Investigation Report No. 2287

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<th>File No.</th>
<th>ACMA2009/2258</th>
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<td>Licensee</td>
<td>Northern Rivers Television Pty Ltd</td>
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<td>Station</td>
<td>NRN (One HD)</td>
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<td>Type of Service</td>
<td>Commercial Television</td>
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<td>Name of Program</td>
<td>Round 8 US, Tackling Peace, Poker, UFC Wired, Sports Tonight</td>
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<td>Dates of Broadcast</td>
<td>7 July 2009, 26, 27 and 28 August 2009</td>
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<td>Relevant Legislation</td>
<td>Clauses 38(1) and 38(9) of Schedule 4 and clause 7(1)(o) of Schedule 2 to the Broadcasting Service Act 1992</td>
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<td>Date Finalised</td>
<td>6 January 2010</td>
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<td>Decision</td>
<td>No breach of clause 7(1)(o) of Schedule 2 to the Broadcasting Services Act 1992</td>
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The complaint
On 7 September 2009, the Australian Communications and Media Authority (the ACMA) received a written complaint alleging that the licensee of NRN, Northern Rivers Television Pty Ltd, failed to provide captioning for various programs broadcast on its One HD (ONE) multi-channel between 26 and 28 August 2009.

The ACMA has investigated the licensee’s compliance with clauses 38(1) and 38(9) of Schedule 4, and clause 7(1)(o) of Schedule 2 to the Broadcasting Services Act 1992 (the Act) in accordance with section 147 of the Act.¹

The broadcast
The licensee launched its new digital multi-channel ONE on 2 July 2009. ONE is described on the station website as:²

…ONE, Network Ten’s new 24-hour free-to-air sports channel, …[plays] sport LIVE – whatever time of the day or night the event occurs, in whichever part of Australia or the world it occurs AND then also replay in peak times as the viewer appetite warrants.

Relevant legislation
38 Captioning

Basic rules

(1) Subject to this clause, each commercial television broadcasting licensee, […], must provide a captioning service for:

(a) television programs transmitted during prime viewing hours; and
(b) television, news or current affairs programs transmitted outside prime viewing hours.

…

(4) If:

(a) there is a simulcast period, or a simulcast-equivalent period, for the licence area of a commercial television broadcasting licence; and

(b) the licensee provides a core commercial television broadcasting service in the licence area; and

(c) the licensee provides:

(i) a SDTV multi-channelled commercial television broadcasting service; or

(ii) a HDTV multi-channelled commercial television broadcasting service;

in the licence area;

¹ Section 147 of the Act provides that a person may make a complaint to the ACMA if it relates to a condition of a licence or a class licence.
then, during that period, subclause (1) does not require the provision of a captioning service for a television program transmitted on:

(d) a SDTV multi-channelled commercial television broadcasting service; or

(e) a HDTV multi-channelled commercial television broadcasting service;

unless the program has been previously transmitted on the core commercial television broadcasting service.

Special Rules

(9) If:

(a) there is a simulcast period, or a simulcast-equivalent period, for the licence area of a commercial television broadcasting licence; and

(b) during that period, the licensee transmits a television program on:

(i) a SDTV multi-channelled commercial television broadcasting service; or

(ii) a HDTV multi-channelled commercial television broadcasting service; and

(c) the program has been previously transmitted on another commercial television broadcasting service provided by the licensee in the licence area; and

(d) the licensee provided a captioning service for the program when the program was so previously transmitted on the other service;

the licensee must provide a captioning service for the television program transmitted as mentioned in paragraph (b).

‘Prime viewing hours’ are the hours between 6.00pm and 10.30pm each day.

Where clause 38 applies to a commercial television broadcasting licensee, then compliance with clause 38 is a licence condition for that licensee. Licence conditions applicable to commercial television broadcasting licensees are at clause 7 of Schedule 2 to the Act.

Relevantly, clause 7(1)(o) states:

(1) Each commercial television broadcasting licence is subject to the following conditions: […]

(o) if clause 38 of Schedule 4 (which deals with captioning of television programs for the deaf and hearing impaired) applies to the licensee – the licensee will comply with that clause;

Assessment

The investigation assessment is based on:

• Submissions from the licensee
• Submissions from the complainant
• Program scheduling on Southern Cross Ten for the period between 28 June to 18 July

Other sources consulted are identified where relevant.
Issue: Whether the licensee failed to provide a captioning service for the broadcasts.

Complainant’s submissions
The complainant first complained to the ACMA on 30 July 2009 about a lack of captioning of programs broadcast on ONE during prime viewing hours. Following a request for further specific information in relation to the complaint, the complainant submitted on 19 August and 7 September 2009 that:

There [are] no subtitles between 6pm and 10:30 pm.

...On Wednesday 26 August 2009…I watched Poker from 10 pm to 11 pm – no captions
   UFC Wired – no captions
   Friday August 28 2009, Poker 10pm to 11pm. No captions…Before that I watched part of Sports Tonight. No captions.

The complainant also provided the ACMA with a Sunday Telegraph Television Guide identifying the following broadcasts of concern:
- Poker broadcast Wednesday 26 August 2009 at 10pm-11pm
- UFC Wired broadcast Thursday 27 August 2009 at 10pm-11pm
- Sports Tonight broadcast Friday 28 August 2009 at 9.30pm-10.30pm
- Poker broadcast Friday 28 August 2009 at 10pm-11pm.

Licensee’s submissions
In response to the ACMA’s request for comments on the broadcasts identified by the complainant, the licensee submitted that:

[...]

We confirm that none of [the programs] were captioned when they were broadcast on ONE.

