



COMMUNICATIONS, ENTERTAINMENT & TECHNOLOGY LAW COMMITTEE

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Public Comment on ACMA Guide to the Transfer of Community Broadcasting Licences

The Guide of the Australian Media and Communications Authority is predicated on the ability of community broadcast licensees to transfer their interests as enabled in section 91A of the Broadcasting Services Act.

The Guide makes clear the processes and requirements that must be met in making applications for transfer of licences and that such applications will be available for public inspection.

The key issue seems to be that the transferral mechanism should not enable community broadcasting licences to become commodities for use in trade by commercial entities. While this may not seem a likely outcome given the requirement to comply with sections of the Act covering such issues as standards, community representation and consideration, it is nevertheless a possible development.

Section 91A has been broadly interpreted by ACMA in the Guide as providing licensees with the opportunity to pass the licence to another entity given the need or desirability of transfer in relation to issues including but not restricted to merger, change of legal entity and financial capacity.

However the Guide gives the impression at Section 1 that the approval of transfer is largely a matter to be decided at the discretion of ACMA rather than emphasising the function of section 91A(6) of The Broadcasting Act:

- (6) The ACMA must not approve the transfer of a community broadcasting licence unless the ACMA is satisfied that:
 - (a) if the licence has not been renewed—the proposed transferee represents the same community interest as the original licensee represented when the licence was allocated; or
 - (b) if the licence has been renewed on one or more occasions—the proposed transferee represents the same community interest as the applicant for renewal represented when the licence was last renewed.

Legal challenges arising out of contested transfers may well turn on interpretation of this section, in particular the words “the same community interest”. It is currently left open to ACMA to determine in consultation with the applicant what might comprise “the same community interest”. Greater certainty and transparency in the decision making process could be achieved by better defining “the same community interests”.

As Section 1 currently reads, it is impossible to ascertain on what basis ACMA will judge the “community interests” as being the same i.e. according to what standard measures does ACMA determine “the same community interests”. In a hypothetical scenario where the original entity has been dissolved and the controlling stakeholders have formed an entity excluding some previous stakeholders and incorporating new stakeholders, how does ACMA determine the “community interests” as being the same in accordance with the original licence application? This seems a more important matter than currently set out in the Guide given the highly competitive nature of the licensing process. It is plausible applicants for transfer of licence will later ignore representations which were of advantage to them in the licensing process and presumably they should be discouraged from doing so by ACMA without good reason.

The reference to “interests of the general community” provided at number 2 of page 5 creates further uncertainty. Where a licensee has failed to represent “interests of the general community” or reach other standards of conduct outlined in its original applications at what point will ACMA call for new applications for the licence rather than transfer the interest to another entity nominated by the underperforming licensee?

It is possible that the transfer process may be open to abuse by existing stakeholders in partnership with aspirant commercial and/or community stakeholders as a backdoor. Such misuse of the process would more closely resemble the award of the licence to new licensee rather than a transfer to a licensee “representing the same community interests”.

Section 91A(7)(a) makes express reference to the issue of consideration being provided to the applicant in relation to the transfer.

- (7) In deciding whether to approve the transfer of a community broadcasting licence, the ACMA must have regard to:
 - (a) the principle that, except in special circumstances, the transfer should not be approved if consideration has been, or is to be, provided to the applicant in relation to the proposed transfer; and...

Applicants for transfer will be aware that commercial consideration must be presented in compliance with this principle. The Guide would be most instructive if it included hypothetical examples of “special circumstances” in the matter of commercial consideration that would/would not contravene 87A(1). To what extent for instance is “consideration” an acceptable element in CTV licences given the additional conditions of Section 87A:

Section 87A – Additional conditions on CTV licences

Policy underlying additional conditions

87A(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.

Recommendations

In summary we recommend that the Guide to the transfer of community broadcasting licences incorporate:

1. Clearer instruction re Section 91A(6) with particular regard to interpretation of “represents the same community interests”.
2. More emphasis on the requirement for the transferees to meet the commitments regarding community representation made in the original or most recent licence application.
3. Inclusion of hypothetical examples to illustrate ambiguous wording such as the exception regarding “consideration” in “special circumstances” in Section 91A(7)(a). This is of particular concern in relation to the underlying principle of Section 87(A) requiring that CTV licences “not operate in the same way as commercial broadcasting services.”

About this submission

The NSW Young Lawyers Communications, Entertainment and Technology Law Committee thanks the Australian Communications and Media Authority for the opportunity to provide public comment on the ACMA Guide to the Transfer of Community Broadcasting Licences. The Committee comprises young lawyers under the age of 36 or in their first 5 years of practice and law students with a keen interest in media, communications, technology, and intellectual property law.

Christine Harris-Smyth was a member of the board of TVS representing the interests of community partner SLICE TV in 2004, was an employee of Metro TV in the lead up to test broadcasts of Sydney’s Channel 31 in 1988, and is a member of the Committee.

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