

EXPLANATORY STATEMENT

Approved by the Australian Communications and Media Authority

Broadcasting Services Act 1992

Broadcasting Services (Television Captioning) Standard 2023

Authority

The Australian Communications and Media Authority (**the ACMA**) has made the *Broadcasting Services (Television Captioning) Standard 2023* (**the Standard**) under subsection 130ZZA(1) of the *Broadcasting Services Act 1992* (**the BSA**) and subsection 33(3) of the *Acts Interpretation Act 1901* (**the AIA**).

Section 130ZZA of the BSA requires the ACMA to determine standards that relate to the quality of captioning services provided for television programs by commercial television broadcasting licensees, national broadcasters, subscription television broadcasting licensees and subscription television narrowcasting licensees.

Under subsection 33(3) of the AIA, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. The ACMA previously determined the *Broadcasting Services (Television Captioning) Standard 2013*, which commenced on 6 June 2013 (**the 2013 Standard**). The 2013 Standard was scheduled to “sunset” under Part 4 of Chapter 3 of the *Legislation Act 2003* (**the LA**) on 1 October 2023. The Standard repeals and replaces the 2013 Standard, replicating the substance of the 2013 Standard with minor drafting changes that do not affect its operation.

Purpose and operation of the Standard

The *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* amended the captioning requirements in the BSA to facilitate improved access to free-to-air and subscription television by Australians who are deaf or hard of hearing. Amongst the amendments was an obligation on the ACMA to take all reasonable steps to ensure that standards relating to the quality of captioning services provided for television programs by commercial television broadcasting licensees, national broadcasters, subscription television broadcasting licensees and subscription television narrowcasting licensees, are in force.

The purpose of the Standard is to establish minimum requirements for the quality of captioning provided with television programs by free-to-air and subscription television providers, to ensure that captioning services are meaningful to viewers who are deaf or hard of hearing. Subsection 130ZZA(2) of the BSA states that quality for the purposes of subsection 130ZZA(1) includes readability, comprehensibility and accuracy.

While subsection 130ZZA(2B) of the BSA states that subsection 130ZZA(2A) does not authorise the ACMA to determine that a lower quality of captioning services is acceptable for a kind of program or program material, subsection 130ZZA(2A) requires the ACMA to consider, in determining the Standard, the difference between providing captioning services for live and pre-recorded television programs; and wholly live or wholly pre-recorded television programs, and television programs including both live and pre-recorded material.

Subsections 130ZZA(4), (6) and (7) of the BSA require commercial television broadcasting licensees, subscription television broadcasting licensees and subscription television narrowcasting licensees,

respectively, to comply with the Standard. Pursuant to clauses 7, 10 and 11 of Schedule 2 to the BSA, each of those licensees respectively, must comply with the Standard as a condition of its licence.

Subsection 130ZZA(5) of the BSA requires national broadcasters to comply with the Standard.

A provision-by-provision description of the Standard is set out in the notes at **Attachment A**.

The instrument is a disallowable instrument for the purposes of the LA.

Documents incorporated by reference

The Standard incorporates by reference the BSA.

The BSA is incorporated as in force from time to time in accordance with section 7 of the Standard, section 10 of the AIA and subsection 13(1) of the LA.

The BSA can be accessed, free of charge, from the Federal Register of Legislation:

<http://www.legislation.gov.au>.

Consultation

Before the Standard was remade, the ACMA was satisfied that consultation was undertaken to the extent appropriate and reasonably practicable, in accordance with section 17 of the LA and section 126 of the BSA.

Consultation over the course of the review of the Standard included:

- seeking early feedback on the operation of the Standard from broadcasters, deaf and hard of hearing advocacy groups and captioning providers
- participating in site visits to observe the operations of captioning providers
- conducting consumer research into deaf and hard of hearing adults' use and experience of captioning
- engaging with regulators in the United Kingdom, Ireland, Canada and the United States about captioning quality regulatory arrangements in their jurisdictions
- conducting public consultation that ran for 6 weeks from 2 May 2023 to 13 June 2023 inviting comments on the remaking of the 2013 Standard in response to a consultation paper published on the ACMA's website accompanied by the results of the consumer research. The ACMA also liaised with some industry submitters about specific matters raised in their submissions following the consultation process.

To encourage engagement from people who are deaf or hard of hearing, the ACMA published an Auslan video on its social media channels, added banner text alerting visitors to the ACMA website homepage about the consultation process, and contacted key deaf and hard of hearing advocacy groups to encourage their members and other interested parties to make submissions.

