



Response to the Department of Broadband, Communications and the Digital Economy Discussion Report: Access to Electronic Media for the Hearing and Vision Impaired - Approaches for Consideration

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Contents

1. Introduction	3
About ASTRA	3
2. The Subscription Television Story	3
The Subscription Television Model is Unique	4
Subscription Television Media Access Targets should be different to Free to Air Media Access Targets	4
3. The Captioning of Subscription Television	5
History of Captioning Subscription Television	6
Conflicting Legislation – Broadcasting Services Act 1992 vs Disability Discrimination Act 1992	7
Complexity of Captioning in a Subscription Television Multi-channel environment	8
Cost Issues for Captioning Subscription Television	9
4. Captioning Quality	9
5. The Introduction of Audio Descriptions on Subscription Television	9
The Government’s Proposed Technical Trial on the ABC	10
6. Extension of Captioning Requirements to other Platforms	10
7. Conclusion	10
8. Annexure A – List of ASTRA Members	12

1. Introduction

The Australian Subscription Television and Radio Association (**ASTRA**) welcomes the opportunity to respond to the Department of Broadband, Communications and the Digital Economy's Discussion Report "*Access to Electronic Media for the Hearing and Vision Impaired – Approaches for Consideration*" (**the Report**).

ASTRA is supportive of the Government's commitment to social inclusion and its consideration of approaches to promote inclusion and accessibility for all as Australia moves to a digital economy.

This is evidenced by the fact that ASTRA's channel members exceeded the minimum levels set out in the captioning exemption granted under the *Disability Discrimination Act 1992* (**the DDA**) in 2004.

In relation to electronic media access, in particular captioning and audio description targets, it is unnecessary and overly burdensome to enshrine captioning targets in legislation, as is contemplated by the Report. Industry is already surpassing current targets previously agreed with the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission (**AHRC**)).

The regulation of captioning targets should be covered under the *Broadcasting Services Act 1992* (**the BSA**). Further, the Government should not adopt a one-size-fits-all approach to regulation of media access in relation to broadcasting. The regulation of captioning targets is a complex task which requires a comprehensive understanding of the distinctive characteristics of a subscription television multi-channel environment.

ASTRA supports the Government's proposed trial of audio description on television involving the Australian Broadcasting Corporation (**ABC**). However, ASTRA does not support the introduction of minimum requirements for audio description until the television industry has a greater understanding of the complexities involved in delivering this service.

About ASTRA

ASTRA is the peak industry body for subscription television and narrowcast TV in Australia. ASTRA was formed in September 1997 when industry associations representing subscription (multi-channel) television and radio platforms, narrowcasters and program providers came together to represent the new era in competition and consumer choice. ASTRA's membership includes the major subscription television operators, as well as channels that provide programming to these platforms. A complete list of ASTRA members is attached at Annexure A.

2. The Subscription Television Story

The subscription TV industry is the undisputed market leader of digital broadcasting. A dynamic sector that is constantly evolving and growing, subscription television is received nationally by 32% of Australians through their homes and many more through hotels, clubs and other entertainment and business venues.

Since its inception, over \$A9 billion dollars has been invested in infrastructure, capital, facilities, productions, programs and services in order to establish and develop the subscription TV industry.

ASTRA's members are responsible for the bulk of this investment which has been distributed throughout metropolitan, regional and remote markets. The industry has facilitated the creation of jobs in the Australian television industry, as well as investing in infrastructure and the production of Australian content. The industry continues to invest in Australian television programming and production.

The Subscription Television Model is Unique

The commercial model of subscription television, as well as its appeal, is predicated on the availability of choice. That is, subscription television is dependent upon the ability of platforms such as FOXTEL and AUSTAR to provide viewers with a wide range of programming options. There are currently over 88 distinct channels available across the various subscription television platforms within Australia.

A distinctive feature of subscription television is the direct contractual relationship between the service provider and the subscriber. The voluntary relationship between the provider of a retail service and a subscriber to that service provides subscribers with freedom of choice along with the capability and responsibility to select the programs they wish to receive.

