

6 April 2010

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Dear Sir/Madam

Re: Application for Exemption under Section 55 of the Disability Discrimination Act: Closed captioning on Subscription Television June 2009.

The Disability Discrimination Legal Service Incorporated ("DDLS") is an independent, community organisation that specialises in disability discrimination matters. It is a not for profit incorporated association that provides free legal service to people with disabilities. It also provides community legal education and undertakes law and policy reform projects in the areas of disability and discrimination.

A committee of volunteers manages the service. The DDLS Management Committee includes people with disabilities. Many volunteers and students with disabilities contribute their time and energy to the work of the DDLS.

The DDLS works as an active member of the community legal sector and the disability advocacy sector.

The Application

The Commission has received an application on behalf of ASTRA, The Australian Subscription Television and Radio Association for a temporary exemption for its members under section 55 of the *Disability Discrimination Act 1992* (DDA) from complaints relating to providing captions for the television programs broadcast by the members of the applicant for a period of 5 years.

By way of summary, the applicant submits: ***"That an obligation to caption all programming on all Channels would be financially prohibitive in a subscription television environment."***

The Disability Discrimination Legal Service Inc (DDL) is opposed to the Commission granting a further temporary exemption on the grounds that:

1. THE COMMISSION CANNOT GRANT AN EXEMPTION IN FAVOUR OF AN UNAMED APPLICANT
2. ASTRA's CLAIM OF PROHIBITIVE COSTS IS NOT SUFFICIENTLY PARTICULARISED
3. ASTRA's CLAIM OF PROHIBITIVE COSTS IS NOT MADE OUT
4. THE PROHIBITIVE COST OF COMPLYING WITH SECTION 24 OF THE DDA IS NOT A SUFFICIENT GROUND FOR THE GRANT OF AN EXEMPTION
5. THE ADULTERATION OF THE EXEMPTION PROCESS UNDERMINES THE OBJECTS OF THE DDA
6. THE ISSUES RELATED TO THE EXEMPTION REQUIRE A PUBLIC INQUIRY TO BE MADE

1. THE COMMISSION CANNOT GRANT AN EXEMPTION IN FAVOUR OF AN UNAMED APPLICANT

ASTRA makes the application on behalf of the parties named in the application as well as *"on behalf of any Channel Providers that may be included as part of an Applicants' service during the duration of the exemption period."*

- 1.1 Section 55 (1)(A)(ii) provides that an application may be made on behalf of the applicant and another person or other persons on whose behalf the application was made. The DDL submits that for the purpose of section 55 (1)(A) the applicant- person or persons for whom the application is made must at all times be sufficiently identified as a person. ASTRA makes the application on behalf of the parties named in the application as well as *"on behalf of any Channel Providers that may be included as part of an Applicants' service during the duration of the exemption period"*. The applicant is unable to identify the other channels referred to because they do not exist yet. The exemption is a guarded privilege that cannot be given away lightly and with more reason to an unidentified applicant whose circumstances, particularly the ability to comply with the Act, cannot be inquired upon for the simple reason that they are unknown or not in existence at the time the application was made or the exemption was given.
- 1.2 The identities of the all applicants are also essential to determining whether the circumstances of the applicants justify the granting of an

exemption. In the present case, the main grounds relied upon by ASTRA for its application for an exemption are the prohibitive costs of captioning. The prohibitive costs of complying with the Act can only be determined if the applicant can be properly identified. If a person or persons cannot be identified, their resources or financial capacity to comply with the Act, i.e. to supply captions, cannot be determined.

- 1.3 The identities of the applicants are also essential under Section 57(1a). This section requires the Commission to set out its findings on material questions of fact. The identity of an applicant or a person to whom the benefit of exemption is given is a material question of fact. The public has the right to know who the beneficiaries of the exemption are and why they were deemed entitled to breach the Act with impunity.

2. ASTRA'S CLAIM OF PROHIBITIVE COSTS IS NOT SUFFICIENTLY PARTICULARISED

The main sources of evidence that ASTRA relies upon as proof of its progress during its initial 5 year exemption are the figures contained in its application that refer to how *the "obligation to caption all programming on all Channels would be financially prohibitive in a subscription television environment."* However, ASTRA does not provide an analysis of these costs or give any indication of how these costs would affect the operation of any of its members.

ASTRA provides the following figures in the text of its application in the Executive Summary. The figures are again problematic in regards to the extent that they can be seen to support ASTRA's application with respect to prohibitive cost of captioning.

