



Investigation Report No. 1993

File no.	2008/328
Licensee	Darling Downs Broadcasting Society Inc.
Station	4DDB Toowoomba QLD
Type of service	Community radio
Issues	Advertising Sponsorship Not for profit Represent community interest
Dates of broadcast	28, 29 and 30 March 2008
Relevant legislation/code	Clauses 9(1)(b), 9(2)(b), 9(2)(e) and 9(3)(b) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>

Investigation conclusion

- Breach of clause 9(1)(b) of Schedule 2 to the *Broadcasting Services Act 1992* [advertising]
- No breach of clause 9(2)(b) of Schedule 2 to the *Broadcasting Services Act 1992* [represent community interest]
- Breach of clause 9(2)(e) of Schedule 2 to the *Broadcasting Services Act 1992* [profit-making]
- Breach of clause 9(3)(b) of Schedule 2 to the *Broadcasting Services Act 1992* [sponsorship]

The complaints

On 1 and 7 April 2008, the Australian Communications and Media Authority (ACMA) received two written complaints alleging Darling Downs Broadcasting Society Inc, the licensee of 4DDB, is not operating in accordance with its licence conditions.

Both complainants allege that:

- 4DDB is broadcasting advertisements; and
- the introduction of new programming means that 4DDB is failing to represent the community interest.

Complainant 1 also alleges that:

- 4DDB is broadcasting sponsorship announcements in excess of the allowable five minute per hour limit; and
- the service is being operated as part of a profit-making enterprise.

The service

4DDB has operated in the Toowoomba RA2 licence area since 1 November 1979 on a long-term community broadcasting licence and its current licence is due to expire on 1 March 2010.

The community interest in respect of which the licence was allocated and last renewed is the general community in the geographic area of Toowoomba RA2. The licence area comprises the local government areas of Toowoomba, Cambooya, Crow's Nest, Gatton, Jondaryan, Pittsworth and Rosalie in Queensland.

The 4DDB website states that:

Listeners range from 5% to 10% of the 120,000 population base in Toowoomba and surrounds. Radio 4DDB FM targets the 12 - 25 age group and the 35+ age group listeners.¹

Assessment

The preliminary assessment is based on written submissions from the complainants and the licensee and copies of broadcasts submitted by the licensee at ACMA's request.

Issue 1: Broadcasting advertisements

Relevant provisions of the *Broadcasting Services Act 1992*

Schedule 2 - Standard conditions

Part 5 - Community broadcasting licences

¹ www.4DDB.org.au [accessed 25 June 2008]

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 ...

Part 1 - Interpretation

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

(1) For the purposes of this Schedule (other than paragraphs 7(1)(a), 8(1)(a), 9(1)(a), 10(1)(a) and 11(1)(a)), 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.

Complainant's submissions

Complainant 1 submitted that the announcements broadcast during Pat O'Shea Promotions Pty Ltd (Pat O'Shea Promotions) programs are advertisements as the relevant organisations are not legitimate sponsors of 4DDB.

Complainant 2 submitted that the programs presented by two former commercial broadcasters include talkback, tipsters, race calling, interviews, football chat and that while this was problematic '[...] my real concern is the enormous amount of intrusive advertising and general references to pubs, pokies, used car dealerships, and other

kinds of sponsorships usually associated with such programs'. Additionally, complainant 2 submitted that 4DDB should refrain from broadcasting what is 'obviously paid and unpaid commercial content'.

Licensee's submissions

In its initial response, the licensee emphatically denied the allegations. However, in response to the preliminary report, the licensee submitted that:

The Committee and Management of 4DDB without making any admissions is prepared to accept the findings of the Australian Communications and Media Authority and to work co-operatively with the Authority in the future to ensure 4DDB complies with the Broadcasting Act and the Code of Practice for community radio stations. In particular, but without limiting the generality hereof, the Committee and Management of 4DDB will give attention to the following:-

1. A continued monitoring and supervision process of the timing of broadcast advertisements;

Finding

I find that the licensee breached clause 9(1)(b) of Schedule 2 to the *Broadcasting Services Act 1992* (the Act) by broadcasting advertisements on the following occasions:

- between 6.00 and 7.00 am, 7.00 and 8.00 am, and 8.00 and 9.00 am on 28 March 2008;
- between 6.00 and 7.00 am, and 7.00 and 8.00 am on 29 March 2008; and
- between 12.00 and 1.00 pm, and 1.00 pm and 2.00 pm on 30 March 2008.

Details are at Attachment A.

Reasons

What is an advertisement?

It is a condition of all community broadcasting licences that the licensee must not broadcast advertisements. The condition is in clause 9(1)(b) of Schedule 2 to the Act.

The *Macquarie Dictionary 4th Edition* defines 'advertisement' as follows:

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.

It follows that any material that promotes goods, services or activities will usually fall within the ordinary meaning of the term advertisement. This does not mean that community broadcasters cannot broadcast any promotional material. The Act provides

that certain promotional material is not taken to be an advertisement.² This includes:

- sponsorship announcements which acknowledge financial support by a sponsor of the licensee or a program broadcast on the community broadcasting service provided under licence;
- community information material or community promotional material;
- material that promotes the licensee's service; and
- material which is accidental or incidental to the broadcasting of other matter, and for which the licensee does not receive payment or other valuable consideration.

This means that a promotional announcement that falls within one of these categories is not considered to be an 'advertisement'. A community broadcaster may broadcast such an announcement without breaching the prohibition on advertising.

Assessment of recordings

A review of the relevant broadcasts³ indicated that the licensee had broadcast promotional material which did not fall within one of the categories listed above. They are therefore advertisements. Specifically:

- three advertisements were broadcast between 6.00 and 7.00 am on 28 March 2008;
- eight advertisements were broadcast between 7.00 and 8.00 am on 28 March 2008;
- six advertisements were broadcast between 8.00 and 9.00 am on 28 March 2008;
- seven advertisements were broadcast between 6.00 and 7.00 am on 29 March 2008;
- eight advertisements were broadcast between 7.00 and 8.00 am on 29 March 2008;
- seven advertisements were broadcast between 12.00 and 1.00 pm on 30 March 2008; and
- 1 advertisement was broadcast between 1.00 and 2.00 pm on 30 March 2008.

