

**STATEMENT OF REASONS FOR DECISION TO MAKE A TARGET REDUCTION ORDER (FTA/TRO-0070) FOR EASTERN AUSTRALIA SATELLITE BROADCASTERS PTY LTD IN RESPECT OF THE IMPARJA PRIMARY CHANNEL BROADCAST TO THE SOUTH EASTERN AUSTRALIA TV3 LICENCE AREA ON VAS SL1130135**

1. **DECISION**
	1. On 8 August 2018, for the reasons set out below, the Australian Communications and Media Authority (the ACMA) made a target reduction order for Eastern Australia Satellite Broadcasters Pty Ltd (the Applicant) in respect of the Imparja television primary channel broadcast to the South Eastern Australia TV3 licence area on VAS (SL1130135) (the Service). The target reduction order was made under subsection 130ZUA(4) of the *Broadcasting Services Act 1992* (the BSA).
	2. The target reduction order would reduce the Applicant’s captioning targets for the specified eligible period of 1 July 2018 to 30 June 2021 (the Specified Eligible Period):

|  |  |  |
| --- | --- | --- |
| Financial year  | Annual captioning target  | Reduced annual captioning target |
| 1 July 2018 to 30 June 2019 | 100% | 90% |
| 1 July 2019 to 30 June 2020 | 100% | 90% |
| 1 July 2020 to 30 June 2021 | 100% | 90% |

1. **LEGISLATION**
	1. Part 9D of the BSA provides that:
* a television broadcasting licensee must provide a captioning service for all the television programs transmitted on its primary channel during ‘designated viewing hours’ (100 per cent captioning target) (s130ZR).
* from 1 July 2014 ‘designated viewing hours’ are the hours between 6am and midnight each day (ss130ZL(2)).
* a commercial television broadcasting licensee must also provide a captioning service for television news or current affairs programs transmitted on its primary channel outside ‘designated viewing hours’ (s130ZR).
* a commercial television broadcasting licensee may apply for a target reduction order that provides that a specified percentage is the reduced annual captioning target for a specified commercial television broadcasting service for the financial year (ss130ZUA (1)(b)).
* a target reduction order requires a commercial television broadcasting licensee to meet the reduced annual captioning target for the service during ‘designated viewing hours’ for each financial year during the eligible period (ss130ZUAA(2)).
* before making a target reduction order, the ACMA must publish a notice of the draft target reduction order and invite submissions within 30 days of publication (ss130ZUA (7)).
* the ACMA must consider any submission received and may not make the target reduction order unless it is satisfied, after having regard to specified matters (**Attachment A**), that a refusal to make the target reduction order would impose an unjustifiable hardship on the applicant (ss130ZUA(5)).
	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 a target reduction order under subsection 130ZUA(4) 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:
1. a statement setting out the reasons for the decision; and
2. a statement to the effect that an application may be made to the AAT for a review of the decision
3. **APPLICATION**
	1. On 15 May 2018, the ACMA received an application from Imparja Television Pty Ltd (Imparja Television), as agent for the Applicant, seeking a target reduction order under paragraph 130ZUA(1)(b) of the BSA in relation to the Imparja primary channel of the Service for the Specified Eligible Period (the Target Reduction Order).

Applicant

* 1. The Applicant is the licensee for commercial television broadcasting licence SL1130135, transmitting to the South Eastern Australia TV3 licence area via the Viewer Access Satellite Television (VAST) system. The Applicant also operates commercial television broadcasting licence SL1130136 (call sign VAN), transmitting to the Northern Australia TV3 licence areas via VAST.
	2. The Applicant is co-owned and operated by Imparja Television, which is a privately owned not-for-profit company, wholly owned and controlled by Northern Territory and South Australian Aboriginal corporate shareholders. Imparja Television is also the commercial television broadcasting licensee for SL2898 (call sign IMP), broadcasting to the Remote Central and Eastern Australia TV1 licence area.
	3. To lower operational costs, in January 2015 the Applicant ceased broadcasting from its Alice Springs facility and now contracts a Sydney company to transmit its programming.

