A submission in response to the Australian Communications and Media Authority’s preliminary decision to grant an exemption to Optus Vision Media Pty Ltd

Media Access Australia

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This submission relates to the exemption applications lodged by Optus Mobile TV Pty Ltd for the subscription television service Ovation.

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1. **About Media Access Australia**

Media Access Australia is Australia’s only independent not-for-profit organisation devoted to increasing access to media for people with disabilities.

At the core of our work is the understanding that exclusion from mainstream audiovisual media has profound effects on educational outcomes, workforce participation and social inclusion.

Access to media through technology empowers people to be independent, gain knowledge, make their own choices, and be active members of our society.

We promote inclusion by providing expert knowledge and advice on existing and emerging mainstream technologies to government, industry, educators, consumer organisations and individuals.

1. **The approach to exemptions should reflect policy**

In the Explanatory Memorandum accompanying the legislation to amend the *Broadcasting Services Act.*,the intent of the Parliament is made clear in regards to the purposes of the amendments. Paragraph 93 states quite clearly: “The over-arching policy is for a subscription television licensee to meet annual captioning targets, that will increase in time, in respect of particular categories of subscription television services that are required to be captioned. Incremental improvements in the accessibility of television services are consistent with the objectives of the DDA.”

In simple terms, the purpose of the amendment is to improve access to television, not provide a simple administrative process by which licensees seek to avoid their captioning obligations. In light of this we regard the granting of an exemption as an exceptional circumstance that is provided as a last resort and for a minimum timeframe. In granting an exemption we believe that a full and public process outlining clear reasons for the temporary exemption should be provided so that both the public and Parliament are satisfied that it is truly exceptional circumstances.

The processes undertaken in other jurisdictions, such as the UK and USA, which are outlined below, reflect the seriousness of excluding access to Deaf and hearing impaired viewers. We would also expect that granting an exemption for any more than a 12-month period would not occur as the legislated process allows for a reapplication if the exceptional circumstances that may warrant an exemption in the public interest continue to exist. By following such a process, the ACMA is making it clear that its expectation is that a licensee is doing everything within its capabilities to meet the legislated requirements that are a condition of a right to broadcast with a degree of exclusivity.

1. **Costs**

The ACMA has granted a preliminary exemption order for Optus Vision Media for the Ovation channel for two years, 1 July 2013 to 30 June 2015, noting that captioning is not currently provided on this service. The application notes that the service is delivered via the Foxtel platform, but is not captioned, and to comply with captioning requirements the channel would need to be live captioned. The ACMA has accepted that this would constitute “unjustifiable hardship”. However, the ACMA has not stated how it defines this, so there is no indication of how profitable Optus Vision Media would need to become before it is required to deliver captioning.

In the UK, access requirements of broadcasters are set out in the communications regulator Ofcom’s ‘Code on Television Access Services’.[[1]](#footnote-1) Ofcom determines whether a channel is required to provide access services (captioning, signing and audio description) by looking at audience share, and the cost of access services compared to the ‘relevant turnover’[[2]](#footnote-2) of the channel.

Any channel that has an audience share of less than 0.05% is exempt from access requirements.

If a channel is not exempt due to audience share, Ofcom will determine its access requirements based on what Ofcom has determined to be an average cost per hour of access services, compared to the turnover of the channel (or in the case of several channels owned by one company, the turnover of that company). There are three levels of access requirements. With regards to captioning, Level One is the full captioning target, Level Two is 66% of the target, and Level Three is 33% of the target. The target itself is determined by the number of years the channel had been broadcasting. In the first year of broadcast it is required to caption 10% of programs, and this rises to 80% in the tenth year.

Ofcom expects each channel (or channel owner) to provide access services to the highest level it can within a budget equating to 1% of their relevant turnover. Only those channels or channel owners which cannot achieve Level Three by spending this amount are exempt from access requirements.

In the US, the Federal Communications Commission has determined that “No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel during the previous calendar year.” In addition to this, providers are generally exempt from captioning provisions if they have gross revenues of less than $3,000,000 during the previous calendar year.[[3]](#footnote-3)

In both the UK and US, these rules are clear, simple and publicly available. We submit that the ACMA also needs to make public the exact criteria which it is using to approve applications for exemptions or target reductions based on financial hardship or burden, so that consumers can be confident that a reasonable decision has been made.

1. **Future accessibility on the service**

The Optus Mobile services were introduced without regard to providing captions. We believe that the ACMA should only grant exemptions to services like Optus if there is a commitment on their part to investigate and plan the logistics of providing captioning, so this can be done in a timely fashion if and when the services becomes profitable enough to warrant caption requirements. We also believe, for the reasons stated above, that the ACMA should never grant exemptions for longer than 12 months.

1. <http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/tv-access-services/code-tv-access-services/> [↑](#footnote-ref-1)
2. ‘Relevant turnover’ is defined here: <http://stakeholders.ofcom.org.uk/consultations/socp/main/?a=87101> [↑](#footnote-ref-2)
3. <http://transition.fcc.gov/cgb/dro/exemptions_from_cc_rules.html> [↑](#footnote-ref-3)