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**STATEMENT OF REASONS FOR PRELIMINARY DECISION TO MAKE AN EXEMPTION ORDER (STV/EO-393) FOR FETCHTV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE FOOD NETWORK FOR THE FINANCIAL YEARS 2020 to 2022**

1. PRELIMINARY DECISION
	1. On 12 May 2021, for the reasons set out below, the Australian Communications and Media Authority (**the ACMA**) has formed the preliminary view that it should make an exemption order for FetchTV Pty Ltd (ACN 130 669 500) (**the Applicant**) in respect of the subscription television service, Food Network (**the Service**), for the specified eligible period of 1 July 2020 to 30 June 2022 (**the Specified Eligible Period**).
	2. A notice setting out the draft exemption order has been published on the ACMA’s website for the purpose of consultation under subsection 130ZY(6) of the *Broadcasting Services Act 1992* (**the BSA**).
2. LEGISLATION

**Annual captioning targets**

* 1. Subsection 130ZV(1) of the 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 an exemption order**

* 1. Paragraph 130ZY(1)(a) of the BSA provides that a subscription television licensee may apply to the ACMA for:

an order that exempts from subsection 130ZV(1), a specified subscription television service provided by the licensee in a specified eligible period (an **exemption order**).

* 1. An exemption order, if granted, would exempt the service from the captioning target for each financial year in the specified eligible period of the exemption order.
	2. Subsection 130ZY(4) of the BSA provides that the ACMA must not make the exemption 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 exemption order would impose an unjustifiable hardship on the applicant, the ACMA must have regard to the matters specified in subsection 130ZY(5) of the BSA (these are addressed individually below).
	4. Subsection 130ZY(3) of the BSA provides that, if an application under subsection (1) has been made for an exemption 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 an exemption order under subsection 130ZY(3) of the BSA, the ACMA must:
1. within 50 days after receiving the application for an exemption order, publish on the ACMA’s website a notice:
2. setting out the draft exemption order; and
3. inviting persons to make submissions to the ACMA about the draft exemption 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 23 March 2021, 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.
	2. The Service’s genre falls within the captioning category of ‘General Entertainment Category A’, which would normally attract an annual captioning target of 85% for the financial year commencing 1 July 2020.

**The Applicant**

* 1. The Applicant is a subscription television licensee. The Applicant is an indirect wholly owned subsidiary of Media Innovations Pty Ltd.
	2. 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 captioned services to nominate any of its subscription television general entertainment services to be exempt from the annual captioning target for 2020-21 under section 130ZX of the BSA.
	3. The Applicant provides a low cost, but full service, pay TV offering which can be ‘bundled’ and distributed by its internet service provider (**ISP**) partners. The low-cost model means the Applicant’s content must largely be available at a low price point. All channels must be ‘pass through’ because the Applicant has no ability to compile channels itself or carry out post or pre-production by the addition of captions on content.[[2]](#footnote-3)
	4. The Applicant submits that, to the extent that it can do so, it seeks to provide popular content that may not be offered by its competitors and that, within its cost parameters, it looks for niche content.

**The Service**

* 1. The Service is an American television channel, showing special and regular episodic programs about food and cooking. The Service features daytime and ‘primetime’ line-ups – the daytime programming is devoted to instructional cooking programs, while ‘Night-time’ features food-related entertainment programs, such as cooking competitions, food-related travel shows, and reality shows. The Service is provided by Discovery Networks Asia Pacific Pte. Ltd (**the Channel Provider**).
	2. The Service is available as part of the linear channels packages provided by the Applicant. The packages are:
* The Fetch Entertainment Package – a legacy package
* The Fetch Ultimate Package
* The Fetch Knowledge package.
	1. The Service has not previously been broadcast with captions on the Applicant’s platform. The Applicant has been granted captioning exemption orders for the Service for each financial year since 1 July 2014.
	2. This is the Applicant’s fourth application for an exemption order for the Service. The last exemption order (STV-EO-00378), covering the period 1 July 2018 to 30 June 2020, was made by the ACMA on 26 June 2019.
1. EVIDENCE AND REASONS FOR PRELIMINARY DECISION
	1. As noted above, the ACMA must not make an exemption 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 an exemption 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 exemption 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. The Applicant submitted that if the ACMA does not make an exemption order with respect to the Service, it will be required to cease to provide the Service or to operate in breach of its subscription television broadcasting licence conditions. This is because:
* the Channel Provider does not currently provide the Service with captioning because the Service is not required to be captioned in the jurisdiction where it is produced (i.e. the United States) or in any other jurisdiction in which it is distributed; and
* the Channel Provider would not caption the Service for the Applicant because of the insignificant number of subscribers to the Service, when weighed against the very substantial cost of captioning.
	1. The Applicant submitted that it would suffer the following detriment from the removal of the Service:
* The Service is a well-known and respected entertainment service. It is one of the few channels it provides that is not available on other subscription television providers.The Service offers a popular genre and an attractive name to the services provided by the Applicant. Its removal would reduce the variety and breadth of the Applicant’s content and diminish the value and appeal of the Applicant as a service provider, making the Applicant’s service offerings less attractive to ISPs and potential subscribers.
* ISP customers can terminate their agreements with ISPs for the provision of the Applicant’s packages if there are ‘material’ changes to the content line-up. Removal of a service increases the likelihood of customers being entitled to cancel their agreement with the ISP, which would be detrimental to both the Applicant and the ISP.
	1. The Applicant advises that it is not in a position to incur the costs involved in the provision of live captioning for the Service and provided a quote from a third-party captioning provider for the cost to caption the Service (see paragraph 5.26, below). The costs for captioning the service involve both high initial set-up costs and recurring annual captioning and infrastructure costs.
	2. The ACMA considers that detriment would be suffered by the Applicant as a result of a failure to make the exemption order, because the Channel Provider does not caption the service and cessation of the Service because of its lack of captions would diminish the value and appeal of the Applicant’s service offerings. The alternative of the Applicant paying for live captioning of the Service is not commercially viable due to the high cost of live captioning relative to the Applicant’s financial position, meaning that cessation of the Service is probable if an exemption order is not made.

