

Community Broadcasting Not-for-Profit Guidelines

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1. Introduction

Community broadcasting services are valuable contributors to the diversity of media voices that are heard in Australia. To ensure that they maintain their unique quality as community-focused broadcasters, the *Broadcasting Services Act 1992* (the Act) requires all community broadcasting licensees (licensees) to comply with the obligations that are set out in the Act, licence conditions and codes of practice.

Community broadcasting licensees, including temporary community broadcasting licensees, are subject to the licence condition that the licensee will not operate the service for profit or as part of a profit-making enterprise (the licence condition).¹

The not-for-profit nature of community broadcasting is reinforced by the definition of community broadcasting in the Act, which characterises community broadcasting services as broadcasting services that, among other things, are not operated for profit or as part of a profit-making enterprise.²

To enable community broadcasting licensees to comply with the licence condition, it is essential that they be able to identify what would constitute operating their service for profit or as part of a profit-making enterprise.

1.1 Purpose of guidelines

The Australian Communications and Media Authority (the ACMA) has noted that some community broadcasting licensees have found it difficult to understand how this licence condition applies in practice. It is hoped that such licensees will find it helpful to have, set out in one document, the ACMA's views as to how the licence condition operates. To this end, the inclusion of examples, based on real-life scenarios, should help community broadcasting licensees to comply with the licence condition.

The guidelines are advisory only and do not replace the requirements of the Act. If in doubt, licensees should approach the relevant industry group representing the community broadcasting sector: the Community Broadcasting Association of Australia (CBA); or the Australian Community Television Alliance (ACTA). Licensees might also like to seek independent legal advice.

Licensees may also contact their peak organisations for assistance, such as the Australian Indigenous Communications Association (AICA), Southern Community Media Association (SCMA), National Ethnic and Multicultural Broadcasters Council (NEMBC), Radio for the Print Handicapped (RPH), Christian Media Australia (CMA) or Indigenous Remote Communications Association (IRCA).

Queries about these advisory guidelines may be directed to the ACMA's Community Broadcasting Group at communitybroadcasting@acma.gov.au.

¹ Clause 9(2)(e) of Schedule 2 to the Act.

² Section 15(b) of the Act.

2. Key points

- Community broadcasting services are services that are provided for community purposes. It is a condition of their licence that they not operate the service 'for profit or as part of a profit making enterprise'.
- There are two aspects to this licence condition:
 - a licensee will not operate the service for profit; AND
 - it will not operate the service as part of a profit-making enterprise.
- Community broadcasting licensees can make a surplus, provided it is only used to benefit or improve the broadcasting service, for example, building or improving broadcast studios, improving transmission facilities, investing in outside broadcast facilities or providing training to staff or volunteers. A licensee cannot distribute any surplus to its members.
- Community broadcasting licensees can pay salaries and commissions, provided the amounts paid represent bona fide compensation and are directly related to work performed or services rendered.
- In relation to any surplus made, careful consideration must be given to:
 - how the revenue is generated (whether the service is operated as part of a profit-making enterprise); and
 - how the revenue is distributed (whether the service is operated for profit).
- Where a licensee's revenue is distributed, in whole or in part, for the direct or indirect personal benefit of the licensee's personnel or members, or for the direct or indirect personal benefit of any other person or organisation, this is likely to be in breach of the licence condition.
- Where the licensee's broadcasting service is used to generate revenue for the benefit of a company, business or project set up for commercial purposes, this could be a breach of the licence condition. A community broadcasting service is likely to be 'part of a profit-making enterprise', where activities conducted using its broadcasting service have a direct relationship with the profit-making activities of the enterprise.
- Licensees should take care to ensure that, when they enter into commercial arrangements, they do not risk breaching the licence condition. Agreements should be clearly understood and recorded in writing.
- Particular care should be taken with commercial arrangements involving:
 - payment for access to airtime;
 - agreements with agents to procure sponsorship for the service; and
 - the production and sale of CDs and other promotional arrangements.
- Compliance with the licence condition may be considered by the ACMA in response to a complaint or when it is deciding whether to allocate or renew a licence. Each matter will be considered on a case-by-case basis.

