



**Australian
Broadcasting
Authority**

Investigation Report No. 1520

File No.	2005/0708
Licensee	Prime Television (Northern) Pty Ltd
Station	NEN
Type of Service	Commercial Television
Names of Programs	Local news
Dates of Broadcast	Since the licensee commenced transmission in digital mode on 31 March 2003
Relevant Legislation	Regulation 3.01 of the <i>Broadcasting Services (Digital Television) Regulations 2000</i> ; clause 38(4) of Part 4 of Schedule 4 to the <i>Broadcasting Services Act 1992</i>

Investigation conclusion

The ABA finds that the licensee, Prime Television (Northern) Pty Ltd:

- breached Regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000*, by not providing a captioning service for local news broadcast in the regional licence area for NEN for more than two years after it commenced transmission in digital mode on 31 March 2003.

The complaint

On 22 March 2005, the Australian Broadcasting Authority (the ABA) received a complaint dated 18 March 2005, alleging that ‘Prime Television in Newcastle is not captioning any of its local news broadcasts’.

Relevant legislation

Clause 38 of Part 4 of Schedule 4 to the *Broadcasting Services Act 1992* (the Act) states:

38 Captioning standards

- (1) The regulations must determine standards that are to be observed by:
 - (a) holders of commercial television broadcasting licences; and
 - (b) national broadcasters;in relation to the captioning of television programs for the deaf and hearing impaired.
- (2) Standards under subclause (1) must require licensees and national broadcasters to meet specified goals or targets in relation to the extent to which television programs, or specified kinds of television programs, are captioned for the deaf and hearing impaired.
- (3) Subclause (2) does not limit subclause (1).
- (4) Standards under subclause (1) must be directed towards ensuring the achievement of the following objectives:
 - (a) the objective that, as far as is practicable:
 - (i) holders of commercial television broadcasting licences; and
 - (ii) national broadcasters;should provide a captioning service for television programs transmitted during prime viewing hours;
 - (b) the objective that, as far as is practicable:
 - (i) holders of commercial television broadcasting licences; and
 - (ii) national broadcasters;should provide a captioning service for television news programs, and television current affairs programs, transmitted outside prime viewing hours.
- (4A) Subclause (4) has effect subject to subclause (4B).
- (4B) Standards under subclause (1) must not require the provision of a captioning service for:
 - (a) a television program, or a part of a television program, that is wholly in a language other than English; or
 - (b) a television program, or a part of a television program, the audio component of which consists only of music that has no human vocal content that is recognisable as being in the English language; or

(c) so much of the audio component of a television program as consists of incidental or background music.

(4C) For the purposes of paragraphs (4B)(a) and (b), disregard minor and infrequent uses of the English language.

(5) For the purposes of subclause (4), *prime viewing hours* are the hours:
(a) beginning at 6 pm each day or, if another time is prescribed, beginning at that prescribed time each day; and
(b) ending at 10.30 pm on the same day or, if another time is prescribed, ending at that prescribed time on the same day.

(6) Standards under subclause (1) do not apply to a particular licensee or national broadcaster before the first occasion on or after 1 January 2001 on which the licensee or broadcaster broadcasts television programs in digital mode.

(7) A national broadcaster must comply with a standard under subclause (1).

Note: For compliance by licensees, see clause 7 of Schedule 2.

(8) In this clause:

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

Regulation 3.01 of the Broadcasting Services (Digital Television Standards) Regulations 2000 (the Captioning Standards) states:

3.01 Captioning standards

For subclause 38 (1) of Schedule 4 to the Act, the standards set out in Schedule 3 are to be observed by:

- (a) commercial television broadcasting licensees; and
- (b) national broadcasters;

in relation to the captioning of television programs for the deaf and hearing impaired.

