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**DRAFT STATEMENT OF REASONS FOR PRELIMINARY DECISION TO MAKE AN EXEMPTION ORDER (STV-EO-00377) FOR FETCHTV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE HGTV FOR THE 2018-19 AND 2019-2020 FINANCIAL YEARS**

1. **PRELIMINARY DECISION**
	1. On 20 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 FetchTV Pty Ltd (the Applicant) in respect of the subscription televisionGeneral Entertainment Category B service HGTV (the Service), for the specified eligible period of 1 July 2018 to 30 June 2020 (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 their general entertainment 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 to make the exemption order or target reduction order, as the case may be, 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 or target reduction order, the ACMA must, after considering the application, either (by writing) make the order, or refuse to make the 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%. The captioning target for Category A general entertainment services will reach 100% in the 2023-24 financial year. The captioning target for a Category B general entertainment service will reach 100% in 2025-26, while the captioning target for a Category C general entertainment service will reach 100% in 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 1 April 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. This is the Applicant’s third application for an exemption order for the Service. The last exemption order (STV/EO-301) was made for the Service for the period of 1 July 2016 to 30 June 2018.

Applicant

* 1. The Applicant is a subscription television licensee. The Applicant is an indirect wholly owned subsidiary of Media Innovations Pte Ltd (MIPL).
	2. The Applicant has provided a total of 63 subscription television services in the English language in 2018-19, including 32 general entertainment, 10 news, 18 sports and three music services. Of these services, approximately two-thirds included captioning that is provided by its channel providers. The Applicant does not, itself, provide captioning on any of its services and does not have the infrastructure to do so. The Applicant does not have the scale of services to nominate any of its subscription television general entertainment services to be exempt from the annual captioning target for 2018-19 under section 130ZX of the BSA.
	3. 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 sign up for the Applicant’s services via the Applicant’s website or selected consumer electronic stores.
	4. The Applicant also provides access to apps to watch movies on demand.

Service

* 1. The Service broadcasts reality programming related to home improvement and real estate.
	2. The Service is available as part of the following packages provided by the Applicant:
	+ Fetch ‘Entertainment’ package – a ‘legacy’ package that contains a large number of English language channels, which has not been available to new subscribers since the Applicant re-packaged its channel offerings in February 2017;
	+ Fetch ‘Ultimate’ package, which contains all 47 channels available in each of the four ‘Premium’ packs (‘Kids’, ‘Knowledge’, ‘Vibe’ and ‘Variety’) provided by the Applicant; and
	+ Fetch ‘Knowledge’ package, which currently has 18 channels and is primarily of a news and documentary genre.
	1. The Service is provided by Scripps Networks Interactive (Asia) Pte Ltd (the Channel Provider).
	2. Like every channel provided through FetchTV, the Service is obtained under licence wholly from the Channel Provider, which compiles the channel and then delivers it to the Applicant (‘pass-through’ service). The Applicant picks up the signal of the Service and displays it on its platform but provides no input to the content of the Service.
	3. The Service’s genre is General Entertainment Category B, which would normally attract an annual captioning target of 65 percent for the financial year commencing 1 July 2018, increasing by five percent each financial year thereafter.
	4. The Service, one of the 32 general entertainment services provided by the Applicant in 2018-19, is currently only available on its platform. The Applicant submits that inclusion of the Service is consistent with its intention to provide as broad a range of content as possible.

**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 if the Exemption Order is not made, the Service will be removed from the Applicant’s channel offerings. This will diminish the overall value and appeal of the Applicant’s package offerings and therefore may affect it financially.
	2. The Applicant submits that if the Exemption Order is not made for the Service, the Applicant will need to cease providing the Service because:
	+ the Service does not contain captioning;
	+ the Service is not required to be captioned, except in Australia;
	+ the Service is distributed in Australia only on the Applicant’s platform and it is not commercially viable for the Channel Provider to caption the Service just for the Applicant;
	+ the Applicant is not in a financial position to caption the Service; and
	+ the Applicant will breach the conditions of its subscription television licence if it continues to broadcast the Service without a captioning exemption.
	1. The ACMA accepts that, if the Exemption Order is not made, the Applicant will need to cease providing the Service. In these circumstances the ACMA considers that the detriment likely to be suffered by the Applicant will have associated impacts on its business model and financial circumstances.

*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 Applicant provided figures on the average daily reach of the Service for the 2017-18 financial year on a commercial-in-confidence basis.
	3. 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 limits the ability of deaf or hearing-impaired viewers to engage with content on the Service.

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

* 1. The Applicant provided a breakdown of the:
	+ total number of subscribers to its platform;
	+ the number of subscribers who would be able to access the Service because they are subscribers to one of the Applicant’s packages that contain the Service; and
	+ the number of subscribers who actually viewed the Service in February 2019.
	1. Although there is no evidence before the ACMA as to how many subscribers to the FetchTV platform do so primarily to access the Service, the ACMA accepts that the number of viewers is low.