3. What does it mean to operate a broadcasting service for profit or as part of a profit-making enterprise?

3.1 Overview

Community broadcasting services must not be operated for profit or as part of a profit-making enterprise.³ This requirement is set out in one of the conditions of a community broadcasting licence (the licence condition).⁴

The licence condition prohibits the licensee from using the broadcasting service for the purpose of making a profit. It also prohibits the licensee from using the broadcasting service in a way that may enable it or any other person to generate revenue for the benefit of a company, business or project set up for a commercial purpose. Use of the broadcasting service to exploit its commercial potential is also inconsistent with the requirement that the broadcasting service be provided for community purposes.⁵

The licensee can use the broadcasting service to generate revenue in accordance with the Act,⁶ including obtaining sponsorships and undertaking other fundraising activities. However, licensees should take care when entering into commercial arrangements with businesses and organisations operated for profit to ensure that the arrangements do not place them at risk of breaching the licence condition.

A licensee can generate a surplus so long as it is used for the continued operation or improvement of the service and not distributed to members, or other individuals or organisations.

3.2 Operating a broadcasting service for profit

The Act does not define the term 'for profit'. Therefore, the relevant ordinary meaning of the term applies.

The Explanatory Memorandum to the Act provides some guidance on the meaning of operating a broadcasting service for profit:

Paragraph [15](b) recognises that some community broadcasters may have a [...] surplus at the end of a financial year; this in itself would not exclude such a service from [the community broadcasting service] category. So long as those surpluses are utilised for the continued operation of the service and are not distributed for personal use amongst those persons who are involved in the management or operation of the service, this criterion will be satisfied. However, this criterion would not permit a situation where a community broadcasting service was conducted in such a manner as to produce a large operating surplus which was then distributed in the form of large salaries, wages, allowances or fees to those persons involved in the management and/or operations of the service.⁷

This highlights the importance of the licensee ensuring that any surplus is used for the continued operation of the broadcasting service. A surplus cannot be distributed for the direct or indirect personal benefit of the licensee's personnel or members or for the direct or

³ Section 15(b) of the Act.

⁴ Clause 9(2)(e) of Schedule 2 to the Act.

⁵ Section 15(a) of the Act and clause 9(2)(d) of Schedule 2 to the Act.

⁶ There are some restrictions on the way the licensee can generate revenue. See, for example, section 87A of the Act and clause 9(3) of Schedule 2 to the Act.

⁷ Clause 15 of the Explanatory Memorandum to the *Broadcasting Services Bill 1992*.

indirect personal benefit of any third parties. A surplus can, for example, be used to build or improve broadcast studios, to improve transmission facilities, to invest in outside broadcast facilities or to provide training for staff or volunteers.

It is generally understood that a licensee is not operating a service for profit if:

- the assets and income of the licensee (including any surplus) are used to benefit or improve the service, such as building or improving studios and transmission facilities, purchasing equipment or providing training to staff or volunteers; and
- the assets and income of the licensee (including any surplus) are not distributed directly or indirectly to its members or persons who are involved in the management or operation of the broadcasting service except as bona fide compensation for services rendered or to compensate for expenses incurred on behalf of the licensee.

Operating a broadcasting service for profit

Where a licensee has generated an operating surplus and it is distributed, in part or in whole, in any form that is not bona fide compensation for work performed, services provided or expenses incurred, to persons who are involved in the management or operation of the broadcasting service, this would result in a breach of the licence condition. This is because the licensee has not used the surplus for the continued operation of the broadcasting service. In addition, in such a situation it may be questionable whether the licensee has provided the broadcasting service for community purposes.

Radio Example

9PRZ entered into an airtime access agreement with Footy Raider to broadcast 30 x 2 hour coverage of AFL matches at \$200 per hour. The agreement was renewed annually over five years. The arrangement resulted in revenue of \$12,000 per year for 9PRZ, which 9PRZ used to upgrade studio equipment and update broadcasting software.

