

STATEMENT OF REASONS FOR THE DECISION TO MAKE TARGET REDUCTION ORDER STV-TRO-00145 FOR FOXTEL CABLE TELEVISION PTY LTD IN RESPECT OF THE AURORA CHANNEL SUBSCRIPTION TELEVISION SERVICE FOR THE 2022-2023 FINANCIAL YEAR

1. DECISION

- 1.1 On June 9 2023, for the reasons set out below, I, Phyllis Fong, as delegate of the Australian Communications and Media Authority (**the ACMA**), decided to make a target reduction order (**the Order**) for Foxtel Cable Television Pty Ltd (ACN 069 008 797) (**the Applicant**) in respect of the subscription television service, Aurora Channel (**the Service**), for the specified eligible period of 1 July 2022 to 30 June 2023 (**the Specified Eligible Period**).
- 1.2 The Order has been published on the ACMA's website in accordance with subsection 130ZY(10) of the *Broadcasting Services Act 1992* (**the BSA**).

2. LEGISLATION

Annual captioning targets

- 2.1 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.
- 2.2 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

- 2.3 Paragraph 130ZY(1)(b) of the BSA provides that a subscription television licensee may apply to the ACMA for a target reduction order that:
 - (i) is expressed to relate to a specified subscription television service provided by the licensee in a specified eligible period; and
 - (ii) 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.
- 2.4 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.

- 2.5 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.
- 2.6 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.
- 2.7 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).
- 2.8 Subsection 130ZY(6) of the BSA provides that, before making a target reduction order under subsection 130ZY(3) of the BSA, the ACMA must:
- a) within 50 days after receiving the application for a target reduction order, publish on the ACMA's website a notice:
 - (i) setting out the draft target reduction order; and
 - (ii) inviting persons to make submissions to the ACMA about the draft target reduction order within 30 days after the notice is published: and
 - b) consider any submissions received within the 30-day period mentioned in subparagraph 130ZY(6)(a)(ii) of the BSA.
- 2.9 Section 204 of the BSA provides that an application may be made to the Administrative Appeals Tribunal (AAT) for a review of a decision to make a target reduction order under subsection 130ZY(3) of the BSA, by a person whose interests are affected by the decision.
- 2.10 Section 205 of the BSA provides that, if the ACMA makes a decision that is reviewable under section 204 of the BSA, the ACMA is to include in the document by which the decision is notified:
- a) a statement setting out the reasons for the decision, and
 - b) a statement to the effect that an application may be made to the AAT for a review of the decision.

3. LEGISLATIVE OBJECTIVES

- 3.1 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%.

3.2 The Second Reading Speech for the 2012 Amendment Bill¹ 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.

3.3 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.

4. APPLICATION

4.1 On 30 March 2023, the Applicant applied for the Order under paragraph 130ZY(1)(b) of the BSA in relation to the Service for the Specified Eligible Period, as follows:

Specified Eligible Period	Annual captioning target	Proposed reduced annual captioning target
1 July 2022 to 30 June 2023	65%	25%

The Applicant

4.2 The Applicant is a subscription television licensee. The Applicant is a subsidiary of NXE Australia Pty Limited (NXE).²

4.3 The Applicant provides movie, general entertainment, news, sport and music subscription television services, and on-demand access to movies.

The Service

4.4 The Service is provided by Aurora Community Television Pty Ltd (**the Channel Provider**) and is delivered to the Applicant for broadcast as a pass-through service.³ The Channel Provider is contractually obliged to the Applicant to provide sufficient captioning on the Service to enable the Applicant to comply with the captioning obligations imposed by Part 9D of the BSA.

4.5 The Applicant has submitted that the Service screens Australian content created by emerging and independent producers. The Service provides a national platform for programming produced by a wide variety of interest groups, from religious services to

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.

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%.

³ A ‘pass-through service’ is a service that is obtained under a licensing agreement from a Channel Provider.

not-for-profit organisations. During the Specified Eligible Period, the Service has been broadcast without captioned content since October 2022.

