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**DRAFT STATEMENT OF REASONS FOR THE PRELIMNARY DECISION TO MAKE A TARGET REDUCTION ORDER STV-TRO-00139 FOR FOXTEL CABLE TELEVISION PTY LTD IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE TRT WORLD 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, TRT World (**the Service**), for the specified eligible period of 1 July 2021 to 30 June 2022 (**the Specified Eligible Period**).
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 | 50% | 29% |

**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 provided by TRT Corporation (**the Channel Provider**) and delivered to the Applicant as a live pass-through service for transmission to the Applicant’s subscribers.[[3]](#footnote-4) It is a 24-hour English-language international news service based in Istanbul, Turkey, that delivers worldwide news and current affairs as well as programming related to sport, business, arts, and culture. The target audience for the Service is those aged over 16 who are interested in international news.
  2. The Applicant distributes the Service as part of its 'Foxtel Plus Bundle' package. The Channel Provider is contractually obliged to the Applicant to provide captioning for programs broadcast on the Service.
  3. The Service falls within the captioning category of ‘subscription television news service’, which would normally attract an annual captioning target of 50% for the financial year commencing 1 July 2021.

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 has submitted that, if the Target Reduction Order is not made for the Service, it will be in breach of the captioning target requirements for subscription television services in Part 9D of the BSA.
  2. The Applicant submitted that, under its contract with the Channel Provider, the Channel Provider is obliged to provide necessary captioning on the Service to comply with the BSA, and that the Applicant is not itself able to insert captioning.
  3. The Applicant has indicated that approximately 50% of the content broadcast on the Service is live, with the remaining content comprising repeats of live programming and pre-recorded programs. Captioning on the Service was sourced by the Channel Provider from another company (**the Captioning Provider**) based in Turkey. The Captioning Provider was only able to deliver captions for repeat and pre-recorded programs and did not caption live content.
  4. The Applicant has explained that, from 6 March 2022, the Captioning Provider experienced difficulties in providing captions for programs on the Service due to a shortage of qualified staff as a result of the Covid-19 pandemic. Consequently, captioning on the Service ceased from 7 March 2022. Up until that point, the Channel Provider was, on average, captioning 42.91% of programming on the Service. The Channel Provider thereafter ended its engagement of the Captioning Provider.
  5. The Applicant has suggested alternative captioning solutions to the Channel Provider to address the current captioning shortfall, including live-captioning; changing the existing programming mix to include more captioned content; and engaging a new captioning provider. The Channel Provider has not been prepared to action any of the suggestions, primarily because it is of the view that the cost to engage a new captioning provider is not commercially viable given the short time that the channel supply agreement with Foxtel has left to run (it expires in September 2022), and because changing the programming mix to suit Foxtel would adversely impact viewing for customers in other countries.
  6. Based on the level of captioning that was provided during the Specified Eligible Period before captioning ceased, the Applicant submitted that it cannot meet the 50% target for the Service for the Specified Eligible Period and that 29% of content on the Service will have been captioned throughout the Specified Eligible Period.
  7. The Applicant submitted that it and the Channel Provider, could not have anticipated the issues affecting the external Captioning Provider. The Applicant has submitted that, if the Target Reduction Order is not made, it will be in breach of its captioning obligations in Part 9D of the BSA and may cease providing the Service.
  8. The ACMA understands that the circumstances causing the current lack of captions are likely to continue unless and until the Applicant makes a decision to renew its channel supply agreement with the Channel Provider from September 2022 (a decision which may be affected by the outcome of this application). If the Target Reduction Order is given, and the Applicant decides to renew the channel supply agreement for the Service, captioning will likely be restored in the 2022-2023 financial year, allowing the Applicant to meet the captioning target for the Service in that year.
  9. The ACMA considers that the expected failure by the Applicant to provide the Service with captioning to the required 50% target has been caused by unexpected issues (primarily with the Captioning Provider experiencing staff shortages due to the Covid-19 pandemic) that are beyond the Applicant’s control. The Applicant has incurred a substantial expense in its contract with the Channel Provider to allow for the cost of captioning and has put several alternatives to the Channel Provider to attempt to achieve the 50% captioning target. However, none of these alternatives was acceptable to the Channel Provider for its own commercial reasons.
  10. If the Target Reduction Order is not made, the Applicant will breach a licence condition and may need to cease providing the Service. The ACMA considers that the Applicant has taken reasonable commercial steps to fulfil its captioning obligations, and the failure to do so appears to be beyond its control, meaning that the detriment to the Applicant, in the circumstances described above, would constitute an unjustifiable hardship.