Pre-recorded promotional announcements

Of the 40 advertisements, 38 were in the form of pre-recorded announcements.

These announcements had a promotional character and were 'designed or calculated to draw public attention' to the businesses mentioned.

These announcements did not fall within any of the categories of material which are not taken to be advertisements under the Act (referred to above).

In particular, the announcements, which appear to have been made on behalf of sponsors, did not acknowledge the financial support of those sponsors for the licensee or a program broadcast by the licensee.

² Clauses 2(1) and 2(2) of Schedule 2 to the Act.

³ As the complainant has expressed concern about the compliance of Pat O'Shea and David Silver's sport programs generally, ACMA has reviewed each program broadcast during the week nominated by the complainant i.e. Friday 28 March 2008, Saturday 29 March 2008 and Sunday 30 March 2008.

Live interviews

The remaining two advertisements involved discussions with a representative of a commercial organisation and are considered below.

Rendezvous on Ruthven Coffee & Tea Lounge

On 28 March 2008 between 8.00 and 9.00 am, the licensee broadcast a segment which ran for three minutes and 43 seconds and involved the announcers crossing to an individual at a local shopping centre for an update on local events.

The segment included information that would be of interest to the local community (e.g. the outcome of a recent Council election, entertainment at the local shopping centre). However, the consistent theme throughout the segment is the services available at Rendezvous on Ruthven Tea & Coffee Lounge.

True Health Wellness

On 29 March 2008 between 7.00 and 8.00 am, the licensee broadcast a segment which ran for 13 minutes and 28 seconds and involved the announcers interviewing a representative of True Health Wellness, a local health and fitness business. The interview covers the weight loss program provided by True Health Wellness.

The segment covers an issue that would be of interest to the community (i.e. weight loss). However, the consistent theme throughout the segment is the program and services provided by True Health Wellness.

Are these interviews ‘advertising’?

The promotional material in both segments was ‘designed or calculated to draw public attention’ to the two businesses and would ordinarily be considered to be advertising.

The segments both contained some community information and material that was not promotional. However, the calculated nature of the broadcast of the promotional material shows that it was not incidental or accidental to the broadcast of that material.

4DDB’s logs confirm that the two businesses mentioned in the interviews are sponsors of the relevant program. However, 4DDB did not acknowledge the financial support provided by those sponsors at any time during the segments.

My preliminary finding is that the promotional material does not fall within any of the categories of material that are not taken to be advertisements under the Act. It follows that my preliminary view is that both of these interviews are advertisements, the broadcast of which places 4DDB in breach of its licence conditions.

Issue 2: Time limit on sponsorship announcements

Relevant provisions of the *Broadcasting Services Act 1992*

Schedule 2 – Standard conditions

Part 5 – Community broadcasting licences

9 Conditions applicable to services provided under community broadcasting licences

- (3) A community broadcasting licensee may broadcast sponsorship announcements. However, they must not run in total for more than:

[...]

- (b) ...5 minutes in any hour of broadcasting.

[...]

- (5) In working out the length of time devoted to the broadcasting of sponsorship announcements, account is not to be taken of the broadcasting by a community broadcasting licensee of any of the following:

- (a) material that publicises programs to be broadcast by the licensee;

- (b) material that promotes the licensee's products, services or activities for the broadcast of which the licensee does not receive any consideration in cash or in kind;

- (c) community information or community promotional material for the broadcast of which the licensee does not receive any consideration in cash or in kind.

Complainant's submissions

Complainant 1 submitted that sponsorship announcements run over the allowable five minutes per hour during the programs broadcast by Pat O'Shea and David Silver, for example:

- Saturday 29 March 2008 6.00 am to 7.00 am
- Saturday 29 March 2008 7.00 am to 8.00 am;

Licensee's submissions

In its initial response, the licensee emphatically denied the allegations. However, in response to the preliminary report, the licensee submitted that:

The Committee and Management of 4DDB without making any admissions is prepared to accept the findings of the Australian Communications and Media Authority and to work co-operatively with the Authority in the future to ensure 4DDB complies with the Broadcasting Act and the Code of Practice for community radio stations. In particular, but without limiting the generality hereof, the Committee and Management of 4DDB will give attention to the following:-

[...]

2. A similar continued monitoring and supervision of the time limit on sponsorship announcements;

Finding

I find that the licensee breached the condition of its licence in clause 9(3)(b) of Schedule 2 to the Act by broadcasting sponsorship announcements that ran in total for more than five minutes per hour on:

Friday 28 March 2008 7.00 – 8.00 am

Saturday 29 March 2008 6.00 – 7.00 am

Sunday 30 March 2008 12.00 – 1.00 pm

Reasons

It is a condition of community radio broadcasting licences that the licensee must not broadcast sponsorship announcements for more than five minutes per hour.

In assessing 4DDB's compliance with this licence condition, I have only taken into consideration promotional announcements that acknowledged the financial support of the sponsor for the station or a program. A full list of these announcements is at Attachment A.

A review of the programs confirms that the sponsorship announcements ran in total:

Date	Time	Sponsorship Announcements
Friday 28 March 2008	6.00 – 7.00 am	3 min 19 sec
Friday 28 March 2008	7.00 – 8.00 am	8 min 19 sec
Friday 28 March 2008	8.00 – 9.00 am	4 min 7 sec
Saturday 29 March 2008	6.00 – 7.00 am	5 min 39 sec
Saturday 29 March 2008	7.00 – 8.00 am	2 min 38 sec
Sunday 30 March 2008	12.00 -1.00 pm	8 min 37 sec
Sunday 30 March 2008	1.00 -2.00 pm	3 min 2 sec

Accordingly, sponsorship announcements were broadcast in excess of the five minute per hour limit on three occasions – 28 March 2008 between 7.00 and 8.00 am; 29 March 2008 between 6.00 and 7.00 am and 30 March 2008 between 12.00 and 1.00 pm.

