

The Senate

Environment and Communications
Legislation Committee

Broadcasting Services Amendment (Improved
Access to Television Services) Bill 2012
[Provisions]

June 2012

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Recommendations

Recommendation 1

2.21 The committee recommends that the government consider amending the bill to include the words 'with captions' following the words 'previously transmitted' in subsections 130ZR(4)(f), (5)(e), (6)(e) and (f), and (7).

Recommendation 2

2.43 The committee recommends, subject to the previous recommendation, that the bill be passed.

Chapter 1

Introduction

1.1 On 19 June 2012, the Senate, on the recommendation of the Senate Selection of Bills Committee, referred the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012 [Provisions] to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 25 June 2012.¹

1.2 The reasons given for referral of the bill were to examine:

- the commercial and regulatory implications on broadcasters of making the proposed captioning obligations a condition of a broadcasting license;
- the implications for free-to-air commercial networks if the proposed obligations are not met due to factors beyond their control (such as failure by a third party captioning provider to provide services); and
- the implications for the long-term viability of services provided by subscription television such as pass-through channels like BBC World News, CNN and Aljazeera.²

1.3 The bill was introduced to the House of Representatives by the Minister for Infrastructure and Transport, the Hon Anthony Albanese, on 30 May 2012 and passed without amendment on 20 June 2012.³ The bill was introduced to the Senate on 21 June 2012.⁴

1.4 In accordance with usual practice, the committee advertised the inquiry on its website and wrote to relevant organisations inviting submissions. The committee received 12 submissions (see Appendix 1).

1.5 The committee would like to give special thanks to the organisations that made submissions to the inquiry with such short notice.

Purpose of the bill

1.6 The bill seeks to amend the *Broadcasting Services Act 1992* to facilitate improved access to free-to-air and subscription television by people with a hearing impairment.

1 *Journals of the Senate*, No. 92–19 June 2012, p. 2528.

2 Senate Selection of Bills Committee, *Report No. 6 of 2012*, Appendix 1, p. 6.

3 *House of Representatives Votes and Proceedings*, No. 111–30 May 2012, p. 1521; and *House of Representatives Votes and Proceedings*, No. 115–20 June 2012, p. 1592.

4 *Journals of the Senate*, No. 94–21 June 2012, p. 2598.

1.7 The bill proposes to introduce new and increase existing legislative requirements for the provision of captioning services by commercial, national and subscription television broadcasters. The bill would also require that emergency warnings broadcast on television must be transmitted in the form of text and speech and captioned wherever reasonably practicable.⁵

1.8 When introducing the bill, the minister noted that:

Access to electronic media is important to all members of our community, including those with a hearing impairment. It is expected that by 2020 hearing loss is likely to affect more than five million Australians.

...

The passing of this bill will improve the accessibility of television, ensuring a more inclusive viewing experience for all Australians.⁶

1.9 The bill seeks to implement the government's response to a number of recommendations made as part of the Department of Broadband, Communications and the Digital Economy's review into media access.

1.10 The bill is also consistent with Australia's international obligations under the United Nations Convention on the Rights of Persons with Disabilities to promote, protect and ensure the rights of people with a disability.⁷

Background

1.11 The Australian Bureau of Statistics estimates that approximately 2.67 million Australians—one in every eight people—have some form of hearing loss.⁸ Over the next decade, an ageing population is expected to lead to an increase in the number of Australians who experience hearing impairments.⁹ Hearing loss is expected to affect more than five million Australians by 2020.¹⁰

5 Explanatory Memorandum, p. 1.

6 The Hon Anthony Albanese, MP, Minister for Infrastructure and Transport, *House of Representatives Hansard*, 'Second reading speech: Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012', 30 May 2012, p. 8.

7 Explanatory Memorandum, pp 3–5.

8 Australian Bureau of Statistics (ABS), *2007/08 National Health Survey*, ABS Cat. No. 4364.0, ABS, Canberra, 2009, p. 15.

9 DBCDE, *Media Access Review Discussion Report*, November 2009, p. 1, www.dbcde.gov.au/television/television_captioning/media_access_review/media_access_review_discussion_report (accessed 21 June 2012).

10 Access Economics, *Listen hear! The Economic impact and cost of hearing loss in Australia*, Report for the Cooperative Research Centre for Cochlear Implant and Hearing Aid Innovation and the Victorian Deaf Society, Melbourne, 2006, p. 39, www.audiology.asn.au/pdf/listenhearfinal.pdf (accessed 21 June 2012).

1.12 For many Australians, visual and hearing impairments make it hard to enjoy a digital world that most people take for granted.

Captioning¹¹

1.13 Captioning is the presentation of audio content as text on screen. Captions include descriptions of speech, sounds, laughter and music.

1.14 Captions are usually displayed on the bottom of a television screen (or in some cases on a separate screen, such as in cinema complexes) to show which character is speaking or where the sound is coming from.

1.15 There are two types of captioning: open and closed. Open captioning is overlaid onto the original recording of a television program or movie and appears on screens automatically. Closed captioning is hidden from the normal television picture and requires a teletext decoder to be viewed.

