

STATEMENT OF REASONS FOR THE DECISION TO MAKE A TARGET REDUCTION ORDER (STV-TRO-087) FOR TELSTRA PAY TV PTY LIMITED IN RESPECT OF THE SUBSCRIPTION TELEVISION SERVICE BBC WORLD NEWS FOR THE 2019-20 FINANCIAL YEAR

Issued under section 205 of the *Broadcasting Services Act 1992*.

1. DECISION

- 1.1 On 26 June 2020, for the reasons set out below, the Australian Communications and Media Authority (**the ACMA**) decided to make a target reduction order for Telstra Pay TV Pty Ltd (**the Applicant**) in respect of the subscription television service BBC World News (**the Service**), for the specified eligible period of 1 July 2019 to 30 June 2020 (**the Specified Eligible Period**).

2. LEGISLATION

Annual captioning targets

- 2.1 Subsection 130ZV(1) of the *Broadcasting Services Act 1992* (**the BSA**) requires a subscription television licensee, such as the Applicant, to meet annual captioning targets for its subscription television services for each financial year commencing from 1 July 2012. An annual captioning target for a financial year is a percentage of the total number of hours of programs transmitted on the subscription television service during the financial year. The annual captioning target for a financial year is dependent on the category of subscription television service provided by a licensee.
- 2.2 There are nine categories of subscription television services: movie service (divided into three sub-categories – Movies A, B and C); general entertainment service (divided into three sub-categories – General Entertainment A, B and C); news service; sports service; and music service.

Application for target reduction order

- 2.3 Subsection 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(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.
- 2.6 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) (these are addressed individually below).
- 2.7 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.
- 2.8 Subsection 130ZY(6) of the BSA provides that, before making a target reduction order under subsection 130 ZY(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.

Legislative objectives

- 2.10 The purpose of captioning target requirements, introduced in 2012 by legislative amendments to the BSA, is to facilitate improved access to free-to-air and subscription television by Australia's deaf and hearing-impaired community, by requiring broadcasters to caption speech and other sounds during television broadcasts.
- 2.11 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

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.

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.

2.12 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.

3. APPLICATION

3.1 On 30 March 2020, 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:

Specified Eligible Period	Annual captioning target	Proposed reduced annual captioning target
1 July 2019 to 30 June 2020	40%	20%

3.2 This is the Applicant's first application for a target reduction order for the Service. The Service has not previously been broadcast by the Applicant with captions, as the Applicant has either been granted an exemption order, or has nominated the Service for an exemption from captioning under subsection 130ZX(5) of the BSA².

3.3 On 18 May 2020, the ACMA published on its website a notice setting out the draft target reduction order for the Service, and invited persons to make submissions to the ACMA by 17 June 2020.

The Applicant

3.4 The Applicant is a subscription television licensee. The Applicant is a wholly-owned subsidiary of Telstra Corporation Limited (**Telstra Corporation**).

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

The Service

3.6 The Service is a channel compiled by BBC World Distribution Limited (**the Channel Provider**) and delivered to the Applicant as a live pass-through for transmission to the Applicant's subscribers. The Service is an English-language international news and current affairs channel.

3.7 The Applicant is a reseller, to its own subscribers, of subscription television services offered by the Foxtel Cable Television Pty Ltd (**Foxtel**) platform. The Applicant has no direct contractual influence or control over the content of the Service, or the Channel Provider's provision of captioning for the Service. The Service is offered to

² An exemption under subsection 130ZX(5) of the BSA permits an applicant, prior to 1 July 2022, to exempt a number of subscription television news services from compliance with captioning obligations, where certain circumstances prescribed in subsections 130ZX(5) and (6) apply.

the Applicant's subscribers as part of its \$49.00 per month 'Foxtel Plus Bundle'. Telstra Corporation is a minority (35%) owner of the holding company which owns Foxtel.

- 3.8 The Applicant submitted that the Channel Provider has provided a captioned version of the Service since 18 March 2020 (although not to the extent that the Service would meet the prescribed annual captioning target of 40% for 2019-20).

4. EVIDENCE AND REASONS FOR DECISION

- 4.1 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.
- 4.2 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.
- 4.3 In reaching a decision to make the Target Reduction Order, the ACMA has considered the following:
- written representations and supporting evidence submitted by the Applicant, which included information provided by the Channel Provider in support of the application; and
 - submissions received by the ACMA during the consultation period for the draft order.
- 4.4 This information is considered below by reference to each of the criteria specified in subsection 130ZY(5) of the BSA.
- 4.5 The submissions are published on the ACMA website³, and the ACMA's responses are set out below. Information provided to the ACMA on a confidential basis by the Applicant or Channel Provider has been taken into account by the ACMA in reaching its decision, but has not been reproduced in these reasons for decision.

