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**(DRAFT) STATEMENT OF REASONS FOR THE PRELIMINARY DECISION TO MAKE A TARGET REDUCTION ORDER (STV-TRO-083) FOR FOXTEL CABLE TELEVISION PTY LIMITED IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE BBC WORLD NEWS FOR THE 2019-2020 FINANCIAL YEAR**

1. **PRELIMINARY DECISION**
   1. On 4 February 2020, for the reasons set out below, the Australian Communications and Media Authority (**the ACMA**) has decided to publish a draft target reduction order for Foxtel Cable Pty Limited (**the Applicant**) in respect of the subscription television service BBC World News (**the Service**), for the specified eligible period of 1 July 2019 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.

**Application for target reduction order**

* 1. Subsection 130ZY(1)(b) of the BSA provides that a subscription television licensee may apply to the ACMA for 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.
   1. 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.
   2. Subsection 130ZY(4) provides that the ACMA must not make the target reduction order unless the ACMA is satisfied that a refusal to do so would impose an unjustifiable hardship on the applicant.
   3. In determining whether a failure to make the target reduction order 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).
   4. Subsection 130ZY(3) of the BSA provides that, if an application under subsection (1) has been made for a target reduction order, the ACMA must, after considering the application, either (by writing) make the order, or refuse to make the order.
   5. Subsection 130ZY(6) of the BSA provides that, before making a target reduction order under subsection 130 ZY(3), the ACMA must, within 50 days after receiving the application for a target reduction order, publish on the ACMA’s website a notice setting out the draft target reduction order, and inviting persons to make submissions to the ACMA about it within 30 days after the notice is published. Any submissions received within that 30 day period must be considered by the ACMA.

**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 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 on subscription television is a business expense which must be borne by licensees, except where, on application under section 130ZY of the BSA, a licensee is able to satisfy the ACMA that compliance with the captioning obligations would impose an unjustifiable hardship on the licensee.
  3. 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.

1. **APPLICATION**
   1. On 24 December 2019, the Applicant applied for a target reduction order under paragraph 130ZY(1)(b) of the BSA in relation to the Service for the Specified Eligible Period (**the Target Reduction Order**), as follows:

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| --- | --- | --- |
| **Specified Eligible Period** | **Annual captioning target** | **Proposed reduced annual captioning target** |
| 1 July 2019 to 30 June 2020 | 40% | 20% |

* 1. This is the Applicant’s first application for a target reduction order for the Service. The Service has not previously been broadcast with captions, as the Applicant has previously nominated the Service for an exemption from captioning under subsection 130ZX(5) of the BSA. This permits the Applicant, prior to 1 July 2022, to exempt a number of subscription television news services from compliance with captioning obligations, where the circumstances prescribed in subsections 130ZX(5) and (6) apply.

**The Applicant**

* 1. The Applicant is a subscription television licensee and is part of a group of companies and partnership entities under the holding company, NXE Australia Pty Limited, which is owned by News Corporation (65%) and Telstra Corporation Limited (35%).
  2. The Applicant provides movie, general entertainment, news, sport and music subscription television services. The Applicant also provides on-demand access to movies.

**The Service**

* 1. The Service is a channel compiled by BBC World Distribution Limited (**the Channel Provider**) and delivered to the Applicant as a live pass through for transmission to the Applicant’s subscribers. The Service is an English-language international news and current affairs channel.
  2. The Service is part of the Applicant’s $49.00 per month ‘Foxtel Plus Bundle’.

1. **EVIDENCE AND REASONS FOR PRELIMINARY DECISION** 
   1. As noted above, the ACMA must not make a target reduction order unless the ACMA is satisfied that a refusal to make that order would impose an unjustifiable hardship on the Applicant. In determining whether a failure to make a target reduction order would impose an unjustifiable hardship, the ACMA must have regard to each of the matters specified in subsection 130ZY(5) of the BSA, assessing their relative weight and significance.
   2. 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) of the BSA and the purpose and objects of the relevant statutory provisions.
   3. In reaching a preliminary decision to make the Target Reduction Order, the ACMA has considered written representations and supporting evidence submitted by the Applicant, which also includes information provided by the Channel Provider, in support of the application. This information is considered below by reference to each of the criteria specified in subsection 130ZY(5) of the BSA.