Many of the channels offered on subscription television are specialised in nature and, as a result, these channels may have a very low share of viewing relative to the commercial and national broadcasters which are of broad appeal. For example, the Seven Network achieved a 21.4% share of viewing in the national ratings statistics for 2009, compared to the 1.0% achieved by FOX 8 as the best performing subscription channel.¹

The niche nature of many of the subscription television channels means that they also have limited revenue streams. Imposing onerous regulatory obligations on these businesses – such as mandatory targets for captioning and audio descriptions – would result in some of these channels being unsustainable and withdrawing from the Australian market.

For example, the highest rating show on subscription television during 2009 was the finale of Australia's Next Top Model, which attracted 340,000 viewers². This is in comparison to the highest rating show on commercial television, the Masterchef finale, which attracted 3.7 million viewers³.

Subscription Television Media Access Targets should be different to Free-To-Air Television Media Access Targets

Despite the growth of the subscription television industry, penetration is still low at 32% compared with the commercial and national broadcasters which have close to 99% penetration.

In 1997, the Australian Broadcasting Authority, now the Australian Communications and Media Authority (**ACMA**), recognised the unique characteristics of subscription television when it commented in its Final Report on Australian Content for Pay TV that:

“Pay TV operates by offering as a package a range of ‘niche’ or specialised programming channels which subscribers must pay to receive. Within this context it enhances the viewing options and complements free to air services.”

¹ OZTAM Ratings Data. All People. Weeks 1-50 2009. Excludes time-shifted versions of channels.

² WA Today, <http://www.watoday.com.au/entertainment/next-top-model-finale-breaks-ratings-record-20090708-dd1p.html>

³ Sydney Morning Herald, <http://www.smh.com.au/news/entertainment/tv--radio/masterchef-sets-ratings-record/2009/07/20/1247941856869.html>

“Pay TV has a smaller audience to commercial television which is provided free to air with no direct cost to the viewer... Pay TV is further differentiated from free to air television in terms of the number of different channels, total hours broadcast, reduced advertising opportunities and the niche nature of much of its programming.”⁴

It is inappropriate to impose the same obligations on subscription television channels as are imposed on the commercial and national broadcasters for a number of reasons including:

- the differences in share of viewing and penetration levels; and
- the inconsistency with parliamentary intention.

The Government has also recognised the difference between primary channels and additional multi-channels for commercial and national broadcasters. Currently, commercial and national broadcasters are not required to provide a captioning service unless the program has previously been transmitted and captioned on a core television service.

The Explanatory Memorandum to the Bill that clarified the captioning obligations for the commercial television digital primary channels and contained the exemption for the multichannels states:

“Multichannels will also initially reach a much smaller audience than the main analogue/SDTV channel. Therefore it is appropriate that a lighter regulatory burden be placed on multichannels”⁵

This approach is consistent with the policy approach to the regulation of broadcasting services contained within the BSA which clearly provides for a lighter regulatory approach where the services regulated have a lesser degree of influence (ie have a lower viewing share and penetration). The BSA states that:

“Parliament intends that different levels of regulatory control be applied.... According to the degree of influence... that services are able to exert”⁶

3. The Captioning of Subscription Television

ASTRA is supportive of the introduction of technologies that will bring greater access to more people – and that includes making subscription television accessible to all. In the past, ASTRA’s members have exceeded the agreed targets in relation to phasing in captioning on subscription television that were agreed with the AHRC under a DDA exemption (details of which are set out at paragraph 3.6 below). ASTRA is currently discussing an extension to this exemption with revised targets.

However, ASTRA has serious concerns with the Government’s proposed intention to amend the *Broadcasting Services Act 1992* and introduce legislatively mandated captioning targets.

ASTRA does not support regulatory intervention except in cases where it is directed to a demonstrated market failure. That is, regulation should be a ‘last resort’ mechanism to be introduced in instances of durable market failure when industry led practices have failed to address the issue and it is clear that regulatory intervention would achieve a better result.

⁴ Australian Broadcasting Authority, *Final Report on Australian Content for Pay TV: Report to the Minister for Communications and the Arts*, 1997.

⁵ Broadcasting Legislation Amendment (Digital Television) Bill 2006, http://www.austlii.edu.au/au/legis/cth/bill_em/blatb2006499/memo_0.html

⁶ *Broadcasting Services Act 1992*, S4(1)

ASTRA is opposed to the regulation of the subscription television industry including captioning targets for the reasons that:

- in the absence of such regulation, the subscription television industry exceeded the captioning targets approved by the AHRC;
- the inclusion of regulated captioning targets under the BSA could result in a conflict with current requirements under the DDA, addressed below. In addition to the potential for conflict, the broadcasting industry is operating in a converging environment where it is acknowledged that the regulatory framework needs review; and
- the regulation of captioning targets is a complex task which requires a comprehensive understanding of the distinctive characteristics of a multi-channel environment.

