

**AUSTRALIAN HUMAN RIGHTS COMMISSION
DISABILITY DISCRIMINATION ACT 1992 (CTH), section 55(1)
NOTICE OF GRANT OF A TEMPORARY EXEMPTION**

By this instrument, the Australian Human Rights Commission grants to the Applicants an exemption pursuant to section 55(1) of the *Disability Discrimination Act 1992 (Cth)* (DDA).

SUMMARY

The Applicants sought an exemption from the DDA in so far as it requires captioning for people who are Deaf or who have a hearing impairment on the television programs supplied or broadcast by the Applicants.

The Applicants proposed that the Commission grant the exemption subject to the condition that the Applicants will increase the percentage of captioning provided on a number of the channels that they operate.

The Commission has granted an exemption to the Applicants until 31 December 2012 because it is satisfied that an exemption of the duration and subject to the conditions granted is reasonable because it represents acceptable progress towards eliminating discrimination and furthering the objects of the DDA.

The exemption is granted on the terms and subject to the conditions outlined in Attachment A of this Notice.

BACKGROUND

The Applicants

The Applicants are the Seven Network Limited group of companies, the Nine Entertainment Co group of companies, the Network Ten Limited group of companies, the Prime Media Group of companies, the WIN Corporation group of companies, the Southern Cross Australia group of companies, Imparja Television Pty Ltd, the Special Broadcasting Services Corporation and the Australian Broadcasting Corporation (ABC). The Applicants are broadcasters of television programs screened on free to air television.

The Application

The Applicants applied to the Commission for an exemption from the provisions of the DDA that require that they provide captioning on the television channels that they operate for people who are Deaf or who have a hearing impairment. The Applicants sought an exemption that would operate until 31 December 2012.

The Applicants proposed that as a condition to the Commission granting the exemption, the Applicants would increase the amount of captioning that they provide on some of the channels that they operate. Significantly, the Applicants undertook to provide captioning on:

- at least 90% of Programs screened between 6.00 am and 12.00 midnight; and

- all Programs (excluding sport) that commence from 6.00 pm to 10.30 pm until the conclusion of the Program

on their primary channel.

The Applicants noted that in December 2010 the Australian Government - Department of Broadband, Communications and the Digital Economy released the final report of its Investigation into Access to Electronic Media for the Hearing and Vision Impaired (Media Access Report). The Media Access Report recommended that new captioning targets for the Applicants be inserted into the *Broadcasting Services Act 1992* (Cth)(BSA). The Applicants state that they were advised by government that amendments to the BSA setting new captioning targets for the Applicants would be introduced into Parliament in 2011.

The Applicants state that they seek a short exemption to cover the period before the amendments to the BSA commence. They submit that the conditions that they propose are consistent with the recommendations contained in the Media Access Report. The Applicants state that the exemption is designed to ensure the same outcomes as would be achieved for 2012 were the amendments to the BSA recommended in the Media Access Review Report in place.

The Applicants note that they have complied with the terms of earlier exemptions granted by the Commission by: consulting with deafness community groups, reporting on those consultations to the Commission, meeting captioning targets and regularly reporting to the Commission on captioning levels.

Submissions received by the Commission

The Applicants' request for a temporary exemption was posted on the Commission's website and interested parties were invited to comment on the application.

The Commission received 54 submissions in response to the application: one submission supported the Commission granting the exemption, one did not oppose the Commission granting the exemption and 52 opposed the Commission granting the exemption.

41 of the 52 submissions were in identical terms and stated

I have read with interest the application by the TV Networks for a further 12 months exemption from the Disability Discrimination Act, due to the legislative process for reform of captioning regulation not having been completed at the 31st December 2011.

I disagree with granting this exemption, on the grounds that the TV networks have had since 13th October 2008 till 31st December 2011 to make these changes and in order for the Disability Discrimination Act to have its effect as a legislation protecting those with Disabilities in the community from discrimination, it must be enforced.

We want to see the original agreement to have 100% captioning of free to air TV from 6am to midnight each day by 2014 be followed through and enforced.

The majority of the submissions from consumers state that an exemption should not be granted because the Commission has granted a number of exemptions to the Applicants in the past and the Applicants should now provide a service that is fully accessible.

One consumer, Ms Elena Down, provided a detailed submission outlining reasons why the Commission should refuse the application.

Ms Down submitted that the Applicants have not outlined why it would impose an unjustifiable hardship upon them within the meaning of the DDA to provide captioning on all of their services, or on a greater proportion than that proposed in the application. Ms Down is of the view that the Commission should not grant an exemption to the Applicants unless they could show that it would impose an unjustifiable hardship on them to provide greater levels of captioning than those proposed in the application.

