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**DRAFT STATEMENT OF REASONS FOR THE PRELIMNARY DECISION TO MAKE A TARGET REDUCTION ORDER STV-TRO-00138 FOR FETCH TV PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE DISCOVERY TURBO FOR THE 2021-2023 FINANCIAL YEARS**

1. **PRELIMINARY 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 Fetch TV Pty Ltd (**the Applicant**) in respect of the subscription television service, Discovery Turbo (**the Service**), for the specified eligible period of 1 July 2021 to 30 June 2023 (**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 31 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 | 90% | 60% |
| 1 July 2022 to 30 June 2023 | 95% | 65% |

**The Applicant**

* 1. The Applicant is a subscription television licensee. The Applicant is an indirect wholly owned subsidiary of Media Innovations Holdings Pty Ltd (MIH).
	2. All services offered by the Applicant are licensed wholly from channel suppliers who acquire and compile the service and deliver it to the Applicant. The Applicant provides no input whatsoever into the content of its services.
	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 services are ‘pass-through’ because the Applicant has no ability to compile services 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 the only 24-hour, 7-days a week, motoring channel in Australia. Programmes are aimed primarily at motoring enthusiasts. It is aimed at a younger, mainly male, audience.
	2. The Service is provided by Discovery Networks Asia Pacific Pty Ltd (**the Channel Provider**) and is delivered to the Applicant for broadcast as a pass-through service. The Applicant has no contractual entitlement, or practical capacity, to alter the content that is provided on the Service, or to insert additional content.
	3. The Service is available as part of the following packages provided by the Applicant:
		+ Fetch ‘Entertainment’ package –a ‘legacy’ package of programming that contains a large number of English language channels;
		+ Fetch ‘Ultimate’ package, which contains all 48 channels available in each of the four ‘Skinny’ packs (‘Kids’, ‘Knowledge’, ‘Vibe’ and ‘Variety’) provided by the Applicant; and
		+ Fetch ‘Variety’ package, which currently has 10 channels, including drama and music.
	4. The Service’s genre is General Entertainment Category A, which attracts an annual captioning target of 90% for the financial year commencing 1 July 2021 and 95% for the financial year commencing 1 July 2022.
	5. In December 2014, the Applicant applied for a captioning exemption order for the Service for a 1-year period from 1 July 2014 to 30 June 2015. The ACMA subsequently made the exemption order under subsection 130ZY(3) of the BSA.
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, if the ACMA does not make the 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:
* Due to its channel supply arrangements with another subscription television licensee, Foxtel Cable Television Pty Limited (Foxtel), the Channel Provider intends to caption the Service at the subscription television general entertainment Category C captioning targets of 60% for 2021-2022 and 65% for 2022-2023 and does not intend to provide the Service with captioning necessary to meet the captioning targets for Category A services (90% for 2021-2022 and 95% for 2022-2023), irrespective of whether the Target Reduction Order is made.
* The Applicant cannot alter the content of the Service from what is provided by the Channel Provider and therefore cannot provide additional captions for the Service to make up the shortfall.
* In any case, it would not be commercially viable for the Applicant to pay for sufficient additional captioning on the Service due to the high cost of live captioning relative to the Applicant’s financial position (the Applicant’s cost estimate is provided in paragraph 5.27 below). The Applicant notes that this is a cost that its competitor, Foxtel, is not required to bear.
	1. The Applicant is unable to nominate the Service as a subscription television general entertainment Category C service because the Applicant does not broadcast a sufficient number of services to qualify for that category, as required by subsection 130ZW(3) of the BSA.
	2. The Applicant submitted that it would suffer certain detriments to its business if it were required to remove the Service:
* as the Service is a well-known and very sought-after service that is an attraction in the Applicant’s service offerings, its removal would reduce the variety and breadth of the Applicant’s content and diminish the value and appeal of the Applicant’s service offerings, making them 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, meaning that 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 notes the claimed detriments and further notes that, if the Applicant was required to cease providing the Service, it would suffer a competitive disadvantage relative to other subscription television licensees that provide the Service, because the Applicant provides fewer services than those competing licensees.
	2. ACMA considers that detriment would be suffered by the Applicant as a result of a failure to make the Order, because the Channel Provider, due to its own financial constraints, will only caption the proportions of the Service indicated above, and if the Applicant ceases to provide the Service because of this, it will diminish the value and appeal of the Applicant’s service offerings.

*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 there would likely be a negligible impact on deaf and hearing-impaired viewers or potential viewers if the ACMA made the Order, because:
* viewers would receive the same amount of captioning when watching the Service provided by the Applicant as they would for the Service when it is provided by other subscription television licensees (i.e., at a 60% target in 2021-2022 and a 65% target in 2022-2023)
* as provided by the Applicant, the Service has a small audience.
	1. The Applicant provided subscription figures, as at February 2022, 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)
	2. 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. Nevertheless, he ACMA considers that making the 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)].
	3. The Applicant submitted that, because a failure to make the Order would cause it to remove the Service from its platform, there would be a negative impact whereby all viewers, including the deaf and hearing impaired, will lose access to the Service even though it is currently being provided with a substantial amount of captioning. Its cessation would see an overall reduction in the amount of captioned material on the Applicant’s platform.
	4. In the longer-term, the Applicant submitted that, because a failure to make the Order would cause it 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.
	5. 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 the 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 2022, 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
* the percentage of subscribers (relative to total subscribers accessing linear channel content) who viewed the Service through 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 2022, was relatively low.

