

**STATEMENT OF REASONS FOR THE DECISION TO MAKE THE EXEMPTION ORDER STV/EO-00289 FOR FETCHTV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE BBC WORLD NEWS**

1. **DECISION**
	1. On 19 May 2017, for the reasons set out below, the Australian Communications and Media Authority (ACMA) decided to make an exemption order, under subsection 130ZY(3) of the BSA, for FetchTV Pty Ltd (the Applicant; Fetch TV), in relation to the subscription television news service, BBC World News (the Service) (the Exemption Order).
	2. The Exemption Order exempts the Applicant from the requirement to ensure that a captioning service was provided for:
* 25 per cent of the total number of hours of television programs transmitted on the Service in the financial year 1 July 2016 to 30 June 2017; and
* 30 per cent of the total number of hours of television programs transmitted on the Service in the financial year 1 July 2017 to 30 June 2018 (the Specified Eligible Period).
1. **LEGISLATION**
	1. Subsection 130ZV(1) of the *Broadcasting Services Act 1992* (the BSA) provides that a subscription television licensee that provides a subscription television service in a financial year must at least meet the annual captioning target for that financial year.
	2. Subsection 130ZV(2) of the BSA outlines how the applicable percentage for the annual captioning target for the relevant financial year is calculated. The annual captioning target differs according to the subscription television service category and increases by five per cent each financial year until it reaches 100 per cent.
	3. Paragraph 130ZY(1)(a) of the BSA provides that a subscription television licensee may apply to the ACMA for an order (an *exemption order*)that exempts from subsection 130ZV(1) of the BSA, a specified subscription television service provided by that licensee in a specified eligible period.
	4. Subsection 130ZY(3) of the BSA provides that if an application under subsection 130ZY(1) of the BSA has been made for an exemption order, the ACMA must, after considering the application, by writing, either make the exemption order or refuse to make the exemption order.
	5. Subsection 130ZY(4) of the BSA provides that the ACMA must not make the exemption order unless it is satisfied that a refusal to make the exemption order would impose an unjustifiable hardship on the applicant.
	6. Subsection 130ZY(5) of the BSA specifies the matters the ACMA must have regard to in determining whether a failure to make the exemption order would impose an unjustifiable hardship on the applicant. A copy of these matters is at **Attachment A**.
	7. Subsection 130ZY(6) of the BSA provides that, before making an exemption order under subsection 130ZY(3) of the BSA, the ACMA must:
2. within 50 days after receiving the application for an exemption order, publish on the ACMA’s website a notice:
3. setting out the draft exemption order; and
4. inviting persons to make submissions to the ACMA about the draft exemption order within 30 days after the notice is published; and
5. consider any submissions received within the 30-day period mentioned in subparagraph 130ZY(6)(a)(ii) of the BSA.
	1. Section 204 of the BSA provides that an application may be made to the Administrative Appeals Tribunal (AAT) for a review of a decision to make an exemption order under subsection 130ZY(3) of the BSA, by a person whose interests are affected by the decision.
	2. Section 205 of the BSA provides that, if the ACMA makes a decision that is reviewable under section 204 of the BSA, the ACMA is to include in the document by which the decision is notified:
6. a statement setting out the reasons for the decision; and
7. a statement to the effect that an application may be made to the AAT for a review of the decision.
8. **BACKGROUND**
	1. On 21 February 2017, the Applicant submitted an application seeking an exemption order under paragraph 130ZY(1)(a) of the BSA in relation to the Service for the Specified Eligible Period (the Application).
	2. The Applicant is a subscription television licensee. The Applicant provides general entertainment, news, sport and music television services. The Applicant also provides access to apps to watch movies on demand.
	3. The Applicant and FetchTV Content Pty Ltd are indirect wholly owned subsidiaries of Media Innovations Pte Ltd (MIPL).
	4. The Applicant is primarily a wholesaler of subscription television services and also has a small direct to retail distribution. The customers of the Applicant are Australian Internet Service Providers (ISPs) and direct customers. ISPs typically offer access to the Applicant’s services as part of a bundle of products, while direct customers can sign up for the Applicant’s services via the Applicant’s website or selected consumer electronic stores.
	5. The Service is the BBC's international news and current affairs television channel including BBC news bulletins, documentaries, lifestyle programmes and interviews. As a subscription television news service, the annual captioning target for the Specified Eligible Period is 25 per cent for the financial year 1 July 2016 to 30 June 2017 and 30 per cent for the financial year 1 July 2017 to 30 June 2018. This represents the percentage of total number of hours of television programs transmitted on the Service which must be captioned during the Specified Eligible Period.
	6. For existing subscribers, the Service is provided as part of the Fetch TV ’Entertainment’ package. The Applicant re-packaged its channel offerings at the end of February 2017. For new subscribers, the Service is available as part of the ‘Knowledge’ channel pack, which consists of 17 television services. Subscribers are not able to subscribe solely to the Service.
	7. Like every channel provided through Fetch TV, the Service is obtained under licence wholly from the channel provider which acquires and compiles the channel and then delivers it to the Applicant. The Applicant provides no input to the content of the Service. The channel provider of the Service is BBC World Distribution Limited (the Channel Provider).
	8. This is the third application by the Applicant for an exemption order under paragraph 130ZY(1)(a) of the BSA relating to the Service. The last exemption order for the Service (STV/EO-00169) covered the financial years 1 July 2014 to 30 June 2015 and 1 July 2015 to 30 June 2016.
	9. On 5 April 2017, the ACMA published on its website a notice setting out the draft exemption order for the Service and invited persons to make submissions to the ACMA by 5 May 2017.
9. **EVIDENCE AND REASONS FOR DECISION**
	1. In deciding to make the Exemption Order, the ACMA assessed firstly, whether a refusal and/or failure to make the Exemption Order would impose hardship on the Applicant and secondly, whether such hardship would be unjustifiable in light of the objects and purposes of the BSA. In making this assessment, the ACMA had regard to the matters specified in subsection 130ZY(5) of the BSA.
	2. The ACMA has relied upon written representations and supporting evidence submitted by the Applicant in its application and in response to further enquiries. The ACMA has also relied upon written representations and supporting evidence submitted by the Applicant as part of the previous exemption order application for the Service, outlined in paragraph 3.8 above, as well as publicly available information. Information provided to the ACMA on a confidential basis by the Applicant has not been reproduced.
	3. Additionally, the ACMA has relied upon submissions received during the consultation period from Media Access Australia, Deaf Australia, the Australian Communications Consumer Action Network (ACCAN), and a number of individuals. A list of parties who made submissions can be found at **Attachment B**. These submissions are discussed in greater detail below in paragraphs 4.47 – 4.65.