*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 (29%) will have been provided on the Service since the commencement of the Specified Eligible Period and the Target Reduction Order will only cover the current financial year
* a lot of the news content on the Service is highly text and visual based including on-screen news tickers and scrolling text headlines, and captioning is not likely to dramatically enhance the viewing experience of the audience
* only a small number of deaf and hearing-impaired viewers are expected to watch the service on any given day.
  1. Confidentially, the Applicant provided figures for the average daily reach for the Service on the Foxtel platform and estimates that 1 in 6 of its viewers is deaf or hearing impaired.
  2. 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, a figure equivalent to that cited by the Applicant.[[[4]](#footnote-5)] [[[5]](#footnote-6)] [[[6]](#footnote-7)].
  3. Therefore, although total audience numbers may be very 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.
  4. The ACMA notes the Applicant’s view that the adverse impact of an absence of captioning would be mitigated to some extent by on-screen text such as on-screen news tickers and scrolling text headlines. The ACMA considers that although this text may assist the comprehension of a news program by deaf and hearing-impaired viewers, it is not an adequate replacement for an absence of captions.
  5. The ACMA has reached a preliminary view that the Target Reduction Order, if made, would have an adverse impact on deaf or hearing-impaired viewers, although this effect would be minimal because:
* the overall number of viewers of the Service, and therefore the likely number of deaf and hearing-impaired viewers, or potential viewers, is very low
* a significant amount of captioning (29%) has already been provided across the Specified Eligible Period
* the use of on-screen text as described above may assist comprehension by deaf and hearing-impaired viewers.

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

* 1. The Applicant provided 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 of other licensees who resell Foxtel services), sourced from Foxtel DWH viewing data. Information that was provided comprised:
* 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. Having regard to the figures supplied by the Applicant in confidence, and information available to the ACMA about the number of people affected by partial or total hearing loss, the ACMA accepts that the number of subscribers who access the Service is very low, but that deaf and hearing-impaired viewers are likely to make up a reasonable proportion of viewers (up to approximately 16.7%).
  2. Further, while the Service has a low number of viewers, the ACMA considers that it is preferable for those viewers to have some captioning available on the Service rather than for those viewers to lose access to the Service through its possible cancellation or suspension.

*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.
  5. The ACMA notes that the Applicant has contracted the Channel Provider to supply required captioning for the Service at a significant cost ($466,000 for the Specified Eligible Period).

*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 would be approximately $466,000.00, for the Specified Eligible Period.
  2. However, the Applicant has also indicated that the cost of providing captioning on the service to meet the required target is not the reason why the target will not be met.

*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, approximately 70.22 hours of captioned programs were transmitted on the Service each week.
  3. The Applicant submitted that the captioned programming was all provided by the external Captioning Provider.

*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 international pass-through news channels on its platform in the future, which will have a wider impact on the availability of international global news services in Australia.
  3. The ACMA considers that a loss of the Service would reduce the quantity of television programs relating to news that are offered on the Applicant’s platform.
  4. While making the Target Reduction Order is likely to impact the quality of the Service for deaf and hearing-impaired viewers in the short term, the ACMA considers that the quality of the Service for deaf and hearing-impaired viewers should improve if Foxtel decides to renew the contract for provision of the Service and a new captioning provider is sourced.

*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 3 Exemption Orders and 2 Target Reduction Orders for the 2021‑2022 financial year. The Applicant was notified that the 3 Exemption Orders were not approved on 8 September 2021; and 2 draft Target Reduction orders were published for comment on 22 April 2022.[[7]](#footnote-8)

*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 Applicant because:

* the failure to caption programs on the Service from 7 March 2022 was due to significant and unexpected difficulties (caused by COVID-19 and outside of the Applicant’s control) which disrupted the operations of the Channel Provider’s Turkish-based captioning provider for the Service, preventing the Channel Provider from fulfilling its contractual obligation to meet the prescribed captioning target in the Specified Eligible Period
* the Applicant has tried, but been unable, to resolve these difficulties, primarily because they relate to the relationship between the Channel Provider and the Captioning Provider, and to the Channel Provider’s own commercial circumstances
* irrespective of whether the Target Reduction Order is made, the level of captioning on the Service will not increase during the Specified Eligible Period
* the Applicant being found to be in breach of Part 9D, and likely ceasing to provide the Service, would be to the detriment of its own business and to audiences, including deaf and hearing-impaired audiences.

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 channel or service is one obtained under a licensing agreement from the Channel Provider. Under its agreement with TRT Corporation, the Applicant does not alter the content that is provided on the TRT World Service or insert additional content. [↑](#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)
7. STV/TRO-132 and STV/TRO-133 <https://www.acma.gov.au/draft-exemption-orders-and-target-reduction-orders-consultation> [↑](#footnote-ref-8)