

A Response to the *Deregulation in the Communications Portfolio Framing Paper* December 2013

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About Media Access Australia

Media Access Australia is Australia's only independent not-for-profit organisation devoted to increasing access to media for people with a disability.

Access to media, enabled through technology, empowers people to be independent, gain knowledge, make their own choices and be active members of our society.

We promote inclusion by providing information and expertise on the accessibility of mainstream technologies to government, industry, educators, consumer organisations and individuals.

We work as a catalyst for change across television, video, cinema, the arts, education, digital technology and online media, with a primary focus on people who are blind or vision impaired, or Deaf or hearing impaired.

Reducing regulation long-term

Thank you for the opportunity to look at longer-term issues around reducing regulation. We see three issues around the access provisions of the *Broadcasting Services Act* that we would like to raise with the government for further discussion:

1. The highly legalistic approach to caption quality issues undertaken by the ACMA.
2. The inconsistent approach to the caption exemption process by the ACMA
3. The likelihood of the audio description advocacy process leading to complex regulation and significant use of unnecessary resources.

In all cases we have outlined the issues and what we see as the regulatory burdens/potential costs surrounding these and have suggested ways forward.

We would welcome an opportunity to discuss the practical detail and implications of these further with the Minister's office and the Department.

Simplifying approach to caption quality undertaken by the ACMA

The ACMA's approach to caption quality complaints is entirely reactive. It waits for a complaint to be lodged, opens a case file for each complaint, investigates each complaint in isolation from others, and generally takes several months to issue a ruling (sometimes closer to a year). This approach is extremely protracted and costly, as well as frustrating for people making complaints and expecting a more timely response. For broadcasters it means that every complaint has to be treated as a potential serious breach of a license condition and thus a legal response is the first reaction.

The real world experience is much more subtle and should be focussed on fixing small problems quickly and dealing with genuine systemic issues when they are identified.

Caption problems, which can be due to either technical issues or problems with the creation of the captions, tend to fall into two categories. They can be restricted to an individual program, or they can be systemic issues which have a long-term impact. The ACMA's approach is ineffective in



dealing with both categories. It cannot react fast enough to technical issues or caption supply issues that have impacted on an individual program, sometimes resulting in a complete loss of captions, as these usually need to be dealt with immediately before they affect subsequent programs. And by treating each complaint in isolation, it can miss important, systemic problems affecting caption quality, such as consistently poor live captioning on one channel or one program.

The consumer making the complaint generally wants it to be fixed quickly and preferably before the next episode is broadcast or the program repeated. The primary concern is being able to access a decent service, not “punishment” of some wrongdoing. From the broadcaster’s perspective, it wants an environment where problems are dealt with in an appropriate way in proportion to their severity and impact, not a “one size fits all approach”; especially one that is overly legalistic and creates a natural reaction to be defensive.

This issue is not simple and there needs to be some changes to the approaches made by the ACMA and some education of both consumers and broadcasters. To help this process MAA is currently undertaking a major research white paper on captioning standards and methods of evaluating caption quality internationally, which will make recommendations about how the ACMA could deal more effectively with issues relating to caption quality. This paper will be published in February 2014 and has already attracted international interest.

Without pre-empting the findings of the paper, the view of MAA is that more proactive and interactive approaches, such as those taken by Ofcom in the UK, lead to more cost-effective regulation and better outcomes for consumers and broadcasters. Ofcom’s approach requires more-timely reporting of compliance by broadcasters, including reports of caption error rates on sample live captioned programs. It also deals firmly with broadcasters which fail to comply with legislative requirements. Broadcasters are therefore conscious of their obligations and strive to comply. This reduces the number of complaints, and the costs to Ofcom of dealing with them. The whole system is publicly transparent and properly focuses on the tiny minority of broadcasters that attempt to not comply with an industry-wide system and gain some kind of unfair competitive advantage.

The ACMA caption exemption process

The BSA allows for the ACMA to grant exemptions to the captioning requirements on the grounds of unjustifiable hardship. Although this process was subject to a form of public consultation, the ACMA did not provide any reasonable explanation for why it granted a range of exemptions, and in a very inconsistent way. The exemption process again was very legalistic and indicated that the ACMA did not see any role in looking at the real-world situation and suggesting alternative approaches to ensure a consistent policy approach and, more importantly a competitive level playing field and consistent outcomes for consumers.

The range of exemptions showed that the length of an exemption was guided more by what a licensee had applied for, rather than looking at the best outcome for the situation. This process needed to be a lot more transparent so that consumers could understand the rationale for why a channel should be exempted and licensees were clear under what circumstances exemptions would be considered. The process for the first year gave no insight into this. MAA expects that future exemption applications will all be for the maximum 5 years and will be granted as that is the pattern that was established.