ASTRA claims that its members captioned

- **41,258 hours in 2004/05;**
- **55,048 hours in 2005/06;**
- **69,805 hours in 2006/07;**
- **102,954 in 2007/08 and**
- **120,012 hours in 2008/09.**

If the figures provided by ASTRA for 2008/2009, the period of greatest captioning, are divided by the number of days in a year and further divided by the 33 members that make up ASTRA the amount is reduced to 0.5 hours per day for any single Subscription TV channel (assuming each member supplies 20 channels). This is clearly inadequate. Further, there is no indication that the figures are derived from a third party independent audit of the Subscription

TV hours provided by ASTRA's members. The DDLS submits that this creates a question of credibility and increases the ambiguity of all of the figures that are part of the particulars of the ASTRA application.

Consultation with the Victorian Deaf Society by the DDLS indicated that deaf and hearing impaired members of that organisation find the captioning service provided by ASTRA members to be totally inadequate.

Problems with captioning identified by members of the Deaf Community include:

- Subtitles lagging behind speech
- Captioning advertised, but not provided
- Some shows on are only partly captioned
- Channels with the most captioning incur the most cost (in addition to the basic pay tv)

ASTRA's failure to particularise their application according to the prohibitive cost of complying with section 24 of the DDA, through the information they provide on the progress of their members to caption their services, creates two issues that must be considered. The issues are critical to whether ASTRA should be granted another exemption.

1. The failure to contextualise the particulars of their application creates a technical flaw in their application;
2. ASTRA is asking that these figures are seen as constituting a defence to a complaint under sections 11 and 24 of the DDA. If this were the case, ASTRA would not need an exemption to protect itself against liability that might arise from the DDA.

The DDLS therefore submits that the information contained as part of the applicant's particulars in the:

- Executive Summary Chart as part of the Executive Summary p. 3-6
- Captioning progress Charts (Table 1) as part of the Application p.6-14
- Channels of choice for Deaf and Hearing Impaired Chart (Table 2 Category Vote) as part of the undertakings p.14-17
- Currently enabled Channels Chart (Table 3 Annexure 1)
- Future Plans Chart (Annexure 2)
- Information regarding proposed channels for Phase 1 and 2 Channels and the Additional channels throughout ASTRA's application

is information that fails to provide sufficient particulars to determine whether the prohibitive cost related to the captioning that its members would have to provide to their Subscription TV services justifies an exemption from the requirement for ASTRA's members to comply with section 24 of the DDA.

3. THE PROHIBITIVE COST OF COMPLYING WITH SECTION 24 OF THE DDA IS NOT MADE OUT

The only reference to costs in ASTRA's application refer to Infrastructure costs 'of over \$1 billion " *to migrate to a full digital cable and expanded satellite service increasing Channel choice and introducing interactive and active services to best utilise the opportunities offered in the digital landscape.*" Another reference to cost is made in 'Bandwidth facts.' This relates to the amount Optus has invested totalling approximately \$500 million deploying its C1 satellite which has since 2004 provided bandwidth leased by FOXTEL and AUSTAR to distribute expanded digital subscription TV services. Reference is also made to Telstra's and Optus's collective investment of more than \$4 billion building their cable networks to create bandwidth.

However, none of these figures bear any relevance to whether the cost of subscription TV captioning as part of the investment in the expansion of Subscription TV services has been or is prohibitive. If anything these references put the figures obtained by the DDLS regarding the cost of captioning for Subscription TV into perspective and does not justify an exemption based on the "financially prohibitive cost" of providing captioning. Consultations with leading providers of captioning and subtitling gave the DDLS the following estimates regarding the cost of TV subtitling/captioning. One of the organisations consulted provides all the subtitling for a well known free to air TV service.

This organisation calculates its fees in terms of volume. The greater number of hours, the less the cost. They quote \$18 per minute or \$500-\$1000 per hour of content. Thus captioning a half hour news segment would cost no more than \$540.

ASTRA's 33 members include News Corporation which made a \$3,378,000,000 profit in 2009, Singtel Optus which made a \$529 million profit in 2009, The Movie Network which made a \$141,227,000 profit in 2009 and Turner Broadcasting System Asia Pacific Inc which made a \$3,118,000,000 profit in 2008

ASTRA's claim that captioning is financially prohibitive seems to be difficult to substantiate given the profits of some of its members and the cost that has been invested in infrastructure referred to in its application.

4. THE PROHIBITIVE COST OF COMPLYING WITH SECTION 24 OF THE DDA IS NOT A SUFFICIENT GROUND FOR AN EXEMPTION

Justice Bell of the Victorian Civil and Administrative Tribunal observed in Lifestyle Communities (No. 3) [2009] VCAT 1869 at paragraph 96 that the purpose of the Equal Opportunity Act *'did not permit the grant of exemptions in order to achieve convenient, economic and practical outcomes, but that the true purpose was to promote equal opportunity and*

prevent discrimination'." The DDLS submits that the same may be said of the DDA. It is not sufficient for the applicant to rely on prohibitive costs - it must demonstrate that the application results in a tactical and strategic measure to further the objects and purposes of the DDA.

