

**STATEMENT OF REASONS FOR THE DECISION TO MAKE THE EXEMPTION ORDER STV/EO-00353 FOR SKY CHANNEL PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE SKY RACING1**

1. **DECISION**
   1. On 22 June 2017, for the reasons set out below, the Australian Communications and Media Authority (ACMA) decided to make an exemption order for Sky Channel Pty Ltd (the Applicant), in relation to the subscription television sports service, Sky Racing1 (the Service) (the Exemption Order). The Exemption Order was made under subsection 130ZY(3) of the *Broadcasting Services Act 1992* (the BSA).
   2. The Exemption Order exempts the Applicant from the requirement to ensure that a captioning service is provided for the financial years 1 July 2017 to 30 June 2022 (the Specified Eligible Period):

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| --- | --- |
| Financial Year (FY) | Captioning target (as a % of the total hours of programs transmitted on the Service in the FY) |
| 1 July 2017 – 30 June 2018 | 30 |
| 1 July 2018 – 30 June 2019 | 35 |
| 1 July 2019 – 30 June 2020 | 40 |
| 1 July 2020 – 30 June 2021 | 45 |
| 1 July 2021 – 30 June 2022 | 50 |

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 29 March 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 is a subscription television licensee and is a wholly owned subsidiary of Tabcorp Holdings Limited.
   4. The Applicant provides wholesale subscription television sports services to subscribing TAB agencies and licensed venues (such as pubs, clubs and hotels). Sky Racing1 is also broadcast by Foxtel to subscribing residential homes, however this exemption order does not apply to the Sky Racing1 service broadcast by Foxtel.
   5. The Service is an English language racing channel, covering Australian thoroughbred, harness and greyhound racing, as well as some international racing. The Service is broadcast 24 hours a day, seven days a week and its target audience is TAB wagering customers of TAB agencies and licensed venues.
   6. Live racing and racing replays make up 80% of the Service’s content. The remaining 20% of the Service’s content is racing focussed magazine-style programs. These magazine-style programs are generally shown early in the morning or late at night.
   7. This is the second application by the Applicant for an exemption order under paragraph 130ZY(1)(a) of the BSA relating to the Service. The previous exemption order for the Service (ST/EO-39) covered the financial years 1 July 2012 to 30 June 2017.
   8. On 17 May 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 16 June 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. 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 3.7 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 a submission received during the consultation period from Media Access Australia. This submission is discussed in greater detail below in paragraphs 4.37 – 4.42.

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

* 1. The Applicant submitted that a failure to make an exemption order would result in unjustifiable hardship for the Applicant. The Applicant submitted that the unjustifiable hardship would result from:
* The captioning being unnecessary and unbeneficial, given the existing visual format of the programs and the viewing preferences of its audience. Specifically, subscriber audiences prefer to view the racing vision and existing on-screen text;
* Consideration of the $2,120,000 spent per annum to deliver a large amount of text on-screen, which would likely be obscured or duplicated by captioning; and
* The estimated cost of $5,189,800 to meet the captioning requirements for the five year period of the proposed exemption order, which the Applicant considers prohibitive.
  1. In considering whether a failure to make an 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 was the unnecessary imposition of costs which would not necessarily enhance the Service for deaf or hearing impaired viewers, or potential viewers, in a meaningful way.
  2. Based on the information provided, the ACMA is satisfied that a refusal and/or failure to make the Exemption Order would impose an unjustifiable hardship on the Applicant.

***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 submitted that there would be no negative impact for the deaf and hearing impaired viewers, or potential viewers, if the exemption order was granted, for reasons including:

1. Large quantities of information are already provided as text on the racing programs.
2. The quality of captioning, having regard to accuracy, readability and comprehensibility, and the delays in live captioning, would be so low as to render the captioning unbeneficial.
3. Subscribing TAB agencies and licensed venues have sole discretion to turn captions on and off and because of reasons a) and b), are unlikely to turn captions on.
4. The magazine programs are most often broadcast outside of TAB agency and licensed venue trading hours.

These four points are discussed in greater detail below.