Result: 9PRZ is unlikely to breach the licence condition. The amount of airtime provided to Footy Raider and the fees were reasonable. In addition, the revenue generated was used to benefit the operations of the broadcasting service and was not distributed to any volunteer or member of 9PRZ or to Footy Raider.

3.3 Payments to staff and contractors

Some licensees have salaried or contract positions, such as a station manager, administrative assistant, sales manager and/or technical consultant. Licensees can pay salaries and commissions, provided the amounts are bona fide and directly related to the work or service provided. Such amounts must be properly accounted for in the licensee's financial records.

A salary or commission would generally be considered bona fide if it reflected current market rates or was comparable to salaries and commissions for staff and contractors in similar-sized stations in metropolitan or regional areas, or to the amount payable for similar work in the local employment market. Care should be taken to ensure that staff are appointed on the basis of their suitability for a position. For significant salaried positions, a competitive, merit-based selection process may be the best way of avoiding allegations of patronage and ensuring transparency.

If salaries or commissions are excessive, a licensee could avoid ever making a surplus because of the ongoing distribution of revenue, as it is earned, to staff or contractors. This may constitute a breach of the licence condition. Similarly, it would not be in keeping with the community purpose of a community broadcasting service were a licensee to distribute any surplus as bonuses to staff or contractors.

3.4 Operating a broadcasting service as part of a profit-making enterprise

The Act does not provide a definition or an explanation of what is meant by the expression 'part of a profit-making enterprise'. Therefore, the relevant ordinary meaning of the expression applies.

The Explanatory Memorandum to the Act provides an example of a broadcasting service operated as 'part of a profit-making enterprise':

A service would be considered to be 'part of a profit-making enterprise' where that service contributes to the generation of income for an organisation other than the service provider, e.g. a service which broadcast horse racing direct to betting shops would be considered to be part of the same profit-making enterprise as those betting shops.⁸

Even if only a limited part of the broadcasting service is used to generate revenue for the profit-making enterprise, the broadcasting service could still be regarded as forming part of the enterprise.

While the licensee may enter into arrangements with a profit-making enterprise, for example, by paying the enterprise fees for services it provides, the broadcasting service cannot be used to generate revenue for that enterprise.

Where the licensee's broadcasting service is used to generate revenue for the benefit of a company, business or project set up for a commercial purpose, this would result in a breach of the licence condition. The licence condition does not prohibit contractual arrangements for normal station operations, sponsorship or fundraising activities. For a service to be 'part of' a profit-making enterprise, the broadcasting service must be being used in a direct way to generate revenue or profit for the commercial enterprise.

⁸ Clause 15 of the Explanatory Memorandum to the *Broadcasting Services Bill 1992*.

Particular care should be taken where the licensee's broadcasting service is only part of its operations. It would not be acceptable under the licence condition for a surplus generated by the licensee's broadcasting service to be distributed to another part of the licensee's operations for some other purpose not related to the operation of the community broadcasting service.

A licensee needs to distinguish between the broadcasting service it is licensed to provide and any broader operations it might have, particularly where revenue is being generated and distributed. In these circumstances, the ACMA recommends that the licensee consider setting up a separate corporate entity or a separate board of management as an effective means of ensuring that decision-making in relation to the broadcasting service is independent from any such broader operations.

Operating a broadcasting service as part of a profit-making enterprise

A broadcasting service would be considered to be 'part of a profit-making enterprise' where the service is used to directly generate revenue for the benefit of a company, business or project set up for commercial purposes. Even if only a limited part of the broadcasting service is used to generate revenue for the profit-making enterprise, the broadcasting service could still be regarded as forming part of the enterprise.

Radio Example

Pretty Face Ltd entered into a five-year program agreement with 2DEF for airtime to broadcast its program, *The Beauty Show*, for 12 x 1-hour episodes at \$400 per hour. 2DEF received an annual payment of \$4,800 from Pretty Face Ltd.