***Paragraph 130ZY(5)(a) of the BSA – the nature of the detriment likely to be suffered by the applicant***

* 1. The Applicant submitted that, if an exemption order is not made the Service will be removed from the Applicant’s channel offerings. This will diminish the value and appeal of the Applicant’s services as subscribers will be deprived of access to the Service and this may affect the Applicant financially.
	2. In addition, the Applicant has submitted that a failure to make an exemption order will be detrimental to the Channel Provider, who will lose a credible and high quality platform for the distribution for their channel.
	3. The Applicant has submitted that if an exemption order is not made for the Service, the Applicant will need to remove the Service because:
* The Service does not contain captioning;
* The Applicant is not in a financial position to caption the Service; and
* While it does offer pre-recorded English closed captions for some of its content in North America, the same content is not easily transferred to the Applicant for a number of practical and commercial reasons.
* The Channel Provider advised that it would not be commercially viable for it to caption the Service for the Australian distribution only.
	1. In considering whether a failure to make the Exemption Order would impose unjustifiable hardship on the Applicant, the ACMA considered that the nature of the detriment likely to be suffered by the Applicant is the removal of the Service.
	2. The ACMA also considered that there may be associated consequences such as loss of revenue for the Channel Provider and the Applicant which would directly result from a failure to make the Exemption Order, and the removal of the Service.
	3. Based on the information provided, the ACMA is satisfied that that a refusal and/or failure to make the Exemption Order would impose an unjustifiable hardship on the Applicant, given that it would be likely to result in the removal of the Service, due to the financial situation of the Applicant and its difficulty in being able to incur the costs of providing captioning services at this point in time.

***Paragraph 130ZY(5)(b) of the BSA – the impact of making the exemption order on deaf or hearing impaired viewers, or potential viewers, of the subscription television service concerned;***

* 1. The Applicant has submitted that the Service has a small audience and therefore the overall number of deaf or hearing impaired viewers or potential viewers is likely to be small.
	2. The Applicant has advised that if there is a growth in subscriber numbers in Australia, the Channel Provider may be incentivised to commit funds to the provision of captioning to remain in the market.
	3. The ACMA considers that making the Exemption Order will be detrimental for viewers, or potential viewers who are deaf or hearing impaired. This is because the provision of captioning services allows viewers who are deaf and hearing impaired to access television services and in this case, a television news service.
	4. The ACMA accepts the evidence provided by the Applicant that the number of subscribers who have access to the Service and watch the Service is small; however, the ACMA also recognises that the number of subscribers to the Service who watch the Service may increase if captions were provided.
	5. The ACMA is not satisfied, therefore, that making the Exemption Order would not have a detrimental impact on deaf or hearing impaired viewers, or potential viewers, of Fetch TV, including the Service.

