****

**DRAFT STATEMENT OF REASONS FOR PRELIMINARY DECISION TO MAKE AN EXEMPTION ORDER (STV-EO-00364) FOR TELSTRA PAY TV PTY LIMITED IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE AUSTRALIAN CHRISTIAN CHANNEL FOR THE 2018-2019 FINANCIAL YEAR**

1. **PRELIMINARY DECISION**
	1. On 16 May 2019, for the reasons set out below, the Australian Communications and Media Authority (the ACMA) has decided to make a draft exemption order for Telstra Pay TV Pty Limited (the Applicant) in respect of the Australian Christian Channel (the Service), for the specified eligible period of 1 July 2018 to 30 June 2019 (the Specified Eligible Period).
2. **LEGISLATION**

**Annual captioning targets**

* 1. Subsection 130ZV(1) of the *Broadcasting Services Act 1992* (the BSA), requires a subscription television licensee, such as the Applicant, to meet annual captioning targets for its subscription television services for each financial year commencing from 1 July 2012. An annual captioning target for a financial year is a percentage of the total number of hours of programs transmitted on the subscription television service during the financial year. The annual captioning target for a financial year is dependent on the category of subscription television service provided by a licensee.
	2. There are nine categories of subscription television services: movie service (divided into three sub-categories – Movies A, B, and C); general entertainment service (divided into three sub-categories – General Entertainment A, B, and C); news service; sports service; and music service.
	3. Licensees that provide more than 18 general entertainment services in a financial year can nominate categories for the services for that financial year to reduce their captioning obligations for some of their general entertainment services. Of the three categories of general entertainment services, Category A services have the highest captioning targets while Category C have the lowest captioning targets. For example, for the 2018-19 financial year General Entertainment A has a captioning target of 75%, General Entertainment B has 65% and General Entertainment C has 45%.

**Applications for exemption or target reduction orders**

* 1. Subsection 130ZY(1) of the BSA provides that a subscription television licensee may apply to the ACMA for:
1. an order that exempts from subsection 130ZV(1), a specified subscription television service provided by the licensee in a specified eligible period; or
2. a target reduction order that:
	1. is expressed to relate to a specified subscription television service provided by the licensee in a specified eligible period; and
	2. for each financial year included in the eligible period, provides that a specified percentage is the reduced annual captioning target for the service for the financial year.
	3. An exemption order, if granted, would exempt the service from the captioning target for each financial year in the specified eligible period.
	4. A target reduction order, if granted, would mean that the service would need to meet the reduced annual captioning target for each financial year in the specified eligible period of the target reduction order.
	5. Subsection 130ZY(4) provides that the ACMA must not make the exemption order or target reduction order unless the ACMA is satisfied that a refusal would impose an unjustifiable hardship on the applicant.
	6. 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 matters specified in subsection 130ZY(5) (these are addressed individually below).
	7. Subsection 130ZY(3) of the BSA provides that, if an application under subsection (1) has been made for an exemption order, the ACMA must, after considering the application, either (by writing) make the exemption order, or refuse to make the exemption order.

