

The Senate

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Environment and Communications  
Legislation Committee

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Broadcasting and Other Legislation  
Amendment (Deregulation) Bill 2014  
[Provisions]

February 2015

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***Committee address***

PO Box 6100

Parliament House

Canberra ACT 2600

*Tel:* 02 6277 3526

*Fax:* 02 6277 5818

*Email:* ec.sen@aph.gov.au

*Internet:*

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications)

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## **Committee membership**

### ***Committee members***

Senator Anne Ruston, Chair	LP, South Australia
Senator Anne Urquhart, Deputy Chair	ALP, Tasmania
Senator Matthew Canavan	NATS, Queensland
Senator James McGrath	LP, Queensland
Senator the Hon Lisa Singh	ALP, Tasmania
Senator Larissa Waters	AG, Queensland

### ***Participating member for this inquiry***

Senator Scott Ludlam	AG, Western Australia
Senator Rachel Siewert	AG, Western Australia

### ***Committee secretariat***

Ms Christine McDonald, Committee Secretary  
Ms Zoe Hutchinson, Principal Research Officer  
Mrs Dianne Warhurst, Administrative Officer



# Table of Contents

Committee membership .....	iii
<b>Chapter 1 - Background.....</b>	<b>1</b>
Introduction .....	1
Conduct of the inquiry.....	1
Background.....	1
Overview of the bill.....	2
Reports of other committees.....	8
<b>Chapter 2 - Key issues .....</b>	<b>9</b>
Introduction .....	9
Support for the legislation .....	9
Issues relating to Schedule 6 – Captioning .....	9
Issues relating to Schedule 3 – New Eligible Drama Expenditure auditing requirements.....	26
Consultation.....	27
Committee comment .....	30
<b>Australian Greens Dissenting Report - Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 .....</b>	<b>33</b>
<b>Appendix 1 - Submissions, additional information and answers to questions taken on notice .....</b>	<b>39</b>
<b>Appendix 2 - Public Hearing.....</b>	<b>41</b>



# Chapter 1

## Background

### Introduction

1.1 On 30 October 2014, on the recommendation of the Senate Selection of Bills Committee, the Senate referred the provisions of the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 (the bill) to the Senate Environment and Communications Legislation Committee (the committee) for inquiry and report by 9 February 2015.

1.2 The reasons for referral were that:

- the removal of auditing requirements for Australian content has the potential to significantly impact the amount of Australian content in the local broadcasting media landscape;
- there are significant concerns over the legislation's changes to captioning requirements; and
- both bills have the potential to significantly impact the viewing experience of Australian television content for local audiences.<sup>1</sup>

### Conduct of the inquiry

1.3 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and inviting submissions by 10 December 2014.

1.4 The committee received 27 submissions, which are listed at Appendix 1. The committee held a public hearing in Sydney on 2 February 2015.

1.5 The submissions and transcript of evidence may be accessed through the committee's website at:

[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Environment\\_and\\_Communications/Broadcasting\\_Deregulation](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation)

1.6 The committee thanks all the organisations and individuals who assisted the committee with the inquiry.

### Background

1.7 In the second reading speech to the bill, the Hon Malcolm Turnbull, Minister for Communications, stated that the telecommunications and broadcasting sectors are two of the most heavily regulated parts of the Australian economy. The Minister commented that their regulatory frameworks 'are still fundamentally based in a mid-1990s world of relatively stable technologies and business models'.<sup>2</sup> The Minister

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1 Selection of Bills Committee, *Report No. 14 of 2014*, 30 October 2014, Appendix 3.

2 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11606.

argued that, as a consequence of technological change, regulation had to be brought up to date.<sup>3</sup>

1.8 Finally, the Minister stated that there was a need to ensure that:

...as we go through our deregulatory agenda in this portfolio...we strike the right balance between deregulation and ensuring that there is diversity in our media industry, whilst always ensuring that consumer protections are both effective and relevant.<sup>4</sup>

### ***Communications Deregulation Roadmap***

1.9 The proposed changes set out in the bill align with the Government's commitment to reducing the regulatory burden for business.<sup>5</sup> In 6 May 2014, the Government released its *Communications portfolio: Deregulation Roadmap 2014* (Communications Roadmap). The Communications Roadmap identified proposals and areas for reform in telecommunications, radiocommunications, broadcasting and regulatory policy. The Communications Roadmap included the following proposed areas of reform and review in relation to broadcasting:

- digital television regulations;
- captioning requirements;
- Australian and children's television content quotas and sub quotas; and
- broadcasting compliance and reporting obligations of the Australian Communications and Media Authority (ACMA).<sup>6</sup>

### **Overview of the bill**

1.10 The bill amends the *Broadcasting Services Act 1992* (BSA), the *Radiocommunications Act 1992* (Radcomms Act) and the *Australian Communications and Media Authority Act 2005* (the ACMA Act) with the aim of reducing the regulatory burden on the broadcasting industry. The measures incorporated in the bill address both the issues identified in the Communications Deregulation Roadmap and through consultation with industry.<sup>7</sup>

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3 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

4 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11606.

5 Explanatory Memorandum (EM), Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014, p. 1.

6 Department of Communications, *Communications portfolio: Deregulation Roadmap 2014*, [http://www.communications.gov.au/deregulation/communications\\_portfolio\\_deregulation\\_roadmap\\_2014](http://www.communications.gov.au/deregulation/communications_portfolio_deregulation_roadmap_2014) (accessed 25 November 2014).

7 EM, p. 1.

### ***Digital switchover and restack provisions***

1.11 On 10 December 2013, the switchover from analogue television to digital-only was completed and the restack program commenced. The restack program involves the progressive reorganisation of television services across Australia to ensure that no television services use the digital dividend spectrum. The term 'digital dividend' refers to the spectrum that has been freed up by the switch from analogue to digital television.<sup>8</sup> The restack program is also to ensure that television services are transmitted in a more spectrally efficient manner. The restack program was scheduled to be completed by 31 December 2014.<sup>9</sup>

1.12 The regulatory framework to facilitate the switchover from analogue to digital-only television broadcasting was contained in Schedule 4 of the BSA. The bill proposes to amend the BSA, Radcomms Act and the ACMA Act to remove or amend the planning and licensing provisions that related to digital switchover and restack (once restack is completed).<sup>10</sup>

### ***Australian Communications and Media Authority planning powers***

1.13 Part 3 of the BSA sets out a range of Australian Communications and Media Authority planning powers in respect of the broadcasting services bands spectrum.<sup>11</sup> This includes planning criteria, consultation requirements and the requirement for the ACMA to develop a number of different types of planning instruments, including frequency allotment plans, licence area plans and television licence area plans.<sup>12</sup>

1.14 The Minister noted that, while these planning provisions were necessary when the ACMA was first established, 'many are now considered onerous, given the other legislative requirements the ACMA is required to adhere to'.<sup>13</sup> The Schedule 1 of the bill proposes the following amendments to the BSA to:

- repeal the requirement for the ACMA to prepare and maintain frequency allotment plans on the basis that the ACMA has completed the initial planning of services in the broadcasting services bands spectrum and has sufficient information and tools at its disposal to ensure that planning in one licence area will not compromise plans for adjacent licence areas (repeal of sections 24 and 25);<sup>14</sup>

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8 Department of Communications, *Digital dividend*, [http://www.communications.gov.au/radio/radiofrequency\\_spectrum/digital\\_dividend](http://www.communications.gov.au/radio/radiofrequency_spectrum/digital_dividend) (accessed 19 January 2014).

9 EM, p. 2.

10 EM, p. 2.

11 EM, p. 2.

12 EM, p. 2.

13 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

14 EM, p. 2.

- broaden and extend the scope of the Minister's directions power to provide specific or general directions to the ACMA concerning the preparation or variation of a frequency allotment plan (proposed subsection 26(8));<sup>15</sup>
- repeal the requirement for the ACMA to provide for wide public consultation when performing particular functions on the basis that the completion of the ACMA's initial planning of services in the broadcasting services bands spectrum means the requirement is unnecessary (proposed sections 27 and 35);<sup>16</sup> and
- make consequential amendments resulting from the amendments.<sup>17</sup>

### ***Captioning***

1.15 In his second reading speech, the Minister commented that reflecting stakeholder feedback, the Communications Roadmap identified captioning reporting as an area for reform in 2014.<sup>18</sup> He noted that, the Department of Communications and the ACMA had consulted with industry and key accessibility groups on a range of potential reforms that primarily seek to improve administrative arrangements for free-to-air broadcasters and subscription television licensees while requiring that they continue to meet captioning obligations.<sup>19</sup> The Minister concluded that:

I want to make it quite clear that broadcasting licensees will still be required to meet the same specified level of captioning for television programs to assist viewers with hearing impairment.<sup>20</sup>

1.16 Captioning is the text version of the audio component of an audio-visual program such as a television show. The provisions relating to captioning are currently set out in Part 9D of the BSA and aim 'to assist viewers with a hearing impairment by requiring Australian free-to-air broadcasters and subscription television licensees to meet specified levels of captioning for television programs'.<sup>21</sup> Part 9D also requires free-to-air broadcasters and subscription television licensees to meet target, quality, record-keeping and reporting requirements.<sup>22</sup>

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15 EM, p. 12.

16 EM, pp 13–14.

17 EM, pp 11–13.

18 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

19 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

20 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11607.

21 EM, p. 2.

22 EM, p. 2.

1.17 The bill proposes to amend Part 9D of the BSA to increase flexibility for free-to-air broadcasters and subscription television licensees in complying with captioning obligations by:

- removing annual reporting requirements for free-to-air by reverting to a complaints based compliance framework which reflects the increased consumer transparency afforded by 100 per cent captioning between 6am and midnight on primary channels (repeal of subsections 130ZZC(1) to (4));<sup>23</sup>
- allowing for the annual captioning target for subscription television channel providers to be 'averaged' across an associated group of sports channels (proposed subsection 130ZV(3));<sup>24</sup>
- granting exemptions from captioning obligations for new subscription television channels from one to almost two years, depending on when the new service commences (proposed subsection 130ZV(6));<sup>25</sup>
- restricting repeat captioning obligations to programs provided by the same channel provider (proposed subsection 130ZZ(2));<sup>26</sup>
- establishing a more efficient 'two-tiered' record keeping framework (proposed new section 130ZZD); and
- removing the obligation for the ACMA to conduct a review of captioning obligations by 31 December 2015 (repeal of Division 7).