***Paragraph 130ZY(5)(c) of the BSA – the number of people who subscribe to the subscription television service concerned;***

* 1. The Applicant provided a breakdown of the:
* total number of subscribers to Fetch TV;
* the number of subscribers who would be able to access the Service because they are subscribers to the Entertainment package; and
* the number of subscribers who were actually viewing channels within the Entertainment package during November 2016 – January 2017.
	1. The Applicant also provided internal analysis using data received from each set-top box to determine the number of viewers who accessed the Service.
	2. The ACMA considered the information provided by the Applicant on a commercial-in-confidence basis and acknowledges that the Applicant was able to provide specific breakdown of the number of subscribers, the number of subscribers with access to the Service and the approximate viewing audience of the Service.
	3. As the Service is offered to subscribers as part of a package, the ACMA acknowledges that the information provided by the Applicant helped to distinguish the number of subscribers who have access to the Service, and those that actually watch the Service.
	4. The ACMA considers that the Service currently has a small viewing audience although the number of subscribers who have access to the Service is much larger. The ACMA acknowledges the potential for that audience to increase over the Specified Eligible Period.

***Paragraph 130ZY(5)(d) of the BSA – the financial circumstances of the applicant***

* 1. The Applicant has submitted information about its financial circumstances and the financial circumstances of MIPL and its subsidiary companies on a commercial-in-confidence basis.
	2. The Applicant was established in 2009 and has been available commercially since June 2010.
	3. The ACMA notes the Applicant’s submission that the Applicant’s business proposition is to provide an extremely low cost but full service subscription TV offering and therefore the content must be largely available to the Applicant at a low price point. Retail customers pay $399 (Mighty) or $149 (Mini) for the Fetch TV box and pay a $1 one-off activation fee. Premium channel packs, such as the one on which the Service can be accessed, are added at $6 each per month or $20 per month for all four packs. The ACMA does not consider that the Applicant’s business model should exempt the Applicant from having to meet captioning targets.
	4. The ACMA examined the financial information provided by the Applicant on a commercial-in-confidence basis and is satisfied that a failure to make the Exemption Order would:
* impose financial costs on the Applicant, as the Applicant would be required to caption the Service, which would include captioning infrastructure establishment costs; or
* cause the Applicant to remove the Service.

	1. In order to provide captioning on the Service, the Applicant would need to pay for the set up costs for a third party captioning provider, as well as the cost to live caption the Service to meet the annual captioning target.
	2. Based on the 21 applications for exemption and target reduction orders made by the Applicant for the Specified Eligible Period, the ACMA considers that the costs involved in providing live captioning for television services that are not captioned by the channel providers is likely to exceed $22 million in order to meet the annual captioning targets in the 2016–17 financial year.
	3. Based on the information provided, the ACMA considers that the current financial circumstances of the Applicant would make it difficult for the Applicant to incur the costs involved in providing captioning services in accordance with the legislation and therefore not making the Exemption Order would impose unjustifiable hardship on the Applicant.

***Paragraph 130ZY(5)(e) of the BSA – the estimated amount of expenditure that the applicant would be required to make if there was a failure to make the exemption order***

* 1. The Channel Provider advised that it would not be commercially viable for it to caption the channel for the Australian distribution only and provided supporting evidence.
	2. The Applicant provided a third party quote of the costs to caption the Service:
* $120,000 non-recurring costs;
* $59,000 recurring annual costs from the first year; and
* $668,200 to live caption each year.
	1. The above figures represent the cost of setting up only a single channel. The third party quote indicates that the non-recurring cost to set up 21 channels for captioning would be approximately $955,000, averaging $45,500 per channel, as some of the set-up costs would be shared across the 21 channels.
	2. The Applicant noted that if it was required to caption the Service, it would be required to live caption it, as it is a pass-through service for which the Applicant does not have any input into the content of the Service.
	3. The ACMA is satisfied that based on the Applicant’s financial circumstances and the cost of providing captioning on the Service, failing to make the Exemption Order for the Service would create unjustifiable hardship on the Applicant.

***Paragraph 130ZY(5)(f) of the BSA – the extent to which captioning services are provided by the applicant for television programs transmitted on subscription television services provided by the applicant***

* 1. In accordance with section 130ZV of the BSA, the Applicant is required to meet the annual captioning targets for the various categories. For a subscription television news service, the annual captioning target is 25 per cent for the financial year 2016–17, and 30 per cent for the financial year 2017–18.
	2. Under section 130ZX of the BSA, prior to 1 July 2022, a subscription television licensee can nominate certain television services to be exempt from captioning obligations within a genre category within a financial year if:
* it has already met the captioning targets for the set number of television services within that particular genre category; and
* it has remaining television services within that particular genre category.

