

DRAFT STATEMENT OF REASONS FOR THE PRELIMINARY DECISION TO MAKE A TARGET REDUCTION ORDER (STV-TRO-00102) FOR FOXTEL CABLE TELEVISION PTY LIMITED IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE CMT FOR THE 2020-2021 FINANCIAL YEAR

1. PRELIMINARY DECISION

- 1.1 On 10 February 2021, 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 Television Pty Limited (**the Applicant**) in respect of the subscription television service CMT (**the Service**), for the specified eligible period of 1 July 2020 to 30 June 2021 (**the Specified Eligible Period**).

2. LEGISLATION

Annual captioning targets

- 2.1 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.
- 2.2 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

- 2.3 Subsection 130ZY(1)(b) of the BSA provides that a subscription television licensee may apply to the ACMA for a target reduction order that:
- (i) is expressed to relate to a specified subscription television service provided by the licensee in a specified eligible period; and
 - (ii) 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.

- 2.4 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 a specified eligible period of the target reduction order.
- 2.5 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.
- 2.6 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) (as addressed individually below).
- 2.7 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.
- 2.8 Subsection 130ZY(6) of the BSA provides that, before making a target reduction order under subsection 130ZY(3) of the BSA, the ACMA must:
- a) within 50 days after receiving the application for a target reduction order, publish on the ACMA's website a notice:
 - (i) setting out the draft target reduction order; and
 - (ii) inviting persons to make submissions to the ACMA about the draft target reduction order within 30 days after the notice is published; and
 - b) consider any submissions received within the 30-day period mentioned in subparagraph 130ZY(6)(a)(ii) of the BSA.

Legislative objectives

- 2.9 The purpose of captioning target requirements 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.
- 2.10 The Second Reading Speech for the 2012 Amendment Bill¹ 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.
- 2.11 Paragraph 63 of the Explanatory Memorandum to the 2012 Amendment Bill states:

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.

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.

3. APPLICATION

- 3.1 On 23 December 2020, 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:

Specified Eligible Period	Annual captioning target	Proposed reduced annual captioning target
1 July 2020 to 30 June 2021	35%	17.5%

- 3.2 This is the Applicant's first application for a target reduction order for the Service. The Service commenced broadcasting on 1 July 2020.
- 3.3 As at 21 November 2020, approximately 2.61% of programs transmitted on the Service were captioned. Between November 2020 and early February 2021, the Applicant increased the level of captioning on the Service by an average 0.5 per cent week. The Applicant plans to continue to increase the level of captioning of the Service at this rate over the remainder of the 2020-21 to ensure that it meets its proposed 17.5% captioning target by 30 June 2021. It is also acting to meet the required rate of 40% for the 2021-22 financial year.²

The Applicant

- 3.4 The Applicant is a subscription television licensee. The Applicant is a subsidiary of NXE Australia Pty Limited.³
- 3.5 The Applicant provides movie, general entertainment, news, sport and music subscription television services.

The Service

- 3.6 The Service is a channel provided by Viacom International Media Networks Australia Pty Limited (**the Channel Provider**) and delivered to the Applicant as a live pass through for transmission to the Applicant's subscribers.⁴ The Service is a country music channel primarily featuring Australian and international country music videos.
- 3.7 The Applicant distributes the Service as part of its 'Foxtel Plus Bundle' package. The Channel Provider is contractually obliged to the Applicant to provide captioning for programs broadcast on the Service.

² Captioning data for the period from November 2020 to early February 2021 was provided to the ACMA by the Applicant on 4 February 2021 following a request by the ACMA for additional information.

³ NXE Australia Pty Limited is a joint venture between News Corporation and Telstra Corporation Limited. News Corporation has a 65% interest in NXE Australia Pty Limited with Telstra Corporation Limited owning the remaining 35%.

⁴ A pass through channel or service is one obtained under a licensing agreement from the Channel Provider. Under its agreement with Viacom International Media Networks Australia Pty Limited, the Applicant does not alter the content that is provided on the CMT Service or insert additional content.