1.18 The proposed amendments will also provide ACMA with greater flexibility when assessing whether free-to-air broadcasters and subscription television licensees are meeting the captioning quality standards by:

- requiring the Captioning Quality Standard<sup>27</sup> to differentiate between live and pre-recorded broadcasts (proposed subsection 130ZZA(2A));<sup>28</sup> and
- introducing a new exception to captioning quality breaches where the breach is due to engineering or technical failures (proposed subsection 130ZZA(7A)).<sup>29</sup>

### ***New Eligible Drama Expenditure Scheme auditing requirements***

1.19 The New Eligible Drama Expenditure Scheme, set out in Division 2A of the BSA, requires certain subscription television channel providers and licensees to spend

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23 EM, p. 44.

24 EM, p. 3.

25 EM, p. 3.

26 EM, p. 3.

27 The Captioning Quality Standard sets rules about the quality of captions for television services requiring them to be readable, accurate and comprehensible.

28 EM, p. 3.

29 EM, p. 3.

at least 10 per cent of their total programming expenditure on new Australia or New Zealand drama productions or co-productions.<sup>30</sup> In addition, New Eligible Drama Expenditure Scheme participants are required to report their annual eligible drama expenditure for the financial year by 20 August of the following year. The annual return must be in an ACMA approved form and accompanied by an auditor's certification.<sup>31</sup>

1.20 The bill proposes to remove the scheme's audit requirements by amending section 103B and subsections 103ZA(1) and 103ZB(1) of the BSA. The new provisions which still require subscription television channel providers and licensees to submit annual returns to ACMA. Subdivision 1 of Division 2A of Part 7 of the BSA is also to be repealed to remove the requirement for ACMA to issue compliance certificates to licensees, channel providers and part-channel providers, which state whether eligible drama expenditure requirements have been met, or whether there is a shortfall that needs to be made up the following year.<sup>32</sup>

### ***Control and ownership***

1.21 The bill proposes amendments to certain provisions within the media ownership and control framework. These amendments aim to address a number of anomalies regarding the operation of the legislation and to reduce reporting requirements. The Minister stated that:

The bill will also correct an anomaly in the way certain licence areas are treated with respect to the media ownership and control rules. This will make sure that the method used to calculate media diversity voices —the requirement variously five or four independent media voices—more accurately reflects the practical reality of commercial radio services available to residents in certain licence areas.

The bill will ensure, for example, that, where a smaller commercial radio licence area is entirely within another larger commercial radio licence area, the commercial radio services licensed to operate in the larger licence area are also counted as media diversity voices in the smaller licence area.<sup>33</sup>

### ***Complete overlapping licences areas***

1.22 The bill proposes to amend subsection 61AC(1) of the BSA to address an anomaly with regard to the calculation of media diversity voices in commercial radio licence areas. The anomaly arises as a commercial radio service licensed to operate in a licence area that entirely overlaps another licence area is not counted as voice in the smaller, overlapped licence area. The amendments aim to ensure that 'the method used

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30 EM, p. 3.

31 EM, p. 3.

32 EM, pp 36–37.

33 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11608.

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to calculate media diversity points more accurately reflects the practical reality of services available to residents in overlapped licence areas'.<sup>34</sup>

#### *Notification requirements*

1.23 The bill proposes to remove the requirement that commercial television broadcasting licensees, commercial radio broadcasting licensees, specified datacasting licensees and companies that publish associated newspapers provide an annual list of their directors to the ACMA (repeal section 62 and amend sections 63, 65A and 65B of the BSA). It was noted that the ACMA can access this information from other sources including the Australian Securities and Investments Commission.<sup>35</sup>

1.24 The amendments to section 63 will extend the requirement for commercial broadcasting licensees, specified datacasting licensees and publishers of associated newspapers, and persons who obtain control of any such licences or newspapers, to notify the ACMA of changes in control under sections 63 and 64 of the BSA from 10 calendar days to 10 business days from any such change. It was noted that this amendment will reduce the administrative burden on relevant entities by providing a more reasonable notification timeframe, while still allowing the ACMA to maintain accurate and current control registers.<sup>36</sup>

1.25 The amendments to sections 65A and 65B are consequential to the repeal of section 62.

#### *Licence area population determination*

1.26 Section 30 of the BSA provides that the ACMA may determine the population of a licence area, the populations of areas where licence areas overlap, and the total population of Australia. Population determinations inform a range of provisions in the BSA, including certain media ownership and control limits and local content obligations for regional commercial radio.

1.27 The bill proposes to amend sections 43C and 52. The amendments will provide grandfathering relief for commercial broadcasting licensees that, as a result of the making of a new population determination, would be in breach of the relevant statutory control and local content rules if they maintained their current commercial radio operations. This will prevent broadcasting licensees being adversely affected as a result of factors that are entirely beyond their control (i.e. changes in the population of licence areas).<sup>37</sup>

#### *Requirement to review codes of practice*

1.28 The bill proposes the repeal of section 123A and subclause 28 of Schedule 6 of the BSA. Section 123A requires the ACMA to periodically conduct reviews to assess whether a number of provisions of the BSA operate in accordance with

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34 EM, p. 4.

35 EM, p. 4.

36 EM, p. 4.

37 EM, p. 5.

prevailing community standards. Those provisions relate to codes of practice developed by industry groups representing commercial and community television licensees, open narrowcasting television services or datacasting licensees regarding community standards and the protection of children from harmful content.<sup>38</sup> Clause 29 mirrors section 123A and requires the ACMA to periodically conduct a review of the operation of subclause 28(4) to see whether that subclause is in accordance with prevailing community standards.

1.29 The Minister noted that there has never been a review under section 123A since its enactment in 1992 as there are alternative mechanisms for the ACMA to determine whether those provisions operate in accordance with prevailing community standards. Further, 'both provisions are clearly redundant and should be repealed'.<sup>39</sup>

### **Reports of other committees**

1.30 On 25 November 2014, the Parliamentary Joint Committee on Human Rights (PJCHR) tabled its *Sixteenth Report of the 44<sup>th</sup> Parliament* in the Senate, which examined the bill in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The report examined the bill and considered that the proposed changes to captioning requirements may constitute a limitation on the rights of persons with disabilities. The report sought further advice from the Minister for Communications regarding the compatibility of the proposed amendments to the captioning provisions with the rights to equality and non-discrimination.<sup>40</sup>

1.13 The Senate Standing Committee for the Scrutiny of Bills in its *Alert Digest No. 15 of 2014* raised concerns regarding Schedule 4, item 1 which would repeal section 123A of the BSA. As noted above, the section would remove the requirement for ACMA to conduct reviews to assess whether codes developed under subsections 123(3A) and (3C) of the BSA are in accordance with community standards and for these recommendations to be tabled in parliament. Due to the proposed removal of this tabling requirement, the committee requested the advice of the Minister as to why these amendments should not be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny. The committee noted that pending the Minister's reply the provisions may be considered to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the committee's terms of reference.<sup>41</sup>

1.31 The committee notes the reports of the PJCHR and the Scrutiny of Bills Committee and the matters raised.

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38 EM, p. 5.

39 The Hon Malcolm Turnbull, Minister for Communications, *House of Representatives Proof Hansard*, 22 October 2014, p. 11608.

40 Parliamentary Joint Committee on Human Rights, *Sixteenth Report of the 44<sup>th</sup> Parliament*, November 2014, p. 4.

41 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 15 of 2014*, 19 November 2014, p. 21.

# Chapter 2

## Key issues

### Introduction

2.1 There was general support for the proposed changes contained in the bill from the television industry. However, other submitters raised concerns in relation to Schedule 6 (captioning) and Schedule 3 (eligible drama program expenditure audits) of the bill. These issues are discussed below.

### Support for the legislation

2.2 Submitters voiced support for the Government's deregulation agenda. For example, Free TV Australia commented that commercial free-to-air television is the most heavily regulated media platform in Australia and welcomed any moves to repeal outdated or unnecessary regulations and reduce the red tape on commercial free-to-air broadcasters.<sup>1</sup> Free TV Australia, Australian Broadcasting Corporation (ABC) and Special Broadcasting Service Corporation (SBS) supported the entire suite of amendments proposed by the bill including the amendments to the captioning provisions.<sup>2</sup>

2.3 The Communications Law Centre (CLC), while commenting on captioning reform and New Eligible Drama Expenditure (NEDE) Scheme audits, expressed support generally for reforms to streamline regulation:

The CLC agrees with the Minister's view, articulated in his 2nd Reading Speech, that aspects of broadcasting legislation and regulation need to be reviewed in light of technological convergence and changes in service delivery. Out-dated and anachronistic regulations that no longer serve the public interest should be removed. The CLC therefore supports the removal of regulatory provisions relating to the transition to digital television as proposed by the Bill. It is also in the public interest to promote regulatory mechanisms that deliver outcomes more efficiently and effectively. The CLC therefore supports most of the proposed amendments to ownership and control regulation as proposed by the Bill.<sup>3</sup>

### Issues relating to Schedule 6 – Captioning

2.4 The importance of captioning services was recognised by submitters to the inquiry. They commented that captioning is critical for ensuring people who are deaf,

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1 Free TV Australia, *Submission 19*, p. 4.

2 See, for example, Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 21; Mr Michael Ward, ABC, *Committee Hansard*, 2 February 2015, p. 21; Ms Lesley Power, SBS, *Committee Hansard*, 2 February 2015, p. 21.

3 Communications Law Centre, *Submission 5*, p. 1.

or hearing impaired, have access to information.<sup>4</sup> For example, Mr Kyle Miers from Deaf Australia commented that:

... 'information is power'... There are various mediums to access information, but many of those are not accessible to deaf people, because they are not captioned... we [the deaf and hearing impaired community] rely heavily on accessible information via the television.<sup>5</sup>

2.5 Submissions from industry voiced commitment to closed captioning 'which promotes inclusion and accessibility for Australians'.<sup>6</sup> Free TV Australia also recognised the importance of captioning but stated that some of the current arrangements are onerous:

Free TV members recognise the importance of captioning services to the deaf and hearing impaired community and are committed to providing comprehensive, high quality captioning services, in line with and beyond their regulatory obligations. However, the current reporting requirements and administrative arrangements surrounding the provision of these services are unduly onerous and resource intensive.<sup>7</sup>

2.6 The question of whether the proposed amendments would maintain the availability and quality of captioning while reducing regulatory burden on industry was one of the key issues in evidence given to the committee.<sup>8</sup> Deaf Australia commented that the 'deregulation bill appears to have been drafted solely based on the perspective of the television industry' with 'no consideration for or attempt to seek out consumers to offer opinions or a different perspective'.<sup>9</sup> Deafness Forum of Australia also submitted that:

While acknowledging there are regulations in the current captioning framework that would benefit from refinement, this Bill has an emphasis on changes which would overwhelmingly benefit broadcasters and strongly

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4 See, for example, Mr Peter Lowe, *Submission 1*, p. 1; Ms Karen McQuigg, *Submission 2*, p. 1; Deafness Council WA, *Submission 3*, p. 2; CPSU, *Submission 4*, p. 1; Media Access Australia, *Submission 6*, p. 2; Name Withheld, *Submission 7*, p. 1; Age and Disability Discrimination Commissioner, *Submission 8*, p. 2; Australian Communications Consumer Action Network, *Submission 10*, pp 4–5.