*Impact of making the exemption 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 exemption order on deaf and hearing-impaired viewers, or potential viewers, of the Service, would be limited since the Service has a small audience and that audience has viewed the Service without captions since 2014.
	2. The Applicant provided subscription figures, as at February 2021, on a confidential basis, that indicated the number of subscribers who can access the Service, and the percentage of those subscribers who have watched the service.[[3]](#footnote-4)
	3. The ACMA accepts that a small percentage of subscribers have watched the Service and that a low number of viewers of the Service are likely to require captioned content on any given day.
	4. 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 and the availability of captioning might attract more hearing-impaired viewers. The ACMA considers that making the exemption 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.[[[4]](#footnote-5)] [[[5]](#footnote-6)] [[[6]](#footnote-7)].
	5. The Applicant has cited viewer feedback which it claims indicates that the captioning of movie services is valued more highly by deaf and hearing-impaired viewers than captioning on other services, including the Service.
	6. In the longer-term, the Applicant submitted that, because the failure to make an exemption order would cause the Applicant to remove the Service from its platform, this would have the potential effect of decreasing the Applicant’s revenue and jeopardising the Applicant’s overall viability. This would disadvantage deaf and hearing-impaired viewers by limiting the likelihood that funds would be available to commence captioning of other services in the future and might lead to an outcome whereby deaf and hearing-impaired viewers, or potential viewers, of the Service (along with other viewers) lose access to the Applicant’s platform entirely, including to the Applicant’s most popular services, which are captioned.
	7. Based on the information provided in the Applicant’s submission, the ACMA considers that it is probable that the Applicant will cease to provide the Service if an exemption order is not granted.

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

* 1. The Applicant provided the following information about subscriber numbers, as at February 2021, to the ACMA on a confidential basis:
* the total number of subscribers to the Applicant’s platform;
* the total number of subscribers with access to a content package that includes the Service (and therefore who can access the Service);
* the percentage (relative to total subscribers of the Applicant’s platform) of subscribers who viewed the Service; and
* the percentage of subscribers (relative to total subscribers accessing linear channel content) who viewed the Service though linear channel access
	1. Having regard to the figures supplied by the Applicant in confidence, the ACMA accepts that the number of subscribers who have accessed the Service, as at February 2021, was relatively low.

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

* 1. The Applicant submitted that its business plan is to provide a low-cost but full-service subscription TV offering, and accordingly the content must be largely available to the Applicant at a low price point and cover a diverse range of services.
	2. The Applicant submitted that it is not commercially viable for a company of the Applicant’s current size and financial position to incur the extremely high costs involved in the provision of live captioning for the Service. With the Service being an international pass-through service, without any of its content captioned by the Channel Provider, live captioning is the only means of captioning available to the Applicant.
	3. The Applicant provided details of its financial circumstances on a confidential basis. These included consolidated financial statements for its corporate group for the financial year ended 30 June 2020.
	4. Based on the information provided, the ACMA accepts that it is not commercially viable for the Applicant to incur the costs of captioning the Service to the prescribed 85% target in 2020-2021, independently of the Channel Provider, and that not making the exemption order would impose unjustifiable financial hardship onr the Applicant.
	5. The ACMA is also of the view, based on the information in the Application, that unless the circumstances of the Applicant change significantly over the remainder of the Specified Eligible Period, it will not be commercially viable for the Applicant to incur the costs of captioning the Service to the prescribed targets as they increase up until 30 June 2022.
	6. The ACMA considers, based on confidential information provided by the Applicant including information about its forward business planning, that not making the exemption order for the entire Specified Eligible Period is likely to involve unjustifiable financial hardship for the Applicant.

