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**DRAFT STATEMENT OF REASONS FOR THE PRELIMINARY DECISION TO MAKE A TARGET REDUCTION ORDER STV-TRO-00124 FOR FETCH TV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE AL JAZEERA (ENGLISH) FOR THE 2020‑2021 FINANCIAL YEAR**

1. **PRELIMINARY DECISION**
	1. On 12 May 2021, for the reasons set out below, the Australian Communications and Media Authority (**the ACMA**) formed the preliminary view that it should make a target reduction order for FetchTV Pty Ltd (ACN 130 669 500) (**the Applicant**) in respect of the subscription television service, Al Jazeera (English) (**the Service**), for the specified eligible period of 1 July 2020 to 30 June 2021 (**the Specified Eligible Period**).
	2. A notice setting out the draft target reduction 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 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 23 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% | 30% |

* 1. On 1 February 2021, Al Jazeera Media Network (the **Channel Provider**) launched a closed caption system on the Service to meet the captioning target of 45% for the current financial year. Due to the COVID-19 pandemic, the Channel Provider encountered numerous unforeseen delays in the implementation of captioning to meet the required target, leading to the Applicant requesting the Target Reduction Order for the Specified Eligible Period.

**The Applicant**

* 1. The Applicant is a subscription television licensee. The Applicant is an indirect wholly owned subsidiary of Media Innovations Holdings 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 news 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 a 24-hour international news and current affairs channel.
	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 Channel Provider commenced captioning the Service in February 2021 and intends to caption to the prescribed target of 50% in 2021-22.
	2. The Service falls within the 'subscription television news service' 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. As noted above, 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. For reasons outside of its control and primarily related to the COVID-19 outbreak, the Channel Provider encountered a range of delays in commencing captioning on the Service. The delays related to equipment delivery and training of captioning staff, which meant captioning services were launched in February 2021, rather than at the beginning of the financial year.
	2. While the Channel Provider is now 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% in the current financial year. While there will be a shortfall for the 2020-21 financial year, there are positive indications that the Service will fully meet the prescribed captioning target of 50% in the 2021-2022 financial year.
	3. The Applicant submitted that if the ACMA does not make a target reduction 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. Cessation of the Service would be particularly detrimental as the Applicant expects to be able to meet the prescribed captioning target in 2021-2022.
	4. The Applicant submitted that it would suffer the following detriment from the removal of the Service:
* As noted in paragraph 4.5 above, the Applicant has no ability to compile channels itself or carry out post or pre-production by the addition of captions on content, so has been unable to caption the content shortfall from earlier in the financial year.
* The Service is a well-known and respected source for news and adds to the breadth of content provided by the Applicant. Its removal would reduce the variety of the Applicant’s content. The Applicant has recently ceased broadcasting the CNN service and the removal of the Service would diminish its international news offerings and the appeal the Applicant has as provider of large brand name channels (of which the Service is a prominent part). A diminution of services would make the Applicant’s service offering 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 ACMA considers that detriment would be suffered by the Applicant if the Target Reduction Order is not made for the Specified Eligible Period, and notes that the Service is proposed to be captioned to a level 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 limited since the Service has a small audience.
	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 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 1 in 6 Australians are affected by total or partial hearing loss.[[[4]](#footnote-5)] [[[5]](#footnote-6)] [[[6]](#footnote-7)].
	5. The Applicant submitted that, because the failure to make a target reduction order would cause the Applicant to remove the Service from its platform, there may be a perverse outcome whereby all viewers, including the deaf and hearing impaired, will lose access to the Service even though it has recently commenced to supply a high level of captioning. Its cessation would see an overall reduction in the amount of captioned material on the Applicant’s platform.
	6. 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 a target reduction 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 channels 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 costs involved in the provision of captioning for the Service to replace the intended captioning that the Channel Provider was not able to provide in the period from 1 July 2020 until February 2021 due to the COVID-19 pandemic. As the Service is a pass-through service, live captioning was the only means of captioning available to the Applicant. The ACMA is aware from information provided with other applications made under subsection 130ZY(1) that the cost of providing live captioning is significant.
	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, from the point of time when it was aware that the Channel Provider would not be providing the expected level of captioning on the Service, it would not have been commercially viable for the Applicant to incur the costs of captioning the Service to meet the prescribed 45% target in 2020-2021.
	5. The ACMA considers, based on confidential information provided by the Applicant including information about its forward business planning and the potential impact on the Applicant’s subscriber base and revenue if the Service is removed from the platform, that not making the target reduction order for the Specified Eligible Period is likely to involve unjustifiable financial hardship for 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 Applicant has submitted that, according to the Channel Provider, the estimated expenditure to meet the prescribed captioning target for the 2020-21 financial year by captioning an additional 15% of content (should the ACMA not grant the Target Reduction Order) would have been in excess of $364,650 for the Specified Eligible Period, if it had not been prevented from providing captioning early in that financial year due to delays caused by the COVID‑19 pandemic.
	2. The Applicant has not provided an estimate of what the costs would have been for it to live-caption the Service to the required extent, in lieu of captioning being provided by the Channel Provider, but understands, based on estimates provided by the Applicant with other applications, that this cost can be very high. The ACMA accepts that the Applicant would not have pursued this option earlier in the financial year, had it been aware of the Channel Provider’s difficulties in commencing captioning, because it could not afford the expense.

*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 were subscription television sports services that were exempt under subscription television category exemption rules).[[8]](#footnote-9) The remaining service did not meet its captioning target.
	3. Eleven services provided by the Applicant in 2019‑20, including the Service, were subscription television news services. Of these, 8 were exempted from the captioning targets under exemption orders.

*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 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 would 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 one, 2 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 is of the preliminary view that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Applicant because:
* Delays in equipment delivery and training of captioning staff for reasons outside of the control the Channel Provider, primarily related to the COVID‑19 outbreak, meant that captioning of the Service could not commence until February 2021.
* While the Channel Provider is now 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% in the 2021-2021 financial year. 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.
* The Applicant advises that 50% of content on the Service will be captioned in 2020-21. A refusal to make the order (leading to the probable removal of the Service from the Applicant’s platform) would see an overall reduction in the amount of captioned material available on the Applicant’s platform, which is not to the benefit of existing and potential deaf or hearing-impaired viewers.
* If the ACMA were not to make a target reduction 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)