5 Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 7.

6 ASTRA, *Submission 15*, p. 2.

7 Free TV Australia, *Submission 19*, p. 4.

8 See, for example, Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 7; Mr Michael Ward, ABC, *Committee Hansard*, 2 February 2015, p. 21; The Hon. Susan Ryan AO, Age and Disability Discrimination Commissioner, Australian Human Rights Commission, *Committee Hansard*, 2 February 2015, p. 10; Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, p. 2; Community and Public Sector Union, *Submission 4*, p. 1; Mr Lyndon Lockrey, *Submission 23*, p. 1.

9 Deaf Australia, *Submission 13*, p. 7.

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disadvantage consumers by removing protections that safeguard access to quality captioning services.<sup>10</sup>

2.7 The Community and Public Sector Union (CPSU) added its concerns about the bill's impact on the availability of captioning:

It is not clear how the Bill will improve captioning services for deaf or hearing impaired Australians. This should be the primary focus of any reforms to captioning regulation. Rather, the proposed changes will make it easier for broadcasters to provide less captioning and water down captioning quality while still meeting obligations.<sup>11</sup>

2.8 However, industry groups, both subscription television and free-to-air television, commented that the reforms contained in the bill primarily relate to the removal or amendment of administrative provisions, which will not impact adversely on the amount of captioning provided on Australian television.<sup>12</sup> For example, Ms Julie Flynn, Free TV Australia, which represents all of Australia's commercial free-to-air television broadcasters, stated:

...we are absolutely committed both to meeting our requirements to provide a certain level of captioning—100 per cent captioning between 6 am and midnight—and to the quality standards that apply in the act. We do not believe that any of these changes will have any material impact on either of those...<sup>13</sup>

2.9 Mr Michael Ward from the ABC also supported the amendments regarding captioning and stated the amendments would assist the ABC in continuing to meet its obligations:

We support the amendments...The ABC has a long history of providing broadcast captions...We are committed to delivering to the statutory requirements and beyond, both in terms of broadcast and online services, and we see that the amendments that are proposed here will actually assist us in continuing to do that...We are committed to delivering to the statutory requirements and beyond, both in terms of broadcast and online services, and we see that the amendments that are proposed here will actually assist us in continuing to do that.<sup>14</sup>

2.10 The Australian Subscription Television and Radio Association (ASTRA), the peak body representing subscription television in Australia, submitted that it was supportive of the proposed changes. Further, subscription television regularly exceed legislative requirements regarding captioning:

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10 Deafness Forum of Australia, *Submission 12*, p. 2.

11 Community and Public Sector Union, *Submission 4*, p. 1.

12 See, for example, ASTRA, *Submission 15*, p. 3. See also ABC, *Submission 24*, p. 1. See also Free TV Australia, *Submission 19*, pp 4 and 5–6; Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 21

13 Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 21.

14 Mr Michael Ward, ABC, *Committee Hansard*, 2 February 2015, p. 21.

Notwithstanding the legislated limit for [subscription television] channels being capped at 70 channels in FY14, Foxtel, a member of ASTRA, provided captioning in excess of this limit. For FY14, Foxtel not only delivered captioning on a number of additional channels—for example, Foxtel Movies Disney, Disney XD, Smooth, and Foxtel Store channels 903–914—but it also exceeded its captioning target for a significant number of its channels.<sup>15</sup>

2.11 The Department of Communications (the Department) reiterated that the amendments proposed in the bill are consistent with the Government's deregulation agenda and are aimed at reducing compliance costs, increasing flexibility for broadcasters in the way they meet their captioning obligations, and achieving greater administrative simplicity.<sup>16</sup> The Department's submission and witnesses at the public hearing confirmed that the amendments are not intended, or expected, to reduce the amount of captioned content available to hearing-impaired viewers, or the quality of captioning services provided. Dr Simon Pelling, Department of Communications, stated:

There is no erosion of the amounts of captioning that are required under the act, in anything we are doing. We are looking at...fairly straightforward measures to try to make simpler compliance by the industry in terms of those objectives, responding to concerns they have raised about some of the practical things about making captioning happen. A general principle behind that would be that, if you can release industry of some of its relatively unnecessary regulatory burdens, they are better able to do things that matter for consumers.<sup>17</sup>

2.12 In addition, the Department considered that the proposed amendments to be compatible with human rights and concluded that 'the amendments will better support the ability of television licensees to provide captioning services that benefit Australians with a disability, the absence of which would restrict their ability to access television services'.<sup>18</sup>

2.13 While the committee notes that the proposed changes will not reduce the amount of captioning on television, the following discussion addresses the major issues raised by submitters in relation to the captioning provisions contained in the bill:

- the removal of annual reporting by free-to-air broadcasters in relation to captioning obligations and ensuring compliance with captioning obligations through a complaints based system rather than through reporting and monitoring;

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15 ASTRA, *Submission 15*, p. 6. See also Foxtel, *Submission 18*, p. 1.

16 Department of Communications, *Submission 20*, pp 5–6.

17 Dr Simon Pelling, First Assistant Secretary, Department of Communications, *Committee Hansard*, 2 February 2015 p. 41.

18 Department of Communications, *Submission 20*, p. 6.

- allowing captioning to be averaged across subscription sports channels in a group;
- the exemption to captioning quality breaches in the case of technical or engineering failures;
- the automatic exemption of new subscription channels from captioning requirements for a period of one to almost two years;
- removal of the requirement for independent auditing of eligible drama program expenditure; and
- the lack of adequate consultation processes in relation to the proposed changes to captioning and eligible drama program expenditure.

***Annual reporting requirements and complaints based compliance framework***

2.14 Currently, broadcasters are required to report to the ACMA within 90 days of the end of the financial year on their compliance with their captioning obligations. The bill proposes to remove annual reporting by free-to-air broadcasters. The compliance arrangements will instead be based on existing mechanisms within the BSA which enable viewer complaints to the ACMA about alleged breaches of the captioning provisions and the ACMA's discretionary powers to investigate broadcasters' compliance with licence conditions along with broadcast matters more generally.<sup>19</sup>

***Removal of reporting requirements relating to captioning compliance for free-to-air broadcasters***

2.15 The Department commented that captioning obligations for the free-to-air television sector have gradually increased such that it is now required to provide 100 per cent captioning from 6 am to midnight on primary channels and for news or current affairs programs transmitted on primary channels at any time. The Department concluded that:

This means it is now clear to consumers when services do not meet captioning requirements on the primary channel enabling compliance to be assessed on the basis of complaints and other existing measures provided for in the BSA, rather than through annual reporting arrangements.<sup>20</sup>

2.16 The Department went on to note that the ACMA has reported a high level of compliance with the annual captioning target requirement for the 2012–13 reporting period and that there are significant compliance incentives for broadcasters to meet their captioning obligations. The Department concluded:

These compliance incentives, increased consumer transparency and high industry compliance rate strongly indicate that the removal of annual

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19 Department of Communications, *Submission 20*, p. 6.

20 Department of Communications, *Submission 20*, p. 6.

reporting requirements for the free-to-air broadcasters will not reduce the effectiveness of captioning requirements.<sup>21</sup>

2.17 The ACMA was also of the view that the proposed amendments would not impact adversely on the amount of captioning provided. Ms Jonquil Ritter, ACMA, stated:

I think it is fair to say that most of the issues, if not all, have come up through the complaints process and that, with 100 per cent during those key hours, we would think it would be unnecessary to report because we have complied with 100 per cent. Having got to the stage of 100 per cent, it seems sensible to have the minimum amount of regulation to achieve the outcome and that there will not be a problem caused by the removing of that annual reporting.<sup>22</sup>

2.18 Free-to-air broadcasters strongly supported the proposal to remove the annual reporting obligations in relation to captioning.<sup>23</sup> For example, the ABC stated that bill would remove 'onerous' reporting obligations while having no impact on the quality of captioning:

The Corporation supports these captioning amendments as they remove onerous reporting obligations...The amendments contained in the Bill will allow the Corporation to redirect resources away from reporting, but will have no impact on the way audiences experience captioning on its television services.<sup>24</sup>

2.19 Similarly, SBS argued that existing reporting obligations are burdensome and are not timely:

While SBS understands the importance of regulatory oversight by an independent regulator, SBS submits that this reporting does no more than indicate to the regulator, in some cases more than a year after the fact, that a problem has occurred and what steps were taken to rectify the problem.<sup>25</sup>

2.20 The committee also heard evidence about the onerous nature of the current reporting system. The ABC outlined its reporting requirements which include eight annual compliance reports on output and technical difficulties experienced in each state and territory.<sup>26</sup> Mr Tony Abrahams from Access Innovation Media, which provides captioning services, explained further:

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21 Department of Communications, *Submission 20*, p. 7; see also Dr Simon Pelling, First Assistant Secretary, Department of Communications, *Committee Hansard*, 2 February 2015, p. 40.

22 Ms Jonquil Ritter, ACMA, *Committee Hansard*, 2 February 2015, p. 42.

23 See, Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 21; Mr Michael Ward, ABC, *Committee Hansard*, 2 February 2015, p. 21; Ms Lesley Power, SBS, *Committee Hansard*, 2 February 2015, p. 21.

24 ABC, *Submission 24*, p. 4. See also Free TV Australia, *Submission 19*, pp 2 and 6–7.

25 SBS, *Submission 14*, p. 3. See also Ms Lesley Power, SBS, *Committee Hansard*, 2 February 2015, p. 25.

26 ABC, *Submission 24*, p. 4.

The reporting requirements at the moment are incredibly onerous. We put a couple of screenshots...[in our submission of] the form that you have to download from the ACMA to fill that in for every single breach. When you consider a 100 per cent captioning obligation and potentially every five seconds that you have missed should be a line item in one of those, you are talking about 17 boxes to fill in for one each individual one. That data has then got to be manually shifted from the broadcaster systems to that ACMA system and there is scope for error within that.<sup>27</sup>

2.21 However, Media Access Australia argued that it is not onerous for broadcasters to compile annual compliance reports and noted that:

Both [broadcasters] and their caption suppliers have records of all programs that have been captioned, while the suppliers submit reports about any program which has not been captioned, or only partially captioned, due to technical or other issues...

