Investigation report no. BI-512

| Summary |  |
| --- | --- |
| **Licensee** | Greater Bendigo Community Radio Inc. |
| **Station** | 3BBS |
| **Type of service** | Community Broadcasting – Radio |
| **Date of broadcast** | 6 July 2019 |
| **Relevant legislation** | Schedule 2 to the *Broadcasting Services Act 1992* (the BSA):* paragraph 9(1)(b) [prohibition on broadcast of advertisements]
 |
| **Date finalised** | 14 November 2019 |
| **Decision** | Breach of paragraph 9(1)(b) of Schedule 2 to the BSA |

Background

On 15 July 2019, the Australian Communications and Media Authority (the ACMA) started an investigation under the *Broadcasting Services Act 1992* (the BSA) into Greater Bendigo Community Radio Inc.’s compliance with paragraph 9(1)(b) of Schedule 2 to the BSA.

Greater Bendigo Community Radio Inc. is the licensee of 3BBS, a community radio broadcasting service. 3BBS is licensed to represent the ‘geographic area with a focus on sport’ community interest in the Bendigo RA4 licence area in Victoria.

The ACMA started the investigation after receiving a complaint on 8 July 2019. The complaint alleged that, during a football broadcast on 6 July 2019, ‘there were many mentions of sponsors that were not clearly indicated as such, as per regulations’.

Assessment and submissions

This investigation is based on:

* submissions from the licensee received by the ACMA on 9 August 2019
* a recording of the licensee’s commentary on the Maryborough Castlemaine District Football League (MCDFL) match between Harcourt and Navarre, broadcast on 6 July 2019.

Other sources are identified where relevant.

When assessing content, the ACMA considers its meaning to an ‘ordinary reasonable’ listener or viewer. This includes the natural, ordinary meaning of the language, context, tenor and tone of the content, and any inferences that may be drawn from this meaning.

Australian courts have considered an ‘ordinary reasonable’ listener or viewer to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.[[1]](#footnote-1)

The ACMA then assesses whether the content complies with the relevant licence conditions.

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

Finding

The licensee breached the licence condition set out in paragraph 9(1)(b) of Schedule 2 to the BSA when it broadcast the announcements listed in the table below.

|  |  |  |
| --- | --- | --- |
| **Date** | **Organisation** | **Number of announcements** |
| 6 July 2019 | Poyser Holden  | 6 |
| Aussie Disposals  | 9 |
| Priority One Property | 8 |
| McDonalds in Maryborough | 6 |

Reasons

Under paragraph 9(1)(b) of Schedule 2 to the BSA, community broadcasting licensees are prohibited from broadcasting advertisements.

The BSA does not define ‘advertisement’. The ACMA considers 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.[[2]](#footnote-2)

Subclauses 2(1) and 2(2) of Schedule 2 to the BSA provide for a number of qualifications to the general prohibition on advertising on community broadcasting services. These relate to the broadcasting of:

* material broadcast as an accidental or incidental accompaniment to the broadcasting of other matter, provided no valuable consideration was received for broadcasting this material
* community information material or community promotional material
* a sponsorship announcement that acknowledges financial support by a person of the licensee or of a program broadcast on a service provided under the licence
* material that announces or promotes a service provided under the licence, including material that is likely to induce public support, whether financially or otherwise, or to make use of, the service or services provided under the licence.

These provisions apply to material of an advertising character such that it is ‘not taken to be’ advertising for the purposes of the prohibition in paragraph 9(1)(b).

In determining whether the licensee breached the licence condition prohibiting the broadcast of advertisements, the ACMA must consider:

* whether the material broadcast was of an advertising character
* if so, whether any of the provisions set out in Clause 2 of Schedule 2 to the BSA apply.

**Was the material broadcast of an advertising character?**

The recording of the licensee’s commentary on the MCDFL match between Harcourt and Navarre, broadcast on 6 July 2019, contained material of an advertising character. A transcript of this material is in **Attachment B**.

This material included 61 announcements made live on-air by the commentators that were intended to promote the products or services of, or were designed or calculated to draw public attention to, the organisations listed in the table below.

|  |  |
| --- | --- |
| **Organisation** | **Number of announcements** |
| Poyser Holden  | 16 |
| Aussie Disposals  | 20 |
| Priority One Property | 19 |
| McDonalds in Maryborough  | 6 |

**Do any of the Clause 2 provisions apply?**

**Paragraph 2(1)**

The provision set out in paragraph 2(1) of Schedule 2 to the BSA contains two elements. Both must be satisfied for this provision to apply. The first element requires that the material of an advertising character be broadcast as an accidental or incidental accompaniment to the broadcasting of other matter.[[3]](#footnote-3) The second element applies if the licensee did not receive any payment or other valuable consideration for broadcasting the material of an advertising character.[[4]](#footnote-4)

The ACMA considers that all 61 announcements identified above were broadcast deliberately, and not as an accidental or incidental accompaniment to the broadcasting of the MCDFL match commentary. Accordingly, the ACMA considers that none of the 61 announcements identified above fall under the provision set out in paragraph 2(1).

