



FreeTV
Australia

**Submission by
Free TV Australia**

Senate Environment and Communications
Legislation Committee

Public inquiry into the *Broadcasting Services
Amendment (Improved Access to Television)
Bill 2012*

21 June 2012



TABLE OF CONTENTS

EXECUTIVE SUMMARY	1
1 INTRODUCTION	2
2 LIABILITY FOR BREACH	2
3 TECHNICAL DIFFICULTIES – 130ZUB SHOULD APPLY TO THE PART	4
4 ONEROUS REPORTING REQUIREMENTS.....	4
5 PROGRAMS FINISHING AFTER MIDNIGHT	5



EXECUTIVE SUMMARY

- Free TV recognises that captioning is a much-valued service within the deaf and hearing-impaired community. In addition to meeting the legislative and regulatory requirements which apply to captioning, broadcasters have worked collaboratively with the Australian Human Rights Commission and hearing-impaired advocacy groups to substantially increase captioning levels on their primary channels. Free TV members also regularly engage in active consultation with the Australian Communications and Media Authority (ACMA) and hearing-impaired advocacy groups on captioning quality issues.
- Free TV supports the *Broadcasting Services Amendment (Improved Access to Television) Bill 2012* (the Bill) in implementing the recommendations of the *Media Access Review Final Report*. However, we have practical concerns about the drafting of some provisions in the Bill that create substantial and unworkable regulatory burdens on broadcasters, with no positive consequences for hearing impaired viewers.
- Our primary concern is in relation to liability for breaches of the new captioning obligations due to circumstances beyond the control of broadcasters. Under the Bill, when the ACMA is assessing whether there has been a breach of the captioning licence condition, there is no consideration of whether the cause of the breach is outside the reasonable control of the licensee. We have proposed an amendment based on the Australian Consumer Law, which will provide an appropriate and fair balance in circumstances where the licensee has failed to comply due to unforeseen events beyond its control.
- There is a related drafting issue in relation to technical outages and difficulties. Free TV recommends a small amendment so broadcasters are not found in breach of the licence conditions on captioning quality in the event of technical or engineering difficulties.
- Free TV is also concerned at the requirement in the Bill for all broadcasters to report annually on their compliance with the captioning quality standards, which are yet to be determined by the ACMA. A complaints-based system is the most appropriate way to monitor captioning quality.
- Finally, the provisions around captioning targets in the Bill should enable broadcasters to include the whole of a program that commences before midnight but finishes after midnight. This will provide an incentive for broadcasters to continue captioning programs finishing after midnight, such as live captioned sporting events.



1 Introduction

This submission is made by Free TV Australia (Free TV) which is the peak industry body representing all commercial free-to-air broadcasters in Australia.

Commercial free-to-air broadcasters are committed to building on the significant achievements made to date in terms of television captioning. Under the existing arrangements with the Australian Human Rights Commission, Free TV members have committed to increased captioning levels on their primary channels to 90% of the broadcasting day for the calendar year 2012.

These arrangements with the Australian Human Rights Commission have greatly benefited the deaf and hearing impaired community and have facilitated constructive, positive and productive interactions between broadcasters and hearing-impaired advocacy groups. Free TV members have also been active participants in the Co-regulatory Captioning Committee (CCC), which is convened by the ACMA and deals with issues around the quality of captioning.

Free TV is committed to continuing the provision of quality captioning services to the deaf and hearing-impaired community. This Bill will make the regulatory requirements around captioning clearer and more intuitive for all of the relevant stakeholders, which is supported by Free TV.

However, Free TV has some outstanding concerns in relation to the drafting of particular parts of the Bill which create substantial regulatory burdens on broadcasters and have no positive consequences for hearing impaired viewers. These practical concerns are outlined below. Attachment A sets out our proposed amendments to rectify these issues.

2 Liability for breach

Under the Bill, a commercial free-to-air broadcaster will breach the new licence condition if they are unable to provide a captioning service (including a captioning service of a certain quality) for reasons beyond their control, even if they have acted reasonably and honestly.

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

By way of comparison, if there are technical problems and the whole of a broadcaster's service goes black, there is no licence condition or penalty for broadcasters. However under the Bill, if all or part of a captioning service experiences difficulties, then broadcasters' licences are jeopardised and broadcasters may be subject to substantial penalties.

A breach of the new Part 9D by a commercial television broadcaster may result in:

- an offence in breach of s139(1) of the Broadcasting Services Act 1992 (Cth) (BSA);
- liability for a civil penalty under s140A of the BSA;
- a remedial direction under s141 of the BSA;
- an offence for breach of a remedial direction under s142 of the BSA; and/or
- termination or suspension of the relevant commercial television broadcasting license under s143 of the BSA.