1.16 Teletext is the generic name for the inclusion of text information (such as captions) within a broadcast television signal. The text data is encoded onto a part of the television signal not normally shown by regular television sets called the Vertical Blanking Interval (VBI). Special decoders or television sets with integrated teletext decoders are able to receive and display the data on the screen.

1.17 Television guides list captioned programs with a 'CC' for closed captions or an 'OC' for open captions. Most broadcasters include an in-vision logo at the start of each captioned program.

Image: Logos used to represent open and closed captioning

Closed captions



Open captions



1.18 Captions are produced in two different ways depending on whether they are for programs that are pre-recorded (offline captions) or for a program that is broadcast live (online captions).

1.19 Offline captions are created when sufficient production time enables captioning from a pre-recorded program. A copy of the taped program is transcribed by captioners who are also required to check for spelling and timing issues. Offline

11 Information in this section is drawn from the Australian Broadcasting Corporation website, 'Closed captions: Frequently asked questions', www.abc.net.au/reception/tv/ccfaq.htm (accessed 21 June 2012).

captions result in precise transcripts being placed under relevant speakers at the bottom of the screen. After the pre-recorded program is captioned, the caption file is encoded into the VBI of the tape and is ready for broadcast.

1.20 Online captions are produced by highly trained stenographers who use shorthand machines to type captions as the words are spoken. Phonetic spelling and minor contractions may be used where required. Online captions are typically presented as a scrolling two-line block of text in a fixed location of the screen. It is not possible for the online captions to be moved to avoid graphics or images.

1.21 Captioning of programs on Australian television to assist those with a hearing impairment began in 1982 when the Australian Caption Centre, a not-for-profit institution, began providing services to the ABC and the Nine and Ten networks. The Seven Network also introduced an in-house captioning service around the same time.¹²

Regulatory framework

1.22 The *Broadcasting Services Act 1992* provides for the captioning of free-to-air television programs. In addition, the *Disability Discrimination Act 1992* seeks to promote equal opportunity and access for people with a disability across all electronic media.¹³

1.23 Schedule 4, clause 38 of the *Broadcasting Services Act* deals with captioning. The current captioning requirements oblige each commercial television broadcasting licensee and each national broadcaster to provide a captioning service for television programs transmitted during prime viewing hours (currently defined as 6.00 pm to 10.30 pm) and for news or current affairs programs transmitted outside prime viewing hours.

1.24 It is a condition of a commercial broadcasting license for broadcasters to comply with these captioning requirements. The Australian Communications and Media Authority (AMCA) has responsibility for enforcing compliance with licence conditions and is empowered to deal with breaches of conditions. The ACMA is however limited to considering whether or not a licensee is providing captioning services and cannot investigate concerns about the quality of captioning.¹⁴

12 Parliamentary Library, Unpublished *Bills Digest 2011–12*, 'Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012', p. 4.

13 Other than the general non-discriminatory provisions of the *Disability Discrimination Act 1992*, there is no regulatory requirement specifically for the audio description (captioning) of electronic media.

14 *Broadcasting Services Act 1992*, sections 147–151.

Industry codes

1.25 In addition to the provisions in the Broadcasting Services Act, the broadcasting industry is to develop codes of practice and register these with the ACMA.¹⁵ The *2010 Commercial Television Industry Code of Practice* developed by Free TV Australia on behalf of commercial television licensees is the current industry code.¹⁶

1.26 Under the code the commercial television industry is required to:

- ensure that closed captioning is clearly indicated in program guides, press advertising, program promotions and at the start of the program;
- exercise due care in broadcasting closed captioning and ensure that adequate procedures are in place to monitor the quality of captioning;
- provide adequate advice to hearing-impaired viewers if scheduled closed captioning is not transmitted; and
- provide the information contained in emergency or safety announcements visually wherever practicable.¹⁷

1.27 The Australian Subscription Television and Radio Association (ASTRA) has similarly developed industry codes for the subscription television industry. The *Subscription Broadcast Television Code* (2007), *Subscription Narrowcast Television Code* (2007) and the *Open Narrowcast Television Code* (2009) contain guidelines for providing captions.¹⁸

1.28 The subscription television industry codes ensure that where closed captioning is made available it will be clearly identified in program guides and when extending the range of programs captioned, the broadcaster will consult with organisations representing the hearing impaired.¹⁹

Complaints process

1.29 If a viewer believes that a broadcaster has failed to comply with an industry code they may write to the relevant broadcaster within 30 working days of the broadcast at issue. If a commercial broadcaster does not answer the complaint within

15 *Broadcasting Services Act 1992*, section 123.

16 Free TV Australia, *2010 Commercial Television Industry Code of Practice*, www.freetv.com.au/media/Code_of_Practice/2010_Commercial_Television_Industry_Code_of_Practice.pdf (accessed 21 June 2012).

17 Free TV Australia, *2010 Commercial Television Industry Code of Practice*, section 1.24.

18 Australian Subscription Television and Radio Association (ASTRA) website, 'Codes of Practice', www.astra.org.au/Menu/Policy/Codes-of-Practice (accessed 21 June 2012).