***McDonalds in Maryborough***

The licensee has submitted that it did not receive any income for broadcasting announcements for McDonalds in Maryborough. However, as the ACMA considers that these announcements were broadcast deliberately, the two elements of paragraph 2(1) have not been satisfied.

**Paragraph 2(2)(a)**

Under paragraph 2(2)(a) of Schedule 2 to the BSA, community information material or community promotional material is permitted on community radio and is not taken to be the broadcasting of an advertisement. What constitutes community information material or community promotional material is considered on a case-by-case basis.

The ACMA considers that none of the 61 announcements identified above represent community information material or community promotional material. Accordingly, the ACMA considers that none of these announcements fall under the provision set out in paragraph 2(2)(a).

**Paragraph 2(2)(c)**

Under the provision set out in paragraph 2(2)(c) of Schedule 2 to the BSA, material that announces or promotes a service provided under the licence is permitted on community radio. What constitutes material that announces or promotes a service provided under the licence is considered on a case-by-case basis.

The ACMA considers that none of the 61 announcements identified above represent material that announces or promotes a service provided under the licence. Accordingly, the ACMA considers that none of these announcements fall under the provision set out in paragraph 2(2)(c).

**Paragraph 2(2)(b)**

Under the provision set out in paragraph 2(2)(b) of Schedule 2 to the BSA, sponsorship announcements that acknowledge financial support of the licensee or a program broadcast on the licensee’s service are allowed on community radio. The ACMA generally considers an acknowledgement of a sponsor’s financial support (‘tag’):

* must state the name of the person or organisation that has given support in cash or in kind
* must be attached to each individual sponsorship announcement
* must be clearly heard or visible and understood
* must be in the same language as the sponsorship announcement
* can be placed in any part of a sponsorship announcement, provided it is clear to listeners that the information to be broadcast and/or that has been broadcast is a sponsorship announcement.[[5]](#footnote-5)

Where sponsorship is of a program, the ACMA considers that the tag must make the association between the sponsorship and the program clear.[[6]](#footnote-6)

Sponsorship announcements must also be genuine. A licensee must be able to demonstrate, if asked, that the sponsors featured in announcements are financial supporters of the licensee or a program provided under the service.[[7]](#footnote-7)

***Poyser Holden***

Ten of the 16 announcements for Poyser Holden identified above stated ‘full on fresh footy thanks to Holden Colorado at Poyser Holden’. The ACMA considers that an ordinary reasonable listener would understand this to be an acknowledgement of the financial support that the sponsor (Poyser Holden) gave to a program broadcast on the licensee’s service (‘full on fresh footy’). Accordingly, the ACMA considers that these 10 announcements were appropriately tagged and fall under the provision set out in paragraph 2(2)(b).

The remaining six announcements for Poyser Holden stated ‘thanks to Holden Colorado at Poyser Holden’ after an announcement of a goal or the score. As these six announcements did not refer to the licensee or a program broadcast on the licensee’s service, the ACMA considers that they were not appropriately tagged and do not fall under the provision set out in paragraph 2(2)(b). As noted above, none of the remaining Schedule 2 provisions apply. Accordingly, the ACMA considers that the licensee breached paragraph 9(1)(b) when broadcasting these six announcements for Poyser Holden.

***Aussie Disposals***

Eleven of the 20 announcements for Aussie Disposals identified above were broadcast as listed in the table below.

|  |  |
| --- | --- |
| **Statement** | **Number of announcements** |
| ‘Full on fresh footy thanks to Aussie Disposals’  | 10 |
| ‘Full on fresh footy, we’ve gone 20 minutes in the last, thanks to Aussie Disposals’ | 1 |

The ACMA considers that an ordinary reasonable listener would understand these announcements to contain an acknowledgement of the financial support that the sponsor (Aussie Disposals) gave to a program broadcast on the licensee’s service (‘full on fresh footy’). Accordingly, the ACMA considers that these 11 announcements were appropriately tagged and fall under the provision set out in paragraph 2(2)(b).

The remaining nine announcements for Aussie Disposals stated ‘thanks to Aussie Disposals’, after an announcement of a goal, the score or the time. As these nine announcements did not refer to the licensee or a program broadcast on the licensee’s service, the ACMA considers that they were not appropriately tagged and do not fall under the provision set out in paragraph 2(2)(b). As noted above, none of the remaining Schedule 2 provisions apply. Accordingly, the ACMA considers that the licensee breached paragraph 9(1)(b) when broadcasting these nine announcements for Aussie Disposals.

