

AUSTRALIAN MEDIA LAW UPDATE

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BROADCASTING LAW UPDATE

Community TV

[77] During 2004, the Australian Broadcasting Authority (ABA) allocated the first licences for community television broadcasting services,² or CTV licences.³ While a number of aspirant 'community television' type services had broadcast on Channel 31 of the broadcast services bands since 1994, they had done so on a trial basis at the request of the Commonwealth government. However, these trial services were conducted using open narrowcasting class licences issued under Pt 8 of the *Broadcasting Services Act 1992* (Cth) (BSA) (ONC licences), because the ABA did not have the power to provide for temporary community television licences. In other words, they were not licensed in relation to the type of service they were providing.⁴

The BSA was subsequently amended in 2002 to provide for community television licences.⁵ This outcome followed from a review into the regulation of the digital transmission of community television broadcasting services using the broadcasting services bands (the 2002 Review).⁶

[78] CTV licences are established, generally as community broadcasting licences under Pt 6 of the BSA. However, a number of specific provisions were introduced to cover problems relating to the operation of CTV services that were highlighted by the

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² *Broadcasting Services Act 1992* (Cth) Pt 6.

³ *Broadcasting Services Act 1992* (Cth) s 6 defines CTV licence to mean 'a community broadcasting licence under Part 6 that provides television programs but is not targeted, to a significant extent, to one or more remote Indigenous communities.'

⁴ *Broadcasting Services Act 1992* (Cth) s 15 sets out the indicia of a community broadcasting service.

⁵ *Broadcasting Services Act 1992* (Cth) amended by the *Broadcasting Legislation Amendment Act (No 2) 2002* (Cth).

⁶ Department of Communications, Information Technology and the Arts, *The Future of Community Television: A review of the regulatory arrangements that should apply to the digital transmission of community television broadcasting services using spectrum in the broadcasting services bands and how access to spectrum should be provided free of charge*, June 2002. http://www.dcita.gov.au/broad/television/community_television/the_future_of_community_television>. *Broadcasting Services Act 1992* (Cth), Sch 4, cl 60C provided that before 1 January 2002, the Minister had to review the regulatory arrangements that should apply to the digital transmission of community television broadcasting services using spectrum in the broadcasting services band and how access to spectrum should be provided free of charge.

2002 Review, which raised concerns about the financial and management capacity and accountability and revenue raising ability and financial viability of the CTV services. For instance, licences cannot be allocated to applicants for CTV licences which were not a company limited by guarantee within the meaning of the *Corporations Act 2001* (Cth).⁷

CTV Licence Conditions

While the licence conditions contained in Pt 5 of Sch 2 applied to all community broadcasting licensees, additional licence conditions contained in s 87A were imposed on CTV licences (s 86(2)). The additional conditions imposed on CTV licences were designed to delineate CTV services from commercial television broadcasting services, and to ensure that they were properly governed, and could be financially viable.

A specific policy comment indicates that parliament intends that CTV services be regulated in a manner that 'causes them not to operate in the same way as a commercial television broadcasting services' (s 87A(1)).

The ABA has the power to determine, vary, or revoke conditions (s 87A(8)–(11)). Conditions are to be imposed on the 'sale of access to air-time' (s 87A(2)–(6)). 'Access' means 'the right to select or provide programs to be broadcast during the air-time', while 'air-time' means 'time available for broadcasting programs on a community broadcasting service' (s 87A(12)). The meaning of 'sell', in relation to 'access to air-time', is defined as meaning entering 'into any arrangement under which a person receives any consideration in cash or in kind in relation to the provision of the access to air-time'.

The key limitations⁸ on selling access to air time limits sale to no more than:

- two hours per day to a particular person or company,⁹ who operates a profit-making enterprise, except if they have the sole or dominant purpose of assisting a person in education or learning (s 87A(2)); or

⁷ *Broadcasting Services Act 1992* (Cth) s 81(1)(a). The general suitability issues set out in s 83(2), applied to all community broadcasters as well: s 81(1)(b).

⁸ *Broadcasting Services Act 1992* (Cth) s 87A(6) allows the ABA to impose other conditions on all CTV licences relating to sale of access to air-time.

- eight hours per day to profit-making enterprises (s 87A(3)), or to a ‘particular person’ (s 87A(4)).