19 For example, see ASTRA, *Subscription Broadcast Television Code*, 2007, section 2.4, <http://s3.amazonaws.com/assets.astra.org.au/material/codes%5CSTBCodesofPractice2007.pdf> (accessed 21 June 2012).

30 working days, or 60 working days for a subscription broadcaster, the complainant may refer the issue to the ACMA for consideration.

1.30 In assessing the complaint, the ACMA must determine whether or not a breach of the relevant code has occurred. If a breach has occurred, the ACMA may direct the broadcaster to comply with the code. Failure to comply with such a direction may result in a financial penalty.²⁰

Disability Discrimination Act

1.31 The Disability Discrimination Act makes disability discrimination unlawful and aims to promote equal opportunity and access for people with a disability. Under the Act, individuals can lodge complaints of discrimination and harassment with the Australian Human Rights Commission (AHRC).

1.32 The AHRC is responsible for receiving complaints of discrimination under the Act and attempting to conciliate agreements between the parties. The AHRC may also, on application, grant temporary exemptions from complaints in relation to specific issues for up to five years.²¹ The effect of an exemption is that actions or circumstances covered by the exemption are not unlawful under the Disability Discrimination Act while the exemption remains in force.

1.33 In 2009 the AHRC negotiated an agreement with the free-to-air television industry to reduce discrimination in accessing media by setting captioning targets for television broadcasts.²² In exchange for their commitments, the agreement provided broadcasters with a temporary exemption from complaints relating to captioning.²³ The agreement covered the period 2009 to 2011.

1.34 Under the agreement, free-to-air broadcasters were required to increase captioning targets by five per cent each year on programs broadcast between the hours of 6.00 am and midnight the same day.²⁴ The captioning targets for each year are set out in the table below.

20 Australian Communications and Media Authority website, 'Broadcasting investigations', www.acma.gov.au/WEB/STANDARD/pc=PC_90147 (accessed 22 June 2012).

21 Australian Human Rights Commission website, 'Exemptions under the Disability Discrimination Act', www.hreoc.gov.au/disability_rights/exemptions/exemptions.html (accessed 22 June 2012).

22 Australian Human Rights Commission website, 'Temporary exemption: Free to air television captioning (No. 3)', http://humanrights.gov.au/disability_rights/exemptions/tvcap/dec082.htm (accessed 21 June 2012).

23 Media Access Australia website, 'Free-to-air TV', <http://mediaaccess.org.au/research-policy/australian-access-regulation/television/free-to-air-tv> (accessed 21 June 2012).

24 Australian Human Rights Commission website, 'Temporary exemption: Free to air television captioning (No. 3)', http://humanrights.gov.au/disability_rights/exemptions/tvcap/dec082.htm (accessed 21 June 2012).

Table: Proposed captioning targets for free-to-air television broadcasters under the Australian Human Rights Council agreement 2009–2011²⁵

Year	2009	2010	2011	2012
Captioning target	75%	80%	85%	90%

1.35 An extension of this five per cent per annum increase would have required the free to air networks to provide 100 per cent captioning by 2014. This accords with the captioning targets outlined in the bill.

1.36 In May 2012 the AHRC negotiated a five-year agreement with the Australian Subscription Television and Radio Association (ASTRA) to ensure that captioning levels on subscription television increase over the next three years.²⁶ The new targets across a 24-hour period are to:

- increase captioning for some subscription movie channels from 55 per cent to 75 per cent;
- increase captioning for some subscription general entertainment channels from 35 per cent to 55 per cent; and
- increase captioning for some subscription sports channels from 5 per cent to 15 per cent.²⁷

Media access review

1.37 Between 2008 and 2010 the Department of Broadband, Communications and the Digital Economy conducted a review into media access for the hearing and vision impaired.²⁸

1.38 The department commenced the review by releasing a discussion paper that examined, amongst other issues, the availability of captioning and audio description for free-to-air television, subscription television and film. The discussion paper

25 Australian Human Rights Commission website, 'Temporary exemption: Free to air television captioning (No. 3)', http://humanrights.gov.au/disability_rights/exemptions/tvcap/dec082.htm (accessed 21 June 2012).

26 Australian Human Rights Commission website, 'Pay TV captioning to increase over the next three years,' www.hreoc.gov.au/about/media/news/2012/42_12.html (accessed 21 June 2012).

27 Australian Human Rights Commission website, 'Pay TV captioning to increase over the next three years,' www.hreoc.gov.au/about/media/news/2012/42_12.html (accessed 21 June 2012).

28 Department of Broadband, Communications and the Digital Economy (DBCDE) website, 'Media access review', www.dbcde.gov.au/television/television_captioning/media_access_review (accessed 21 June 2012).

received 168 submissions from representatives of the television and film industries and disability organisations.²⁹

1.39 The subsequent discussion report outlined possible approaches the government could adopt to improve audio description and caption levels on free-to-air and subscription television and other electronic media. Consultation on the report included 54 submissions from stakeholder groups.³⁰

1.40 The final report of the review was released in 2010 and contained 22 recommendations to improve audio description and captioning levels in Australia.³¹ In commenting on the report, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, outlined the government's intention to:

...move to immediately implement the Report's recommendations, and call on industry and disability group stakeholders to similarly take action to implement recommendations that affect them.³²

1.41 The government committed to introduce legislation to:

- provide regulatory certainty by consolidating captioning requirements for both free-to-air and subscription television broadcasters into the Broadcasting Services Act;
- raise captioning targets to provide a better outcome for people with a disability; and
- introduce requirements for caption quality.³³

1.42 The government also committed to conducting a further review of captioning in 2013 to consider the effectiveness of the changes and the impact of transformations

29 DBCDE, *Media Access Review Discussion Paper*, April 2008, www.dbcde.gov.au/television/television_captioning/media_access_review/media_access_review_discussion_paper (accessed 21 June 2012).