Schedule 3 of the Captioning Standards states:

1 Provision of captioning service

- (1) Licensees and national broadcasters must provide a captioning service for:
 - (a) television programs transmitted during prime viewing hours; and
 - (b) television news programs, and television current affairs programs, transmitted at any time.
- (2) However, subclause (1) does not apply to the following television programs or parts of television programs:
 - (a) for a licensee — a television program mentioned in paragraph 6 (8) (d) of Schedule 4 to the Act;
 - (b) for a national broadcaster — a television program mentioned in paragraph 19 (8) (d) of Schedule 4 to the Act;

- (c) a television program mentioned in subclause 38 (4B) of Schedule 4 to the Act;
 - (d) for a television news program transmitted in a regional licence area — the audio component of a part of the television news program that contains:
 - (i) unscripted speech delivered by a person who is not a newsreader or reporter, or who is not speaking in his or her capacity as a newsreader or reporter; or
 - (ii) unscripted speech that is transmitted at the time it is delivered, or is recorded less than 2 hours before the first transmission of the television news program.
- (3) Paragraph (2) (d) ceases to have effect at the end of 31 December 2003.

Assessment

The assessment is based on submissions from the complainant and the licensee.

Complainant's submission

The complainant submitted that 'Prime Television in Newcastle is not captioning any of its local news broadcasts'.

Licensee's submission

The licensee submitted that the complaint, at the date it was made, was correct. The licensee acknowledged that it had not complied with the captioning requirement and apologised for that failure. Prime¹ also submitted that since the date of the complaint, however, it has provided captioning on local news in most of the NEN licence area.

While the licensee did not excuse its failure to comply with the Captioning Standards, it did submit 'a number of mitigating factors', as follows:

- Prime entered into an agreement with a consortium of suppliers in September 2003 for the delivery of a newsroom computing system whose specifications included the ability to generate closed captions
- entry into this contract should have provided ample time for captioning to be implemented by the date of Prime's first digital local news broadcast
- implementation of the system proposed encountered unexpected problems beyond Prime's control
- because the captioning system had to be integrated with a suite of newsroom functionalities, the problems relating to the implementation of this suite had to be solved before captioning could be included as part of Prime's digital facilities; and
- Prime has been working very hard to get this system working efficiently. We are now confident that the captioning elements of the system are working and we are

¹ Prime Television Limited on behalf of the licensee.

concentrating on ensuring that all our news and current affairs broadcasts go to air with captions.

Finding

The ABA finds that the licensee, Prime Television (Northern) Pty Ltd, breached Regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000*, by not providing a captioning service for local news broadcast in the regional licence area for NEN for more than two years after it commenced transmission in digital mode on 31 March 2003.

Reasons

Under the *Broadcasting Services Act 1992* (the Act), licensees transmitting programs in digital mode must meet the standards relating to captioning of programs for the deaf and hearing impaired (clause 38 of Schedule 4 to the Act).

Clause (1) at Schedule 3 of the Captioning Standards requires licensees to provide a captioning service for:

- television programs transmitted during prime viewing hours (6.00 pm to 10.30 pm) and
- television news and current affairs programs transmitted at any time.

Licensees have been required to provide captioning from the date they commenced digital transmission. Prime started transmitting in digital mode on 31 March 2003. However, clause (1) did not apply to television programs or parts of television programs in some cases, including the audio component of a part of a television news program transmitted in a regional licence area that contains unscripted speech delivered by a person who is not a newsreader or presenter, or that is transmitted at the time it is delivered or is recorded less than two hours before the first transmission of the television news program (paragraph (2)(d) of Schedule 3 of the Captioning Standards). This exemption ceased to have effect at the end of 31 December 2003.

The ABA notes Prime's advice² that:

- Prime had commissioned a new system, as it considered it would provide a higher standard of captioning
- there were unexpected delays in developing the new newsroom computer system, which would provide closed captioning on all news programs
- Prime expected that closed caption broadcasts would commence on 4 April 2005
- most of its news material is captioned, with approximately seven minutes per day, or 2 per cent of news and information programs, not captioned
- it is fully compliant with the captioning requirements in relation to other programs transmitted during prime time, as most of the captions are supplied by Seven and

² In emails to the ABA in March 2005.