*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 notes the Applicant’s submission that its business proposition is to provide a low-cost but full-service subscription TV offering, and therefore the content must be largely available to the Applicant at a low price point, and cover a diverse range of services. Retail customers pay $449 (Mighty) or $169 (Mini) for the Fetch TV box and pay a $1 one-off activation fee. Premium channel packs, such as the ‘Knowledge’ pack, on which the Service can be accessed, are added at $6 each per month or $20 per month for all four packs.
	3. The Channel Provider also provided relevant financial information on a commercial-in-confidence basis. It argued that the cost of captioning 65% of the content on the Service would be grossly disproportionate to the Service’s revenue, reach and viewership.
	4. The Applicant has indicated that, if the Exemption Order is not granted, the Service will be removed from its platform, as the Channel Provider will not provide captioning for the Service and the Applicant is not in a financial position to incur the captioning cost.
	5. 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 meet the captioning targets in the Specified Eligible Period would impose a severe financial burden on the Applicant, which it does not have the capacity to pay. A failure to grant the Exemption Order will result in the removal of the Service from the Applicant’s platform and this will have associated impacts on the Applicant’s business model and financial circumstances.

*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 General Entertainment Category B Service, which carries a captioning target requirement of at least 65% for the 2018-19 financial year.
	2. The Channel Provider submits that it cannot afford to provide captions for the Service.
	3. The Applicant noted that, if it was required to caption the Service to the annual captioning target, it would be required to live caption it, as it is a pass-through service. The Applicant has no ability to compile the Service or carry out post or pre-production by the addition of pre-prepared captions on the content.
	4. The Applicant provided a third-party quote of the costs to provide 65% captioning for the Service to meet the annual captioning target in 2018-19, amounting to $1,863,800. The costs include the following:
	+ $120,000 non-recurring costs;
	+ $59,000 recurring annual costs from the first year; and
	+ $1,684,800 to live caption the Service to the captioning target in the year.

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

* 1. In providing information about the number of services it broadcasts with captioning, the Applicant referred to the information provided to the ACMA with respect to its captioning compliance in the last financial year.
	2. Captioning was provided on 34 of the Applicant’s 65 subscription television services during the period of 1 July 2017-30 June 2018. All the captioning was provided by third-party channel providers of those services. The ACMA acknowledges that, where the captioning services were provided by third-party channel providers, the Applicant exceeded the annual captioning targets.
	3. The remaining 31 services were exempt from the captioning targets in 2017-18. Of these, 17 had obtained exemption orders, and 14 were exempted by a ‘new service exemption’ under subsection 130ZV(6). The Applicant did not have a sufficient number of subscription television services, or captioned services, to nominate any exempt services under section 130ZX.
	4. Of the 36 general entertainment services provided by the Applicant in 2017-18, seven services were exempted from the captioning target under exemption orders and five other services had reduced captioning targets under target reduction orders.
	5. In order for the Applicant to nominate a subscription television general entertainment service to be an exempt service under section 130ZX of the BSA for 2018–19, the Applicant must have met the captioning target for at least 43 of its other subscription television general entertainment services in the year.
	6. Based on the information available, the Applicant has broadcast fewer than 43 general entertainment services in 2018-19. Therefore, the Applicant is not eligible to nominate any of its subscription television general entertainment services to be exempt services for the financial year under section 130ZX of the BSA.

*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 Exemption Order, the Service would need to be removed from the Applicant’s platform to mitigate breach of the Applicant’s obligations under Part 9D of the BSA.
	2. The ACMA considers that a loss of the Service would reduce the quantity of subscription television programs for travel entertainment that are provided by the Applicant. A loss of the Service would result in the loss of the only subscription television service on the Applicant’s platform that is devoted exclusively to travel entertainment, and potentially a loss of 8,760 hours of travel entertainment programs in each year (as the Service currently broadcasts 24 hours a day, 7 days a week).

*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 14 exemption order applications and three target reduction order applications for the two financial years 2018-19 and 2019-20; and two exemption order applications for the financial year 2018-19.

| **No.**  |  **Channel Name** | **Order Type** | **Exempt period sought** |
| --- | --- | --- | --- |
| STV/EO-367 | Bloomberg | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-368 | CGTN | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-369 | Channel News Asia | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-370 | Euronews | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-371 | France 24 | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-372 | NDTV News | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-373 | Australian Christian Channel | Exemption | 1 July 2018 - 30 June 2019 |
| STV/EO-374 | BBC World News  | Exemption | 1 July 2018 - 30 June 2019 |
| STV/EO-376 | Fashion TV | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-378 | Food Network | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-379 | The Travel Channel | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-380 | Horse and Country | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-371 | ZooMoo | Exemption | 1 July 2018 - 30 June 2019 |
| STV/EO-382 | Baby TV | Exemption | 1 July 2018 - 30 June 2020 |
| STV/EO-383 | Al Jazeera  | Exemption | 1 July 2018 - 30 June 2020 |
| STV/TRO-75 | Nat Geo Wild | Target reduction | 1 July 2018 - 30 June 2020 |
| STV/TRO-76 | TLC | Target reduction  | 1 July 2018 - 30 June 2020 |
| STV/TRO-77 | Style | Target reduction | 1 July 2018 - 30 June 2020 |

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

* 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.
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:
	* providing captioning for the Service would impose significant financial costs on the Applicant;
	* the Applicant does not currently have the financial capacity to caption the Service;
	* a refusal to make the order is likely to result in the removal of the Service from the Applicant’s platform, as the Applicant would breach a licence condition in respect of the Service if it continues to provide it without captions; and
	* removal of the Service would adversely affect the Applicant’s business model of providing a low-cost subscription television service with diverse content.
	1. Having regard to the above, the ACMA is satisfied that a refusal to make the Exemption Order would impose an unjustifiable hardship on the Applicant.
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)