Service

* 1. The Service transmits to the South Eastern Australia TV3 licence area, an area spanning approximately 2,083,197 square kilometres.
	2. The Service's target audience is those living in remote and regional Australia.
	3. The Service transmits programming from the Nine Network, with limited local programming insertions, which include indigenous and locally produced programs. The Applicant replaces all advertising inserted by the Nine Network with its own interstitial commercials and station identifiers.
	4. The Applicant estimated that its local programming amounted to 12.5 hours per week, making up approximately 9.92 per cent of ‘designated viewing hours’ (6am to midnight daily) on the primary channel. The local programming:
* occurs on weekdays from 9am to 11pm and on Saturdays, from 11am to 1pm and from 5pm to 5.30 pm
* may be shifted to different times and durations periodically to take into account sport programming and special events, such as major events within the broadcast area.
	1. The Applicant has indicated that local programing includes:
* indigenous music, 4-wheel drive, motorbike, fishing or camping programs on the weekend outside primetime;
* paid local content that enables remote audiences to purchase goods and services not normally available to them because of the distances that they reside from major population centres; and,
* exceptional programs like the annual Finke Desert Race.
	1. On 27 June 2018, the ACMA published on its website a notice setting out the draft target reduction order for the Service and invited persons to make submissions to the ACMA within 30 days, by 27 July 2018 (the consultation period).
1. **EVIDENCE AND REASONS FOR DECISION**
	1. The ACMA made the Target Reduction Order following its assessment of firstly, whether a failure to make the Target Reduction 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 130ZUA(6) of the BSA.
	2. The ACMA has relied upon written representations and supporting evidence submitted by the Applicant for the application for a target reduction order for the Service. Information provided to the ACMA on a confidential basis has not been reproduced.
	3. No submissions were received by the ACMA during the consultation period.

*Nature of the detriment likely to be suffered by the applicant (paragraph 130ZUA(6)(a) of the BSA)*

* 1. The Applicant has submitted that if the Target Reduction Order is not made, it would need to significantly reduce its local programming in favour of a greater reliance on its Nine Network programming because:
* the local programming is not currently captioned;
* the Applicant is not in a financial position to caption the local programming; and
* the Nine Network programming is captioned during ‘designated viewing hours’ (6am and midnight daily).
	1. The Applicant submitted that by discontinuing its local programming, it would forego a vital revenue stream that enables it to maintain a viable business whilst at the same time provide essential services to remote and regional Australia.
	2. In considering whether a failure to make the Target Reduction Order would impose unjustifiable hardship on the Applicant, the ACMA considers that the nature of the detriment likely to be suffered by the Applicant would be the removal of a large proportion of its local programming and the consequential loss of advertising revenue from that content.

*Impact of making a target reduction order on deaf or hearing impaired viewers, or potential viewers of the broadcasting service concerned (paragraph 130ZUA(6)(b) of the BSA)*

* 1. The Applicant has estimated that the Imparja primary channel has a potential audience of 685,000 across the Service and another two commercial television broadcasting services, VAN (SL1130136, which is also licensed to the Applicant) and IMP (SL2898, which is licensed to Imparja Television).
	2. The Applicant was unable to provide information on the potential viewers who are reliant on captions.
	3. The Applicant has submitted that if the Target Reduction Order was made, viewers who are deaf or hearing impaired would be able to view programs produced and shot around their local area, but they may not be able to fully understand those programs.
	4. The ACMA does not consider the Applicant’s response in this regard to be compelling. Notwithstanding this, the ACMA has formed the view that making the Target Reduction Order would be of low to medium impact for viewers, or potential viewers, who are deaf or hearing impaired. In the ACMA’s opinion, this is because:
* the overwhelming majority of television programs transmitted during ‘designated viewing hours’ (6am to midnight daily) and news and current affairs programs transmitted outside designated viewing hours (midnight to 6am) are likely to be captioned (through contractual arrangements with the Nine Network); and,
* any local programming that includes indigenous content is not required to be captioned if in a language other than English, as per section 130ZM of the BSA.