***Priority One Property***

Eleven of the 19 announcements for Priority One Property identified above were broadcast as listed in the table below.

|  |  |
| --- | --- |
| **Statement** | **Number of announcements** |
| ‘Full on fresh footy thanks to Priority One Property’  | 10 |
| ‘Full on fresh footy, 18 minutes in the second, thanks to Priority One Property’ | 1 |

The ACMA considers that an ordinary reasonable listener would understand these announcements to contain an acknowledgement of the financial support that the sponsor (Aussie Disposals) gave to a program broadcast on the licensee’s service (‘full on fresh footy’). Accordingly, the ACMA considers that these 11 announcements were appropriately tagged and fall under the provision set out in paragraph 2(2)(b).

The remaining eight announcements for Priority One Property stated ‘thanks to Priority One Property’ after an announcement of a goal, the score or the time. As these eight announcements did not refer to the licensee or a program broadcast on the licensee’s service, the ACMA considers that they were not appropriately tagged and do not fall under the provision set out in paragraph 2(2)(b). As noted above, none of the remaining Schedule 2 provisions apply. Accordingly, the ACMA considers that the licensee breached paragraph 9(1)(b) when broadcasting these eight announcements for Priority One Property.

***McDonalds in Maryborough***

The licensee has submitted:

*[…] In the live broadcast the callers mention the league major sponsor McDonalds Marborough. They are not our sponsors and we don’t receive any income from this. However the league asks us to acknowledge them.*

McDonalds in Maryborough did not provide financial support to the licensee, and the ACMA does not consider sponsoring the league to be providing financial support to a program broadcast on the licensee’s service.

The ACMA therefore considers that the six announcements for McDonalds in Maryborough identified above do not fall under the provision set out in paragraph 2(2)(b). As noted above, none of the remaining Schedule 2 provisions apply. Accordingly, the ACMA considers that the licensee breached paragraph 9(1)(b) when broadcasting these six announcements for McDonalds in Maryborough.

Attachment A

Relevant provisions of the *Broadcasting Services Act 1992*

**Schedule 2—Standard conditions**

**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 (other than paragraph 9(1)(a)), 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 a 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 a 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 service or services provided under the licence;

is not taken to be the broadcasting of an advertisement.

[…]

**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, and the licensee will not broadcast sponsorship announcements otherwise than as mentioned in this clause;

[...]

Interpretation of advertising taken from the Community Broadcasting Sponsorship Guidelines 2008[[8]](#footnote-8)

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 a 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’.[[9]](#footnote-9)

* 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.

Attachment B

Transcript

Announcements broadcast on 3BBS during coverage of the MCDFL match between Harcourt and Navarre on 6 July 2019.