5. ADULTERATION OF THE EXEMPTION PROCESS UNDERMINES THE OBJECTS OF THE DDA

The DDLS accepts that for the DDA to be effective it needs to balance the competing interests of people with disabilities and service providers. The exemption regime contained in sections 45-58 of Division 5 of Part 2 of the DDA can be seen to provide a means through which this can be achieved. However, the DDLS is also deeply concerned with the applicant's attempt to undermine the objects and purposes of the DDA with a self serving reliance on the exemption process.

In this instance, ASTRA is effectively asking people with disabilities, particularly those who are deaf and hearing impaired who want access to Subscription TV services but rely upon the captioning of these services, to trust ASTRA and their members and suspend their right to take legal action under section 24 of the DDA for a period that will amount to 10 years.

It seems from reading the application for exemption, that ASTRA is approaching the Commission using an argument of reasonableness and/or unjustifiable hardship. The DDLS is becoming increasingly concerned with the two previous exemptions being granted on this basis.

There are exemptions granted by the Commission where the applicant has an argument which is based upon such matters as could be described as "positive discrimination". A state example is where a swimming pool has applied for an exemption to allow only women to attend for a certain time of the day, at a specific time during the week, in order to allow Muslim women who for religious and cultural beliefs cannot swim in front of men. This is the sort of exemption which the DDLS can appreciate requires the imprimatur of a commission.

Applications based on reasonableness or unjustifiable hardship on the other hand, have no place under Section 55. There is a defence under the Act for respondents who claim such difficulties. When a respondent uses such defences before a court, they are required to provide evidence of their position. It is not enough for them to simply allege that the provision of certain equipment or services is unreasonable, or that they do not have sufficient funds. Conversely, it seems sufficient for applicants to make self serving claims of unreasonableness or unjustifiable hardship because the evidence they rely on would not be tested. If an application for exemption is approved on this basis, the respondent has been able to successfully circumvent its legal obligations.

If the Commission were to grant exemptions simply on the basis that the applicant had made some progress previously, and had a defence under the Act if its discriminatory provision of goods and services was challenged in the near future, then Section 55 proves to be largely redundant.

If it is indeed the case that an applicant would have a defence under reasonableness and unjustifiable hardship, this should be tested in the courts, not endorsed by the Commission without a proper airing of the evidence. If their claims have merit, they will successfully defend themselves against claims of discrimination, but at least people with disabilities have had the opportunity to use the law, which is as Parliament intended. It is of particular concern to us that many of the exemptions applications are specific to the Deaf Community, yet the efforts made to inform them of such applications prior to decisions are hardly adequate.

We believe that it is not sufficient to expect people with disabilities to view the Commission website regularly in order that they become aware of applications that affect them. In particular, deaf people for whom English is a second language are not going to be able to navigate or even fully understand the Commission's website. There is not even proper debate around many of these exemptions - the exception being the recent cinema application when an outside organisation took it upon themselves to fully inform the deaf and vision impaired communities.

We submit that considering the complex technical nature of the ASTRA's application as well as the specialist language used, the Commission should have released an explanatory memorandum about the application in order to assist the public in understanding the merits or shortcomings of the application.

6. THE ISSUES RELATED TO THE EXEMPTION REQUIRE A PUBLIC INQUIRY TO BE MADE

The DDLS submits that the Commission must conduct a public hearing and receive evidence for and against the application. Further, there is the need to challenge the reasons relied upon by the applicants in maintaining the current inadequacy of access to captioning on Subscription and Free to Air TV services for people with disabilities. In this respect television should be recognised as the most common medium, together with the internet and the radio, for people with disabilities to be informed and entertained. An audit of such services must be performed independently but with the cooperation of both people with disabilities and the Subscription TV industry. The credibility of any organisation that represents the interests of its members, particularly where those interests primarily affect the profitability of its members, will generally be criticised as biased against or uninterested in, the needs of those who have the potential to adversely affect that profitability.

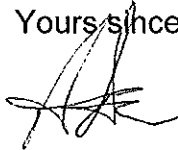
CONCLUSION

The DDLS submits that ASTRA's application does not sufficiently demonstrate that it should continue to have an exemption from the operation of section 24 of the DDA. It does not provide clear evidence of the financial incapacity of its members to *caption all programming on all Channels* to justify the grant of a further 5-year exemption

The DDLS submits that the granting of another exemption on this basis is legally flawed because issues related to the financial capacity of a person or persons to comply with the DDA are not made out. Such a factor is a defence that ought to be raised and tested in response to a complaint and should therefore not by itself justify the grant of an exemption.

The DDLS therefore asks the Commission to refuse to grant ASTRA an exemption on the basis of its current application and the information relied upon in support of its application.

Yours sincerely



Adam Jones
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