The number of services that may be nominated for exemption will decrease over time.

* 1. In order for the Applicant to nominate a television news service to be an exempt service, under section 130ZX of the BSA for this financial year, it must have met the captioning target for three of its other television news services.
	2. Based on the information available, the Applicant broadcasts nine television news services, and it has sought exemptions for all of these services. Therefore it is not eligible to nominate any additional subscription television news services to be exempt services under section 130ZX of the BSA.
	3. In providing information about the number of captioning services provided by the Applicant, the Applicant referred to the annual compliance report provided to the ACMA with respect to its captioning requirements in the last financial year.
	4. Captioning was provided on 23 of its 42 subscription television services during the period of 1 July 2015 – 30 June 2016. The information submitted indicates that the Applicant exceeded its annual captioning targets with respect to nearly all of its general entertainment, sport and music services which were not subject to exemption or target reduction orders. The Applicant had exemption orders for eight out of nine television news services. The Applicant did not meet the annual captioning target for two subscription television services.
	5. The ACMA acknowledges that where the captioning services are provided by third party channel providers, the Applicant has met if not exceeded the annual captioning targets in most cases.

***Paragraph 130ZY(5)(g) of the BSA – the likely impact of a failure to make the exemption order on the quantity and quality of television programs transmitted on subscription television services provided by the applicant***

* 1. The Applicant submitted that a failure to make an exemption order would result in the Service being removed from the Applicant’s channel offerings, which would have reduced the availability of content the Applicant could provide and potentially affect the viability of the business.
	2. The ACMA acknowledges that the removal of the Service as a result of failing to make the Exemption Order would affect the quality and quantity of television programs offered by the Applicant. This is because the ACMA notes that the Service targets viewers with a particular interest in international news, documentaries, lifestyle programmes and interviews.
	3. The Applicant has also submitted that the success of any other exemption and target order application could have very serious detrimental effects on the ongoing viability of Fetch TV services.
	4. The ACMA considers that a failure to make the Exemption Order for the Applicant is likely to result in the removal of a large number of television programs from Fetch TV’s channel offerings due to the financial situation of the Applicant and its difficulty in being able to incur the costs of providing captioning services at this point in time. Therefore the ACMA is satisfied that failing to make the Exemption Order for the Service would cause unjustifiable hardship on the Applicant.

***Paragraph 130ZY(5)(h) of the BSA – whether the applicant has applied, or has proposed to apply, for exemption orders or target reduction orders under this section in relation to any other subscription television services provided by the applicant;***

* 1. The ACMA has made the following exemption and target reduction orders for services provided by the Applicant:

|  | Exemption orders | Target reduction orders |
| --- | --- | --- |
| 1 July 2012 – 30 June 2013 | 4 |  |
| 1 July 2012 – 30 June 2014 | 17 | 1 |
| 1 July 2013 – 30 June 2015 | 1 |  |
| 1 July 2014 – 30 June 2015 | 1 |  |
| 1 July 2014 – 30 June 2016 | 18 | 4 |

* 1. The Applicant applied for 16 exemption orders and four target reduction orders for the financial years 2016–17 and 2017–18; and one exemption order for the financial year 2016–17. Further information about the channels subject to those applications can be found at **Attachment C**.

***Paragraph 130ZY(5)(i) of the BSA – such other matters (if any) as the ACMA considers relevant.***

* 1. The Applicant has noted that competition in the market for content services has increased with the entry of subscription video on demand providers. These providers are not required to provide captioning services and face no penalty for removal of content if they do not caption.
	2. The ACMA acknowledges a number of additional matters submitted by the Applicant; however, the ACMA does not consider that these matters are relevant in deciding whether a failure to make the Exemption Order would impose an unjustifiable hardship on the Applicant.

