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**DRAFT STATEMENT OF REASONS FOR THE PRELIMNARY DECISION TO MAKE A TARGET REDUCTION ORDER STV-TRO-00132 FOR FOXTEL CABLE TELEVISION PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE SKY RACING 2 FOR THE 2021-2022 FINANCIAL YEAR**

1. **DECISION**
   1. On [DATE], for the reasons set out below, I, [XXX XXX], as delegate of the Australian Communications and Media Authority (**the ACMA**), formed the preliminary view that the ACMA should make a target reduction order for Foxtel Cable Television Pty Ltd (ACN 069 008 797) (**the Applicant**) in respect of the subscription television service, Sky Racing 2 (**the Service**), for the specified eligible period of 1 July 2021 to 30 June 2022 (**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 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 a target reduction order**

* 1. Paragraph 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) (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. The prescribed captioning targets for subscription television services are legislated to increase by 5% annually until they reach 100%.
   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 3 March 2022, 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 2021 to 30 June 2022 | 50% | 25% |

**The Applicant**

* 1. The Applicant is a subscription television licensee. The Applicant is a subsidiary of NXE Australia Pty Limited (NXE).[[2]](#footnote-3)
  2. The Applicant provides movie, general entertainment, news, sport and music subscription television services.

**The Service**

* 1. The Service is an English-language racing service that falls within the captioning category of ‘subscription television sports service’.
  2. The Applicant has submitted that the Service features a mix of Australian and international thoroughbred, harness and greyhound racing. The Service is broadcast 24 hours a day, 7 days a week, and racing is consistently shown throughout the year.
  3. Live racing, and replays of live racing, make up approximately 85% of the Service's content; the remaining 15% is racing-focused magazine-style programs, which are generally shown early in the morning or late at night.
  4. The Applicant has submitted that, as well as race footage, a large amount of text (i.e. a race form guide) is broadcast as part of the service content. This content comprises live wagering graphics, horse names, jockey names, wagering odds, and real-time graphics depicting race order while the races are run. During the live broadcast of a race, real-time data is broadcast, comprising a preamble relating to the race, information regarding the final loading and the jump. Once the race is complete, the graphics depict the winner and data about the next race.
  5. The Applicant did not provide any detail about the racing-focused magazine-style programs that make up approximately 15% of the Service’s content.
  6. The target audience for the Service is racing punters, who use the data displayed on the screen to create a racing card and to bet on their desired races.
  7. The Service is provided by Sky Channel Pty Ltd (**the Channel Provider**) and is delivered to the Applicant for broadcast as a pass-through service.[[3]](#footnote-4) The Applicant has no contractual entitlement, or practical capacity, to alter the content that is provided on the Service, or to insert additional content.
  8. The Service is available as part of the Applicant's 'Foxtel Plus Bundle' which is the basic package available to all cable/satellite subscribers at a cost of $49 per month.
  9. The Applicant has advised that the Channel Provider is currently providing captions on the Service for both the 85% racing content and the 15% magazine-style content, on a proportionate basis.
  10. The Service has not previously been broadcast with captions on the Applicant’s platform because the Applicant has previously nominated the Service for exemptions from captioning that were available under subsection 130ZX(7) of the BSA.
  11. In July 2021, the Applicant applied for a captioning exemption order for the Service for a 5-year period that included the Specified Eligible Period. The Applicant was advised on 15 October 2021 that its application was unsuccessful.