* 1. *Quantity of information already provided* – In its Application, the Applicant provided screenshots of racing programs on the Service, taken before, during and after the races. These screen shots show that a substantial amount of information about the races is provided as text. The Applicant stated that at times, up to 75% of the screen displaying the Service is taken up by text information about the races. Having viewed sample screen shots, the ACMA acknowledges that this appears to be correct. The displayed text information largely reflects the audio commentary before, during and after a race. The ACMA also notes the Applicant’s advice that it spends $2,120,000 each year to provide this information as on-screen text.
  2. The screen shots provided by the Applicant display examples of closed captioning, to demonstrate where, on the screen, closed captions might fit and how they would display. While acknowledging that different receivers (i.e. television models) may vary somewhat in how they display captions, the ACMA notes that the examples demonstrate the potential for on-screen text information, or racing vision, to be obscured by the captions. The Applicant has therefore argued that the addition of captions is likely to inhibit viewing, rather than assist, and the ACMA acknowledges this may be correct in relation to the Service.
  3. *Quality of captioning live races* – Captioned programs in Australia are required to comply with the *Broadcasting Services (Television Captioning) Standard 2013* (the Standard). The Standard requires captions to be readable, accurate and comprehensible, so that they are meaningful to viewers. The Applicant has argued that it is unlikely any captions produced for the Service would meet the standard for the following reasons, among others:
* The speed of race calls, if transcribed verbatim at the same pace as the spoken content, would likely be beyond the average viewer’s reading speed.
* The speed of race calls makes accurate, real-time captioning difficult. This may result in captioning delays or the captioner sacrificing accuracy for speed.
* The unusual names and the racing terminology used in races means that it is likely that captions would often be inaccurate.
* The speed of race calls would make it impossible for captions to be displayed for sufficient time to allow the viewer to read them and follow the racing vision.
* The captions would regularly over-run a scene change because of the speed of the race and the race calls, so that captions would not coincide with the racing vision.

The ACMA recognises the challenges in producing readable, accurate and comprehensible captions for the racing programs broadcast by the Service.

* 1. *Subscribers are likely to turn captions off* – The Applicant advised that subscribing TAB agencies and licensed venues have sole discretion to turn captions on. The Applicant asserted that these subscribers are unlikely to turn the captions on because the captioning would obscure the racing vision and critical racing text displays, and TAB agencies and licensed venues need to ensure a good customer experience to ensure they keep their patronage. The Applicant stated that the customers’ experience would be diminished if the racing vision was obscured by captions.
  2. No evidence was submitted to substantiate the claim that subscribing TAB agencies and licensed venues would be unlikely to turn the captions on if captions were available. The ACMA acknowledges the Applicant’s reasoning as to why this may be the case, however the ACMA also considers that there may be circumstances where a subscriber would consider it appropriate to turn the captions on.
  3. *Magazine programs broadcast outside of subscriber trading hours* – The Applicant advised that early in the morning and late at night, when there is less live racing, the Service broadcasts magazine programs. These are the programs which would benefit from captioning as they include interviews and commentary about racing, rather than specific race calling, with additional detailed information displayed as on-screen text. As was noted earlier, the Applicant has advised that in general, TAB agency trading hours are from 10am to 7pm, and most licensed venue trading hours are from 11am to midnight. The ACMA notes that this is not always the case, with some TAB agencies open until 11pm.
  4. The Applicant has provided samples of its weekday and weekend program schedule to demonstrate that its magazine programs are typically broadcast between 4am and 9am on a weekday and 4am to 10am on weekends, before subscribers would typically be open for business. The samples provided by the Applicant reflect online program schedules for the Sky Racing1 channel. Whilst the ACMA acknowledges that deaf or hearing impaired viewers are unlikely to have a meaningful experience watching the Service’s magazine’s programs without access to captions, it does recognise that the Service’s magazine programs are generally not broadcast during the subscribers’ trading hours. As such, the ACMA considers that this factor is an important aspect of the proposed exemption order.
  5. The ACMA considers the making of the Exemption Order may have some detriment for viewers, or potential viewers, who are deaf or hearing impaired. While the ACMA accepts evidence provided by the Applicant about the number of subscribers to the Service, the ACMA recognises that were it to refuse to make the Exemption Order, potential viewers to the Service may increase via additional viewers who are deaf or hearing impaired, and viewers of the Service who are deaf or hearing impaired may have a more meaningful experience with the content. However, the ACMA has also had regard to the predominantly visual content of the Service and the likely duplication of large amounts of information provided as on-screen text.