Other enforcement options are also available to the ACMA for the breach of a licence condition, including the acceptance of enforceable undertakings.

It is true that the criminal offences under s139(1) and s142(1) of the BSA are not strict liability offences. There must be a fault element for each offence to be made out. A fault element in relation to a corporation means that the corporation "expressly, tacitly or impliedly authorised or permitted the commission of the offence".

In contrast, a civil penalty, remedial direction, suspension or termination can apply without the offending broadcaster having any fault element in relation to the relevant breach. For this reason, these provisions might be described as "strict liability". Free TV members do not believe the requirement for the ACMA to consider fault is reflected in the draft legislation or accompanying explanatory memorandum.

There are a number of instances under the existing regime where the ACMA has found broadcasters to be in breach of their captioning obligations, even where it is clear that the cause of the breach was not the fault of the licensee. As captioning levels increase to 100% of the broadcast day between 6am and midnight, strict liability for these obligations is an impractical and unworkable compliance standard.

Amendment required

The Bill should be amended to require the ACMA to consider whether a licensee has acted reasonably and honestly in determining whether a breach of the licence condition has occurred. It is important to note that this proposed amendment:

- does not affect the requirement for broadcasters to caption a specified proportion of their programs on the primary channel;
- does not affect the requirement for broadcasters to comply with the ACMA's quality standards; and
- places the onus on broadcasters to demonstrate that they have acted reasonably and honestly in discharging their captioning obligations.

What is "reasonable" will depend on all the circumstances. We would expect consideration of these issues to include matters such as contractual arrangements with third parties, and whether or not the same captioning failure has occurred previously.

Free TV has based this proposed amendment on the *Competition and Consumer Act 2010* (Cth) (CCA), which recognises that civil penalty provisions can apply in circumstances where a party is not at fault and provides a reasonable and appropriate defence in relevant circumstances. Section 226 of the Australian Consumer Law (Schedule 2 of the CCA) provides that a defence to an action for recovery of a civil penalty applies where "*the person acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused*".

Free TV therefore recommends the inclusion of a new subsection in 130ZUB:

- (2) *If:*
- (a) *apart from this subsection, a commercial television broadcasting licensee has breached a provision of this Part; and*
 - (b) *in doing so, the commercial television broadcasting licensee acted honestly and reasonably and, having regard to all the circumstances of the case, ought fairly to be excused;*
- then the breach is to be disregarded in determining whether the licensee has complied with the provision.*



3 Technical difficulties – 130ZUB should apply to the Part

As a related matter, Free TV also recommends that proposed section 130ZUB in the Bill be amended to apply to the whole of new Part 9D, not just Division 2.

Section 130ZUB(1) is designed to accommodate situations where technical difficulties are experienced and there is a problem with the broadcast. However, it is currently only drafted to excuse licensees from breaching the captioning quota provisions. It does not apply to excuse licensees in relation to captioning quality.

If technical difficulties occur, it is likely that this will also affect the quality of the captioning service. For example, if a television picture experiences interference then it is likely that the captions will not be comprehensible. Likewise, if a television service goes to black as a result of a technical outage, there will automatically be a breach of the captioning quality provisions, as no captions will be provided at all.

For these reasons, section 130ZUB should be amended to deal with this discrepancy.

4 Reporting requirements

The Bill currently requires broadcasters to report and keep records on compliance with the new provisions, including the captioning quality provisions at Division 4.

The requirement is stated very broadly and there is no visibility around what the scope of the reporting requirement will be. This prevents broadcasters from assessing the likely impact of these obligations. There is very little guidance in the Bill or the Explanatory Memorandum, and Free TV is concerned that there is the potential for very onerous reporting requirements to arise.

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

A complaints based system is the most appropriate mechanism for measuring the quality of a captioning service. Where there is a problem, caption users will have the opportunity to complain to the ACMA. The hearing impaired community and other users of captions are the best placed to determine whether captioning is of sufficient quality.

Measuring compliance with annual targets is something that broadcasters already do, and we do not have any objection to this requirement. Free TV accepts that there is no practical way for the ACMA to monitor compliance in this area.

Conversely, because compliance with the captioning quality standards is a licence condition, complaints will go directly to the ACMA and they will investigate. The ACMA will already be in possession of up to date information about any compliance issues concerning captioning quality, including the number of complaints and breaches against each broadcaster. Consequently, requiring licensees to report this information again to the ACMA is an unnecessary and impractical regulatory burden.

It is important to note that if our suggested amendment is made to the Bill, broadcasters will still be required, as a licence condition, to comply with the ACMA's captioning quality standards. People who have a complaint about the quality of a captioning service will still be able to complain to the ACMA, and broadcasters will still be held to account. Our proposed amendment only addresses the additional reporting requirement.



