

Investigation Report no. BI-665

Summary	
Licensee	Port Stephens FM Radio Inc
Station	Port Stephens FM
Type of service	Community Broadcasting
Relevant legislation	<i>Broadcasting Services Act 1992</i> <ul style="list-style-type: none">> paragraph 9(1)(b) of Schedule 2 [prohibition on advertising]
Decision	The Licensee: <ul style="list-style-type: none">> breached paragraph 9(1)(b) of Schedule 2 [prohibition on advertising]

Background

On 4 April 2023, the Australian Communications and Media Authority (**ACMA**) received a complaint about Port Stephens FM Radio Inc (**Licensee**).

The complaint alleged the Licensee may have failed to comply with paragraph 9(1)(b) of Schedule 2 to the *Broadcasting Services Act 1992* (**BSA**), which prohibits advertising.

On 27 April 2023 the ACMA commenced an investigation into the Licensee's compliance with this licence condition.

The Licensee

Since 1 February 2000, the Licensee has held a long-term community radio broadcasting licence to represent the General Geographic Area community interest in the Port Stephens RA1 licence area.

The service operated by the Licensee is 'Port Stephens FM' and its callsign is 2PSR.

The expiry date of the Licensee's current licence is 31 January 2025.

Assessment and submissions

This investigation has considered the following submissions provided to the ACMA:

- > the complaint, received on 4 April 2023
- > copies of the Licensee's broadcasts that were the subject of the complaint, received from the Licensee as four audio files on 9 May 2023
- > written submissions received from the Licensee on 27 April 2023 and 1 June 2023.

Other sources are identified in this report where relevant.

Issue 1: Did the Licensee breach the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA [prohibition on advertising]?

Relevant licence condition

Schedule 2

Part 5 – Community broadcasting licences

9 Conditions applicable to services provided under community broadcasting licences

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

[...]

(b) the licensee will not broadcast advertisements [...]

Finding

The ACMA's finding is that the Licensee breached the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA.

Reasons

The complaint

The complaint alleged that the Licensee broadcast interviews with a local business, and an announcement about another local business, both of which raised concerns about its compliance with the prohibition on advertising.

The complaint alleged this occurred on 28 March 2023, 29 March 2023, 31 March 2023, 1 April 2023, and 3 April 2023.

Relevant submissions

On 9 May 2023, the Licensee submitted copies of the relevant broadcasts from 28 March 2023, 29 March 2023, 31 March 2023, 1 April 2023.¹

Relevant to the allegations in the complaint, the submitted broadcasts contained:

- > several announcements about businesses which are sponsors of the Licensee
- > several interviews with a subject matter expert from a local business (**Business X**).

On 1 June 2023, the Licensee explained that Business X is also one of its sponsors, and that as part of the sponsorship arrangement, the Licensee broadcasts three messages for Business X per week.

¹ The Licensee submitted that, due to a technical problem, it did not have a copy of the 3 April 2023 broadcast.

However, the Licensee submitted that the interviews with a subject matter expert from Business X are separate from the sponsorship arrangement. This means Business X does not pay to be featured in the interviews, which are about providing general information to the local community.

Relevant guidelines

What is an advertisement?

The ACMA's Community Broadcasting Sponsorship Guidelines (**Sponsorship Guidelines**) note that the BSA 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'.

- > 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.²

Qualifications to the prohibition on advertising

Subclauses 2(1) and 2(2) of Schedule 2 to the BSA provide for a number of qualifications to the general prohibition on advertising.

If one of these qualifications applies, then the relevant material is not taken to be an advertisement for the purposes of the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA.

The qualifications apply if the material broadcast meets any of the following descriptions:

- > accidental or incidental (incidental being secondary to the subject of the broadcast and a minor part of it, such as a casual reference to a product or service where that type of casual reference is likely to occur in the context of a discussion of some other thing), and the licensee does not receive payment or other consideration for broadcasting the material
- > community information or community promotional material
- > promotion of the licensee's community broadcasting service

² [Community Broadcasting Sponsorship Guidelines](#), page 3.

- > a sponsorship announcement, which may promote the activities, events, products, services or programs of a sponsor (an individual or organisation that provides payment in cash or in kind to a licensee or its program), provided that it contains acknowledgement of the financial or in-kind support by the sponsor of the Licensee or its program.

Interviews with subject matter experts

Relevant to the matters considered in this investigation, the Sponsorship Guidelines note that interviews with subject matter experts are common and play a legitimate role in community broadcasting. Licensees may provide information about subject matter experts to establish their credentials. However, care should be taken to ensure that discussions do not move from the general (such as general information or advice) to the specific (for example, the promotion of a particular product, service, or organisation).

An interview is more likely to be characterised as an advertisement if the broadcaster has a financial or other arrangement with the expert being interviewed.

The ACMA assesses potential advertising material on a case-by-case basis.

Analysis

The ACMA has reviewed the broadcasts submitted by the Licensee. Set out below is an analysis of:

- > announcements about two local businesses (**Business A** and **Business B**) which raised concerns about the Licensee's compliance with the prohibition on advertising
- > the interviews with subject matter experts from Business X.