For the purposes of clause 38(4) of Schedule 4 of the BSA, we also confirm that none of these programs had previously been broadcast (or “transmitted”) on Southern Cross Ten – i.e. Northern Rivers Television’s “core commercial television broadcasting service”. Our understanding of clause 38(4) is that this means that these programs were not required to be captioned when they were broadcast on ONE.

[...]

For these reasons, we do not consider that the broadcasting of the above four programs on ONE without captions breached the captioning obligations under Schedule 4 of the BSA, or the licence condition in clause 7(1)(o) of Schedule 2 of the BSA (that makes compliance with clause 38 of Schedule 4 a condition of licence).

In response to the ACMA’s request for comments on any programs broadcast on ONE during prime viewing hours on Tuesday 7 July and Friday 10 July 2009, that were previously broadcast on ONE’s core/simulcast service, the licensee submitted that:
We have reviewed the schedule of programs that were broadcast on ONE during that period. We confirm that only the following two programs broadcast on ONE during prime viewing hours on Tuesday 7 July and Friday 10 July 2009 had previously been broadcast on Southern Cross Ten:

- Tuesday 7 July, 1915-2030, Moto GP “Round 8 United States” was broadcast on ONE (Originally broadcast on Monday 6 July on Southern Cross TEN at 0615, without captions); and

- Tuesday 7 July, 2030-2130, “Tackling Peace” was broadcast on ONE (Originally broadcast on Southern Cross Ten on Saturday 4 July in the afternoon, without captions).

Neither of these programs was captioned when they were broadcast on ONE. This is because they were not captioned when they were originally broadcast on Southern Cross Ten. Again, this is because they were not originally broadcast in “prime viewing hours” on Southern Cross Ten, and were not news or current affairs programs (note that “Tackling Peace” is a documentary).

For these reasons, we do not consider that the broadcasting of these programs on ONE without captions breached the captioning obligations under Schedule 4 of the BSA, or the licence condition in clause 7(1)(o) of Schedule 2 of the BSA (that makes compliance with clause 38 of Schedule 4 a condition of licence).

On 14 December 2009 the ACMA requested off the licensee any available documentation that substantiates its submissions set out above.

The licensee provided the programming schedule for Southern Cross Ten for the period between 28 June to 18 July 2009, which confirmed that the following broadcasts were not broadcast on Southern Cross Ten prior to the simulcast period:

- Poker (broadcast on ONE 26 and 28 August 2009)
- UFC Wired (broadcast on ONE 27 August 2009)
- Sports Tonight (broadcast on ONE 28 August 2009).

The programming schedule also confirmed that the programs ‘Tackling Peace’ and ‘Moto GP Round 8 United States’ were broadcast on Southern Cross Ten outside of prime viewing hours prior to the simulcast period. The licensee submitted:

- The schedule for the Southern Cross Ten (NRN – Northern Rivers Television’s core commercial TV service) for the period 28 June 2009 to and including 18 July 2009 indicates:
  - That ‘Moto GP Round 8 United States’ was broadcast on Southern Cross Ten on Monday 6 July 2009 at 0645 (not 0615 as previously advised); and
  - That ‘Tackling Peace’ was broadcast on Southern Cross Ten on Saturday 4 July at 1300 ...

The licensee also submitted in relation the program ‘Sports Tonight’:

- As the title suggests Sports Tonight is a dated sporting program. “Coverage of all the day’s local, national, and international sporting news. If it happened in sports today, you’ll see it on Sports Tonight”.

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During the week commencing 23 August 2009 the only episode of Sports Tonight (broadcast on NRN – Northern Rivers Television’s core commercial TV service) was at 17:30 Saturday 29 August 2009 and this program is relevant to the sporting news of 29 August 2009.

The episode of Sports Tonight (broadcast on ONE 28/8/09) was relevant to the sporting news of 28 August 2009 and was not broadcast on the NRN – Northern Rivers Television’s core commercial TV service.

Finding
The licensee did not breach clause 7(1)(o) of Schedule 2 to the Broadcasting Services Act 1992 (the Act), as it complied with clauses 38(1) and 38(9) of Schedule 4 to the Act, for the broadcast of programs on the ONE HD multi-channel from 7 July 2009 to 28 August 2009.

Reasons
Clause 38(4)(c) of Schedule 4 to the Act states that if the licensee provides a SDTV or HDTV multi-channelled commercial television service, it is not required to provide a captioning service unless the program has previously been transmitted on the core commercial television service.

Clause 38(9) of Schedule 4 to the Act provides that where programs broadcast on a SDTV or HDTV channel were previously transmitted and captioned on ‘another commercial television broadcasting service provided by the licensee in the licence area’, the licensee must provide a captioning service for those programs on the multi-channel.

The delegate considers that Southern Cross Ten is the ‘core commercial television service’ of “ONE”, and is also ‘another commercial television broadcasting service provided by the licensee’ from “ONE”.

The licensee has confirmed that the programs identified by the complainant were not captioned and there is no available information to the contrary. The complainant’s submissions in this regard are acknowledged. However, the licensee submitted that the relevant programs were not previously broadcast on the core commercial television service. Therefore, pursuant to clause 38(4) of Schedule 4 to the Act, it was not required to caption the programs on the multi-channel “ONE”. Accordingly, the licensee has not breached its obligations under clause 38(1) of Schedule 4 to the Act.

The licensee identified additional broadcasts on the dates nominated by the ACMA as having previously been broadcast on Southern Cross Ten. The licensee confirmed that these broadcasts were also not captioned when broadcast on “ONE”. However, the licensee has submitted that these programs, when previously broadcast on Southern Cross Ten, were not captioned because they fell outside of prime viewing hours, in accordance with clause 38(1) of schedule 4 to the Act. Therefore, the licensee has satisfied its obligations under clause 38(9) of Schedule 4 to the Act, and the licensee was not required to caption the programs on the multi-channel “ONE”.