If the proposed amendment is not accepted, Free TV requests that the Bill and the Explanatory Memorandum be revised to provide greater clarity and boundaries around the requirement to report on captioning quality.

5 Programs finishing after midnight

In measuring compliance with the captioning targets under section 130ZT, broadcasters should be able to include the whole of a program that commences before midnight but finishes after midnight. This would be in keeping with similar precedents in the Australian Content Standard for the transmission quota, and Australian first release drama programs. It is important to note that there is no evidence of broadcasters using this mechanism to circumvent their obligations under the Australian Content Standard.

Section 130ZT should be amended to provide that if a captioned program begins before midnight on the same day and ends on the next day, the part of the program broadcast after midnight is taken to have been broadcast in targeted viewing hours. Broadcasters will incur the cost/resources to caption the part of the program that is broadcast after midnight and captioning users will receive the benefit, so it is reasonable for that part to count towards the quotas.

If this change is not made, it could have the perverse result that a program which is live captioned (such as a sporting event that started before midnight) would cease to be captioned at midnight, thereby disappointing many hearing impaired viewers who may have commenced watching the event which may not conclude for many hours after midnight.

Implementing this change will require minor amendments to proposed provisions 130ZL and 130ZT, as marked at Attachment A.



ATTACHMENT A

130ZL Designated viewing hours

Programs transmitted before 1 July 2014

- (1) For the purposes of the application of this Part to programs transmitted before 1 July 2014, **designated viewing hours** are the hours:
 - (a) beginning at 6 pm each day or, if another time is prescribed, beginning at that prescribed time each day; and
 - (b) ending at 10.30 pm on the same day or, if another time is prescribed, ending at that prescribed time on the same day.

Programs transmitted on or after 1 July 2014

- (2) For the purposes of the application of this Part to programs transmitted on or after 1 July 2014, **designated viewing hours** are the hours:
 - (a) beginning at 6 am each day or, if another time is prescribed, beginning at that prescribed time each day; and
 - (b) ending at midnight on the same day or, if another time is prescribed, ending at that prescribed time on the same day.

(3) For the purposes of the application of this Part to programs transmitted on or after 1 July 2014, if a captioned program begins before midnight and ends on the next day, the part of the program broadcast after midnight is taken to have been broadcast during **designated viewing hours**.

130ZT Annual captioning targets for 2012-13 and 2013-14—commercial television broadcasting licensees

...

Targeted viewing hours

- (5) For the purposes of this section, **targeted viewing hours** are the hours:
 - (a) beginning at 6 am each day or, if another time is prescribed, beginning at that prescribed time each day; and
 - (b) ending at midnight on the same day or, if another time is prescribed, ending at that prescribed time on the same day.

(6) For the purposes of this section, if a captioned program begins before midnight and ends on the next day, the part of the program broadcast after midnight is taken to have been broadcast during **targeted viewing hours**.

130ZUB Certain breaches to be disregarded

- (1) If:
 - (a) apart from this subsection, a commercial television broadcasting licensee has breached a provision of this ~~Division Part~~; and
 - (b) the breach is attributable to significant difficulties of a technical or engineering nature for the licensee; and
 - (c) those difficulties could not reasonably have been foreseen by the licensee;then the breach is to be disregarded in determining whether the licensee has complied with the provision.

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



ATTACHMENT A

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

...

Division 6—Reports and record-keeping

130ZZC Annual compliance reports

Commercial television broadcasting licensee

- (1) A commercial television broadcasting licensee must, within 90 days after the end of each financial year, prepare and give to the ACMA a report relating to compliance by the licensee with Divisions 2, ~~4~~ and 5 during the financial year.

Note: For compliance by licensees, see clause 7 of Schedule 2.

- (2) A report under subsection (1) must:
 - (a) be in a form approved, in writing, by the ACMA; and
 - (b) set out such information as is required by the form.

...

130ZZD Record-keeping

Commercial television broadcasting licensee

- (1) A commercial television broadcasting licensee must:
 - (a) cause compliance records for the licensee for each financial year to be made in a form approved in writing by the ACMA; and
 - (b) retain the compliance records in its custody until the end of the period ending 90 days after its report under subsection 130ZZC(1) in relation to that financial year is given to the ACMA; and
 - (c) without charge, make available to the ACMA, on request, any compliance records made by the licensee under paragraph (a) that have been retained by the licensee (whether or not the licensee is, at the time of the request, under an obligation to retain the records).

Note: For compliance by licensees, see clause 7 of Schedule 2.

...

Compliance records

- (4) For the purposes of this section:
 - (a) **compliance records** for a commercial broadcasting licensee or a national broadcaster, as the case may be, for a financial year, means records of such information as will enable compliance by the licensee or national broadcaster with Divisions 2, ~~4~~ and 5 during that financial year to be readily ascertained; and

...