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**DRAFT STATEMENT OF REASONS FOR THE PRELIMINARY DECISION TO MAKE A TARGET REDUCTION ORDER   
STV-TRO-00125 FOR TELSTRA PAY TV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE TRT WORLD FOR THE 2020‑2021 FINANCIAL YEAR**

1. **PRELIMINARY DECISION**
   1. On 16 April 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 Telstra Pay TV Pty Ltd (**the Applicant**) in respect of the subscription television service TRT World (**the Service**), for the specified eligible period of 1 July 2020 to 30 June 2021 (**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 a 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) (as 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 130ZY(3) of the BSA, the ACMA must:
3. within 50 days after receiving the application for a target reduction order, publish on the ACMA’s website a notice:
   1. setting out the draft target reduction order; and
   2. inviting persons to make submissions to the ACMA about the draft target reduction order within 30 days after the notice is published; and
4. consider any submissions received within the 30-day period mentioned in subparagraph 130ZY(6)(a)(ii) of the BSA.
5. **LEGISLATIVE OBJECTIVES**
   1. 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. 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 March 2021, 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 2020 to 30 June 2021 | 45% | 20% |

**The 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 Service**

* 1. The Service is provided by TRT Corporation (**the Channel Provider**) and delivered to the Applicant as a live pass through for transmission to the Applicant’s subscribers.[[2]](#footnote-3) It is a 24-hour English-language international news channel based in Istanbul, Turkey that delivers worldwide news and current affairs as well as programming related to sport, business, arts and culture. The target audience for the Service is those aged over 16 who are interested in international news.
  2. The Applicant is a reseller, to its own subscribers, of subscription television services offered by the Foxtel Cable Television Pty Ltd (Foxtel) platform. The Service is offered to the Applicant’s subscribers as part of its 'Foxtel Plus Bundle' package. Telstra Corporation Limited is a minority (35%) owner of the holding company which owns Foxtel. The Channel Provider is contractually obliged to Foxtel to provide captioning for programs broadcast on the Service.
  3. The Service falls within the 'news' captioning category, which would normally attract an annual captioning target of 45% for the financial year commencing 1 July 2020.

1. **EVIDENCE AND REASONS FOR PRELIMINARY DECISION** 
   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.
   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.
   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.
   4. 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. As a reseller of the Service, the Applicant’s approach to captioning is effectively to adopt the same approach that Foxtel takes. Under the captioning provisions of the BSA, this does not preclude the Applicant, as a separate licensee, from providing captioning to the prescribed target level, and indeed the Applicant’s approach would mean that if Foxtel is found to have contravened a licence condition in respect of captioning, the Applicant would likely also have contravened the licence condition.
  2. The Channel Provider commenced captioning the Service in September 2020. It was obliged to commence captioning from 1 July 2020; however, it encountered unexpected, significant, technical and practical difficulties which included a significant disruption to its captioning workforce, as a result of the Covid-19 outbreak.
  3. Acknowledging that the Service is produced in Istanbul in Turkey, the Channel Provider had to reduce the number of employees working at the Service in order to minimise the spread of Covid-19. This delayed the commencement of captioning staff and facilities planned by the Channel Provider to achieve the level of captioning required under the BSA. Further, it has meant continued difficulties in the workflow, and assignment of a labour force, for captioning the Service.
  4. While the Channel Provider is providing captioning for the Service, it has informed the Applicant that it is not capable of delivering captions up to the required level of 45%. The Channel Provider has advised that it takes approximately 4 to 12 hours of work to produce pre-prepared captions for one broadcast hour. Our assessment is that the Channel Provider would not be able to provide sufficient new captioned programs for the Service to make-up the captioning target of 45% of its broadcast hours for the 2020-21 financial year, if the Target Reduction Order was not made.
  5. The Applicant has submitted that the Channel Provider is working to meet its contractual obligation to Foxtel by supplying captioning for the Service, but that downstream resellers like the Applicant will be unable to meet the required level of 45% by the end of the Specified Eligible Period due to:
* the unprecedented and protracted impact of Covid-19 on the Channel Provider’s staff and operations, and
* the Applicant being reliant on the Channel Provider to provide all its captioning for the Service.
  1. The Applicant submitted that, if the target reduction order is not granted, the Applicant:
* will be in breach of Part 9D of the BSA in respect of the Service
* may be forced to limit the number of international pass through news channels on its platform in the future.
  1. The ACMA considers that detriment would be suffered by the Applicant as a result of a failure to make the Target Reduction Order, because of the unexpected, significant, technical and practical difficulties which have disrupted the Channel Provider’s captioning workforce for the Service as a result of Covid-19.
  2. While the ACMA notes the detriment that would be suffered by the Applicant if the Target Reduction Order is not made for the Specified Eligible Period, the Service should meet the prescribed annual captioning target of 50% 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)*

