



Australian Government
**Australian Communications
and Media Authority**

Investigation Report No. 1833

File No.	2007/1852
Licensee	Goldfields Community Radio Co-Operative Limited.
Station	Fresh 89.5 FM
Type of Service	Community Broadcasting Service
Issues	Advertising Represent the community interest Encourage participation
Relevant Legislation	Clauses 9(1)(b) and 9(2)(b) and 9(2)(c) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>

Investigation Outcome

Goldfields Community Radio Limited, the licensee of Fresh 89.5 FM, breached the conditions of its community broadcasting licence:

- that the licensee must continue to represent the community interest that it represented at the time its licence was allocated or last renewed; and
- that the licensee must encourage participation in the operations of the service provided under the licence.

There is no evidence available that Goldfields Community Radio Limited breached the condition of its licence that it must not broadcast advertisements.

The complaint

The Australian Communications and Media Authority (ACMA) received a complaint on 31 August 2007 about Goldfields Community Radio Limited (Fresh 89.5 FM).

The complainant alleges that Fresh 89.5 FM:

- broadcast advertisements;
- does not encourage members of the community to participate in the operations of the service; and
- does not continue to represent the community interest.

ACMA decided to investigate the complaint as allegations of breaches of licence conditions in clauses 9(1)(b) and 9(2)(b) and 9(2)(c) of Schedule 2 to the *Broadcasting Services Act 1992* (the Act).

The service

In 1983, the Australian Broadcasting Tribunal allocated Fresh 89.5 FM a community broadcasting licence to provide a community broadcasting service on the 89.5 frequency to serve the general community within the Bendigo RA1 licence area.

In 2006, Fresh 89.5 FM failed to lodge a valid application for renewal of that licence and the licence expired. Since that time, ACMA has allocated temporary community broadcasting licences (TCBLs) to Fresh 89.5 FM. The community interest specified on the TCBLs is the general community within the Bendigo RA1 licence area.

Assessment

The investigation is based on:

- the complaint;
- submissions provided by the licensee in writing on 15 October 2007, 13 December 2007, 24 January 2008 and 14 April 2008;
- telephone conversation with licensee representative on 14 March 2008; and
- recordings of programs broadcast by Fresh 89.5 FM on 3 March 2008.

Issue 1: Broadcast of advertisements

Relevant provisions of the Act

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 ...

2 Interpretation – certain things do not amount to broadcasting of advertisements

(1) For the purposes of this Schedule ... a person is not taken to broadcast an advertisement if:

- (a) the person broadcasts matter of an advertising character as an accidental or incidental accompaniment to the broadcasting of other matter; and
 - (b) the person does not receive payment or other valuable consideration for broadcasting the advertising matter.
- (2) For the purposes of this Schedule ... the broadcasting by a community broadcasting licensee of:
- (a) community information material or community promotional material; or
 - (b) a sponsorship announcement that acknowledges financial support by a person of the licensee or of a program broadcast on the service provided under the licence, whether or not the announcement:
 - (i) specifies the name and address of, and a description of the general nature of any business or undertaking carried on by the person; or
 - (ii) promotes activities, events, products, services or programs of the person; or
 - (c) material that announces or promotes the service provided under the licence, including material (whether by way of the announcement or promotion of activities, events, products, services or otherwise) that is likely to induce public support, whether financially or otherwise, or to make use of, the services provided under the licence;

is not taken to be the broadcasting of an advertisement.

Complaint

The complainant submitted that Fresh 89.5 FM broadcast advertisements on 8 June 2007 between 7am and 5.30pm.

Licensee's submissions

Fresh 89.5 FM could not provide a recording of programs for 8 June 2007 because of technical problems. It provided a recording of programs broadcast on 3 March 2008.

Finding

There is no evidence available that Fresh 89.5 FM broadcast advertisements in breach of the condition of its licence in Clause 9(1)(b) of Schedule 2 of the Act.

Reasons

Clause 9(1)(b) of Schedule 2 of the Act provides that a community broadcasting licensee must not broadcast advertisements.

