



**Submission to Digital Switchover Taskforce discussion paper:  
Legislative Framework for Implementing a Digital Television  
Switchover Timetable**

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## 1. ABOUT MAA

### 1.1. Who is MAA?

Media Access Australia (MAA) is a not-for-profit, public benevolent institution and Australia's primary media access organisation. Our role is to be a catalyst for the provision of access to media for disadvantaged people through the use of technological solutions.

MAA was originally a captioning and audio description supplier known as the Australian Caption Centre, which was founded in 1982. This part of the organisation was divested in 2006. As the ACC, we provided captioning services for all the Australian television networks, as well as the captioning of television commercials, live theatre, videos and DVDs, and pioneered the audio description of DVDs in Australia in 2005. MAA no longer provides commercial access services.

MAA is a national organisation based in Sydney and works in collaboration with consumer organisations, Government and industry across the country and internationally. We also provide a comprehensive free information service (including two websites: [www.mediaaccess.org.au](http://www.mediaaccess.org.au) and [www.audiodescription.com.au](http://www.audiodescription.com.au)) and assist thousands of people with everyday access issues, as well as helping organisations provide more access. We also publish the quarterly *Media Access Report*, providing factual topical information on media access issues from around the world.

### 1.2. MAA's objects (from the MAA Constitution)

The objects for which the Company (Media Access Australia) is established are:

1. To establish and maintain an organisation for the provision and promotion of information services principally but not exclusively for the benefit of people who suffer disability for health, education, social, financial or similar reasons;
2. To establish and maintain an organisation for the provision and promotion of media access services for the benefit of individuals with impaired capacity to access such services.

### 1.3. How does MAA operate?

MAA brings a unique perspective to the world of access and appears to be the only organisation in the world operating in this way. MAA operates as a catalyst for change. We want to see more access to media in Australia and the world. Therefore our starting point is how do you make more access possible? We frame this approach in the context of considering consumer desires, costs, distribution channels, supply techniques, equipment, convergence and regulation.

The question of what the most appropriate level of access should be at a particular time should be answered by the consumers. Our role is to help in getting to that level of access, especially looking at implementation issues, including cost-effective approaches and drawing on successes from other places.

## **2. ACCESS TO ELECTRONIC MEDIA FOR THE HEARING AND VISION IMPAIRED**

The separate investigation into Access to Electronic Media for the Hearing and Vision Impaired being undertaken by the Federal Government is examining access issues, including captioning, in a comprehensive way. It is possible that outcomes from this investigation will impact on this discussion paper, particularly as the media access investigation included a discussion of appropriate legislative change.

MAA's response to this discussion paper follows the direction of our response to the media access investigation and deals with specifics of current issues with the *Broadcasting Services Act*.

As a result of this inquiry Media Access Australia hopes that there will be significant changes to the regulation of captioning in the *Broadcasting Services Act*. As part of our submission to the inquiry we supported a model that included incremental quotas leading to the consumer's desired coverage (universally at 100% of non-exempt programs), the introduction of audio description and improved compliance measures.

However it is also important to highlight the connection between captioning provisions and the digital switchover. The provisions on captioning are found in Schedule 4 of the *Broadcasting Services Act* which specifically deals with digital television and many captioning provisions relate to situations which are specific to the simulcast period. It is therefore essential that the regulation of captioning (and audio description) is considered when devising the framework for the digital switchover.

Given that the *BSA* currently provides for a one-off captioning requirement on the "main" channel, that is all prime time and all news and current affairs programs, the discussion of regulation of access to this channel has been moved to later in the submission as the solutions are the same as the solutions to the (currently) more complex multichannel provisions.

## **3. DEFINITIONAL PROBLEMS IN THE CAPTIONING REGULATIONS**

The main captioning provisions are found in section 38 of Schedule 4, Division 3 of the *Broadcasting Services Act* (*BSA*). Subsection 1 currently imposes an obligation to provide a "captioning service" on "each commercial television broadcasting licensee and each national broadcaster." There is currently no definition of a captioning service in the *BSA*.