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

* 1. The Applicant submitted that its business model is to provide a low-cost but full-service subscription TV offering. The key part of the business model is to ensure that its offering is keenly priced so that it is affordable for ISPs to include in their bundles. The Applicant’s distribution model is almost entirely predicated on inclusion in ISP bundles.
	2. 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 2021.
	3. The Applicant submitted that if sufficient captioning for the Service cannot be provided by the Channel Provider, then the only way in which the Applicant could comply with the captioning obligations would be to source live captioning from another provider. The Applicant has provided a quote from AI Media of $780,000 per year for live captioning (not including non-recurring set-up costs of $1,065,000 that could be spread across other services if required) and has submitted that it would not be financially viable to provide sufficient live captioning to meet the captioning target for the Service at the quoted cost (in addition to what is already provided by the Channel Provider).
	4. Based on the confidential financial information provided, the ACMA accepts that it is not commercially viable for the Applicant to incur the costs of providing captioning on the Service that would be sufficient to increase it from 60% to the prescribed 90% target in 2021-2022 and from 65% to the prescribed 95% target in 2022-2023.
	5. The ACMA considers, based on confidential information provided by the Applicant including information about its forward business planning, that if it does not make the Target Reduction Order the Applicant would be subject to a significant additional captioning cost (which would impose a significant financial hardship on the Applicant) if it did not decide to cease providing the Service.

*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 it has no ability to compile the Service or carry out post or pre-production by the addition of pre-prepared captions on the content, and is prohibited from including any insertions or overlays on the channel by its agreement with the Channel Provider.
	2. The Applicant has submitted that, because the Service is a pass-through service, if the Applicant were required to caption the Service to the annual captioning target (i.e. beyond the level that will be captioned by the Channel Provider), it would be required to use live captions.
	3. The Applicant has provided a quote from AI Media for the estimated cost of captioning an additional 30% of content each year of the Specified Eligible Period (i.e. in addition to the captioning already provided by the Channel Provider), should the ACMA not grant the Order.
	4. The AI Media quote specifies an annual cost of $780,000 for captioning, plus a non-recurring initial set-up cost of $1,065,000. Therefore the total cost to live caption 30% of content on the Service for the entire Specified Eligible Period would be $2,625,000.
	5. The ACMA also notes that, at the time the application was made, it would have been practically very difficult for the Applicant to have arranged sufficient additional captioning for the Service to comply with the 90% obligation by or before the end of the financial year.

*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 indicated that captioning was provided on 42 of its 57 subscription television services in the period from 1 July 2020 to 30 June 2021.[[7]](#footnote-8)
	2. All the captioning was provided by third-party channel providers of those services. In 40 cases the Applicant reported that it exceeded the annual captioning targets. The Applicant has reported that 2 services provided captioning but did not meet the required captioning target.
	3. Of the remaining 20 services that were not captioned in 2020-2021, 15 were exempt from captioning targets (of these 15, 12 had exemption orders in force and 3 were subscription television sports services that were exempt under subscription television category exemption rules).[[8]](#footnote-9)
	4. Twenty-seven services provided by the Applicant in 2020‑2021, including the Service, were subscription television general entertainment services. Of these, 6 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 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 and variety of subscription television general entertainment services offered on the Applicant’s platform and may impact the viability of the platform as a whole, as the loss of services 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. 12 services provided by the Applicant are subject to an exemption order for a period that overlaps or partially overlaps with the Specified Eligible Period.
	2. 3 services provided by the Applicant are subject to a target reduction order for a period that overlaps or partially overlaps with 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:
* Having regard to the financial information provided by the Applicant (including revenue from subscribers) and the high costs estimated for the provision of sufficient additional captioning, it is not commercially viable for the Applicant to provide captioning for an additional 30% of programming on 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 additional captioning within the Specified Eligible Period.
* If the ACMA were not to make the Order, the Applicant would be unable to meet the prescribed captioning target for the Service, making it likely that the Applicant would be in breach of the captioning requirements in Part 9D of the BSA throughout the Specified Eligible Period.
* To limit the extent and duration of the breach the Applicant has advised that, if the Target Reduction Order is not made, it would cease to provide the Service which would have consequential detriment for the appeal of its service offerings, and the operations of its business.
* The Applicant advises that at least 60% of programming on the Service will be captioned in 2021-2022. A refusal to make the Target Reduction Order (and the subsequent removal of the Service from the Applicant’s platform) would lead to an overall reduction in the amount of captioned material available on the Applicant’s platform, which would not be to the benefit of existing and potential deaf or hearing-impaired viewers.
* 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. A pass-through 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> [↑](#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)