timeslot, with the captioning still counting towards the quota. To ensure the continued provision of an appropriate level of captioning per channel, licensees would still be required to meet a captioning target of at least two thirds of the existing captioning target on each individual channel.

Example: The 2014-15 captioning target for sports channels is 15%, with this target applying to every individual sports channel. Under the proposed amendments, where a subscription broadcaster transmits five sports channels provided by the same channel provider:

⁸ The ACMA may informally agree to accept measures by broadcasters to improve compliance with the BSA. For more formal measures, the BSA sets out the ACMA's role in accepting undertakings, and enforcing undertakings, at Part 14D, while section 141 provides for the kinds of remedial direction the ACMA may give in relation to licence conditions for commercial, community or subscription services.

- *The amount of captioned content must average at least 15% across the group of channels.*
- *Each of the five channels must caption at least 10% (two thirds of 15%).*
- *One channel could be as high as 35% with the other four at 10%.*

Narrow the repeat captioning obligations on subscription television licensees

This amendment adds proposed new subsection 130ZZ(2) at the end of section 130ZZ of Part 9D of the BSA. It introduces a new set of circumstances under which an existing requirement—that a subscription television licensee ensures that all program-repeats are captioned if the program was captioned when previously transmitted—would not apply. The proposed new subsection would provide an exemption from the existing requirement if the program previously transmitted was originally supplied by a channel provider or part-channel provider, and the program when repeated was supplied by a different channel provider or part-channel provider.

The amendment reflects the content distribution arrangements evident in the subscription television sector where a licensee may obtain the same program from two different sources, and the second version of a program may not have captions included, or the included captions might not comply with Australian requirements. The proposed amendment will avoid an unintended consequence of existing legislation where there is a cost to broadcasters in expending resources to caption the same program twice, with no overall benefit to viewers in doing so. In narrowing the rule to only apply to programs provided by the same channel provider or part-channel provider, the proposed amendment preserves the intent of the existing provision to ensure that broadcasters continue to transmit versions of programs that have already been captioned.

Automatic exemption from captioning obligations granted to new subscription television channels

The Bill adds new subsection 130ZV(6), that will provide that new subscription television services transmitted by a licensee are exempt from the captioning targets established by section 130ZV for a period of one to almost two years, depending on when the new service commences. To qualify for the exemption the subscription television service must predominantly consist of programs not previously transmitted in Australia prior to the commencement of the service. Under the proposed new subsection the exemption from captioning obligations would apply from service commencement until after the financial year beginning on the first 1 July that is at least one year after the service commenced. For example, if a new subscription television service commenced on 1 September 2015, the applicable exclusion period would be 1 September 2015 to 30 June 2017.

The proposed automatic exemption is designed to encourage subscription television licensees to bring new content and channels to Australian audiences and would only apply to channels that mainly consist of content not previously transmitted in Australia. This requirement will also avoid creating an incentive for licensees or channel providers to do little more than ‘rebrand’ existing content to avoid captioning requirements.

The Department notes that subscription television licensees can currently apply to the ACMA to exempt channels from captioning obligations on the grounds that providing captioned services would result in unjustifiable hardship. This hardship is likely to be greater for start-up services that don’t have established audiences. In practice the ACMA has approved the significant majority of applications (e.g. in December 2013 the ACMA received 41 applications for exemption orders for 2013-14 and made all 41, or 100 per cent, of these). An automatic exemption process would save both licensees and the ACMA resources in completing and considering applications.

More flexible captioning quality standards

The Bill will insert proposed new subsections 13OZZA(2A) and 13OZZA(2B) after subsection 13OZZA(2). Currently, section 13OZZA provides that the ACMA may determine standards that relate to the quality of captioning services provided by television broadcast licensees, including commercial television broadcast licensees, national broadcasters, subscription television broadcasting licensees and subscription television narrowcasting licensees. The proposed new subsection will provide that in determining a standard under subsection (1), the relevant industry regulator – the ACMA – must consider the differences between providing captioning services for:

- live television programs and pre-recorded television programs;
- wholly live television programs and programs that include both live and pre-recorded program material; and
- wholly pre-recorded television programs and programs that include both live and pre-recorded program material.