Issue 3: Representing community interest

Relevant provision of the *Broadcasting Services Act 1992*

Schedule 2 - Standard conditions

Part 5 - Community broadcasting licences

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.

Complainants' submissions

Complainant 1 submitted that:

- the following programs – Friday and Saturday breakfast, a Saturday morning racing preview and a Sunday afternoon sports show – are horse racing orientated and one of the ‘advertisers’ include the race tipping service ‘The Last Stride’ (which is owned by Pat O’Shea), TAB agencies and hotels. The emphasis is on Keno, poker machines promotions and pubTAB facilities;
- 4DDB is currently trying to introduce all day Saturday race broadcasting;
- the introduction of horse racing means that the licensee is not representing its community interest; and
- horse racing services are provided in the licence area by Radio TAB on 1008AM and 93.7FM. 4DDB is not providing an alternative service but duplicating these services.

Complainant 2 submitted the following:

- 4DDB’s format has changed from offering a wide variety of music and worthwhile features such as BBC news to sports broadcasts on Fridays, Saturdays and Sundays, with a ‘very unwelcome focus on horseracing’;
- 4DDB now has two former commercial radio presenters hosting ‘identical programs’ to the sports/sporting talkback shows they previously presented on a commercial service. The programs include talkback, tipsters, race calling, interviews, football chat and that this is:

...bad enough but my real concern is the enormous amount of intrusive advertising and general references to pubs, pokies, used car dealerships, and other kinds of sponsorships usually associated with such programs.

- these sports programs have displaced far more appropriate programs.

Licensee's submissions

The licensee submitted the following:

- The format changes were made due to ‘constant criticism in the last five or so years that the station was stagnating and in a rut and that it needed new blood’.
- The previous focus on music meant that there was ‘no local information or cultural or sporting programs’. While the easy listening format was appreciated, particularly by retired people, many people took this for granted and did not become members.
- Due to the easy listening format, the membership numbers have been low.
- Changes in the local commercial radio sector resulted in a popular local sport program being axed by a commercial broadcaster; and the Toowoomba community reaction to the loss of this local content was ‘unparalleled and unprecedented in local radio history’. 4DDB thought it could take advantage of the situation to diversify its own programming and attract new listeners and members. It invited the two presenters of the axed local sports programs to attend a 4DDB Committee meeting in July 2007.

- 4DDB followed its usual procedures in introducing the format changes, that is, the issue was discussed by the Committee and a vote taken:

It was felt then and all the committee except [Mr X] feel now that since our charter requires us to broadcast programs that are not catered for by other broadcasters that we are filling the void left by 4WK and catering to a large listening audience interested in local sport'

- The popularity of the programming has been endorsed by the members who elected Pat O'Shea and David Silver at the last Annual General Meeting to sit on the Committee.
- Some complaints have been received following the introduction of the sports programs, however, most of these complainants have accepted the changes following an explanation of the need to provide a diversity of programming.
- More people are in favour of the format changes than have complained and 250 new members have joined 4DDB 'because of the new format and not many of the previous members have left'.

In response to the preliminary report, the licensee submitted that:

The Committee and Management of 4DDB without making any admissions is prepared to accept the findings of the Australian Communications and Media Authority and to work co-operatively with the Authority in the future to ensure 4DDB complies with the Broadcasting Act and the Code of Practice for community radio stations. In particular, but without limiting the generality hereof, the Committee and Management of 4DDB will give attention to the following:-

[...]

3. Continued representation of the community interest in programming – it is noted that the Authority is satisfied that 4DDB 'acts for' the general community of Toowoomba by providing a service that meets its needs. This means that the programming changes made by the Committee in the last 12 months will stay and will be improved upon;

Finding

I am unable to find on the information available that the licensee has breached the condition of its licence that it must continue to represent the community interest that it represented at the time when the licence was last renewed (clause 9(2)(b) of Schedule 2 to the Act).

Reasons

Represent

It is a condition of all community broadcasting licences that the licensee must continue to represent the community interest it represented at the time the licence was allocated or was last renewed ('the representation condition').

The Macquarie Dictionary defines *represent* to mean, amongst other things, 'to speak and act for by delegated authority'.

Does 4DDB continue to ‘act for’ its community interest?

Community broadcasters will generally ‘act for’ their community interest by providing a service that meets its needs.

4DDB is licensed to meet the needs of the general community of the Toowoomba RA2 licence area. As such, it is to be anticipated that 4DDB would have a range of programs to meet a diversity of needs from within this community. Accordingly, the introduction of sports programming by 4DDB does not automatically indicate that it is in breach of the representation condition.

4DDB’s program schedule has a high percentage of music programs with a variety of genres represented (e.g. country, folk, jazz, bluegrass, nostalgia and easy listening). Talk programs are limited to a number of ethnic programs, including programs for the Dutch, Chinese and Filipino communities, and the program *Sunday Talk*. In my view, the introduction of local sports programming has served to increase the local talk content of the 4DDB service and add to the diversity of programming. This is particularly significant as coverage of local sports is not provided by other services within the licence area.

In relation to Complainant 1’s concerns that race broadcasting is already provided in the area, it is noted that a narrowcasting service based in Brisbane, RadioTAB, does provide its service in Toowoomba (via transmitter on frequency 93.7FM). However, RadioTAB’s state-wide and interstate focus is different to 4DDB’s race programming, which provides a local focus.

4DDB has provided evidence that the sport programs have been well received by the community. It advises that it has receives positive feedback and attributes a significant increase in membership to the efforts of Pat O’Shea and David Silver in raising the profile of the service.

