A submission in response to the Australian Communications and Media Authority’s preliminary decisions to grant exemptions to Telstra Pay TV Pty Ltd

Media Access Australia

February 2014

This submission relates to the exemption applications lodged by Telstra Pay TV Pty Ltd for the following channels on Telstra Mobile F:

* A & E (Application # 111)
* ABC1 (# 112)
* Arena (# 113)
* BBC World News (# 114)
* SportsFan (# 115)
* Cartoon Network (# 116)
* Channel [V] Hits (# 117)
* Channel [V} (# 118)
* CNN (# 119)
* Discovery Mobile (# 120)
* Disney Channel (# 121)
* Disney Junior (# 122)
* E! Entertainment (# 123)
* Eurosports (# 124)
* Eurosportsnews (# 125)
* Footy TV (AFL) (# 126)
* FOX Sports (# 127)
* Fox8 (# 128)
* League TV (NRL) (# 129)
* Lifestyle YOU (# 130)
* MAX (# 131)
* MTV (# 132)
* Nat Geo Adventure (# 133)
* National Geographic (# 134)
* Nick Jr (# 135)
* Nickelodeon Mobile (# 136)
* SBS One (# 137)
* SF (# 138)
* Sky News Business (# 139)
* Sky News (# 140)
* Sports Play Powered by Fox Sports (# 141)
* The Comedy Channel (# 142)
* The Lifestyle Channel (# 143)
* Sky News Weather (# 144)
* TV1 (# 145)

Submitted by:

Chris Mikul

Project Manager

Media Access Australia

Phone: 02 9212 6242

Email: chris.mikul@mediaaccess.org.au

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 34 preliminary exemption orders for Telstra Pay TV, noting that captioning is not currently provided on its services. To create the infrastructure to would impose financial costs which would make the service unviable, and therefore constitute “unjustifiable hardship”. However, the ACMA has not stated how it defines this, so there is no indication of how profitable Telstra Pay TV 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 (FCC) 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 services**

The technology exists to provide captions on mobile phones. In the United States, the FCC introduced rules on 29 October 2013 that make it compulsory for all devices used to receive or play digital video – including smartphones – to receive and display captions.[[4]](#footnote-4) These rules put into effect one of the requirements of the *21st Century Communications and Video Accessibility Act 2010*. The FCC also established an online ‘Accessibility Clearinghouse’ which lists mobile devices that support closed captions.[[5]](#footnote-5)

We also note that Telstra has committed to introduce captions (and audio description) on the Telstra T-Box and other devices capable of downloading Telstra media content as part of its Disability Action Plan 2013-2016 (Commitment 1.1, page 5).

Since the ACMA granted Telstra Pay TV its previous exemption, it appears to have done little or no work towards providing captioning on its content, although the ACMA notes that it has been advised that “its recent investment in technology might accommodate captioning in the future”. We believe that an exemption should only be granted after a firm commitment to introducing captions is made, and an estimated time for it to commence has been given.

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)
4. <http://www.fcc.gov/document/fcc-adopts-new-video-accessibility-rules> [↑](#footnote-ref-4)
5. <http://ach.fcc.gov/products-and-services/mobile-devices/region-na/all-manufacturer/all-blind-features/all-cognitive-features/all-hearing-features/all-mobility-features/all-physical-features/page-1-of-3/show-100/blind-or-visually-impaired> [↑](#footnote-ref-5)