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

By this instrument, the Australian Human Rights Commission (the Commission) has refused the application of the members of the Australian Subscription Television and Radio Association (ASTRA) for a temporary exemption pursuant to s 55(1) of the *Disability Discrimination Act 1992* (Cth) (DDA).

SUMMARY

The Applicants have requested that the Commission grant them a temporary exemption from the application of s 24 of the DDA in so far as it requires captioning of television programs supplied or broadcast by the Applicants.

The Applicants have sought an exemption for a period of five years. The Applicants propose that as a condition of granting the exemption, they will increase the percentage of programs that are captioned on 65 of the 91 channels operated by ASTRA members.

The Applicants advise that they will report to the Commission annually on the percentage of captioning being provided on each channel.

The Commission has refused to grant the exemption because the conditions on which the Applicants propose that the exemption be granted represent insufficient progress in eliminating discrimination and furthering the objects of the DDA. This is particularly the case when the benefit in granting the exemption is balanced against the detrimental impact of a temporary exemption on the ability of people who are Deaf or have a hearing impairment to lodge complaints about failure to provide captioning on the service provided by the Applicants.

BACKGROUND

The Applicants are 34 broadcasters who operate 91 subscription television channels.

Nature of Application

The Applicants requested that the Commission grant them a temporary exemption from the application of s 24 of the DDA in so far as it requires captioning of television programs supplied or broadcast by the Applicants. The Applicants seek an exemption for a period of five years.

The Applicants propose that 26 channels should be exempt from the requirement to provide any captioning. The Applicants argue that they should not be required to provide captions on channels that: provide live sport or news from overseas, are of niche interest, have a high level of textual support, are a high definition version of a standard definition channel, are on pay per view services or on foreign language channels. The Applicants also submit that any new channel operated by an Applicant and launched during the exemption period should be exempted from the requirement to provide captions for two years from the launch of the channel and should be subject to reduced captioning targets thereafter.

The Applicants state that the 65 channels on which they propose to provide captioning should be divided into 6 groups according to their content. The Applicants propose to caption the television programs that they broadcast at the following rates:

Group	Channels	2010/2011	2011/2012	2012/2013	2013/2014	2014/2015
Group 1 10 channels	Disney Channel, Fox 8, Playhouse Disney, Showcase, Showtime, Showtime Action, Showtime Comedy, Showtime Drama, TCM, World Movies[1]	50%	55%	60%	65%	70%
Group 2 17 channels	111 Hits, Arena TV, Cartoon Network, Discovery Channel, E!, ESPN, Fox Classics, FOX News, Hallmark Channel, HOW TO, Movie One, MTV, National Geographic Channel, Nickelodeon, The Lifestyle Channel, TV1, UKTV	30%	35%	40%	45%	50%
Group 3 20 channels	Animal Planet, BIO, Boomerang, Crime and Investigation, Discovery Home and Health, Discovery Science, Discovery Travel and Living, Family Movie Channel, Lifestyle FOOD, Lifestyle YOU, Movie Extra, Movie Greats, Nick Jnr, Ovation, Sci Fi, Starpics, The Comedy Channel, The History Channel, W, Nat Geo Adventure	20%	25%	30%	35%	40%
Group 4 7 channels	13th Street, BBC Knowledge, CBeebies, Discovery, Turbo Max, Kidsco, Nat Geo Wild, The	0%	5%	10%	15%	20%

[1] World Movies contains English language subtitles and not captions.

	Style Network					
Group 5 6 channels	Fox Sports 1, Fox Sports 2, Fox Sports 3, Fuel TV, Sky News, Sky News Business	0-5%	5%	5-7.5%	7.5%	10%
Group 6 5 channels	Channel [V], V Hits, CMC, MAX, VH1	5%	5%	5%	5%	5%

The Applicants state that compliance with the terms of the exemption shall be calculated on an annual basis.

