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Submission: A captioning Scheme for Subscription Television

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Contact details	Level 13, 100 Arthur Street, North Sydney, NSW 2060
Status of Submission	Public

Introduction

Fetch TV Pty Ltd (Fetch) welcomes the invitation to provide comments in response to the issues canvassed in the proposed reforms in relation to captioning for Subscription Television (STV Captioning Scheme).

As a subscription television provider, Fetch has been materially affected by the complexity and resource intensive nature of the existing STV Captioning Scheme.

We are appreciative of the pragmatic efforts of the Department as reflected in the proposed new STV Captioning Scheme to endeavour to balance the interests of the deaf and hearing impaired community and those of subscription TV providers who have been adversely affected by the operation of the existing STV Captioning Scheme. The existing STV Captioning Scheme is in our view, not fit for purpose, not reflective of the realities of the operation of a Subscription Television platform and creates and perpetuates inequalities between the participants in the wider market for audio visual content.

We are happy for the matters raised in this submission to be made public. We are happy to expand upon any matters raised in this submission.

Response

We address below specific matters in respect of which the Paper has requested submission.

1. THE NUMBER OF STV CAPTIONING CATEGORIES

- (a) Fetch strongly supports the removal of the three separate categories within those channels that fall within "General Entertainment"..

As the Paper indicated, the effect of the existence of three categories with differing captioning targets has led to the anomalous result whereby a channel, when it is distributed on the Fetch platform, may be subject to a higher captioning target than the identical channel when distributed on for example, Foxtel. This is because of the greater

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number of channels that will appear on Foxtel. The practical effect is that the provider of the Channel will inevitably provide captioning at the level that is required to satisfy Foxtel's captioning obligation (it being the substantially larger customer) – and cannot for sound economic reasons, provide a greater level of captions to satisfy Fetch's higher obligations.

The result is that Fetch is required to make a substantial number of applications for target reduction orders in respect of channels which are carried on both Foxtel and Fetch. This step is extremely time consuming and serves no useful purpose whatsoever in furthering the aims of the legislation. The result for the viewer is identical – the viewer gets a channel with the same level of captioning regardless of where the channel is distributed. The position also causes confusion for channel providers who struggle to understand why the same channel should be subject to different captioning targets when on different STV Platforms. Not infrequently, channel providers will advise Fetch that they have “complied” with the required captioning target, but Fetch will often then determine that the Channel Provider has complied with the lower Foxtel target, not the higher Fetch target, leaving Fetch in the position of non-compliance.

For this reason, Fetch's position is that if a separate category of General Entertainment channels remains, then all channels which fall within that category must be subject to the same captioning target.

- (b) Related to the above, Fetch's view is that the process of “nominations” for General Entertainment channels within the categories has proven highly problematic to administer in practice and itself forms another basis for the removal of separate categories of General Entertainment channels. It must follow that the nominations process for General Entertainment channels will fall away if there are no longer separate categories.

For context, Fetch is an STV Licensee which only distributes linear channels which are provided by third parties, we do not at present compile any linear channels. As a result, the provision of captioning is entirely within the control of the Channel Providers. Given the anomalous application of the captioning categories, the nominations process throws up operational issues in practice – channels which at one point of the year have advised that they will meet a particular captioning level may for one reason fall short whilst other channels “over perform” in provided percentages. This means that an STV Licensee such as Fetch may be in the position of having to report a non-compliance in the specified numbers of channels within a category, whilst channels nominated in other categories exceed their targets. The inflexibility of the nomination and reporting process needs to be addressed in this regard (but will be considerably helped by the introduction of a single target for General Entertainment channels).

- (c) In the same way, the process of nominations for exemptions pursuant to Section 130 ZX for channels within the Sports and News categories, although useful, again results in anomalous positions where the same channel may be able to be exempted on Foxtel (because of the greater number of fully captioned channels permitting the exemptions to apply) but not on Fetch. This again results in the necessity for Fetch to make exemption applications in respect of those affected channels.
- (d) Fetch considers that all channels within the Movie Channels category should be subject to a single captioning target.
- (e) We have no objection to the maintenance of the categories for News, Sports and Music.

2. Captioning Levels/ Targets

We adopt the statement in the Paper to the effect that the legislation provided for annual increases in the captioning targets on the assumption that there would continue to be ever increasing subscriber numbers for STV Licensees.

This assumption is no longer correct. Changed consumer behavior and the entry into the market of a plethora of streaming services and other means of consumption of content has changed the landscape for the delivery of audio-visual content unalterably. Subscriber numbers for traditional Pay TV platforms, subject to the captioning legislation, are not ever increasing.

Fetch does not consider that the continued year on year increase in captioning percentages is sustainable for the providers of linear channel services. The economics of the provision of linear channels are often marginal and it is becoming increasingly clear that providers are being pressed to compress costs in all directions. The fact that channels provided via streaming or which are otherwise outside the current regulatory regime are not subject to captioning obligations serves to underline the fact that the present very high level of captioning targets and the progressive increases are broadly unsustainable.

The high costs of captioning are such that it is possible that it is increasingly not viable to launch or continue to support a linear channel in Australia and therefore, we consider that targets, where they apply, should be fixed and ideally at the lowest current level for General Entertainment and at no more than the existing levels for music, sport and news.

We believe the new scheme targets should be reset at the 2020/21 levels “C” category level and remain at those levels. However, we could accept the proposal for a target for increasing General Entertainment as set out in Table 7.5 based on averaging.

