

# **Australian Communications and Media Authority Submission**

## A Captioning Scheme for Subscription Television Issues Paper

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# Contents

<b>Introduction</b>	<b>1</b>
<b>Addressing Issues for Comment</b>	<b>2</b>
1. Number of categories	2
2. Levels of captioning (annual captioning targets)	3
3. Freeze or continued annual increases of captioning targets	3
4. Retention of exemptions and target reduction orders (unjustifiable hardship)	4
5. Retention of nominated exemptions	4
6. New racing exemption	5
7. New low audience share exemption	5
8. Publication of captioning information	6
9. Retention of certain captioning rules	7

# Introduction

The Australian Communications and Media Authority (the ACMA) is responsible for the implementation and enforcement of captioning rules in Part 9D of the *Broadcasting Services Act 1992* (the BSA) and in subordinate instruments, such as the *Broadcasting Services (Television Captioning) Standard 2013* (the Standard).

The ACMA welcomes the opportunity to make a submission in response to the issues paper, *A Captioning Scheme for Subscription Television* (the Issues Paper).

The ACMA notes the intention of the Issues Paper is to inform the making of a Ministerial regulation intended to replace existing captioning rules for subscription television licensees currently in Division 3 of Part 9D of the BSA (the Regulation). The expectation is that the Regulation will simplify the subscription television captioning framework for all stakeholders, including licensees and audiences.

The ACMA's submission addresses the 'Issues for Comment' from the perspective of the regulator charged with implementing and administering the changes proposed in the Issues paper.

The ACMA supports amendments that will both maintain appropriate levels of captioning and simplify and improve the current framework.

# Addressing Issues for Comment

## 1. Number of categories

### *Issue for comment*

Should the 5 categories of STV services listed in Table 5 above be adopted in the Scheme? If so, is it appropriate to average the captioning levels for the movie and general entertainment categories?

The ACMA supports the proposal to reduce the number of subscription television service categories from 9 (the current number) to 5. Collapsing the 3 categories for STV movie services and for STV general entertainment services into a single category for each would simplify compliance for licensees.

Currently, a STV general entertainment service that is broadcast in substantially the same form by two or more licensees can have different captioning targets, depending on the category for which it has been nominated by the licensee. This can be confusing to audiences and create complexities for licensees. As noted in the Issues paper, typically, a licensee that broadcasts a greater number of STV general entertainment services has more flexibility to decide in which category such a service should be placed.

The ACMA has observed that where a channel is broadcast by more than one licensee, channel providers may agree to provide captioning to meet the lowest applicable target, which tends to favour licensees that broadcast a greater number of STV general entertainment services. This may put other licensees in the position of being in breach of the captioning rules for failing to meet the captioning target when providing a service with the same level of captioning as a competitor, or having to apply to the ACMA for a target reduction order.

This kind of situation would be avoided if licensees could not choose between different service categories for STV general entertainment services.

The ACMA notes that while this issue has not affected STV movie services in the same way, the simplification of categories will give audiences clearer expectations about the required captioning target for a service.

The ACMA has no view on the appropriate captioning target for a merged movie or general entertainment category, but makes the following observations about the proposal to set targets based on the average of the existing movie and general entertainment categories, especially if the intention is to maintain the overall net level of captioning that is currently provided by each licensee:

- When calculating average captioning targets, consideration should be given to the fact that the existing categories (A, B and C) currently include different numbers of services.
- Consideration could also be given to the existing level of captioning that is currently provided. For example, the level of captioning achieved for STV movies is currently 98% captioning, suggesting that a target higher than the average may be achievable by licensees.
- If an average figure is calculated, it will mean that current 'Category C' movie and general entertainment services will be subject to a higher target. Depending on when in 2021-22 the Regulations come into effect, consideration should be

given to transitional arrangements in case licensees have already finalised captioning plans with channel providers for the 2022-23 financial year and had not planned to meet the new, higher, 'average' target. To prevent licensees from being disadvantaged by a change, the Regulation could include a grandfathering provision, so that, for 2022-23, if a service does not meet the new target, it is not in breach as long as it would have met the target for its category, had the current statutory provisions continued to apply.

## 2. Levels of captioning (annual captioning targets)

### ***Issues for comment***

What is an adequate level of captioning for STV services to commence on 1 July 2022?

- a. Resetting the annual captioning targets at 2020-21 levels?
- b. Remaining at the 2021-22 annual captioning targets?
- c. Moving to the 2022-23 annual captioning targets?
- d. Some other set of targets? Please explain why.