Pretty Face Ltd entered into a five-year sponsorship agreement with CosmetiCo to supply sponsorship announcements during *The Beauty Show*. Pretty Face Ltd received an annual payment of \$12,000 from CosmetiCo. 2DEF was not part of this agreement and was not privy to how much CosmetiCo had paid to Pretty Face Ltd. 2DEF did not receive any payment from Pretty Face Ltd for the sponsorship announcements provided to it by CosmetiCo for broadcast by 2DEF on *The Beauty Show*.

Result: 2DEF might be operating its service as part of a profit-making enterprise, in breach of the licence condition. 2DEF should have questioned Pretty Face Ltd about the arrangements regarding the broadcast of sponsorship announcements during *The Beauty Show* prior to coming to an agreement with them. It should then have included relevant clauses regarding sponsorship in its program agreement with Pretty Face Ltd. This would have ensured that Pretty Face Ltd was not receiving a disproportionate amount for the broadcast of sponsorship announcements on *The Beauty Show*, and that sponsorship announcements broadcast during the program complied with licence requirements.

Radio Example

A board member of a licensee company, Southern Community Broadcasting Inc (SCB), is also a director of a profit-making enterprise, Southern Highlands Sports Pty Ltd (SHS). SHS entered into an agreement with Southern Netball Association for the purchase of rights to and sponsorship of all netball matches to be broadcast by SCB. The expense of outside broadcast coverage of the netball matches was paid by SHS, which also received all revenue generated from sponsorship sales.

When the ACMA drew to the attention of SCB the likelihood of its being in breach of the licence condition to not operate the service as part of a profit-making enterprise, SCB took appropriate measures to remedy the situation. The measures included SCB:

- only broadcasting sponsorship announcements on its service if the sponsorship agreement is between SCB and the sponsor rather than between the sponsor and a third party involved with SCB;
- ensuring that any consideration for the broadcast of sponsorship announcements is paid to SCB and not to a third party involved with SCB;
- ensuring that all agreements are in writing, including in relation to sponsorship, access to airtime, broadcasting rights and program purchase;
- retaining a copy, and maintaining a register, of all agreements, including in relation to sponsorship, access to airtime, broadcasting rights and program purchase; and
- maintaining a register of remuneration paid by SCB, including to persons involved in programs broadcast by SCB.

Result: SCB was likely to be in breach of the licence condition to not operate the service as part of a profit-making enterprise before it implemented the changes in its arrangements with SHS. The measures it took minimised the risk of this occurring, as it was then in a position to comply with the licence condition as well as to provide evidence of such compliance.

Television Example

Fun4Kidz was a registered business name of Kidz Media Pty Ltd (Kidz Media), a fully-owned subsidiary of Kidz Lifestyle Corporation Ltd (Kidz Lifestyle). Kidz Lifestyle was a commercial entity, that is operated for profit from the ownership and management of childcare centres and the delivery of childcare services in the five mainland States.

First Agreement: In November 2009, Kidz Lifestyle entered into a three-year program agreement with Tele TV, under which Tele TV would broadcast Fun4Kidz programs in the 6am to 8am weekend timeslot. Kidz Lifestyle also marketed and sold merchandise associated with the programs. This was expected to generate an annual income of \$760,000. From this amount, Kidz Lifestyle would pay Tele TV an annual fee of \$520,000 to broadcast the Fun4Kidz programs.

The broadcasts commenced in February 2010 and included:

- a 30-minute animated cartoon program;
- a 30-minute game-show program;
- a 30-minute healthy eating program; and
- a 30-minute fun fitness program.

The two-hour per day (Saturday and Sunday) Fun4Kidz programming was interspersed with sponsorship announcements for Kidz Lifestyle and Kidz Media, as well as other businesses, and promotions for Fun4Kidz programs and of Tele TV. All sponsorship revenue during the broadcasts accrued to Kidz Lifestyle, which paid Tele TV a set fee for the weekend hours.