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

* 1. The Applicant submitted that, if the Target Reduction Order is not granted, the nature of the detriment likely to be suffered by the Applicant is that it will be in breach of Part 9D of the BSA in respect of the Service, and will have to consider removal of the Service from the Applicant’s platform.
  2. While the Channel Provider is contractually obliged to provide captioning of the Service, it has encountered practical and technical difficulties in doing so, and will only be able to start captioning after 1 February 2020.
  3. The Channel Provider provides captioning for a similar, though not identical, channel to licensees in Japan and North America. However, for commercial, technical and potentially regulatory reasons, these captions are not easily transferrable to the Service provided to the Applicant for broadcast in Australia.
  4. This is due to different formatting standards for closed captions that are used in North America compared to Australia, and the fact that program delivery to the different counties must occur via different satellites.
  5. The Applicant advised that the Channel Provider is sourcing a captioning solution for the Service, which will permit the Service to meet the proposed reduced annual captioning target from February 2020, and to meet the prescribed annual captioning targets from 1 July 2020 onwards.
  6. The Applicant stated that the captioning solution proposed by the Channel Provider requires lengthy functionality and compatibility testing. This means that the Channel Provider is not practically capable of providing captions on the Service to meet the prescribed annual captioning target of 40% by the end of the Specified Eligible Period.
  7. The ACMA considers that the following factors indicate progress on the Applicant’s behalf towards compliance with the object of the captioning provisions of the BSA, which is to have all services eventually captioned at 100%:
* the Service (which has not previously had any captioning) will be captioned at 20% in 2019-2020;
* the Target Reduction Order is sought for only one year; and
* the Applicant’s has stated that captioning of the Service, at the prescribed annual captioning target levels, will be achievable from 1 July 2020 onwards.
  1. The ACMA considers that the introduction of captioning on the Service, with the future provision of captioning at the prescribed annual captioning target levels, is preferable to the Service being removed altogether.

*Impact of making the target reduction order on deaf or hearing-impaired viewers, or potential viewers, of the Service (paragraph 130ZY(5)(b) of the BSA)*

* 1. The Applicant submitted that the impact of making the Target Reduction 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 from the 2018-19 financial year, on a confidential basis, indicating the average daily viewer numbers for the Service, and the estimated number of subscribers who might use captions on the Service.
  3. The ACMA accepts the evidence provided by the Applicant about the relatively low number of viewers of the Service who are likely to require captioned content on any given day. However, the ACMA considers that making a Target Reduction Order will generally have some detrimental effect for viewers, or potential viewers, of the Service 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)].
  4. The Applicant submitted that the nature of the Service comprises predominantly text and visual content, and that captioning is unlikely to dramatically enhance the viewing experience of the deaf and hearing-impaired audience.
  5. The ACMA acknowledges that, while the Service has a substantial amount of textual information in addition to visual content, the ACMA does not accept that captions are unlikely to dramatically enhance the viewing experience of the deaf and hearing-impaired audience.
  6. The ACMA considers that a lack of captioning adversely impacts the viewing experience of the deaf and hearing-impaired audience. For example, when dialogue between news presenters and interviewees is not captioned, the viewing experience of deaf and hearing-impaired viewers is limited to incomplete on-screen information.
  7. The ACMA notes that content on the Service has not been captioned previously, which detracts from the viewing experience for deaf and hearing-impaired viewers of the Service.
  8. While making the Target Reduction Order means there will be adverse impacts for deaf and hearing-impaired viewers in 2019-2020, the ACMA notes the progress being made toward the Service meeting its annual captioning targets from 1 July 2020 onwards.

