

Comments on the *Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012*

1. Introduction

- 1.1. Thank you for the opportunity to provide a submission to the Senate Environment and Communications Legislation Committee on the above the Bill. In light of the fast turnaround required for this submission, Media Access Australia (MAA) will not replicate the extensive data it has provided around television captioning issues through various submissions, but will focus on what it sees as the most important issues surrounding the Bill.
- 1.2. We will also assume that the Committee is familiar with the general work and role of MAA and that our interest is primarily in achieving workable solutions to media access. MAA is a not-for-profit organisation that was previously known as the Australian Caption Centre. It divested its commercial business operations to Red Bee Media and has no commercial interest in television captioning services. MAA is an acknowledged expert in media access issues and has assisted governments and other organisations in Australia and overseas.
- 1.3. If there are any aspects of MAA's submission that need clarification, or the committee requires any further information or data, MAA would be happy to assist.

2. Background

- 2.1. We note that in the invitation dated 20 June 2012 to provide a submission the letter asks for MAA to address "issues that may be of relevance". However, we are aware via the public Disability Rights Blog hosted by the Australian Human Rights Commission <http://www.ahrcblog.com/2012/06/19/update-on-media-access-bill/> that some more specific issues have been raised. Namely: "The commercial and regulatory implications on broadcasters of making compliance with these captioning obligations a condition of a commercial television broadcasting license, a subscription television broadcasting licence, and a class licence. Implications for free-to-air 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. 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."
- 2.2. Through this submission, MAA will address some of these issues as they have been raised in past inquiries and discussions.

2.3. When the Bill was first released for public comment (and the version that formed the official Bill is an updated version of this), there was a general acceptance among consumer organisations and other stakeholders that the Bill would essentially enshrine agreements and processes that were already in place or had been negotiated over long time periods through public processes. Furthermore, that the Bill was not an appropriate vehicle for seeking new approaches, enhanced quotas or other desired outcomes. From that perspective, consumer organisations and MAA held back on revisiting previous discussions and accepted that the Bill was a starting point for proper and tidy regulation of captioning services for television. It was also noted that there were parallel processes taking place that would address some issues (such as captioning on free-to-air multichannels, which is due to be formally reviewed in 2012) and that these were the best ways to deal with any latent or ambit claims. It was in this spirit that it appeared all parties were operating to ensure that the key objective of ensuring that captioning regulation was contained in the most logical place, alongside other regulations covering television.

3. The intent and changes created by the Bill

- 3.1. The Bill fundamentally achieves several outcomes. Firstly it brings three separate forms of regulation into one area of regulation. Second it clearly identifies that the BSA is the appropriate vehicle for regulation of captioning as it forms part of a television service. Third it moves the regulatory approach in Australia to one that is more in common with similar approaches in other jurisdictions, including the USA and UK, that television services, whether they are free or subscription, should be treated in fundamentally similar ways for issues such as captioning. Finally, it provides for a clearer, more robust and useful approach to the issue of caption quality. Media Access Australia (MAA) strongly supports the four outcomes of this approach.
- 3.2. A consequence of placing all television captioning under the BSA is that it also means that there is a single regulator of these services, presently the Australian Communications and Media Authority (ACMA). This overcomes the problems of the current regime that has a mix of the ACMA and the Australian Human Rights Commission (AHRC), including cross-over regulation where different parts of a television service may be regulated by both or one alone. This has led to confusion, difficulty in identifying responsibility for regulation and different outcomes for potential problems, depending on whether the problem occurred during the BSA regulated time of day (in which case ACMA had carriage) or under a program that was part of the AHRC quotas.
- 3.3. The issue of quality under the current regimes is particularly problematic as there is no definition of quality of captions, and the ACMA could only deal with captioning quality issues if captions were deemed to be of such low quality that they did not constitute a captioning service under the BSA. The Bill addresses this by having a section on caption quality.

4. Particular caption quota issues

- 4.1. The Bill provides for two different approaches to captioning quotas depending on whether a license holder is a free-to-air or subscription provider. This approach is somewhat unusual as in other regimes, notably the USA and UK, there is no differentiation between the two, but the quotas focus on audience sizes/turnover and geographic reach. The quotas are tiered and have a percentage target in those regimes. Australia's approach is partly a reflection of the merging of separate caption quota schemes where the BSA scheme applying to free-to-air was around time limitations (prime time defined as 6pm – 10.30pm) and genres (news and current affairs programs) and the AHRC schemes applying to both free-to-air and subscription TV were based around percentage quotas. It should be noted that the Bill fairly rapidly effectively moves both types of television to a percentage quota.
- 4.2. The quotas also have different definitions of what constitutes a “day”. The subscription TV approach mimics that generally taken around the world, which is to look at the period during which a channel broadcasts (usually 24 hours per day). However, the free-to-air approach has been for an 18 hour day defined from 6am to Midnight. MAA has always found this approach to be unusual and one that in time should be addressed to move it to a 24 hour day, particularly as most programming in the Midnight to 6am segment comprises repeated programs, with some exceptions. It is also noted that some free-to-air channels do provide captions on programs in this timeslot, but they typically comprise repeated programs and “pass-through” programs (such as overseas news programs) that are already captioned and provided as such. Thus there are no significant costs associated with providing captions on these. MAA would fully support the inclusion of these captioned programs as part of a quota which relates to a 24 hour day, but only on the condition that overall quotas are increased. Under the Bill, a supposed 100% captioning quota actually only represents 75% as it refers to 100% of an 18 hour period. Arguing for the inclusion of midnight to 6am captioned programming is simply an attempt to reduce captioning levels between 6am and midnight.
- 4.3. The subscription channel quotas are defined in percentage terms, but have an unusual system in the Bill of referring to genres, rather than audience share or turnover or other general measurements. It is accepted that this is a reflection of the current AHRC agreement and that the Bill does provide clear definitions of the genres. Furthermore, the Bill allows the license holder (ie Foxtel) to nominate the channels that have to provide captioning under the different genres. It is anticipated that the initial nominations will reflect the current AHRC agreement, reflecting the approach that a primary function of the Bill is to bring current arrangements under one jurisdiction, but not to change the substance of those arrangements.