Fifteen submissions were received including from captioning providers, broadcasters, and advocacy groups representing deaf and hard of hearing people, and individuals who identify as deaf or hard of hearing. The submissions from organisations addressed specific questions in the consultation paper that sought views on remaking the Standard, whether additional interpretative guidelines on the Standard are necessary, and the merits of pursuing a trial for a metric model of measuring captioning quality and how such a trial might be conducted. Submissions received from individuals focused on the submitters' experiences of captioning and the impacts of poor-quality captioning.

Overall, most submitters supported remaking the Standard. However, some industry submissions qualified their support subject to:

- removing requirements that the ACMA consider font, colour and positioning of captions when assessing readability and whether captions clearly identify individual speakers when assessing comprehensibility, and
- addressing concerns about the interpretation of ‘distinct program segments.’

Some industry submitters also raised concerns that the abovementioned readability and comprehensibility factors in the Standard prevent the use of overseas caption files for programming, increasing the cost burden and presenting a barrier to using innovative captioning technologies.

While the ACMA carefully considered these matters, there is not sufficient evidence at this time that demonstrates that captioning services would be unaffected and continue to be meaningful to deaf and hard of hearing viewers, in the absence of these requirements. Mindful that the express purpose of this Standard is to provide captions that are meaningful to deaf and hard of hearing people, it would be premature to remove quality considerations without fully understanding the impact of the changes on the quality of captions and the viewing experiences of deaf and hard of hearing people.

Our consumer research also found that satisfaction with captioning quality, by those who use captioning, is high across all broadcasting services. A similar opinion was echoed by several submitters who expressed the view that captioning quality in Australia is of a very high level. The suggested changes may risk weakening the Standard and undermining this performance.

Having reviewed the submissions and taking into account all the inputs to the review, the ACMA concluded that the Standard, where complied with, is effective and efficient in achieving its purpose as it results in captions that are meaningful to viewers who are deaf or hard of hearing. Accordingly, the ACMA decided that the instrument should be remade in substantively the same form.

Consistent with the suggestion in the consultation paper and in response to submitters’ strong support for guidelines, the ACMA will publish additional guidance about how we apply and interpret key aspects of the Standard. It is intended that this guidance will address concerns raised by industry including where there may be some misunderstanding about the interpretation of particular provisions, and clarify how to comply with the Standard. The ACMA expects to work with industry on the development of a suitable trial of a metric measurement model, the results of which may inform a review of this Standard within the next five years.

Regulatory impact assessment

A preliminary assessment of the proposal to make the Standard was conducted by the Office of Impact Analysis (OIA), based on information provided by the ACMA. OIA advised that because the Standard in its operation has a more than minor impact, remaking the instrument requires an Impact Analysis (IA). It further noted that an agency may self-assess that a Standard is operating efficiently and effectively, informed by a consultation process with affected stakeholders and certified by the agency head, in lieu of an IA. As noted above, based on consultation feedback the ACMA considers that the Standard is operating effectively and efficiently and should be remade in substantively the same form. The certification letter (OIA reference number: OIA23-05004) is available on the website of the OIA.

Statement of compatibility with human rights

Subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* requires the rule-maker in relation to a legislative instrument to which section 42 (disallowance) of the LA applies to cause a statement of compatibility with human rights to be prepared in respect of that legislative instrument.

The statement of compatibility set out in **Attachment B** has been prepared to meet that requirement.

Notes to the *Broadcasting Services (Television Captioning) Standard 2023*

Part 1—Preliminary

Section 1 Name

This section provides for the Standard to be cited as the *Broadcasting Services (Television Captioning) Standard 2023*.

Section 2 Commencement

This section provides for the Standard to commence at the start of the day after the day it is registered on the Federal Register of Legislation.

The Federal Register of Legislation may be accessed free of charge at www.legislation.gov.au.

Section 3 Authority

This section identifies the provision of the Act that authorises the making of the Standard, namely subsection 130ZZA(1) of the *Broadcasting Services Act 1992 (the Act)*.

Section 4 Repeal of the *Broadcasting Services (Television Captioning) Standard 2013*

This section provides that the *Broadcasting Services (Television Captioning) Standard 2013* (Registration No F2013L00918) is repealed.

Section 5 Object of this standard

This section sets out the object of the Standard, which is to set minimum requirements for television broadcasters and narrowcasters relating to the quality of captioning services, to ensure that captioning services are meaningful to viewers who are deaf or hard of hearing. The terminology has been updated from ‘deaf and hearing impaired’ to ‘deaf and hard of hearing’ in line with contemporary practices and preferences.