- where programs were not supplied by Seven, Prime usually required the third-party supplier to make the program available with captions.

The issue for consideration is whether Prime has been compliant with the Captioning Standards, 'as far as is practicable'. The Act allows for an exception to comply with the obligation in the phrase 'as far as is practicable' used in paragraphs 38(4)(a) and (b) of Schedule 4 to the Act. This has been interpreted to mean that it takes precedence over the word 'must' used at clause 1(1) of the Captioning Standards. This reading is consistent with subsections 13(1)(c) and (2) of the *Legislative Instruments Act 2003*³ and relevant case law.⁴

In the context of this investigation, the ABA considers that the 'mitigating factors' provided by the licensee were not of a nature envisaged to be covered by the phrase, 'as far as is practicable', provided by the Act. The ABA considers that by the time Prime was captioning all of its news and current affairs programs transmitted by NEN in its regional licence area in April 2005, Prime would not have been complying with the Captioning Standards for over two years. While it was understandable for unforeseen problems to arise, especially where new systems and equipment were being introduced, there was a long lead time before the obligation came into effect for Prime on 31 March 2003 when it commenced transmission in digital mode, as:

- the digital television requirements at Schedule 4 to the Act were introduced in 1998 and
- the Captioning Standards were notified in the *Commonwealth of Australia Gazette* on 29 November 2000.

The ABA notes the licensee's acceptance that at the date the complaint was made, the allegation that NEN was not captioning any of its local news broadcasts was correct.

Action taken by the licensee

The ABA notes that in response to the preliminary breach finding, the licensee has taken the following steps:

- local news broadcasts for the Newcastle area have been captioned from 4 April 2005;
- local news broadcasts in the Tamworth and North Coast parts of the NEN licence area are scheduled to have captioning by 25 April 2005.

³ Sections 13 (1) and (2) of the *Legislative Instruments Act 2003* provides:

(1) If enabling legislation confers on a rule-maker the power to make a legislative instrument, then, unless the contrary intention appears:

(a) the *Acts Interpretation Act 1901* applies to any legislative instrument so made as if it were an Act and as if each provision of the legislative instrument were a section of an Act; and
 (b) expressions used in any legislative instrument so made have the same meaning as in the enabling legislation; and
 (c) any legislative instrument so made is to be read and construed subject to the enabling legislation, and so as not to exceed the power of the rule-maker.

(2) If any legislative instrument would, but for subsection (1), be construed as being in excess of the rule-maker's power, it is to be taken to be a valid instrument to the extent to which it is not in excess of that power.

⁴ See for example *Shanahan vs Scott* (1957) 96 CLR 245 at 250.

Further, in an email to the ABA on 17 May 2005, the licensee indicated that:

- Prime had been consistent in providing captioned local news broadcasts in the Newcastle area since 11 April 2005
- Prime's problems had been confined to Tamworth and the North Coast, with some equipment failures within the first few days, but captioning had been consistent for the past fortnight and
- Prime was confident that it had overcome all the hurdles and assured that it was captioning all Prime News broadcasts in the NEN licence area.

Action taken by the ABA

Given the seriousness of the breach, the ABA decided to seek an undertaking from the licensee that it will:

- monitor local news compliance with the Captioning Standards for three months and
- provide a report to the ABA on the outcome of that monitoring within two weeks after the monitoring period has concluded.

Decision

I, Andree Wright, Director, Industry Performance and Review Branch, being the appropriate delegated officer of the Australian Broadcasting Authority, determine for the above reasons that the licensee, Prime Television (Northern) Pty Ltd, breached Regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000*, by not providing a captioning service for local news broadcast in the regional licence area for NEN for more than two years after it commenced transmission in digital mode on 31 March 2003.

Signed:

Andree Wright

dated this 24th day of June 2005.