It is noted that clause 130ZZE of the BSA Amendment provides for a review of the access provisions to be undertaken by the ACMA by the end of 2015 and for this to be reported to the Minister by June 2016. However, we feel these issues (and the ones identified in the “immediate” category) warrant a broader discussion and investigation and that practical regulatory outcomes could be achieved earlier.

Audio description advocacy likely to lead to complex regulation issues

The introduction of an Audio Description (AD) service on Australian television is a primary issue for blind and vision impaired people and was highlighted by the successful advocacy leading to the trial of an AD service on the ABC in 2012. The subsequent lack of an ongoing service or discussion of an introduction of a service has led to extensive advocacy by blind and vision impaired consumers. This matter is currently the subject of 28 complaints to the Australian Human Rights Commission against the ABC for failing to provide an AD service beyond the 2012 trial. The conciliation hearing of these complaints is expected to occur in early 2014.

The strategy of lodging complaints by blind people is predominantly around a frustration that there is no ongoing service and no planned regulatory process to provide AD in Australia. This mimics strategies utilised by Deaf and hearing impaired advocates in the early 2000s to achieve increases in the captioning levels of free-to-air television and the first caption quotas for subscription television. Whilst these provided outcomes for consumers, the process (outlined below) was convoluted and resource-intensive, resulting in a dual-regulatory system for captioning on Australian television. Ultimately this was resolved by bringing together the captioning quotas and rules into the *Broadcasting Services Act* via the *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* and prescribing the *Disability Discrimination Act* as part of that process to ensure that captioning issues for television would not be dealt with that way. There is a very real likelihood that the process could be repeated with AD, leading to resources being tied up in dealing with DDA complaints, inconsistent negotiated outcomes and some regional stations not delivering a service.

It is worth recounting the steps that occurred with captioning to illustrate how convoluted and resource-intensive it became before being finally resolved with the 2012 amendment act.

Free-to-air television process

1. Free-to-air captioning enshrined in the BSA for 2001 with all programs between 6pm and 10.30pm, and all news and current affairs programs, whatever the time of broadcast.
2. *Disability Discrimination Act* complaints leads to an agreed undertaking in 2002 to increase captioning based on % quotas. Operates in parallel with BSA. This did not include all regional stations.
3. Temporary agreement extends quotas whilst BSA amendments being contemplated.
4. BSA amendments enacted and finally brought in quality issues as well.

Subscription television

1. No BSA coverage at first.
2. *Disability Discrimination Act* agreement brokered in 2004 to bring about captioning on subscription TV.



3. On expiry, new agreement attempted and rejected by AHRC. Decision referred to AAT in 2010.
4. BSA amendments proposed, but AAT agreement still being negotiated and confidential – higher levels under the confidential AAT arrangement.
5. Days after AAT agreement announced, BSA finally amended with new arrangements that are inconsistent with previous arrangements. Quality issues dealt with for the first time.

Impact of the DDA approach

1. Drawn out negotiation that is based around complaints, not a consistent public, policy-based approach to access.
2. AHRC has little enforcement power and managed by people with no broadcast knowledge.
3. Agreements are only between parties that were subject to original complaints.
4. Not part of a broadcasting regulation environment leading to double-reporting and multi-agency compliance.
5. Confusing for consumers as to where they take any grievances/issues.
6. No certainty for broadcasters.

Suggested approach

1. Orderly approach using the BSA whilst running an initial service on the ABC to inform the industry on how to run a full national service that is integrated into the broadcast operations.
2. Allows time for consumers, broadcasters and regulators to negotiate a sensible, practical outcome that works within existing regulatory processes.
3. The value of this process was outlined in the Media access review final report 2010: “Therefore, prescribing the relevant parts of BSA under the DDA will provide consumers and broadcasters with a level of regulatory certainty. It will provide certainty about future targets, one overarching regulatory system and a clear and cost-effective compliance and complaints mechanism.” (Page 17)
4. The *BSA Amendment Act 2012* includes a review mechanism (clause 130ZZE) that requires the ACMA to undertake a review of the access provisions before December 2015. This would seem the ideal opportunity to resolve the AD issue, particularly if the ABC had set up and was operating a proper service that could be used to inform this process.