Taking the above into account, I am satisfied that 4DDB ‘acts for’ the general community of Toowoomba by providing a service that meets its needs.

Does 4DDB have ‘delegated authority’ from the community?

To ‘represent’ a community interest, a community broadcaster must also have ‘authority’ or a right to act for its community interest. An association can demonstrate an implied right to act if it can show a real and not insubstantial link between it and the community interest it claims to represent. An implied right to represent a community interest will commonly arise for a community broadcasters that has:

- the express object of representing the interests of the relevant community group in its constitution;
- membership that is open to members of the community within the licence area with the particular interest;
- strategies for encouraging membership and involvement by members in its decision-making forums; and
- corporate governance arrangements that ensure that decisions are made in the interests of the relevant community interest, including rules that deal effectively with conflicts of interest.

In this case, I have no information that suggests that 4DDB's constitution is not appropriate, including its membership provisions. I note that it has a reasonable number of volunteers and has recently increased its membership. However, I am aware that there is a financial relationship between 4DDB and two of its board members and that the arrangement is likely to be of financial benefit to those board members. This is an apparent conflict of interest that gives rise to concerns about 4DDB's corporate governance arrangements. At this time, I have little information available about the effect of this apparent conflict on 4DDB's decision-making and I cannot find that 4DDB's does not continue to have a substantial link to its community.

Overall assessment

It follows that, despite concerns about 4DDB's corporate governance arrangements, I am not satisfied that 4DDB has breached its obligation to continue to represent its community interest.

Issue 4: Whether the licensee operates the service for profit or as part of a profit-making enterprise

Relevant provision of the *Broadcasting Services Act 1992*

Schedule 2 - Standard conditions

Part 5 - Community broadcasting licences

9 Conditions applicable to services provided under community broadcasting licences

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

[...]

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

Complainant's submissions

Complainant 1 submitted that:

- two former commercial broadcasters have joined 4DDB and any 'advertising' revenue they obtain is paid directly to their business, Pat O'Shea Promotions;
- 4DDB does not receive this revenue as sponsorship fees;
- 4DDB's logs differentiate between station sponsors and 'Pat & David's clients';
- the following programs - Friday and Saturday breakfast, a Saturday morning racing preview and a Sunday afternoon sports show – are horse racing orientated and one of the 'advertisers' include the race tipping service 'The Last Stride' (which is owned by Pat O'Shea), TAB agencies and hotels. The emphasis is on Keno, poker machines promotions and pubTAB facilities;
- 4DDB is currently trying to introduce all day Saturday race broadcasting for which it will receive a substantial subsidy from UNiTAB and 'exacerbate their already illegal use of a community station as part of a profit making enterprise';

- Pat O'Shea Promotions has set up its own website (www.102point7fm.com.au) which promotes its programs and sponsors and 'The Last Stride' but no details of the stations other programs or 'official' sponsors; and
- accountability and transparency have 'gone since Pat O'Shea Promotions began using this community licence for their own personal profit'.

Licensee's submissions/evidence

The licensee submitted that:

- it emphatically denies the allegations;
- the complaints are a result of a dispute over programming within the station;
- it has a 'temporary verbal agreement with Pat O'Shea Promotions to present and produce local sporting programs over the airwaves of 4DDB';
- it has liaised with the Community Broadcasting Association of Australia (CBA) in relation to the broadcast of the sport programming to ensure compliance with the *Community Broadcasting Code of Practice 2002*; and
- 'Following [the President's] perusal of the CBA response [the President] now felt on safe enough ground to ask Pat O'Shea Promotions to start paying 4DDB the monthly fee of \$1,100 starting from April 2008. This was to compensate 4DDB for income forgone from the station's sponsors by replacing them with Pat O'Shea Promotions sponsors in the sporting programs'.

Additionally, the licensee provided copies of various documents showing the following:

- The 23 July 2007 Committee meeting minutes indicate that Pat O'Shea and David Silver made the following comments:

It was felt that such a [sporting] program would be of benefit to the sporting community, providing it with a coverage that could no longer be found on the darling Downs. It would also benefit the station with an influx of financial members from that community, assisting the station to operate more comfortably as regards to expenses. Pat and David would benefit by a continuity of their income from the sponsors which they would bring over from 4WK.

- The 28 January 2008 Committee meeting minutes indicate that Pat O'Shea made the following comments:

He formed as business with the idea of using his connections to help his advertisers; it was [4DDB President] that approached him to see what 4DDB could do to help the sporting community after the fall out from 4WK. It came down to "What we are (Pat & David) and what we do" and the reasons why they joined 4DDB. Pat doesn't want to see a takeover and feels we together can do a lot of good things. If membership doesn't increase a takeover can happen. If the racing program does not benefit the station and the listeners then Pat is not interested in following through with it.

- The 31 March 2008 Committee meeting minutes note:
[Sponsorship officer] also stated that he supported Pat O'Shea Promotions and that we needed to sort out an agreement with them for their promotions. A figure of \$250 per week was mentioned and Phil thought that that was fair, but

promotion must not exceed 5 minutes per hour and that there could possibly be some time slot changes to accommodate this regulation. The minutes further note that, following a secret ballot regarding the proposed agreement between 4DDB and Pat O'Shea Promotions, the result was eight votes to one that the 4DDB would 'renew [its] agreement with Pat O'Shea and David Silver and receive payment of \$1,000⁴ per month for the life of this committee'. It was further agreed that this agreement would commence 1 April 2008.

