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Dear Sir/Madam,

Foxtel welcomes the opportunity to make a submission in response to the Australian Government issues paper, 'A Captioning Scheme for Subscription Television' (the Issues Paper) dated October 2021.

The Foxtel Group is one of Australia's most progressive and dynamic media companies, directly employing around 1,800 people and delivering a diverse subscription television (**STV**) service to both regional and metropolitan areas over cable and satellite, as well as providing a range of internet delivered services including Foxtel Go, Foxtel Now, and the Kayo Sports, Binge and Flash streaming services.

Foxtel's submission on the Issues paper is structured as follows:

1. The **Executive Summary** outlines Foxtel's key submissions.
2. **Part A** sets out Foxtel's approach and overarching position on STV captioning regulation.
3. **Part B** sets out current STV captioning regulation.
4. **Part C** outlines why changes to STV captioning regulation are required.
5. **Part D** outlines Foxtel's view of the STV captioning reform measures proposed in the Issues Paper.

EXECUTIVE SUMMARY

- Foxtel is committed to remaining a leader in closed captioning, and to the fundamentals of the current regulatory scheme for STV captioning.
- This submission highlights that STV captioning rules are complex and place significant obligations on the STV industry and on channels that offer a diversity of programming but do not necessarily offer broad audience appeal.
- We therefore welcome the proposed reform of the STV captioning scheme, which we submit will maintain STV as a leading source of captioning for deaf and hard of hearing people through a streamlined STV captioning scheme which is fairer to STV while also increasing transparency and consistency for consumers.
- Foxtel supports a number of the Issues Paper reform proposals, however submits they must be implemented as a package to ensure that the changes deliver the desired simplicity and fairness to both providers and consumers.

- The package of changes we support are: (1) removing the annual increases in captioning targets; (2) introducing a low audience share exemption together with an exemption for racing channels; and (3) reducing the number of categories for the Movies and General Entertainment (**GE**) genre categories.
- These proposals will ensure that STV remains a leading source of captioning for hard of hearing Australians with captioning appropriately targeted at channels with a reasonable audience share, while also making it easier for consumers to understand and access information regarding the availability of captions.

PART A: FOXTEL'S APPROACH TO STV CAPTIONING REGULATION

Foxtel recognises the importance of ensuring that STV programming is available for deaf and hard of hearing viewers and is committed our leading role in providing services that are accessible. As such Foxtel takes its legal and social obligations to provide closed captioning very seriously and has a high level of closed captioning compliance.

Foxtel has concerns with the way in which captioning is regulated on subscription television and the complex and significant rules which apply to the industry compared to the level of captions required on free-to-air (**FTA**) services with much larger audiences.

We are seeking a simpler and more predictable approach to captioning which in addition to being fairer to subscription television channel providers will also be more transparent and predictable for our customers.

Our view is that to be meaningful, reform must deliver:

- simplicity in the operation of the STV captioning framework for the benefit of both the industry and consumers;
- recognition of the differences in viewing levels across different channels; and
- consistency across broadcasting platforms and sectors based on objective metrics.

If the reforms proposed in the Issues Paper are implemented, the Foxtel platform will continue to caption at a significantly higher rate than what is regulated for all FTA providers combined and there will be no diminution in the quality of captions on subscription television.

PART B: CURRENT STV CAPTIONING REGULATION

Foxtel's captioning obligations increase across the Foxtel platform each financial year, both in terms of the number of channels that are required to caption and the level at which those channels must caption.

Our captioning targets are particularly strict and increase at a uniform rate of 5% per annum across each channel until they reach 100%. In FY22 more than 90 unique channels on the Foxtel platform are required to caption and from 1 July 2022, all channels across the Foxtel platform will be required to caption, subject to any individual exemptions and regardless of their audience and reach. This compares to the commercial FTA broadcasters who are only subject to substantive captioning obligations on one channel for each network.

A brief outline of the current STV captioning rules is below:

- Foxtel's captioning obligations increase across the Foxtel platform each financial year, both in terms of the number of channels required to caption and level at which those channels must caption.
- STV captioning targets increase at a uniform rate of 5% per annum across each channel until they reach 100%.
- In FY23 absent any law reform, all STV channels will be required to caption, subject to any individual exemptions.
- Each year Foxtel is required to manage an internal captioning plan and report to the ACMA on its captioning levels across all channels and any relevant exemptions. This process is overly time consuming and delivers minimal transparency for consumers.
- By comparison, the FTAs are only required to caption 75% of their main channel (100% of 6am to midnight) with no meaningful obligation on their multi-channels (other than a requirement to caption news and current affairs programs and repeats of previously captioned programs).