Reporting is a fundamental feature of compliance, consumer protection and efficient market operation, and should be maintained. It also provides the opportunity to highlight additional captioning outside of quotas, showing that parts of the industry are interested in pursuing more access, which is an excellent social (and business) outcome.<sup>28</sup>

2.22 In addition, a number of individuals and organisations, including those representing persons with disabilities, expressed concern that the removal of reporting requirements of free-to-air broadcasters in relation to captioning could undermine the availability of and quality of captions.<sup>29</sup> For example, one individual submitter argued that:

The proposed Bill will remove the annual reporting requirements for free to air broadcasters that have worked so well in improving captioning provision and quality. In effect they send a signal to broadcasters that they no longer need to take captioning provision seriously because they are no longer considered accountable.<sup>30</sup>

#### *Reverting to a complaints based system compliance framework*

2.23 The committee received submissions raising concerns about the proposed move to a complaints based compliance framework in respect of breaches of

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27 Mr Anthony Abrahams, Access Innovation Media Pty Ltd, *Committee Hansard*, 2 February 2015, p. 17.

28 Media Access Australia, *Submission 6*, p. 3.

29 See, for example, Mr Peter Lowe, *Submission 1*, p. 1; Ms Karen McQuigg, *Submission 2*, p. 1; Deafness Council WA, *Submission 3*, p. 2; CPSU, *Submission 4*, p. 1; Media Access Australia, *Submission 6*, p. 2; Name Withheld, *Submission 7*, p. 1; Age and Disability Discrimination Commissioner, *Submission 8*, p. 2; Australian Communications Consumer Action Network, *Submission 10*, pp 4–5.

30 See, for example, Ms Karen McQuigg, *Submission 2*, p. 2; Australian Communications Consumer Action Network, *Submission 10*, pp 4–5.

captioning obligations for free-to-air broadcasters.<sup>31</sup> For example, the CLC did not support this amendment, citing the potential risk of under reporting by users of captioning services in relation to potential breaches of regulatory requirements.<sup>32</sup>

2.24 The Deafness Forum of Australia argued that the proposed amendment would shift the burden onto the individual with a disability:

Of significant concern is the proposal to move to a complaints based mechanism – to require individual consumers to lodge their own complaints of inadequate or poor captioning in place of refinements and the removal of genuine 'red tape' in the current regulatory framework. People with disability have firsthand knowledge that a complaints approach is ineffective, places the burden of cost on the individual and does not drive systemic reform.<sup>33</sup>

2.25 Ms Lauren Henley from the Australian Human Rights Commission gave evidence to the committee that a complaints based system may be less effective in ensuring compliance because it:

...relies on people having an understanding of their rights under that legislation and where to go to lodge a complaint and how to lodge a complaint, and not everyone necessarily has access to that information.<sup>34</sup>

2.26 While accepting that simplifying the compliance system for captioning should be a priority, Mr Alex Varley from Media Access Australia argued that there are a range of challenges in a complaints based system.<sup>35</sup> He stated that ultimately consumers of captioning:

...just want to go home and watch TV; they do not want to be spending half their time sitting there worrying about whether something is complying with regulations. Once they do that, they have to get involved in this quite legalistic, drawn-out process, which in some cases can take up to a year to have a resolution, and sometimes that resolution just says, 'Yes, it wasn't captioned.'...it is putting an onus on people who are pretty unsophisticated about these issues, as most people are about any legalistic issues. Fundamentally they just want a service. So that is my objection to that.

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31 See also Ms Karen McQuigg, *Submission 2*, p. 2; Media Access Australia, *Submission 6*, pp 2–3; Name Withheld, *Submission 7*, p. 1; Deaf Australia, *Submission 13*, p. 9; Australian Federation of Disability Organisations, *Submission 17*, p. 2; Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 7.

32 Communications Law Centre, *Submission 5*, p. 1.

33 Deafness Forum of Australia, *Submission 12*, p. 2. See also Ms Karen McQuigg, *Submission 2*, p. 2; Media Access Australia, *Submission 6*, pp 2-3; Name withheld, *Submission 7*, p. 1; Deaf Australia, *Submission 13*, p. 9; Australian Federation of Disability Organisations, *Submission 17*, p. 2.

34 Ms Lauren Henley, Australian Human Rights Commission, *Committee Hansard*, 2 February 2015, p. 12.

35 Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, p. 2; See also, Media Access Australia, *Submission 6*, pp 7–8.

Consumers are generally not interested in making complaints that then lead to a detailed, legalistic investigation and reporting system that can take up to 9 months to resolve. Generally they want the problem acknowledged, logged and hopefully fixed. If the regulator took a more pro-active, monitoring and spot-checking approach to compliance, then these sorts of issues could be dealt with in a more effective way, including exploring how particular problems arise.<sup>36</sup>

2.27 Similarly, an individual submitter described the practical difficulties of relying on a complaints based approach:

This change is of particular concern because captions describe things "in the moment"...Viewers may be upset, even enraged, but in the time it takes to contact the broadcaster through the National Relay Service, or write, the moment is lost and, with it, the motivation to complain.

I have tried to complain to broadcasters once or twice myself when something really interesting is on and captions have broken down, but it is virtually impossible to get through to a real person at the stations after business hours. I have been grateful that, although I have never complained, there is an agency working behind the scenes to ensure a good level of access. In this proposed new system, I would be on my own.<sup>37</sup>

2.28 The free-to-air broadcasters supported the change to a complaints based system. Free TV Australia commented that:

A complaints based compliance regime is a more efficient, sensible and responsive mechanism for measuring compliance with captioning obligations, particularly as commercial free-to-air broadcasters are now required to caption 100% of the programming on their primary service between 6 am and midnight.<sup>38</sup>

2.29 It was noted that consumers can make a complaint to the ACMA or provide feedback to the broadcaster concerned. It was argued that this enables those who are best placed to determine whether a relevant captioning fault or interruption has materially impacted on viewing experience. In addition, the complaints based system will ensure the rectification of issues in a more timely manner and 'a reporting system that identifies errors which occurred more than a year ago is not a practical way of addressing captioning faults'.<sup>39</sup>

2.30 Ms Ritter, ACMA, provided the committee with details of the steps taken by ACMA to ensure that its complaints process was accessible:

...a webpage dedicated to making complaints about captioning and forms for captioning...[the ACMA] have also produced a series of videos for the deaf and hearing-impaired, which are on our [the ACMA] website, and the

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36 Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, p. 2.

37 Ms Karen McQuigg, *Submission 2*, p. 2. See also Deaf Australia, *Submission 13*, pp 8–9.

38 Free TV Australia, *Submission 19*, p. 6.

39 Free TV Australia, *Submission 19*, p. 6.

captioning complaints page appears second in a Google search response. ...We have taken steps to try and make it as easy as we can.<sup>40</sup>

2.31 A number of free-to-air television broadcasters stated that they have also sought to put in place mechanisms to make complaints easy and accessible.<sup>41</sup> For example, Ms Flynn from Free TV Australia explained:

In 2010 we established an online complaints system, through Free TV, which is state of the art. We did a lot of work modelling other systems...we are very confident that we have an easy-to-use system, as evidenced by the fact that, as soon as we moved to that system more broadly, the number of complaints jumped up. But the level of complaints has subsequently gone down. We advertise how to complain at least once a day across all the time zones, every broadcaster and every channel. So there is a very high level of recognition of our complaints processes.<sup>42</sup>

2.32 Free-to-air broadcasters also noted that internal monitoring of captioning ensures that 'captioning faults are picked up either before transmission or as each program is going to air, and the error rectified to ensure that it will not recur'.<sup>43</sup>

2.33 The ABC, which also provided evidence on its consumer complaints processes, concluded that it believed that this is 'an effective and less resource-intensive way to monitor the provisions of captions on television in Australia'.<sup>44</sup>

#### ***Averaging of captioning targets across subscription sports channels***

2.34 A further matter raised is the proposed change to allow captioning targets to be averaged across subscription sports channels in a group. While these changes are aimed at introducing flexibility for subscription television licensees in meeting their obligations without changing the total number of hours of captioning, the CPSU and Media Access Australia commented that this change makes calculating quota requirements more complicated.<sup>45</sup> The CPSU also argued that the change 'would let broadcasters use large events where extensive captioning is commercially attractive to cut back on formal captioning obligations'.<sup>46</sup>

2.35 In addition, it was argued that the proposed change would confuse consumers and make it difficult for deaf or hearing impaired consumers to know what they were actually going to receive in terms of captioned content when subscribing to sports channels. For example, Media Access Australia commented:

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40 Ms Jonquil Ritter, ACMA, *Committee Hansard*, 2 February 2015, p. 42.

41 See, Mr Michael Ward, ABC, *Committee Hansard*, 2 February 2015, p. 22; Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 21.

42 Ms Julie Flynn, Free TV Australia, *Committee Hansard*, 2 February 2015, p. 22.

43 SBS, *Submission 14*, p. 3. See also Mr Todd Loydell, SBS, *Committee Hansard*, 2 February 2015, p. 23.

44 ABC, *Submission 24*, p. 3. See also SBS, *Submission 14*, p. 4.

45 CPSU, *Submission 4*, p. 2; Media Access Australia, *Submission 6*, p. 4.

46 CPSU, *Submission 4*, p. 2.

Under present arrangements, a subscriber to sports channels would receive all of the covered channels, but different subscribers like different sports and there is potential for their chosen sport to be the one that is "under captioned".