Other conditions relate to:

- community access to air-time (s 87A(7)(a));
- the governance of CTV licences, including constitutional requirements (s 87A(7)(b)); and
- the provision of annual reports to the ABA (s 87A(7)(c)).

In addition, general licence conditions as set out in Pt 5 of Sch 2 apply to all community broadcasting licensees, but are of specific interest to CTV licences. For instance, it is a condition of licence that they do not broadcast RC or X programs (cl 9(1)(g)), and they cannot broadcast R films that have not been modified as provided for in s 123(3A)(b) (cl 9(1)(ga)).

As well, a series of general community and governance obligations apply to all licensees, which dovetail with the s 87A conditions imposed on the holder of a CTV licence:

- it has to remain a suitable licensee (cl 9(2)(a));
- it will continue to represent the community interested it represented when the licence was allocated or renewed (cl 9(2)(b));
- it will encourage the involvement of the community in its operations and program provision (cl 9(2)(c));
- it will provide the service for community purposes (cl 9(2)(d)); and
- it will not operate the service for profit or as part of a profit-making enterprise (cl 9(2)(e)).

[79] *Draft CTV Additional Licence Conditions*

In December 2004, the ABA called for submissions on a proposal to impose three conditions on community television broadcasting licences under s 87A of the BSA.¹⁰ Submissions closed on 17 January 2005. The draft conditions are set out in Sch 1 of

⁹ *Broadcasting Services Act 1992* (Cth) s 87A(5) included a person in a position to exercise control of the company or any related body corporate of the company

¹⁰ *ABA Community broadcasting services: Proposed licence conditions on community television licences* <http://www.aba.gov.au/tv/licensing/community/draft_conditions2004>.

the *Broadcasting Services (Additional Conditions — CTV Licence) Determination 2004*.¹¹

Financial difficulties

The ABA is proposing the imposition of a condition relating to the financial difficulties of licences. This condition requires that if at a board meeting the board becomes aware of financial difficulties that appear likely to cause the CTV licensee to enter into either or both of receivership and voluntary administration, the CTV licensee must notify the ABA, in writing, of the financial difficulties as soon as practicable after the meeting (cl 1(1)).

In this case, the CTV licensee must give the ABA a written report of the actions it has taken in relation to the financial difficulties, and the progress of its financial affairs within 1 month *after* the day it notifies the ABA and within each subsequent period of 1 month, until the financial difficulties are resolved (cl 1).

Sale of access to air-time

The sale of access to air-time is a key condition imposed on CTV licensees by the BSA (s 87A(2)–(6)). The ABA is proposing to augment these conditions by requiring that the CTV licensee has to establish and maintain a register of persons with whom it has agreements or arrangements (called 'persons') in relation to the sale of access to air-time (cl 2(1)).

The condition imposes a clarification, and description of, the characteristics of the purchaser, the amount of air-time bought, when it was bought, and the income received, among other things, based on s 87A(2)–(3) (cl 2(2)). The condition also requires that the compliance with these subsections be monitored (cl 2(3)).

TV programs broadcast

This condition imposes obligations about the amount, time and character of programs broadcast by CTV licensees. This condition requires that:

¹¹ *Broadcasting Services Act 1992* (Cth) ss 87A(6) and (7) provides for the ability of the ABA to make such determinations, and the focus of the conditions — see above.

- the CTV licensee has to broadcast programs for at least 12 hours a day (cl 3(1)(a)), between 6 am and midnight (cl 3(2)),
- unless the ABA has authorised it in writing to broadcast for a shorter period (cl 3(1)(b)), in which case the times it broadcasts will be specified by the ABA (cl 3(3)).

In either case, the licensee has to broadcast programs that are diverse and current, and meet the needs of a broad range of groups within the CTV licensee's community of interest (cl 3(2)–(3)).

However, the condition notes that the CTV licensee is also subject to the licence condition that the licensee will continue to represent the community of interest it represented at the time the licence was allocated or renewed.¹²

Sponsorship announcements, national interest and emergency broadcasts directed by the Minister, licensee program publicity, and licensee product, service, [80] or activities for which it does not receive consideration, and community information or promotional material for which it does not receive consideration, will 'count' as program content for time calculations (cl 3(4)) so long as the time given to such broadcasts does not exceed 15 minutes (cl 3(5)).