PART C: WHY CHANGES TO THE STV CAPTIONING RULES ARE REQUIRED

We argue that changes to the STV captioning framework are urgently required for the following reasons:

1. Administrative and regulatory relief

Captioning is an STV licence condition under the BSA, meaning that if Foxtel does not meet its captioning requirements for any given year, it is in breach of one of its licence conditions. This is in direct contrast to platforms such as Netflix which face no direct regulatory consequences for any failure to caption or any lapses or errors.

The STV captioning rules are extremely complex. Foxtel has now reached the point where some channels are required to caption at 100% over a 24-hour day which makes technical compliance exceedingly difficult. This means that if a channel that is required to caption at 100% inadvertently fails to caption one program, then Foxtel will be in breach of one of its licence conditions.

For example, in FY20 three Foxtel Movies channels with a 100% target were in breach of their captioning obligations due to each channel's failure to caption a single movie over the course of the year. These breaches resulted in less than 1% total non-compliance per channel over the entire year and each was due to minor technical and human errors. This enormous technical and compliance burden will increase year-on-year as more channels reach a 100% quota.

Foxtel has been required to apply for exemptions and remove channels from its platform, reducing choice to consumers, to avoid or minimise the potential regulatory impact of breaches. For example, in FY19:

- Foxtel applied to the ACMA for an exemption for the Adults Only channel. The ACMA's refusal to grant the exemption contributed to the decision to remove of the channel from the Foxtel platform.
- Foxtel applied for an exemption order for the Aurora channel for financial reasons related to the ability of the channel to caption. This

application was refused by the ACMA. As there was not enough time left in the year for Aurora to meet its full captioning target, Foxtel then applied and was granted a target reduction order for the channel. However due to the large amount of technical work required to commence captioning, the launch of captioning on Aurora was delayed, ultimately resulting in the channel not meeting its reduced quota by less than 1%.

2. Transparency and predictability

The current STV captioning rules are confusing from both a regulatory and consumer perspective.

The Movies and GE genre categories are divided into three categories per genre, each with their own separate captioning targets (i.e. six categories rather than two). In addition, under s.130ZX of the BSA, licensees are currently able to nominate exempt channels based on a minimum number of channels in the same genre meeting captioning targets (**Numbers Exemption**).

It is up to each STV licensee to nominate the applicable GE or Movies subcategory for each channel and which channels will receive the benefit of a Numbers Exemption. This means that under the current rules, GE and Movies channels that sit on multiple STV platforms may have different captioning obligations per platform.

Although the Numbers Exemption will no longer be available to licensees from 1 July 2022, the overall complexity of the STV captioning rules makes it very difficult to prospectively communicate to customers the level at which each channel will caption.

Simplifying channel captioning obligations will enable channel providers to more clearly identify their relevant captioning obligations and allow consumers to better understand how subscription television programming is required to be captioned.

3. Parity with industry

Foxtel is subject to several licence conditions that are common to the commercial FTAs. However we are also subject to several sector specific conditions including a detailed captioning regime that, in FY23 absent any reform, will apply to close to 100 channels.

Reform of the STV captioning rules will maintain STV's leadership role in captioning but is an important step in creating better regulatory balance between STV obligations, commercial FTA multi-channels subject to minimal captioning obligations, and datacasting channels subject to no captioning obligations. This is despite these channels often having larger audiences than more heavily regulated STV channels, and despite being similar or identical to STV channels.

As outlined above, whilst under the current rules Foxtel is required to eventually caption 100% of its content across 100% of its channels:

- FTA broadcasters are only obliged to caption their main channel for 18 hours a day; and news and current affairs programs and repeat programming that has previously been aired with captions, that may appear on their multi-channels; and
- Streaming services are not subject to specific captioning regulation.

The effect of this regulatory imbalance is that FTA multi-channels, which are arguably the more accessible form of entertainment and information, escape substantive captioning obligations while STV channels are regulated for the same genres and in many cases with much lower audience shares.