- 4.6 The Service's genre falls within the captioning category of 'General Entertainment' and is nominated by the Applicant as Category C, which would normally attract an annual captioning target of 65% for the financial year commencing 1 July 2022, increasing by 5% each financial year thereafter.
- 4.7 The Service is available as part of the Applicant's 'Foxtel Plus Bundle' which is the basic package available to all cable/satellite subscribers.

5. EVIDENCE AND REASONS FOR DECISION

- 5.1 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.
- 5.2 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.
- 5.3 In reaching a decision to make the Order, the ACMA has considered written representations and supporting evidence submitted by the Applicant.
- 5.4 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)

- 5.5 The Applicant has submitted that, if the ACMA does not make the Order, it would suffer the detriment of being in breach of its obligations under Part 9D of the BSA with respect to the Service. The ACMA notes that paragraph 10(1)(eb) of Schedule 2 to the BSA imposes a licence condition that requires a licensee such as the Applicant to comply with all applicable provisions in Part 9D of the BSA.
- 5.6 The Applicant submitted that, under its contract with the Channel Provider, the Channel Provider is obliged to provide necessary captioning on the Service to enable the Applicant to comply with Part 9D of the BSA.
- 5.7 The Applicant submitted that the Channel Provider was subject to a cyber-attack in October 2022 when ransomware was installed on its systems. This incident caused damage to the Channel Provider's 'captioning card' which could not be restored, and which has prevented the Channel Provider from captioning programs on the Service.

- 5.8 As a result of the cyber-attack and the subsequent technical difficulties faced by the Channel Provider, the Channel Provider has not been able to deliver captions on the Service to meet the required target of 65% for the 2022-2023 financial year. This means that, due to circumstances beyond the Applicant's control, the Applicant does not expect the Service to meet the 65% target by the end of the 2022-2023 financial year.
- 5.9 The Applicant has submitted that the Channel Provider is still in the process of working to provide a solution to restore captions to its programming, but the Channel Provider relies on individuals contributing on a 'pro-bono' basis to assist the restoration, and, despite their best efforts, this has been a 'stumbling block' in restoring captions.
- 5.10 The Applicant noted that the Channel Provider had attempted to restore captioning on the Service, for example, by exploring the option of using a cloud-based playout model. The Applicant submitted that, although this option will restore captioning to levels that will meet the required target for the 2023-2024 financial year, it will not be available until the first half of that year.
- 5.11 Based on the information provided by the Applicant, in particular the circumstances that led to the reduction in captions on the Service and to the time taken for the Channel Provider to restore captions, the ACMA is of the view that the reduction of captions that has already occurred in the 2022-2023 financial year was beyond the control of the Applicant and the Channel Provider.
- 5.12 The ACMA also notes the steps taken by the Channel Provider to restore captions on the Service and therefore to meet the terms of its contract with the Applicant. On this basis, the ACMA is of the view that, if the detriment to the Applicant, namely, the risk of being found non-compliant with a licence condition, was realised, it would be despite the fact that the Applicant has taken reasonable steps, including paying the Channel Provider, to ensure that captions were provided.
- 5.13 The Applicant has also submitted that, if the ACMA does not make the Order, there is a possibility that the Applicant may cease to provide the Service to minimise any ongoing non-compliance. The ACMA notes the Applicant's view, but does not consider that this is likely, because ceasing the Service would not undo any breach that may have already occurred in the 2022-2023 financial year. Additionally, as the Applicant expects captioning at the required level to be restored for the 2023-2024 financial year, ceasing the Service would not be necessary to prevent future non-compliance.

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)

- 5.14 The Applicant submitted that the impact of making the Order on deaf or hearing-impaired viewers, or potential viewers, of the Service, would be limited because:
- the Service commands a low viewership, with deaf or hearing-impaired viewers making up a small proportion of total viewers.
 - a proportion of the annual captioning target will still be provided.
 - the Channel Provider intends to caption the Service at the required captioning category level from 2023-2024 onwards.

5.15 Confidentially, the Applicant provided figures for the average daily reach for the Service, and estimates that 1 in 6 of its viewers is deaf or hearing impaired.