The Applicants also propose that where one provider owns multiple channels, the provider should be allowed to pool or aggregate provision of captions across the channels that it owns. For example, the Premier Media Group operates 5 channels, one of which is to be captioned at 50% at the conclusion of the exemption and 4 which are to be captioned at 10% at the conclusion of the exemption. Under the Applicants' aggregation proposal, Premier Media Group would comply with the terms of the exemption if at the conclusion of the exemption each of its 5 channels were captioned at 18%, which is an average of the amount of captioning required to be provided across all 5 channels.

Applicants' reasons for requesting an exemption

The Applicants seek an exemption on the conditions outlined above for the following reasons.

The Applicants argue that they should not be required to provide captions at the same rate as free to air television providers. The Applicants argue that the subscription channels that they operate have a lesser share of the market compared to free to air stations and are therefore less profitable. Further, the Applicants say that unlike the free to air broadcasters who have exclusive access to the public broadcast spectrum, subscription television relies on private investment and therefore must balance increased costs with the ability to deliver their service at an attractive rate. The Applicants also note that there are a greater number of subscription channels than free to air channels. The Applicants argue that any requirement to caption this service is therefore more onerous than the requirement to caption free to air channels because it requires a greater amount of captioning overall.

The Applicants contend that the *Broadcasting Services Act 1992* (Cth) (BSA) demonstrates that Parliament intends that a lesser regulatory burden should be placed on subscription television compared to commercial and national broadcasters. The Applicants note that the BSA does not require subscription television to be captioned and exempts the secondary digital channels of free to air channels from providing captions. The Applicants submit that this factor should influence the captioning targets on which any exemption from the DDA is conditional.

The Applicants argue that the conditions that they propose are comparable to the conditions on which the Commission granted an exemption to the free to air television providers. The free to air television providers are currently required to provide captions on 75% of their service between 6 am and 12 pm. The Applicants propose to caption 50% of the content on ‘Group 1’ channels in the first year of the exemption period with captioning increasing throughout the term of the exemption to 70% in 2014/2015. The Applicants submit that, looking at a 24 hour period, the exemption granted to free to air television currently requires that providers caption at 56%. The Applicants consider that when compared to the captioning targets set for free to air television, the targets that they propose are reasonable.

The Applicants argue that the way that channels are provided to platforms (like Foxtel and Austar) should be considered when determining the level of captioning that they should be expected to provide. The Applicants advise that programs screened on some channels are delivered by way of ‘pass through’ signals from overseas and are not captioned. The Applicants argue that it would be expensive for them to add captions to these programs. The Applicants also claim that there are particular difficulties and expenses associated with captioning live content and music videos. The Applicants note that five subscription television channels are dedicated music clip based channels and several channels have a high level of live content.

The Applicants state that there are several factors that make a comparison between the Australian subscription market and overseas subscription markets inappropriate. The Applicants note that penetration of subscription television in the Australian market is lower than in other countries. The Applicants note that the Australian subscription television market is less mature than overseas markets such as the United States and United Kingdom (UK). However, the Applicants say that captioning of Australian subscription television is in the same range as captioning on UK subscription television (33% compared with approximately 48%) despite the Australian market being six years younger than the UK market.

The Applicants state that in proposing percentages at which programs would be captioned they have considered: whether a channel is part of a basic subscription television package or a specialized package, the percentage of live programming on the channel, the length of time since the channel was launched, the genre of the channel and the ability to source or create captions, whether programs shown are locally produced or internationally shared channel feeds, whether the channel is of broad or niche appeal and the commercial model underpinning the channel.

Submissions received by the Commission

The Applicants’ request for a temporary exemption was posted on the Commission’s website [hyperlink] and interested parties were invited to comment on the exemption.

The Commission received seven submissions [hyperlink] in response to the Application: four submissions did not support the granting of the exemption, one expressed conditional support for the exemption and two expressed no view on whether the Commission should grant the Applicants request for a temporary exemption. The submissions made the following points in response to the Application.

Insufficient evidence of financial hardship

The Applicants claim that it would be financially prohibitive for them to provide captioning at higher levels. However, several submissions contend that the Applicants' claims of financial hardship are insufficiently particularised. The Disability Discrimination Legal Service (DDLS) notes that several of the Applicants are multi-million dollar companies and no explanation is provided as to why these entities cannot provide captioning at higher rates.