The ACMA does not have a view on whether existing captioning targets for STV service categories should be retained or, if not, what the appropriate new targets should be.

## 3. Freeze or continued annual increases of captioning targets

### ***Issues for comment***

- a. Is it appropriate that annual STV captioning levels be frozen or should captioning levels continue to increase by 5 per cent per annum as per the existing rules at subsection 130ZV(2) in the BSA?
- b. If STV annual captioning levels are frozen, should this freeze be permanent or reviewed after a period of time? If the latter, what should that period of review be?

As the intention of the legislation as originally enacted was to provide a captioning framework that provides for a 100% target over time, it would be consistent with this intention for revised captioning targets to continue to increase automatically over time.

If the requirement to increase the captioning target annually is removed, it is unlikely that the overall level of captioning provided by licensees will increase from initial levels set in the Regulation. If targets are frozen, this should be for a short-term period and be subject to a review after 24 months.

## 4. Retention of exemptions and target reduction orders (unjustifiable hardship)

### *Issue for comment*

- a. As audience share or the difficulty in captioning racing channels are factors in applications for exemption or target reduction orders based on hardship, is it necessary to retain these exemption or target reduction orders based on hardship for STV licensees, given the proposed introduction of new exemptions based on objective and transparent criteria (see Proposal 4 and 5)?
- b. If these exemptions and target reduction orders are retained, should their:
  - i. availability be limited to circumstances where other exemptions do not apply?
  - ii. assessment criteria be amended? If so, how?

The ACMA is of the view that the existing system of exemption and target reduction orders made by the ACMA, based on 'unjustifiable hardship' should not be retained if the additional exemption options set out in the Issues Paper are introduced (although transitional arrangements for existing orders should be included). This is because the process is administratively burdensome and having a combination of exemptions and discretionary orders adds complexity into the framework and associated decision-making processes for licensees and the ACMA. The ACMA notes that the existing process of exemption and target reduction orders has also been criticised by advocacy groups as lacking in transparency.

If the Regulation retains exemption and target reduction orders, in addition to new exemption options, their duration should be limited to one year, and the grounds for the ACMA to make an order (and the criteria to be considered) should be for hardship caused by 'exceptional circumstances' that are not contemplated by the design of other exemption options. In effect, the application for an order should only be an option of last resort for licensees.

Exceptional circumstances would be one-off, non-ongoing, events that affected captioning during the year, that were not foreseen by the licensee and that do not relate to grounds where other exemption options in the Regulation would apply. For example, if the Regulation makes provision for a low audience-share exemption, a licensee should not be permitted to apply to the ACMA for an order on the basis that the audience share of the service (whatever its size) means that the requirement to caption would impose a hardship on the licensee.

## 5. Retention of nominated exemptions

### *Issue for comment*

Is it appropriate for this exemption to be retained until such time as the proposed new exemptions set out at proposals 4 and 5 can be claimed?

In its current form, the nominated services exemption can lead to a channel having different captioning targets because it is provided by a different licensee. As is the case with multiple STV service categories for STV movie services and STV general entertainment services, this can be confusing to audiences and create complexities for licensees.

The ACMA expects that when the nominated service exemption is discontinued and the number of categories is collapsed, the same channel provided by different licensees will have the same captioning target. This would mean that if a channel provider enters into an arrangement with a licensee to meet a captioning target, the captioning provided will

equally assist any other licensee that provides the channel. Accordingly, the ACMA supports the removal of the 'nominated services exemption'.

In relation to the proposal that this exemption be retained until such time as the proposed new exemptions can be claimed, the ACMA considers this is not appropriate. The ACMA notes that, nominated services exemptions set out in section 130ZX of the BSA were to have ceased at the end of the current financial year. As licensees have been aware of the end date of the section 130ZX exemption, retaining this provision until such time as proposed new exemptions can be claimed may create an unfair disadvantage to a licensee that has already taken steps to address their captioning obligations post 1 July 2022.

## 6. New racing exemption

### ***Issue for comment***

As the criteria for this new proposed exemption is objective and self-evident, it is proposed that STV licensees do not apply for racing exemptions but should publish the channels to which this exemption applies each financial year. Options for the publication of exemptions are raised for comment at Proposal 6. Is it appropriate that this exemption be 'claimed' by publication only?

In general, the ACMA is aware that some racing services may not meet the proposed 70% threshold to claim this exemption. An option to address this could be for services that do not meet this threshold to only be required to caption an equivalent proportion of non-racing content (e.g. magazine-style programming that is not live race calls or replays of live race calls) to make up the difference.