Result: It is likely that Tele TV would be in breach of the licence condition to not operate the service as part of a profit-making enterprise. Kidz Lifestyle was making a profit from the broadcast of the Fun4Kidz programs on Tele TV through the sale of associated merchandise. The profit-making occurred, notwithstanding that the relationship was a fee-for-service arrangement.

Second Agreement: In March 2010, Tele TV entered into a three-year sponsorship agreement with Kidz Media. The agreement provided for Kidz Media to pay Tele TV to broadcast three minutes per hour of sponsorship announcements, promoting the childcare centres owned and operated by Kidz Lifestyle, during weekend broadcasts of Fun4Kidz programs. Kidz Lifestyle provided funding to Kidz Media to purchase the sponsorship spots, which it used, in turn, to pay Tele TV. There were no associated merchandise sales.

Result: It would be unlikely that Tele TV was in breach of the licence condition to not operate the service as part of a profit-making enterprise. While Kidz Media was a fully-owned subsidiary of Kidz Lifestyle and was receiving funding from Kidz Lifestyle to pay for the sponsorship spots, no profit-making was involved. Kidz Media was paying all the funding it received from Kidz Lifestyle to Tele TV to broadcast sponsorship announcements during the Fun4Kidz programs.

4. More examples of operating a broadcasting service for profit or as part of a profit-making enterprise

Licensees enter into a range of different commercial arrangements to generate revenue for their services. While it is not possible to cover every type of arrangement, additional examples are provided in this part of the guidelines to assist understanding. The examples discussed below include:

- payment for access to airtime, particularly for community radio;
- agreements with agents to procure sponsorship for the service; and
- the production and sale of CDs and other promotional arrangements.

The examples have been drawn from investigations, licence renewals and allocations to illustrate what is likely and unlikely to result in a breach of the licence condition.

It is important to emphasise that the ACMA considers the question of whether a licensee is operating a service for profit or as part of a profit-making enterprise on a case-by-case basis. Slight changes to the facts described in any of these examples may result in a different outcome.

4.1 Commercial agreements

Many licensees run the risk of breaching the licence condition where they enter into commercial arrangements without properly understanding the implications for compliance with the licence condition.

For a licensee planning to enter into commercial agreements, there are some best practices that ought to be implemented, including:

- good record keeping, that is, making sure agreements are in writing, signed by an authorised person and copies kept are easily retrievable;
- making sure all decision-making complies with the organisation's constitution, the corporate governance requirements in the community broadcasting codes of practice and the relevant legislation under which the licensee is incorporated;
- being certain about the actual amount of revenue and surplus that is expected to be generated through the agreement;
- being certain of how any money received by an external party will be used (for example, production costs, salaries), and taking reasonable steps to try to ensure that the external party is not intending to use the broadcasting service as part of its profit-making enterprise; and
- ensuring that when entering into a commercial arrangement, the licensee does not jeopardise compliance with the licence condition and that it is able to continue to provide the service for community purposes.

4.2 Payment for access to airtime

Payment for access to airtime is commonly referred to as an airtime access fee, paid to a licensee by an individual or group wishing to access airtime on a licensee's service. The service usually publishes a schedule of fees, which may contain a standard fee or have a range of fees for peak and non-peak periods or concessions for students and seniors.

While payment for access to airtime is generally by way of a financial consideration, it may also be an in-kind arrangement.

As the Act does not specifically provide for the sale of airtime on community radio, it is important that licensees enter into this type of arrangement with caution and in a transparent manner.