Ms Down also noted that the United Nations Convention on the Rights of Persons with Disabilities requires States parties to take appropriate measures to ensure to persons with disabilities access, on an equal basis, to information and communications facilities and services that are open to the public. Ms Down contends that 'accessing free to air television on an equal basis with others means that a person with a hearing disability should be able to access the same television programs at the same times as any other person watching television'.

Ms Down states that it is disingenuous for the Applicants to suggest that the outcomes achieved under the proposed exemption would be the same as the outcomes that would have been achieved in 2012 had the amendments to the BSA recommended in the Media Access Report been enacted. Ms Down notes that the Media Access Report recommended that the BSA be amended to include a reference to captions of an 'adequate quality'. Ms Down notes that the application does not make any undertakings with respect to caption quality.

Deafness Forum of Australia Inc indicated that it did not oppose the application. Deafness Forum noted the increases in captioning that have been made by the Applicants over the life of previous exemptions. However, Deafness Forum stated that this must be the final exemption that the Commission grants to the Applicants.

Deafness Forum noted a concern about the quality and accuracy of captioning. It stated that the quality of captioning has declined in recent years and that this is an issue of concern to its members.

Deaf Australia Inc contended that the Commission should not grant the exemption. Deaf Australia stated that the Deaf community 'has become increasingly exasperated with the slow increase in captioning content, unhappy about the poor quality of some captioning, especially live captioning and resentful of the constant requests for exemptions from complaint or the denial of their right to complain, particularly about poor captioning quality'.

Media Access Australia (MAA) recommended that the Commission grant the exemption. MAA stated that the conditions proposed by the Applicants would provide captioning at the same level as that recommended in the Media Access Report. MAA also notes that the undertakings made by the Applicants in relation to children's television programs provide a greater level of captioning than they would have been required to provide under the amendments to the BSA recommended in the Media Access Report.

MAA also expresses concern about the quality of captions provided by the Applicants.

MAA notes that the low levels of captioning on some of the digital multi channels is a major issue for many consumers who are Deaf or who have a hearing impairment. MAA states that the Australian Government has advised that it will reconsider the issue of multi channels before December 2012. MAA considers that the Government's proposed review is the appropriate way to deal with the issue of captioning levels on multi channels.

REASONS FOR DECISION

The Commission has considered all of the material that has been placed before it, together with the Commission's Guidelines on Temporary Exemptions under the DDA. Pursuant to section 55 of the DDA, the Commission grants an exemption to the Applicants in the terms and on the conditions outlined in **Attachment A** of this Notice.

In determining whether to grant an exemption, the Commission is required to determine whether, balancing the reasons that weigh in favour of granting the exemption against the reasons that weigh against granting the exemption, it would be reasonable to grant the exemption. The Commission is of the view that the following factors in favour of granting the exemption outweigh any factors that weigh against granting the exemption.

High levels of captioning proposed

A condition of the exemption will require the Applicants to provide high levels of captioning. The Applicants will caption at least 90% of programming screened between 6.00 am and midnight on their primary channel. The Applicants will also caption all programs on their primary channel that commence between 6.00 pm and 10.30 pm until the conclusion of the program. In addition, the ABC will provide some level of captioning on some programs screened on its secondary channels.

Several of the submissions received by the Commission argued that the Commission should not grant this exemption because the Applicants have had the benefit of an exemption since 2003 and should now be providing a service that is fully accessible to people who are Deaf or who have a hearing impairment. The Commission notes that the Applicants have complied with the terms of each exemption that the Commission has granted to them and that they have increased the amount of captioning that they provide over the life of each exemption.

The Applicants seek an exemption that is effective until 31 December 2012. Having regard to the concerns of consumers about the number of exemptions granted to the Applicants and the period of time that the Applicants have had to make their service fully accessible, the Commission considers that it is appropriate to grant a short exemption.

Many of the submissions that the Commission received from consumers expressed concern that the Applicants have not made any undertakings in relation to caption quality. The Commission notes that a person may complain to the Australian Communications and Media Authority (ACMA) if he or she believes that a broadcaster has breached the conditions of their licence.¹ It is a licence condition that

¹ Section 147 BSA.

broadcasters comply with the provisions of the BSA in relation to captioning.² Where ACMA finds that a broadcaster has breached a licence condition, there are a range of sanctions that ACMA may take in relation to the breach.³

Further, amendments to the BSA outlined in the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012 (BSA Amendment Bill), if passed in their current form, will increase ACMA's powers in relation to caption quality. The BSA Amendment Bill provides that ACMA may, by legislative instrument, determine standards that relate to the quality of captioning services.⁴ Broadcasters must comply with a standard in relation to captioning quality determined by ACMA.⁵

The Media Access Report recommended that the Government include new captioning targets in the BSA, mandating 100% captioning between 6.00 am and midnight on the primary television service provided by national broadcasters and commercial television broadcasters by 2014. In accordance with achieving this object, the Media Access Report recommended that the BSA be amended to provide that captioning should be provided on 90% of programs screened between 6.00 am and midnight on a broadcaster's core or primary channel.