 *Submission received from Media Access Australia*

* 1. In its submission, Media Access Australia (MAA) objected to the ACMA granting the Order on the basis that:
* The ACMA did not define ‘unjustifiable hardship’ nor indicate how profitable the Applicant would need to be in order to be required to deliver captioning. MAA submitted that the ACMA should specify the exact criteria it uses to approve applications for exemptions based on financial hardship or burden.
* The granting of an exemption order should be treated as an exceptional circumstance, provided as a last resort and for a minimum timeframe.
* There is insufficient clarity regarding how the ACMA determines financial hardship or burden, or how profitable the Applicant would need to become before it is required to deliver captioning.
* An exemption order would be incompatible with the overarching intent of the BSA that subscription television licensees meet annual captioning targets, increasing incrementally over time.
* Fetch TV commenced operation in 2010 and has no captioning infrastructure, nor is there any indication that Fetch TV intends to put any captioning infrastructure in place in the future.
	1. The ACMA acknowledges MAA’s submission; however, notes that the term ‘unjustifiable hardship’ is undefined in both the BSA and the *Explanatory Memorandum to the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012* (the Explanatory Memorandum). The ACMA does not have the power to set rules to define what constitutes ‘unjustifiable hardship’. The criteria the ACMA uses to assesses whether a refusal and/or failure to make an exemption order would impose unjustifiable hardship is specified in subsection 130ZY(5) of the BSA. When considering the financial circumstances of an applicant, the ACMA assesses each application on a case by case basis and in the circumstances as a whole.
	2. MAA suggested the ACMA adopt a similar approach to the ones used in the UK and USA for determining whether an applicant be excluded from meeting its captioning obligations on the basis of the audience share and/or channel revenue. The ACMA acknowledges that different exemption processes apply under different legislative frameworks in the UK and USA. Under the BSA, the ACMA does not have the power to mandate financial and/or subscriber thresholds relating to the provision of captioning for subscription television services. The ACMA also does not have the power to override legitimate claims for confidential treatment of commercial-in-confidence information provided by the Applicant, in order to provide the financial transparency MAA is seeking.
	3. MAA stated that an exemption order would be incompatible with the overarching intent of the BSA. The submission emphasised the detriment for deaf and hearing impaired people by limiting their ability to enjoy Australian subscription television services. This is an issue well understood by the ACMA, and by the Parliament, which nevertheless saw a potentially greater detriment to a greater number of people if the cost for a service provider of meeting the captioning obligations on a particular television service was likely to make it uneconomical for the service provider to continue to provide that television service.
	4. MAA also opposed the granting of an exemption order on the ground that the Applicant has no captioning infrastructure and there are no indications it is making efforts to put such infrastructure in place. The current exemption order process under the BSA requires the ACMA to consider whether a refusal to make an exemption order would impose an unjustifiable hardship on the Applicant. In making the decision, the ACMA must consider the criteria specified in section 130ZY(5) of the BSA, which are listed at **Attachment A**. The criteria include the financial circumstances of the Applicant, the estimated expenditure the Applicant is required to make if an exemption order is not made and the impact on the quantity and quality of subscription television services provided by the Applicant.
	5. Evidence provided by the Applicant indicates that the estimated costs of providing captioning for the Service would be unreasonably high in view of the Applicant’s financial circumstances and would likely result in the removal of the Service by the Applicant.

*Submission received from ACCAN*

* 1. Similar to MAA’s submission, ACCAN objected to the ACMA granting an exemption order and noted that the overarching intent of the BSA is that subscription television licensees meet annual captioning targets. The ACMA’s response on this point is as per paragraph 4.50 above.
	2. ACCAN also stated that it is predicted that the Australian subscription television market will experience increased uptake of services with significant revenue growth over the next 5 years. The ACMA notes that its decision on whether to make an exemption order for the Applicant is based on assessment of the available evidence against the criteria specified in the BSA. The criteria include the number of subscribers to the Service, the impact of making an exemption order on deaf and hearing impaired viewers of the Service and the financial circumstances of the Applicant.
	3. ACCAN asserted that, under the captioning legislative framework in place prior to 2012, subscription services needed to provide tangible evidence that they were working towards meeting their legislative obligations. ACCAN argued that the ACMA needs to apply this principle to the current exemption process. Similar to the MAA submission, ACCAN argued that the Applicant has made no efforts to investigate opportunities to meet its legislative obligation. The ACMA’s response on this point is as per paragraphs 4.51 and 4.52 above.
	4. ACCAN questioned the Applicant’s cost estimations for set-up of each of the channels subject to an exemption order application. Specifically, ACCAN suggested that the one-off set-up cost of $120,000 per channel would surely be amortised across all channels. The ACMA acknowledges that:
* some of the set-up costs would be shared across all the channels requiring captioning, including the costs for network routers and switches and installation of connection to the Playout Centre, and
* other infrastructure costs would need to be paid per channel, including encoders and inserters.

On this basis, the cost to set up a single channel for captioning would be approximately $120,000; however, the cost to set up 21 channels for captioning would be approximately $45,500 per channel. As such, the total cost to set up 21 channels for captioning would be approximately $955,000.

* 1. Similar to MAA’s submission, ACCAN argued that the ACMA should adopt a similar approach to the one used in the UK for determining whether an applicant be excluded from meeting its captioning obligations. The ACMA’s response on this point is as per paragraphs 4.48 and 4.49 above.