In the Inquiry into Access to Electronic Media for the Hearing and Vision Impaired Media Access Australia noted the importance of including a definition of a captioning service. Relevant to this inquiry is the failure to specify that a captioning service

means captioning a soundtrack in its entirety. Furthermore, the model suggested by MAA removes the definitional and interpretation issues associated with main and multichannels, in that all channels (subject to a series of exemptions) had access obligations that were ramped up over time (measured from the commencement of broadcasting in digital).

#### **4. MULTICHANNELS**

##### **4.1. The concept of a multichannel**

Multichannels are made largely exempt from captioning requirements however the definition of a multichannel presents problems in accurately identifying what is deemed to be a multichannel. Multichannels are defined in sections 5B-5D of Schedule 4 of the Act. The two central elements are that:

- They are transmitted using multi-channelling transmission capacity
- They are promoted as distinct from any other broadcasting service provided by the licensee/national broadcaster. Importantly this does not specify that it must be distinct from the original or primary service provided by the broadcaster hence both channels could effectively be multichannels.

Currently commercial broadcasters are only able to transmit high definition multichannels and therefore which channel is the multichannel is relatively clear. In the case of the ABC, it is more blurred, with the channels being marketed as ABC1 and ABC2. The current offering on ABC 2 is “different” in that it is not a mirror of the “main” ABC1 channel, although it is mainly programmed with timeshifted (by a few days rather than hours) or older repeated programs.

In the case of the commercial HD channels, they either retransmit the main channel offering, or substantially the main channel offering.

In 2009 commercial broadcasters will be able to broadcast standard definition multichannels with unique content and according to the industry (Free TV’s submission Access to Electronic Media for the Hearing and Vision Impaired p 8) will have “attractive and unique services” that will appeal to “niche audiences attracted to specialised programming”.

##### **4.2. The viewer’s perspective**

From a viewer’s perspective, what they are being offered is a choice of channels (that happen be owned/programmed by a distinct broadcaster). Having a digital decoder is the mechanism by which those channels are accessed (in the same way as paying a subscription fee is the way to access subscription television “multichannels”).

Thus the post-switchover offering will be a number of channels with a variety of content. Some will be unique to a particular channel, some will be shared (repeated) across a number of channels. The present day example of this is ABC1/ABC2.

Thus from an access perspective, it makes sense to apply the same regulatory regime to each of these channels as captioning-watching viewers (and audio description users if this service is allowed to start) will want to choose the programming that most interests them, much like they do already in choosing between broadcasters. The uniform regulatory regime that applies to current channels ensures that a caption viewer chooses which program they want to watch knowing the likelihood of it being captioned (guaranteed if it is during prime time or a news and current affairs show, mixed chance with other programs). It makes sense to apply the same policy perspective to any new channels, however they are labelled. This is exactly what has happened in other regulatory regimes, such as the UK and USA.

#### **4.3. So why not make them all equally accessible and simplify the regulations?**

From a consumer perspective that makes perfect sense. They want to choose which programming they would like to watch from a range of channels. This mirrors the present day viewing conditions. In fact, the broadcasters and government are even encouraging them to switch to digital television based on the promise of more channel choice.

However, industry has said that they need to be “protected” from the undue burdens of providing access on these new channels. Furthermore, the 2006 explanatory memorandum clarified that the current exemptions are based around the technical and financial cost of captioning being out of proportion to the audience share and related revenue of multichannels. The policy solution at that time was to grant a temporary exemption, excepting already captioned programs.

Thus the clear policy issue identified by the government was that it is appropriate to look at audience shares and revenues in determining whether access provisions should apply to a channel.

#### **4.4. Overseas regulatory regimes agree with this policy position**

The United States and the United Kingdom governments both agree that low audience share and revenue can potentially impact on the ability of channels to make their programs accessible. They ensured that these factors were enshrined in their access regulations to properly protect broadcasters who had channels that had low audience shares or low revenues.

For example, in the United Kingdom the Code on Television Access Services excludes channels with less than 0.05% of audience share from access requirements (clause 11) and creates three levels of access requirements based on revenue. Where the lowest level of access would cost more than 1% of revenue the channel is completely exempt (clause 21).

The American system works in a slightly different way in that channels must apply for an exemption, and spending more than 2% of their turnover on providing access is deemed to be a ground for securing an exemption. However the basic principle is the same.

