



Australian Government
**Australian Communications
and Media Authority**

Investigation Report No. 1507

File No.	2005/0525
Licensee	Swan Television & Radio Broadcasters Pty Ltd
Station	STW
Type of Service	Commercial Television
Name of Program	News and election updates
Date/s of Broadcast	21, 26 and 27 February 2005
Relevant Legislation/Code	Regulation 3.01 of the <i>Broadcasting Services (Digital Television) Standards Regulations 2000</i> ; clause 38(4) of Division 3 of Part 4 of Schedule 4 to the <i>Broadcasting Services Act 1992</i>

Investigation Conclusion

The delegate finds that the licensee of STW, Swan Television & Radio Broadcasters Pty Ltd:

- breached regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000*, by not providing a captioning service for its sports segment in the *News* on 27 February 2005;
- did not breach regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000* as it provided a captioning service for the sports segment in the *News* on 21 February 2005; and
- did not breach regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000* as it provided a captioning service for the coverage of the WA State elections on 26 February 2005.

THE COMPLAINT

Between 17 February 2005 and 1 March 2005, the Australian Broadcasting Authority received complaints that Swan Television & Radio Broadcasters Pty Ltd, the licensee of STW, did not caption or only summary captioned the following broadcasts:

- the sports segment in the 6pm *News* on 21 February 2005
- the coverage of the Western Australian (WA) State elections on 26 February 2005 and
- the sports segment in the 6pm *News* on 27 February 2005

From 1 July 2005, ACMA continued the investigation in accordance with clause 11 of Schedule 4 to the *Australian Communications and Media Authority (Consequential and Transitional Provisions) Act 2005*.

The nature of the complaint follows.

Sports segment in the 6 pm News, 21 February 2005

The following three statements in the sports segment were not captioned:

- Rick Hart, the Chairman of the Fremantle Dockers, about the club's success in getting out of debt
- Andrew Demetriou, an AFL spokesman, on the same subject and
- Daniel Chick, a member of the Eagles team, about a recent game against the Dockers.

Coverage of WA State elections on 26 February 2005

On 26 February 2005, the licensee crossed live to the WA State election room on three occasions. The complainant has referred to the following updates:

- an election update during the 6 pm *News*
- a victory speech by the Premier, Geoff Gallop at 9.43 pm.

Transcripts of these broadcasts are at Attachment A.

Sports segment in the 6 pm News, 27 February 2005

The following statements in the sports segment were not captioned:

- two statements made by Eagles player Ashley Sampi
- one statement made by Chris Donnolly, Dockers' coach and
- one statement made by the Australian cricket captain, Ricky Ponting.

A statement made by the reporter was also not captioned:

REPORTER: Matthew Padlich kicked four goals as [indecipherable] dominated after half time winning by 58 points.

ASSESSMENT

The assessment is based on submissions from the complainant and the licensee, and copies of relevant broadcasts provided by the licensee. As the licensee was unable to provide tapes of the broadcasts with the displayed captions, an assessment was made based on the transcripts of the captions.

Relevant legislation

Clause 38 of Division 3 of Part 4 of Schedule 4 to the *Broadcasting Services Act 1992* relevantly provides:

Schedule 4 Digital television broadcasting

Part 4 Standards

Division 3 Captioning standards

38 Captioning standards

- (1) The regulations must determine standards that are to be observed by:
 - (a) holders of commercial television broadcasting licences
[...]
in relation to the captioning of television programs for the deaf and hearing impaired.
- (2) Standards under subclause (1) must require licensees ... 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.
- (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
[...]
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
[...]
should provide a captioning service for television news programs, and television current affairs programs, transmitted outside prime viewing hours.

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.

COMPLAINANT'S SUBMISSIONS

The complainant submitted that:

- only parts of the sports segment on 21 February 2005 were captioned. In particular, a comment made by Eagles player, Mr Chick was not captioned. At the commencement of the segment, a captioned announcement was broadcast apologising for the lack of captions in the story
- only parts of the sports segment broadcast on 27 February 2005 were captioned or summary captioned. In particular, statements made by Mr Sampi, an Eagles player; the coach of the Dockers football team; and the Australian cricket captain, Mr Ponting, were not captioned at all. Summary captions do not comply with the Broadcasting Services Act
- in the election coverage on 26 February 2005, the licensee provided only summary captions which missed relevant detail. The captions stated that Dr Gallop was at a private dinner, however, did not say where Mr Barnett was. Further, the summary captions of the victory speech gave the impression that the election winner, Dr Gallop, had been 'sparing and perfunctory' in his acknowledgment of his opponent Colin Barnett, whereas the full live caption coverage of the speech provided on ABC TV showed that Dr Gallop had been 'fulsome in his praise and respect' for Mr Barnett and
- the licensee does not regularly capture live-to-air crosses.