1. **EVIDENCE AND REASONS FOR 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.
   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, under its contract with the Channel Provider, the Channel Provider is obliged to provide necessary captioning on the Service and that the Applicant is not itself able to insert captioning.
  2. So that the Applicant would comply with its captioning obligation for the Service, the Channel Provider launched captioning on the Service from 24 November 2021, following extensive configuration and testing. The Applicant has estimated that the cost to the Channel Provider of providing captioning for the 2021-2022 financial year will be $100,000.00 (see paragraph 5.27 of this statement).
  3. The Applicant has submitted that, between December 2021 and February 2022, the third-party captioning system used by the Channel Provider failed on ‘several occasions’, resulting in captioning outages on the Service, some of which extended over several days.
  4. The combination of the time taken for the Channel Provider to implement captioning, and the subsequent technical difficulties, means that the Applicant does not expect to meet the 50% target for the Service by the end of the 2021-2022 financial year.
  5. The Applicant has submitted that, if the ACMA does not make the Target Reduction Order, it would suffer the detriment of being in breach of its obligations under Part 9D of the BSA with respect to the Service.
  6. The Applicant has further submitted that this detriment would constitute unjustifiable hardship because:
* the Channel Provider has attempted to implement a captioning system, at a significant cost, and the failure to meet the target is in part caused by technical difficulties
* the nature of the Service, where approximately 85% of the programming is racing and already includes a large amount of on-screen textual data about each race, means that for much of the programming, the provision of captioning is not beneficial for viewers (including deaf and hearing-impaired viewers) and, in fact, clutters the screen.
  1. The ACMA has noted that the Applicant has attempted to avoid the detriment of being in breach of its Part 9D captioning obligations by arranging for the Channel Provider to implement captioning on the Service from 24 November 2021. The Applicant has indicated that this start date was preceded by a period of configuration and testing but did not specify how long this testing took.
  2. The Applicant did not provide specific reasons why captioning of the Service did not commence earlier in the 2021-2022 financial year, but the ACMA notes that the Applicant may have been waiting to learn the outcome of its earlier exemption order application made in July 2021. The ACMA advised the Applicant that its application was unsuccessful on 15 October 2021.
  3. The ACMA has also noted the Applicant’s submission about the difficulty and cost of captioning live-racing programs, such as on-screen cluttering, and that the captioning of those programs would be of limited, if any, benefit to deaf or hearing-impaired viewers. The Applicant has not claimed that this reasoning applies to the racing-focused magazine programs generally shown early in the morning or late at night, although the ACMA notes that these programs only constitute approximately 15% of programming on the Service.
  4. As the Channel Provider is captioning racing content and non-racing, magazine-style, content on a proportionate basis, if the Target Reduction Order is not made and the Applicant is required to caption the Service to meet the 50% target, any additional programming that is captioned would be likely to consist predominantly of racing content and the Applicant’s reasoning about the lack of benefit to viewers (including deaf and hearing-impaired viewers) would therefore apply to a majority of the additional content.
  5. Consequently, the ACMA is of the preliminary view that, if the Target Reduction Order is not made:
* the Applicant would suffer the detriment of being in breach of its Part 9D captioning obligations, which it has already incurred an expense to avoid, in circumstances where it has no contractual entitlement, or practical capacity, to alter the content that is provided by the Channel Provider, or to insert additional content;
* because of the nature of the Service, the cost of the detriment would be disproportionate compared to the minimal benefit to deaf and hearing-impaired audiences of providing captions for what would predominantly be racing programming that is accompanied by detailed on-screen textual information in any event.
  1. Having regard to the detriment to the Applicant, and the small potential benefit to deaf and hearing-impaired viewers, the ACMA is of the preliminary view that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Applicant.

*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 if the ACMA makes the Target Reduction Order, it would have a low impact on deaf or hearing-impairedviewers because:
* some captioning has been provided on the Service since 24 November 2021
* in contrast to other subscription television services where captioning would be the only on-screen text, the Service provides a substantial amount of information as text on screen and, during a race, much of the screen is taken up by textual information which, for deaf and hearing-impaired viewers, achieves the same benefits as captioning
* confidentially, the Applicant provided figures for the average daily reach for the Service on the Foxtel platform, which were low, and estimates that 1 in 6 of its viewers is deaf or hearing impaired.
  1. Information available to the ACMA indicates that between 10.2% and 15.3% of Australians (i.e. between approximately 1 in 10 and 1 in 6) are affected by total or partial hearing loss.[[[4]](#footnote-5)] [[[5]](#footnote-6)] [[[6]](#footnote-7)]. Therefore, although total audience numbers may be low, hearing-impaired viewers may make up a reasonable proportion of total viewers. The ACMA considers that making the Target Reduction Order would have some adverse impact on deaf and hearing-impaired viewers, and potential viewers.
  2. The ACMA has reached a preliminary view that the Target Reduction Order, if made, would have a minimal adverse impact on deaf or hearing-impaired viewers. This is because:
* the overall number of viewers of the Service, and therefore the likely number of deaf and hearing-impaired viewers, or potential viewers, is low
* while there will be some detriment for deaf and hearing-impaired viewers caused by a reduced amount of captioning of the racing-focused magazine-style programs (which make up approximately 15% of the content on the Service), the extensive on-screen textual information that accompanies racing broadcasts (detailed in paragraph 4.7 above) largely compensates for most of the information that could be obtained from captioning of live commentary during racing broadcasts.

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

* 1. The Applicant provided the following information, on a confidential basis, about the number of people who subscribe to the ‘Foxtel Plus Bundle’ via the Applicant (and who can therefore access the Service) and about the average daily number of viewers who watched the Service across the Foxtel platform as a whole (i.e., including subscribers of the Applicant and other licensees who resell Foxtel services), sourced from OzTAM:
* the total number of subscribers to the Foxtel Plus Bundle (containing the Service) provided by the Applicant at the close of the 2020-2021 financial year
* the average daily reach for the Service as supplied by all licensees on the Foxtel platform in the 2020-2021 financial year
* the total percentage audience share of the Service across all Foxtel providers in the 2020-2021 financial year.
  1. The Applicant estimates that in 2020-2021, a very low number of viewers might have used captions on the Service across the entire Foxtel platform on any given day.
  2. Having regard to the figures supplied by the Applicant in confidence, the ACMA accepts that the number of subscribers who access the Service is low, but that deaf and hearing-impaired viewers are likely to make up a reasonable proportion (approximately 16.7%) of viewers.