We understand that the amendment is based around ensuring that particular types of sport are captioned when they switch to other channels to ensure consistency of captioned product, but this needs more explanation and investigation to ensure that it is clear to consumers what they are being offered and what they will receive match closely.<sup>47</sup>

2.36 Mr Varley from Media Access Australia provided further comments at the committee's public hearing. Mr Varley stated that discussions with ASTRA had taken place and that 'the industry was looking for some flexibility about when it shifts sports to different channels to ensure it continues to be captioned'. He went on to comment that if a consumer subscribes to a sports package on subscription TV they will receive all the sports channels, and access the captioning. However, Mr Varley stated that the information about the change needed to be adequately explained 'so people see what the purpose is behind it...In this case, if that is all they are trying to do then I do not see why people would not support that, but that needs to be made more clear'.<sup>48</sup>

2.37 The Age and Disability Discrimination Commissioner also commented that the aim of increasing flexibility for broadcasters may be a reasonable intention, but it could reduce choices for deaf people who have an interest in some of the minority sports or less nationally popular sports. Further, consumers were not consulted about the proposed changes.<sup>49</sup>

2.38 ASTRA and Fox Sports were generally supportive of the provisions to allow the averaging of annual captioning targets across a group of subscription sports channels.<sup>50</sup> Fox Sport stated that the amendments would assist it to 'direct captioning to programming which is of the greatest interest to audiences and would have no impact on the amount of content captioned across [subscription television] sports channels'.<sup>51</sup> ASTRA explained the effect of the proposed amendments:

The effect of the amendments would be that a proportion of a channel's captioning target could be 'moved' to another sports channel within the same group. This may be done if, for example, the first day of a golf tournament is shown on FOX SPORTS 1, but the second day is shown on FOX SPORTS 2. There could be a scenario where the captioning target for FOX SPORTS 2 had already been met, whilst the target for FOX SPORTS 1 had not yet been met. Given that FOX SPORTS is likely to choose to

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47 Media Access Australia, *Submission 6*, p. 4. See also Australian Communications Consumer Action Network, *Submission 10*, p. 3.

48 Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, p. 3.

49 Ms Lauren Henley, *Committee Hansard*, 2 February 2015, p. 13.

50 See Ms Melissa Quinn, Fox Sports, *Committee Hansard*, 2 February 2015, p. 29; Mr Andrew Maiden, ASTRA, *Committee Hansard*, 2 February 2015, p. 29.

51 Fox Sport, *Submission 26*, p. 1.

apply its captioning investment in order to meet the regulated targets, it may be that (in the absence of amendment) the captioning would not 'follow' the tournament to FOX SPORTS 2 as FOX SPORTS would choose to caption other programming on FOX SPORTS 1 in order to meet the regulated target.<sup>52</sup>

2.39 Mr Andrew Maiden, CEO of ASTRA, in evidence to the committee explained that customers would not be disadvantaged by the proposed averaging of captioning targets across sports channels:

Every sports customer gets every sports channel offered by Fox Sports...they would not be at a disadvantage if this [amendment] were to occur. All that would happen is that the captions would in a sense follow the program rather than having to be attached to a particular channel.<sup>53</sup>

2.40 Mr Maiden went on to comment that consumer groups may have misunderstood the implications of the proposed change and that consumers who purchased a subscription television sports package accessed all sports channels.<sup>54</sup>

2.41 However, ASTRA advocated for the minimum captioning level *per channel* to be reduced from two-thirds of the annual captioning target to one-half, noting that this would not reduce the total amount of content captioned across the sports channels.<sup>55</sup>

2.42 The Department responded to ASTRA's suggestion and commented:

We were working with the industry to find an arrangement which reflected their concerns about how groups of channels, particularly sports channels, dealt with captions across the suite of channels. Then the question became: how far do you go? In the discussion process and in our thinking on that, we started from the proposition that we would go for a third, because we thought that was a reasonable quantity to look at and it gave the industry some flexibility. We do not want to go too far. As you have heard today, there are interests on both sides of this. We thought that the mechanism that we came up with represented a reasonable balance of interests with regard to that issue.<sup>56</sup>

2.43 In addition, the Age and Disability Discrimination Commissioner recommended that a strict reporting mechanism be established to monitor compliance with the proposed requirement to meet two-thirds of the 15 per cent quota on each

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52 ASTRA, *Submission 15*, p. 8. See also Access Innovation Media, *Submission 11*, p. 7.

53 Mr Andrew Maiden, ASTRA, *Committee Hansard*, 2 February 2015, p. 30.

54 Mr Andrew Maiden, ASTRA, *Committee Hansard*, 2 February 2015, p. 30.

55 ASTRA, *Submission 15*, p. 8.

56 Dr Simon Pelling, Department of Communications, *Committee Hansard*, 2 February 2015, p. 41.

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separate sports channel. The Commissioner stated that 'this is necessary to ensure that consumers are not disadvantaged as a result of these new arrangements'.<sup>57</sup>

***Exemption for quality breaches due to technical or engineering failures***

2.44 The bill proposes to create an exemption to captioning quality standard breaches where the breach is due to technical or engineering difficulties which could not reasonably have been foreseen (proposed subsection 130ZZA(7A)). Television industry submitters were generally supportive of the amendment.<sup>58</sup> Free TV Australia argued that this provision would correct an anomaly in the current provisions of the BSA dealing with technical difficulties which affect captions:

The current exception at subsection 130ZUB(1) is intended to accommodate situations where unforeseen technical or engineering difficulties interfere with the provision of captions. However, the section currently only operates to excuse licensees from breaching the captioning quota provisions. It does not apply to excuse licensees in relation to captioning quality...

There have been instances where the ACMA has accepted that a broadcaster has experienced unforeseen technical difficulties and excused the breach, but has still gone on to find a breach of the licensee's requirement to comply with the Quality Standard (section 130ZZA).<sup>59</sup>

2.45 Free TV Australia stated that 'unforeseen technical and engineering difficulties are not something that a broadcaster can anticipate, and must be accommodated as part of any compliance regime'. While supporting the proposed change, Free TV Australia also put forward the argument that further changes were required to reflect the fact that a captioning service may be disrupted due to an unforeseen event that is not of a technical or engineering nature, and is beyond the control of the licensee or broadcaster, for example, the evacuation of the building in which live captioning is being undertaken.<sup>60</sup>

2.46 Mr Abrahams from Access Innovation Media argued exceptions were required because:

...there are inevitably going to be issues where minutes are lost for one reason or another. It may be engineering or technical; it can be human as well...Sometimes you do not even know that the thing is going to come on

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57 The Hon Susan Ryan, Age and Disability Discrimination Commissioner, *Committee Hansard*, 2 February 2015, p. 10. See also Age and Disability Discrimination Commissioner, *Submission 8*, p. 3; Ms Lauren Henley, Australian Human Rights Commission, *Committee Hansard*, 2 February 2015, p. 13.

58 See for example, SBS, *Submission 14*, p. 5; ASTRA, *Submission 15*, p. 14.

59 Free TV Australia, *Submission 19*, pp 8–9. See also Department of Communications, *Submission 20*, p. 9.

60 Free TV Australia, *Submission 19*, pp 9, 10–11.

air until you see it...once in a while you miss one of those things and that is a strict breach.<sup>61</sup>

2.47 However, several submitters were opposed to this exemption for breaches due to technical or engineering failures.<sup>62</sup> For example, Deaf Australia expressed concern that this amendment would increase:

...problems with captioning as broadcasters will simply point to [a] 'third party', or through Service Legal Agreements, to caption suppliers, thereby absolving themselves from their responsibility to monitor captions.<sup>63</sup>

### ***Automatic exemption for new subscription channels***

2.48 The BSA is to be amended to automatically exempt new subscription channels from captioning obligations for a period of one to almost two years (proposed subsection 130ZV(6)). The Department noted that to qualify for this exemption, the subscription television service must predominantly consist of programs not previously transmitted in Australia prior to the commencement of the service. The Department went on to comment:

The proposed automatic exemption is designed to encourage subscription television licensees to bring new content and channels to Australian audiences and would only apply to channels that mainly consist of content not previously transmitted in Australia. This requirement will also avoid creating an incentive for licensees or channel providers to do little more than 'rebrand' existing content to avoid captioning requirements.<sup>64</sup>

2.49 In addition, the Department pointed to existing mechanisms for subscription television licensees to apply to the ACMA to exempt channels from captioning obligations on the grounds that providing captioned services would result in unjustifiable hardship. The Department concluded that 'an automatic exemption process would save both the licensees and the ACMA resources in completing and considering applications'.<sup>65</sup>

2.50 Some submitters raised concerns in relation to this provision arguing that captioning obligations are well established and that there are already mechanisms for exclusions contained in the BSA making the proposed change unnecessary.<sup>66</sup> For example, the Age and Disability Discrimination Commissioner commented:

We do not think that is justified. Captioning, as witnesses have commented this morning, has been around for 30 years. It is not new or unknown

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61 Mr Anthony Abrahams, Access Innovation Media Pty Ltd, *Committee Hansard*, 2 February 2015, p. 18.

62 See Australian Communications Consumer Action Network, *Submission 10*, p. 4.

63 Deaf Australia, *Submission 13*, p. 10.

64 Department of Communications, *Submission 20*, p. 8.

65 Department of Communications, *Submission 20*, p. 8.

66 Australian Communications Consumer Action Network, *Submission 10*, p. 3; Deaf Australia, *Submission 13*, p. 11.

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technology. A new licensee seeking to come into this sector should be well aware of captioning requirements and how it works and we do not see that there is a case for that exemption.<sup>67</sup>

2.51 Media Access Australia provided the following comments on the existing mechanisms:

The present channel quota system allows licensees to designate new channels as being excluded and not subject to captioning requirements. This takes it a step further and makes it so a new channel is automatically exempt for at least a year. Furthermore, the drafting of the clause is very loose in defining a new channel and would be subject to dispute.

The current arrangements already give the licensees freedom to choose which channels they want to caption. If they feel a new channel needed to be exempt from caption requirements for whatever reasons, they can do this. We believe this amendment is unnecessary and should be removed.<sup>68</sup>

2.52 Similarly, the CPSU submitted that it is unclear why the proposed change is necessary given the arrangements already in place. The CPSU went on to state that it was concerned that the change:

...will only reinforce the treatment of captioning as an afterthought. Rather than making it easier to get an exemption, broadcasters should be encouraged to include captioning from the establishment of a new channel and to build-in systems and procedures that can be scaled up to make sure that captioning is part of the production process from the beginning.<sup>69</sup>

2.53 Mr Miers, from Deaf Australia, also questioned why the exemption had been included in the bill and stated that:

Access...should be a forethought for all people. If they are exempt then consumers miss out on information, and in our view that is discrimination in terms of access to information and not in line with the Convention on the Rights of Persons with Disabilities.<sup>70</sup>

2.54 On the other hand, ASTRA submitted that:

...it is reasonable for a new [subscription television] channel to have a short period of grace to build up its captioning infrastructure and processes as well as invest in the acquisition and/or production of captioning for its programming.<sup>71</sup>

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67 The Hon Susan Ryan, Age and Disability Discrimination Commissioner, *Committee Hansard*, 2 February 2015, p. 10.

68 Media Access Australia, *Submission 6*, p. 4. See also Australian Communications Consumer Action Network, *Submission 10*, p. 3.

69 CPSU, *Submission 4*, p. 3.

70 Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 8.