Briz31

These conditions have been clearly drafted in response to the emerging development of situations affecting CTV licences in the first year of their operation. In connection with the condition requiring the notification of financial difficulties to the ABA, the situation of the Brisbane CTV licensee Briz31 Ltd ('Briz31'), is current. Briz31 had operated under an ONC licence until it was successfully awarded the Brisbane CTV licence in 2003. The licence period began on 1 August 2004, and the ABA had requested Briz31 to report monthly to the ABA setting out how it is progressing financially.

¹² That is, the conditions set out in the *Broadcasting Services Act 1992* (Cth) Sch 2, Pt 5 cl 9(2)(b).

However, in November 2004, the directors placed the company into voluntary administration. It owed an estimated \$310,000 to about 20 creditors, including \$200,000 to the transmission provider, Broadcast Australia, which is paid \$13,000 each month for the right to be on air.¹³ Among other issues, Briz31 was affected by its obligations to one of its providers, which meant it had to limit aspects of its programming. But in January 2005,¹⁴ it was reported that funding would be provided by Queensland University of Technology,¹⁵ because it would allow the further broadcast of news and programs made by its students'.¹⁶ Another donation of \$150,000 had been made by the harness race supporter (which is shown on Briz31), developer Kevin Seymour.¹⁷ It was reported that:

QUT has agreed to invest \$250,000 but its funding package is subject to approval by the university's council which next meets on February 23. Confirmation of the university's involvement comes less than a week after vice-chancellor Peter Coaldrake said he had no plans to buy into the venture. In a letter to the station's administrator KordaMentha, Professor Coaldrake said he recommended to the council that the funding be approved ... Control of the station will be handed back to its current management, however, a new board is likely to be announced later this week.¹⁸

These developments raise interesting questions thrown out by the situation at Briz31, and the development of the draft conditions. The ABA has sought to impose, through licence conditions, obligations relating to problems with finances that it foresaw with Briz31, rather than to consider these matters simply as a 'request' for information. In addition, it may be trying to smooth over the consequences of a change in direction that may be consequent upon the involvement of new parties in the operation of the CTV licence, as proposed by new licence conditions in cl 3(2)–(3), concerning the obligation to the community of interest of the CTV licensee.

¹³ Scott Murdoch and Emma Chalmers, 'TV drama all too real', *The Courier-Mail*, Brisbane, 15 November 2004, 17.

¹⁴ Scott Murdoch, 'Funding lifeline for broadcaster Briz31', *The Courier-Mail*, Brisbane, 17 January 2005, 2.

¹⁵ It should be noted that the QUT is the institution in which I work, though I have no knowledge of, or connection with, these arrangements.

¹⁶ Murdoch, above n 14.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

However, this begs the question — can a donation or a change in financial support (and presumably an interest in the operation of the licensee) be enough to change the licensee's community of interest it represented at the time the licence was allocated, if 'strings were attached', which meant that its focus now differed.¹⁹ However, is the ability to gain access to the air-time, as provided for in s 87A(2), relating to education or learning, something that has no impact on the community of interest of the CTV licensee?

[81] At one extreme, it may suggested that if a change to the community of interest by refocussing its position, then the licensee may have to surrender the licence, as there is no provision for the transfer of community broadcasting licences in the BSA. This blunt reading would be an argument favoured by other applicants who were unsuccessful in obtaining the licence, though neither of the two other applicants was found to meet the tests needed to be allocated a licence under s 84 of the BSA. However, this outcome would be unreasonable if only minor adjustments were made to the service. On the other hand, if any new board were to radically alter the direction and structure of the CTV licensee, so that the service bore no resemblance to the type proposed by Briz31 in its original application, then this may mean that the licence would have to be surrendered, and re-allocated. The structure of the new conditions may need to consider the meaning of the 'community of interest' condition found in Sch 2, Pt 5, cl 9 (2)(b).