Measures that a radio licensee may implement when entering into payment for airtime arrangements to assist it in avoiding operating the service for profit or as part of a profit-making enterprise include:

- making details available to the community of the proportion of airtime available for a fee and free on its weekly program schedule;
- having regular reviews of the weekly program schedule to ensure that the sale of airtime is not preventing community participation in the selection and provision of programs;
- applying financial and in-kind payment for access to airtime in a transparent and accountable manner, as well as ensuring that airtime access fees are reasonable in the circumstances;
- ensuring that purchasers of airtime understand and agree to respect the obligations placed on community broadcasting licensees, particularly in relation to the prohibition regarding the operation of the service for profit or as part of a profit-making enterprise;
- keeping proper records of agreements and transactions;
- authorising only certain specified personnel to sell and receipt the sale of airtime on behalf of the licensee; and
- ensuring that there is regular scrutiny of records of airtime sales.

4.3 Access to airtime for community television licences

The Act permits community television licensees to sell limited portions of airtime to people that operate businesses for profit or as part of a profit-making enterprise.⁹

However, community television licensees must not sell:

- more than two hours of airtime in any day to a person who operates a business for profit or as part of a profit-making enterprise, unless the person is a company that has a sole or dominant purpose of assisting a person in education or learning;
- a combined total of more than eight hours of airtime in any day to persons who operate a business for profit or as part of a profit-making enterprise; and
- more than eight hours of airtime in any day to any one person.

For the purposes of the additional community television licence conditions described above, the sale of access to airtime to the following is taken to be the sale of access to airtime to the same company:

- any person in a position to exercise control of the company; and also
- any related body corporate of the company.

Where the licensee provides a program producer with airtime and allows that producer to sell sponsorship slots in that airtime and retain the sponsorship revenue, the licensee should periodically ask the producers to provide documentary evidence to demonstrate that the sponsorship revenue has genuinely been used to cover production costs and not used

⁹ Section 87A of the Act.

to generate a profit for a profit-making enterprise or distributed for personal gain. This will assist the licensee to avoid inadvertently breaching the licence condition.

Television Example

VisiTV entered into an airtime access agreement with Televisual Ltd, a company that produces and sells a range of audiovisual material, including educational shows and documentaries, as well as reality television programs and movies. The dominant purpose of Televisual Ltd is to maximise profits from the material that it produces and sells.

Under the agreement, Televisual Ltd had access to 6 hours of airtime (at \$500 per hour) for audiovisual material that was broadcast on VisiTV from 12pm to 6pm each Friday over 12 months. The material is of an educational nature. VisiTV earned \$156,000 as a result of the agreement, which it spent on the purchase of a new transmitter and replacement of analog with digital equipment.

Result: VisiTV is likely to be in breach of the additional CTV licence condition, as it sold more than 2 hours of airtime in one day to Televisual Ltd. Although Televisual Ltd produced and sold a range of educational audiovisual material, its dominant purpose is to make a profit and not to assist people in education or learning.

4.4 Agreements with agents to procure sponsorship

Agreements with agents to procure sponsorship for the broadcasting service can be a good way to outsource this legitimate revenue-generation activity. However, care must be taken in such arrangements to ensure that the broadcasting service is the main beneficiary of such sponsorship. The licensee must be the recipient of the revenue generated, with the agent being paid only a commission or fee based on a comparable market rate.

Television Example

Tele TV did an exclusive deal with Bravo Co, a sales and marketing company. According to the deal, Bravo Co would sell as much sponsorship of the Tele TV service as it could, within the legal limits available. Bravo Co guaranteed Tele TV \$100,000 a year, but would keep any revenue generated in excess of that amount.

Result: Tele TV is likely to be operating the service as part of a profit-making enterprise, as any profits in excess of \$100,000 from the sale of sponsorship on behalf of the licensee would accrue to Bravo Co rather than to Tele TV.

4.5 Production and sale of CDs and other promotional arrangements

Community broadcasting licensees enter into a range of different commercial arrangements to generate revenue for their services. Examples of such arrangements include:

- the production and sale of CDs;
- the merchandising of branded clothing;
- the setting up and maintenance of station websites;
- the publication of monthly or quarterly newsletters; and
- the sponsorship of events, such as dance parties and concerts.