**Other categories of exemption**

* 1. In addition to the facility to apply for exemption and target reduction orders as detailed above, the captioning framework also provides for two other types of exemptions:
1. **New services** - Subsection 130ZV(6) provides an exemption from the captioning target obligations for new subscription television services that predominantly consist of programs not previously transmitted in Australia before, for a period of at least one year and possibly up to almost two years, depending on the date the new service commences broadcasting.
2. **Exempt nominations** - Section 130ZX allows subscription television licensees that have met the captioning targets for a threshold number of services in a genre in a financial year to nominate a percentage of their remaining channels for exemption. This is a transitional measure that is intended to assist licensees as they introduce captioning on all their subscription television services in order to comply with their captioning target obligations. It will end in July 2022, at which time it is expected that subscription television licensees will provide captioning services on all their subscription television services in compliance with their captioning obligations (save for the possibility of exemptions or target reductions being granted under section 130ZY).
3. **LEGISLATIVE OBJECTIVES**
	1. The purpose of captioning target requirements, introduced in 2012 by legislative amendments to the BSA, is to facilitate improved access to free-to-air and subscription television by Australia’s deaf and hearing-impaired community, by requiring broadcasters to caption speech and other sounds during television broadcasts.
	2. The overall legislative obligation for subscription television services to meet the captioning target requirements will increase over time to 100 per cent. The captioning target for Category A general entertainment services will reach 100 per cent in the financial year, 2023-24. The captioning target for a Category B general entertainment service will increase to 100 per cent by 2025-26, while the captioning target for a Category C general entertainment service will reach 100 per cent by 2029-30.
	3. The Second Reading Speech for the 2012 Amendment Bill[[1]](#footnote-2) noted that a gradual, incremental increase in captioning targets is intended to assist Australia’s broadcasters to adjust to the increasing costs associated with the changes. The cost of providing captioning services by subscription television licensees is a business expense which must be borne by licensees, except where, on an application under section 130ZY of the BSA, a licensee can satisfy the ACMA that compliance with the captioning obligations would impose an unjustifiable hardship on the licensee. Paragraph 63 of the Explanatory Memorandum to the 2012 Amendment Bill states: “The priority for government is for television services to be broadcast, and where possible for those services to be broadcast with captions. It is not the intention of the government that services not be shown because captioning obligations result in unjustified hardship on broadcasters.”
4. **APPLICATION**
	1. On 29 March 2019, the Applicant applied for an exemption order under paragraph 130ZY(1)(a) of the BSA in relation to the Service for the Specified Eligible Period (the Exemption Order).
	2. The service has not previously been broadcast with captions as the Applicant has previously nominated the Service for a captioning exemption under section 130ZX.

Applicant

* 1. The Applicant is a subscription television licensee. The Applicant is a wholly owned subsidiary of Telstra Corporation Limited.
	2. The Applicant provides movie, general entertainment, news, sport and music subscription television services. The Applicant also provides on-demand access to movies.

Service

* 1. The Service broadcasts a wide variety of Christian faith-based documentary and teaching programs, as well as entertainment programs including movies and episodic television. The Service is part of the Applicant’s $29 per month ‘Entertainment’ package.
	2. The Service has been in operation in Australia for over 20 years. The Service is provided by Australian Christian Channel Pty Limited (the Channel Provider) and is available on the Foxtel platform, Fetch TV, D2 satellite, online via the ACC.tv website and via the ACCTV app available for Apple and Android mobile devices and Apple TV, Android TV, Chromecast, Amazon Fire and Roku devices. None of these platforms currently provide captions for the Service.
	3. The Service’s genre is General Entertainment and is nominated by the Applicant as Category C, which would normally attract an annual captioning target of 45 percent for the financial year commencing 1 July 2018, increasing by five percent each financial year thereafter.

**EVIDENCE AND REASONS FOR PRELIMINARY DECISION**

* 1. As noted above, the ACMA must not make an exemption order unless the ACMA is satisfied that a refusal to make the exemption order would impose an unjustifiable hardship on the Applicant.
	2. In determining whether a failure to make an exemption order would impose an unjustifiable hardship, the ACMA must have regard to each of the matters specified in subsection 130ZY(5), assessing their relative weight and significance.
	3. The term ‘unjustifiable hardship’ is not a defined term in the BSA and is to be given its ordinary and natural meaning as appropriate to the legislative context. The ACMA considers that the test requires it to assess the weight and significance of any hardships to the Applicant made out in the material before the ACMA, and to assess whether or not the imposition of those hardships on the Applicant is unjustifiable, having regard to the criteria specified in subsection 130ZY(5) and the purpose and objects of the relevant statutory provisions.
	4. In reaching a preliminary decision to make the Exemption Order, the ACMA has considered written representations and supporting evidence submitted by the Applicant, and information provided by the Channel Provider in support of the application.