History of Captioning Subscription Television

ASTRA is supportive of the objectives of the Government's social inclusion agenda and is keen to ensure that subscription television programming is available to deaf and hearing impaired viewers.

In June 2004, the AHRC granted ASTRA's members a five year temporary exemption pursuant to the DDA, subject to conditions. The key conditions of the temporary exemption required subscription broadcasters to:

- implement captioning rollout for a minimum of twenty channels (phase 1);
- enable a further twenty channels within 24 months (phase 2) of the captioning launch and apply the captioning rollout to those channels enabled; and
- ensure availability of information on program captioning.

ASTRA members exceeded the captioning levels required by the AHRC exemption. Since the introduction of closed captioning on subscription television in 2004, the average annual growth rate of captioning hours on subscription television has been 31%, illustrated in the table below.

Year	Captioned (hours) ⁷
2004/05	41,258
2005/06	55,048
2006/07	69,805
2007/08	102,954
2008/09	120,012

With respect to the twenty phase 1 channels and twenty phase 2 channels, the industry was required to achieve minimum levels of 25% and 15% of captioning across a 24 hour period in year 5. The industry reached and exceeded these levels achieving an average of 44% and 24% respectively. The industry also enabled an additional 5 channels with closed captioning. The industry proposes to continue to increase these levels on both the existing channels and new channels over time.

⁷ Exclusive of subtitling provided on World Movies.

In addition to providing a greater volume of captioned programming to deaf and hearing impaired subscribers, subscription television considered the quality of services provided and prioritised captioning on peak viewing hours.

Subscription television providers also introduced additional services such as enabling the recording of captions and the ability to search by 'closed captioned programs' via electronic and online program guides.

ASTRA submits that the Government's public policy objective of social inclusion is being achieved without the need for regulation. The demonstrated willingness of subscription television to phase in captioning beyond the requirements of the exemption would suggest that there is no market failure and, therefore, no demonstrated need to regulate.

Conflicting Legislation – *Broadcasting Services Act 1992 vs Disability Discrimination Act 1992*

Under the present regulatory framework, ASTRA members are applying to the AHRC to seek an exemption under the DDA. In the event that the new exemption is granted, if the Government were to introduce additional legislative requirements under the BSA, it would result in a conflict between the operation of these two Acts, a conflict that is currently experienced by the commercial and national broadcasters.

ASTRA supports a self-regulatory model for subscription television. However, ASTRA believes that if any regulation of subscription television is considered it should be consolidated under the BSA, where the intention of Parliament is to recognise the influence of different broadcasting services. The ACMA, as the broadcast sector's regulator, is best placed to understand the subscription television model.

The BSA also acknowledges that the Parliament intends broadcasting services to be regulated in a manner that, in the opinion of the ACMA, enables public interest considerations to be addressed while not imposing unnecessary financial and administrative burdens on providers of broadcasting services⁸.

The BSA already recognises that differences exist between the broadcast models of the subscription and commercial or national broadcasters and these differences are reflected in approach to regulatory intervention, as can also be seen through the following:

- Drama Spend - subscription television broadcast licensees are required to ensure that where a service is a drama service 10% of the program expenditure in relation to that service is spent on new Australian content each year;
- Commercial FTA licensees are subject to Australian Content Standard 2005 which requires them to broadcast an annual minimum quota of 55% of Australian programming between 6am and midnight;
- Classification Day Part Zones - commercial FTA television broadcast licensees are subject to requirements in relation to the time of day that programs may be broadcast, however subscription television is not subject to these types of obligations; and
- Children's Television - the commercial FTA television broadcasters are subject to the Children's Television Standard which imposes minimum programming and scheduling requirements in relation to that content.

⁸ Broadcasting Services Act 1992, section 4.