For example, in FY21 STV GE channels such as Fox Arena were required to caption 85% of their content, despite their audience being approximately one fifth the size of comparable channel 9Go! which was ostensibly exempt from captioning. Similarly, Foxtel Movies Premiere was required to caption 100% of its content in FY21, despite having an audience approximately one fourth the size of comparable channel 7Flix which was (other than repeats) exempt from captioning.

See **Attachment A** to this submission for a comparison of targets of comparable FTA vs STV channels, showing their respective audience shares vs their respective FY21 captioning obligations.

Foxtel is not seeking to move away from its captioning leadership role, but is seeking to highlight the disconnect between captioning regulation on FTA, streaming services and STV services, which also perpetuates the problems identified with sector-specific regulation identified in the Final Report of the Digital Platforms Inquiry.¹ We therefore submit that amendment of the STV captioning rules is an important step towards technology neutral regulation.

PART D: PROPOSED REFORM MEASURES

We support reasonable and sensible reform measures as outlined in the Issues Paper, however it is important for both fairness and simplicity that those changes are implemented as a package.

Our view is that the proposed measures must ensure that we remain committed to leading levels of captioning but also provide recognition of the imbalance and the pressures that the current obligations place on smaller channels. Significantly, we will still be the main providers of captioned television services in Australia.

We note that the urgency of these reforms has reached a critical level as the Numbers Exemption ends in FY22, which means all channels will need to caption irrespective of audience size and technical difficulties associated with captioning.

Our comments on the reforms proposed in the Issues Paper are below. We also include some comments on the other measures discussed in the Issues Paper, including the role of exemption and target reduction orders, if the package of reform measures is implemented.

1. Low audience share exemption

We support an audience share exemption which applies where viewership of a channel is below 0.1% of the average annual national audience share (across both FTA and STV in all homes). For illustrative purposes, 0.1% of the average annual national audience share in 2020 was equal to approximately 1,850 people.

An exemption based on audience share is consistent with the regulatory policy of the BSA, which states that different levels of regulation should be applied to services “according to the degree of influence” those services have on the Australian community.

¹ ACCC, *Digital platforms inquiry – final report* (Final Report, 26 July 2019) 196.

Foxtel's position is that STV captioning obligations should be targeted to the channels with a reasonable level of viewers and should be based on objective metrics. This position is consistent with the rationale for the audience share exemption available in the UK legislation which is also designed to achieve the greatest audience benefit.²

One of the key benefits offered by STV is the ability to offer increasingly specialised channels. Channels such as the Aurora Community Channel, Australian Christian Channel, and Sky News Extra deliver programs that the commercial and national FTA broadcasters are unable to offer. Most of these channels attract a limited number of viewers and have a very low share of viewing and their ability to offset the high cost of captioning is challenging. However, they provide a vehicle for community and other groups to deliver key messages to a national audience. It would be consistent with the existing regulatory policy to provide an exemption for these small channels based on their low audience share.

Introducing an objective test for exemptions based on well-known existing metrics will also help ensure improved regulatory consistency across licensees—it is well known that exemption orders have been issued by the ACMA for channels on one platform but refused in relation to the same channel on a different platform. By way of example the ACMA recently refused an exemption for Sky Racing on the Foxtel platform, however Sky Racing have themselves obtained exemption orders for Sky Racing 1 and 2 when they supply and licence these channels directly themselves (which they do for TABs and licensed premises). This outcome is not consistent policy, is confusing for viewers and creates regulatory distortions.

We note that even if a low audience share exemption is introduced, there will still be a very significant number of STV channels that we expect will be above the 0.1% threshold and therefore will be required to caption. Further, even where a channel is eligible for a low audience share exemption, they may choose to continue to provide a level of captions on their services.

An indicative list of channels that we anticipate will not be eligible for the low audience share exemption (or any other proposed statutory exemption) in FY23 is at **Attachment B**.

² Ofcom, 'Television Access Services – Review of the Code and guidance' 23 March 2006 https://www.ofcom.org.uk/data/assets/pdf_file/0016/42442/access.pdf p4.

2. Genre categories

Foxtel supports the proposal to simplify the genre categories by collapsing the category splits in Movies and GE. This will ensure that there is a single target for Movies and a single target for GE. However it is critical that this change is implemented together with the low audience share exemption and genre cap.