5.16 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] ^[5] ^[6]. 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 Order would have some adverse impact on deaf and hearing-impaired viewers, and potential viewers.

5.17 Having considered the Applicant's submission, the ACMA has formed the view that making the Order would have an adverse effect on deaf and hearing-impaired viewers. The ACMA notes in the Applicant's submission that a proportion of the annual captioning target will still be provided if the Order is granted. However, based on information provided by the Applicant, this would be between 25% and 29% of all programming on the Service, which is significantly less than the required target of 65%.

5.18 The ACMA is of the view that in making the Order, captioning of 25% of the Service against a 65% target represents a significant impact on deaf or hearing-impaired viewers, or potential viewers. However, the ACMA notes that the impact overall would be minimal because the size of the deaf and hearing-impaired audience for the Service is low.

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

5.19 The Applicant provided the following information, on a confidential basis, about the number of people who subscribe to the Service, sourced from OzTAM:

- The number of subscribers to the Applicant's Service at the close of the 2021-2022 financial year.
- The average daily reach of the Service in the 2021-2022 financial year, across subscribers to all the licensed subscription television broadcasters who provide the Service, including the Applicant.
- The total percentage audience share of the Service in the 2021-2022 financial year, across subscribers to all the licensed subscription television broadcasters who provide the Service, including the Applicant.

5.20 Based on the figures about the proportion of Australians who are deaf and hearing-impaired, the Applicant estimates that in 2021-2022, a very small number of viewers, might have used captions on the Service on any given day.

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>.

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.

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/$File/Roadmap%20for%20Hearing%20Health.pdf)

5.21 Having regard to the figures supplied by the Applicant in confidence, and the Applicant's own estimates about the proportion of Australians affected by hearing loss, the ACMA accepts that the number of subscribers who access the Service is relatively low, but that deaf and hearing-impaired viewers are likely to make up a reasonable proportion of those viewers.

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

5.22 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).

5.23 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.

5.24 On a confidential basis, the Applicant provided the revenue, and other financial information for the 2021-2022 financial year.

5.25 The ACMA has considered the financial information provided by the Applicant, in confidence, in respect of NXE.

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

5.26 The Applicant submitted that the estimated amount of expenditure for the Channel Provider to meet the required captioning level is approximately \$50,000.00 for the Specified Eligible Period (but noting that technical difficulties with restoring captioning after a cyber-attack are the real cause of the shortfall in captioning)

5.27 The ACMA notes that the Channel Provider is contractually obliged to the Applicant to provide captioning on the Service. Thus, any expenditure by the Applicant on replacement captioning of programs on the Service would have been additional to contractual amounts already paid to the Channel Provider.

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

5.28 In its annual compliance report for 2021-2022, provided in accordance with subsection 130ZZC(5) of the BSA, the Applicant reported providing captioning on 93 of 98 subscription television services.

5.29 The Applicant has submitted that, over the previous 6 months, it provided approximately 49 hours of captioning on the Service each week. This would equate to an average rate of captioning of approximately 29.16% 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.

5.30 The ACMA notes that the Applicant expects the Channel Provider will restore captioning on the Service to the required level in the 2023-2024 financial year.

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)

5.31 As noted above, the Applicant has submitted that, if the ACMA does not make the Order, the Applicant may be found in breach of its obligations under Part 9D of the BSA, and that to mitigate against the impacts of such a finding, the Applicant may need to remove the Service from its platform. The Applicant submits that this would reduce the quantity of subscription television services provided by the Applicant.

5.32 As noted above, the ACMA is of the view that it is not likely that a failure to make the Order would cause the Applicant to cease to provide the Service.

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)

5.33 The Applicant has lodged a target reduction order for one other service, for a period that overlaps with the Specified Eligible Period.

Other matters as the ACMA considers relevant (paragraph 130ZY(5)(i) of the BSA)

5.34 There are no other matters the ACMA considers relevant in respect of this application.

6. RESPONSE TO SUBMISSIONS RECEIVED

6.1 The ACMA received a submission from the Australian Communications Consumer Action Network (ACCAN) on 1 June 2023 in response to the draft target reduction order published on 5 May 2023.