In response to ACMA's queries regarding the nature of 4DDB's relationship with Pat O'Shea Promotions, the licensee submitted the following:

- Pat O'Shea and David Silver present the following sporting programs on 4DDB on Fridays, Saturdays and Sundays:

<i>Friday Breakfast</i>	6.00 am to 9.00 am
<i>Saturday Breakfast</i>	6.00 am to 8.00 am
<i>Saturday Racing Preview</i>	8.00 am to 11.00 am
<i>Sunday Local Sports Preview</i>	12.00 pm to 3.00 pm (summer) 12.00 pm to 6.00 pm ⁵ (winter)

- David Silver is the producer of these sporting programs;
- Pat O'Shea and David Silver are the directors and only shareholders of Pat O'Shea Promotions;
- Pat O'Shea Promotions is a corporate member of 4DDB;
- Pat O'Shea Promotions receives no payment from 4DDB;
- Pat O'Shea Promotions 'invoices businesses directly that Pat O'Shea and David Silver refer to in their programmes on 4DDB';
- 4DDB 'invoices Pat O'Shea Promotions a fixed fee of \$1100 per month including GST as a lump sum sponsorship payment – this sum is calculated at the rate of 5 minutes per hour at the maximum rates charged by 4DDB';
- Pat O'Shea and David Silver are both Committee members and David Silver is Vice President of the Committee; and
- Pat O'Shea and David Silver abstain from voting on matters involving Pat O'Shea Promotions.
- In relation to the arrangement between 4DDB and Pat O'Shea Promotions:

There were no written contracts between 4DDB and Pat O'Shea Promotions Pty Ltd when the association began in early August 2007 even though a signed contract was sought by Pat O'Shea Promotions Pty Ltd. [The President] asked them and the Committee [...] not to lock in the respective parties into a contract until we saw how the arrangement worked in practice. If things didn't work out

⁴ This amount excludes GST.

⁵ The winter program includes live coverage of the Toowoomba Rugby League Match of the Day.

for either party then the verbal arrangement could be ended with a minimum of complications. [The President] also wanted to seek advice from the CBAA as to whether the new arrangements breached the codes of Practice.

Preliminary verbal advice was very general and in the vein that as long as the Committee and members agree and it benefits the Society; it should be okay. Also in late July last year the then Committee only had about two months to serve so [the President] asked [his] colleagues to approve a trial of about 6 months then the new Committee could evaluate the situation in the New Year and decide whether to continue the sporting programs or not. The decision was actually taken recently at the March 2008 committee meeting following written advice to me from [...] the CBAA [...]

The current trial will apply for the life of this Committee, which is until the A.G.M. on 24th September 2008⁶ unless A.C.M.A. direct us to make any changes...

In the initial exploratory and informal meeting between Pat O'Shea Promotions Pty Ltd and the 4DDB Executive prior to the July 2007 Committee Meeting instead of requesting payment from 4DDB for their professional services Pat O'Shea Promotions Pty Ltd proposed that their remuneration come from their sponsors who had left commercial radio station 4WK when Pat O'Shea and David Silver were terminated. These sponsors offered to follow them anywhere. It was proposed depending on committee approval that these sponsors would replace 4DDB's sponsors in the proposed sporting programs and would be scheduled and serviced by Pat O'Shea Promotions Pty Ltd.

These sponsors would pay the same commercial radio rates that they were paying at 4WK. 4DDB would receive compensation by Pat O'Shea Promotions Pty Ltd at the rate of \$250 per week. This amount was calculated by [...], 4DDB's sponsorship coordinator who was present at this informal first meeting. This amount was calculated on the maximum allowable of five minutes per hour and gives the station more money than it would have received from its own sponsors.

Given concerns that this arrangement could be interpreted as 4DDB 'subleasing the airwaves', a decision was made that Pat O'Shea Promotions Pty Ltd should make regular donations to 4DDB until the legality of the agreement could be clarified;

Pat O'Shea and David Silver advised the Committee that they would promote membership of 4DDB. As a result of their promotion, 4DDB received 168 membership applications within a month of their first broadcast on 4 August 2008, compared to 6 for the previous month. Additionally, they also 'joined up many corporate members last year at \$110 each.

- Pat O'Shea and David Silver have 'spent thousands of dollars of their own money on upgrading the station's technical infrastructure so that their football broadcast could take place. Any suggestion by the complainants that Pat O'Shea Promotions is making a "killing" financially at 4DDB's expense is false'.

⁶ The 4DDB Annual General Meeting has been rescheduled for 30 September 2008.

- In relation to the Last Stride:
 - ‘The Last Stride’ is a racing information journal, registered as a newspaper and produced by Pat O’Shea Promotions... ‘The Last Stride’ has sponsorship messages on some Saturday mornings between 8.00 am and 11.00 am... ‘The Last Stride’ supports many sporting organisations and events in the region... There is ‘no financial or other connection between the journal and 4DDB’ and the ‘reference to “The Last Stride” on 4DDB is simply a reference to the journal owned by the corporate sponsor and member, Pat O’Shea Promotions Pty Ltd.
- The www.4ddb.org.au website was ‘developed for 4DDB at no charge by a student at the University of Southern Queensland as part of his degree’. The site has been left idle after several failed attempts to contact the student.
- The www.102point7fm.com.au website was developed and paid for by Pat O’Shea Promotions. It enables 4DDB to stream audio and video (e.g. Toowoomba Rugby League Match of the Day). It is popular with listeners and 4DDB receives positive feedback via emails. Other 4DDB presenters have not taken up the offer to have pages dedicated to their programs on the www.102point7fm.com.au website:
 - We’d like to stress this website was developed at no cost to 4DDB and there’s no financial benefit to either Pat O’Shea Promotions, or 4DDB from the website – it’s purely promotional.
- 4DDB is not negotiating with 4TAB to provide racing programs on the 4DDB service and will not ‘unless a referendum of the members approves race broadcasting’. No date has been set for the referendum although Pat O’Shea Promotions is pushing for a date to be set.
- David Silver gets infrequent calls from 4TAB, however, it has been made clear that no decisions can be made until the referendum is held.