Collapsing the category splits for the Movies and GE categories has several benefits. It is simpler for consumers to understand the rate at which a particular channel is captioned and it is simpler for providers to communicate that rate to their customers. Collapsing the Movies and GE categories also has significant administrative benefits for both STV platforms and channels as it ensures that channels are captioned at the same rate regardless of which STV platform they are distributed on.

We therefore support collapsing the Movies and GE genre categories, subject to the captioning targets being capped at the average of no greater than the current FY22 rates and the low audience share and racing channel exemptions being introduced. Our view is that these reforms will only achieve their desired outcomes of simplicity and fairness if implemented as a package.

We make further comments about the appropriate target for the Movies category in section 4 below.

3. Application of low audience share exemption to “new channels”

We note that a gap in the proposed exemption reforms arises where a new service with niche programming and an expected low audience share launches on an STV platform where the new channel exemption is not available due to the nature of its programming and audience share viewing data is also not yet available for the new service.

New channels that are expected to have a low audience may not enter the Australian industry if they are required to automatically caption at the full rate stipulated for that financial year and cannot qualify for a new channel or low audience share exemption.

The new channel exemption in the BSA is narrowly drafted to only apply to services that “predominantly consist of programs not previously transmitted in Australia”.³ Such a narrow application means that only a small number of “new” channels on the Foxtel platform are able to use the new channel exemption. In addition, the proposed low audience share exemption applies to channels for which audience data from the previous calendar year is below a certain threshold.

We submit that similar to the UK regime, where channels are automatically exempt from accessibility arrangements in their first year of operation,⁴ provision should be given for services that are “new” but may not meet the narrow new channel exemption requirements. To prevent services from taking advantage of this exemption, Ofcom has the power to determine that a television service should be treated as a continuation of a previous service in circumstances where the nature of the service has remained substantively the same.⁵

³ *Broadcasting Services Act 1992* (Cth) s130ZV(6).

⁴ Ofcom, ‘Ofcom’s Code on Television Access Services’ dated 5 February 2021

https://www.ofcom.org.uk/data/assets/pdf_file/0035/179954/tv-access-services-code.pdf 5.

⁵ Ofcom (n 2) 3.

In the alternative, where a new channel is expected to achieve a low audience share, providers may be able to rely on a sample such as the channel's first month of audience share data to determine whether the low audience share exemption applies to the new service for that financial year.

4. Capping Targets

We strongly support a proposal to introduce a total cap on each genre's captioning target, rather than progress to the current ultimate 100% requirement.

Capping STV targets will be consistent with the FTA requirements, which are capped. Notwithstanding their significantly greater audience, reach and accessibility, commercial FTA channels have capped 75% quotas on their main channels and unlike STV services, there is no regulatory pathway to increase their channels to 100% over 24 hours.

We also note that capping targets at reasonable rates is consistent with the highly regarded UK regime where captioning targets for all channels, other than public broadcasters, are set at a maximum of 80%.

Our view is that STV captioning targets should be capped across all genres at an average of no greater than the relevant FY22 captioning level per genre (per Table 7 of the Issues Paper). This option will continue to provide an extremely high, industry leading level of captioning on STV services (that will require continued substantial investment) and will continue to exceed the level of captions provided on the commercial FTAs but is fairer to the STV sector.

We note the comment on page 9 of the Issues Paper that reported captioning levels in 2019-20 for the 12 movie services offered by Foxtel and its resellers well exceeded their targets and that this may suggest that the targets for this genre are at too low a level. We do not accept this for the following reasons.

First, as explained above comparable FTA channels and streaming services are not subject to such significant obligations.

Second, a higher target means that technical compliance is a real issue for STV licensees. For example, if the target for the Movies genre was set at a target of 95% this would effectively mean that just one movie over a 24 period could not be captioned. This is particularly significant when viewed in the context of the FTA captioning requirements as illustrated in the following example:

Service	CY20 Audience Share	Proposed Captioning Target	Mandated captioned hours in a 24 hour period
Foxtel Movies Romance (Foxtel movies service)	0.14%	95%	22.8 hours
		90%	21.6 hours
Seven (FTA main channel)	15.5%	75%	18 hours
7flix (FTA multi-channel)	1.34%	0%	0 hours

Third, capping at fairer, reasonable rates, which are below 100% is consistent with the highly regarded UK regime for which captioning targets for all channels, other than public broadcasters, are set at a maximum of 80%.