4. EVIDENCE AND REASONS FOR PRELIMINARY DECISION

- 4.1 The ACMA must not make a target reduction order unless it 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.
- 4.2 The term 'unjustifiable hardship' is not defined in the BSA and is to be given its ordinary and natural meaning as appropriate to the legislative context. The ACMA considers that the BSA 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.
- 4.3 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)

- 4.4 The Applicant stated that the Service was launched on the Applicant's platform on 1 July 2020, and that the Channel Provider had intended to use the captioned files from the Applicant's discontinued Country Music Channel (CMC), which ceased broadcasting on 30 June 2020, to satisfy the prescribed annual captioning target for 2020-21.
- 4.5 However, the Channel Provider encountered unexpected significant technical and practical difficulties relating to the use of the captioned files. The CMC files were incompatible with the Channel Provider's new cloud-based playout technology and could not be used by the Channel Provider. The Channel Provider considered supplying captioned music clips from its other music channels but it determined that both the playout technology and genre were not compatible with the requirements of the Service.
- 4.6 The Applicant submitted that, if the Target Reduction Order is not granted, detriment would likely be suffered by the Applicant because the prescribed 35% captioning target for 2020-21 could only be achieved by broadcasting a high number of repeats of its captioned programming available for broadcast. Such programming would reduce the quality and appeal of the Service for all potential viewers, potentially leading to a loss of subscribers for the Applicant.
- 4.7 The Applicant has submitted that the Channel Provider is working to meet its contractual obligation to the Applicant by creating new captioned programs for the Service. The Applicant stated that the Channel Provider has been captioning content for the Service since November 2020.

- 4.8 The Channel Provider has advised that it will take 15 hours of work to produce pre-prepared captions for one broadcast hour. Due to the limited time remaining in this financial year, the Channel Provider will not be able to provide sufficient new captioned programs for the Service to meet the captioning target of 35% of its broadcast hours for the 2020-21 financial year.
- 4.9 The Applicant submitted that the Channel Provider's captioning solution will permit the Applicant to provide captioned content for 17.5% of the Service's broadcast hours in the 2020-21 financial year and should help the Service to meet the prescribed annual captioning target of 40% for the Service for the 2021-22 financial year.
- 4.10 The ACMA considers that detriment would be suffered by the Applicant as a result of a failure to make the Target Reduction Order, because:
- significant and unexpected technical difficulties prevented the reuse of existing captioned content from the Applicant's discontinued CMC service
 - to meet the prescribed captioning target for the Service, a very high number of repeats of the captioned programming available for broadcast would need to be shown, reducing the quality and appeal of the Service for all potential viewers, and potentially causing financial detriment through the loss of subscribers.
- 4.11 While the ACMA notes the detriment that would be suffered by the Applicant for the Specified Eligible Period, the Applicant expects the Service will meet the prescribed annual captioning target of 40% for the 2021-22 financial year.

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)

- 4.12 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, and the Target Reduction Order being sought for only one year.
- 4.13 The ACMA accepts that the evidence provided by the Applicant indicates that a relatively low number of viewers of the Service are likely to require captioned content on any given day. However, the ACMA also notes that, although the total numbers may be low, hearing-impaired viewers may make up a reasonable proportion of total viewers. In forming this view, the ACMA notes that around one in six Australians are affected by total or partial hearing loss.^[5]^[6]
- 4.14 The Applicant submitted that the Service predominantly broadcasts music videos, and that captioning is unlikely to dramatically enhance the viewing experience of the deaf and hearing-impaired audience.

⁵ 2009-10 Year Book Australia, www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/9B34B8C8BF2FDA34CA25773700169C83

⁶ Access Economics: Listen Hear! The economic impact and cost of hearing loss in Australia, February 2006 located at <http://apo.org.au/node/2755>

- 4.15 The ACMA acknowledges that, while the Service has a substantial amount of visual content, it does not accept that captions are unlikely to enhance the viewing experience of the deaf and hearing-impaired audience.
- 4.16 Rather, the ACMA considers that a lack of captioning adversely impacts the viewing experience of the deaf and hearing-impaired audience, which is likely to be enhanced by access to the captioned lyrics of songs in broadcast videos, and to other captioned dialogue.
- 4.17 The ACMA considers that making a target reduction order is likely to have some adverse effect in 2020-21 for viewers, or potential viewers, of the Service who are deaf or hearing-impaired. The ACMA notes that the Applicant expects the Service to meet its prescribed annual captioning target from 1 July 2021 onwards.