Insufficient amount of captioning

Several submissions claim that the rates of captioning proposed by the Applicants represent either no increase from the current rate at which the Applicants provide captioning or an insufficient increase. Media Access Australia contends that after having monitored the rate at which the Applicants provide captioning, in many cases the rates proposed in the Application could result in a decrease from the rate at which the Applicants are currently providing captions.

Deaf Australia Inc states that given that subscription television is purchased in packages rather than as individual channels it is important to look at the overall captioning percentages for these packages. Deaf Australia notes that only 20% of programs in the 'Get Started' package (the basic package which all consumers of subscription television must purchase) will be captioned at the conclusion of the exemption period. Deaf Australia further states that most of the captioning is on premium packages, thus forcing Deaf and hearing impaired consumers to pay higher fees if they want to have access to subscription television.

Aggregation

Several submissions argue that providers should not be allowed to aggregate captioning levels across the channels that they operate. These submissions argue that the ability to aggregate captions leads to uncertainty for Deaf and hearing impaired consumers who purchase subscription television packages based on the Applicants' representations as to the percentage of captioning that will be provided on particular channels. Some submissions also claim that the impact of the Applicants being able to aggregate captioning percentages within ownership groups is greater because a typical subscription television package contains programs from a number of providers. Accordingly, consumers will not be sure even of the overall level of captioning within the package that they have purchased.

Deaf Australia notes that the Applicants currently provide captioning on several channels at substantially higher levels than those required under the terms of the last exemption granted to the Applicants. Deaf Australia contends if providers are allowed to aggregate the amount of captioning they provide, it would be possible for providers who are currently exceeding the prescribed level of captioning on one channel to make no change to the amount of captions that they currently provide and still meet their obligations under the exemption.

Exempt channels and programs

Several submissions express concern about the Applicants' proposal that they be exempt from the obligation to provide captions on a number of channels and types of programs. Some submissions suggest that contrary to the Applicants' submission, it would not be difficult or expensive to provide captions on live programs, music videos or pay per view services. Particularly, several submissions note that MTV in the UK is screened with captions.

The Deafness Council of Western Australia Incorporated recommends that the Commission restrict the scope of the exemption to channels that have committed to increase the amount of captioning that they currently provide.

Not a proper use of section 55 of the DDA

The DDLS notes that the Applicants seek an exemption on behalf of themselves and 'any channel providers that may be included as part of the Applicants' service during the duration of the exemption period.'[2] The DDLS contends that for the purposes of section 55(1)(a) of the DDA, the identity of those obtaining the benefit of the exemption must be clear. The DDLS is of the view that the exemption would be too broad if expressed to cover television channels which do not currently exist.

The DDLS expresses a concern that the Application is sought on the basis of unreasonableness or the unjustifiable hardship of providing a fully accessible service. The DDLS states that temporary exemptions under section 55(1)(a) of the DDA should not be granted on this basis. The DDLS considers that the Applicants should not have the protection of an exemption but should be required to prove their claims of unreasonableness or unjustifiable hardship in court if a complaint of disability discrimination is made about their failure to provide captions.

Comparison with the UK Model

Several submissions propose that the Applicants adopt the UK model whereby 1% of a provider's annual turnover is spent on providing an accessible service.

Audio description

Vision Australia drew the Commission's attention to the absence of audio description from the scope of the Application and stated that the incorporation of audio description as a component of subscription television services in Australia is long overdue.

Further information received from the Applicants

On 4 June 2010 the Commission wrote to the Applicants asking that they provide further information in support of their request for a temporary exemption. The Applicants responded to the Commission's letter on 8 July 2010.

The Commission asked the Applicants for information about their profit in the 2009/2010 financial year and about the amount that they spend on captioning. Whilst the Applicants did not disclose their annual profit or spend on captioning, they stated that they are committed to increasing the percentage of their service that is captioned.

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[2] ASTRA Application for Exemption under section 55 of the Disability Discrimination Act. Closed captioning on subscription television. February 2010. Appendix E.