In terms of how the exemption would be claimed in practice, the ACMA suggests that this could work in a similar way to how the exemptions for new services are currently claimed, in that licensees could nominate services as falling within this exemption when reporting (or publishing) compliance (e.g. on an annual basis).

## 7. New low audience share exemption

### ***Issues for comment***

- a. Is there any evidence that a threshold other than less than 0.1% is a more appropriate threshold level for a low audience share exemption? What is the alternative threshold and the evidence of its appropriateness?
- b. Where available, is the OzTAM measurement used in the 'A2' report appropriate for determining the low audience share for the purposes of this exemption? Are there measures that are more appropriate?
- c. Is an exemption period of 2 years appropriate for this exemption? If not, what alternative period is more appropriate and why?
- d. Should the low audience share exemption be claimed by 'publication', where both the details of the exemption and the data relied upon to demonstrate the low audience share are published?

The ACMA supports changes aimed at simplifying the framework, including the proposed low audience share exemption.

To the extent that STV services should be exempt on the basis of having a low audience share, the ACMA is of the view that the nominated threshold of 0.1% for a service based on OzTAM calculations is reasonable.



A 2-year exemption period on these grounds may be appropriate. For ease of administration, licensees should only be permitted to apply for additional 2-year periods that commence after the end of the previous 2-year period (this would prevent a rolling exemption on this basis).

In terms of how the exemption would be claimed in practice, the ACMA suggests that this could work in a similar way to how the exemptions for new services are currently claimed, in that licensees could nominate services as falling within this exemption when reporting (or publishing) compliance. The ACMA's view is that in order to claim the exemption, licensees will need to provide evidence of audience numbers and the basis for the application of the exemption specific to the licensee. This evidence should be based on independently verifiable sources (e.g. OzTAM). OzTAM could be consulted to determine whether audience share information can be broken down by licensee.

## 8. Publication of captioning information

### ***Issues for comment***

- a. What information should be published?
  - i. Should the overall, actual percentage of captioning proposed to be delivered by STV licensees for each channel for the current financial year be published?
  - ii. Should a list of services that are not captioned and the relevant exemption and/or target reduction orders be published?
  - iii. Should information about whether individual programs are captioned or not be published?
  - iv. Should a requirement to include information on whether a program is captioned or not be included in the Electronic Program Guides of STV Licensees?
- b. When should information be published?
  - i. For information about the captioning levels and applicable exemptions and target reduction orders at a service (channel) level, should information be published before the start of every financial year (noting that the new, proposed exemptions will apply from the beginning of each financial year)?
- c. If retrospective exemptions remain in place or new services become available during the financial year, how should published reports be amended?
- d. Where should information be published? Should information about the captioning levels and applicable exemptions and target reduction orders at a service (channel) level be published on:
  - i. the ACMA website
  - ii. the website of each STV licensee
  - iii. both the ACMA website and on the website of each STV licensee?
- e. Should information about individual programs be published in the program guides (electronic and otherwise) of STV licensees?

The ACMA agrees with the principle expressed in the Issues Paper that captioning levels should be transparent to audiences. The ACMA notes that in some cases, complaints it has received from viewers have referred to the absence of accurate captioning information provided by a licensee or have been made because it was not clear to a viewer whether a captioning requirement applied to a program or service.

The ACMA notes that there is currently no specific requirement for licensees to either provide captioning information in a program guide, or to ensure that it is accurate or up to date. The ACMA is therefore of the view that proposals for additional transparency included in the Issues Paper, such as the introduction of a 'captioning plan', would benefit viewers, alongside licensee commitments to include captioning information (including required targets) for services and programs on both their website and electronic program guides. This information should be updated to ensure that audiences are able to make informed decisions about their viewing options.

The ACMA is of the view that audiences should have access to captioning information on the website of each STV licensee, as it will be the main access point for subscribers and potential subscribers.

In addition to the publication of day-to-day captioning information to assist deaf and hearing-impaired viewers to decide whether to watch specific programs, audiences may also benefit from the publication of annual captioning information, including targets and whether those targets are achieved. This will assist viewers and stakeholders to evaluate the success of the entire captioning framework with respect to individual licensees. Information published by licensees could be similar to the information that is already required under the annual compliance reporting rules in Division 6 of Part 9D of the BSA.

## 9. Retention of certain captioning rules

***Issue for comment***

Should the modified formula for STV services be modified in any way? If so, why and how?

The ACMA has no view on the formula for calculating the annual captioning target for STV sports services.

The ACMA is of the view that provisions to disregard unforeseen technical/engineering breaches (currently in section 130ZZAB of the BSA) should be retained in the Regulation.