In response to the preliminary report, the licensee submitted that:

The Committee and Management of 4DDB without making any admissions is prepared to accept the findings of the Australian Communications and Media Authority and to work co-operatively with the Authority in the future to ensure 4DDB complies with the Broadcasting Act and the Code of Practice for community radio stations. In particular, but without limiting the generality hereof, the Committee and Management of 4DDB will give attention to the following:-

[...]

4. The Management Committee acknowledges the excellent services of pat O’Shea and David Silver to 4DDB, and whilst it appears from the findings of the Authority that 4DDB will not be able to continue any relationship with Pat O’Shea Promotions Pty Ltd (except as a sponsor and member) in the future because of the constraints of community broadcasting, the Committee intends to ensure that Pat O’Shea and David Silver will remain as highly valued members of the team at 4DDB. The Management Committee therefore expects that 4DDB with appropriate re-structuring will not only be able to continue with its current successful programming, but it will also be

in a position to continue with its current sponsors and Pat and David's new roles will be a key part of that success.

Finding

I find that the licensee has operated the service as part of a profit-making enterprise since 4 August 2007. Accordingly, the licensee is in breach of the condition in clause 9(2)(e) of Schedule 2 to the Act.

Reasons

It is a condition of all community broadcasting licences that the licensee must not operate the service for profit or as part of a profit making enterprise.⁷

Did 4DDB operate the service 'for profit'?

Section 15 of the Act provides that a community broadcasting service is a service that, amongst other things, is not operated for profit or as part of a profit-making enterprise.

The Explanatory Memorandum to the *Broadcasting Services Bill 1992* comments in relation to the definition for community broadcasting services at section 15 of the Act:

Paragraph [15](b) recognises that some community broadcasters may have a modest operating surplus at the end of a financial year; this in itself would not exclude such a service from [the community broadcasting service] category. So long as those surpluses are utilised for the continued operation of the service and are not distributed for personal use amongst those persons who are involved in the management or operation of the service, this criterion will be satisfied.

It follows that a service is not operated for profit if:

- the service has made a modest operating surplus; and
- the surplus has been utilised for the continued operation of the service; and
- the surplus has not been distributed for personal use amongst persons who are involved in the management or operations of the service.

The complainant expressed concern about 4DDB's agreement with Pat O'Shea Promotions which began providing programming for 4DDB on 4 August 2007.

4DDB's audited financial statements for the 2006-07 financial year show:

- the service had a relatively modest operating surplus of \$18,829.89⁸ ;
- the surplus was retained and has not been distributed for personal use amongst persons involved in the service; and
- there is no evidence indicating that the surplus has been retained for any purpose other than the continued operation of the service.

⁷ Clause 9(2)(e) of Schedule 2 to the Act

⁸ Expenditure and income totalled \$84,503.24 and \$103,333.13 respectively.

Approximately 23% of total expenditure was paid to individuals involved in the management or operations of the service. However, these amounts were directly related to work necessary for the operation of the service (\$15,739.60 in commissions i.e. 25% of sponsorship income generated) or for reimbursement of expenditure incurred in the performance of official duties (\$3,575.00 for the Presidential allowance).

This information relates to the financial year before the period relevant to this investigation. Financial accounts for the next financial year are not available. However, there is no evidence that indicates that 4DDB's financial arrangements have changed so that its operating surplus is distributed for the personal use of persons involved in the service. In the circumstances, I have concluded that 4DDB did not operate the broadcasting service for profit at any time relevant to this investigation.

Did the licensee operate the service as 'part of a profit-making enterprise'?

The Explanatory Memorandum also states:

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.

What is a 'profit-making enterprise'?

The Macquarie dictionary relevantly defines 'enterprise' to mean either:

a project undertaken or to be undertaken...(or) a company organised for commercial purposes.

Project

Pat O'Shea Promotions undertakes a range of projects, one of which is the provision of programming to 4DDB in accordance with the agreement. According to the definition above, this project is considered to an enterprise. It will be a profit-making enterprise if its purpose is to financially benefit Pat O'Shea Promotions.

Company

Pat O'Shea Promotions is registered as an Australian proprietary company that is limited by shares. It is a for-profit entity operated by its directors for the benefit of its shareholders. Pat O'Shea and David Silver are the directors and sole shareholders of Pat O'Shea Promotions.

Pat O'Shea Promotions is a company organised for commercial purposes and is therefore, in itself, a profit-making enterprise.

4DDB's arrangement with Pat O'Shea Promotions

4DDB advised that it has a verbal agreement with Pat O'Shea Promotions. Under this agreement Pat O'Shea Promotions makes a monthly payment of \$1,100 to 4DDB as a 'lump sum sponsorship payment'. This amount is roughly equivalent to the amount 4DDB would receive if it was paid by its own sponsors for five minutes per hour of announcements on its behalf.

This verbal agreement is documented in the Committee Minutes and submissions provided to ACMA by 4DDB.

Under the agreement, the payment of this monthly fee entitles Pat O'Shea Promotions to:

- broadcast sporting programs on 4DDB for 11 hours per week⁹;
- charge its program sponsors a rate equivalent to that charged by commercial radio; and
- keep the sponsorship income generated during its 11 hours of weekly broadcasts.

Is the arrangement intended to generate profit for Pat O'Shea Promotions?

4DDB retains ultimate control of programming at all times. However, in practice, 4DDB has sold the air-time on its service and the arrangement provides for Pat O'Shea Promotions to operate the service for a specified number of hours and to retain any income received for broadcasting sponsorship announcements on the service.

ACMA has asked 4DDB for information about the rate that Pat O'Shea Promotions charges its sponsors. However, 4DDB has not provided this information.

4DDB's records show that Pat O'Shea promotions intended to charge its sponsors the same rates that they were paying to commercial broadcaster 4WK. I am aware that the rates charged by commercial broadcastings services for advertising time are usually significantly higher than those charged by community broadcasting services to broadcast sponsorship announcements. No contradictory evidence has been provided by 4DDB. I infer from this that Pat O'Shea promotions makes, or expects to make, a profit from the arrangement.