The BSA Amendment Bill adopts the recommendation of the Media Access Report in relation to captioning levels on the services provided by the Applicants. Accordingly, if the BSA Amendment Bill is passed in its current form, the Applicants will be required to provide the same level of captioning under the BSA and under the exemption.

Does not displace legislative action by the Australian Government

Many of the submissions received by the Commission appear to oppose the granting of the application based on an assumption that if the Commission grants an exemption to the Applicants this will slow down the legislative process or because the proposal outlined in the application is an alternative to amendments to the BSA. These assumptions are incorrect.

The process for amending the BSA is independent of the Commission's consideration of the application. Whether the Commission grants or refuses the application has no bearing on the timing of the proposed amendments to the BSA. In any event, the conditions attached to the exemption are consistent with the level of captioning proposed in the BSA Amendment Bill.

² Clause 7(1)(o) schedule 2, BSA.

³ See Part 14B BSA.

⁴ Proposed section 130ZZA Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012.

⁵ Proposed section 130ZZA (4)-(7) Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012.

APPLICATION FOR REVIEW

Subject to the *Administrative Appeals Tribunal Act 1975* (Cth), any person whose interests are affected by this decision may apply to the Administrative Appeals Tribunal for a review of the decision.

A handwritten signature in black ink, appearing to read 'C Branson', written in a cursive style.

Dated this 8th day of June 2012

Signed by the President, Catherine Branson QC, on behalf of the Commission.

ATTACHMENT A

1. The Commission grants an exemption from Division 2 of the DDA to the Applicants insofar as it requires the Applicants to provide captioning for persons who are Deaf or who have a hearing impairment on any channel operated by the Applicants.
2. The exemption is granted subject to the following conditions.
 - a. During the exemption period the Applicants must provide captioning on the television channels that they operate as outlined below.

Channel	Captioning obligation
All Primary Commercial Television Broadcasting Services and all Primary National Television Broadcasting Services	<p>-At least 90% of Programs screened between 6.00 am and 12.00 am shall be captioned.</p> <p>-All Programs (excluding sport) that commence from 6.00 pm to 10.30 pm shall be captioned until the conclusion of the Program.</p>
All Primary Commercial Television Broadcasting Services	<p>-All New Programs that ACMA has classified with the designation 'C' (Children) or 'P' (Preschool) shall be captioned.</p>
ABC 1, ABC 2, ABC 3, ABC News 24	<p>-All current affairs programs that are broadcast on the Primary Channel and are screened exclusively within one State or Territory shall be captioned</p> <p>-All New Programs that are Schools Programs shall be captioned</p> <p>-At least 1000 hours of captioning on Pre-School and Children's Programs shall be captioned.</p> <p>-At least 50 hours of captioning of New Programs that are Australian produced Pre-School Programs or Children's Programs shall be captioned.</p> <p>-At least 50 hours of captioning of New Programs that are overseas produced Pre-School Programs or Children's Programs shall be captioned.</p>

- b. Within 28 days of the conclusion of the Exemption Period, the Applicants will report to the Commission on the levels of captioning achieved by the Applicants during the exemption period.
- c. The Applicants shall participate in any discussions convened by ACMA on the subject of caption quality.

Definitions

'Children's program' means a program the target audience of which is school-aged children (6 to 15 years old).

'Exemption Period' means the period from the date on which the President of the Australian Human Rights Commission signs this Notice until 31 December 2012.

'New Programs' means Programs that commence screening for the first time on any television channel before the conclusion of the exemption period.

'Pre-School Program' means a program the target audience of which is pre-school aged children (one year old to five years old).

'Primary Commercial Television Broadcasting Service' has the meaning set out in clause 41G of Schedule 4 to the BSA.

'Primary National Television Broadcasting Service' has the meaning set out in clause 41M of Schedule 4 to the BSA.

'Program' does not include advertising or sponsorship matter (whether or not of a commercial kind).

'Schools Program' means a program that fits the curriculum for primary through to secondary school and which is designed primarily for teachers as a class room resource.

Interpretation

Captioning levels shall be measured at the conclusion of the Exemption Period.

Foreign language Programs which are screened with sub titles shall be counted in the total amount of captioning provided by an Applicant.

The Applicants are not required to provide captioning on a program, or a part of a program, that is wholly in a language other than English in accordance with clause 38(7) of Schedule 4 to the BSA.