71 ASTRA, *Submission 15*, p. 9.

2.55 Ms Sophie Jackson from Foxtel explained in evidence to the committee that the exemption was needed to allow new channels to launch subscription television that do not have captioning capability:

There are approximately 93 discrete channels on the Foxtel platform. Of those channels, Foxtel actually controls only 20 or so, and the other channels provided on our platform are represented by a wide, diverse group of channel providers...there are also smaller, niche channels that do not have the same resources as a group such as Discovery or Disney. We have community channels—the Australian Christian Channel, Aurora, and a number of other channels—that do not have that capability. What we are suggesting is: you allow the new channel exemption. It will remove a barrier to entry to some of those diverse, niche channels that wish to launch channels on subscription television.<sup>72</sup>

2.56 In addition, Mr Maiden from ASTRA noted that the proposed amendments 'would effectively formalise an arrangement that is already in place. In 2013–14, for instance, the ACMA was asked to consider 41 applications for exemptions and granted all of them'.<sup>73</sup>

#### ***Quality of live captioning – live and pre-recorded broadcasts***

2.57 Proposed subsections 130ZZA(2A) and (2B) would allow the Captioning Quality Standard to differentiate between live and pre-recorded broadcasts. The Captioning Quality Standard sets rules about the quality of captions for television services requiring them to be readable, accurate and comprehensible. The Department noted that the proposed new subsections:

...make it clear that free-to-air broadcasters and subscription television licensees must aim to achieve the same captioning quality regardless of whether the program, or program material, was live or pre-recorded. The amendment recognises that while captioning for live programs should aim to meet the same high standard as pre-recorded programs, the added challenges necessitated by live captioning make this more difficult to achieve in practice. These constraints should be taken into account in determining whether a breach has occurred.<sup>74</sup>

2.58 Some submitters opposed the proposed changes. For example, the CPSU, while acknowledging the differences between live and pre-recorded broadcasts, stated that its members were concerned that live broadcasts by networks may be used as an excuse for poor quality captioning.<sup>75</sup>

2.59 The Australian Communications Consumer Action Network expressed concern that that proposed subsections 130ZZA(2A) and (2B) are contradictory:

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72 Ms Sophie Jackson, Foxtel, *Committee Hansard*, 2 February 2015, p. 18.

73 Mr Andrew Maiden, ASTRA, *Committee Hansard*, 2 February 2015, p. 30.

74 Department of Communications, *Submission 20*, p. 9.

75 CPSU, *Submission 4*, p. 3.

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...this amendment is so unclear it is in fact meaningless because it is contradictory. In subsection 2(a), the amendment allows the ACMA to determine a standard with consideration to different programming (live and pre-recorded), while in subsection 2(b) the amendment stipulates that there is to be no different level of closed caption quality.<sup>76</sup>

2.60 The Australian Communications Consumer Action Network went on to state that the amendments may create different levels of quality for different programming, specifically for programming which is closed captioned using live captioning techniques. It commented further:

It is clear from discussion with industry that live closed caption techniques will be used increasingly for non-live programming. If the ACMA is to consider closed caption quality based on the delivery method of the captions, it is reasonable to expect that caption quality, particularly comprehensibility, will deteriorate proportional to the extent of usage of live captioning, which is generally of lesser quality. In order for closed captions to be meaningful, closed captions must be readable, accurate and comprehensible. Comprehensibility, as defined in the *Broadcasting Services (Television Captioning) Standard 2013*, includes the "extent to which the appearance of the caption coincides with the onset of speech of the corresponding speaker, sound effect or music".<sup>77</sup>

2.61 The ABC and SBS both supported the proposed changes with SBS stating that the amendment:

...represents a valid and reasonable recognition that applying the same standards to pre-prepared and live captioning services is unworkable. For example, some elements of the current Standards have limited application to live captioning services, including colour, positioning, identification of individual speakers and sound effects.<sup>78</sup>

2.62 ASTRA supported proposed subsection 130ZZA(2A) but opposed the inclusion of proposed subsection 130ZZA(2B) and argued:

It is illogical to insert subsection 130ZZA(2A), which provides that the ACMA must consider the differences between live and pre-recorded programs when determining a standard, and at the same time propose to insert subsection 130ZZA(2B), which provides that the ACMA is not permitted to determine a lower quality of captioning is acceptable for such program material.<sup>79</sup>

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76 Australian Communications Consumer Action Network, *Submission 10*, p. 4.

77 Australian Communications Consumer Action Network, *Submission 10*, p. 4.

78 SBS, *Submission 14*, p. 5; ABC, *Submission 24*, p. 2.

79 ASTRA, *Submission 15*, p. 13. See also Access Innovation Media, *Submission 11*, p. 5; Free TV Australia, *Submission 19*, p. 8.

2.63 Free TV Australia also sought the removal or clarification of proposed subsection 130ZZA(2B) 'because it seems at odds with the recognition that live captioning has particular constraints and challenges'.<sup>80</sup>

### **Issues relating to Schedule 3 – New Eligible Drama Expenditure auditing requirements**

2.64 Under the New Eligible Drama Expenditure (NEDE) scheme, certain subscription television licensees, channel providers and part-channel providers are required to spend at least 10 per cent of their total programming expenditure on new Australian or New Zealand drama productions or co-productions. The bill proposes a number of amendments to the existing regulatory framework including the removal of audit requirements. The Department noted that the bill does not propose any changes to NEDE requirements in terms of the obligation and to whom the scheme applies. Participants will still be required to submit annual returns in the approved form.<sup>81</sup>

2.65 The Department noted there has been a high level of compliance with the NEDE obligations. In the five most recent reporting periods, where minimum obligations have not been met, 'expenditure short falls have been minor in nature and were generally met in the next reporting period'. In addition, the ACMA had advised that the existing auditing obligations are financially burdensome, costing an estimated \$15,000 per licensee and channel provider per year, against little compliance benefit. The ACMA also has other mechanisms available to retain a high level of confidence in industry compliance including use of its power to make inquiries into the correctness of reports. Further, the BSA makes it an offence for any licensee, channel provider or part-channel provider to intentionally contravene its reporting requirements.<sup>82</sup>

2.66 The Department concluded that:

In light of the industry's high compliance with the NEDE scheme and existing compliance incentives in the BSA, the need for additional auditor checks cannot be justified against the expense borne by NEDE scheme participants. In this context the repeal of the audit requirement is consistent with the Government's deregulation agenda to remove unnecessary or inefficient regulation.<sup>83</sup>

2.67 ASTRA supported removing the requirement for independent auditing of reports on annual eligible drama expenditure arguing the administrative burden imposed by this requirement is not warranted in light of the high levels of compliance in this area:

Importantly, relevant [subscription television] channel providers and licensees will continue to be required to submit annual reports to the

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80 Free TV Australia, *Submission 19*, p. 8.

81 Department of Communications, *Submission 20*, p. 4.

82 Department of Communications, *Submission 20*, pp 4–5.

83 Department of Communications, *Submission 20*, p. 5.

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ACMA at the end of each financial year. These annual reports will include data on the total drama expenditure incurred by relevant channels/licensees, and detailed reporting on their eligible drama expenditure.

The submission of these annual reports must not be false or misleading. Licensees and channel providers take their legal obligations in this regard very seriously. Indeed, the industry regards the telling of Australian stories as crucial to its appeal to subscribers.<sup>84</sup>

2.68 However, Screen Producers Australia questioned whether sufficient information was available to demonstrate that removal of auditing requirements was the best approach:

All regulation requires some administrative processes and a high-level of compliance is not reason enough to remove the auditing requirement. The relative costs and benefits have not been clearly communicated and importantly, the degree to which the high-level of compliance has been achieved as a result of the auditing requirement remains unclear.<sup>85</sup>

2.69 The CPSU also questioned whether a 'spot check' approach was sufficient to ensure compliance.<sup>86</sup> The CLC suggested that if mandatory auditing requirements are to be removed, the ACMA should undertake regular compliance monitoring regarding the subscription television industry's commitment to Australian and New Zealand drama productions and co-productions. The CLC argued that 'although there has been a high level of compliance with these regulatory requirements to date, this does not necessarily mean that these levels of compliance will be attained in the future in the absence of robust regulation'.<sup>87</sup>

2.70 Screen Producers Australia also supported compliance auditing by the ACMA if the amendments are passed. Mr Matthew Deaner commented:

I think you would want to have a requirement on the ACMA to be auditing frequently, or at least the motivation for participants in the scheme to be concerned that the ACMA might audit it frequently, and that would need to be demonstrated in terms of a regularity of audits and maybe a degree of uncertainty in the participants.<sup>88</sup>

## Consultation

2.71 A significant number of the submitters to the inquiry expressed concern that there had been a lack of adequate consultation in relation to the proposed amendments

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84 ASTRA, *Submission 15*, p. 7. See also Foxtel, *Submission 18*, p. 2.

85 Screen Producers Australia, *Submission 22*, p. 2.

86 CPSU, *Submission 4*, p. 3.

87 Communications Law Centre, *Submission 5*, p. 4.

88 Mr Matthew Deaner, Screen Producers Australia, *Committee Hansard*, 2 February 2015, p. 37.

to captioning obligations and NEDE scheme audits.<sup>89</sup> For example, Mr Miers from Deaf Australia stated that while he had participated in a teleconference with the Department after the release of the bill:

...we did not have an opportunity to provide any detailed feedback. They [the Department] just told us what the proposed changes were going to be. I do not believe that there has been any adequate or appropriate consultation with consumers or broadcasters.<sup>90</sup>

2.72 A number of submitters stated that there should be ongoing consultation in relation to the proposed measures in the bill and captioning requirements.<sup>91</sup> Mr Miers from Deaf Australia argued that the legislation should be deferred to allow for full consultation with the deaf community:

We recommend that this legislative amendment be deferred in order to have fully inclusive consultation with the consumer community. We are the users of the captions, and there has been no consultation with deaf people. They have a lot to say.<sup>92</sup>

2.73 The Age and Disability Discrimination Commissioner agreed that the captioning amendments in the bill should be delayed pending further consultation:

It is an area where there is a lot of specialist interest that a person who does not have deafness cannot readily grasp without that consultation. I know that I myself have been very well informed by discussions with the consumers of this, and I would not have had that knowledge beforehand and I think we are all in that boat. So I would strongly endorse consultation around the issue of the reporting and what should go into it.<sup>93</sup> P. 13

2.74 Mr Varley from Media Access Australia noted that the bill proposes to repeal the provisions requiring the ACMA to undertake a captioning review by 31 December 2015. As a consequence, Mr Varley argued, while the bill is useful in that it raised the need for reform:

...we think that the best approach for dealing with this whole issue is to allow the statutory review to be undertaken by the ACMA this year. But I think this committee has a very valuable role in helping to guide the key issues that the ACMA should really focus on...