Community Television Code of Practice

The ABA registered the CTV Code of Practice on 24 September 2004,²⁰ as provided for by Pt 9 of the BSA. The Code was created under s 123 of the BSA, and was developed by the peak body, the Community Broadcasting Association of Australia (CBAA). As CTV had previously operated under ONC codes of practice, the new Code was now sector specific.²¹

The CTV Code begins by setting out a series of guiding principles. It notes that:

¹⁹ *Broadcasting Services Act 1992* (Cth) Sch 2, Pt 5 cl 9 (2)(b).

²⁰ Australian Broadcasting Authority, 'ABA registers Community Television Code of Practice', news release, NR 122/2004, 24 September 2004.

²¹ It is the role of the peak body to develop the code in consultation with the ABA, and the code will be applicable to the operation of the section of the industry: *Broadcasting Services Act 1992* (Cth) s 123(b).

In pursuing these principles stations endeavour to:

- Promote harmony and diversity in contributing to a cohesive, inclusive and culturally diverse Australian community;
- Pursue the principles of democracy, access and equity, especially to people and issues under-represented in other media;
- Enhance the diversity of programming choices available to the public and present programs which expand the variety of viewpoints broadcast in Australia;
- Demonstrate independence in their programming as well as in their editorial and management decisions;
- Support and develop local and Australian arts, music and culture in the station's programming, to reflect a sense of Australian identity, character and cultural diversity;
- Widen the community's involvement in broadcasting.
- Demonstrate a commitment to participate in the development of the community-broadcasting sector at a state and national level in order to support continuous improvement across all community television service providers.

The Code itself deals with internal governance, public comments, programming issues, children's televisions, program classification, sponsorship and community service announcement, and code reviews.

Code 1 — Governance

This code of practice is designed to ensure that licensees have appropriate corporate governance and dispute resolution procedures in place to deal with internal disputes, community and access principles, how to deal with volunteers, and the process of dispute resolution. It requires that licences have written policies and procedures to facilitate conflict resolution.

[82] *Code 2 — Handling Complaints from the Public*

Among the practices put in place, this code requires that licensees provide a minimum of 50 on-air announcements each year about the CTV code, and how the public can access. It sets out a process for handling complaints, and by whom. It also provides for the means by which records are kept, and complaint advice provided to the ABA.

Code 3 — Programming

This code emphasises the community nature of CTV licences, privacy issues, and fairness in news and current affairs programming. In particular, it focuses on the need to provide 'the highest level of community-oriented and diverse Australian programming', including the need to support the development of local and Australian programming.

Code 4 — Children's television

This code imposes anti-harm provisions, suitable broadcast times for children's programs, and appropriate identification of children's content.

Code 5 — Program Classification and Identification

The code adopts the requirements about the times that material may be shown and the categories of classification.

Code 6 — Sponsorship and Community Service Announcements

It is noted that this code 'augments the sponsorship conditions set down in Sch 2 of the *Broadcasting Services Act*'. The code requires that the licensee retains editorial control and independence in programming and that it not enter into sponsorship arrangements that are likely to affect the independence and integrity of the service (Code 6, 6.1). It notes that sponsorship 'will not be the sole factor in determining access to broadcast time' (Code 6, 6.2). It suggests that sponsorship announcements be pre-classified to comply with the CTVA production checklist (Code 6, 6.3), that sponsorship will be clearly tagged, (Code 6, 6.5) or indicated at the close of the program for information based programs or buying guide (Code 6, 6.6).

Code 7 — Review of Codes

This code indicates that the codes be maintained and revised to 'accurately reflect contemporary community broadcasting principles'. It notes that the code will be reviewed every three to five years, and that consultation with the ABA and the public will be carried out as part of this process.

Documentaries and the Australian content rules

The ABA has provided guidelines that seek to explain what is meant by the television program genre of 'documentary'.²² The *Documentary Guidelines: Interpretation of 'documentary' for the Australian Content Standard* (the guidelines),²³ seek to expand upon the *Broadcasting Services (Australian Content) Standard 1999* (Cth) (the standard).