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

* 1. Subscribers to the Service are TAB agencies and licensed venues (such as pubs, clubs and hotels). The Applicant has advised that in general, TAB agency trading hours are from 10am to 7pm, and most licensed venue trading hours are from 11am to midnight.
  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 the number of subscribers to the Service. The Applicant did not provide an estimate of how many viewers access the Service through these subscribers. It is therefore not possible, from the available information, to estimate the number of viewers of the Service who might be deaf or hearing impaired.

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

* 1. The Applicant submitted information about its financial circumstances on a commercial-in-confidence basis.
  2. The ACMA examined the financial information provided by the Applicant on a commercial-in-confidence basis. The ACMA also examined the Applicant’s estimated expenditure to provide the required captioning, should the exemption order not be granted. The cost to caption the Service is discussed in detail (from paragraph 4.21 onwards) below.
  3. The estimated expenditure that the Applicant would be required to make if the ACMA did not make the exemption order would have a financial impact on the Applicant. However, the ACMA does not consider that this estimated expenditure of itself would be an unjustifiable hardship, having regard to the Applicant’s recent financial position.

***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. In order to provide captioning for 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. The Applicant estimated captioning costs by referring to the fees normally charged by an established external captioning provider.
  3. The Applicant advised that racing programs represent 80% of this Service, and only 1% of those programs are replays; 79% of the programs are live racing which would require live captioning. The Applicant advised that the remaining 20% of the Service is taken up by magazine programs, half of which are live and half of which are replays.
  4. The Applicant estimated the number of hours of captioning that would be required to meet the yearly captioning targets. It has advised that replays of racing and magazine programs would include captioning from the first play, and therefore it has not included replay hours in its calculation of the number of hours that would require captioning.
  5. The Applicant estimated that it would cost approximately $2 million to caption all content each year. The captioning targets will increase by 5% each year, from a requirement to caption 30% of all content in 2017-18, to a requirement to caption 50% of all content in 2021-22. The Applicant therefore estimated that it would cost between $870,000 and $1,260,000 to meet the incrementally increasing captioning target each year in the Specified Eligible Period.
  6. The Applicant estimated that the total expenditure to meet the captioning obligations for the eligible five year period of the proposed exemption order is approximately $5,190,000. These costs are based on the cost of captioning, as described above, plus infrastructure costs.
  7. In its 2012-17 exemption order application for the same Service, the Applicant submitted it would cost approximately $500,000 per year to live caption the Service, allowing for incremental increases in the captioning targets in each of the five years. The increase in quoted captioning costs in the current application is related to the increase in the annual captioning target from 25% in the 2016–17 financial year, to 50% in the 2021–22 financial year.
  8. The ACMA has considered the Applicant’s estimates of the expenditure required to caption the Service and acknowledges that these estimates appear to reflect current captioning costs in Australia.
  9. The ACMA acknowledges that in accordance with the BSA, the annual captioning target for the subscription television sports service will progressively increase until it reaches 100%, and therefore the costs involved in captioning will increase.

***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. The captioning targets for a subscription television sports service, for the Specified Eligible Period, are set out in paragraph 1.2.
  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 subscription television sports service to be an exempt service, under section 130ZX of the BSA for this financial year, it must have met the captioning target for seven of its other television sports services.
  2. Based on the information available, the Applicant broadcasts two subscription television sports services, and it has sought exemptions for both of these services. Therefore it is not eligible to nominate any additional subscription television sports services to be exempt services for the financial year under section 130ZX of the BSA.

***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, if the ACMA did not make an exemption order, the Applicant might review its programming. In particular, the Applicant submitted that it might review the continuance of the magazine-style programs shown on the Service (which are provided at cost), having regard to the additional cost of providing a captioning service. While this is noted in the Application as a possibility, the ACMA does not consider it has sufficient information to form a view as to the likely impact of a failure to make the exemption order on the quantity and quality of subscription television services provided by 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 previously made three exemption orders for services provided by the Applicant; one each for Sky Racing1, Sky Racing2 and TVN, all for the financial years of 2012-13 to 2016-17. The ACMA has not previously made any target reduction orders for the Applicant.
  2. In 2017, the Applicant applied for two exemption orders for the five financial years from 2017–18 to 2021–22, for Sky Racing1 and Sky Racing2. The Sky Racing2 exemption order application reference is STV/EO-00354.