- 4.4. The current arrangements and the Bill allow for exemptions. Worldwide there is a general acceptance that non-vocal programming, foreign language programming and very short programming is exempted from captioning requirements. In some regimes, channels with small turnover or tiny audiences are also given exemptions. However, it is important to note that in such cases (and the UK requirements are a clear example of this) that channels are not given blanket exemptions. If a channel changes its audience/turnover it can move up and down the quota tables (and some channels do this). The approach is that the exemption is based around a metric, not that the channel itself should be always exempt.
- 4.5. The Bill does provide for some exemptions to extend to 2022 in the case of subscription television services, and an application process whereby a service can be exempted by ACMA. If we take the case of some services that may be listed as exempt by the license holder (which could include BBC World, CNN and Aljazeera) then they could be exempt until at least 2022 and on successful application to ACMA for longer periods than that. On this basis MAA submits that there are extensive exemptions already in place and a process by which further exemptions could be obtained. Giving blanket exemptions to channels, especially over such a long timeframe, is against good regulatory approach, consumers' interests and tries to second guess what a television environment will be like in 10 years' time.
- 4.6. In contrast to this, the free-to-air sections do not seek to exempt channels except multichannels. MAA accepts this, as there is already a public process identified for reviewing free-to-air multichannel captioning in 2012. Furthermore, these channels are not exempted from providing captions on repeated programs shown with captions on other channels held by the license holder. Free-to-air channels may also apply for an exemption from ACMA via a public process.
- 4.7. We also note that the Bill proposes that ACMA must conduct a review of the operation of this Part by the end of 2015 and that a report must be given to the Minister by the end of June 2016 and that report must be tabled in the Parliament. MAA supports this sensible approach of reviewing the new captioning regime after it has had some time to operate and that review is a public process that allows the Parliament of the day full access to ACMA findings. MAA regards all of these measures as sufficient opportunities for channels and services to deal with changes in circumstances and raise any reasonable issues that arise from the operation of this Bill.

5. Caption quality and responsibility for captioning

- 5.1. A fundamental issue that this Bill deals with is the long-standing problems around the lack of a proper regime for dealing with caption quality. The Bill reflects a five-year process that has been undertaken by ACMA dealing with all stakeholders and reaching a reasonable position that ensures that captions of an adequate quality are presented and

that breaches of this are properly addressed by the regulator. In MAA's considered opinion, having dealt with hundreds of consumer enquiries and issues about captioning and with its expertise in captioning issues worldwide, caption quality is the primary consumer concern.

- 5.2. MAA also notes that the Bill provides for unforeseen breaches of the captioning requirements, such as significant technical or engineering difficulties. MAA supports this approach as a sensible safeguard against significant problems that a channel or service may encounter. However, a fundamental principle is that caption quality and the provision of a caption service is part of the program and should be treated with the same urgency, concern and attention as other elements of the program such as sound and vision.
- 5.3. At the present time, captioning services tend to be outsourced to professional access service companies, many of whom operate in an international market. In some cases channels provide in-house captioning. MAA strongly supports the principle of not dictating production processes, but focussing on outcomes. So it is the primary responsibility of the channel or service to ensure that their contractual arrangements ensure that the relevant regulations and standards are met. Anecdotally, it is common practice for captioning contracts to contain clauses around this, including caption providers paying any costs (including fines) around breaches caused by their inadequate service. Who provides the captions is not an issue for regulation, as long as the captions are provided to an acceptable standard. In giving the broadcasters this right, the responsibility is that they ensure that they deliver the required standard, including via any third party arrangements that they choose to engage in.

6. Conclusion and recommendation

- 6.1. The Bill was initially drafted and subject to a process of public consultation. A number of stakeholders, including MAA, made submissions to the Department. Some of the issues raised were included in the final version of the Bill submitted to the Parliament, including some issues raised by the television broadcasters.
- 6.2. The Bill reflected both in substance and intention to replicate as far as possible the number of existing regulatory arrangements in place and bring them under one regime. It has achieved that. It was recognised that the Bill was not an opportunity for further pursuit of ambit claims or to rewrite existing agreements.
- 6.3. The Bill has a number of review mechanisms built into it that are properly defined, public and subject to external scrutiny. These mechanisms allow broadcasters and consumers alike to raise issues that concern them and to have them considered fairly. Furthermore, there is a general review required by the end of 2015 of the operation of the contents of the Bill and this review will be made public. This allows a reasonable timeframe for the

new regulatory regime to operate and for any issues to be worked through.

6.4. The Bill is the culmination of a progressive approach to captioning regulation on television that started with the introduction of free-to-air caption quotas with the commencement of digital television. It brings regulation into line with common practice around the world and makes it transparent and equitable for consumers and broadcasters. On this basis, MAA strongly recommends that the Bill is supported without amendment.