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89 See, for example, Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, pp 1–2; Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 8; Mr Anthony Abrahams, Access Innovation Media Pty Ltd, *Committee Hansard*, 2 February 2015, p. 19; CPSU, *Submission 4*, p. 3.

90 Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 8.

91 See Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, pp 1–2; Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 8.

92 Mr Kyle Miers, Deaf Australia, *Committee Hansard*, 2 February 2015, p. 9.

93 The Hon Susan Ryan, Age and Disability Discrimination Commissioner, Australian Human Rights Commission, *Committee Hansard*, 2 February 2015, p. 13.

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I think there needs to be more consultation to tease out what the real issues are, and I think that probably also goes across to both the television stations and their suppliers, because there is some subtlety in the way that these things actually work in practical terms which is quite difficult to capture in a legalistic framework for a piece of legislation, and I think that needs to be consulted further.<sup>94</sup>

2.75 Mr Deaner from Screen Producers Australia argued that there had also been a lack of adequate consultation in relation to the proposed to removal of the audit requirements for the NEDE Scheme:

Overall, it would seem that the bill calls for an all-or-nothing approach, and greater consultation would have allowed us to discuss how to alter the requirements so that they are less onerous, for example—if they are considered onerous through that discussion—or how audits or other types of inquiries may or may not occur. But here we are left with an amendment in which we have no further information.<sup>95</sup>

2.76 Dr Pelling, Department of Communications, acknowledged in evidence to the committee that consultation in relation to the proposed measures in the bill could have been improved:

This is a deregulation bill, and we had a range of discussions with industry and with the Australian Communications and Media Authority in the lead-up to preparation of the bill. Subsequent to the bill being introduced, we had a number of discussions with various access stakeholders on the issues in the bill. I think it is true to say that in an ideal world we would have preferred to have an exposure draft; but, given the timing of the process and the way the bill was developed, an exposure was not able to be released. This committee provides another opportunity for us to hear the views of the various stakeholders, and we will certainly consider what people say very seriously and we have looked at these submissions as well.<sup>96</sup>

2.77 In response to a question on notice, the Department provided the following information about its consultation process

The Department of Communications met with the Australian Communications Consumer Action Network on 15 May 2014, and Media Access Australia on 4 June 2014, on proposed amendments to captioning legislation.

Following the introduction of the Bill the Department met with the Australian Human Rights Commission on 31 October and with Media Access Australia, Australian Communications Consumer Action Network, Deafness Forum of Australia, Deaf Australia, and the Australian Federation

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94 Mr Alex Varley, Media Access Australia, *Committee Hansard*, 2 February 2015, pp 1–2.

95 Mr Matthew Deaner, Screen Producers Australia, *Committee Hansard*, 2 February 2015, p. 34.

96 Dr Simon Pelling, First Assistant Secretary, Department of Communications, *Committee Hansard*, 2 February 2015 p. 40.

of Disability Organisations on 21 November 2014. People with a Disability Australia Incorporated were also invited but did not participate.

The Australian Communications and Media Authority met with Media Access Australia on 9 April 2014, and also participated in the Department's 4 June 2014 meeting with that organisation, on proposed amendments to captioning legislation.<sup>97</sup>

2.78 The committee also notes that the Explanatory Memorandum states that, from December 2013, a review has been conducted by the Department and the ACMA resulting in it no longer being necessary or appropriate to conduct a comprehensive statutory review that considers the operation of Part 9D.<sup>98</sup>

### **Committee comment**

2.79 The committee considers that the measures in the bill will contribute to easing regulatory burden on the broadcasting industry while maintaining important protections for consumers and accessibility to television services for persons with disabilities.

2.80 The committee acknowledges that access to captioning is of fundamental importance to the deaf and hearing impaired communities. The committee notes that a number of submitters expressed concern that captioning availability and quality would decline due to the proposed removal of annual reporting by free-to-air broadcasters in respect of captioning. However, the committee notes that the proposed legislation does not reduce the captioning requirements under the BSA and consumers will be able to make complaints in relation to any non-compliance.

2.81 The committee considers that convincing evidence was not received that the move to a complaints based system will reduce compliance and lead to a reduction in the quantity or quality of captioning *per se*. By contrast there is persuasive evidence from the free-to-air broadcasters that the proposed amendments to reporting requirements will significantly reduce the regulatory burden associated with onerous and unnecessary reporting. In addition, the committee notes that complaints systems maintained by broadcasters will allow for the timely receipt of complaints and thus allow systemic issues to be quickly identified and rectified.

2.82 Some submitters expressed concern regarding proposed subsections 130ZZA(2A) and (2B) which would allow the Captioning Quality Standard to differentiate between live and pre-recorded broadcasts. However, the committee considers that the new subsections will provide a process for determining captioning standards that takes into account differing standards that may apply to live and pre-recorded programs while aiming to achieve the same captioning quality.

2.83 The committee similarly notes concerns raised by some submitters in relation to the proposed averaging of captioning requirements across subscription sports channels, exemptions for new channels and the exemption for quality breaches due to

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97 Department of Communications, *Answer to question on notice*, hearing 2 February 2015.

98 EM, p. 45.

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technical or engineering failures. The committee also acknowledges that some broadcasters would have liked to have seen broader or more comprehensive amendments. However, the committee considers, based on current information, that the bill represents the right balance between providing access to captioning and providing sufficient flexibility to the broadcasting industry. The committee acknowledges that in many cases both free-to-air and subscription broadcasters are going above and beyond their mandated captioning requirements. Such efforts are to be applauded.

2.84 A number of submitters raised concerns regarding the removal of the audit requirements for the New Eligible Drama Expenditure Scheme. However, the committee considers that there is no compelling evidence to suggest that removal of the auditing requirement will lead to a reduction in compliance and notes that there are other mechanisms available within the BSA to address compliance issues.

2.85 The committee notes that a large number of submitters indicated that the consultation processes in relation to the bill had been inadequate. The committee agrees that the breadth of consultation in relation to this bill has been insufficient. As a consequence, the effect of some proposed amendments appear to have been misunderstood and inadequate attention was given to a range of serious concerns and interests.

2.86 This lack of comprehensive consultation was acknowledged by the Department of Communications in its evidence to the committee. The committee is of the view that if there had been a greater degree of consultation this would have led to increased understanding of the scope and potential impact of the proposed changes.

2.87 Finally, the committee notes that there are a number of other proposed measures in the bill that were not the focus of submissions but nevertheless received support through submissions and evidence.

### **Recommendation 1**

**2.88 The committee recommends, noting the concerns regarding the adequacy of consultation, that the bill be amended to require the Australian Communications and Media Authority to undertake a review of the operation of the captioning requirements under the *Broadcasting Services Act 1992* by 31 December 2018.**

### **Recommendation 2**

**2.89 The committee recommends that, subject to the proposed amendment, the Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 be passed.**

**Senator Anne Ruston  
Chair**



# **Australian Greens Dissenting Report**

## **Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014**

The Broadcasting and Other Legislation Amendment (Deregulation) Bill 2014 is another piece of the Government's deregulation agenda that has been introduced with insufficient consultation and without consideration of its impacts on viewers.

The Australian Greens thank all of the submitters to the inquiry, and acknowledge their efforts given the relatively short submission period. The submissions, particularly those from the hearing impaired and deaf community, have identified a range of problems with the Bill that are outlined below.

Given the range of concerns identified, the Australian Greens do not support passing this Bill without substantial amendments.

### **Section 1: Captioning**

One in six Australians are hearing impaired and as our population ages this will increase to one in four, meaning that there is likely to be an increased reliance on television captioning in the future. It is clear from the submissions to this inquiry that TV broadcasters and caption suppliers are keen to respond to the increasing demand. Captioning frequency and quality has improved significantly over the past decade and the commitments to 100% captioning during 6am and 12pm on free-to-air broadcasts are welcome ones.

However, the deregulation agenda of the current Liberal Government is again impacting on those who least deserve and are least able to bear the costs of it; in this case, the deaf community.

Furthermore, the lack of consultation has meant that this legislation has been produced without appropriate consideration of the impact that it will have on consumers, broadcasters or the suppliers of captions. The Australian Greens have identified a number of concerns that must be addressed before the Bill is passed.

### ***Monitoring and reporting***

The Bill proposes shifting from an annual reporting compliance scheme, in which broadcasters are required to demonstrate that they meet their captioning obligation, to a consumer complaints mechanism. In doing this, the Bill does not provide sufficient guarantees that the ACMA will continue to consistently monitor compliance with the captioning quantity and quality requirements or that broadcasters will continue to review and address systemic failures, unless a consumer makes a specific complaint.

Effectively, the burden of reporting is shifted from the broadcasters and onto the individual consumer. A number of consumer representative bodies have argued that this is unacceptable, as it makes consumers responsible for policing the broadcasters

rather than making broadcasters responsible for demonstrating that they have met their obligations.

The Australian Greens share the perspective of Media Access Australia, that reporting is a 'fundamental feature of compliance, consumer protection and efficient market operation, and should be maintained.'<sup>1</sup>

An effective consumer complaints mechanism can complement this statutory reporting requirement, but should not replace it.

Some submissions noted the current annual reporting process means that there are delays of up to a year in identifying captioning breaches and that in many cases the issues have been resolved by the time the report is submitted.<sup>2</sup> However, they did not demonstrate that a viewer complaints mechanism would result in more timely resolution of systemic failures.

On the weight of the evidence provided to the committee, the Australian Greens believe that the responsibility for reporting non-compliance with captioning quality requirements should remain with the broadcaster because, as Media Access Australia noted in their submission, the broadcasters and caption suppliers have the complete records of the programs they have captioned and the technical issues that have occurred.<sup>3</sup>

Nevertheless, the Australian Greens recognise that the current reporting regime is overly complex – as demonstrated by AI Media in their submission.<sup>4</sup>

To ensure that there are still reporting obligations while reducing the regulatory burdens on broadcasters, AI Media proposes amending the reporting framework to focus on easier to generate yet still verifiable reports such as 'percentage of captioning target' achieved.<sup>5</sup> This could make reporting simpler for broadcasters, and timely and transparent for consumers, without losing the regulatory oversight.

Simplified reporting is preferable to removing reporting requirements altogether and should be considered further.

**For these reason, the Australian Greens recommend not passing schedule 6 (section 130ZZD) in its current form. The burden of reporting should remain on broadcasters, rather than consumers, but simpler reporting frameworks should be considered.**

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1 Media Access Australia, Submission 6, p. 3.