5. Publication of captioning information

It is reasonable for deaf and hard of hearing viewers who are contemplating or are currently subscribing to STV to want to know which channels will be captioned and at what level. Viewer transparency of captioned programming is currently available via some providers (e.g. Foxtel provides information in our Electronic Program Guide and Foxtel Magazine).

By collapsing the categories in the Movies and GE genres (subject to a reasonable captioning target) and adopting statutory exemptions based on objective criteria (such as audience share), a prospective and single STV captioning plan can be published ahead of each financial year for the benefit of caption users and channel providers alike. The plan could be published subject only to any later individual exemptions, new channel exemptions or target reduction orders.

6. Exemption orders and target reduction orders

We do not support the removal of the availability of exemption orders and target reduction orders, even if a low audience share exemption and a racing channel exemption are introduced.

Although a low audience share exemption will likely ensure that channels that are less profitable due to lower audience share have regulatory relief, we consider that there will still be marginal cases where a channel may not meet their captioning target and for whom an exemption or target reduction order may be appropriate.

We argue that financial considerations should remain relevant to captioning obligations and appropriately targeted at the relevant provider – the channel provider. Captioning should not be such a significant barrier to entry into subscription television broadcasting in Australia that channels are either forced to exit the industry or do not contemplate entry.

We would also like to clarify the suggestion at Table 4 that exemption and target reduction orders have been widely available to Foxtel.

Whilst Table 4 of the Issues Paper notes that 318 exemption orders have been granted to STV licensees, the Foxtel platform has only ever been granted one exemption order – the Australian Christian Channel in FY19 for one year only. The Foxtel platform has only ever been granted target reduction orders in relation to five channels – TRT world, CMT, BBC World News, Australian Christian Channel and Aurora Community Channel. These orders have all been made on the basis that the channels were building solutions to caption at their legislated rate.

The bulk of STV captioning exemption orders have been granted to Fetch, even where an application is made by Foxtel in relation to the same channel e.g., in 2015 Foxtel was refused exemption orders in relation to CNBC and BBC, even though exemption orders were already in place for those channels on Fetch.

7. Racing Exemption

We support an automatic exemption for racing services where live racing and the replays of live racing represent at least 70% of the channel's content.

The unique nature of racing channels (horse, harness and greyhound), which feature dense displays of on-screen information and rapid, unstructured commentary make them inherently unsuited to captioning. To reduce red-tape and remove the significant administrative burden of preparing and lodging individual exemption applications, an automatic exemption for these services should be introduced.

If captioning was introduced on to a racing program we understand it would obscure both the racing vision and the critical racing text displays. This is because it would not be possible to position the captions in a manner which would not obscure the other on-screen text or the racing vision. At times up to 75% of the screen view during coverage of a race is comprised of text information.

















We also note that the audio commentary before and after a race on a racing channel largely reflects the information that is already available as text on the screen. Due to the speed at which race commentary is delivered, we also understand that the readability, accuracy and comprehensibility of the captioning would also be poor during coverage of a race.

For completeness, **Attachment C** to this submission contains Foxtel's responses to each of the proposals for a STV captioning scheme.

Best Regards,

On behalf of the Foxtel Group
FOXTEL, Fox Sports, Foxtel Media, Kayo, BINGE

Attachment A – FTA multi-channels vs STV captioning targets (FY21)

Channel	Description	Audience*	Captioning target**	STV comparison	Description	Audience*	Captioning Target (FY21)
	General entertainment & sport	39,606	0%		General entertainment	11,879	85%
	General entertainment & sport	43,099	0%		General entertainment	5,603	85%
	Movies	24,071	0%		Movies	3,982	100%
	General entertainment	31,995	0%		General entertainment	6,101	85%
	General entertainment & movies	36,067	0%		General entertainment	9,239	85%
	Lifestyle	35,367	0%		Lifestyle	16,337	85%
	Youth targeted programming	36,145	0%		Youth targeted programming	11,322	85%
	General entertainment & sport	53,728	0%		General entertainment	4,143	55%

* Source: Source: OzTAM. 5 City Metro. Linear Data. Live + Playback to 7 Days. Total People. Jan - Dec 2020. 0600-2359