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

- 4.18 Having regard to figures supplied by the Applicant in confidence, the ACMA accepts that the average number of subscribers to the Foxtel platform, who accessed the Service between 1 July 2020 and 21 December 2020, was relatively low.

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

- 4.19 The Applicant is owned by NXE Australia Pty Limited, which is a joint venture between News Corporation (which has a 65% interest) and Telstra Corporation Limited (which has a 35% interest).
- 4.20 The ACMA has considered the financial information provided by the applicant in confidence in respect of NXE Australia Pty Limited. Based on that financial information, the ACMA accepts that the Applicant would suffer financial detriment if it were required to meet the captioning obligations independently of the Channel Provider, noting that the Applicant has contracted the Channel Provider to supply the Service at a contract price which includes provision for the cost of captioning.

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

- 4.21 The Channel Provider has advised the Applicant that the estimated expenditure to meet the prescribed captioning target for the 2020-21 financial year (should the ACMA not grant the Target Reduction Order) could range between \$11,498 and \$28,749 depending on the number of times each music clip is repeated.
- 4.22 The ACMA notes that the Channel Provider has advised that it will take approximately 15 hours of work to produce pre-prepared captions for one broadcast hour. This means that the time needed to prepare new captioned material (after the date in November 2020 when the Channel Provider established that technical difficulties would prevent it from using captioned files from the discontinued CMC service) is another factor inhibiting achievement of the prescribed captioning target in 2020-21.

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

4.23 In its 2019-20 annual compliance return, the Applicant reported providing captioning on a total of 67 subscription television services.

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)

4.24 The Applicant submitted that, if the ACMA does not make the Target Reduction Order, the Applicant will need to broadcast a very high number of repeats of the captioned programming available for broadcast in order to meet the prescribed captioning target.

4.25 The Applicant submitted that a much higher level of repetition of its captioned music videos will reduce the quality and appeal of the Service for all viewers, and potentially result in a loss of subscribers for the Applicant.

4.26 In addition, the Applicant stated that if the Target Reduction Order is not granted, and the Channel Provider does not meet the captioning target for the Service, the Applicant will be in breach of Part 9D of the BSA in respect of the Service. As a result, the Applicant may be forced to limit the number of music channels and in particular, country music channels, on its platform in the future, which will have a wider impact on the availability of music services in Australia. (The Applicant provides four other non-country music services.)

4.27 The ACMA has considered the Applicant's submission that, as of 21 November 2020, 2.61% of programs transmitted on the Service carry captions, and that it is currently on track to meet the prescribed annual captioning targets from 1 July 2021 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 and appeal of the Service for deaf and hearing-impaired viewers should improve as the Applicant incrementally increases its level of captioning from November 2020 to full compliance at 40% by 1 July 2021.

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)

4.28 The Applicant has made applications for five Target Reduction Orders for the 2020-21 financial year. These Target Reduction Orders are currently being assessed by the ACMA.

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

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

CONCLUSION

4.30 In summary, the ACMA is satisfied that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Applicant because:

- significant and unexpected practical and technical difficulties have prevented the Channel Provider from fulfilling its contractual obligation to the Applicant to meet the prescribed captioning target in the Specified Eligible Period
- if a Target Reduction Order is not granted, the prescribed captioning target for the Service can only be achieved by such high levels of repetition of the captioned programming available for broadcast that the quality and appeal of the Service would likely be reduced for all viewers, potentially causing a loss of subscribers to the Applicant
- if the ACMA were to make the Target Reduction Order it would have some adverse impact on deaf or hearing-impaired viewers in 2020-21, however, the Applicant expects the level of captioning of the Service to increase incrementally from November 2020, and that the prescribed annual captioning target will be met from 1 July 2021 onwards, which will be to the benefit of deaf or hearing-impaired viewers.