We consider captioning levels should then be frozen permanently and would not require review unless as part of an industry wide reassessment pursuant to which all forms of distribution of content are treated equally. This position would provide a degree of certainty to Channel Suppliers as to their costs going forward.

3. Current Exemptions and New Exemptions

- (a) Fetch supports the maintenance of the current types of exemptions and target reductions on the basis of unjustifiable hardship. We do not consider that this exemption should apply only where the other exemption provisions do not apply.
- (b) Fetch supports the maintenance of the “New Channels” exemption but with criteria that would broaden its application. As present, the application of the “New Channels” exemption is limited because it is unclear. It is not clear to STV Licensees (or channel providers) how much the inclusion of existing programming within an otherwise new channel disqualifies it from being regarded as “new” and what “predominant” means.

Fetch would support the introduction of criteria in relation to the “new” channel that would allow a more flexible approach, particularly given that the exemption is for a short period only. For example, channels which do contain a fairly high degree of programming that is or has been distributed within the territory (eg more than 50%) should not by that fact alone be unable to claim the exemption if a range of other features which indicate “newness” are present (for example, a novel programming mix, a new channel provider or compiler) A more flexible approach would increase the likelihood that new linear channels could be introduced and trialed in Australia – for example using already existing programming but incorporating new programming without a strict requirement for a

particular percentage of new programming. This would reflect the reality of compilation of linear channels in the present market.

- (c) We are strongly of the view that the process of application for exemptions and target reductions on the basis of unjustifiable hardship should be greatly simplified as the current process is disproportionately time consuming and costly. We would support a provision whereby exemptions are granted for a minimum of 3 years by default (which would allow certainty for platform and provider and more closely match the typical length of a content licence). We would also support a process whereby if an STV Licensee makes an application for a longer period of time and that application is rejected on the basis that the period of exemption sought cannot be sustained, a shorter period can be substituted by the decision maker – rather than the current position, which only permits the application to be refused. This latter has necessitated the practice within Fetch of making numerous short exemption applications to avoid the possibility of this outcome.
- (d) Fetch supports the proposal for a proposed Low Audience Share exemption as discussed in the paper based on criteria of an audience share of below 0.1%. For the purpose of determining audience share, Fetch notes and supports an option for the STV Licensee to provide internal measurements for channels that do not fall within the available OzTam reports. We urge that the application process be simplified with for example, a statutory declaration from an authorised person from the STV Licensee regarding the internal audience measures accepted. The statement could be subject to an audit by ACMA at its option. Whilst evidence of the measurement could be provided to ACMA confidentially, such viewing and audience share information will usually be commercially sensitive information not to be provided for publication.
- (e) In addition to the proposed Low Audience Share exemption, Fetch strongly recommends the addition of a separate exemption category which would apply to what may be called “International Pass Through Channels”. These channels, are typically but not always, international news channels, are produced for an international audience, are provided often on the basis of a single feed made available to multiple jurisdictions, none of which generally have any captioning requirements. As is noted in the quotation from Foxtel, STV Licensees in Australia are no more than transmission platforms for such channels received from international sources. The process of captioning such channels is not merely expensive, but, broadly, for a small STV Licensee such as Fetch, financially unviable because the only way to produce captions for this kind of international channel is to live caption which is prohibitively expensive. In such a case, for Fetch, the choice is not whether or not to caption, but rather, that the relevant channel would not be carried. Given that the obligation of captioning falls upon the STV Licensee and not the channel provider as a matter of law, it is the nature of the channel itself rather than its share of audience which underlies the necessity for such an additional exemption. Although such channels may fall within the Low Audience Share Exemption, it is not always the case that they will. An exemption for such channels on the basis that they are international pass through channels is likely to increase the range and diversity of channels available and over time, lead the channel provider to invest the resources required to caption the channel. The Al Jazeera News channel (English) is a good example of a channel provider which has moved in this direction recently.
- (f) Fetch supports the proposal for a proposed Racing Exemption.
- (g) Fetch supports the retention of Sports averaging within channel provider groups.

4. The publication of captioning information for prospective and current subscribers

Fetch considers that the current system which identifies programming as captioned using the universal “CC” symbol is acceptable. It appears prominently upon the User Interface and the EPG for all channels and the Fetch website lists all captioned channels.

As the current STV Captioning Scheme is structured, it would be impractical for STV Licensees to publish information as to the existence of exemptions in respect of channels as such exemptions (or target reductions) may be made at different times of the year, are retrospective and in any event, may be changed across the year depending on the “nomination” process.

We do not support a provision that the captioning status be included in the EPG as a *requirement* of the legislation. The metadata comprised in an EPG is provided by the Channel Suppliers or third parties and not generally within the control of the STV Licensee who should not suffer a breach for incorrect or absent data as to the captioning. However, as a practical matter, the EPG will generally always indicate the captioning status of a programme.

5. Other

Fetch’s experience with the existing Captioning Scheme has shown that the scheme and the legislation is inflexible with no or extremely limited discretion within ACMA to allow for the amendment of reports or nomination applications even for obvious error. We are of the view that the complexity and inflexibility will be reduced by the removal of the separate General Entertainment channel categories in Fetch’s particular case. However, Fetch considers that any replacement scheme needs a degree of flexibility and appropriately applied discretion permitted to the regulator and the ability to adapt to the constant changes that occur in relation to the contracting of content for a STV Licensee. We would support extending the circumstance where breaches may be disregarded and we would suggest that nominal or negligible shortfalls in the meeting of targets (within a range of say, 3%) similarly be disregarded.

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Fetch TV Pty Ltd

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