

Example: If 'Channel Y' earned \$1m in revenue in 2014-15, and the cost to provide captioning services for that channel in that year would exceed a threshold, e.g. 5 per cent or \$50,000, then that channel would be exempt from having to meet captioning obligations for that year on the basis that doing so would both provide an unreasonable imposition on providers and threaten its provision to viewers.

This option would draw on approaches taken in international markets such as the UK, where an audience share percentage (0.05%) threshold is used in determining captioning exemptions, and the US, where 'video programming providers' are exempt from captioning obligations if such expenditure would exceed 2 per cent of the gross revenues earned by the relevant channel during the previous year.

The option would result in increased transparency in relation to captioning targets by requiring targets for channels to be published in advance, in the same way as would happen under captioning channel plans.

Issues for consideration in relation to this option:

- This option would set a consistent captioning target per channel regardless of licensee.
- The requirement to caption programming would depend on the success of the channel, ensuring that successful channels provide this service, and that emerging channels are automatically exempted until they become more established with audiences.
- Would audience numbers, channel revenue or both be effective thresholds? What could other thresholds be included?
- This is consistent with key features of the models taken in the US and UK.

Option 3: Channel provider responsibility

Under this option the responsibility for meeting captioning obligations could be placed on channel providers as the business units which supply the content. For instance the ACMA would be able to accept captioning compliance reports from channel providers (and part channel providers), which would reduce the regulatory burden on relevant licensees. It would also support a reduction in unnecessary or duplicative reporting, as a channel provider could provide a single report on programming it provided to multiple licensees, instead of those multiple licensees each providing a report on the same programming.

Licensees would remain ultimately responsible for compliance obligations where channel providers fail to meet compliance requirements, including for example written and audio-visual record keeping, and in responding to complaints made either to the licensee or the ACMA.

These reporting arrangements draw on the New Eligible Drama Expenditure Scheme in the BSA (Part 7, Division 2A) where channel providers report against minimum expenditure obligations but licensees bear the ultimate responsibility for compliance with captioning obligations.

Unlike options 1 and 2 above, implementing option 3 would be a regulatory response, in that new regulation would be established, while existing regulation (relevant licensees' ultimate responsibility for captioning compliance) would remain in place.

Attachment A: Further issues and statutory review

A number of other issues that have been raised by stakeholders are outlined in this section. The Department's view is that it is not appropriate to consider further reform to address these issues at this time, for the reasons outlined below. Particularly where these issues relate to amendments that have only recently been introduced by the Deregulation Act, it is appropriate that where the issues referred to below require further consideration, this should happen in the context of the statutory review of Part 9D (the statutory review) that the BSA provides must take place by 31 December 2016.²³

Captioning obligations for commercial regional television broadcasters:

Commercial FTA television networks that provide services to regional areas of Australia (regional broadcasters), such as WIN, Prime, Southern Cross Austereo and Imparja, operate in different market conditions to commercial FTA broadcasters that operate in metropolitan markets, such as the Nine, Seven and Ten. Regional broadcasters often source a significant amount of their programming from metropolitan networks through affiliation agreements. Regional broadcasters generally also provide some local content including, for example, minimum levels of material of local significance as required under section 43A of the BSA.

Some stakeholders have raised concerns about the effect of captioning obligations on commercial regional broadcasters. For instance existing arrangements may create duplication of reporting where regional broadcasters are required to report on compliance for programmes that metropolitan broadcasters are also required to report on. Taking into account the size and operating environment of regional broadcasters, some stakeholders have suggested there is also value in considering whether regional broadcasters should take responsibility for captioning breaches in relation to programmes broadcast under an affiliation agreement.²⁴

It is appropriate that, as broadcast licensees, regional commercial FTA broadcasters bear ultimate responsibility for satisfying legal obligations under the BSA. The Department notes that commercial arrangements with affiliated metropolitan networks provide regional broadcasters with a mechanism to ensure they are able to receive both captioned programming and associated record-keeping and report data as required to meet their regulatory obligations.