In addition, the Productivity Commission recognised that some of the differences can be attributed to the differences in the way in which the two television platforms operate:

“Free-to-Air broadcasters used radio frequency spectrum which is a scarce public resource. The licensing fees paid, and some of the other regulations to which they are subject, reflect the benefit they derive from having preferential access to that public resource.”⁹

The ACMA, as the broadcasting regulator, commented in a submission to the Productivity Commission on the regulatory framework as follows:

“The ACMA has observed significant change in the communications policy environment in recent years, including across broadcasting platforms. These changes have generated considerable pressure on communications regulation. The ACMA response to date has largely been facilitated by utilising regulatory flexibility within the existing legislative framework (with minor legislative amendment where possible, including for online services under the BSA).

The ACMA considers that the communications regulatory framework as a whole requires review as there is an increasingly fragmented approach taken on new policy and communications developments and the regulatory flexibility the ACMA has available is near exhaustion. The ACMA’s current approach to managing the increasing pressure on the communications regulatory environment has a limited capacity to maintain the efficiency, effectiveness and appropriateness of communications regulation.”¹⁰

In light of the need for a review of the communications regulatory framework, ASTRA submits that any contemplation of additional regulation under this framework should be delayed until after such time as a review is completed.

Complexity of Captioning in a Subscription Television Multi-Channel Environment

The introduction of targets in legislation would require a comprehensive understanding of the complexities of captioning in a subscription television multi-channel environment. The total costs associated with providing closed captioning are higher in a subscription television environment due to its large number of channels.

It is critical to appreciate that channels are not all provided to subscription television platforms on the same basis. Some channels are made available to platforms by way of shared signals across various territories throughout the Asia Pacific region and in some cases the world. These channels are currently offered in Australia in a very economical manner due to the common signal. However, because these channels are intended for an international broadcast, many do not carry captioning. Further, because of the ‘pass through’ nature of the shared signal, the platforms are unable to edit the content by including captions.

In the context of news channels for example, channels like CNN, BBC World News and Eurosport are only broadcast by way of a shared signal, and do not include captions because these channels are designed for international audiences. To impose a captioning obligation on these channels would significantly increase the costs of producing the international broadcast and radically change

⁹ Annual Review of Regulatory Burdens Business: Social and Economic Infrastructure Services Productivity Commission Research Report August 2009.

¹⁰ ACMA, ‘Submission to Productivity Commission Annual Review of Regulatory Burdens on Businesses: Social and Economic Infrastructure Services, July 2009, http://www.pc.gov.au/__data/assets/pdf_file/0008/90791/subdr073.pdf

the platform economics of offering these channels. In some cases, this may result in the withdrawal of channels from the Australian market. Where the captions are available, for example on Fox News, the captions are passed through.

Costs Issues for Captioning Subscription Television

The total costs associated with providing closed captioning are higher in the subscription television environment than in the free to air television environment due to the volume of channels provided and the time period over which captioning targets are measured. While programming budgets of individual channels are lower than those of the commercial and national broadcasters, savings do not apply to closed captioning costs. To caption an hour of original or live programming costs the same amount, regardless of the broadcast environment and the number of viewers.

Where a program shown on subscription television has been captioned overseas or locally, the caption file is most often separately purchased, reformatted, re-timed and embedded onto the transmission master. As captioning is transmitted and stored differently in different countries, captioned programming obtained from different countries may need to be repurposed for broadcast in Australia.

Subscription television programming is diverse in its content and format. As a result, captioning requirements are necessarily varied. For example, local programming requires original captioning which is significantly more expensive than repurposing existing captioning files. Live programming is labor intensive and considerably more expensive. Finally, music clip captioning is subject to particular copyright and licence fees.

Unlike the commercial and national broadcasters, which the Federal Government has provided with exclusive use of publicly-owned broadcasting spectrum on a “no risk” basis for the provision of digital television services, the bandwidth used by subscription television broadcasters represents a fixed cost.

To broadcast closed captions, subscription television broadcasters require additional bandwidth to that required for the main program stream. As additional bandwidth and infrastructure is required to support captions, subscription television broadcasters face a substantially higher cost over and above the costs faced by commercial and national broadcasters due to the significantly greater number of channels on subscription television.

4. Captioning Quality on Subscription Television

ASTRA is not aware of any issues in relation to caption quality. However, the subscription television industry is committed to continued engagement with representatives of the deaf or hearing impaired community to ensure any concerns in this regard are addressed.

Further, ASTRA will work with stakeholders in relation to the finalisation of voluntary guidelines on captioning quality.