*Submission received from Deaf Australia*

* 1. Deaf Australia also objected to the ACMA granting an exemption order, on the grounds that doing so would allow the broadcaster to discriminate against deaf and hard of hearing people who wish to subscribe to Fetch TV. Deaf Australia referred to the first outcome of the National Disability Strategy (the NDS), which is ‘inclusive and accessible communities’. This outcome seeks to ensure that people with a disability live in accessible and well-designed communities with opportunity for full inclusion in social, economic, sporting and cultural life[[1]](#footnote-1). Deaf Australia also referred to the principles of Universal Design referred to in the NDS, which call for products and services to be developed in such a way that they do not need specialised or adapted features to be used by everyone. Deaf Australia noted that the NDS quotes “captions on all visual material such as DVDs, television programs and videotapes”[[2]](#footnote-2) as an example of universal design.
	2. Deaf Australia also refers to the United Nations’ Convention on the Rights of Persons with Disabilities (the Convention), and in particular quotes the article of the Convention which refers to persons with disabilities having the right to enjoy access to television programmes, films, theatres and other cultural activities, in accessible formats.
	3. In response to Deaf Australia’s submission, the ACMA recognises the importance of the NDS and the Convention. The ACMA’s decisions to make exemption orders are based on relevant evidence and the criteria specified in section 130ZY(5) of Part 9D of the BSA. The objectives of Part 9D of the BSA are directed at increasing access to television and as such are consistent with Australia’s international obligations under the Convention and domestic policies, such as the government’s social inclusion policy. This was noted in the Statement of Compatibility with Human Rights in the *Explanatory Memorandum to the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012*, which introduced Part 9D of the BSA.
	4. The ACMA also notes that the NDS states that “each level of government has specific roles and responsibilities across the range of policies and programs that impact on people with disability, their families and carers. The Strategy does not change the nature of these roles and responsibilities, but seeks to create a more cohesive approach across all governments”[[3]](#footnote-3). The ACMA’s roles and responsibilities includes granting exemption orders where an applicant meets the criteria specified in the BSA.

*Other submissions*

* 1. The ACMA received a further 16 submissions from members of the community (see **Attachment B**) in relation to all 17 exemption orders and four target reduction orders applied for by the Applicant in March 2017. The submitters are either deaf or hard of hearing, or have immediate family who is deaf or hearing impaired. All of these submissions asked the ACMA to not make the orders as it would be unfair and unequitable:
* Three of the submissions stated that the individuals concerned are Fetch TV subscribers and that they pay the same amount as other subscribers yet would have access to less content if the orders were granted.
* The other 13 submissions stated that the individuals concerned would not subscribe to Fetch TV if the orders were granted, as they or their family members who are deaf or hearing impaired would not have access to the same amount of content as other subscribers.
	1. The ACMA acknowledges that deaf and hearing impaired viewers will not have access to the same amount of content as a result of the Exemption Order being granted, and that this places deaf and hearing impaired viewers at a disadvantage.
	2. However, the ACMA is also privy to commercial-in-confidence information regarding the Applicant’s financial position, which the ACMA has considered in determining whether it is reasonable to expect the Applicant to meet the captioning targets. This financial information indicates that the Applicant would experience unjustifiable hardship if required to meet the targets, and the ACMA is obliged to consider whether unjustifiable hardship would be incurred.
	3. The ACMA considers that the Applicant is still building its customer base and establishing stability in the market. This view is based on the Applicant’s circumstances, including the number of subscribers to its subscription television services and its financial position. The ACMA considers the circumstances of each applicant on a case-by-case basis when determining whether to grant an exemption order.

*ACMA’s overall assessment of submissions related to this application*

* 1. The ACMA acknowledges that, in making the decision whether to grant the Exemption Order, there was a tension between ensuring that the Service is accessible to deaf and hearing impaired viewers and ensuring the Service is available to any viewer who subscribes to the channel package which includes the Service.
	2. The Applicant advised the ACMA that if an exemption order was not granted, it would remove the Service from its channel offerings. The ACMA notes that the Applicant advised that it would do the same for any of the other 16 Services subject to exemption order applications if exemption was not granted. The ACMA acknowledges the impact this would have on the quality and quantity of content provided by the Applicant, and the further possible impacts the ACMA’s decision on competition within the subscription television market in Australia.
	3. The ACMA also recognises that deaf and hearing impaired viewers who wish to watch the Service will be disadvantaged by the granting of the Exemption Order, and accordingly the ACMA does not make this decision lightly or without careful consideration. However, the ACMA is bound by the current legislative framework to take certain matters into consideration when determining whether to grant an exemption order, and to consider the various intents of the BSA, as set out in the Explanatory Memorandum.

