

Investigation report no. BI-578

Summary	
Licensee	Sutherland Shire Community Radio Assoc. Inc.
Station	2SSR
Type of service	Community – radio
Issue	Not for profit; broadcasting advertisements
Relevant legislation	Paragraph 9(2)(e) of Schedule 2 to the <i>Broadcasting Services Act 1992</i> Paragraph 9(1)(b) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>
Decision	Breach of subparagraph 9(2)(e) [the licensee will not operate the service as part of a profit-making enterprise] Breach of subparagraph 9(1)(b) [the licensee will not broadcast advertisements]

Background

On 15 June 2020 the Australian Communications and Media Authority (**the ACMA**) received a complaint about Sutherland Shire Community Radio Assoc. Inc. (**the licensee**). The licensee has held a long-term community radio broadcasting licence since 1992 representing the general geographic area community interest in the Sutherland RA1 licence area in NSW. Its current licence expires on 24 September 2022.

The complaint alleged that a program (the **program**) broadcast by the licensee was being used to generate an income for a business (the **business**) which is a profit-making enterprise, and was broadcasting advertising for the business. The complainant states:

‘Every week the [program] advertises and promotes the businesses paying for advertising and marketing services’

‘ [the business]... advertises itself... during their show...’

On 17 December 2020, the ACMA commenced an investigation under the *Broadcasting Services Act 1992* (**the BSA**) into the licensee’s compliance with the licence condition at paragraph 9(2)(e) of Schedule 2 to the BSA [the licensee will not operate the service as part of a profit-making enterprise] and the licence condition at Paragraph 9(1)(b) of Schedule 2 to the BSA [the licensee will not broadcast advertisements].

Assessment and submissions

This investigation has considered:

- the complaint received by the ACMA on 15 June 2020;
- the written submission from the licensee received by the ACMA on 10 February 2021, including a script for the October 2020 program;
- social media posts made by the business, relating to the program, from October 2019 to October 2020;
- episodes of the program broadcast in February 2020, January 2020, and December 2019, taken from livestreams on the program’s Facebook page.

Other sources are identified in this report where relevant.

The relevant licence conditions for this investigation are at **Attachment A**.

Issue 1: Was the licensee operating the service as part of a profit-making enterprise?

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:

[...]

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

Finding

The licensee breached the licence conditions at paragraph 9(2)(e)(e) of Schedule 2 to the BSA.

Reasons

It is a condition of all community broadcasting licences that the licensee must not operate the service as part of a profit-making enterprise.

The ACMA's Community Broadcasting Not-For-Profit Guidelines 2011 provide the following guidance on how the ACMA interprets this provision:

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.¹

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.²

In determining whether the licensee has operated a service as part of a profit-making enterprise, the ACMA sought to establish whether the program was being used in a direct way to generate revenue for the business, a commercial enterprise.

The key reason that the ACMA found a breach on this occasion was that, based on the content reviewed, the ACMA considered that the program was being used to generate revenue for the business.

Between December 2019 and March 2020, the ACMA identified eight instances of the social media accounts of the business promoting interviews on the program with its clients. The ACMA understands that the services in questions were clients of the business on the basis that: each are identified as members of the business's rewards program and are also promoted via the business's magazine and the business social media accounts.

¹ Clause 15 of the Explanatory Memorandum to the Broadcasting Services Bill 1992.

² ACMA Community broadcasting not-for-profit guidelines, page 5.

The ACMA is of the view that the interviews were promotional in nature because while some of the information in the interview was of a general nature and could be classified as community material, content included in the broadcasts also included specific information about the locations, services, opening hours, target markets, menu options and other promotional details and benefits

In addition to these individual promotions of the business's clients, the program also clearly aligned itself to the business, and contained promotions of the business itself, further indicating that the program was operating as part of a profit-making enterprise.

The ACMA notes that the licensee appears to have appropriate policies and administrative procedures in place to assist its programs and presenters to comply with the licence condition to not operate the service or services for profit or as part of a profit-making enterprise. In addition, the submission from the licensee states that the producer/presenter and co-host of the program had all completed training, passed their exams and had signed the 2SSR Presenters Code of Conduct, indicating that they understood the 2SSR sponsorship policy.

Notwithstanding this, the ACMA has found sufficient evidence to show that the program was being used to generate revenue for the business, by promoting clients that were paying the business for marketing services.