What is an advertisement under the Act?

The Act does not define 'advertisement' but does provide that certain material will not be taken to be advertisements.

This means that to determine whether Fresh 89.5 FM broadcast advertisements, I must first consider whether Fresh 89.5 FM broadcast material that falls within the ordinary definition of "advertisement". If so, I must then consider whether the material is of a kind that is not taken to be an advertisement for the purposes of the Act.

The ordinary meaning of “advertisement” – promotional material

The *Macquarie Dictionary 4th Edition* 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.

The High Court has considered the meaning of the term ‘advertisement’ in 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.’¹

It follows that the term ‘advertisement’ includes material that promotes a product, service, or organisation. This will be the case whether or not the licensee received payment or valuable consideration for broadcasting the advertisement.

When will promotional material not be taken to be an advertisement?

As noted above, the Act provides that certain promotional material is not taken to be an advertisement. This includes:

- community promotional material;
- sponsorship announcements which acknowledge financial support of the licensee or a program broadcast on the community broadcasting service provided under the licence; and
- promotions for programs provided by the licensee.

A further exception applies if a licensee is not paid to broadcast promotional material *and* the broadcast of that material is accidental or incidental to the broadcast of the other material.

Review of material broadcast

ACMA requested material broadcast on the date specified by the complainant but this was not available.

ACMA requested and reviewed a recording of material broadcast between 12 and 6pm on 3 March 2008. During that time Fresh 89.5 FM broadcast promotional material that falls within the ordinary meaning of advertisement. However, all the promotional material is not to be taken to be an advertisement under the Act because:

- the promotional material was community information or community promotional material;
- promotional announcements made on behalf of Fresh 89.5 FM sponsors acknowledged financial support provided to Fresh 89.5 FM by the sponsor; or
- the announcement promoted programs provided by Fresh 89.5 FM.

I note that acknowledgements of financial support by sponsors often took the form of the words “eighty nine five sponsor” before or after a sponsorship announcement. The

¹ *Capital Television Pty Ltd and the Station of NSW v the Commonwealth* (1992) 177 CLR at 166.

words were rapidly spoken but, in all announcements reviewed, they were audible and understandable.

Issue 2: Encourage participation in the operations of the service

Relevant provisions of the Act

9 Conditions applicable to services provided under community broadcasting licences

[...]

(2) Each community broadcasting licence is [...] subject to the following conditions:

[..]

(c) the licensee will encourage members of the community to that it serves to participate in:

(i) the operations of the licensee in providing the service.

Complaint

The complaint alleged that Fresh 89.5 FM did not encourage participation by members of the community in the operations of the service. In particular, it alleged that Fresh 89.5 FM did not present itself as a community station and did not promote volunteer involvement or community involvement in decision-making. Importantly, the complainant claimed that Fresh 89.5 FM had failed to facilitate community participation in decision-making as it had not held Annual General Meetings (AGMs) during the period 2001 to 2005.

Licensee's submission

Fresh 89.5 submitted that, on average, 72 people were involved in the operations of the service as volunteers each week. It advised that it has 187 members and a number of committees to allow members of the community to have input into decision-making. It encourages participation in these committees through placing notices in the studio. Appointment to the committees is through appointment by the board and decisions are based on the skills and interests of the applicants.

The Programming Committee formally reviews programming three times per year after seeking input from the community through on-air announcements. It then makes recommendations to the Board of Directors.

Fresh 89.5 FM advised that during the period 2001 to 2005 members of the community were involved in the operations of the service through committee structures and other meetings. However, it admitted that it failed to hold AGMs during that period.

Finding

During the period 2001 to 2005, Fresh 89.5 FM did not encourage participation by members of the community in the operations of the service and was in breach of the licence condition in Clause 9(2)(c)(i) of Schedule 2 of the Act.

Reasons

Membership levels and active committee structures indicate that Fresh 89.5 FM had taken some steps to encourage participation by members of the community in the operations of the service. In addition, I have reviewed material broadcast on 3 March 2008 and found that the service presented itself as a community radio station and made regular announcements to encourage volunteer involvement. I am also satisfied that the committee structure described by Fresh 89.5 FM is appropriate for this purpose.