²³ See s130ZZE of the BSA.

²⁴ For instance a submission to the deregulation process by Free TV Australia states that regional broadcasters should not be held to have breached captioning obligations for 'as live' programming delivered to them by a third party (i.e. affiliated metropolitan broadcaster).

Treatment of captioning breaches:

As noted above, FTA television broadcasters are subject to a strong and effective compliance regime which provides a range of sanctions and remedies including, in severe cases, the possibility of a broadcaster's licence being cancelled. Some stakeholders have argued that greater flexibility in determining breaches is required, including where a breach:

- affects less than 50 per cent of a licence area;
- was the result of unforeseen events;
- was the responsibility of a third party supplier; or
- occurred despite the responsible broadcaster having acted reasonably and in good faith.

It has also been argued that the BSA should be amended such that compliance with Part 9D captioning obligations would not be a licence condition for broadcasters.

Under existing arrangements the ACMA has discretion to apply proportional and reasonable sanctions, depending on the circumstances. The Deregulation Act introduced increased flexibility into how captioning breaches are determined,²⁵ and it is important that these changes should be allowed to take effect, and their impact observed, before considering further amendment in this area.

Assessment of captioning quality:

Some stakeholders have argued that the existing captioning regulatory framework is inadequate in the way it accounts for captioning quality obligations, including measurement of captioning quality. Ai-Media have proposed that alternative approaches to measurement of captioning quality be considered.²⁶ Other stakeholders have asserted that the ACMA should be required to consider 'near-live' programming when making a captioning quality standard.²⁷

The Deregulation Act requires the ACMA to review the Standard to take into account the differences between providing captioning services for live television programmes, pre-recorded television programmes and programs that include both live and pre-recorded material. The ACMA's review of the standard is due to be completed by 19 March 2016, and it has released a discussion paper seeking submissions by 18 December 2015. The Deregulation Act also introduced an exemption for captioning quality breaches where the breach is due to unforeseen engineering or technical failures.

²⁵ See clause 11 of Schedule 6 to the Deregulation Act.

²⁶ See Ai-Media submission to the Senate Committee Inquiry at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation/Submissions

²⁷ For instance see Free TV Australia submission to the Senate Committee Inquiry at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation/Submissions

Amend minimum captioning target for each STV channel in a group of STV sports channels:

The Deregulation Act amended the captioning regulatory framework in such a way that where they are provided by the same channel provider, sports channel captioning targets can be ‘averaged’ over a group of sports channels. Under the amendment, each individual channel in a group of relevant channels must still meet a minimum captioning target, namely two thirds of the target that applied to that channel prior to the introduction of the Deregulation Act.

ASTRA has proposed that the new minimum captioning level per individual channel affected by the provision be revised from two thirds to 50 per cent. While the proposed amendment may be feasible where it is demonstrated that the objective of maintaining the overall amount of captioning is supported, the Department’s view is that the most appropriate way to consider this option is as part of the 2016 statutory review.

Mandatory consultation between applicants and the ACMA:

During consultation regarding the Deregulation Bill, ASTRA suggested that the Bill include an obligation for the ACMA to consult with applicants in relation to a target reduction order or exemption order before finalising an order, and that the ACMA should have the power to vary the terms of an order sought by an STV licensee. ASTRA’s stated view was that:

This would avoid the need for multiple applications to be made in circumstances where an initial application is rejected for issues such as failing to provide certain information, applying for a target reduction which is considered too great, or applying for a period which is considered too long.²⁸

Good consultation is part of good regulatory practice. However defining a specific obligation to undertake consultation and negotiation on aspects of order applications may reduce flexibility and increase costs. Such an approach is also prima facie inconsistent with the Government’s deregulation agenda which seeks to reduce regulatory oversight costs for Government as well as the regulatory burden on industry.²⁹

