Investigation report no. BI-453

| Summary |  |
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| **Licensee** | Peedac Pty Ltd |
| **Station** | 6MNE |
| **Type of service** | Community Broadcasting – radio |
| **Relevant legislation** | Sub-paragraph 9(2)(c)(i) of Schedule 2 to the *Broadcasting Services Act 1992* |
| **Date Finalised** | 28 March 2019 |
| **Decision** | Breach of sub-paragraph 9(2)(c)(i) of Schedule 2 to the *Broadcasting Services Act 1992* [encouraging community participation in the operations of the service] |

Background

On 13 December 2018, the Australian Communications and Media Authority (the ACMA) received correspondence raising concerns that the licensee of 6NME, Peedac Pty Ltd (the licensee), is not encouraging community participation in the operations of the service.

On 16 January 2019, the ACMA commenced an investigation under section 170 of the *Broadcasting Services Act 1992* (the BSA) into the licensee’s compliance with the licence condition at sub-paragraph 9(2)(c)(i) (encouraging community participation in operations of the licensee in providing the service or services) of Schedule 2 to the BSA.

The licensee

The licensee has held a long-term community radio broadcasting licence to represent the Indigenous community interest in the Perth RA1 licence area since 22 January 2008. The expiry date of the current licence is 21 January 2023.

The licensee is an Indigenous organisation that oversees a diverse portfolio. The licensee stated this encompasses:

providing *Disability Employment Services*, employment and training services through *Parents Next* and *Youth JobsPath* training, accredited training through *JobTrainWA,* corporate catering and training through *Kuditj, Indigenous truancy program* and Indigenous community broadcasting through Noongar Media Enterprises.[[1]](#footnote-1)

The licensee is a not-for-profit company limited by shares and a wholly-owned subsidiary of Kaarta-Moorda Aboriginal Corporation (KMAC), a registered Indigenous corporation.

The broadcasting service itself is operated by a wholly-owned subsidiary of the licensee, Noongar Media Enterprises PTY Ltd (Noongar), also a not-for-profit company limited by shares.

Submissions

This investigation has taken into account:

* correspondence received by the ACMA on 13 December 2018
* written submissions and documents provided by the licensee to the ACMA on 31 January 2019, 5 February 2019 and 7 March 2019.

Other sources are identified in this report where relevant.

Issue: Is the licensee encouraging participation in the operations of the service?

Relevant licence condition

**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 […]

Finding

The licensee is in breach of sub-paragraph 9(2)(c)(i) of Schedule 2 to the BSA*.*

Reasons

It is a condition of all community broadcasting licences that the licensee must encourage members of the community that it serves to participate in the operations of the licensee in providing the service or services.

The ACMA’s *Community Broadcasting Participation Guidelines 2010* (the Guidelines) provide the following guidance on how a licensee might encourage community participation in the operations of the service:

Sound corporate governance practices […] enable communities to have adequate input into the decision-making that affects their services.

Examples of sound corporate governance practices include:

[…]

* measures to prevent the concentration of control in the hands of a few individuals (for example, using a range of committees, limiting the number of proxy votes that a member can exercise and having a limited renewable term for individuals holding positions on committees or the board).

[…]

The community participation requirement means that participation in a service should be open to all within the licensee’s defined community interest.

If restrictions on membership are unreasonable, the licensee may not comply with the community participation requirement.

[…]

Licensees should ensure there are other opportunities for involvement by non-members from the broader community. Some other ways that licensees with membership restrictions can involve their communities include:

* holding station meetings and planning days with a broad range of station participants including members, producers and staff;
* seeking comprehensive feedback and suggestions from the community;
* recruiting non-member volunteers from the wider community;
* having community representatives on committees;
* including volunteers and staff representatives as ex-officio members on the board;
* engaging with community groups;
* providing training;
* informing the community of the licensee’s activities through noticeboards, newsletters, meetings, on-air announcements and the station’s website; and
* participating in community events.