30 DBCDE, *Media Access Review Discussion Report*, November 2009, www.dbcde.gov.au/television/television_captioning/media_access_review/media_access_review_discussion_report (accessed 21 June 2012).

31 DBCDE, *Media Access Review Final Report*, December 2010, www.dbcde.gov.au/television/television_captioning/media_access_review (accessed 21 June 2012).

32 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Improving media access for vision and hearing-impaired people', Media release, 3 December 2010, www.minister.dbcde.gov.au/media/media_releases/2010/109 (accessed 21 June 2012).

33 The Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Improving media access for vision and hearing-impaired people', Media release, 3 December 2010.

in the communications industry, such as the National Broadband Network and the switchover to digital television.³⁴

Outline of the bill

1.43 The bill seeks to insert a new Part 9D into the Broadcasting Services Act which would set out the captioning requirements for broadcasters in relation to particular television programs and broadcasting services.

Captioning obligations

1.44 The proposed captioning provisions would replace the concept of prime viewing hours with the concept of designated viewing hours. The new designated viewing hours would be implemented in two phases:

- from the commencement of the provisions until 1 July 2014, designated viewing hours would be the same as the current prime viewing hours—from 6.00 pm to 10.30 pm; and
- from 1 July 2014 onwards designated viewing hours would be from 6.00 am to midnight on the same day.

1.45 The proposed captioning requirements would still require commercial television broadcasting licensees and national broadcasters to caption 100 per cent of television programs during the designated viewing hours and to caption news or current affairs programs broadcast outside these hours.

1.46 Certain programs aired during designated viewing hours would not be required to be captioned, such as television programs that are wholly in a language other than English or programs that consist wholly of music.

Multi-channel services

1.47 If a commercial television broadcasting licensee or national broadcaster provides a multi-channel service, captioning would not be required on programs shown on the multi-channels unless the program has been previously broadcast on the primary channel.

Annual captioning targets for 2012–14

1.48 In order for commercial television and national broadcasters to gradually achieve the objective of providing a captioning service for 100 per cent of television programs broadcast between 6.00 am and midnight each day, annual captioning targets have been included in the bill.

34 The Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Improving media access for vision and hearing-impaired people', Media release, 3 December 2010.

1.49 Captioning targets would increase incrementally for commercial and national broadcasters by five per cent each financial year, starting at 90 per cent in the financial year beginning 1 July 2012 and increasing to 95 per cent the next financial year.

1.50 In calculating the percentage of programs captioned during the targeted hours, advertising, sponsorship and community service announcements would be excluded.

1.51 If a broadcaster believed they cannot meet their captioning targets they would be able to apply in writing to the ACMA for an exemption or target reduction. The ACMA would be able to allow for an exemption or target reduction if it is satisfied that a refusal would impose an unjustifiable hardship on the applicant. In considering the application the ACMA would be required to have regard to issues such as:

- the nature of the detriment likely to be suffered by the applicant;
- the financial circumstances of the applicant;
- the estimated amount of money required to be paid by the applicant if an exemption or reduction were refused;
- the extent to which captioning services are provided by the applicant; and
- the impact of making an exemption or target reduction on deaf or hearing impaired viewers.

1.52 The ACMA would only be able to make an exemption following a public consultation period. If the ACMA were to make a target reduction for a broadcaster, this reduction would apply for a financial year. A broadcaster would have to ensure that it meets the new caption targets.

1.53 Any exemptions or target reductions approved by the ACMA would have to be published on its website.

Subscription television broadcasters

1.54 The annual captioning targets for subscription television broadcasters are divided into nine categories based on genres and types of programming. The categories and captioning targets for subscription broadcasters are included in the table below.

Table: Annual captioning targets for subscription television broadcasters

Category	Percentage for financial year commencing 1 July 2012	Percentage for financial year commencing 1 July 2013	Percentage for financial year commencing 1 July 2014
Category A subscription television movie service	60%	70%	75%
Category B subscription television movie service	40%	50%	55%
Category C subscription television movie service	30%	40%	45%
Category A subscription television general entertainment service	40%	50%	55%
Category B subscription television general entertainment service	30%	40%	45%
Category C subscription television general entertainment service	15%	20%	25%
Subscription television news service	10%	12.5%	15%
Subscription television sports service	10%	12.5%	15%
Subscription television music service	5%	5%	5%

1.55 The classification of Category A, B and C movie and general entertainment services would be applied according to the number of movie and entertainment services provided by the subscription broadcaster in a financial year.