These arrangements are sometimes complex, especially when the arrangements require other organisations to produce, promote and sell the merchandise. As such, licensees should take care when entering into such arrangements, including consideration of the appropriate use of the station logo, as well as copyright and royalty arrangements, to ensure that the service is not operated for profit or as part of a profit-making enterprise.

Radio Example

8XYZ wanted to promote local musicians and, in the process, generate revenue for the broadcasting service. To do so, it entered into an arrangement with Ragtime Co to produce a CD for sale. Ragtime Co owned a retail store selling CDs and other music products. Details provided on the CD cover and in on-air marketing included the station's on-air identity and logo, as well as promotions for Ragtime Co and its store.

The arrangement entailed 8XYZ paying a fee-for-service of \$20,000 to Ragtime Co for producing 10,000 CDs. This is half the cost that 8XYZ would have had to pay on the open market (the reduced cost being an in-kind payment to 8XYZ).

8XYZ sold the CDs for \$5 each and managed to sell 8,000, raising \$40,000, which it spent on the purchase of new studio equipment and office upgrade.

Result: 8XYZ would likely be in breach of the licence condition to not operate the service as part of a profit-making enterprise. The promotion of Ragtime Co on the CD and in on-air marketing indicated that the relationship with 8XYZ was being used to generate revenue for Ragtime Co.

Radio Example

6BCD wanted to promote jazz musicians in its licence area and, in the process, generate revenue for the broadcasting service. To do so, it approached Tag Ltd and discussed the production of a CD for sale. Details on the CD cover included the station's on-air identity and logo.

During the discussion, Tag Ltd indicated to 6BCD that there was no need to make an upfront payment for the production of the CD. Tag Ltd would produce 10,000 CDs a year over three years. Tag Ltd would receive 75% of CD sales and 25% would go to 6BCD. (The CDs were sold at an agreed price of \$10 each.)

Under this agreement, 6BCD earned \$75,000 and Tag Ltd earned \$225,000. 6BCD spent the \$75,000 it earned under the agreement on new equipment and running costs of the station.

Result: 6BCD is likely to be operating the service as part of a profit-making enterprise, as the arrangement favoured Tag Ltd, with the money received by Tag Ltd vastly exceeding the cost of production. Tag Ltd made a large profit from the arrangement, benefiting considerably more than 6BCD.

Television Example

OurTV wanted to make a DVD that would promote local actors and production talent. Sale of the DVD would enable OurTV to generate revenue for station equipment and facilities.

OurTV engaged a company, TV-DVD Ltd, to produce 30,000 DVDs for \$15,000. This was significantly less than the market rate, as TV-DVD Ltd wanted OurTV to acknowledge it as a sponsor of the broadcasting service.

OurTV sold 25,000 DVDs for \$15 each, raising \$375,000 gross and \$360,000 net after deduction of the initial outlay of \$15,000. OurTV spent the money on upgrading station equipment and improving facilities.

Result: OurTV is unlikely to be in breach of the licence condition. It was a fee-for-service arrangement with TV-DVD Ltd. The arrangement was documented in a contract and OurTV used the revenue it generated from the sale of the DVDs to upgrade station equipment and improve facilities.

5. The ACMA's role in compliance

The ACMA is required by the Act to investigate any valid complaints that a licensee has not complied with the licence condition to not operate their service for profit or as part of a profit-making enterprise. An investigation may be conducted by the ACMA into compliance with either or both parts of the licence condition. Each matter will be considered on a case-by-case basis.

The ability of an aspirant or existing licensee to comply with the licence condition is also a relevant factor for consideration by the ACMA when it is deciding whether to allocate or renew a licence. In the case of renewals, this may include consideration of whether the licence condition has been breached previously by the licensee.

In considering whether a licensee has breached the licence condition, the ACMA will consider:

- whether the service is being operated to generate a profit such as, for example, one which is being distributed to people who are involved in the management of the licensee ('operated for profit'); and/or
- whether the service is being used to directly generate revenue for an organisation other than the service provider ('part of a profit-making enterprise').