However, Fresh 89.5 FM has admitted that it excluded the community from access to high level decision-making at AGMs for an extended period of time. AGMs are a key part of the operations of community broadcasting service operated by co-operatives or incorporated associations. This is because they deal with high level reporting and decisions, including the election of the Board of Directors. Such decisions may affect all other areas of the operations of the service. For this reason, whatever other efforts Fresh 89.5 FM has made, I cannot find that it has met its obligations to encourage participation if members of the community are excluded from involvement in the service in this way.

Issue 3: Representing the community interest

Relevant provisions of the Act

9 Conditions applicable to services provided under community broadcasting licences

[...]

(2) Each community broadcasting licence is [...] subject to the following conditions:
[..]

(b) the licensee will continue to represent the community interest that it represented at the time when the licence was allocated or was last renewed;

Complaint

The complainant alleged that Fresh 89.5 FM did not continue to represent the general community interest of Bendigo. In particular, the complainant claimed:

- the service is not broad-based but focuses on sports and music requests;
- Fresh 89.5 FM does not promote itself as a community radio station; and
- Fresh 89.5 FM does not encourage access by the community to decision-making.

Licensee's submission

Fresh 89.5 FM submitted that it represented the community of Bendigo by providing a broad-based service including a significant amount of local programming. It provided a copy of its program schedule which is focussed on sports and music. However, the schedule also includes local news, interviews, specialist music programming (including music for the Indigenous community and music by local artists) and a program for the Filipino community.

As noted above, Fresh 89.5 FM confirmed that it had failed to hold AGMs during the period 2001 to 2005.

Finding

During the period 2001-2005, Fresh 89.5 FM did not continue to represent the general community interest of Bendigo and has breached the condition of the licence in clause 9(2)(b) of Schedule 2 of the Act.

Reasons

The Act requires a community broadcasting licensee to continue to represent the community interest it represented at the time the licence was allocated or was last renewed. As noted above, Fresh 89.5 held a long-term community broadcasting licence to represent the general community of Bendigo until it expired in 2006. Since that time it has held temporary community broadcasting licences to represent the same community interest.

The Act does not define the term “represent”. The Macquarie dictionary relevantly defines it to mean “to speak and act for by delegated authority”. In practice, this means that a community broadcaster must both:

- speak or act for its community interest by providing a service that meets its interests and needs; and
- have some authority to speak or act on behalf of the community.

Many community broadcasters have implied authority to speak or act on behalf of their community by having open membership, democratic processes and encouraging the community to be involved in their decision-making forums.

Fresh 89.5 FM’s constitution provides for open membership and democratic processes. However, as noted above, Fresh 89.5 excluded the community from these processes during the period 2001 to 2005 by failing to hold AGMs. Members could not elect members of the board during that period and, without such an election, Board Members could not claim to have any implied authority to represent the members of the community.

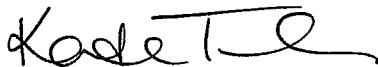
It is also the case that a board that is not representative of the community will find it more difficult to identify the needs and interests of that community and to provide a service that meets the needs of that community. It follows that, if I am not satisfied that Fresh 89.5 FM represents the community of Bendigo, I cannot be convinced of their submissions that the service provides for the needs and interests of that community.

For these reasons, I find that Fresh 89.5 FM failed to represent the general community of Bendigo during the period 2001 to 2005.

Decision

As delegate of the Australian Communications and Media Authority, I determine for the above reasons that Goldfields Community Radio Limited, licensee of Fresh 89.5 FM in Bendigo, has breached the following conditions of its community broadcasting licence in clause 9(2) of Schedule 2 to the *Broadcasting Services Act 1992*:

- that the licensee must continue to represent the community interest that it represented at the time its licence was allocated or last renewed (clause 9(2)(b) of Schedule 2; and
- that the licensee must encourage participation in the operations of the licensee in providing the service.



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3 September 2008