*Nature of the detriment likely to be suffered by the Applicant (paragraph 130ZY(5)(a) of the BSA)*

* 1. The Applicant submits that the Channel Provider does not currently caption the Service and the Channel Provider has confirmed to the Applicant that it is working on building a captioning solution for the Service with an intent to launch captioning by 1 July 2019.
	2. Due to the timing of that proposal, the Channel Provider is not capable of providing captioning to the level required of a General Entertainment Category C service (45%) by the end of the 2018-19 financial year. The Applicant is seeking an exemption order for the 2018-19 financial year only and has applied separately for a target reduction order for the 2019–20 financial year. If this exemption order is not granted, the Applicant submits that it will be in breach of Part 9D of the BSA in respect of the Service and may be forced to suspend or cancel the Service.
	3. The Applicant submits that, if the Service was removed from the Applicant’s platform, it would have an impact on the availability of dedicated religious channels in Australia and subscribers would be deprived of access to the Service.
	4. The ACMA does not accept that the removal of the Service from the Applicant’s platform will have a significant impact on the availability of dedicated religious channels in Australia. The ACMA notes the availability of the channel through other platforms such as online and through apps. The ACMA has not received evidence from the Applicant or the Channel Provider that the channel would cease altogether if it is removed from the Applicant’s platform.
	5. The ACMA accepts that there will be detriment to those subscribers who currently access the Service if the Applicant makes a commercial decision to cease providing the Service. However, the ACMA is not satisfied that this would impose undue financial or other detriment on the Applicant, since the applicant has stated that the Service, of itself, does not attract many subscribers to the Applicant’s platform.
	6. The ACMA notes that Foxtel Cable Television Pty Limited and Selectra Pty Limited have submitted applications for target reduction orders to caption the Service at 20% for the 2019-20 financial year on their respective platforms. The ACMA understands that the Applicant will receive the benefit of any captioning that appears on the Service, as broadcast by those licensees. This is because the Applicant is a reseller of the subscription services provided by Foxtel Cable Television Pty Limited, and does not currently have the contractual right, or sufficient infrastructure in place to live caption the feed. The intention of Foxtel Cable Television Pty Limited to caption in future is, in practical terms, the Applicant’s intention. The ACMA considers that the intention to caption 20% of the Service, which currently does not contain any captioning, shows some progress towards compliance with the object of the captioning provisions of the BSA to have all services eventually captioned at 100%. The ACMA considers that, if it is not appropriate for the Service to be captioned to the relevant annual captioning target because that would impose unjustifiable hardship on the licensee, then some captioning on the Service is preferable to the Service being removed altogether.
	7. The ACMA accepts that a refusal to make the Exemption Order will result in the Service being withdrawn altogether. The ACMA also accepts that the Channel Provider, while it is not in a position to do so immediately, has committed to captioning 20% of the Service in 2019-20. The ACMA considers that refusing to make the Exemption Order in these circumstances imposes a hardship that is not justifiable. It will effectively result in a lost opportunity for the Applicant to broadcast the service in 2019-20 with some captioning rather than not broadcasting it at all. The ACMA also considers that existing and potential deaf and hearing-impaired viewers would benefit from having access to more captioned content in the near-future.

*Impact of making the exemption order on deaf or hearing-impaired viewers, or potential viewers, of the broadcasting service concerned (paragraph 130ZY(5)(b) of the BSA)*

* 1. The Applicant submits that the impact of making the Exemption Order on deaf and hearing-impaired viewers, or potential viewers, of the Service, would be low due to the low viewership of the service.
	2. The ACMA accepts the evidence provided by the Applicant about the number of viewers of the Service; however, the ACMA considers that making an exemption order will generally have some detrimental effect for viewers, or potential viewers, who are deaf or hearing-impaired. In forming this view, the ACMA notes that around one in six Australians are affected by total or partial hearing loss[[[2]](#footnote-3)] [[[3]](#footnote-4)]. The ACMA also notes that this content has not been captioned previously, which has limited the ability of deaf or hearing-impaired viewers to engage with content on the Service to date.
	3. However, as stated above, the ACMA considers that having some captioning on the Service is preferable to having no Service at all. While making the Exemption Order will still mean that no captioning will be shown on the Service for the remainder of the 2018-19 financial year, the ACMA considers that this is outweighed by the opportunity for a progressive increase in captioning to appear on the Service in the next and future financial years.

*Number of people who subscribe to the subscription television service (paragraph 130ZY(5)(c) of the BSA)*

* 1. The Applicant provided the number of subscribers to the Applicant’s platform and the average daily reach of the Service on a commercial-in-confidence basis. The ACMA accepts that the average daily reach of the Service is a small proportion of total subscribers to the platform.
	2. There is no evidence before the ACMA as to how many subscribers to the Applicant’s platform do so primarily to access the Service. However, the ACMA accepts that the number is likely to be low, as is the known number of actual viewers. Despite a low number of viewers, the ACMA considers that it is preferable for those viewers (and other potential viewers who might access the Service if captioning was available on the Service) to access some captioning in the near future rather than have those viewers lose access to the Service through its cancellation or suspension, and lose the opportunity to experience any captioning on the Service in the near future.