[…]

Committees are an important way in which members and other people in the community serviced by the licensee’s service can have a say in the running of the service.

Licensees should aim to have a range of committees, make their members aware of how to nominate for committee positions, and have their committees meet regularly and keep appropriate records.

Correspondence received by the ACMA alleges that the corporate group has changed significantly since its licence was first allocated and that these changes may be preventing community participation in the operations of the licensee in providing the service. Specifically, concerns were raised regarding the corporate structure of the licensee and its subsidiary Noongar, Noongar’s independence, and that some of Noongar’s policies—required by the *Community Broadcasting Codes of Practice 2008* (the Codes)*—*may have been revoked.

In response to the ACMA’s preliminary view, the licensee stated that ‘Indigenous broadcasting is a specialist category and we do possess substantial experience in the indigenous sector’. When the ACMA examines compliance with community participation requirements, it considers the individual circumstances of each service. The community participation requirement, nonetheless, applies to all services, regardless of their location, the community they serve or the size of that community.

In the ACMA’s experience, licensees encourage community participation in their operations when they have sound corporate governance practices, value and promote membership and volunteering, and have an effective and transparent committee structure. These practices enable communities to have adequate input into the decision-making that affects their service.

***Is membership restricted?***

As is outlined in the Guidelines, the ACMA considers membership to be one of the primary ways of encouraging community participation in the operations of the service. This is because members can have a say in decision-making by:

* attending and voting at meetings;
* nominating for membership of boards and committees;
* participating in boards and committees; and
* proposing items of business for general meetings.

The ACMA’s strong preference is for community radio broadcasting services to have open membership policies. Membership is open if it is automatic on application or if a licensee may only refuse membership on the basis of specific and transparent criteria.

When the licence was allocated in 2008 and subsequently renewed in 2012 and 2017, it was noted that, although the licensee did not have open membership, KMAC (the parent company) did have open membership to all Aboriginal and Torres Strait Islander people over the age of 18 that reside in the area; no restriction was placed on the maximum number of members.

As such, although members were unable to vote directly at AGMs and special general meetings (SGMs) held by either the licensee or Noongar, members of the community could have participated in decision-making processes which impacted the parent company’s decisions in respect of its subsidiaries.

It is noted that the membership policy supplied to the ACMA following the 2017 renewal states that ‘Members of KMAC will be considered to be members of Noongar Radio’. The community participation policy supplied at this time states that Noongar:

must encourage members of the community to participate in the management, programming and operations of the service. […] Through its endorsed representatives on the NME board, KMAC (the sole shareholder of Peedac and its subsidiaries) receives reports and is able to give direct feedback from its members.

In its submissions, the licensee provided copies of minutes for the 20 November 2018 AGM and SGM for KMAC. These minutes indicate that KMAC has adopted changes to its constitution which restrict the maximum number of members of the company to five.

In a licence area with an Indigenous population of more than 30,000, KMAC’s decision to reduce its membership to only five people means that members of the broader Aboriginal and Torres Strait Islander community are effectively no-longer able to vote at meetings or propose items of business for general meetings.

***Can community members participate on boards and committees?***

The licensee has indicated that, over the last 12 months, it has undergone a significant restructure, causing some upheavals, including:

the restructuring of staff across all divisions, the registration and/or redundancy of three Noongar staff members (and consequent understaffing) and significant changes on the Noongar board.

The licensee has further indicated that these changes were implemented in part to reduce discord and increase operational effectiveness ‘with political and philosophical agreement across the spectrum’.