1.56 If a subscription broadcaster provided between one and six television movie services, those services would be Category A services. If more than six movie services were provided, the subscription broadcaster would have to nominate with the ACMA for six of those services to be Category A services, one to be a Category B service and the remaining services would be classified as Category C services.

1.57 Similarly if a subscription broadcaster provided between one and 18 general entertainment services in a financial year, those services would be Category A services. If more than 18 general entertainment services were provided, the subscription broadcaster would have to nominate 18 services to be Category A services, 16 services as Category B services and the remaining services would be classified as Category C services.

1.58 The bill would also place a cap on the number of programs that are required to be captioned. If more than 11 subscription movie services, 43 general entertainment services, seven sport services or six music services were shown by a broadcaster in a financial year prior to 1 July 2022, the services shown above this limit would not be required to be captioned. The number of services that are exempt from captioning would decrease over time until the exemption ceases on 1 July 2022.

1.59 The subscription television broadcaster would have to make an application with the ACMA on which services over the cap would not be captioned. The ACMA would be required to hold a public consultation on the proposals.

1.60 From 1 July 2015 the annual captioning targets would increase incrementally by multiplying the previous year's annual captioning target by 1.05 until each annual captioning target reaches 100 per cent. If a percentage worked out using this formula were not a multiple of five per cent, the percentage would be rounded up to the nearest multiple of five per cent.

1.61 For example, if the annual captioning target for a subscription television music service for the financial year beginning 1 July 2015 is five per cent, the formula would be: $5\% \text{ (annual captioning target)} \times 1.05 = 5.25\%$.

1.62 As the increased annual target would not be a multiple of five per cent, the annual captioning target for the financial year beginning 1 July 2016 would be rounded up to 10 per cent.

1.63 Subscription television broadcasters would also be required to caption program repeats.

Certain breaches to be disregarded

1.64 Certain breaches of the proposed broadcasting changes would be disregarded if:

- the breach were attributable to significant difficulties of a technical or engineering nature; and
- those difficulties could not reasonably have been foreseen by the licensee or broadcaster.

1.65 An example of a breach that may be disregarded, as proposed in the Explanatory Memorandum, is if there were technical outages due to local weather conditions that resulted in a television program being broadcast without captions.³⁵

35 Explanatory Memorandum, p. 22.

Captioning standards

1.66 The bill would allow the ACMA to determine, by legislative instrument, standards that relate to the quality of captioning services. 'Quality' is to include the readability, comprehensibility and accuracy of the captioning.

1.67 The ACMA would have to take all reasonable steps to ensure that the quality standards are in force at all times one year after the commencement of the proposed legislation.

Emergency warnings

1.68 The bill would require broadcasters, when requested by an emergency services agency, to transmit any emergency warning in the form of text, speech and, if it were reasonably practicable to do so, provide a captioning service for the emergency warning.

Reporting

1.69 Broadcasters would be required to prepare and provide a report on compliance with the captioning requirements to the ACMA within 90 days of the end of each financial year. The report would have to include information on the broadcaster's compliance with the annual captioning targets and the ACMA-imposed quality standards as well as the provision of emergency service warnings.

Chapter 2

Key issues

2.1 All submitters to the inquiry were supportive of the bill on the basis it would improve the accessibility of television for people with a hearing impairment.¹ The Australian Communications Consumer Action Network's (ACCAN) view was indicative of these:

ACCAN is of the view that this Bill...provides significant improvements in access to Australian television services for consumers who are Deaf, hearing-impaired or who rely on closed-captions.²

2.2 Whilst supportive of the changes proposed in the bill, many submitters raised some concerns and suggested changes to the bill. Concerns included:

- the application of captioning requirements on a strict liability basis;
- captioning requirements for digital multi-channels; and
- monitoring and reporting, including the complaints process and the quality of captioning.

2.3 These, and some other issues specifically regarding subscription television, are discussed in the following sections of this chapter.

Strict liability

2.4 The Australian Broadcasting Corporation (ABC), Special Broadcasting Service (SBS), Australian Subscription Television and Radio Association (ASTRA) and Free TV Australia all raised concerns regarding the application of captioning requirements on a strict liability basis.³

2.5 The ABC explained:

Prior to 2007 amendments to the Broadcasting Services Act 1992 (BSA), the captioning requirements therein applied 'as far as practicable'. However, this wording was removed in 2007 and since this time, captioning requirements have applied on a strict liability basis.

1 See Deaf Australia Inc, *Submission 1*; Communications Law Centre, *Submission 2*; Australian Broadcasting Corporation (ABC), *Submission 3*; Media Access Australia, *Submission 4*; Special Broadcasting Service (SBS), *Submission 5*; Australian Communications Consumer Action Network (ACCAN), *Submission 6*; COTA Australia, *Submission 7*; Blind Citizens Australia, *Submission 8*; Australian Human Rights Commission (AHRC), *Submission 10* and Free TV Australia, *Submission 11*.

2 ACCAN, *Submission 6*, p. 1.

3 ABC, *Submission 3*, p. 3; ASTRA, *Submission 9*, pp 7–8; SBS, *Submission 5*, p. 2 and Free TV Australia, *Submission 11*, p. 2.