Section 6 Definitions

This section defines a number of key terms used throughout the Standard. For the avoidance of doubt a definition of ‘deaf and hard of hearing’ has been inserted to be clear that it has the same meaning as ‘deaf and hearing impaired,’ which is the language used in the Act.

A number of other expressions used in the Standard are defined in the Act.

Section 7 References to other instruments

This section provides that in the Standard, unless the contrary intention appears:

- a reference to any other legislative instrument is a reference to that other legislative instrument as in force from time to time; and
- a reference to any other kind of instrument is a reference to that other instrument as in force at the commencement of the Standard.

Part 2—Requirements relating to quality of captioning

Section 8 Quality of captioning services

This section provides that television broadcasters and narrowcasters must comply with the requirements in the Standard when providing a captioning service in accordance with their captioning obligations.

This section also includes a note explaining how the ACMA intends to exercise its enforcement powers under the BSA in relation to compliance with the Standard.

Section 9 Determining the quality of captioning services

Section 9 describes how the quality of a captioning service provided for a program will be determined.

Paragraph (a) of section 9 states that the quality of a captioning service must be considered in the context of the program as a whole. This means that a number of factors will be taken into account when determining the quality of a captioning service provided for a program.

The ACMA recognises that broadcasters and narrowcasters may use different methods of captioning, such as live captioning and pre-prepared captioning. The ACMA takes the view that it is important to consider whether the captioning service provided with a program is what would be expected in the context of the program as a whole.

Factors to consider include the circumstances of the broadcast and the nature of the program being broadcast. As suggested by the note to section 9, it is reasonable to expect that during the live broadcast of, for example, a fast-paced sporting match there would be a time lag between the captions and soundtrack and the caption lines may not end at natural linguistic breaks.

In contrast, during the broadcast of a fully-scripted drama program, that has previously been broadcast in Australia, or elsewhere, it would be reasonable to expect that there would be no, or minimal, time lag and caption lines would end at natural linguistic breaks. The expectations for the other factors listed at sections 10, 11 and 12 of the Standard would also be significantly greater than they would be for programming such as a fast-paced, live sporting match.

Paragraph (b) of section 9, and the definition of “program” in section 6, together have the effect that the quality of a captioning service for a program that is a distinct program segment within a television program will be considered in the context of that distinct program segment on its own, provided that the segment is unrelated to other program segments. For example, a current affairs program may consist of several segments which are each distinct from and unrelated to other segments in that program.

Paragraph (c) of section 9 provides that the quality of a captioning service will be determined by considering the cumulative effect of the readability, accuracy and comprehensibility of the captions.

Section 10 Readability of captions

Paragraph (a) of section 10 provides that television broadcasters and narrowcasters must use captions that are readable when providing a captioning service for a program.

Paragraph (b) of section 10 sets out the factors which must be considered, in the context of the program as a whole, when determining whether captions are readable. This list is not intended to be exhaustive and while each of the factors must be considered, they are intended to be used as a guide to determining whether captions are readable. The ACMA takes the view that there may be

circumstances where a captioning service may not satisfy all the criteria listed in paragraph 10(b) but the captions may nonetheless be readable and meaningful to viewers who are deaf or hard of hearing.

Section 11 Accuracy of captions

Paragraph (a) of section 11 provides that broadcasters and narrowcasters must use captions that accurately recreate the soundtrack of a program when providing a captioning service for a program.

Paragraph (b) of section 11 sets out the factors which must be considered, in the context of the program as a whole, when determining whether captions accurately recreate the soundtrack of a program. This list is not intended to be exhaustive and while each of the factors must be considered, they are intended to be used as a guide to determining whether captions accurately recreate the soundtrack of a program. The ACMA takes the view that there may be circumstances where a captioning service may not satisfy all the criteria listed in paragraph 11(b) but the captions may nonetheless accurately recreate the soundtrack of a program and be meaningful to viewers who are deaf or hard of hearing.

Section 12 Comprehensibility of captions

Paragraph (a) of section 12 provides that broadcasters and narrowcasters must use captions that are comprehensible when providing a captioning service for a program.

Paragraph (b) of section 12 sets out the factors which must be considered, in the context of the program as a whole, when determining whether captions are comprehensible. This list is not intended to be exhaustive and while each of the factors must be considered, they are intended to be used as a guide to determining whether captions are comprehensible. The ACMA takes the view that there may be circumstances where a captioning service may not satisfy all the criteria listed in paragraph 12(b) but the captions may nonetheless be comprehensible and meaningful to viewers who are deaf or hard of hearing.