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

* 1. The Applicant is owned by NXE, which is a joint venture between News Corporation (which has a 65% interest) and Telstra Corporation Limited (which has a 35% interest).
  2. The Applicant has submitted that it is part of a group of companies and partnership entities held by NXE that generates revenue through subscriptions and advertising.
  3. On a confidential basis, the Applicant provided the revenue for this group of companies for the 2020-2021 financial year.
  4. The ACMA has considered the financial information provided by the Applicant, in confidence, in respect of NXE. The ACMA notes that the Applicant has contracted the Channel Provider to supply the Service at a contract price, which includes a significant cost for the provision 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)*

* 1. The Applicant submitted that the estimated amount of expenditure for the Channel Provider to meet the required captioning level is approximately $100,000.00, for the Specified Eligible Period.

*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 2020-2021, provided in accordance with subsection 130ZZC(5) of the BSA, the Applicant reported providing captioning on 91 of 99 subscription television services.
  2. With respect to the Service, the Applicant has submitted that, over the previous 6 months, it provided approximately 45 hours of captioning on the Service each week. This would equate to an average rate of captioning of approximately 26.8% per week. The Applicant has further submitted that, based on advice from the Channel Provider, it expects to provide captioning for 25% of content, averaged across the Specified Eligible Period.

*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 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.
  2. The Applicant submitted that, in that event, it may be forced to limit the number of sports services on its platform in the future, which will have a wider impact on the availability of sports services in Australia.
  3. The ACMA notes that, based on the information provided by the Applicant, it is unlikely that the Channel Provider can provide sufficient captioning for the Applicant to meet the prescribed captioning target for the Service (i.e., if the Target Reduction Order is not made).
  4. The Applicant did not indicate the likelihood, or the extent, of reductions in the number of sports services if it is found to be in breach of its Part 9D obligations. So the ACMA does not know how probable it would be that the Service, or other sport services, will not be provided if the Target Reduction Order is not made.

*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 previously made 3 applications for exemption orders for racing services for a 5‑year period that included the Specified Eligible Period, including the application previously made in respect of the Service, as noted in paragraph 4.14. All 3 applications were unsuccessful.
  2. The Applicant has also made an application for a target reduction order with respect to another racing service for the same period as the Specified Eligible Period.

*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 considers that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Application because:

* The Applicant has taken steps to try to meet the 50% captioning target for the 2021-2022 financial year, after its application for a captioning exemption order for the Service was refused on 15 October 2021.
* The expected inability of the Applicant to meet the 50% captioning target has been caused by technical issues and difficulties encountered by the Channel Provider since it commenced captioning on the service in November 2021. Although these technical issues have now been resolved, the Channel Provider is not able to provide sufficient captioning to meet the target, and due to the terms of its contract with the Channel Provider, the Applicant is not able to take action independently to address the captioning shortfall.
* Therefore, if the Target Reduction Order is not made, the Applicant is likely to breach the licence condition requiring compliance with the captioning requirements in subsection 130ZV(1) of the BSA.
* The ACMA accepts that, if it were to make the Target Reduction Order, the adverse impact on deaf and hearing-impaired viewers of the Service (who are low in number, based on the figures provided by the Applicant) would be minimal, due to the nature of the Service (predominantly horse racing) and the extensive textual information that is already provided on-screen, which largely compensates for reduced captioning of live commentary during racing broadcasts.
* In these circumstances, the ACMA is of the preliminary view that the detriment that would be suffered by the Applicant if the Target Reduction Order is not made would be unjustifiable.

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. NXE Australia Pty Limited is a joint venture between News Corporation and Telstra Corporation Limited. News Corporation holds a 65% interest and Telstra Corporation Limited holds the remaining 35%. [↑](#footnote-ref-3)
3. A pass-through service is one obtained under a licensing agreement from a Channel Provider. [↑](#footnote-ref-4)
4. *2017-18 National Health survey: First results*, Australian Bureau of Statistics, Table 3.3 Long-term health conditions, Proportion of persons, located at <https://www.abs.gov.au/statistics/health/health-conditions-and-risks/national-health-survey-first-results/latest-release>. [↑](#footnote-ref-5)
5. *Hearing for Life – the Value of Hearing Services for Vulnerable Australians*, Hearing Care Industry Association, March 2020, located at <https://www.hcia.com.au/hcia-wp/wp-content/uploads/2020/02/Hearing_for_Life.pdf>. [↑](#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> [↑](#footnote-ref-7)