

## Final Investigation Report no. BI-000636

Summary	
<b>Licensee</b>	Orange Community Broadcasters Limited
<b>Station</b>	2OCW
<b>Type of service</b>	Community Broadcasting
<b>Relevant legislation</b>	Paragraph 9(1)(b) of Schedule 2 to the <i>Broadcasting Services Act 1992</i> (BSA) [the licensee will not broadcast advertisements]
<b>Decision</b>	The Licensee breached Paragraph 9(1)(b) of Schedule 2 to the BSA

## Background

In February 2021, the Australian Communications and Media Authority (**ACMA**) received complaints from three complainants in respect of Orange Community Broadcasters Limited (**the Licensee**).

The complaints raised allegations which suggest that the Licensee failed to comply with its obligations to comply with the licence conditions in the *Broadcasting Services Act 1992* (**BSA**).

On 20 December 2021 the ACMA commenced an investigation under section 149 of the BSA into the Licensee's compliance with the licence conditions at: paragraph 9(1)(b) of Schedule 2 to the BSA [the licensee will not broadcast advertisements].

## The Licensee

The Licensee has held a long-term community radio broadcasting licence to represent the general community interest in the Orange RA1 since 1998.

The service operated by the Licensee is FM107.5 (2OCW).

The expiry date of the Licensee's current licence is 21 January 2023.

## Assessment and submissions

This investigation has considered the:

- > Complaints received by the ACMA in February 2021 (**the Complaints**).
- > Recordings provided by one of the complainants, of the program in question (**the program**).
- > A letter to the Orange City Council submitted by one of the complainants.
- > The written submission from the licensee received by the ACMA on 29 March 2022.

## Did the licensee broadcast advertising?

### Relevant licence condition

#### 9. Conditions applicable to services provided under community broadcasting licences

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

[...]

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

## Finding

The ACMA is of the view that the licensee breached the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA.

## Reasons

Paragraph 9(1)(b) of Schedule 2 to the BSA stipulates that it is a condition of all community broadcasting licences that the licensee must not broadcast advertisements.

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

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

- The High Court's consideration of the meaning of the term 'advertising' in the context of the former *Broadcasting Act 1942*:  
It would seem to be used in a broad general sense which would encompass any broadcast or telecast of material 'designed or calculated to draw public attention' to something ... regardless of whether the broadcast or telecast 'serves a purpose other than that of advertising'.<sup>1</sup>
- 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.

Subclause 2(2) of Schedule 2 to the BSA provides two qualifications to this prohibition: the broadcasting of material is not the broadcasting of an advertisement if the broadcasting of the material is accidental or incidental, and is not the broadcasting of an advertisement where the material is a sponsorship announcement.

### **Was the material intended to promote a product or service?**

The episode of the program included the following statements:

'...that's one of the things we're going to do on the show each week... is talk about local businesses... tell people about some products...'

'...we're going to be talking a lot about products and businesses and generally trying to get locals a bit excited about their town, about businesses...'

'...We're talking about local businesses in Orange and some of their fantastic products.'

'...The idea of this show is to have a bit of fun and give some publicity to good businesses and some great products'

This dialogue clearly indicates that one of the intentions of the program was to promote local businesses in Orange.

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<sup>1</sup> *Australian Capital Television Pty Ltd and the State of New South Wales v The Commonwealth* (1992) 177 CLR 106 at 166

Throughout the program, the hosts discussed a number of local businesses in Orange, noting the products and services provided by the businesses in a complimentary way, and also noted things such as product prices and the location of the business. The dialogue used throughout the program promoted the businesses being discussed in various ways, including:

- Drawing attention to the goods and services provided by the businesses
- Encouraging listeners to buy goods and services from the businesses
- Providing the location of the businesses
- Discussing the price and good value of the products from the businesses

### **Payment in cash or kind**

On the basis of a letter provided by one of the complainants, and the submission provided by the licensee on 29 March 2022, the ACMA understands that the licensee did not receive compensation for the promotion of the local businesses on the program.

However, as noted above, the ACMA's Community Broadcasting Sponsorship Guidelines specify that material which promotes a product or service can be considered an advertisement, regardless of whether payment in cash or in kind has been received by a licensee.

### **Was the material an accidental or incidental accompaniment?**

One of the qualifications for the general prohibition on advertising on a community broadcasting service is material that is broadcast as an accidental or incidental accompaniment to broadcasting other matter and that the licensee did not receive payment or other valuable or other consideration for (See subclause 2(1) of Schedule 2 to the BSA). Both these elements must be satisfied for the qualification to apply.

While the first element of this qualification is satisfied, as no financial consideration was received for the promotion of the businesses, the ACMA is of the view that the broadcast of the material was neither accidental or incidental, as the dialogue clearly had the intended purpose of promoting the businesses by drawing the listeners attention to the products and services provided by the businesses in a complimentary way, and providing other information including the location of the businesses and the cost of the products. As both elements have not been satisfied, the material was not an accidental or incidental accompaniment.

### **Was the material a sponsorship announcement?**

Sponsorship announcements that acknowledge financial support of the licensee or a program broadcast on the licensee's service are permitted on community radio in certain circumstances. The discussion of various businesses on the program were not accompanied by an acknowledgement of financial or in-kind support, and so were not sponsorship announcements.

## **Conclusion**

The ACMA has found sufficient evidence to show that advertising was broadcast during the program.

The material broadcast was advertising material and did not meet the qualifications set out in Subclauses 2(1) and 2(2) of Schedule 2 of the BSA for circumstances for which the material would not be considered advertising.

### **Agreed actions**

In its submission to the ACMA on 29 March 2022 the licensee advised that:

- 2OCW's presenters' agreement has been revised to include the requirements relating to advertising and sponsorship, and all current and new presenters are required to sign this agreement.
- All 2OCW's presenters have been directed to read and fully comprehend all of 2OCW's policies and guiding principles.

Based on the information provided by the licensee, the ACMA is satisfied that appropriate action has been taken to ensure future compliance with the licence condition requirements that the licensee will not broadcast advertisements.