Nature of the detriment likely to be suffered by the Applicant (paragraph 130ZY(5)(a) of the BSA)

- 4.6 The Applicant submitted that, if the Target Reduction Order is not granted, the nature of the detriment likely to be suffered by the Applicant is that it will be in breach of Part 9D of the BSA in respect of the Service, and 'may be forced to limit' the number of international pass-through news services on its platform in the future.

³ <https://www.acma.gov.au/draft-exemption-orders-and-target-reduction-orders-consultation>

- 4.7 The Applicant has not explained why being found in breach of Part 9D may force it to limit the number of international pass-through news services in the future. The ACMA notes that any withdrawal of a service by the Applicant would not remedy any breach of Part 9D that has already occurred, although it would prevent breaches from occurring with respect to that service in the future.
- 4.8 The Applicant has indicated that it relies on the Channel Provider to provide captioning for the Service, and that the Channel Provider is contractually obliged to do so to enable Foxtel, and its resellers like the Applicant, to comply with the requirements in Part 9D of the BSA. However, the Channel Provider has encountered practical and technical difficulties in fulfilling its contractual obligation (to Foxtel) to provide the prescribed level of captioning on the Service in 2019-20. The relevant circumstances were explained in the ACMA's reasons for its decision to grant target reduction order STV/TRO-083 to Foxtel, which reduced the captioning target for the Service for the 2019-20 financial year to 20%.⁴
- 4.9 The Applicant submitted that the Channel Provider has provided a captioned version of the Service from 18 March 2020, with a view to meeting the proposed reduced annual captioning target of 20% by the end of the Specified Eligible Period.
- 4.10 As a reseller of the Service, the Applicant's approach to captioning is effectively to adopt the captioning arrangements contracted for by Foxtel. Under the captioning provisions of the BSA, this does not preclude the Applicant, as a separate licensee, from providing captioning to the prescribed target, and indeed the Applicant's approach would mean that if Foxtel is found to have contravened a licence condition in respect of captioning, the Applicant would likely also have contravened the licence condition. However, in this instance where Foxtel has obtained a target reduction order for the Service, the ACMA considers it impractical and unnecessary for the Applicant to provide captioning to a higher target level than Foxtel and other resellers (by arrangement with Foxtel) of the Service.
- 4.11 The ACMA considers that refusing to make the Target Reduction Order in these circumstances would cause detriment to the Applicant, because it would result in the Applicant being in breach of Part 9D of the BSA, and the Applicant would have very little, if any, capacity to address this breach.
- 4.12 The ACMA has also considered the following in concluding that detriment would be suffered by the Applicant as a result of a failure to make the Target Reduction Order:
- the Applicant would be required to incur significant costs to caption the Service to meet the required annual captioning target for the remainder of the Specified Eligible Period (in addition to the costs already paid for the Service); and
 - the low level of viewership, and hence revenue, generated for the Applicant from the Service make it uneconomical for the Applicant to continue offering

⁴ Statement of reasons for the decision to make a target reduction order (STV-TRO-083) for Foxtel Cable Television Pty Limited in respect of the subscription television service BBC World News for the 2019-20 financial year, available at <https://www.acma.gov.au/sites/default/files/2020-03/83%20BBC%20World%20News%20Final%20Statement%20of%20Reason.pdf>.

the Service to subscribers if it were required to meet the captioning obligations independently of the Channel Provider.

4.13 On this basis, if the ACMA does not make the Target Reduction Order, the Applicant would suffer either financial or regulatory detriment.

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)

4.14 The Applicant submitted that the impact of making the Target Reduction Order on deaf and hearing-impaired viewers, or potential viewers, of the Service, would be low due to the low viewership of the Service.

4.15 The Applicant was unable to provide viewership figures for the Service from among its own subscribers. However, to illustrate that viewership was likely to be comparably low, the Applicant provided viewership figures for Foxtel subscribers from the 2018-19 financial year, on a confidential basis, indicating the average daily viewer numbers for the Service, and the estimated number of Foxtel subscribers who might have used captions if they had been available on the Service in 2018-2019.

4.16 The ACMA accepts that the evidence provided by the Applicant indicates that a relatively low number of viewers of the Service are likely to require captioned content on any given day. However, the ACMA also notes that, although the total numbers may be low, hearing-impaired viewers may make up a reasonable proportion of total viewers. In forming this view, the ACMA notes that around one in six Australians are affected by total or partial hearing loss^{[5] [6] [7]}.