The ACMA notes that at its 20 November 2018 AGM and SGM, in addition to restricting membership numbers, KMAC also amended its constitution to change the number of directors to be a minimum of three and maximum of five (reduced from a minimum of five and a maximum of 10). KMAC currently has three directors and five members registered with the Office of the Register of Indigenous Corporations.[[2]](#footnote-2)

The licensee’s constitution allows for the company (the licensee) to appoint directors by general resolution in a general meeting. Noongar’s constitution provides for two directors to be nominated by its only shareholder (the licensee), with the remainder to be nominated by the Manager of Noongar and appointed by the shareholder. As such, all members of Noongar’s board are appointed by the licensee’s board. Noting that KMAC’s membership has been reduced to 5, this means that a small group is now responsible for appointing directors to Noongar’s board.

In its submission of 31 January 2019, the licensee indicated that its current board consisted of five directors, including the three directors of KMAC and the registered contact person for KMAC. The licensee indicated that the current board for Noongar also consists of two KMAC directors and the KMAC registered contact person and two other directors to be confirmed at the next board meeting, one of whom is a community elder (also a director on the licensee’s board) and one of whom is a non-Indigenous director (with a background working for Indigenous organisations). Therefore, only one director on Noongar’s board is currently not also on the board of the licensee.

In its submission of 5 February 2019, the licensee indicated that the current Managing director of the licensee may step down from the Noongar’s board and that the Station Manager has already put forward names of community members who have expressed interest as potential candidates.

This would leave four directors on Noongar’s board who are also directors on the board of the licensee, one member from the broader Indigenous community and one non-Indigenous director.

In response to the ACMA’s preliminary view, the licensee has stated that it:

Acknowledges the lack of transparency in the board and its selection process and subsequent purported conflicts of interest arising from appointing the same directors to Kaarta-Moorda, Peedac and Noongar Media boards.

[…]

Acknowledges the apparent lack of general community representation across all boards. We recognise the requirements of the Acts and our obligations toward the implementation of principles of diversity and independence. Peedac is committed to acting in endorsing an independent NME Board prior to the end of the financial year.

[…]

Agrees to amend […] the NME Constitution [and …] encourage members independent of Peedac to nominate and elect members of the NME Board.

The licensee has also advised that it does not have any active sub-committees. The licensee has stated that Noongar’s current Station Manager meets regularly with the Managing director of the licensee to discuss station concerns and recommendations for improving governance, broadcasting and engaging with the community. The ACMA notes that the licensee has indicated a willingness to consider implementing sub-committees.

***Does the licensee have governance documents to support community participation?***

In response to the ACMA’s preliminary view, the licensee provided a copy of Noongar’s community participation policy (endorsed by Noongar’s board on 20 April 2018) as evidence of its commitment to regulatory compliance across all areas, stating that the policies provide:

* encouragement of the community to participate in the management, programming and operations of the Noongar Radio service;
* reasonable access to membership; and
* an appropriate organisational structure.

The ACMA also observes that this policy states:

* the board will be drawn from a number of sources, including the community, volunteers and industry experts;
* through endorsed representatives on Noongar’s board, KMAC will give direct feedback from its membership; and
* members of the community will be able to join KMAC.

In light of the organisational changes discussed above, it is not evident that this policy remains an applicable governance document for the service. Given that community members are effectively no-longer able to join KMAC, no sub-committees are currently operational and broader community representation on the Noongar board is limited, this policy does not provide relevant mechanisms by which members of the community may participate in the operations of the licensee in providing the service.

The ACMA does note that the licensee has policies that outline the principles of volunteering; the rights and responsibilities of volunteers within the organisation; the rights and responsibilities of the organisation to volunteers; and dispute resolution practices.

***Does the licensee provide other opportunities for volunteering?***

As of 1 December 2018, the licensee has hosted 32 volunteers (four participated in administration work, 24 engaged in broadcasting, production and programming roles, one in a technical role and one in an advisory/managerial capacity). This represents a significant drop since the licence was renewed in 2017, when the licensee reported having 60 volunteers. While this figure is above the national average for an Indigenous community broadcaster, in a metropolitan licence area with an Indigenous population of more than 30,000 (approximately 2% of the Perth RA1 population), the ACMA would expect the service to maintain a larger number of volunteers than Indigenous services in regional and remote areas. In this regard, the ACMA does note the licensee’s comments that it is ‘unable to offer training for volunteers and members of the community on a regular basis’ due to funding restrictions and that it is ‘unlikely to be keen to increase volunteer numbers as there is little to no infrastructure in place to support them’.