#### 4.5. Australian commercial television seems to agree with the issues but not the solution

The commercial free-to-air television industry in Australia has argued that new channels will have low audiences initially and will take time to build up revenue. This is no different to the overseas experience. However the suggested approach to access on these new channels seems to be completely divergent to the magnitude of the impact of access on a new channel. It is disappointing that in the Free TV submission to the current access to electronic media review it seems to attempt a scare campaign around access rather than a considered examination of the evidence and then a mature discussion about the central issues and how best to deal with them.

For example, Free TV states that “it is only once digital multi-channels are truly established that a proper impact assessment of further captioning requirements can be undertaken.” Further analysis of its argument (p8 of the Free TV submission to the investigation) shows that it is constructing its argument on these assumptions:

- That the channels are in a start up phase and will attract only niche audiences in that phase.
- The captioning of primary channels costs millions of dollars per year; similar costs could arise from captioning requirements for each of the digital multi-channels.

The conclusion reached by Free TV is that it is impossible to determine a robust and defensible assessment of the impact of captioning on these channels. Furthermore, the policy solution to this is to not even examine the issue until after switchover is complete.

A proper examination of the available evidence shows a different picture:

- Channels in their start up phase will have small audiences and may have low revenues.
- Consumer organisations have suggested both exemptions for low audience shares and phase ins of quotas on new channels (in the case of captioning in 10% increments from start up), recognising that they have low revenues.
- Costs of captioning are well known, including the range of costs for different genres of programming. Furthermore, the industry has moved quickly to lock down “all inclusive” contracts to cover its needs. This includes complying with the just-expired HREOC quotas that are based on percentage increases each year.
- The cost to each channel would be dependent to some extent on its mix of programming, but those costs could be accurately calculated upfront on the basis of programming decisions. A simple percentage of revenue cap (set somewhere on the 1-2% international benchmark scales) would protect channels from an “undue burden” of expenditure on access.
- As a point of reference, the current cost of access for commercial broadcasters averages around 0.22% of turnover.

#### 4.6. **Public broadcasters are seeking a rational approach that balances access and costs**

This is contrasted with the ABC's approach which seems to support an approach that is more like those operating in the UK and USA:

"The ABC believes that continued, staged increases in the provision of captioned content provides the best approach.... The model should ensure that new services are permitted to begin from relatively low levels of captioned programs and have an opportunity to build community and audience support." (p7 ABC submission to DBCDE Access to Electronic Media for the Hearing and Vision Impaired Discussion Paper).

### 5. DEALING WITH THE MAIN CHANNELS

#### 5.1. **The BSA is not the only regulatory regime**

One of the current problems is that there are two regulatory regimes applying to captioning, the *BSA* provisions and a separate (still to be determined) exemption under the *Disability Discrimination Act*. The *DDA* exemption works on a model of incremental percentage quotas with some exclusions for genres of programming (basically a form of model that is being proposed to apply to all digital channels). MAA argues that this should be merged into a single model, regulated under the *BSA*.

#### 5.2. **The main channel is effectively the same as the other channels**

MAA has argued that from a consumer perspective there is no difference between the newer "multichannels" and the original "main channel", just the start date when the channel could be accessed via a digital decoder. Thus it makes sense to apply the same regulatory regime to the original main channels.

Once again, the Free TV submission to the access investigation has chosen to be alarmist about rising costs (costs are actually falling, the economies of scale and the genre of programs not yet captioned would lead to a lower per hour cost of captioning the main channel). The issues are the same as for the multichannels exemptions for low audience and low revenue/access cost ratios could protect broadcasters from undue burdens of access.

It is interesting to note that in the UK, some of the channels have moved progressively down the access requirements to the point of no access requirements as their audience share has declined (it should be added that the cost of access was not attributed to the decline in audience share in any way). Such a model could work equally effectively in Australia.

The legislative framework in relation to access should reflect mechanisms to allow social inclusion through access whilst balancing fair commercial considerations. The most appropriate way of dealing with this (and one that has been adopted in other countries dealing with these issues) is to identify and quantify the issues and then set appropriate minimum levels at which access

provisions apply.