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

* 1. The Applicant provided the following information to the ACMA on a confidential basis:
* total number of subscribers to the Applicant’s ‘Foxtel Plus Bundle’ (which permits subscribers access to the Service);
* average daily number of subscribers who accessed the Service between 1 July 2018 and 30 June 2019;
* total audience share of the Service across the entirety of the services offered by the Applicant; and
* the estimated number of subscribers who might use captions on the Service.
  1. The ACMA accepts that the average number of subscribers who accessed the Service in 2018-19 was relatively low.

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

* 1. The Applicant provided details of its financial circumstances and ownership structure on a confidential basis.
  2. The ACMA has considered information provided by the Applicant, which indicates that it has the financial capacity to meet the costs of captioning the Service during the Specified Eligible Period. However, the figures provided in confidence about viewership of the Service indicate that the Service is unlikely to contribute significantly to generating revenue from viewer subscriptions. This would likely make it uneconomical for the Applicant to provide the Service, if it is required to meet the captioning obligations independently of the Channel Provider, which has experienced practical and technical difficulties in fulfilling its contractual obligation to provide captions.
  3. The ACMA considers that requiring the Applicant to caption the Service during the Specified Eligible Period is likely to impose financial hardship on the Applicant.

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

* 1. The Channel Provider has advised the Applicant that the total estimated expenditure to meet the prescribed captioning target for the Specified Eligible Period (should the ACMA not grant the Target Reduction Order) is GBP 500,000.00.

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

* 1. The Applicant advised that the television programs provided on the Service were not captioned at the time of making the Application.
  2. In its 2018-19 annual compliance return, the Applicant reported providing captioning on 105 subscription television services.
  3. The Applicant did not provide details of the programs on the Service that would be captioned after 1 February 2020 to enable it to meet the proposed reduced annual captioning target (20%).

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

* 1. The Applicant submitted that, if the ACMA does not make the Target Reduction Order, the Applicant may need to limit the number of international pass-through news channels on the Foxtel platform to mitigate the breach of the Applicant’s obligations under Part 9D of the BSA.
  2. The ACMA accepts that failure to make the Target Reduction Order is likely to impact on the quality of the viewing experience of subscribers if they are deprived of access to the Service. However, the ACMA notes the availability of the channel through online and mobile application platforms. Other than the Service, the ACMA notes the Applicant provides 11 local and international news and current affairs services.
  3. As noted above, the ACMA has considered the Applicant’s submission that the Channel Provider intends to caption the Service from February 2020, and to meet the prescribed annual captioning targets from 1 July 2020 onwards. While making the Target Reduction Order is likely to impact the quality of the Service for deaf and hearing-impaired viewers in the short term, the ACMA considers that the quality of the Service for deaf and hearing impaired viewers will improve from February 2020 onwards.

*Whether the Applicant has applied, or has proposed to apply, for exemption orders or target reduction orders in relation to any other subscription television services provided by the Applicant (paragraph 130ZY(5)(h) of the BSA)*

* 1. The Applicant has made applications for 4 exemption orders (1 of which was approved) and 3 target reduction orders (2 of which were approved) for periods between 1 July 2018 and 30 June 2024.
  2. The Applicant has indicated that it intends to apply for another exemption order or target reduction order in relation to a subscription television service that it provides. The Applicant has not provided any further details of this proposed application.

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

* 1. There are no other matters the ACMA considers relevant in respect of this application.

**CONCLUSION**

* 1. In summary, the ACMA is satisfied that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Applicant because:
* it would impose unjustifiable financial hardship to require the Applicant to bear the costs of meeting the prescribed captioning target for the Service, which attracts few subscribers to the Applicant’s platform, when practical and technical difficulties have prevented the Channel Provider from fulfilling its contractual obligation to meet the prescribed captioning target in the Specified Eligible Period; and
* the risk of removal of the Service from the Applicant’s platform should be avoided, since arrangements are underway to begin captioning the Service after 1 February 2020, and to meet the prescribed annual captioning targets from 1 July 2020, which will benefit deaf and 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@.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)