The standard requires the broadcast of a certain amount of first release Australian documentary programming on Australian commercial television.²⁴ It provides that licensees have to broadcast 20 [83] hours annually of first release Australian documentary programs that are shown between 6am and midnight. In addition, these documentaries have to be of at least 30 minutes' duration.²⁵

The standard defines a documentary program as 'a program that is a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program'.²⁶ However, what constitutes a 'creative treatment of actuality' can be extremely broad. The ABA notes that the guidelines came out of a major review of the Australian content standard was 'broadly appropriate, guidance was needed as to the types of programming that would meet the definition.'²⁷

The guidelines commence by explaining that the definition of documentary program in the Australian content standard can include 'all forms of factual programming'. It notes that the 'definition of documentary is a term of art rather than a precise description'.²⁸ The ABA indicates that the guidelines give direction to it's

²² Australian Broadcasting Authority, 'Australian content standard Documentary Guidelines', news release, NR 168/2004, 17 December 2004.

²³ Australian Broadcasting Authority, *Documentary Guidelines: Interpretation of 'documentary' for the Australian Content Standard*, Sydney, 16 December 2004.

²⁴ *Broadcasting Services Act 1992* (Cth) s 122(2). The ABA is required to determine standards for commercial television broadcasting licences, in relation to the Australian content of programs.

²⁵ *Broadcasting Services (Australian Content) Standard 1999* (Cth), s 16.

²⁶ Under s 6 of the Australian content standard.

²⁷ Australian Broadcasting Authority, above n 23, 1.

²⁸ *Ibid* 3.

interpretation of the meaning of documentary for the purposes of administering the Australian content standard.²⁹

Following the definition in the Australian content standard, the two requirements for a documentary are the need for *actuality* and the need for the *creative treatment* of its subject matter. Actuality means that the events are grounded in fact, or real life — that the events would have happened, whether or not someone was there to film what was happening. However, a situation may be contrived and then the real life events documented, in which case the program may meet the requirements of actuality.³⁰

In order to satisfy the test of *creative treatment*, the material being brought together will be done so demonstrating ‘original thought or expression’. Included among the indicia of what may constitute creative treatment are the program involves the exploration of an idea or theme, it is based around a narrative, or it may be designed to increase a viewer's understanding of an idea. The documentary will have some enduring appeal and ongoing relevance.³¹ On the other hand, the simple recording of events, a chat or interview program, a ‘how to’ guide, a travel guide, or a vehicle to highlight goods and services will not be included.³²

The guidelines canvass the problems that arise in what it calls ‘converging program types’,³³ such as reality programs, reconstructions and travel programs.

Reality programs that involve contrived events, and which contain a competition-based challenge, or which involve a prize, are treated as failing to meet the creative treatment test, as they do not explore or interpret an idea. However, contrived situations that involve the exploration of an idea, or which involves some critical commentary, such as considering life in other eras, may meet the test.³⁴

²⁹ Ibid.

³⁰ Ibid 3–4.

³¹ Ibid 4.

³² Ibid.

³³ Ibid 5.

³⁴ Ibid 5–6.

Reconstructions dealing with factual events may be characterised as a documentary based on the creative treatment test, though a dramatic treatment per se will be treated as dramatised documentary under the Australian drama category.³⁵

[84] *Travel programs* that engage with a place or people will be characterised as documentaries, but magazine type programs appear to be excluded based on the creative treatment test.³⁶

Based on the adoption of these guidelines, programs like *Big Brother*, *Survivor*, *Getaway*, and *My Restaurant Rules*, will not meet the requirements of documentary. The guidelines give the examples of Michael Palins' travel programs, such as *Pole to Pole*, or the *1900s House*, as examples of programs that would meet the test of the creative treatment of actuality in converged program types.

The guidelines also give consideration as to the types of programs excluded from documentary program, namely news, current affairs, sports coverage, magazine, infotainment or light entertainment programs.³⁷ The first two examples will be considered here. The guidelines indicate that news is easily distinguishable from documentary, largely because of its immediacy and its status as reporting.³⁸ Current affairs are distinguishable from documentary for, among other reasons, its limited life span. While it may look at material in a more detailed way than the news, its appeal is usually short lived. On the other hand, current affairs *content* may be treated in a way that constitutes a documentary. In the former category is *A Current Affair*, while in the latter is *The President v David Hicks*.³⁹ In this case, the subject matter may be the same as treated by the current affairs program, but the exploration of an idea allows it to meet the test of creative treatment.

³⁵ Ibid 6.

³⁶ Ibid 7.

³⁷ Ibid 7–11.

³⁸ Ibid 7.

³⁹ Ibid 8.