4DDB submissions confirm that the agreement with Pat O'Shea Promotions is intended to benefit the directors and shareholders of Pat O'Shea Promotions by providing a 'continuity of their income from the sponsors which they would bring over from (commercial broadcaster) 4WK'.

The terms of the agreement between 4DDB and Pat O'Shea Promotions are such that the 4DDB service operates in a manner that contributes to the generation of income for Pat O'Shea Promotions. From this, I must infer that:

- the provision of programming by Pat O'Shea Promotions is a profit-making enterprise; or
- the agreement provides for the operation of the service as part of Pat O'Shea Promotions which is a profit-making enterprise.

Conclusion

My finding must be that from 4 August 2007, 4DDB has operated its community broadcasting service:

- as part of Pat O'Shea Promotions which is a profit-making enterprise; or
- as part of a profit-making enterprise undertaken by Pat O'Shea Promotions.

⁹ Pat O'Shea Promotions Pty Ltd broadcast 14 hours during winter although it is unclear whether this results in an increased monthly fee.

Decision

As delegate of the Australian Communications and Media Authority, I determine for the above reasons that Darling Downs Broadcasting Society Inc., licensee of 4DDB in Toowoomba, has breached the following conditions of its community broadcasting licence set out in Schedule 2 to the *Broadcasting Services Act 1992* that:

- the licensee will not broadcast advertisements (clause 9(1)(b));
- the licensee will not broadcast sponsorship announcements for more than five minutes in any hour (clause 9(3)(b)); and
- the licensee will not operate the service for profit or as part of a profit-making enterprise (clause 2)(e)).

The investigation did not find evidence that was sufficient to find that the licensee breached the conditions of its licence set out in Schedule 2 that:

- the licensee will continue to represent the community interest that it represented at the time its licence was allocated or last renewed (clause 9(2)(b)); and

In light of these serious breaches of licence conditions, ACMA will be pursuing compliance measures addressing the potential for future breaches.

Stephen Atkins
A/g Manager
Community Renewals and Investigations Section
Community Broadcasting Group
Australian Communications and Media Authority

26 August 2008

Sponsorship announcements

Friday 28 March 2008 6.00 am to 7.00 am

Sponsor	Broadcast time	Duration
True Health Wellness	6.04.25 – 6.04.37	00.12
Country Confectionary & Cakes	6.13.29 – 6.13.33	00.04
Siemens Group	6.16.13 – 6.16.32	+0.19
True Health Wellness	6.16.56 – 6.17.04	00.08
McDonalds	6.20.35 – 6.21.05	Advertisement
Siemens Group	6.21.05 – 6.21.35	Advertisement
Mark Philipsons' Betta Electrical	6.25.20 – 6.26.07	00.47
Mark Philipsons' Betta Electrical	6.28.22 – 6.28.30	00.08
Charlton Tyre Service	6.28.30 – 6.28.59	00.29
True Health Wellness	6.28.59 – 6.29.29	Advertisement
H? Funerals	6.51.05 – 6.51.40	00.35
Drayton & Toowoomba Cemetery	6.56.07 – 6. 56.44	00.37
		3 min 19 sec

Friday 28 March 2008 7.00 am to 8.00 am

Sponsor	Broadcast time	Duration
Garden City Tile Warehouse	7.04.25 -7.04.55	Advertisement
Garden City Tile Warehouse	7.07.07 – 7.07.39	Advertisement
True Health Wellness	7.08.57 – 7.09.09	00.12
Charlton Tyre Service	7.22.32 – 7.23.03	00.31
Lyndhurst Stud Farm	7.23.03 – 7.23.36	Advertisement
XXXX Gold Weetwood and Toowoomba Cup	7.23.36 – 7.24.29	Advertisement
Tyre Power	7.28.12 – 7.35.17	07.05

Siemens Group	7.37.13 – 7.37.44	Advertisement
Sponsor	Broadcast time	Duration
Country Confectionary & Cakes	7.38.52 – 7.38.55	Advertisement
Siemens Group	7.47.24.- 7.47.50	00.26
Siemens Group	7.54.14 – 7.54.19	00.05
XXXX Gold Weetwood and Toowoomba Cup	7.55.42 – 7.57.05	Advertisement
Country Confectionary & Cakes	7.58.07 – 7.58.20	Advertisement
		8 min 19 sec

Friday 28 March 2008 8.00 am to 9.00 am

Sponsor	Broadcast time	Duration
Garden City Tile Warehouse	8.00.00 – 8.00.11	00.11
Garden City Tile Warehouse	8.04.26 – 8.04.58	Advertisement
Garden City Tile Warehouse	8.07.12 – 8.07.41	Advertisement
True Health Wellness	8.09.12 – 8.09.21	00.09
Gowrie Road Hotel and Siemens Group	8.10.25 – 8.10.31	00.06
Gowrie Road Hotel and Siemens Group	8.13.25 – 8.15.17	01.52
Gowrie Road Hotel and Siemens Group	8.44.23 – 8.45.07	00.34
Federal Hotel	8.48.43 – 8.51.45	Advertisement
Network 7 <i>Grey's Anatomy</i>	8.51.45 – 8.52.14	Advertisement
Siemens Group	8.52.14 – 8.52.45	Advertisement
Rendezvous on Ruthven Coffee & Tea Lounge	8.53.37 – 8.57.20	Advertisement
Wilsonton Hotel	8.57.21 – 8.57.57	00.36
Mark Philipsons' Betta Electrical	8.57.58 – 8.58.37	00.39
		4 min 7 sec