## **6. REPEAT BROADCASTS**

Consumer organisations have called for 100% television captioning with an understanding that this will happen incrementally. Subsequently the provisions found in Schedule 4, section 38(9)-(10) will remain relevant. Under these exceptions multichannels must provide captions where the program was previously transmitted by the broadcaster on another channel. This is a rational provision as any technical or financial disincentives are minimised. The current practice of broadcasters is to show captions on all repeated programs and is used to fulfill requirements under percentage quotas. Consumers have accepted this as a legitimate way to achieve a captioning quota.

Given the likelihood of any new channels having some repeated programs that would have already been captioned, it makes sense to retain the captions. This already happens with ABC2 and happens in a different form when television networks “pass on” captioned programs to affiliates (eg WIN does not recaption programs that it acquires from the Nine Network).

This could be dealt with in a simple exception clause stating that a broadcaster must show captions on programs that is has already broadcast with captions on another of its channels. The quid pro quo of this from a consumer perspective is that consumers then allow these repeated captioned programs to be counted towards any quota requirements (which is the current practice).

Therefore you could end up with a situation where a new channel is able to exceed its staged captioning requirements through repeated programs alone. If it then switched to totally new programming, the current staged quota would apply.

However it is important that these provisions also apply to programs previously broadcast on the same channel, for example where a rerun of a prime time program is broadcast outside prime time. Additionally, where standard definition multichannels have the same audience potential as one another it is foreseeable that programs from the multichannel would rerun on the original channel. Legislation should also require captioning on these programs.

## **7. EVENTS THAT RUN OVER TIME**

The *BSA* (38(2)-(3) of Schedule 4) creates an exception for a paragraph 6(8)(d) program and a paragraph 19(8)(d) program. This is a confusing mechanism for stating that if an event (normally a sporting event) runs over time and displaces a news program captioning does not need to be provided. In practice this has meant that the sporting program is not captioned and the news program is captioned, although strictly speaking neither would need to be captioned if the news program was broadcast on the multichannel. This is an unfortunate legislative provision as:

- The importance of caption watching viewers accessing news programming has been recognised by requiring all news and current affairs programs to be captioned.
- If the beginning of the program has been captioned it is ridiculous to deny viewers the ability to fully comprehend the end of the event.
- If this is prime time programming then it is unfair to deprive viewers of their access to prime time programming.
- The provisions are confusing and this lack of clarity could lead to the exception being abused.
- There is no technical reason why both programs cannot be captioned simultaneously.

## **8. EXCEPTION FOR FIRST YEAR OF SERVICE**

An exception is also provided for a commercial broadcaster in its first year of service (Schedule 4, s38 (6)). The explanatory memorandum suggests that this provision was informed by the limited audience of these channels (which has been discussed above) and the need to work out technical issues associated with captioning.

There are two inherent flaws with this approach:

- It assumes that the only way to “protect a new low audience channel” is through a blanket ban. However, a regulatory regime that incorporates exemptions for particular programming genres (such as non-vocal music programming, foreign language programming, etc) and exemptions structured around audience shares/minimum revenues or cost of access in proportion to revenue, would achieve the same policy objective that giving an exception for first year of service seeks to achieve. In fact, if these conditions prevail for a number of years, the exemption prevails for this time period.
- There are no genres of programming that cannot be captioned. Captioning is a service that is more than 25 years old in Australia and has been provided in digital environments since 2001, including HD and SD multichannels.

## **9. RECOMMENDATIONS**

- 9.1. A consistent uniform regulatory regime is provided for access issues (captioning and audio description) that applies to all channels, including so-called multichannels and main channels. The UK/USA incremental percentage models are simple, easy to implement versions of this.
- 9.2. Provide exemptions based around either revenue/access cost ratios or audience shares. A useful benchmark for this is the UK’s 1% of turnover.
- 9.3. Provide genre exemptions such as non-vocal music programming, foreign language programming.
- 9.4. Ensure that repeated programs that have already been made accessible retain the access provisions (i.e. a captioned program being repeated on another

channel owned/controlled by a broadcaster).

- 9.5. Remove other exemptions that are inconsistent with the above approaches, such as the first year of broadcast for a multichannel, events displacing news broadcasts, etc.