LICENSEE'S SUBMISSIONS

The licensee submitted that:

Sports segment in the News, 21 February 2005

- the script for the sports segment on 21 February 2005 was changed at the 'last minute' (the change was produced at or around 5.10 pm and finalised for release at 6.05 pm) and could not be captioned. The editing for the story was not completed in time for it to be copied and sent to captioning and consequently the first 16 seconds of the story were not captioned. Whilst transmitting the captions,

the captioners attempted to insert a summary caption which only lasted seven seconds due to the time constraints;

- the licensee has recently changed its summarised caption warning from ‘we apologise for a lack of captions in this story’ to ‘captions in the following story are summarised’, due to the possibility that the former may be misinterpreted to mean that there was no captioning at all.

WA election coverage, 26 February 2005

- the captioning adequately provided the sense and meaning of the dialogue.

Sports segment in the News, 27 February 2005

- the story was completed late and ‘regrettably’ was not able to be captioned in time and
- it is the licensee’s intention to find a way to prevent this from recurring.

In addition, the licensee provided the following general comments about its captioning service:

- most of the content of the *News* program between 6.00 pm and 6.30 pm and the news updates is captioned before it goes to air. The licensee has a relatively small component of live communications that require summary captioning. The licensee has been successfully captioning ‘almost faultlessly’ since 2001, using an off-line method, by which the text of the program is created before the broadcast rather than simultaneously. The licensee believes that this is the most practicable method
- the licensee receives most of its programs from the Nine Network and is obliged to use their captions on programs which meet the national standard and
- the licensee is able to provide extra captioning over and above what the regulations require when programs are broadcast without a time difference. For example, an event that is broadcast live in Sydney between 6.00 pm and 10.30 pm is shown in Perth from 4.00 pm to 8.30 pm, therefore, the programs are being captioned from 4.00 pm to 10.30 pm. The licensee captions more programs than any other Nine Network station.

In response to the preliminary findings, the licensee submitted that:

The News on 21 February 2005 and the coverage of the WA State Elections on 26 February were found not to have breached regulation 3.01 as you have determined that we provided a captioning services ‘as far as practicable’, Regrettably, when we applied the same approach to our captioning requirements on 27 February, one story in a News’ bulletin of some 20+ stories was determined that we didn’t provide a captioning service ‘as far as practicable’.

Needless to say, our view is that under the circumstances, the News bulletin of 27 February was captioned to the best of our ability ‘as far as practicable’.

FINDING

The delegate finds that the licensee of STW, Swan Television & Radio Broadcasters Pty Ltd, breached regulation 3.01 of the *Broadcasting Services (Digital Television*

Standards) Regulations 2000, by not providing a captioning service for its sports segment in the *News* on 27 February 2005.

The delegate finds that the licensee did not breach regulation 3.01 as it provided a captioning service for the sports segment in the *News* on 21 February 2005 and the coverage of the WA State elections on 26 February 2005.

REASONS

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

Clause 1 of 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.

The issue for consideration is whether the licensee complied with the Captioning Standards, 'as far as is practicable'. The Broadcasting Services 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 sections 13(1)(c) and (2) of the *Legislative Instruments Act 2003*¹ and relevant case law.²

The issue to consider is whether, in the broadcasts complained of, the licensee provided a captioning service 'as far as is practicable'.

Sports segment of News, 21 February 2005

The licensee provided a captioning service on 21 February 2005 'as far as is practicable' given the technical constraints at the time of the broadcast. The delegate accepts that the late changes to the script prevented the licensee from captioning parts of the broadcast.

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

(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.

² See for example *Shanahan vs Scott* (1957) 96 CLR 245 at 250.

The delegate finds that the licensee's practice of summary captioning for live broadcasts complies with the Broadcasting Services Act 'as far as is practicable'. Summarising the audio content is a practical method to caption live broadcasts, given that the licensee's use of an off-line captioning method. It is noted that the licensee has implemented an internal system to ensure that all questions of the live-to-air crosses are pre-prepared so that the caption summary will be as faithful as possible to the questions asked and reflect a summary of the responses given.³

WA election coverage, 26 February 2005

The complainant submitted that the captions in the election update during the evening *News* stated that Dr Gallop was at a private dinner, however, that they did not state where Mr Barnett was. ACMA notes that the caption did not include the location of Mr Barnett. Despite this omission, ACMA considers that the licensee provided a captioning service 'as far as is practicable', given the nature of summary captioning. The summary of the election update during the *News* program adequately captured the sense and meaning of the audio broadcast.

The complainant also contended that the summary caption of the victory speech in the 9.43 pm news update gave the impression that the election winner, Dr Gallop, had been 'sparing and perfunctory' in his acknowledgment of his opponent. The delegate considers that the captioning for Dr Gallop's victory speech adequately reflected the audio broadcast. In this regard, it is noted that the caption included Dr Gallop's praise of Mr Barnett and the Liberal Party:

I thank the people of WA for voting in my Government for another term. Democracy is a great institution. WA democracy is alive and well. My congratulations go to Colin Barnett. Can I wish Colin, Lyn and his family all the best for the future...Everyone has played their role in democracy. Thanks to all in the Liberal Party.

The delegate finds that the licensee provided a captioning service 'as far as is practicable' in this instance.