|  |  |
| --- | --- |
| **Time code** | **Transcript** |
| 01:39-01:41 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 03:45-03:52 | And we have played just over three minutes of time, first term, thanks to Aussie Disposals. |
| 06:35-06:38 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 09:29-09:35 | And Harcourt go to 2-1-13, leading Navarre one straight goal. That is thanks to Priority One Property. |
| 10:14-10:16 | Full on fresh footy thanks to Priority One Property. |
| 11:36-11:42 | 3-2-20 Harcourt, one straight Navarre, thanks to Priority One Property.  |
| 12:24-12:30 | This opening term brought to you by McDonalds in Maryborough. They are the league sponsors. |
| 12:46-12:48 | Full on fresh footy thanks to Aussie Disposals. |
| 13:43-13:51 | That’s four for Harcourt. They go to 4-2-26, leading Navarre 1-1-7, thanks to Holden Colorado at Poyser Holden. |
| 15:53-15:55 | Full on fresh footy thanks to Aussie Disposals. |
| 18:00-18:02 | Full on fresh footy thanks to Priority One Property. |
| 20:28-20:32 | This quarter brought to you by McDonalds in Maryborough, the league sponsor. |
| 22:48-22:50 | Full on fresh footy thanks to Priority One Property. |
| 25:15-25:22 | It’s 14 Navarre, trailing Harcourt 5-3-33, thanks to Holden Colorado at Poyser Holden. |
| 27:06-27:11 | 5-4 Harcourt, 2-2 Navarre. That is thanks to Aussie Disposals. |
| 32:45-32:49 | 5-5 Harcourt, 2-2 Navarre. That is thanks to Aussie Disposals. |
| 33:54-33:56 | Full on fresh footy thanks to Aussie Disposals. |
| 35:30-35:41 | That’s 7 for Harcourt. They go to 7 goals 5-47, leading Navarre 2-2-14, thanks to Priority One Property. |
| 37:25-37:28 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 38:33-38:45 | Takes them to 8 goals 5-53, leading Navarre 3-2-20. That is thanks to Holden Colorado at Poyser Holden. |
| 43:46-43:48 | Full on fresh footy thanks to Priority One Property. |
| 45:49-45:46 | They go to 5-3, trailing Harcourt 9-7. That is thanks to Aussie Disposals. |
| 47:24-47:26 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 49:45-49:48 | Full on fresh footy, 18 minutes in the second, thanks to Priority One Property. |
| 51:07-51:14 | Harcourt go to 10-9. They lead Navarre 5 goals 3. That’s thanks to Priority One Property. |
| 52:46-52:49 | Full on fresh footy thanks to Aussie Disposals. |
| 53:56-54:05 | Harcourt move on to 12 goals 9, leading Navarre 5 goals 3, thanks to Holden Colorado at Poyser Holden. |
| 54:18-54:31 | Full on fresh footy. This second term brought to you by MCDFNL sponsor McDonalds in Maryborough. So hop along and get your Big Mac. […] Well, if I’m going to plug them, I may as well plug them right. |
| 55:05-55:08 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 70:41-70:45 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 72:03-72:08 | And we have played just over four minutes of time in this, the third term, thanks to Aussie Disposals. |
| 72:43-72:45 | Full on fresh footy thanks to Priority One Property. |
| 73:27-73:31 | Full on fresh footy. This third term brought to you by McDonalds in Maryborough, league sponsors. |
| 74:26-74:29 | Full on fresh footy thanks to Priority One Property. |
| 76:10-76:13 | Full on fresh footy thanks to Aussie Disposals. |
| 77:10-77:15 | They go to 15-13. Navarre are 5-4, thanks to Aussie Disposals. |
| 77:57-78:00 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 82:11-82:17 | They’re 16-14. Navarre are 5-5. That is thanks to Priority One Property. |
| 83:48-83:51 | Full on fresh footy thanks to Aussie Disposals. |
| 86:00-86:09 | That takes Harcourt to 16-17, leading Navarre 5-5, thanks to Holden Colorado at Poyser Holden. |
| 86:38-86:41 | Full on fresh footy thanks to Priority One Property. |
| 87:49-87:56 | 18-17 Harcourt, 5-5 Navarre, thanks to Priority One Property. |
| 88:42-88:45 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 90:29-90:34 | 5-5 Navarre, 19-18 Harcourt, thanks to Aussie Disposals. |
| 91:39-91:42 | Full on fresh footy thanks to Aussie Disposals. |
| 96:05-96:11 | Full on fresh footy. This last term brought to you by McDonalds in Maryborough. |
| 98:24-98:26 | Full on fresh footy thanks to Priority One Property. |
| 100:49-100:54 | 5-6. And that is thanks to Holden Colorado at Poyser Holden. |
| 104:10-104:14 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 105:15-105:21 | And we have played just on seven minutes in this final term, thanks to Priority One Property. |
| 106:58-107:00 | Full on fresh footy thanks to Aussie Disposals. |
| 108:16-108:21 | 25-19 Harcourt, 5-6 Navarre, thanks to Aussie Disposals. |
| 109:59-110:02 | Eleven and a half gone, final term, thanks to Priority One Property. |
| 110:03-1:10:11 | Full on fresh footy, this last term brought to you by McDonalds in Maryborough, sponsors of the Maryborough Castlemaine District Football Netball League. |
| 111:13-111:15 | Full on fresh footy thanks to Priority One Property. |
| 114:11-114:14 | Full on fresh footy thanks to Aussie Disposals. |
| 118:32-118:36 | Full on fresh footy, we’ve gone 20 minutes in the last, thanks to Aussie Disposals. |
| 119:35-119:40 | Goal. Thanks to Aussie Disposals. |
| 120:54-120:57 | Full on fresh footy thanks to Holden Colorado at Poyser Holden. |
| 122:23-122:26 | Full on fresh footy thanks to Aussie Disposals. |
| 123:48-123:50 | Full on fresh footy thanks to Priority One Property. |

1. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-1)
2. Community Broadcasting Sponsorship Guidelines 2008, page 3. [↑](#footnote-ref-2)
3. BSA, paragraph 2(1)(a) of Schedule 2. [↑](#footnote-ref-3)
4. BSA, paragraph 2(1)(b) of Schedule 2. [↑](#footnote-ref-4)
5. Community Broadcasting Sponsorship Guidelines 2008, page 14. [↑](#footnote-ref-5)
6. Ibid, page 15. [↑](#footnote-ref-6)
7. Ibid, page 14. [↑](#footnote-ref-7)
8. Community Broadcasting Sponsorship Guidelines 2008, page 3. [↑](#footnote-ref-8)
9. *Australian Capital Television Pty Ltd and the State of New South Wales v The Commonwealth* (1992) 177 CLR 106
 at 166. [↑](#footnote-ref-9)