



**Australian Government**

**Department of Broadband,  
Communications and the Digital Economy**

Ms Sophie Dunstone  
Acting Committee Secretary  
Senate Standing Committees on Environment and Communications  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Ms Dunstone

**Questions on Notice - Inquiry into Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012**

Thank you for your email of 21 June 2012 seeking the department's comment on three issues raised by broadcasters with the Committee. Please find below our comments on the issues. We have also incorporated input in our response from the Australian Communications and Media Authority (ACMA).

**Issue 1: Breach of conditions**

We note that a number of submitters have concerns that the proposed captioning quotas raise the prospect of broadcasters being in breach of their legislative requirements due to factors outside their control. We also note that some submitters (such as the ABC, *Submission 3*, p. 3) have requested that the captioning requirements be drafted so that they apply 'as far as practicable'.

The Bill will create a new licence condition for captioning. It is important to understand that the Bill does not change how licence conditions operate. A breach of the new licence condition is subject to the same enforcement regime as a breach of most other licence conditions listed in the *Broadcasting Services Act 1992* (BSA), schedule 2 clauses 7(1) and 10(1).

The Department is aware that both the ABC and Free TV Australia submission have proposed an exemption that would disregard a breach of their licence condition if the broadcaster has acted honestly and reasonably, having regard to all the circumstances of the case, such that the broadcaster ought fairly to be excused.

The new exemption is not required as there is already an exemption for breaches attributable to significant difficulties of a technical or engineering nature (see section 130ZUB). The Bill already provides that certain breaches by a broadcaster of their captioning obligations will be disregarded. That is, if the breach is attributed to significant difficulties of a technical or engineering nature and those difficulties could not reasonably have been foreseen by the broadcaster, then such an inadvertent breach will be disregarded.

With regards to the exemption proposed by broadcasters, there is no 'acting honestly and reasonably' exception applied to other licence conditions on commercial television broadcasters

where a compliance activity has been outsourced by the broadcaster to another. For example, there are currently licence conditions that prohibit the broadcast of particular television programs according to the program's classification. The government is aware that often a contractor engaged by the broadcaster does the activity of classifying the program, or editing the program to reduce its classification to a level appropriate for broadcasting in accordance with the licence. In this circumstance, a breach of the licence condition does not depend upon whether the broadcaster acted honestly or reasonably in the way they approached their compliance activity (such as by outsourcing an activity).

The government has decided to treat the requirement to caption in a similar way. The delivery of the captioning service is within the broadcaster's control because in the first instance they decide whether to produce the captioning service in-house or to outsource that activity. While outsourcing does carry risks regarding non-performance or under-performance by the contractor this is a risk that the broadcaster accepts and manages in their contractual arrangements. To the extent that there are technical difficulties associated with the broadcast of the captioning service, the government's position is that this is adequately catered for by proposed section 130ZUB. However, to the extent that the captioning service is intermittent or of poor quality, the government considers that the broadcaster's breach should not be disregarded because their contractor may have delivered them a poor quality product or no product at all.

The exercise of the ACMA's power under Part 10 of the BSA (which deals with remedies for breaches of licence conditions) is guided by the *Guidelines relating to the ACMA's enforcement powers under the Broadcasting Services Act 1992* (the Guidelines). The Guidelines indicate the ACMA's general approach to responding to contraventions is that enforcement action should be commensurate with the nature of the breach. Most of the enforcement powers listed in the Guidelines would be available to the ACMA with regards to a breach of a licence condition, although the ACMA adopts a graduated approach to enforcement. For example, the first option is that the ACMA may encourage the licensee to comply, or they could accept an enforceable undertaking from the licensee (to either do something or reframe from doing something). These options are in addition to litigation or remedial directions available to the ACMA under the BSA. Generally, the ACMA would only pursue a civil penalty (which is where strict liability arises) as a last resort.

## **Issue 2: Reporting**

We note that a number of submitters have raised concerns that the reporting obligations placed on broadcasters are broad and ill defined (for example see Free TV Australia, *Submission 11*, p. 4 and ABC, *Submission 3*, p. 4). We also note that some submitters raised concerns that there are few indications as to the nature or scope of the required reporting and therefore there is the potential for very onerous reporting requirements to arise.