*Financial circumstances of the Applicant (paragraph 130ZY(5)(d) of the BSA)*

* 1. The Applicant provided details of its financial circumstances on a confidential basis.
	2. The ACMA considers that the Applicant has funds to support the captioning cost for the Service if it were required do so; however, the cost of captioning would no longer make viable the continued distribution of the Service on the Foxtel platform that the Applicant provides, in light of its minimal contribution to revenue from subscribers.
	3. The ACMA considers that having the financial means to caption a service to the prescribed target does not necessarily mean that the hardship caused by the financial impost is justifiable. In considering the Applicant’s financial circumstances, it is important to consider issues broader than just the funds potentially available to the Applicant that could be re‑directed to pay for captioning content.
	4. Relevantly, channel providers to the Foxtel platform are generally required to caption the content they provide under Foxtel’s contractual arrangements for the channel’s distribution (unless a captioning exemption applies). However, the ACMA accepts that the Applicant’s captioning decisions are further complicated because as a reseller of the Service, and unlike Foxtel, the Applicant does not currently have the contractual right to live caption the feed. The Applicant’s approach to captioning its content is effectively to adopt the same approach that Foxtel takes. While under the captioning provisions of the BSA, this does not preclude the Applicant from providing captioning to the prescribed captioning target, in the circumstances addressed in this preliminary decision, the ACMA does not consider it necessary for the Applicant to provide captioning to a different target to any other Foxtel resellers.
	5. The Channel Provider is a not-for-profit organisation and it has submitted that it does not have the financial means to caption the Service to the default annual captioning target in 2018-2019. The Channel Provider has not previously been required to provide any captioning on the Service because the Applicant has been able to nominate the Service for exemption from captioning under section 130ZX of the BSA. However, section 130ZX exemptions depend on the application of a legislative formula that is intended to reduce their availability over time, until their elimination by July 2022. The Applicant had six of those exemptions available in 2017-2018 (and used one for the Service) but expects to have only three available for 2018-2019, and is not willing to use any of them on the Service in preference to other uncaptioned services.
	6. Having regard to paragraph 63 of the Explanatory Memorandum to the 2012 Amendment Bill (see paragraph 3.3 above), the ACMA considers that requiring the Applicant to caption the Service to a 45% target in 2018-2019 would impose significant financial burden on it.

*Expenditure that would be required to caption the Service if the relevant order was not made (paragraph 130ZY(5)(e) of the BSA)*

* 1. The Service has been categorised by the Applicant as a Category C General Entertainment Service, which carries a captioning target requirement of at least 45% for the 2018-19 financial year. The Applicant has advised that at the current rate of captioning for the financial year so far, and the remaining time available, there is no opportunity for the Applicant to provide enough captioned material to meet the target. In addition, the Applicant has advised that its intention would be to no longer supply the Channel if the Exemption Order was not made.
	2. The Applicant does not provide captioning for the Service and its position is that, if the Channel Provider is unable to provide captioning for the Service that the Applicant broadcasts, then it cannot justify incurring that expense for a service that attracts few subscribers to the Applicant’s platform.
	3. The Channel Provider has informed the ACMA that the estimated expenditure it would incur to caption the Service would be $772,757 per financial year, and the ACMA infers that it would cost approximately 45% of that figure ($347,740) to meet the 45% captioning target in 2018-2019.