In response to the ACMA’s invitation to comment on its compliance with the licence condition, the licensee advised that both its board and Noongar’s board include elders who engage with the community and advise of issues and protocols as and when appropriate. The licensee also provided a number of examples of activities that it has undertaken to engage with its community of interest, including:

* providing training to volunteers;
* maintaining relationships with educational institutions (including Curtin University’s School of Indigenous Studies, School of Media, and School of Creative Arts & Social Inquiry);
* providing outside broadcasts (six in the last 12 months, including the live memorial for two young boys lost to Perth’s Swan River, the commemoration of the Pinjarra Massacre, Survival Day/Invasion Day concerts, and a mix of high-profile and local community NAIDOC week events); and
* regularly participating in the CBAA’s Community Engagement Surveys through McNair Ingenuity.

The ACMA acknowledges that activities which foster community engagement and encourage community participation in the selection and provision of programs can form part of an overall strategy to encourage community participation in the operations of the licensee in providing the service. The ACMA also notes that the licensee was awarded the Community Broadcasting Association of Australia’s national award for *Indigenous Engagement* in 2017 and was a finalist in 2018.

However, such activities are unlikely to result in compliance in cases where restrictions on community participation in decision-making processes are unreasonable. While the ACMA recognises the licensee’s previous successes and community engagement activities, in order to assess the licensee’s compliance with the relevant licence condition, these activities have been considered in light of those restrictions placed on community participation discussed above, some of which have occurred as recently as the KMAC 20 November 2018 AGM.

***Conclusion***

The ACMA considers the requirement to encourage community participation in the provision of the service to relates to the ability of the community of interest to have input into the decision-making that affects their service. Restrictions on this input should be reasonable, such that participation remains open to the community.

Based on the information provided, the ACMA makes the following observations:

* KMAC’s membership has been restricted and members of the broader Indigenous community are no longer able to become members of KMAC and participate in decision-making in respect of KMAC’s subsidiaries at AGMs and SGMs, nor is there a mechanism in place to enable community members to join either the licensee or Noongar;
* decision-making by the licensee in providing the service is currently limited to a small group, that is the licensee’s board, with no current opportunities for members of the community to join sub-committees or attend general meetings for the service;
* there is currently little differentiation between the licensee’s board and that of Noongar which, noting the licensee’s diverse portfolio, limits the potential for community participation in decision-making concerning the service;
* while the licensee has indicated it is recruiting another member of the community to join Noongar’s board, the process surrounding this lacks transparency given KMACs restricted membership and the apparent absence of governance policies outlining this process;
* Noongar’s community participation policy is not appropriate to the current organisation structure, such that mechanisms used to encourage community participation are unlikely to be accessible to the community of interest; and
* while the licensee appears to be engaged with its community of interest and provide opportunities for community participation, volunteer opportunities have reduced significantly over the last 12 months.

For these reasons the ACMA considers that current governance structures limit community participation in the licensee’s decision-making functions to only a few individuals and restrictions on community input are unreasonable for a community broadcaster. The ACMA is reassured by the licensee’s willingness to implement mechanisms to address the ACMA’s concerns, however, until such mechanisms are in place, ACMA finds that the licensee is not encouraging community participation in the operations of the licensee in providing the service, in breach of sub-paragraph 9(2)(c)(i) of Schedule 2 to the BSA.

1. Licensee’s submission of 31 January 2019. [↑](#footnote-ref-1)
2. <http://register.oric.gov.au/document.aspx?concernID=102719> [checked 4 February 2019]. [↑](#footnote-ref-2)