Announcements

Business A

On 29 March 2023, the Licensee broadcast the following pre-recorded announcement about Business A, which is a sponsor of the Licensee:

'Are you looking for [product]? [Business A] at [location] is open from [opening hours]. Call in and grab [product] or [service]. Come in and say 'hi' to our friendly staff. [Business A] is located in [location]. Visit [Business A] for [products and services]. Follow us on Facebook for specials. [Business A].'

The ACMA considers that this announcement:

- > promoted the products and services of Business A (describing its opening hours, location, and encouraging listeners to visit)
- > did not contain an acknowledgement of the financial or in-kind support provided by Business A to the Licensee, required for the qualification about sponsorship announcements to apply.

None of the other qualifications to the prohibition on advertising apply. Therefore, this announcement was advertising.

Business B

On 1 April 2023, the Licensee broadcast the following live announcement about Business B, which is a sponsor of the Licensee:

'[Business B], yeah, [Business B]. They were celebrating [event], open 7 days a week, how about that hey? Open 7 days a week, that's [Business B]. They are now located at [location]. That's [location]. They've got [products and prices]. They've got everything there. That's [Business B], they're now located at [location]. They're open 7 days a week.'

The ACMA considers that this announcement:

- > promoted Business B and its products (describing its product range, prices, opening hours, and location)
- > did not contain an acknowledgement of the financial or in-kind support provided by Business B to the Licensee, required for the qualification about sponsorship announcements to apply.

None of the other qualifications to the prohibition on advertising apply. Therefore, this announcement was advertising.

Interviews

On 28, 29, and 31 March 2023, the Licensee broadcast interviews featuring a subject matter expert from Business X.

All three interviews started with an introduction of the subject matter expert, specifying that they were from Business X. The ACMA considers that, in the context, this was information relevant to establishing the subject matter expert's credentials, which does not in and of itself raise concerns about compliance with the prohibition on advertising.

29 and 31 March 2023 interviews

Following the introduction, the 29 and 31 March 2023 interviews discussed general information, community information material, or the licensee's community broadcasting service. Since this material was either general information that did not promote particular products or services, or relevant qualifications to the prohibition on advertising applied, the ACMA's view is that these interviews were not advertising.

28 March 2023 interview

Following the introduction, the 28 March 2023 interview discussed a similar combination of general information and community information material about an upcoming event.

However, the 28 March 2023 interview contained additional comments about Business X's products. Specifically, during the discussion about an upcoming event related to the subject matter expert's area of expertise:

- > the presenter asked, 'You'll have a tent down there or something, mate? Selling your [general category of products] and all that?'
- > the subject matter expert explained that they would not be selling their products, then discussed community information material about free assistance for visitors to the area and how they might sponsor the event.

The conversation then moved on to further general information.

Since the comments about selling products may be considered to promote or draw attention to Business X and its products, the ACMA considered whether any of the qualifications to the prohibition on advertising apply.

In this particular circumstance, the ACMA considers that the qualification about incidental accompaniment applies. This is because:

- > the presenter made only a casual, conversational reference to the subject matter expert selling products, which is likely to occur in the context of querying whether the subject matter expert will attend an event related to their area of expertise
- > the comments made up a minor part of the broadcast, did not relate to any actual opportunity to purchase products from Business X, did not include information about the products Business X sells, who they might be of interest to, or any specifics such as Business X's prices or contact details
- > the comments about Business X's products were secondary to the subject of the broadcast (which was general information and community information material about the upcoming event).

Additionally, as required for this qualification to apply, based on the Licensee's submission about its sponsorship arrangement with Business X, the Licensee did not receive payment or consideration for broadcasting the comments made during the interview.

Therefore, overall, the 28 March 2023 interview did not contain advertising.

Conclusion

The information provided to the ACMA shows that, between 28 March 2023 and 1 April 2023, the Licensee broadcast two announcements about Business A and Business B that were advertisements.

Therefore, the ACMA's finding is that the Licensee breached the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA [prohibition on advertising].

Agreed actions

In response to this investigation, the Licensee advised that it has taken the following actions:

- > amending the pre-recorded announcement about Business A to include acknowledgement of the financial or in-kind support provided by Business A to 2PSR
- > implementing a procedure whereby pre-recorded sponsorship announcements are checked by 2PSR's President and one other member of its committee, to ensure they contain 'tags' which acknowledge the financial or in-kind support provided by the sponsors to 2PSR
- > moving to make all its sponsorship announcements pre-recorded rather than live
- > reminding its presenters who conduct interviews with subject matter experts from Business X to ensure that discussions during interviews are general, and not about specific products and services
- > reminding Business X about 2PSR's obligations under this licence condition and that discussions during interviews should remain general, and not be about specific products and services
- > conducting a training session with its presenters which included information about conducting interviews, compliance with relevant licence obligations, and example scenarios
- > on at least two occasions, in its weekly email to all presenters, emphasising the need to ensure discussions during interviews are general, and not about specific products and services
- > at an upcoming presenter update, arranging to remind all its presenters who conduct interviews to take steps to ensure the interviewee has been informed that the interview should be general, and not about specific products and services.