The Applicants submit that the UK model which requires 1% of turnover to be spent on captioning is not appropriate in the Australian subscription television environment. The Applicants restate that the Australian subscription television market is different to the UK market. The Applicants say that the current exemption that applies to free to air television and the obligation imposed on free to air networks under the BSA are based on a percentage of airtime model rather than according to the profit made by the providers. The Applicants also submit that setting captioning levels by percentage of profit does not necessarily equate to an increase in captioning levels and could also lead to a reduction in levels on channels that might otherwise be able to achieve higher levels of captioning.

The Applicants explain the basis of their proposed rates of captioning. Group 1 is made up of the most popular channels that have achieved high rates of captioning in the past. Groups 2 and 3 are essentially made up of the Phase 1 and 2 channels from the first exemption that the Commission granted to the Applicants. The Applicants state that channels within Groups 2 and 3 will initially provide captions at the figure representing the end point of the last exemption and will increase their captioning at a rate of 5% per year, as they did under the previous exemption granted to the Applicants. Group 4 channels are channels introduced into the market in 2008/2009. They are initially exempt from providing captions and then are required to increase the provision of captions at 5% per year. Group 5 consists of news and sports channels. The Applicants contend that these channels are captioned at comparatively low levels because they have a high degree of live content that is difficult to caption. Group 6 consists of dedicated music channels which the Applicants contend are also difficult and expensive to caption.

The Applicants respond to the claim that some rates of captioning that they propose represent a decrease from the rate at which captioning is currently provided. The Applicants say that it is not reasonable to measure the level of captioning based on what a channel practically achieves in each year. The Applicants submit that channels that have been able to exceed their captioning target may not be able to do so in future years due to budgetary constraints or programming changes. The Applicants claim that no channel that was included in the first exemption granted to the Applicants has decreased the amount of captions that it provides.

In relation to the concerns raised about the Applicants' proposal that they be allowed to aggregate captioning percentages, the Applicants state that this provision was contained in the first exemption that the Commission granted to them. The Applicants also state that this aspect of the proposed exemption allows providers to meet their obligations on channels that are not as well suited to captioning, such as channels that are international feeds. The Applicants state that the pooling mechanism provides channels with more flexibility to schedule captioning on popular programming and is not an avoidance mechanism. The Applicants note that even with the pooling mechanism, the total level of captioning for channels owned by the provider must be met in order to comply with the exemption.

In relation to exempt channels, the Applicants maintain that some types of channels and programs cannot be economically or easily captioned.

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, and has decided to reject the Application. The reasons for the Commission's decision are as follows.

26 channels exempt from captioning

The Commission considers that the Applicants have provided insufficient reasons to justify exempting 26 channels from the obligation to provide captioning. The Applicants propose that there be no obligation to provide captions on 26 of the 91 channels owned by the Applicants or on any channel similar to an exempt channel that is launched within the exemption period. The Applicants propose that this condition exist for the term of the exemption. The Applicants claim that programs such as sports and news channels from overseas, niche interest channels, channels with textual support, non-simulcast high definition channels and foreign language channels should not be required to be captioned. In support of their position, the Applicants argue that some of these channels would be difficult to caption, some have a very low share of the market and some have adequate textual support without providing captions.

The Commission concedes that the reasons advanced by the Applicants may justify providing captioning on the proposed exempt channels at lower levels than on channels with programs that are easier to caption or have a greater market share. However, the Commission considers that the Applicants have not advanced sufficient reasons to justify exempting the providers of the exempt channels from any obligation to provide captioning for the entire period of the exemption. This is particularly the case given that several of the exempt channels are owned by very large corporate entities with the financial capacity to provide some levels of captioning on the service that they provide.

Insufficient levels of captioning proposed

The Commission is of the view that the increase in captioning rates proposed by the Applicants is not sufficient to justify the granting of the exemption. The Applicants propose an increase in captioning on 65 of the 91 channels that they operate. Comparing the levels at which the Applicants currently provide captioning and the level at which they propose to provide captioning in the first year of the exemption, 22 channels could be captioned at lower levels in the first year of the exemption than the level at which they are now captioned. Further, at the conclusion of the exemption period, captioning levels on 20 channels could have not increased or have decreased over the life of the exemption.