* 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, and the Target Reduction Order being sought for only one year.
  2. The ACMA accepts that the evidence provided by the Applicant indicates that a very low number of viewers of the Service are likely to require captioned content on any given day. The ACMA considers that making the Target Reduction Order would have an adverse impact on deaf and hearing-impaired viewers, and potential viewers. In forming this view, the ACMA notes that around one in six Australians are affected by total or partial hearing loss. [[[3]](#footnote-4)] [[[4]](#footnote-5)]
  3. 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 level of captioning on the Service is being increased by a rate of 0.4% per week to meet captioning targets for the 2021-22 financial year.

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

* 1. 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 2019 and 30 June 2020, was relatively low.

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

* 1. The Applicant is owned by Telstra Corporation Limited.
  2. The ACMA has considered the financial information provided by the applicant, in-confidence, in respect Telstra Corporation Limited. Based on that financial information, and the captioning costs referred to below, the ACMA accepts that the Applicant would suffer some financial detriment if it were required to meet the captioning obligations independently of the Channel Provider, noting that Foxtel has contracted the Channel Provider to supply the Service at a contract price which includes provision for the cost of captioning.
  3. The ACMA considers that requiring the Applicant to caption the Service to the prescribed target during the Specified Eligible Period would impose significant 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 estimated expenditure to meet the prescribed captioning target for the 2020-21 financial year (should the ACMA not grant the Target Reduction Order) would be in excess of USD $200,000 per annum (approximately AUD $250,000).
  2. The ACMA notes that the Channel Provider has advised that it takes between 4 and 12 hours of work to produce pre-prepared captions for one broadcast hour. This means that the time needed to prepare new or make-up captioned material (in addition to the parts of the service currently being captioned) 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)*

* 1. In its 2019-20 annual compliance return, the Applicant reported providing captioning on a total of 96 subscription television services.
  2. The Applicant advises that, while the Channel Provider is captioning some content on the Service, the airtime for captioned programs on the Service varies, with captioned programming rotated throughout the schedule. The Applicant also advises that it is not technically or contractually able to caption the Service itself.
  3. A reduction in its captioning target for 2020-21, for the Applicant, will also flow through to the Channel Provider to select the most appropriate and relevant programming to be captioned across the Service as it recovers from the impact of Covid-19.

*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 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 international pass through news channels on its platform in the future, which will have a wider impact on the availability of international global news services in Australia.
  2. The ACMA has also considered the Applicant’s submission that the average numbers of hours being captioned per week is 50.9 and that the percentage of content on the Service, which is captioned, should meet the prescribed annual captioning target 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 level of captioning on the Service increases to meet captioning targets for the 2021-22 financial year.

*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 seven Target Reduction Orders for the 2020‑21 financial year. One draft Target Reduction Order (TRO-00114) has been published for consultation on 7 April 2021.[[5]](#footnote-6)

*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.

1. **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:

* as a reseller of the service from Foxtel, it is neither practical nor commercially justifiable for the Applicant to take responsibility, independently of Foxtel and the Channel Provider, for captioning the Service to the prescribed level of 45% for the Specific Eligible Period.
* unexpected, significant, technical and practical difficulties have disrupted the Channel Provider’s Turkish-based captioning workforce for the Service as a result of Covid-19.
* it would impose unjustifiable financial hardship to require the Applicant to bear the substantial costs of meeting the prescribed captioning target for the Service, when unexpected, significant, technical and practical difficulties caused by the Covid-19 outbreak in Turkey have prevented the Channel Provider from fulfilling its contractual obligation to meet the prescribed captioning target in the Specified Eligible Period.
* 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 level of captioning on the Service is being increased incrementally and the Applicant is expected to meet the prescribed annual captioning target for 2021-22, which will be to the benefit of 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. 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 TRT World or insert additional content. [↑](#footnote-ref-3)
3. 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-4)
4. 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-5)
5. *Telstra Pty Ltd – Draft TRO-00114* <https://www.acma.gov.au/sites/default/files/2021-04/Draft-TRO-00114-Telstra-CMT%E2%80%93Publication-20210407_0.docx> [↑](#footnote-ref-6)