*Financial circumstances of the applicant (paragraph 130ZUA(6)(c) of the BSA)*

* 1. The Applicant’s co-owner, Imparja Television, is a not-for-profit organisation.
	2. The Applicant indicated that it broadcasts to an area that has the highest cost per viewer in Australia, with capital and operational expenditure required to maintain 28 remote retransmission sites throughout its footprint.
	3. The Applicant submitted detailed financial information on a commercial-in-confidence basis.
	4. The applicant has submitted that the estimated cost to caption the local programming would be loss-making to the revenue sourced from this content.
	5. The Applicant has submitted that if it drops the local programming, the loss of revenue would make the business model it operates under a marginal proposition.
	6. The ACMA notes that the Applicant’s business model is highly sensitive to fluctuations in advertising revenue in its market and impacts significantly on its Earnings Before Interest Tax Depreciation and Amortisation (EBITDA).
	7. Based on the information provided, the ACMA considers that the financial circumstances of the Applicant would make it difficult for the Applicant to incur the costs involved in providing captioning services for the local programming. Therefore, not making the Target Reduction Order would create unjustifiable hardship for the Applicant.

*Expenditure that would be required to caption the service (paragraph 130ZUA(6)(d) of the BSA)*

* 1. The Applicant has submitted that it is unable to provide an internal captioning service.
	2. The Applicant provided a commercial-in-confidence detailed breakdown of the estimated costs of using an external captioning service provider to caption the local programming.
	3. The ACMA is satisfied that based on the estimated costs of providing captioning for the local programming, failing to make the Target Reduction Order would create unjustifiable hardship for the Applicant.

*Extent to which captioning services for television programs are provided by the applicant (paragraph 130ZUA(6)(e) of the BSA)*

* 1. The Applicant submitted that it retransmits the Nine Network programming feed and its captioning, except when it inserts its local programming.
	2. The Applicant’s annual captioning compliance reports for the financial year 2016-17 indicated that on average 90.8 per cent of the Service’s programming during ‘designated viewing hours’ (6am to midnight daily) was captioned.
	3. The Applicant submitted that over the six months to mid-May 2018, on average
	140 hours of the Service’s programming is captioned per week, including outside ‘designated viewing hours’.

*The likely impact on the quantity and quality of television programs transmitted on broadcasting services provided by the applicant (paragraph 130ZUA(6)(f) of the BSA)*

* 1. The Applicant submitted that if the ACMA does not make the Target Reduction Order, it will have to drop its local programming and broadcast more networked programming.
	2. The Applicant also submitted that, should it discontinue its local programming, it is highly unlikely that any other commercial television broadcaster would provide the services it currently delivers. For example, the ongoing program to maintain the culture and language of indigenous communities.
	3. The ACMA recognises the logistical difficulties in providing local programming to a remote and large licence area, and considers any attempt to do so should be commended.
	4. The ACMA acknowledges that the removal of any local content, as a result of failing to make the Target Reduction Order, would diminish the quality of service and quantity of relevant and tailored content provided to regional viewers.

*Applications or proposed applications of exemption orders or target reduction orders in relation to any other broadcasting services provided by the applicant (paragraph 130ZUA(6)(g) of the BSA)*

* 1. The ACMA has previously made two target reduction orders for the Service. The first was for the period 1 July 2012 to 30 June 2015; and the second was for the period
	1 July 2015 to 30 June 2018.
	2. The Applicant submitted another application for target reduction order for the Imparja primary channel provided on SL1130136 VAN (Application #69).
1. **CONCLUSION**

5.1 Following consideration of the material referred to in paragraph 4.1 to 4.3 above, the ACMA is satisfied that a refusal to make the Target Reduction Order for the Applicant in respect of the Service, for the specified eligible period of 1 July 2018 to 30 June 2021, would impose an unjustifiable hardship on the Applicant.

1. **APPEAL RIGHTS**

6.1 Under section 204 of the BSA, a person whose interests are affected by this decision to make the Target Reduction 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 1800 228 333.

Attachment A

**Relevant provisions of the BSA**

**Part 9D of the BSA — Captioning**

**130ZUA Exemption orders and target reduction orders--unjustifiable hardship**

 *Criteria for making exemption order or target reduction order*

1. 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.
2. 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:
3. the nature of the detriment likely to be suffered by the applicant;
4. 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 commercial television broadcasting service or national television broadcasting service concerned;
5. the financial circumstances of the applicant;
6. 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;
7. the extent to which captioning services are provided by the applicant for television programs transmitted on commercial television broadcasting services or national television broadcasting services provided by the applicant;
8. 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 commercial television broadcasting services or national television broadcasting services provided by the applicant;
9. 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 commercial television broadcasting services or national television broadcasting services provided by the applicant;
10. such other matters (if any) as the ACMA considers relevant.