5. The Introduction of Audio Descriptions on Subscription Television

ASTRA does not support the introduction of minimum requirements for audio description until the industry has a greater understanding of technical requirements and the costs associated with establishing and delivering this new service.

Some of ASTRA's channel members have started to investigate the complexities of introducing audio descriptions and will continue working with representatives of the blind and vision impaired community to understand the requirements.

The Government's Proposed Technical Trial on the ABC

ASTRA considers that it is appropriate for the Government to run a trial of audio description services on free to air television. This was the way in which audio descriptions were trialed in overseas markets, such as the United Kingdom.

In considering the introduction of audio descriptions, all aspects, not simply technical issues, must be contemplated. This includes the consideration of the costs of implementing technologies, particularly in relation to channels with small viewerships.

In the United Kingdom, Ofcom may exclude programs and services from these requirements having regard to a range of matters, including the extent of the benefit conferred, the technical difficulty and cost of providing the access service. Music and news programs are examples of services that may be excluded from audio description requirements.

ASTRA supports the statement in the Discussion Paper that the trial must:

"...focus on identifying and understanding the technical issues present and contribute to specific new research on the costs, benefits and implications of an introduction of audio description broadcast services more generally in Australia. Issues that could be considered include: establishing and transmitting the service, the development of trained audio-descriptors, and analysis of the audience demand and interest in programming. The capital and recurrent costs of establishing and delivering a new audio description service could also be considered."¹¹

6. Extension of Captioning Requirements to other Platforms

Given the complexities of the introduction of these services in the television environment, currently ASTRA is opposed to the extension of these requirements to other platforms (ie the internet).

However, in the converging environment and the expansion of media on other platforms (eg the introduction of IPTV), Government should be mindful to ensure that there is no regulatory imbalance across platforms.

7. Conclusion

ASTRA is supportive of promoting accessibility in the digital economy and the introduction of technologies that will bring choice to more people including making subscription television accessible to all.

The subscription television model is dependent on the ability of platforms to provide a wide range of programming options. The subscription television model varies significantly to the free to air television model and, as such, Government should not adopt a one-size-fits-all approach to the regulation of this issue in the broadcasting sector.

¹¹ Department of Broadband, Communications and the Digital Economy, *Access to Electronic Media for the Hearing and Vision Impaired – Approaches for Consideration, Discussion Report*, p20.

ASTRA is opposed to the introduction of targets in legislation. However, in any case the introduction of any legislated targets should be considered as part of a wholesale review of the BSA, which recognises the differences and complexities of captioning in a multi-channel environment.

The total costs associated with providing closed captioning are higher in a subscription television environment due to the onerous regulatory obligations on businesses with limited revenue streams – such as captioning and audio descriptions – would result in some of these channels being unsustainable.

Regulation should be a 'last resort' mechanism to be introduced in instances of durable market failure and when industry led practices have clearly failed to address the issue and it is clear that regulatory intervention would achieve a better result.

ASTRA believes that the success of the approach to date is evidenced by the fact that the ASTRA channel members have significantly exceeded the minimum levels previously agreed in the captioning exemption granted under the DDA in 2004.

ASTRA looks forward to continuing to work with Government and other key stakeholders in relation to electronic media accessibility.

Please do not hesitate to contact ASTRA if you require further information or clarification of the matters raised in this submission.

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Annexure A

List of ASTRA Members

Subscription Television Platforms

AUSTAR
FOXTEL
Optus Television
Telstra

Program Channel Providers

Aurora
Australian Christian Channel
BBC Worldwide Channels Australasia
Bloomberg Television
Comcast
Discovery Networks
ESPN
Eurosport
Expo Networks
KidsCo
Movie Network
National Geographic
NBC Universal
Nickelodeon
Ovation
PAN TV
Premier Media Group
Satellite Music Australia
Setanta Sports Australia
Sky Racing
The Hallmark Channel
The Premium Movie Partnership
The Walt Disney Company (Australia) Pty Ltd
Turner International (Australia)
TV1
TVN
TVSN
VH1/MTV
XYZ Networks Pty Ltd

Communications Companies and Other Associate Members

AI Media
Cath Ward Media Services
Full Circle Media
Intelsat
Multi Channel Network
The Playroom Sydney/Omnilab

Affiliate Members

Minter Ellison
TressCox Lawyers
Baker and McKenzie