²⁸ See ASTRA submission to the Senate Committee Inquiry at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation/Submissions

²⁹ See the Whole of Government deregulation agenda at www.dpmc.gov.au/office-deregulation/whole-government-deregulation-agenda

Amended definition of a new channel provider:

The Deregulation Act introduced an automatic exemption from captioning obligations for at least one year after commencement of an STV service ‘if the service predominantly consists of programmes not transmitted in Australia before that commencement.’³⁰

In a submission to the Senate Standing Committee on Environment and Communications Legislation’s Inquiry into the Deregulation Bill (the Senate Committee Inquiry), ASTRA proposed an amendment to the provision to exclude the qualification regarding eligibility for the exemption. Under ASTRA’s proposal, the ‘new channel exemption’ would not be subject to a qualification other than to exclude channels which are merely re-named or re-branded versions of an existing channel—that is, where the content and operation of the service remain materially the same.

ASTRA further proposed that, alternatively, the exemption be amended such that a new service could only be eligible if it predominantly consists of programmes not previously transmitted by the ‘same channel provider’ prior to commencement.

The Deregulation Act inserted a new definition of a channel provider for the purposes of Part 9D that is designed to encourage subscription television licensees to bring new content and channels to Australian audiences. Where captioning obligations are likely to cause unjustifiable hardship, licensees are provided with relief under the existing arrangements in that they are already able to apply for target reduction orders and exemption orders.

Remove repeat programming obligations for STV services:

Some stakeholders have questioned the ongoing need and value of captioning obligations relating to repeat programming. For instance in their submission to the Senate Committee Inquiry Ai-Media stated that:

*Superficially attractive, the “repeat rule” for subscription broadcasters, has negative unintended consequences, is impossible to enforce, and is unnecessary given the imperatives on broadcasters to fill their quotas.*³¹

MAA’s proposal to standardise captioning target arrangements across FTA primary and multichannels is described in the policy options paper at section *c) other stakeholder proposals—regulatory measures for the FTA sector*. In relation to STV services, the Deregulation Act aimed to ensure repeat captioning obligations are better-targeted by restricting repeat captioning obligations to programmes provided by the same channel provider. As new measures introduced by the Deregulation Act have not been operating for a substantial period of time, and other reforms form part of the ongoing discussion this paper aims to support, consideration of any further changes to the repeat captioning obligations beyond those implied at section *c) other stakeholder proposals—regulatory measures for the FTA television sector* should be delayed

³⁰ See clause 5 of Schedule 6 to the Deregulation Act. Available at www.comlaw.gov.au/Details/C2015A00022

³¹ See Ai-Media submission to the Senate Committee Inquiry at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Broadcasting_Deregulation/Submissions, p6

until the statutory review of Part 9D that ACMA is required to undertake by 31 December 2016 under section 130ZZE of the BSA.

Compliance and enforcement regime:

Currently breaches of the captioning standard are also breaches of licence conditions for both FTA and STV licensees. In the extreme, breaches of licence conditions could result in suspension or removal of broadcasting licences. Some stakeholders have argued that that this would be an extreme outcome for breaches of captioning requirements. The issue of enforcement of licence conditions and the penalties applying is one which is wider than captioning and is a consideration in other areas of broadcasting regulation. Alternative sanction regimes are more appropriately considered in the wider deregulation context.

Attachment B: Captioning targets for subscription television services

Annual captioning target for financial year beginning on 1 July 2015³²

Item	Service	Percentage
1	Category A subscription television movie service	80%
2	Category B subscription television movie service	60%
3	Category C subscription television movie service	50%
4	Category A subscription television general entertainment service	60%
5	Category B subscription television general entertainment service	50%
6	Category C subscription television general entertainment service	30%
7	Subscription television news service	20%
8	Subscription television sports service	20%
9	Subscription television music service	10%

³² See section 130ZV of the BSA.