The requirement for very high captioning quotas (95% and 100%) raises the prospect of broadcasters being in breach of legislative requirements for events beyond their control, such as in the event of unavoidable disruptions to the delivery of captioning services caused by technical interruptions to the delivery of captions within the chain of supply from caption service providers. Broadcasters should not be held liable for such events.⁴

2.6 Similarly, Free TV Australia argued:

Broadcasters should not be penalised for external difficulties beyond their control when they have otherwise acted reasonably and honestly in discharging their obligations. These difficulties occasionally arise, despite ongoing efforts by broadcasters to maintain a very high quality of service and ensure full compliance with their captioning requirements.⁵

2.7 To address this concern, Free TV Australia proposed that the bill be amended by the inclusion of a new subsection 130ZUB as follows:

(2) If:

- (a) apart from this subsection, a commercial television broadcasting licensee has breached a provision of this Part; and
- (b) in doing so, the commercial television broadcasting licensee acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused;

then the breach is to be disregarded in determining whether the licensee has complied with the provision.⁶

2.8 The ABC and SBS both recommended that the phrase 'as far as practicable' be re-inserted into the Act.⁷

2.9 ASTRA stated that 'operational circumstances that apply to commercial television broadcasting licensees equally apply to subscription television broadcasting and subscription television narrowcasting licensees' and was keen to ensure that:

...if there is to be provision in the Bill that, for example, disregard breaches of captioning obligations that are due to the actions of a third party, this should apply equally to all broadcasting licensees required to provide captioning services, not just commercial television broadcasting licensees.⁸

4 ABC, *Submission 3*, p. 3.

5 Free TV Australia, *Submission 11*, p. 2.

6 Free TV Australia, *Submission 11*, p. 3.

7 ABC, *Submission 3*, p. 3 and SBS, *Submission 5*, p. 2.

8 ASTRA, *Submission 9*, pp 7–8.

2.10 In response to concerns about the application to broadcasters of strict liability for meeting captioning quotas, the Department of Broadband, Communications and the Digital Economy (DBCDE) stated:

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).⁹

2.11 The department also advised that the bill already provides that certain breaches of the captioning obligations by a broadcaster will be disregarded.¹⁰ DBCDE stated:

...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.¹¹

2.12 The DBCDE also noted that:

The delivery of the captioning service is within the broadcasters' 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, that is a risk that the broadcaster accepts and manages in their contractual arrangements.¹²

Committee view

2.13 The committee is sympathetic to the concerns raised by broadcasters regarding the application of captioning requirements on a strict liability basis. The committee understands there may be occasions where, despite best efforts by a broadcaster, an equipment or technical failure means that captioning requirements are not met.

2.14 The committee welcomes the department's advice that the bill enables breaches of this nature to be disregarded so that no penalty is imposed on the broadcaster.

9 Department of Broadband, Communications and the Digital Economy (DBCDE), *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 1.

10 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 1.

11 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 2.

12 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 2.

Captioning on digital multi-channels

2.15 As noted in Chapter 1, the 'basic rule' captioning obligations proposed in the bill would not apply to:

...any multi-channelled commercial television broadcasting service (other than the core or primary service), with the exception of television programs that have previously been broadcast on the core or primary service (subsection 130ZR(4)). This means that television programs that premiere with captions on the core or primary service and are repeated on a multi-channelled service must be captioned on the multi-channelled service as well...any SDTV multi-channelled national television broadcasting service or a HDTV multi-channelled national television broadcasting service, with the exception of television programs that have previously been broadcast on the core or primary service (subsections 130ZR(6) and (7)). This means that television programs that premiere with captions on a national broadcaster's core or primary television service and are repeated on one of their other services must be captioned on the second service as well...¹³

2.16 The Communications Law Centre, SBS and ASTRA discussed the exemption of free-to-air multi-channels from the captioning requirements. The Communications Law Centre opined:

Viewership of digital commercial multi-channels is increasing, as commercial networks introduce unique content. Whilst some broadcasters have voluntarily introduced captions on some programs, caption levels are well below those on the primary channels. We submit that **captioning obligations should extend to commercial digital multi-channels in 2014** (after the cessation of analogue television transmissions). There will be no distinction between the core or primary channel and digital multi-channels in the all digital broadcasting environment.¹⁴

2.17 SBS sought clarification of the exemption for national broadcasters. SBS suggested:

The exemption for multi-channelled services could be stated better. The exemption (subsections 130ZR(6) and (7) for the national broadcasters) provides that captioning is not required on multichannelled services with the exception of programs that have premiered on the core or primary service *with captions* and are repeated on a multi-channel service (as set out in Explanatory Memorandum). The current draft does not directly state this. It only refers to programs "previously transmitted by the national broadcaster" on the core or primary service. Adding the words "with captions" after the words "previously transmitted" where they appear in subsections 130ZR(6)(e), (f) and (7) would clarify the exemption.¹⁵

13 Explanatory Memorandum, p. 15.

14 Communications Law Centre, *Submission 2*, p. 2.

15 SBS, *Submission 5*, p. 3.

2.18 ASTRA appeared to be concerned about the apparent discrepancy between the captioning requirements of free-to-air television broadcasters, by way of exemptions for multi-channels, in comparison with the captioning requirements for subscription television broadcasters. ASTRA argued:

We note that, from 1 July 2014, the effect of the legislation for FTA [free-to-air] broadcasters would be for a total minimum captioning obligation of no more than 75% of content broadcast on the primary channel. More importantly, the legislation would also continue indefinitely the current exception from captioning for FTA multichannels (except where that program was previously captioned on the primary channel), even though the audience reach on those FTA multichannels is far greater than most channels on STV [subscription television]. This means an indefinite total minimum captioning requirement for FTA commercial broadcasters of just 25% of all content broadcast across the three channels of each network from 1 July 2014 onwards, compared with an ultimate long-term target of 100% captioning of all content broadcast on all STV channels provided by an STV licensee.⁶ Given such low captioning expectations for commercial FTA broadcasters in the legislation as drafted, ASTRA cannot see any public policy justification for commercial FTA broadcasters to have recourse to apply for exemption orders or target reduction orders for unjustifiable hardship.¹⁶

Committee view

2.19 It is the committee's view that the exemptions from the captioning requirements granted to multi-channels find an appropriate balance between improving the accessibility of television for people who are hearing impaired and not placing an onerous burden on broadcasters. It is appropriate that programs which have been premiered with captions and are subsequently repeated on a multichannel must also be captioned.

2.20 The committee sees merit in the SBS's suggestion for clarification of the exemption where a program that was premiered with captions is repeated on a multichannel. The committee therefore recommends that the government consider amending the bill to include the words 'with captions' following the words 'previously transmitted' in subsections 130ZR(4)(f), (5)(e), (6)(e) and (f), and (7).

Recommendation 1

2.21 The committee recommends that the government consider amending the bill to include the words 'with captions' following the words 'previously transmitted' in subsections 130ZR(4)(f), (5)(e), (6)(e) and (f), and (7).

16 ASTRA, *Submission 9*, p. 8.

Reporting

2.22 A number of submitters raised concerns about the quality monitoring and reporting requirements outlined in the bill.¹⁷

2.23 Under the proposed changes, broadcasters would be required to prepare and provide a report on compliance with the captioning requirements to the Australian Communications and Media Authority (ACMA) within 90 days of the end of each financial year. The report would have to include information on the broadcaster's compliance with the annual captioning targets and the ACMA-imposed quality standards as well as the provision of emergency service warnings.¹⁸

2.24 Submitters were concerned that the reporting requirements set out in the bill are too broad and ill defined. According to the ABC:

...as there are few indications as to the nature or scope of the required reporting, there is the potential for very onerous reporting requirements to arise.¹⁹

2.25 Free TV Australia was similarly concerned that 'the requirement is stated very broadly and there is no visibility around what the scope of the reporting requirement will be'.²⁰ Free TV further submitted that:

Conceivably, this provision could result in a broadcaster having to keep a running audit of captioned programs. This would require a broadcaster to review every single captioned program (over 6500 hours per year for each broadcaster) and make subjective assessments about matters such as comprehensibility. This would have significant resourcing implications.²¹

2.26 Broadcasters also questioned the effectiveness of requiring reporting on quality standards.²² Both the ABC and SBS were concerned that there are currently no recognised industry standards on captioning quality.²³ For example, SBS stated that it:

...considers that it would be a particularly onerous burden to require broadcasters to report on their compliance with captioning standards when there are currently no standard industry measures.²⁴

17 For example, see ABC, *Submission 3*, p. 4; SBS, *Submission 5*, p. 2; and Free TV Australia, *Submission 11*, p. 4.

18 Division 6.

19 ABC, *Submission 3*, p. 4

20 Free TV Australia, *Submission 11*, p. 4.

21 Free TV Australia, *Submission 11*, p. 4.

22 For example, see ABC, *Submission 3*, p. 4; and SBS, *Submission 5*, p. 2.

23 ABC, *Submission 3*, p. 4; and SBS, *Submission 5*, p. 2.

24 SBS, *Submission 5*, p. 2.

2.27 The ABC pointed out that it would be difficult for the ACMA to create quality standards on captioning:

The issue of captioning quality is extremely complex and involves a range of limiting factors, including human input, the performance of technical systems and the performance of user equipment. The setting of caption quality standards which do not allow consideration of these limiting factors could potentially result in unreasonable and unachievable standards and could result in a high rate of unavoidable or inadvertent breaches of the standards.²⁵

2.28 DBCDE informed the committee that broadcasters are currently required report annually, and sometimes quarterly, on captioning to the Australian Human Rights Commission.²⁶ The department also indicated that the ACMA proposes to use this as a starting point when considering the appropriate levels of reporting on compliance with captioning requirements.²⁷

2.29 The department continued:

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.²⁸

2.30 The DBCDE also advised the committee that the ACMA proposes to consult with broadcasters in the development of requirements for record keeping and reporting on compliance.²⁹

Committee view

2.31 The committee believes the annual reporting requirements will bring transparency and accountability to the captioning requirements. The committee also notes that there is a precedent for such reporting provisions as broadcasters are currently required to report to the Australian Human Rights Commission.