Sports segment of News, 27 February 2005

The licensee has conceded that it failed to caption parts of the sports segment in the *News* broadcast on 27 February 2005, however has not provided any explanation for this failure.

ACTION TAKEN BY THE LICENSEE

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

- it has decided to make further and substantial changes to its captioning service to the extent that summary captioning will no longer be used in its *News* bulletin. The new captioning service will commence in early October.

The delegate considers these actions address the compliance issues raised by the investigation and will continue to monitor the licensee's performance in this regard.

³ Advice was provided in a letter from the licensee to the complainant dated 22 February 2005.

DECISION

I, Andrea Malone, Acting Executive Manager, Industry Performance and Review Branch, being the appropriate delegated officer of the Australian Communications and Media Authority, determine for the above reasons that the licensee of STW, Swan Television & Radio Broadcasters Pty Ltd:

- breached regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000*, by not providing a captioning service for its sports segment in the *News* on 27 February 2005;
- did not breach regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000* as it provided a captioning service for the sports segment in the *News* on 21 February 2005; and
- did not breach regulation 3.01 of the *Broadcasting Services (Digital Television Standards) Regulations 2000* as it provided a captioning service for the coverage of the WA State elections on 26 February 2005.

Signed: -----
Andrea Malone

dated this day of September 2005

ATTACHMENT A

DEAFNESS FORUM AUSTRALIA - TRANSCRIPT OF ELECTION UPDATES ON 26 FEBRUARY 2005

UPDATE – DURING 6PM NEWS

AUDIO BROADCAST:

PRESENTER: We cross now to the tally-room where Nine's political reporter Nadia Mitsopoulos joins us. Nadia, when are the first votes expected in and is there any exit polling indicating which way the election has gone already?

REPORTER: Sharlyn, we should start getting an idea of the voting trends and any swings away from the Government by about 7:00pm. But analysts predict if this poll goes down to the wire it will be hours before we get a clear result. Now I've spoken to a number of Liberal and Labor sources and both are predicting a Labor win. The ALP expect to lose Bunbury, Albany and Murray. Possibly Riverton, but is confident of picking up the Northern suburbs seat of Kingsley. Liberal insiders say Colin Barnett's \$200 million gaffe over his savings about his financial credibility is actually resonating in the electorate. As for the referendum, the feeling now is that the no vote will probably get over the line.

PRESENTER: Nadia, where will Colin Barnett and Geoff Gallop be tonight?

REPORTER: The Premier will watch the vote count as a private dinner and once the result is known, he'll join supporters at a function at a Perth football club and Colin Barnett will be with his supporters at the Claremont football club. We'll have live updates as the vote count unfolds throughout the evening.

CAPTION: ... We cross now to the tally-room where Nine's political reporter Nadia Mitsopoulos joins us. Nadia, when are the first votes expected in and is there any exit polling indicating which way the election has gone already? Sharlyn, we should start getting an idea of the voting trends and any swings away from the Government by about 7:00pm. But analysts predict if this poll goes down to the wire it will be hours before we get a clear result. Now I've spoken to a number of Liberal and Labor sources and both are predicting a Labor win. The ALP expect to lose Bunbury, Albany and Murray. Possibly Riverton. They'll win Kingsley. Barnett's gaffe and concerns over canal credibility is resonating. Nadia, where will Colin Barnett and Geoff Gallop be tonight? Gallop will be at private dinner. The Premier will join supporters at a football club. We'll have live updates.

UPDATE – 9:43pm

AUDIO BROADCAST:

REPORTER: Hello again, Nadia Mitsopoulos with you in the tally-room. Victorious Geoff Gallop is about to claim victory after his government was tonight re-elected to a second term. Lets now cross to the tally-room.

GEOFF GALLUP: I'd like to thank the people of Western Australia for voting confidence in my government for another term. Democracy is a great institution and I thank all of the people of Western Australia who participated in this election, those that supported my own party, those that supported the other parties and the independents, you've all played your role in making sure Western Australian democracy is live and well. I thank you for that and I thank the people for returning my government so we can continue the good work we're doing on behalf of the people of Western Australia. My congratulations goes to Colin Barnett for the dogged and determined way he fought the campaign and I say to everyone in the Liberal Party, thankyou for the role that you played in our great democracy. Can I wish Colin, Lyn and his family all the best for the future and I know how hard it will be for them tonight and I'm thinking of them and I'm sure they can look forward to a good future.

REPORTER: Just repeating the Gallop government has been re-elected with a likely majority of 7 seats. That's all from the tally-room. Now it's back to the football.

CAPTION: This program is captioned live. Good evening. Nadia Mitsopoulos from the State tally-room. And Dr Geoff Gallop and the Australian Labor Party have won the election. Let's cross now to Labor headquarters. I thank the people of WA for voting in my Government for another term. Democracy is a great institution. WA democracy is alive and well. My congratulations go to Colin Barnett. Can I wish Colin, Lyn and his family all the best for the future. **RAPTUROUS APPLAUSE** Everyone has played their role in democracy. Thanks to all in the Liberal Party