Saturday 29 March 2008 6.00 am to 7.00 am

Sponsor	Broadcast time	Duration
Country Confectionary & Cakes	6.08.27 – 6.08.40	Advertisement
True Health Wellness	6.12.42 - 6.12.54	00.12
McDonalds	6.16.14 – 6.16.46	00.32
Federal Hotel	6.16.46 – 6.17.16	00.30
Chocolate Frog Diet	6.17.16 – 6.17.47	Advertisement
XXXX Gold Weetwood and Toowoomba Cup	6.17.48 – 6.19.00	Advertisement
Mark Philipsons' Betta Electrical	6.19.04 – 6.19.08	00.04
Mark Philipsons' Betta Electrical	6.23.56 – 6.24.22	00.26
Mark Philipsons' Betta Electrical	6.24.23 – 24.52	Advertisement
Mark Philipsons' Betta Electrical	6.27.13 – 6.27.16	00.03
Siemens Group	6.27.22 – 6.27.30	00.08
Siemens Group	6.30.08 – 6.31.14	01.06
Siemens Group	6.43.38 – 6.44.08	Advertisement
Wilsonton Hotel	6.43.09 – 6.44.38	01.29
Clear Mountain Fairview Stud	6.49.10 – 6.51.27	Advertisement
Garden City Tile Warehouse	6.51.27 – 6.51.57	Advertisement
Gatton-Laidley-Lowood Funeral Services	6.52.00 – 6.52.31	00.31
Drayton and Toowoomba Cemetery	6.57.14 – 6.57.52	00.38
		05.39

Saturday 29 March 2008 7.00 am to 8.00 am

Sponsor	Broadcast time	Duration
Garden City Tile Warehouse	7.00.27 – 7.00.40	00.13
True Health Wellness	7.04.24 – 7.04.38	00.14

Sponsor	Broadcast time	Duration
True Health Wellness	7.05.03 – 7.05.18	Advertisement
True Health Wellness and Fighting Fit	7.10.46 - 7.24.14	Advertisement
Wilsonton Hotel	7.27.32 – 7.28.02	00.30
Lyndhurst Stud Farm	7.28.03 – 7.28.39	Advertisement
XXXX Gold Weetwood and Toowoomba Cup	7.28.40 – 7.29.32	Advertisement
K&R Plumbing Supplies	7.30.36 – 7.33.16	Advertisement
K&R Plumbing Supplies	7.46.33 – 7.47.00	Advertisement
Federal Hotel	7.47.00 – 7.47.30	00.30
Siemens Group	7.47.30 – 7.48.00	Advertisement
Clifton Courier	7.48.04 – 7.48.08	00.04
On Our Selection News and Clifton Courier	7.49.21 – 7.49.29	00.08
Gowrie Road Hotel	7.52.43- 7.53.12	Advertisement
Warwick Scrap Metal and Recycling	7.52.13 – 7.53.42	00.29
Mark Philipsons' Betta Electrical	7.56.16 – 7.56.56	00.40
Mark Philipsons' Betta Electrical	7.59.01 – 7.59.11	00.10
		2 min 58

Sunday 30 March 2008 12.00 pm to 1.00 pm

Sponsor	Broadcast time	Duration
Mark Philipsons' Betta Electrical	12.00.00 – 12.00.25	Advertisement
Rebel Sports	12.00.42 – 12.00.43 12.01.01 – 12.04.03 12.02.25 – 12.02.35	Advertisement
Rebel Sport	12.03.50 – 12.05.04	Advertisement
Charlton Tyre Service	12.05.04 – 12.05.32	00.28

Charlton Tyre Service	12.06.53 – 12.08.07	01.14
Siemens Group	12.16.17 – 12.16.47	Advertisement
Charlton Tyre Service	12.16.58 – 12.17.58	01.00
XXXX Gold Weetwood and Toowoomba Cup	12.26.30 – 12.27.24	Advertisement
Charlton Tyre Service	12.27.32 – 12.28.04	00.32
Roma Meet	12.29.29 – 12.30.24	Advertisement
Rebel Sports	12.30.35 – 12.30.39	Advertisement
Siemens Group	12.30.52 – 12.30.57	00.05
Charlton Tyre Service	12.31.45 – 12.32.25	01.10
Charlton Tyre Service	12.33.47 – 12.33.50	00.03
Charlton Tyre Service	12.34.01 – 12.34.33	00.32
Siemens Group	12.34.35 – 12.35.20	00.45
John O'Brian Toyota	12.44.45 – 12.45.16	00.31
Trezise Timber	12.45.16 – 12.45.45	00.29
		8 min 07

Sunday 30 March 2008 1.00 pm to 2.00 pm

Sponsor	Broadcast time	Duration
Siemens Group	01.01.20 – 01.01.30	00.10
Mark Philipsons' Betta Electrical	01.08.58 – 01.09.06	00.08
Siemens Group	01.16.25 – 01.16.27	00.02
Siemens Group	01.18.40 – 01.18.42	00.02
Trezise Timber	01.08.42 – 01.18.49	00.07
Siemens Group	01.19.09 – 01.19.13	00.04
Siemens Group	01.23.30 – 01.23.32	00.02
John O'Brien Toyota	01.25.44 – 01.25.55	00.11

Trezise Timber	01.28.20 – 01.28.32	00.12
Siemens Group	01.29.20 – 01.09.28	00.08
Federal Hotel	01.29.42 – 01.30.12	00.30
Charlton Tyre Service	01.30.13 – 01.30.44	00.31
Siemens Group	01.30.46 – 01.30.50	00.04
Federal Hotel	01.34.36 – 01.34.40	00.04
K&R Plumbing	01.35.01 – 01.35.29	Advertisement
Siemens Group	01.35.30 – 01.35.49	00.19
John O'Brien Toyota	01.36.07 – 01.36.15	00.08
Mark Philipsons' Beta Electrical	01.36.57 – 01.37.01	00.04
Siemens Group	01.53.33 – 01.53.35	00.02
Siemens Group	01.58.02 – 01.58.06	00.04
Trezise Timber	01.58.06 – 01.58.13	00.07
Trezise Timber	01.58.35 – 01.58.38	00.03
		3 min 02