Short-term regulation reform

		Response
1.	Description of legislation	<p>Section 130ZZ of the BSA states that:</p> <p>If:</p> <p><i>a) a subscription television licensee transmits a television program on a subscription television service; and</i></p> <p><i>(b) the program has been previously transmitted:</i></p> <p><i>(i) on the same subscription television service; or</i></p> <p><i>(ii) on another subscription television service provided by the licensee; and</i></p> <p><i>(c) the licensee provided a captioning service for the program when the program was so previously transmitted;</i></p> <p><i>the licensee must provide a captioning service for the television program transmitted as mentioned in paragraph (a).</i></p>
2.	Policy underlying legislation	The policy is intended to ensure that once a program has been captioned on subscription television, it will be captioned if repeated.
3.	Reason regulation is no longer needed/could be amended	<p>The intention of this provision was to mimic the requirement for free-to-air licensees to retain captions when a program is repeated on a multichannel that it also controls. This principle of “captioning following content” is sound, however the creation of this provision is simply impractical.</p> <p>The problem lies in that the subscription television license holder is different in nature to a television license holder, in that it does not have the same level of control and programming input for its individual channels (known as “services” in the Act). Therefore, the requirement that a licensee such as Foxtel must always check whether a particular program has been shown on</p>



		<p>another subscription channel, possibly with a different channel provider, perhaps years earlier, is impractical. The records which would allow it to check this may not exist, or not exist in a form which can be easily utilised.</p> <p>The ACMA also does not have any method for checking this. The rule is an impractical burden on subscription TV suppliers. It is also something which a consumer is very unlikely to lodge a complaint about as they do not have a boundless knowledge of every program captioned and where it was originally shown. (We do not know about any complaint about this to date.)</p>
4.	Proposal to remove or amend (if amend, please describe amendment)	Remove section 130ZZ (a) (ii) and replace with the requirement to repeat any previously captioned programs on that channel (which is similar to the free-to-air requirement).
5..	What impact removal/amendment will have on industry	It will remove the need for subscription TV suppliers to potentially have to track all captioned programs since captioning began on their services (in the case of Foxtel this was 2004.) If this is coupled with the other regulatory suggestion to have the channels declare upfront what their quota will be (it is currently after the year ends), then the natural market behaviour will be for the channel provider to fill its quota in the most effective way possible (and taking up any repeated, already captioned programs) is a common strategy used across the world and in Australia.
6.	What impact amendment/removal will have on consumers/individuals	We don't believe this will have any impact on consumers as the present requirement relies on a consumer to have a boundless knowledge of every program that has been captioned before and to know which channel it appeared on.

		Response
1.	Description of legislation	Sections 130ZVA and 130ZW of the BSA deal with subscription television movie services and general entertainment services which will attract caption quotas. Subscription TV services must nominate up to 11 of the former and 43 of the latter as the ones that will meet the quotas. However the act states that they nominate these to the ACMA for each financial year "before the



		end of the financial year”, which means they would be within their rights to do this on 30 June.
2.	Policy underlying legislation	To ensure caption quotas are met and to ensure that it is clear what the caption quota is for each channel.
3.	Reason regulation is no longer needed/could be amended	We recommend that the regulation should be amended so that subscription TV services must notify the ACMA about which services will be the ones to meet the quotas for a financial year <i>before</i> that financial year commences.
4.	Proposal to remove or amend (if amend, please describe amendment)	Wording should be amended from “by written notice given to the ACMA before the end of the financial year” to “by written notice given to the ACMA before the beginning of the financial year”.
5..	What impact removal/amendment will have on industry	<p>This will mean the each subscription TV service will be aware of its captioning obligations at the beginning of each year and plan accordingly, thus allowing it to have control over captioning costs, know that it may not be subject to last-minute changes by a licensee and to have a marketable product whereby it can inform consumers before they purchase a package, which channels will be captioned and to what percentage.</p> <p>This also brings it into line with the free-to-air requirements where the quotas and channels covered are known at the start of the year. Thus there would be a level regulatory approach for free-to-air and subscription television over captioning requirements.</p> <p>For the ACMA it will allow easier tracking of which channels need to have captions and to what levels, rather than having to both check levels of captioning and to ensure that overall caption requirements have been met. It also would allow the ACMA to take action if a channel looked like it was not on target to meet its stated quota. At present, this is only reported after the year has ended and when the only real option for ACMA is a punitive approach.</p>
6.	What impact amendment/removal will have on consumers/individuals	This will provide essential certainty to consumers about subscription TV services. Deaf and hearing impaired consumers will be able to select which package they want to subscribe to with full knowledge of the level of captioning that is



		required to be provided on those channels. At present there is no way that they can properly determine what the level of captioning is on a channel prior to purchase.
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