4.17 The Applicant submitted that the nature of the Service comprises predominantly text and visual content, and that captioning is unlikely to dramatically enhance the viewing experience of the deaf and hearing-impaired audience.

4.18 While the Service has a substantial amount of textual information in addition to visual content, the ACMA does not accept that captions are unlikely to dramatically enhance the viewing experience of the deaf and hearing-impaired audience.

4.19 The ACMA considers that a lack of captioning adversely impacts the viewing experience of the deaf and hearing-impaired audience. For example, when dialogue between news presenters and interviewees is not captioned, the viewing experience of deaf and hearing-impaired viewers is limited to incomplete on-screen information.

4.20 The ACMA considers that making a Target Reduction Order is likely to have some adverse effect in 2019-20 for viewers, or potential viewers, of the Service who are deaf or hearing-impaired. However, the ACMA notes that captioning has been

⁵ 2012 Year Book Australia, <https://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/1301.0~2012~Main%20Features~Health%20status~229>.

⁶ Access Economics: Listen Hear! The economic impact and cost of hearing loss in Australia, February 2006 located at <http://apo.org.au/node/2755>.

⁷ 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).

provided on the Service since 18 March 2020, with a view to reaching a captioning target of 20% in 2019-20, and that the Channel Provider proposes to meet the prescribed annual captioning targets in subsequent years.

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

4.21 The Applicant provided the following information to the ACMA on a confidential basis:

- total number of subscribers to the Applicant's 'Foxtel Plus Bundle' (which permits subscribers access to the Service);
- average daily number of Foxtel subscribers who accessed the Service on the Foxtel platform between 1 July 2018 and 30 June 2019;
- total audience share of the Service across the entirety of the services offered by Foxtel to its subscribers in 2018-2019; and
- the estimated number of Foxtel subscribers who might have used captions on the Service (if they had been available) on a daily basis in 2018-2019.

4.22 The ACMA accepts that the average number of Foxtel subscribers who accessed the Service in 2018-19 was relatively low, and accepts that a comparably low number is likely in respect of the Applicant's subscribers.

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

4.23 The Applicant provided details of its financial circumstances on a confidential basis.

4.24 The ACMA has considered information provided by the Applicant, which indicates that it has the financial capacity to meet the costs of captioning the Service during the Specified Eligible Period. However, the figures provided in confidence about the viewership of the Service indicate that the Service on its own is unlikely to contribute significantly to generating revenue from viewer subscriptions. This would likely make it uneconomical for the Applicant to provide the Service, if it were required to meet the captioning obligations independently of the Channel Provider, which has experienced practical and technical difficulties in fulfilling its contractual obligation to provide captions to the prescribed level in 2019-20.

4.25 The ACMA considers that requiring the Applicant to caption the Service during the remainder of the Specified Eligible Period to the level necessary to meet the requirement in subsection 130ZV(1) of the BSA, if it were possible, would be likely to impose a substantial and unjustifiable financial hardship on the Applicant.

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

4.26 The Channel Provider has advised the Applicant that the total estimated expenditure to meet the prescribed captioning target for the Specified Eligible Period (should the ACMA not grant the Target Reduction Order) is GBP 500,000.00.

4.27 The Applicant advised that this expenditure is based entirely on the launch of a completely new solution for the Channel Provider to provide closed captions in

Australia. It does not take into account the costs already incurred by the Channel Provider to provide captions since March 2020.

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

4.28 In its 2018-19 annual compliance return, the Applicant reported providing captioning on a total of 81 of 105 subscription television services.

4.29 The Applicant advised that the Channel Provider commenced captioning the Service from 18 March 2020, and that the Service will meet a reduced captioning target of 20% by the end of 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)

4.30 The Applicant submitted that, if the ACMA does not make the Target Reduction Order, the Applicant may need to limit the number of international pass-through news channels which it resells from the Foxtel platform, in order to mitigate the breach of the Applicant's obligations under Part 9D of the BSA. Other than the Service, the ACMA notes that the Applicant provides 13 local and international news and current affairs services.

4.31 The ACMA notes that, although this would be likely to impact on the quality of the viewing experience of subscribers, the Applicant has not explained why a refusal to make the Target Reduction Order may cause the Applicant to limit the number of services it provides.

4.32 The ACMA also notes that news programming provided by the Service is available through other online and mobile application platforms.