*Extent to which captioning services for television programs are provided by the Applicant (paragraph 130ZY(5)(f) of the BSA)*

* 1. In the 2017-18 financial year, the Applicant had 52 general entertainment services. Of these, the Applicant nominated 18 services as General Entertainment A, 16 services as General Entertainment B and 18 services as General Entertainment C. Two services were exempted under subsection 130ZV(6) as they were new services. The Applicant nominated six services for exemption under section 130ZX. The Service was one of the six services exempted. All of the services broadcast in 2017-2018 met their captioning obligations.
	2. The ACMA notes that, in addition to the application for this Exemption Order, the Applicant is able to nominate, under section 130ZX of the BSA, a number of its general entertainment services for exemption from the captioning requirements, with the precise number to be worked out according to a formula prescribed in that section. The capacity of the Applicant to nominate exemptions under section 130ZX is a transitional measure available until July 2022.  During this transitional period, for the ACMA to be satisfied that a refusal to make an exemption or target reduction order would impose unjustifiable hardship on the applicant, it must also be satisfied that the Applicant is unable to nominate the relevant service for exemption under section 130ZX, because the available section 130ZX exemptions are committed to other uncaptioned services broadcast by the Applicant.
	3. The Applicant provided details of the number of general entertainment services it expects to have broadcast in the 2018-19 financial year. In a separate submission, the Applicant also stated that it intends to nominate three services for exemption under section 130ZX. This is in addition to the current exemption order and target reduction order applications sought for the Service and the Aurora channel (see paragraph 4.38 below), respectively. Given the timing of this application, even if it were preferable for the Applicant to nominate the Service for an exemption under section 130ZX, it would not be possible for the Applicant to submit an application for an exemption order or target reduction order for another uncaptioned service for the 2018-19 financial year.

*Likely impact of a failure to make the exemption order on the quality and quantity of television programs transmitted on broadcasting services provided by the Applicant (paragraph 130ZY(5)(g) of the BSA)*

* 1. The Applicant submits that, if the ACMA does not grant the order, the Service may need to be removed from the Applicant’s platform to mitigate breach of the Applicant’s obligations under Part 9D of the BSA. The Channel Provider intends to implement captioning by the beginning of the financial year commencing 1 July 2019, with a progressive increase in captioning in subsequent financial years. The Applicant also submits that loss of the Service will have a significant detrimental impact on the number and quality of dedicated local religious channels offered on the Applicant’s platform.
	2. As explained above, the ACMA has put considerable weight on the submission that the Channel Provider intends to progressively increase its captioning, beginning at 20% in the 2019-20 financial year. The ACMA considers that the accessibility of the programs on the Service for deaf and hearing-impaired viewers will thereby be improved over time. The ACMA considers that the quantity of television programs, and therefore quantity of captioning, on the Applicant’s platform would reduce if the Service were removed from the platform.

*Applications or proposed applications for exemption orders or target reduction orders in relation to any other broadcasting services provided by the Applicant (paragraph 130ZY(5)(h) of the BSA)*

* 1. The Applicant has made a target reduction order application for the Aurora Community Channel (STV/TRO-0073). This target reduction order application is for the 2018-19 financial year at a reduced captioning target of 5%.

*Other matters as the ACMA considers relevant (paragraph 130ZY(5)(i) of the BSA)*

* 1. There are no other matters not addressed previously in this statement of reasons that are relevant to this decision.
1. **CONCLUSION**
	1. In summary, the ACMA is satisfied that a refusal to make the Exemption Order in this instance would impose an unjustifiable hardship on the Applicant because:
* it would impose unjustifiable financial hardship to require the Applicant to bear the costs of captioning a Service that is not operated on a for-profit commercial basis (and cannot itself afford the captioning costs) and that attracts few subscribers to the Applicant’s platform; and
* a process has commenced to progressively increase the amount of captioned material broadcast on the Service in future years, and so a refusal to make the order (which is likely to result in the removal of the Service from the Applicant’s platform) would see an overall reduction in the amount of captioned material, which is not to the benefit of existing and potential deaf or hearing-impaired viewers.
1. Broadcasting Services Amendment (Improved Access to Television Services) Bill 2012 – Second Reading Speech before the House of Representatives on 30 May 2012, available at <https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/4a17e30d-c43b-48b9-83ed-4280fc00314c/0029/hansard_frag.pdf;fileType=application%2Fpdf>. [↑](#footnote-ref-2)
2. 2009-10 Year Book Australia, [www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/9B34B8C8BF2FDA34CA25773700169C83](http://www.abs.gov.au/AUSSTATS/abs%40.nsf/Lookup/9B34B8C8BF2FDA34CA25773700169C83) [↑](#footnote-ref-3)
3. Access Economics: Listen Hear! The economic impact and cost of hearing loss in Australia, February 2006 located at <http://apo.org.au/node/2755> [↑](#footnote-ref-4)