The Department understands that broadcasters currently report annually, and sometimes quarterly, on captioning to the Australian Human Rights Commission (AHRC). We also understand that the ACMA proposes to use this as a useful starting point when considering appropriate levels of reporting on compliance with captioning requirements.

The Bill requires a licensee to prepare and report to the ACMA, within 90 days after the end of each financial year, regarding their compliance with their obligations relating to captioning obligations, captioning standards and emergency warnings (see proposed section 130ZZC).

The Bill requires broadcasters to only report on their compliance once a year (not periodically), and to keep appropriate records to substantiate their reports.

The proposed amendments also require the ACMA to develop quality standards for captioning. In this context, the Department understands the ACMA may ask broadcasters to report on the number of captioning complaints received (and their nature) and ask broadcasters to provide information about the processes and procedures they have in place to ensure they comply with the quality caption standards.

The Department understands that the ACMA proposes to consult with broadcasters in the development of requirements for record keeping and reporting on compliance, when the new captioning requirements are implemented.

Some broadcasters have raised concerns about the potential for these requirements to impose a significant compliance burden. The government considers it appropriate that all broadcasters report on their compliance with the new obligations. The reporting obligations are also commensurate with reporting obligations in comparable countries. For example the United Kingdom's regulator, Ofcom, requires broadcasters to submit quarterly returns in the form and format notified separately by Ofcom.

### **Issue 3: Pass-through channels**

We note that ASTRA raised concerns that the requirement for pass-through services such as BBC World News and CNN to be included in the quotas for captioning is 'not commercially viable for the foreseeable future' (ASTRA, *Submission 9*, p. 2).

We note that it has been proposed that subscription television pass-through channels such as Aljazeera, BBC World News, Bloomberg, CNBC, CNN and Eurosport should be excluded from captioning requirements as they have relatively small audiences and broadcasters argue that the cost of captioning these services could result in them not being shown.

The Bill has been drafted to have broad application and promote full access to free-to-air and subscription television by Australia's hearing impaired community. This intention is broadly consistent with obligations that arise from the *Disability Discrimination Act 1992* as well as Australia's international obligations, including the United Nations Convention on the Rights of Persons with Disabilities which aims to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Bill therefore does not permanently exempt types or categories of services, such as services sourced from international pass-through providers.

However, the Bill does provide all broadcasters with access to an exemption order or target reduction order for unjustifiable hardship. An exemption order will provide a full exemption from meeting the annual captioning targets for a specified service provided by the licensee, while a target reduction order would allow a reduced annual captioning target to be set for each financial year for a specified service provided by the licensee for a specified period. The decision to make or refuse to make an exemption order or a target reduce order by the ACMA is reviewable by the Administrative Appeals Tribunal. It is important to note that the Bill provides that exemptions for unjustifiable hardship can be sought for a period of up to 5 years.

In addition, where a subscription television broadcaster provides more than a specified number of services, the Bill will allow subscription television licensees to seek an exemption from the

ACMA, by nominating the additional services - such as pass-through channels - to be exempt from the captioning requirements for the financial year. The number of services that a licensee can seek an exemption for will decrease over time, until the exemption ceases to apply on 1 July 2022. After 1 July 2022, all services will be required to be captioned.

The department notes that it is technically possible to caption international program feeds in order to provide captioning on broadcast services. While provision of such captioning under current circumstances may result in a new financial burden for a licensee, future developments in technology could allow provision of captioning at significantly reduced costs.

**Other issues: Programs finishing after midnight**

While not asked by the Committee, we note that a number of submissions have raised concerns about programs that begin before midnight and end on the next day.

The department notes that free-to-air and national broadcasters are not currently required to caption programs broadcast outside designated viewing hours or targeted viewing hours. It is a matter for broadcasters whether they caption programs beyond what they are legally required to do. The Bill requires free-to-air broadcasters to caption a certain amount of programs during designated viewing hours and targeted viewing hours. The period between midnight and 6 am is currently outside designated viewing hours and targeted viewing hours.

Allowing broadcasters to count programs broadcast outside designated viewing hours and targeted viewing hours towards meeting their annual captioning targets could potentially reduce the amount of captioned content shown at times more suitable for viewers.

Yours sincerely

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Department of Broadband Communications and the Digital Economy

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