4.33 As noted above, the Channel Provider has been captioning programs on the Service since 18 March 2020, with the aim of meeting the proposed reduced annual captioning target in 2019-20, and meeting the prescribed annual captioning targets in subsequent years.

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)

4.34 The Applicant has made applications for one exemption order and four target reduction orders for periods between 1 July 2018 and 30 June 2024.

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

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

5. RESPONSE TO SUBMISSIONS RECEIVED

5.1 The ACMA received submissions from Deaf Australia Inc (DA) and the Australian Communications Consumer Action Network (ACCAN) in response to the draft target reduction order for the Applicant published on 18 May 2020.

DA submission

5.2 DA stated in its submission that:

- it did not support the request for the target reduction order;
- the legislation must change; and
- industry should develop a plan or strategy to allow equitable access for everyone.

ACCAN submission

5.3 ACCAN stated in its submission that:

- the ACMA should apply the same principle as the previous exemption process, administered by the Australian Human Rights Commission, that applicants be required to provide evidence they are working towards meeting their legislative obligations;
- without full transparency of the Applicant's revenue, ACCAN and other parties are unable to make an informed evaluation of unjustifiable financial hardship;
- the ACMA should adopt a target reduction process based on setting a revenue percentage benchmark similar to that used in the UK;
- there should be greater cross-device and cross-platform accessibility to video content, noting international best-practice mandating the provision of captions irrespective of the broadcast platform; and
- the ACMA should refuse applications for target reduction orders because as long as an order is granted 'Australians who rely on captions continue to find themselves excluded from equitable access to subscription television services'.

ACMA response

5.4 The ACMA administers the captioning requirements as they are set out in the BSA. Legislative change, as recommended by DA and ACCAN, is a matter for the Government, and the Department of Infrastructure, Transport, Regional Development and Communications, which administers the BSA.

5.5 The Applicant provided financial information to the ACMA on a commercial-in-confidence basis. The ACMA considers the request for confidential treatment of this information to be reasonable. The financial information provided is one matter that the ACMA had regard to in reaching its decision, but it is not appropriate to reproduce that information in this Statement as part of the reasons for its decision.

5.6 The ACMA acknowledges that the lack of captioning on a service adversely impacts the viewing experience of the deaf and hearing-impaired audience and, accordingly, making the Target Reduction Order will have some detrimental effect for viewers, or potential viewers, of the Service who are deaf or hearing impaired. The ACMA notes submissions provided by the Applicant about its progress in providing captions on the service, including the explanation that captioning will be included on the Service by the Channel Provider. As indicated at paragraph 4.20 of this Statement, captioning has been provided on the Service since 18 March 2020, with a view to reaching a captioning target of 20% in 2019-20, and the Channel Provider expects to meet prescribed annual captioning targets from July 2020 onwards. The ACMA expects to see increases in captioning in future annual captioning reports for the Service.

6. CONCLUSION

6.1 In summary, the ACMA is satisfied that a refusal to make the Target Reduction Order would impose an unjustifiable hardship on the Applicant because:

- practical and technical difficulties prevented the Channel Provider from fulfilling its contractual obligation to meet the prescribed captioning target in the Specified Eligible Period, and Foxtel has accordingly been granted target reduction order STV/TRO-083⁸, which reduced the captioning target for the Service to 20% for the Specified Eligible Period;
- as a reseller of the Service from the Foxtel platform, it is neither practical nor commercially justifiable for the Applicant to take responsibility, independently of the Channel Provider, for captioning the Service to the prescribed level of 40% in the Specified Eligible Period, since the cost of doing so would be prohibitive relative to the revenue generated for the Applicant by the Service; and
- if the ACMA were to make the Target Reduction Order, it would not have a large adverse impact on deaf or hearing-impaired viewers, noting that captioning has been provided on the Service since 18 March 2020, and the Channel Provider expects to meet prescribed annual captioning targets from July 2020 onwards.

7. APPEAL RIGHTS

7.1 Under section 204 of the BSA, a person whose interests are affected by the decision to make the 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.

7.2 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

⁸ Statement of reasons for the decision to make a target reduction order (STV-TRO-083) for Foxtel Cable Television Pty Limited in respect of the subscription television service BBC World News for the 2019-20 financial year, available at <https://www.acma.gov.au/sites/default/files/2020-03/83%20BBC%20World%20News%20Final%20Statement%20of%20Reason.pdf>

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 \$952 must accompany an application for review by the AAT. An application may be made to the AAT for waiver of the application fee, and the application form for this can be obtained from the AAT.

- 7.3 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.