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

* 1. As noted above, the Applicant submits that the captioning expenditure is unaffordable for small providers such as the Applicant, for a single channel.
	2. 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.
	3. The Applicant provided a third-party quote for the costs to provide 85% captioning for the Service to meet the annual captioning target in 2020-21, amounting to $2,128,450 with a recurring cost of $2,082,450.00 for future years. The costs comprise the following:
* $2,023,450 to live caption the Service to the captioning target in each year; and
* $105,000 non-recurring costs of setting up the captioning infrastructure for the first year; and
* $59,000 recurring annual infrastructure costs after the first year.
	1. The ACMA notes that it is likely that the live captioning component of these costs would involve increase in future years in accordance with the 5% annual increase to the captioning targets for subscription televisiongeneral entertainment services.
	2. The Applicant has submitted that complying with the captioning obligations for the Specified Eligible Period by way of providing live captioning on the Service is not financially viable.

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

* 1. In its annual compliance report for 2019-20, provided in accordance with subsection 130ZZC(5) of the BSA, the Applicant indicated that captioning was provided on 44 of its 64 subscription television services in the period from 1 July 2019 to 30 June 2020.[[7]](#footnote-8) All the captioning was provided by third-party channel providers of those services. Two services met, but did not exceed, their targets. In 38 cases the Applicant reported that it exceeded the annual captioning targets. The Applicant has reported that 4 services provided captioning but did not meet the required captioning target.
	2. Of the remaining 20 services that were not captioned in 2019-20, 19 were exempt from captioning targets (of these 19,15 had exemption orders in force, one was a ‘new’ service and 3 subscription television sport services were exempt under subscription television category exemption rules).[[8]](#footnote-9) The remaining service did not meet its captioning target.
	3. Thirty-six services provided by the Applicant in 2019‑20, including the Service, were subscription television general entertainment services. Of these, 7 were exempted from the captioning targets under exemption orders.

*Likely impact of a failure to make the exemption 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 an exemption order, the Applicant would need to remove the Service from its platform.
	2. Based on the information provided in the Application, the ACMA considers that this would probably occur.
	3. The ACMA considers that cessation of the Service would reduce the quantity of subscription television news programs offered on the Applicant’s platform and could impact the viability of the platform as a whole, as the loss of services generally would tend to make the platform less attractive to subscribers, compared to competing platforms.
	4. This would potentially constrain the Applicant’s future capacity to transmit television programs on the platform.

*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 12 exemption orders and 4 target reduction orders for periods of 1, 2, 3 or 5 years commencing from 1 July 2020.

*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 has formed the preliminary view that a refusal to make an exemption order would impose an unjustifiable hardship on the Applicant because:
* As a pass-through provider of the Service, it is not possible for the Applicant to contract with the Channel Provider to provide pre-prepared captioning for the Service, because the Channel Provider does not offer this option and has advised it is not likely that this will change during the Specified Eligible Period.
* Having regard to the financial information provided by the Applicant (including revenue from subscribers), and the quoted costs of providing live captioning, it is not commercially viable for the Applicant to provide live captioning for the Service. The cost of captioning the Service would be prohibitive relative to the revenue generated for the Applicant by the Service, and it is not likely that it would become commercially viable for the Applicant to provide live captioning within the Specified Eligible Period.
* If the ACMA were not to make an exemption order, the Applicant would be unable to meet the prescribed captioning target for the Service, making it probable that the Applicant would cease to provide the Service to avoid being in breach of the BSA, which would have consequential detriment for the appeal of its service offerings, and the operations of its business.
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. [↑](#footnote-ref-3)
3. The figures indicate the number of subscribers who have accessed the service at least 4 times in a month for more than 3 minutes. [↑](#footnote-ref-4)
4. 2012 Year Book Australia, [https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Health%20status~229](https://www.abs.gov.au/ausstats/abs%40.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Health%20status~229) [↑](#footnote-ref-5)
5. Access Economics: Listen Hear! The economic impact and cost of hearing loss in Australia, February 2006 located at <http://apo.org.au/node/2755>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-6)
6. Roadmap for Hearing Health, Department of Health, February 2019 located at

[https://www1.health.gov.au/internet/main/publishing.nsf/content/CDFD1B86FA5F437CCA2583B7000465DB/$File/Roadmap%20for%20Hearing%20Health.pdf](https://www1.health.gov.au/internet/main/publishing.nsf/content/CDFD1B86FA5F437CCA2583B7000465DB/%24File/Roadmap%20for%20Hearing%20Health.pdf) [↑](#footnote-ref-7)
7. Cartoon Network, Boomerang and CNN ceased being included in the Applicant’s linear channels packages on 24 April 2021. [↑](#footnote-ref-8)
8. Under section 130ZX of the BSA, where a subscription television licensee meets its captioning targets for a specified minimum number of services in a specific category of service (i.e movie, general entertainment, news, sports or music) in a financial year, the licensee may nominate other services in that category in excess of the minimum number that are then exempt from the annual captioning target for that category in that year. [↑](#footnote-ref-9)