** No captioning target for FTA multichannels – requirement to caption News and Current Affairs programs and repeats of primary channel captioned programs only

Attachment B – Channels expected to caption in FY23

Based on the metrics proposed in the Issues Paper, we anticipate the following channels will be required to provide captions at various levels in FY23:

A&E	FOX Sports 506
Animal Planet	FOX Sports More
BBC First	FOX8
CBeebies	Foxtel Movies Action
Crime & Investigation	Foxtel Movies Comedy
Discovery Channel	Foxtel Movies Family
Discovery Turbo	Foxtel Movies Greats
ESPN	Foxtel Movies Hits
FOX Arena	Foxtel Movies Premiere
FOX Classics	Foxtel Movies Romance
FOX Comedy	Foxtel Movies Thriller
FOX Cricket	History
FOX Crime	Investigation Discovery
FOX Docos	LifeStyle
FOX Footy	LifeStyle Food
FOX Funny	LifeStyle Home
FOX League	MTV
FOX News	MTV Classics
FOX One	National Geographic
FOX Sci-fi	Nick Jr
FOX Showcase	Sky News
FOX Sleuth	TLC
FOX Sports 503	UKTV
FOX Sports 505	Universal TV

Attachment C: Proposals for a STV captioning scheme

1. Number of categories

Should the 5 categories of STV services listed in Table 5 above be adopted in the Scheme? If so, is it appropriate to average the captioning levels for the movie and general entertainment categories?

Yes – subject to:

- the implementation of the package of reform proposals outlined in the paper being introduced (in particular the low audience share exemption); and
- an appropriate target for the Movies and GE genres being set.

2. Levels of Captioning (Annual Captioning Targets)

What is an adequate level of captioning for STV services to commence on 1 July 2022?

- a) Resetting the annual captioning targets at 2020–21 levels?**
- b) Remaining at the 2021–22 annual captioning targets?**
- c) Moving to the 2022–23 annual captioning targets?**
- d) Some other set of targets? Please explain why.**

If the categories of STV services are not collapsed into five categories, then our position is that the annual captioning targets should remain at the FY22 captioning targets.

If the categories of STV services listed in Table 5 of the Issues Paper are collapsed then the Movies and GE annual captioning targets should be set at no greater a level than the average of the Movies and GE FY22 levels.

We note that collapsing the GE and Movies categories will increase the level at which Category C movies and GE channels will need to caption. Setting the captioning targets for these genres at the averaged FY22 levels will ensure that this transition is slightly softened, while maintaining a high level of captions on the Foxtel platform.

It is important to note that free-to-air (FTA) channels have capped 75% quotas on their main channels only and unlike STV services, there is no regulatory pathway to increase their channels to 100% over 24 hours.

3. Freeze or Continued Annual Increases of Captioning Targets

- a) Is it appropriate that annual STV captioning levels be frozen or should captioning levels continue to increase by 5 per cent per annum as under the existing rules at subsection 130ZV(2) in the BSA?**

Our position is that annual STV captioning levels should be frozen.

Freezing the targets would be consistent with the FTA regime; notwithstanding their significantly greater audience and reach, FTA channels have capped 75% quotas on

their main channels only and unlike STV services, there is no regulatory pathway to increase their channels to 100% over 24 hours.

We also note that except for public broadcasters, the UK regime has a maximum target of 80%.

b) If STV annual captioning levels are frozen, should this freeze be permanent or reviewed after a period of time? If the latter, what should that period of review be?

For the reasons explained above, a freeze of annual captioning levels should be permanent. The current rate of STV captioning is extremely high, particularly when compared with analogous services on FTA television, for which a review period does not apply.

4. Exemptions and target reduction orders (unjustifiable hardship)

a) As audience share or the difficulty in captioning racing channels are factors in applications for exemption or target reduction orders based on hardship, is it necessary to retain these exemptions or target reduction orders based on hardship for STV licensees, given the proposed introduction of new exemptions based on objective and transparent criteria (see Proposal 4 and 5)?

Yes, it is necessary to retain exemption and target reduction orders based on hardship, as there may be occasions where channels should be granted an exemption under the current criteria, which would not be captured by a low audience share or racing channel exemption.