Consumers who are Deaf or who have a hearing impairment cannot purchase individual channels with the highest levels of captioning but must purchase subscription television packages. Under the Applicants' proposal, only two of the seven subscription television packages will caption over 50% of the package at the conclusion of the exemption period (Movie Network and Showtime Movies). Most packages will be captioned at levels far below this rate. The Commission notes that the basic 'Get Started' package, which all consumers must purchase, will only be captioned at a rate of 20% at the conclusion of the exemption period.

The Commission notes that the Applicants' proposal that providers be permitted to aggregate captioning means that the rates of captioning proposed in the Application may not, in fact, be delivered. For example, the Comedy Channel is in Group 3 and so should be captioned at 20% in the first year of the exemption and 40% at the conclusion of the exemption. However, the Comedy Channel is owned by Foxtel which owns seven other channels. Under the Applicant's proposal, as long as Foxtel provides captions on its seven channels at an average rate of 46%, Foxtel will have complied with the terms of the exemption regardless of whether individual channels are captioned according to the rate outlined in the Application. Accordingly, in practical terms, the level of captioning provided on the Comedy Channel may never increase during the term of the exemption. The uncertainty in the level of captioning is increased where providers operate a number of channels amongst which they may aggregate captions. The Commission notes that six of the 16 ownership groups listed in Appendix B of the Application consist of five or more channels.

The Commission has formed the view that the percentages proposed by the Applicants are unjustifiably low. The Applicants have not explained why they cannot provide captioning at higher rates. The Commission notes that in several instances, the Applicants are in fact providing captions at higher rates than those proposed in the exemption. Further, if the Applicants are allowed to aggregate captioning percentages, even the unsatisfactory rates of captioning proposed in the exemption are not assured.

<u>Different to other captioning exemptions</u>

The Applicants contend that the conditions that they propose are comparable to the conditions on which the Commission granted an exemption to the free to air television providers. The Commission does not agree with this submission for several reasons. The free to air exemption currently requires that providers caption 75% of programs screened between 6 am and midnight. The Applicants note that measured over a 24 hour period, this equates to a requirement to caption 56% of their service. However, under the Application, of the 94 channels operated by the Applicants, only 12 channels would caption 50% or more of their content in the first year of the exemption. At the conclusion of the exemption, only 28 channels would caption 50% or more of their service.

The Commission notes that the exemption granted to free to air television providers requires that at the end of 2010 the free to air television providers will caption 80% of their service and that at the conclusion of the exemption in 2011, 85% of the providers' service screened between 6am to 12pm will be captioned. The Commission accepts that the Applicants are in a different position to the free to air television providers for the reasons outlined in the Application. However, even taking these differences into account, the Commission considers that the levels of captioning proposed by the Applicants are not equivalent to the levels at which free to air television providers are captioning their service.

The Commission also considers that the Application currently before the Commission can be distinguished from the last exemption that the Commission granted to the Applicants. When the Commission granted an exemption to the Applicants in 2004, subscription television was new to Australia. The Applicants were providing significantly lower levels of captioning on a much smaller number of channels. The Commission notes that the Applicants have maintained the rate of captioning on the channels included in the previous exemption decision and congratulates the

Applicants for this. However, the Applicants have shown that they can achieve higher levels of captioning. The Applicants should not be granted an exemption allowing them to make their service accessible more slowly than they have demonstrated that they are capable of doing.

Not consistent with the objects of the DDA

The Commission considers that it would not be consistent with the objects of the DDA to grant the Application. The DDA provides that services should be accessible to people with a disability. Further, the Convention on the Rights of Persons with Disability provides that States parties should recognize the right of persons with disabilities to take part on an equal basis in cultural life, including in access to television programs.

Subscription television is a service like any other service purchased by a consumer. In order to grant an exemption that would limit the protection of rights under the DDA, the Commission must be satisfied that a significant benefit would result. For the reasons outlined above, the Applicants have not satisfied the Commission that such a benefit would result under the terms of the proposed exemption.

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.

Dated this   day of September 2010

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