ACCAN submission

6.2 ACCAN's submission included the following:

ACCAN's long held concern that Australian consumers who rely on closed captions struggle to have the same functional access to television services as other Australians has not changed since we last submitted to the ACMA's draft exemption and target reduction orders.

[...]

[C]losed caption requirements have been part of the Australian subscription television market legislative framework since 2012. Under the previous model, in which the Australian Human Rights Commission presided over the exemption process, subscription services needed to provide tangible evidence that they were working towards meeting their legislative obligations; legislation designed to ameliorate disability discrimination. ACCAN urges the ACMA to apply this principle to the current exemption process. ACCAN is concerned that there has been no commitment from the applicants to investigate opportunities to meet their legislative obligation, nor any stipulation from the ACMA that the applicants take any pro-active measures to address their legislative obligation into the future.

[...]

In the interest of providing equitable access for all Australians to our changing media environment, ACCAN strongly recommends that the ACMA deny [the Application]. This recommendation is based on the lack of evidence that the applicants are taking bona fide steps to meet their captioning obligations beyond the exemption period.

ACMA response

- 6.3 The ACMA acknowledges that a reduction in the prescribed captioning target for the Service will adversely impact the viewing experience of the deaf and hearing-impaired audience and, accordingly, that making the Order will have some detrimental effect for viewers, or potential viewers, of the Service who are deaf or hearing impaired.
- 6.4 The ACMA also acknowledges that the Applicant has requested a significant reduction (of 40%) in the required level of captioning for the Service for the Specified Eligible Period.
- 6.5 However, in deciding to make the Order, the ACMA was satisfied, for the reasons explained, that a refusal to make the Order would impose an unjustifiable hardship on the Applicant.
- 6.6 The ACMA further considers that, for the reasons set out in this statement, it is unlikely that the Applicant will not be in a position to provide captioning on the Service at the prescribed level in future years.

7. CONCLUSION

- 7.1 In summary, the ACMA considers that a refusal to make the Order would impose an unjustifiable hardship on the Applicant because:
 - the failure to caption programs on the Service after 22 October 2022 was due to significant and unexpected difficulties resulting from a cyber-attack on the Channel Provider, and these difficulties were outside of the Applicant's control.
 - the Applicant had contracted with the Channel Provider to provide captions on the Service and, accordingly, has relied on the Channel Provider to meet the terms of the contract, including the restoration of captioning after the cyber-attack.
 - Despite the consideration already paid by the Applicant, the Channel Provider has been unable to restore captioning on the Service to the required level for the Specified Eligible Period.
 - The Applicant expects captioning to be restored to the required captioning target level for the 2023-2024 financial year so the current shortfall in captioning should not recur.
 - Consequently, if the ACMA does not make the Order, the Applicant is likely to suffer unjustifiable hardship due to circumstances causing the failure of captioning on the Service, which were beyond the Applicant's control.

8. APPEAL RIGHTS

- 8.1 Under section 204 of the BSA, a person whose interests are affected by the decision to make a target reduction order may apply to the AAT for a review of the ACMA's decision. The AAT can, among other things, confirm or vary the ACMA's decision, or set aside the ACMA's decision and replace it with its own decision.
- 8.2 Section 29 of the *Administrative Appeals Tribunal Act 1975* states that an application to the AAT for a review of a decision shall be in writing and must contain a statement of the reasons for the application, identifying the respects in which the applicant believes that the decision is not the correct or preferable decision. The AAT has a form which can be used for this purpose. The application must be made within 28 days of the date that the notice of the ACMA's decision is received. The application fee of \$1,011 must accompany an application for review by the AAT. An application may be made to the AAT for a reduction of the application fee, and the application form for this can be obtained from the AAT.
- 8.3 Further information about making an application for review is available on the AAT website at www.aat.gov.au or by telephone on 1800 228 333. The postal address for the AAT is GPO Box 9955 in each capital city.