Examples of cases where exemption or target reduction orders would still be beneficial for both channels and viewers are:

- Where unexpected technical difficulties arise, which mean that a channel cannot meet their overall target but have a pathway to future compliance. For example, in FY21 a target reduction order was granted by the ACMA to the CMT channel after the channel provider encountered unexpected significant technical and practical difficulties relating to the use of captioned files.¹ But for this order, the channel would not have met its captioning target;
- In the event of unprecedented disasters and events e.g. a global pandemic which impacts the ability of a channel to operate as normal and establish captioning technology;
- Where a channel is expected to have a low audience share but audience data is not yet available for the channel.

b) If these exemptions and target reduction orders are retained, should their:

i. availability be limited to circumstances where other exemptions do not apply?

Yes - provided the new low audience share and racing channel exemptions are implemented, Foxtel agrees that the availability of exemption and target

¹ ACMA, 102 Foxtel Cable Television Pty Limited (Web Page)
<https://www.acma.gov.au/publications/2021-03/instruction/102-foxtel-cable-television-pty-limited>

reduction orders should be limited to when other exemptions are not available.

ii. assessment criteria be amended? If so, how?

Our view is that the assessment criteria for exemption orders and target reduction orders should be based on the circumstances of the channel provider and not the STV licensee.

Under the current STV captioning rules, the ACMA may make a statutory exemption or quota reduction order where it is satisfied that a refusal to make the order would impose an “unjustifiable hardship” on the licensee in relation to the channel concerned.

Foxtel has been largely unsuccessful in its attempts to obtain exemptions for channels as the ACMA has not been satisfied that a refusal to make an exemption order for the channel would impose an unjustifiable hardship on Foxtel as the licensee.

Our position is that Foxtel’s financial standing is not a meaningful reflection of an individual channel’s ability to caption and does not reflect the way in which business is conducted where channels are contractually responsible for fulfilling the obligation.

Accordingly it would greatly assist our third-party channels if the test of unjustifiable hardship related to the financial position of the channel provider, which is far more relevant to whether unjustifiable hardship will be imposed, than the revenue position of the licensee.

5. Nominated exemptions

Is it appropriate for this exemption to be retained until such time as the proposed new exemptions set out at proposals 4 and 5 can be claimed?

The exemption provided under s.130ZX of the BSA is due to expire on 30 June 2022. Provided the new exemptions are in place by 1 July 2022 we are comfortable for this exemption to fall away as scheduled under the current rules.

6. New racing exemption

As the criteria for this new proposed exemption is objective and self-evident, it is proposed that STV licensees do not apply for racing exemptions but should publish the channels to which this exemption applies each financial year. Options for the publication of exemptions are raised for comment at Proposal 6. Is it appropriate that this exemption be “claimed” by publication only?

Yes.

However, there may be cases where the exemption may need to be retrospectively claimed where the programming mix of the channel changes and although the channel does not meet the threshold at the outset of the year, it does over the course of the year.

We note that it is not clear as to whether channels which do not meet the threshold to claim the racing exemption, should then have to caption live racing content to meet the applicable captioning target which then applies to that channel.

7. New low audience share exemption

- a) Is there any evidence that a threshold other than less than 0.1% is a more appropriate threshold level for a low audience share exemption? What is the alternative threshold and the evidence of its appropriateness?**

We are comfortable that 0.1% is an appropriate threshold level for a low audience share exemption.

- b) Where available, is the OzTAM measurement used in the "A2" report appropriate for determining the low audience share for the purposes of this exemption? Are there any measures that are more appropriate?**

Yes, the OzTAM measurement used in the "A2" report is appropriate for determining the low audience share for the purposes of this exemption as it captures data from both subscription and non-subscription television homes.

However we note that for various commercial reasons, not all channels on the Foxtel platform presently engage OzTAM to provide audience share data and therefore this measurement cannot be the sole measure used for all Foxtel channels.

- c) Is an exemption period of 2 years appropriate for this exemption? If not, what alternative period is more appropriate and why?**

Yes, we consider that an exemption period of 2 years is appropriate for this exemption as:

- Audience levels are relatively stable and therefore are unlikely to change dramatically over a two-year period;
- This is consistent with the new channel exemption period; and
- Two years gives a channel enough time to prepare for captioning should their audience share start to increase sufficiently.