Issue 1: Conclusion

As a result of the considerations above, the ACMA has concluded that the licensee was operating the service as part of a profit-making enterprise.

Accordingly, the ACMA is of the view that the licensee breached paragraph 9(2)(e) of Schedule 2 to the BSA.

Issue 2: Was the licensee broadcasting advertisements?

Relevant licence condition

9. Conditions applicable to services provided under community broadcasting licences

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

[...]

(b) the licensee will not broadcast advertisements, and the licensee will not broadcast sponsorship announcements otherwise than as mentioned in this clause;

Finding

The licensee breached the licence condition at paragraph 9(1)(c) of Schedule 2 to the BSA.

Reasons

It is a condition of all community broadcasting licences that the licensee must not broadcast advertisements, except in limited circumstances, which are set out below.

The ACMA's Community Broadcasting Sponsorship Guidelines provide the following guidance on how the ACMA interprets this provision:

The Act does not provide a definition for an 'advertisement'. In investigating complaints, the ACMA has previously had regard to the following:

- The High Court's consideration of the meaning of the term 'advertising' in the context of the former *Broadcasting Act 1942*:
It would seem to be used in a broad general sense which would encompass any broadcast or telecast of material 'designed or calculated to draw public attention' to something ... regardless of whether the broadcast or telecast 'serves a purpose other than that of advertising'.³
- The plain English definition in the Macquarie Dictionary (Fourth Edition), which defines 'advertisement' as follows:
Advertisement: noun any device or public announcement, as a printed notice in a newspaper, a commercial film on television, a neon sign, etc., designed to attract public attention, bring in custom, etc.

Accordingly, an advertisement is potentially any broadcast that is intended to promote a product or service, regardless of whether payment in cash or in kind has been received by a licensee, or by any employee, agent, contractor or volunteer of the service.

The key reason that the ACMA found a breach on this occasion was that material broadcast in the program was intended to promote a product or service, and none of the relevant qualifications to the prohibition on broadcasting advertisements applied.

In considering whether the licensee broadcast advertisements, the ACMA has taken the view that the product or service in the context of this investigation is the business.

The script provided by the licensee for the October 2020 program promotes the business by:

- Drawing attention to the services that the business provides
- Drawing attention to the social media channels for the business

Similar dialogue to that found in the October script was also used in the sample episodes of the program examined by the ACMA that were broadcast in February 2020, January 2020, and December 2019.

Was the material an accidental or incidental accompaniment?

One of the qualifications for the general prohibition on advertising on a community broadcasting service is material that is broadcast as an accidental or incidental accompaniment to broadcasting other matter and that the licensee did not receive payment or other valuable or other consideration for. Both these elements must be satisfied for the qualification to apply.

The submission from the licensee indicates that 2SSR did not receive financial gain from its agreement with the business, and no valuable consideration was received beyond 2SSR receiving free advertising with the business. However, the material was neither accidental or incidental, as the dialogue clearly had the intended purpose of promoting the business by

³ *Australian Capital Television Pty Ltd and the State of New South Wales v The Commonwealth* (1992) 177 CLR 106 at 166

drawing the listeners attention to the services it provides and how they can be contacted and followed on social media.

Was the material a sponsorship announcement?

Sponsorship announcements that acknowledge financial support of the licensee or a program broadcast on the licensee's service are allowed on community radio. The dialogue in the script provided by the licensee (quoted above) was not accompanied by an acknowledgement of financial or in-kind support given by the business.

The dialogue from the program did not meet any of the qualifications set out in Subclauses 2(1) and 2(2) of Schedule 2 of the BSA, discussed above.

Issue 2: Conclusion

The ACMA has found sufficient evidence to show that the program broadcast advertisements for the business, and that none of the qualifications to the prohibition on advertising apply in this case.

Accordingly, the ACMA formed the view that the licensee breached paragraph 9(2)(e) of Schedule 2 to the BSA.

Agreed actions

In its submissions to the ACMA on 10 February 2021, and 3 June 2021 the licensee advised that it would, or had, taken a number of steps including:

- The 2SSR Constitution has been updated to clarify sponsorship obligations.
- The 2SSR training documents and processes, and policies including the Social Media policy and Sponsorship policy, have been reviewed and revised.
- A new procedure to review program content is being developed by 2SSR.

Based on the information provided by the licensee, the ACMA considers that appropriate action has been taken to ensure future compliance with the licence condition requirements that the licensee will not operate as part of a profit-making enterprise and will not broadcast advertisements.