* 1. Based on the information provided by the Applicant and in submissions from MAA, ACCAN, Deaf Australia and other individuals, the ACMA is satisfied that a refusal and/or failure to make the Exemption Order would impose an unjustifiable hardship on the Applicant for the following reasons:
1. A failure to make the Exemption Order for the Applicant was likely to result in the removal of a large number of television programs from Fetch TV’s channel offerings due to the financial situation of the Applicant and its difficulty in being able to incur the costs of providing captioning services at this point in time.
2. In turn, this would affect the quality and quantity of television programs offered by the Applicant.
3. The Service currently has a small viewing audience and the ACMA must take into account whether captioning obligations may create an administrative burden that is disproportionate to the public benefit of providing channels that have a small number of subscribers.
4. **DECISION**
	1. Following consideration of the matters outlined above, on 19 May 2017 the ACMA decided, under subsection 130ZY(6) of the BSA, to make the Exemption Order in respect of the Service, for the Specified Eligible Period.
5. **APPEAL RIGHTS**
	1. Under section 204 of the BSA, a person whose interests are affected by this decision to make the Exemption Order may apply to the AAT for a review of this decision.
	2. Section 29 of the *Administrative Appeals Tribunal Act 1975* states that an application to the AAT for a review of a decision, shall be in writing and must contain a statement of the reasons for the application, identifying the respects in which the applicant believes that the decision is not the correct or preferable decision. The application must be made within 28 days of the decision being made.
	3. Further information about making an application for review can be obtained through the Administrative Appeals Tribunal website at [www.aat.gov.au](http://www.aat.gov.au) or by telephoning the Tribunal on 1300 366 700.

Attachment A

**Relevant provisions of the BSA**

**Part 9D of the BSA — Captioning**

**Exemption orders and target reduction orders--unjustifiable hardship**

*Criteria for making exemption order or target reduction order*

(4) The ACMA must not make the exemption order or target reduction order unless the ACMA is satisfied that a refusal to make the exemption order or target reduction order, as the case may be, would impose an unjustifiable hardship on the applicant.

 (5) In determining whether a failure to make the exemption order or target reduction order, as the case may be, would impose an unjustifiable hardship on the applicant, the ACMA must have regard to the following matters:

1. the nature of the detriment likely to be suffered by the applicant;
2. the impact of making the exemption order or target reduction order, as the case may be, on deaf or hearing impaired viewers, or potential viewers, of the subscription television service concerned;
3. the number of people who subscribe to the subscription television service concerned;
4. the financial circumstances of the applicant;
5. the estimated amount of expenditure that the applicant would be required to make if there was a failure to make the exemption order or target reduction order, as the case may be;
6. the extent to which captioning services are provided by the applicant for television programs transmitted on subscription television services provided by the applicant;
7. the likely impact of a failure to make the exemption order or target reduction order, as the case may be, on the quantity and quality of television programs transmitted on subscription television services provided by the applicant;
8. whether the applicant has applied, or has proposed to apply, for exemption orders or target reduction orders under this section in relation to any other subscription television services provided by the applicant;
9. such other matters (if any) as the ACMA considers relevant.

Attachment B

**Submissions received**

| **No.**  | **Name of submitter** | **Summary of submission** |
| --- | --- | --- |
| 1 | Chris Blackham-Davison | A broad submission in relation to all exemption orders and target reduction orders applied for by Fetch TV in the Specified Eligible Period. The submission asked the ACMA to not approve the orders Fetch TV applied for, on the grounds that the submitter is deaf/hard of hearing and will not subscribe to Fetch TV if the orders are granted, as the submitter would not have access to the same amount of content, which the submitter states is unfair and unequitable.  |
| 2 | Kara Weslake | This submission contained content and statements identical to Submission 1.  |
| 3 | Gail Finn | This submission contained content and statements identical to Submission 1. |
| 4 | Hilda Sutcliffe | This submitter states that they have a Fetch TV and were considering subscribing to a Fetch TV subscription channel pack, but will not do so because the submitter is deaf/hard of hearing and if the orders are granted the submitter would not have access to the same amount of content, which the submitter states is unfair and unequitable.  |
| 5 | Phillip Waters | This submission contained content and statements identical to Submission 1. |
| 6 | Suzanne Robertson | This submission contained content and statements identical to Submission 1, with the exception that it is the submitter’s son who is deaf/heard of hearing.  |
| 7 | Robyn Anguey | This submission stated that as a subscriber to the Fetch TV service, they submitter pays the same amount as other subscribers yet will have access to less content if the Order is granted, as the submitter is deaf/hard of hearing. |
| 8 | Robyn Whitney | This submission contained content and statements identical to Submission 1. |
| 9 | Trish Loveday | This submission contained content and statements identical to Submission 7. |
| 10 | Rebekah Rose-Mundy | This submission contained content and statements identical to Submission 1, with the exception that the submitter noted that not only is she deaf, but she has three deaf children and works with many deaf children; the submitter stated that captioning is vital for them to be able to access information and entertainment. |
| 11 | Rachel Hughes | This submission contained content and statements identical to Submission 1. |
| 12 | Emma A. Wilkinson | This submission contained content and statements identical to Submission 1. |
| 13 | Jodi Onge-Jacobson | This submission contained content and statements identical to Submission 7.  |
| 14 | Tony Nicholas | This submission contained content and statements identical to Submission 1. |
| 15 | Chelle Destefano | This submission makes the same points as Submission 1. The submission also stated that it is unlawful to discriminate against deaf, hearing impaired and hard of hearing people.  |
| 16 | Felicity Woodard | This submission contained content and statements identical to Submission 1. |
| 17 | Media Access Australia | See paragraphs 4.47 to 4.52 of the Statement of Reasons for a description of this submission.  |
| 18 | Deaf Australia | See paragraphs 4.58 to 4.61 of the Statement of Reasons for a description of this submission. |
| 19 | Australian Communications Consumer Action Network | Two submissions – one relates to the draft orders published on 5 April 2017 and the other relates to the draft orders published on 12 April 2017.See paragraphs 4.53 to 4.57 of the Statement of Reasons for a description of this submission. |