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

*Submission received from MAA*

* 1. In its submission, MAA noted that the *Explanatory Memorandum to the Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012* (the Explanatory Memorandum) states: “The over-arching policy is for a subscription television licensee to meet annual captioning targets, that will increase in time, in respect of particular categories of subscription television services that are required to be captioned”.
  2. MAA objected to the Exemption Order being granted to the Applicant for a period of five years, arguing that an Exemption Order should be granted for no longer than 12 months, given the changes to captioning technology and the broadcasting industry over time. However, MAA has acknowledged that the ACMA does not have the power to vary the length of an exemption or target reduction application; the ACMA can only accept or reject the application for the period requested. Further, a decision on whether to make an exemption order for the Applicant is based on assessment of the available evidence at the time. It is not appropriate for the ACMA to speculate regarding what technological changes may occur in the captioning industry within the next five years. Based on the evidence available at this time, the ACMA considers that not making the Exemption Order for the five financial years from 1 July 2017 would impose an unjustifiable hardship on the Applicant.
  3. MAA contended that it would be more appropriate for the ACMA to grant a target reduction order rather than an exemption order to the Service. MAA considered that the magazine-style programming broadcast on the Service, while generally broadcast when the subscribers’ businesses will be closed, would benefit from captioning. Specifically, MAA has stated that if the Applicant was required to caption these programs, then the captions would be available to residential homes which subscribe to the Sky Racing1 channel through Foxtel. MAA indicated that currently, Foxtel is not required to caption the channel for its residential subscribers.
  4. The ACMA acknowledges that if the Applicant were to caption these programs, there might be potential benefits for other licensees that broadcast these programs. However, while it is open for the ACMA to refuse to make the Exemption Order, it is not open for the ACMA to make a target reduction order instead.
  5. When assessing an exemption order application, the ACMA is required to consider the criteria specified in the BSA, which relate to the applicant and the specified subscription television service. In this case, the applicant is Sky Channel not Foxtel; and the specified subscription television service is the Sky Racing1 service provided by Sky Channel, not the Sky Racing1 service provided by Foxtel. Having regard to the specific circumstances of the Applicant and the Service, the ACMA considers that not making the Exemption Order would impose an unjustifiable hardship on the Applicant.
  6. The ACMA also notes that under the current captioning legislation, the same channel provided by different subscription television licensees is regarded as a different service. It is the responsibility of individual licensees to provide captioning for its subscription television services to meet annual captioning targets, except where a licensee is exempt by section 130ZX of the BSA (as per paragraphs 4.31 and 4.32); or by exemption or target reduction orders. The ACMA notes that in the financial year 2015–16, Foxtel nominated Sky Racing1 to be one of its exempt services under section 130ZX of the BSA, as the licensee met the captioning target for seven of its other subscription television sports services for the year.

*ACMA’s overall assessment of this application*

* 1. Based on the information provided by the Applicant and having regard to the submission from MAA, 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 significant amount of information is provided as on-screen text for the majority of the programs on the Service, and captioning would duplicate and/or obscure much of this information.
2. The TAB agencies and licensed venues in which the Service will be broadcast have sole discretion whether to use captions, and the ACMA acknowledges the Applicant’s submission that these venues would be unlikely to use available captions, preferring to make the on-screen text and racing vision fully available to viewers.
3. Subscribers to the Service would not be open for business, or broadcasting the Service, for most of the Service’s magazine-style programming hours. Given that these are the programs most suited for captioning, but these programs would not be available for deaf or hearing impaired viewers to watch during subscribers’ business hours, the ACMA considers that the benefits of providing a captioning service in this context would be negligible.
4. The ACMA acknowledges that the quality of captioning would be affected by the speed of the races and race calling, and accordingly considers that the hardship the Applicant may experience in attempting to provide a meaningful captioning service would not be justifiable in these circumstances.
5. **DECISION**
   1. Following consideration of the matters outlined above, on 22 June 2017 the ACMA decided, under subsection 130ZY(3) of the BSA, to make the Exemption Order in respect of the Service, for the Specified Eligible Period.
6. **APPEAL RIGHTS**

6.1 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.

6.2 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.

6.3 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.