Proposed new subsection 13OZZA(2A) will require the ACMA, in the event of determining a standard under subsection(1), to take into account that the provision of captioning services for a live (or partially live) television program may be subject to different conditions and restrictions than the provision of captioning services for a pre-recorded television program. Proposed new subsection 13OZZA(2B) makes it clear that free-to-air broadcasters and subscription television licensees must aim to achieve the same captioning quality regardless of whether the program, or program material, was live or pre-recorded. The amendment recognises that while captioning for live programs should aim to meet the same high standard as pre-recorded programs, the added challenges necessitated by live captioning make this more difficult to achieve in practice. These constraints should be taken into account in determining whether a breach has occurred.

Additionally, the Bill inserts proposed new subsection 13OZZA(7A) after subsection 13OZZA(7), with the effect of providing that a failure by a licensee or broadcaster to comply with a standard determined under subsection (1) is to be disregarded to the extent to which the failure is attributable to significant difficulties of a technical or engineering nature for the licensee or broadcaster, which it could not reasonably have foreseen. The proposed amendment is consistent with an existing exemption for breaches of annual captioning targets for engineering or technical failures and removes an anomaly where an unforeseen technical failure would not amount to a breach of the captioning target, but would breach the captioning quality standard.

Provide for a new ‘two-tiered’ record-keeping framework

Section 13OZZD of Part 9D requires broadcasters to keep records of their compliance with captioning obligations, and requires that commercial television broadcasters, national broadcasters and subscription television licensees must keep these records for up to 180 days following the financial year and make them available to the ACMA upon request and without charge. Consultations with industry stakeholders have identified that the existing record-keeping requirements are unnecessarily onerous and out of step with industry practice.

Proposed new section 13OZZD establishes a more efficient, and targeted record keeping framework which contains a new distinction between ‘written records’ and ‘audio-visual records’. Written records to establish compliance with captioning targets will be required to be kept for up to 90 days following the end of the financial year to which the records relate. Audio-visual records to establish

compliance with captioning quality will be required to be kept for 30 days following the relevant broadcast, or if the broadcaster becomes aware of a complaint under Part 11 of the BSA, 90 days from broadcast. The shorter time period for audio-visual records recognises that there are considerable hardware costs associated with recording and storing television broadcasts.

In requiring both audio-visual and written records to be made the proposed reform requires two separate types of records to be kept. However the periods for which relevant records are required to be retained are shorter which will reduce costs for broadcasters and support ongoing compliance with Part 9D. These more efficient record-keeping arrangements will support the regulator's continued ability to investigate complaints effectively.

Extension of time period for making exemption order or target reduction order applications

The Bill repeals paragraph 130ZUA(3)(c) and replaces it with a revised provision, the effect of which will be to extend the deadline for lodgement of applications for exemption orders and target reduction orders by free-to-air broadcasters and subscription television services.

Under Part 9D broadcasters are entitled to apply to the ACMA for an 'exemption order' to exempt a channel or service from captioning requirements, or a 'target reduction order' to reduce the captioning percentage targets for the service for a specified period of time (between one and five consecutive financial years). Broadcasters can apply for an order before the exemption period being sought commences, or alternatively up to 180 days into the proposed exemption period.

The effect of the proposed amendment is that if a free-to-air broadcaster intends to seek an exemption or target reduction order for one or more consecutive financial years, they have until 31 March in the first financial year for which the exemption or target reduction order is being sought to make the application. Effectively, this proposed amendment will extend the period in which the ACMA can accept an application for a target reduction order or exemption order by three months. This amendment will better recognise that programming schedules often fluctuate and change at short notice and afford greater flexibility for broadcasters to adapt to unforeseen schedule changes.

Conclusion

The legislative amendments that the Broadcasting and Other Legislation Amendment (Deregulation) Bill gives effect to, including amendments to the captioning regulatory framework and to audit requirements for NEDE participants, will remove unnecessary legislation and reduce the regulatory burden on the broadcasting industry. They are consistent with existing legislative objectives, and with Australia's human rights obligations.