Attachment C

Applications for Exemption Orders for the Specified Eligible Period

Between 20 February 2017 and 13 March 2017, the Applicant applied for exemption orders for 17 channels provided by the Applicant, including the Service. Each exemption order application is made for the Specified Eligible Period, with the exception of the Applicant’s Ovation channel, for which it applied for exemption from 1 July 2016 to 30 June 2017 (one financial year). Details are contained in the table below:

| **Channel No.**  | **Channel Name** | **Channel Provider** | **Annual Captioning Target (FY 2016-17)** | **Annual Captioning Target (FY 2017-18)** |
| --- | --- | --- | --- | --- |
| 1 | Channel News Asia | MCN International Pte Ltd | 25% | 30% |
| 2 | BBC World News | BBC Worldwide Australia Pty Limited | 25% | 30% |
| 3 | Ovation | Ovation Entertainment Pty Ltd | 65% | Nil |
| 4 | Horse & Country TV | H&C TV Limited | 65% | 70% |
| 5 | Fashion TV | F.TV Programmgesellschaft mbH | 65% | 70% |
| 6 | Al Jazeera | Al Jazeera Media Network | 25% | 30% |
| 7 | Baby TV | NGC Network (Australia) Pty Ltd) | 65% | 70% |
| 8 | Bloomberg | Bloomberg LP | 25% | 30% |
| 9 | CNBC Asia Pacific | Business News Asia (LLP) t/a CNBC Asia Pacific | 25% | 30% |
| 10 | CGTN (formerly CCTV News) | China International Communications Co Ltd | 25% | 30% |
| 11 | France 24 (English) | France MEDIAS MONDE | 25% | 30% |
| 12 | Euronews | Euronews Societe Anonyme | 25% | 30% |
| 13 | NDTV 24X7 | New Delhi Television Limited | 25% | 30% |
| 14 | HGTV | Scripps Networks Interactive (Asia) Pte Ltd | 55% | 60% |
| 15 | Australian Christian Channel | Australian Christian channel Pty Limited | 65% | 70% |
| 16 | Travel Channel | Scripps Networks Interactive (Asia) Pte Ltd | 65% | 70% |
| 17 | Food Network | Scripps Networks Interactive (Asia) Pte Ltd | 65% | 70% |

*Target Reduction Order Applications*

Between 21 February 2017 and 28 February 2017, the Applicant applied for target reduction orders for 4 channels provided by the Applicant, including the Service. Each exemption order application is made for the Specified Eligible Period. Details are contained in the table below:

| **Channel No.**  | **Channel Name** | **Channel Provider** | **Annual Captioning Target (FY 2016-17)** | **Annual Captioning Target (FY 2017-18)** |
| --- | --- | --- | --- | --- |
| 1 | CBeebies | BBC Worldwide Australia Pty Limited | 55% | 60% |
| 2 | Style | E! Entertainment Television, LLC | 65% | 70% |
| 3 | BBC Knowledge | BBC Worldwide Australia Pty Limited | 55% | 60% |
| 4 | Nat Geo Wild | NGC Network (Australia) Pty Ltd) | 55% | 60% |

1. Department of Social Services, [*‘National Disability Strategy, 2010-2020 Summary Document’*](https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/national-disability-strategy-initiatives/national-disability-strategy-2010-2020-summary), 2011, p. 2, viewed 11 May 2017. [↑](#footnote-ref-1)
2. Department of Social Services, [*‘National Disability Strategy 2010-2020’*](https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-disability-strategy-2010-2020), 2011, p. 30, viewed 11 May 2017. [↑](#footnote-ref-2)
3. Ibid, p.8. [↑](#footnote-ref-3)