Specific concerns regarding subscription television

2.32 The subscription television industry, through its peak body ASTRA, was supportive of the bill.³⁰ However, ASTRA raised concerns relating to pass-through

25 ABC, *Submission 3*, p. 3.

26 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 2.

27 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 2.

28 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 3.

29 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 3.

30 ASTRA, *Submission 9*, p. 1.

television services and the use of quotas in the subscription television business model.³¹

2.33 ASTRA was concerned that requiring pass-through television channels such as BBC World News and CNN to be subject to the captioning quotas would be:

...an expensive process and will significantly add to the cost of delivering these services into Australia. This is then likely to mean that it will become unviable to offer those services in Australia, resulting in a loss of differentiation.³²

2.34 ASTRA therefore recommended that a general exclusion for these pass-through channels 'would avoid the costly and time-consuming process of making an exemption application for each service'.³³

2.35 Also of concern for the subscription television industry was the situation where the same channel was provided by different subscription providers and, in accordance with the proposed changes, some broadcasters would be required to provide captions whilst others would not.³⁴

2.36 To illustrate this point, ASTRA gave the example of Transact (a subscription television broadcaster providing services in the ACT and regional Victoria) which has less than 18 general entertainment services.³⁵ Under the bill, all of the general entertainment services provided by Transact would be Category A services and require captioning. However many of the same channels provided by larger broadcasters such as FOXTEL would be Category B or Category C general entertainment services and be subject to different captioning requirements.³⁶

2.37 For example, the Australian Christian Channel is currently shown by Transact and FOXTEL. Under the bill, the channel would become one of Transact's 18 Category A general entertainment services and would require captioning. FOXTEL, which broadcasts more than 18 general entertainment services, could nominate the channel to be one of its Category B or Category C services and not have to provide captioning.

2.38 ASTRA recommended that the bill be amended to ensure that the least onerous captioning requirements apply, as a minimum standard, to channels that are broadcast by multiple subscription broadcasters.³⁷

31 ASTRA, *Submission 9*, p. 1.

32 ASTRA, *Submission 9*, p. 2.

33 ASTRA, *Submission 9*, p. 2.

34 ASTRA, *Submission 9*, p. 6

35 ASTRA, *Submission 9*, p. 6.

36 ASTRA, *Submission 9*, p. 6.

37 ASTRA, *Submission 9*, p. 6.

2.39 In responding to these claims by the subscription television industry, DBCDE informed the committee that:

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...The Bill therefore does not permanently exempt types or categories of services, such as services sourced from international pass-through providers.³⁸

2.40 The DBCDE stated that the bill does, however, provide all broadcasters with access to an exemption order or target reduction order for unjustifiable hardship. The DBCDE further noted 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.³⁹

Committee view

2.41 The committee acknowledges the concerns raised by the subscription television industry. The committee notes that the intention of the provisions relating to subscription television are broadly consistent with the obligations that arise under the *Disability Discrimination Act 1992* as well as Australia's international obligations, including the United Nations Convention on the Rights of Persons with Disabilities. Therefore the committee does not believe that the subscription television industry should be granted special exemption from providing captioning services.

2.42 The committee recommends, subject to the previous recommendation, that the bill be passed.

Recommendation 2

2.43 The committee recommends, subject to the previous recommendation, that the bill be passed.

Senator Doug Cameron

Chair

38 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 3.

39 DBCDE, *Answer to written question on notice*, 21 June 2012 (received 22 June 2012), p. 4.

Additional comments from the Coalition

The Coalition believes that the short amount of time given to the Committee to conduct this inquiry was inadequate and did not allow stakeholders sufficient time to prepare evidence.

While agreeing with the general drive of the Broadcasting Services Amendment (Improved Access to Television) Bill 2012, the Coalition adds additional commentary to the report in order to raise some legitimate concerns with the Bill. Our consultations with industry suggested there were several areas where imprecise drafting or insufficient clarity in the Explanatory Memorandum created a potentially unfair and uncertain situation for broadcasters in relation to reporting requirements, programs finishing after midnight, international pass-through channels, and strict liability for certain breaches.

The Coalition therefore moved amendments in the House to that effect that the Government was nonetheless unwilling to consider. The Coalition is of the belief the Bill could be improved upon without in anyway reducing the level of service and assurance that is provided to users of this service. We acknowledge the importance of the provision of the captioning service to people in the hearing impaired community, and recommend the Bill not be opposed.

Senator Bridget McKenzie

Senator for Victoria

Appendix 1

Submissions and answers to questions taken on notice

Submissions

- 1** Deaf Australia
- 2** Communications Law Centre, UTS
- 3** Australian Broadcasting Corporation (ABC)
- 4** Media Access Australia
- 5** Special Broadcasting Service (SBS)
- 6** Australian Communications and Consumer Action Network (ACCAN)
- 7** COTA Australia
- 8** Blind Citizens Australia
- 9** ASTRA
- 10** Australian Human Rights Commission
- 11** Free TV Australia
- 12** Vision Australia

Answer to question taken on notice

Department of Broadband Communications and the Digital Economy, answers to questions on notice (received 22 June 2012)