2 Free TV Australia, Submission 19, p. 6.

3 Media Access Australia, Submission 6, p. 3.

4 Access Innovation Media, Submission 11, p. 7.

5 Access Innovation Media, Submission 11, p. 7.

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### ***Live captioning standards***

A number of submitters, including ASTRA and the Australian Communications Consumer Action Network, expressed concern that that proposed subsections 130ZZA(2A) and (2B) are contradictory.<sup>6</sup>

Some submitters, such as Free TV Australia suggested the removal or clarification of proposed subsection 130ZZA(2B) 'because it seems at odds with the recognition that live captioning has particular constraints and challenges'.<sup>7</sup>

However, the Australian Communications Consumer Action have expressed concern that the effect of 130ZZA(2A) is to allow ACMA to distinguish between the quality of captioning based on the method used (live versus pre-prepared) without regard to whether the lower quality, live method was the most appropriate method to use.<sup>8</sup>

The Australian Greens support the move to clearly articulate different quality expectations for live versus pre-recorded captioning; and recognise that the quality of live captioning will always be lower than pre-recorded captioning.

However, the legislation does not yet effectively address the concerns of consumers that the most appropriate captioning method will be used by broadcasters. The Australian Greens recommend that section 130ZZA(2B) be amended to better reflect these concerns, without undermining the ability of the ACMA to distinguish between live and pre-prepared caption quality, as outlined in section 130ZZA(2A).

### ***Averaging of captioning targets across subscription sports channels***

The lack of clarity among submitters about the operation, and impact, of the proposed quote averaging amendment highlights the inadequacy of the consultation undertaken prior to introducing this legislation.

The evidence provided to the committee demonstrated that if a consumer subscribes to a sports package on subscription TV they will receive all the sports channels, and therefore access the same amount of captioning if the averaging of quota requirements is passed.

As stated by Fox Sport, the amendments would assist it to 'direct captioning to programming which is of the greatest interest to audiences and would have no impact on the amount of content captioned across [subscription television] sports channels.'<sup>9</sup>

However, Alex Varley, from Access Media acknowledged that this change 'needs more explanation and investigation to ensure that it is clear to consumers what they are being offered and what they will receive match closely.'<sup>10</sup>

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6 ASTRA, Submission 15, p. 13. See also Australian Communications Consumer Action Network, Submission 10, p. 4; Access Innovation Media, Submission 11, p. 5.

7 Free TV Australia, Submission 19, p. 8.

8 Australian Communications Consumer Action Network, Submission 10, p. 5.

9 Fox Sport, Submission 26, p. 1.

10 Media Access Australia, Submission 6, p. 4.

On balance, the Australian Greens believe that allowing captioning targets to be averaged will not be detrimental to consumers, provided there is a commitment from subscription TV providers to produce information that accurately informs consumers about these changes.

### ***Exemption for quality breaches due to technical or engineering failures***

The Bill proposes to create an exemption to captioning quality standard breaches where the breach is due to technical or engineering difficulties which could not reasonably have been foreseen.

This would have the effect of addressing situations such as the one described by Free TV Australia:

*There have been instances where the ACMA has accepted that a broadcaster has experienced unforeseen technical difficulties and excused the breach, but has still gone on to find a breach of the licensee's requirement to comply with the Quality Standard (section 130ZZA).<sup>11</sup>*

However, Deaf Australia argue that the proposed amendment 130ZZA(7) will give too much scope to broadcasters to shift the responsibility for breaches of captioning standards on to the captioning service provider and avoid penalties even if the technical and engineering failures are clearly systemic.<sup>12</sup>

The Australian Greens recommend addressing the concerns of Deaf Australia by amending the legislation so that the ACMA may rather than is to disregard these failures when considering whether a licensee or broadcaster has failed to comply with the captioning standards.

### **Statutory Review of legislation**

The Australian Greens strongly disagree with the Government position, as outlined in the Explanatory Memorandum that, from December 2013, a review has been conducted by the Department and the ACMA resulting in it no longer being necessary or appropriate to conduct a comprehensive statutory review of the captioning arrangements set out under section 9D of the Broadcasting Services Act.<sup>13</sup>

The consultation around this Bill, and the broader reform, was inadequate and there is still a need to review captioning on Australian television against best practise, including the UN Convention on the Rights of Persons with Disabilities.

**The Australian Greens recommend that Division 7 of Part 9D not be repealed.**

### **Section 2: Local Content**

The Australian Greens note and applaud the high level of compliance by the television industry with the New Eligible Drama Expenditure scheme, which requires a number of subscription television licensees, channel providers and part-channel providers to

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11 Free TV Australia, Submission 19, pp 8–9.

12 Deaf Australia, Submission 13, pp 10–11.

13 Explanatory Memorandum, p. 45.

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spend at least 10 percent of their total programming expenditure on new Australian or New Zealand drama productions or co-productions.

However, insufficient evidence has been presented that would indicate that the removal of auditing requirements for the scheme would not result in a degradation of compliance with the scheme.

The Australian Greens believe that the Government and the television sector must continue to strongly support the development of original Australian content. The industry has long enjoyed a favourable regulatory environment which has driven strong profitability by a number of companies. In this context, it is entirely fit that, in turn, it supports the broader Australian community by generating content that will highlight Australian culture.

The Australian Greens note comments by the Communications Law Centre at the University of Technology, Sydney, that argue that if auditing requirements around the New Eligible Drama Expenditure Scheme were removed, that the ACMA should undertake regularly compliant monitoring and that the provision of Australian content on a range of platforms is in the public interest.

The CLC states: 'Although there has been a high level of compliance with these regulatory requirements to date, this does not necessarily mean that these levels of compliance will be attained in the future in the absence of robust regulation.'<sup>14</sup>

The Australian Greens further note comments from Screen Producers Australia, which state that further analysis is needed to ascertain the impact of the removal of auditing requirements. The SPA states: 'The relative costs and benefits have not been clearly communicated and importantly, the degree to which the high-level of compliance has been achieved as a result of the auditing requirement remains unclear.'<sup>15</sup>

**The Australian Greens recommend that the auditing requirements for the New Eligible Drama Expenditure scheme remain in place.**

## **Conclusion**

This Bill has a number of significant problems which will have a detrimental effect on deaf and hearing impaired consumers of free-to-air and subscription TV services.

The Australian Greens are not opposed to updating and simplifying the regulatory framework that governs TV captioning in Australia, provided this leads to better outcomes for consumers, rather than just broadcasters. The lack of consultation, and the proposed repeal of the statutory review, both point to an unwillingness to consider how the Bill will impact those who are reliant on captions to access the news and entertainment that other Australians take for granted.

Without significant amendment, this Bill will erode the quality of Australian TV captioning and contribute to the discrimination that deaf people face in accessing basic services.

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14 Communications Law Centre, Submission 5, p. 4.

15 Screen Producers Australia, Submission 22, p. 2.

Similarly, insufficient evidence has been presented that would indicate that the removal of auditing requirements for the New Eligible Drama Expenditure scheme would not result in a degradation of compliance, which in turn has a detrimental effect on Australian actors, Australian production companies and Australian viewers.

**The Australian Greens recommend that the Bill not be passed until it has been amended to address the concerns raised in this dissenting report.**

**Senator Rachel Siewert  
Senator for Western Australia**

**Senator Scott Ludlam  
Senator for Western Australia**

# Appendix 1

## Submissions, additional information and answers to questions taken on notice

### Submissions

- 1 Mr Peter Lowe
- 2 Ms Karen McQuigg
- 3 Deafness Council WA Inc
- 4 CPSU
- 5 Communications Law Centre, University of Technology Sydney
- 6 Media Access Australia
- 7 Name Withheld
- 8 Age and Disability Discrimination Commissioner
- 9 Name Withheld
- 10 Australian Communications Consumer Action Network
- 11 Access Innovation Media Pty Limited
- 12 Deafness Forum of Australia
- 13 Deaf Australia
- 14 SBS
- 15 ASTRA
- 16 Ms Rita Pasqualini
- 17 Australian Federation of Disability Organisations
- 18 Foxtel
- 19 Free TV Australia
- 20 Department of Communications
- 21 Mr Michael Lockrey
- 22 Screen Producers Australia
- 23 Mr Lyndon Lockrey
- 24 Australian Broadcasting Corporation
- 25 Ms Kate Obermayer
- 26 Fox Sports
- 27 Mr J R Ryan JP

### Additional information

Deaf Australia - Additional information received following public hearing, Sydney, 2 February 2015

**Answers to questions taken on notice**

Foxtel - Answer to a question taken on notice (from public hearing, Sydney, 2 February 2015)

Australian Human Rights Commission - Answer to a question taken on notice (from public hearing, Sydney, 2 February 2015)

Department of Communications - Answer to a question taken on notice (from public hearing, Sydney, 2 February 2015)

Australian Communications and Media Authority - Answers to questions taken on notice (from public hearing, Sydney, 2 February 2015)

# **Appendix 2**

## **Public Hearing**

*Monday, 2 February 2015 – Sydney*

### **Media Access Australia**

Mr Alex Varley, Chief Executive Officer

### **Deaf Australia**

Mr Kyle Miers, Chief Executive

### **Australian Human Rights Commission**

Ms Lauren Henley, Adviser, Age and Disability Discrimination  
Commissioner

The Hon. Susan Ryan AO, Age and Disability Discrimination  
Commissioner

### **Access Innovation Media Pty Ltd**

Mr Anthony Abrahams, Chief Executive Officer

### **Free TV Australia**

Ms Julie Flynn, Chief Executive Officer

Ms Clare O'Neil, Director of Legal and Broadcasting Policy

### **Australian Broadcasting Corporation**

Mr Michael Ward, Head Policy and Planning, Operations Group

Ms Sarah Harmelink, Policy Researcher, ABC Television

### **SBS**

Ms Lesley Power, General Counsel

Mr Todd Loydell, Head of Government and Regulatory Affairs

### **ASTRA**

Mr Andrew Maiden, Chief Executive Officer

Ms Sophie Jackson, Principal Legal Counsel, Foxtel

Ms Melissa Quinn, Senior Legal Counsel, Fox Sports

**Screen Producers Australia**

Mr Matthew Deaner, Chief Executive Officer

Mr Matthew Hancock, Manager, Strategy and Operations

**Department of Communications**

Ms Ann Campton, Assistant Secretary, Media Branch

Mr David Jansen, Director, Content Section, Media Branch

Dr Simon Pelling, First Assistant Secretary, Consumer and Content  
Division

**Australian Communications and Media Authority**

Ms Jonquil Ritter, Executive Manager of Broadcasting Safeguards