Statement of compatibility with human rights

Prepared by the Australian Communications and Media Authority under subsection 9(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Broadcasting Services (Television Captioning) Standard 2023

Overview of the instrument

The *Broadcasting Services (Television Captioning) Standard 2023 (the Standard)* is made under subsection 130ZZA(1) of the *Broadcasting Services Act 1992 (the BSA)*. The Standard repeals the *Broadcasting Services (Television Captioning) Standard 2013 (the 2013 Standard)*, which was due to sunset on 1 October 2023. The Standard does not change the requirements for commercial television broadcasting, national broadcasters, subscription television broadcasting and subscription television narrowcasting licensees that existed under the 2013 Standard.

The *Broadcasting Services Amendment (Improved Access to Television Services) Act 2012* amended the captioning requirements in the BSA to facilitate improved access to free-to-air and subscription television by Australia's deaf and hard of hearing community. Amongst the suite of amendments was an obligation on the Australian Communications and Media Authority (**the ACMA**) to take all reasonable steps to ensure that standards relating to the quality of captioning services provided for television programs by free-to-air and subscription television providers, are in force.

Subsection 130ZZA(1) of the BSA states that the ACMA may, by legislative instrument, determine standards that relate to the quality of captioning services provided by commercial television broadcasting licensees, national broadcasters, subscription broadcasting licensees and subscription narrowcasting licensees for television programs. Subsection 130ZZA(2) of the BSA states that quality includes readability, comprehensibility and accuracy.

In accordance with this obligation, the ACMA has remade the Standard which establishes minimum requirements for the quality of captioning services provided with television programs, with respect to readability, accuracy and comprehensibility of the captions, to ensure that captioning services are meaningful to viewers who are deaf or hard of hearing.

Under the BSA, compliance with the Standard is a licence condition for commercial television broadcasting, subscription television broadcasting and subscription television narrowcasting licensees (see subsections 130ZZA(4), (6) and (7) and clauses 7, 10 and 11 of Schedule 2 to the BSA). Subsection 130ZZA(5) of the BSA requires national broadcasters to comply with the Standard.

Human rights implications

The ACMA has assessed whether the Standard is compatible with human rights, being the rights and freedoms recognised or declared by the international instruments listed in subsection 3(1) of the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

Having considered the likely impact of the Standard and the nature of the applicable rights and freedoms, the ACMA has formed the view that the Standard engages the following rights and freedoms:

- the right to freedom of expression, including the freedom to receive information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or

through any other chosen media (Article 19(2) of the *International Covenant on Civil and Political Rights (the ICCPR)*);

- the right for persons with disabilities to access, on an equal basis with others, information and communications (Article 9 of the *Convention on the Rights of Persons with Disabilities (the CRPD)*);
- the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice (Article 21 of the CRPD);
- the right for persons with disabilities to effectively and fully participate in political and public life on an equal basis with others (Article 29 of the CRPD);
- the right for persons with disabilities to take part on an equal basis with others in cultural life, including enjoying access to television programs in accessible formats (Article 30 of the CRPD).

The Standard requires television program providers to make their television programs accessible to persons who are deaf or hard of hearing, by ensuring that the captioning provided with programs meets minimum quality standards and is meaningful to deaf and hard of hearing viewers. In this way, the Standard promotes the right to receive information and ideas of all kinds, including those disseminated via television programs, on an equal basis with others. This is consistent with Article 19(2) of the ICCPR and Article 21 of the CRPD.

By providing deaf and hard of hearing television viewers with access to meaningful captions, the Standard also improves the accessibility of information and communications to persons with disabilities, consistent with Article 9 of the CRPD referred to above.

Similarly, quality captioning services that are mandated by this Standard enhance the provision of television programs in accessible formats, which in turn assists deaf and hard of hearing viewers to engage with television programs that provide entertainment and educational, cultural and political information. In doing so, the Standard facilitates the right of people who are deaf or hard of hearing to effectively and fully participate in political and public life and to take part in cultural life, on an equal basis with others, consistent with Articles 29 and 30 of the CRPD referred to above.

Conclusion

The instrument is compatible with human rights because the Standard facilitates access to television services by people who are deaf or hard of hearing. It is consistent with, and does not limit, the applicable rights or freedoms set out above.