Where the ACMA investigates an alleged breach of the licence condition, or when it is assessing compliance with the licence condition, licensees are required to provide relevant information. Accordingly, licensees should ensure that they keep proper records of their transactions and arrangements.

The ACMA takes very seriously any deliberate breach of the licence condition. Enforcement options available to the ACMA for the breach of a licence condition include:

- accepting an enforceable undertaking from the licensee;
- issuing a remedial direction to the licensee;
- issuing a notice of intent to impose an additional condition on the licence; and
- issuing a notice of intent to suspend or cancel the licence.

However, in a situation where a licensee has inadvertently breached the licence condition and is able to provide evidence to this effect, the ACMA would generally be satisfied with the licensee rectifying the breach and putting in place appropriate measures to prevent future breaches of the licence condition.

Appendix A. Extracts from the *Broadcasting Services Act 1992*

Part 2—Categories of broadcasting services

15 Community broadcasting services

Community broadcasting services are broadcasting services that:

- (a) are provided for community purposes; and
- (b) are not operated for profit or as part of a profit-making enterprise; and

[...]

Part 6—Community broadcasting licences

79 Interpretation

In this Part, *company* includes an incorporated association.

[...]

81 When licences must not be allocated

- (1) A licence is not to be allocated to an applicant if:
 - (a) in the case of an applicant for a CTV licence—the applicant is not a company limited by guarantee within the meaning of the *Corporations Act 2001*; or

[...]

87A Additional conditions on CTV licences

Policy underlying additional conditions

- (1) It is the intention of the Parliament that services provided under CTV licences be regulated in a manner that causes them not to operate in the same way as commercial television broadcasting services.

Conditions relating to sale of access to air-time

- (2) Each CTV licence is subject to the condition that the licensee must not sell access to more than 2 hours of air-time in any day to a particular person who operates a business for profit or as part of a profit-making enterprise, unless the person is a company that has a sole or dominant purpose of assisting a person in education or learning.
- (3) Each CTV licence is subject to the condition that the licensee must not sell access to a combined total of more than 8 hours of air-time in any day to people who operate businesses for profit or as part of profit-making enterprises.
- (4) Each CTV licence is subject to the condition that the licensee must not sell access to more than 8 hours of air-time in any day to a particular person.

- (5) For the purposes of the conditions imposed by subsections (2), (3) and (4), the sale of access to air-time to any of the following is taken to be the sale of access to air-time to a company:
- (a) the sale of access to air-time to any person in a position to exercise control of the company;
 - (b) the sale of access to air-time to any related body corporate (within the meaning of the *Corporations Act 2001*) of the company.
- (6) The ACMA may, by written determination, impose other conditions on all CTV licences relating to sale of access to air-time.

[...]

Definitions

- (12) In this section:

access, in relation to air-time, means the right to select or provide programs to be broadcast during the air-time.

air-time means time available for broadcasting programs on a community broadcasting service.

sell, in relation to access to air-time, means enter into any arrangement under which a person receives any consideration in cash or in kind in relation to provision of the access to air-time.

Part 6A—Temporary community broadcasting licences

92A Interpretation

In this Part:

company includes an incorporated association.

[...]

Schedule 2—Standard conditions

Part 5—Community broadcasting licences

9 Conditions applicable to services provided under community broadcasting licences

[...]

- (2) Each community broadcasting licence is also subject to the following conditions:

[...]

- (c) the licensee will encourage members of the community that it serves to participate in:
 - (i) the operations of the licensee in providing the service or services; and
 - (ii) the selection and provision of programs under the licence;
- (d) the licensee will provide the service or services for community purposes;

- (e) the licensee will not operate the service or services for profit or as part of a profit-making enterprise.

[...]

- (3) A community broadcasting licensee may broadcast sponsorship announcements on a particular community broadcasting service. However, they must not run in total for more than:
 - (a) if the licensee is a community television broadcasting licensee—7 minutes in any hour of broadcasting on that service; or
 - (b) in any other case—5 minutes in any hour of broadcasting on that service.

[...]