- d) Should the low audience share exemption be claimed by "publication", where both the details of the exemption and the data relied upon to demonstrate the low audience share are published?**

Foxtel's position is that as the data on which the exemption is claimed is retrospective, the audience share can be claimed by "publication". However, we are of the view that for confidentiality purposes the data relied upon to demonstrate the low audience share should not be published but may be provided to the ACMA on a confidential basis if requested.

8. Publication of captioning information

- a) What information should be published?**

- i. Should the overall, actual percentage of captioning proposed to be delivered by STV licensees for each channel for the current financial year be published?**

This information could be published on a prospective basis if the categories of STV services are collapsed per Proposal 5 and the package of reforms proposed in the Issues Paper are implemented.

By collapsing the categories in the Movie and GE genres (subject to a reasonable captioning target) and adopting statutory exemptions based on

objective criteria (low audience share and racing channels), a prospective and single STV captioning plan can be published on each licensee's website ahead of each financial year for the benefit of caption users and channel providers alike. The plan could be published subject only to any later individual exemptions, new channel exemptions or target reduction orders.

We submit that if the Movies and GE categories are not collapsed, then publication of captioning targets should remain at the end of each financial year to ensure that licensees retain the requisite flexibility needed to manage their captioning plans, and for consistency with current regulatory requirements regarding annual captioning compliance reporting.

Due to the variation between the different A, B and C category targets for the Movies and GE categories, the targets per each channel in these categories can and do move throughout the year in order to ensure compliance across the categories in each genre. The ultimate rate at which a service is captioned may not be determined until closer to the end of the financial year. Foxtel is not currently required to nominate the applicable category for Movie and GE services to the ACMA until the end of each financial year, and we submit that this should remain the case if the Movies and GE categories are not collapsed.

ii. Should a list of services that are not captioned and the relevant exemption and/or target reduction orders be published?

Exemption and target reduction orders are already published on the ACMA's website.

We are comfortable to publish prospective information regarding channels which have a statutory exemption from captioning based on objective criteria i.e. low audience share and racing channels.

iii. Should information about whether individual programs are captioned or not be published?

Foxtel currently makes this information available via our Electronic Program Guide and the Foxtel Magazine and it is a current ASTRA code requirement that "Where closed captioning programming is made available it will be clearly identified with program schedule information provided to media and in program guides."²

Our view is that this requirement is sufficient to ensure that captioning information about individual programs is made available.

iv. Should a requirement to include information on whether a program is captioned or not be included in the Electronic Program Guides of STV Licensees?

See above.

² ASTRA, *ASTRA Subscription Broadcast Television Codes of Practice* (2013) cl 2.4.

b) When should information be published?

- i. **For information about the captioning levels and applicable exemptions and target reduction orders at a service (channel) level, should information be published before the start of every financial year (noting that the new, proposed exemptions will apply from the beginning of each financial year)?**

Where the Movies and GE STV categories are collapsed, information about the relevant STV captioning levels, exemptions and target reduction orders can be published at the start of the financial year.

However, where new services are introduced and new exemptions become available throughout the year that information may become out of date. It would be onerous to continually require STV licensees to update captioning information it has previously published.

Per our response to 8(a)(i) above, our view is that if the Movies and GE categories are not collapsed, and the package of reforms are not implemented, then publication of captioning targets should remain at the end of each financial year to ensure that licensees retain the requisite flexibility needed to manage their captioning plans, and for consistency with current regulatory requirements regarding annual captioning compliance reporting.

c) If retrospective exemptions remain in place or new services become available during the financial year, how should published reports be amended?

See above.

d) Where should information be published? Should information about the captioning levels and applicable exemptions and target reduction orders at a service (channel) level be published on:

- i. **the ACMA website**
ii. **the website of each STV licensee**
iii. **both the ACMA website and on the website of each STV licensee?**

In order to ensure that this information is updated efficiently and expediently, this information should be published on the ACMA website.

STV licensees may choose to publish such information but should not be subject to a legal requirement to continually publish and update such information.

e) Should information about individual programs be published in the program guides (electronic and otherwise) of STV licensees?

See above response to question 8(a)(iii).

9. Retention of certain captioning rules

Should the modified formula for STV services be modified in any way? If so, why and how?

Foxtel is not seeking any changes to the modified formula for subscription sports channels.