

Investigation Report no. BI-666

Summary	
Licensee	Community Radio Endeavour Warrnambool Inc
Station	3WAY FM
Type of service	Community Broadcasting
Relevant Codes of Practice	Community Radio Broadcasting Codes of Practice 2008 (Codes) <ul style="list-style-type: none">> 3.2 [in programming decisions consider community interest, context, degree of explicitness [...] community standards and the social importance of the broadcast]
Decision	The Licensee: <ul style="list-style-type: none">> Breached Code 3.2 of the Codes

Background

On 25 February 2023, the Australian Communications and Media Authority (**ACMA**) received a complaint (**Complaint**) from the complainant (**Complainant**) in respect of Community Radio Endeavour Warrnambool Inc (**Licensee**).

The Complaint

The Complaint related to a pre-recorded audio clip (**the audio clip**) broadcast by the Licensee on two of its programs (**Program 1** and **Program 2**). It alleged that the audio clip was offensive and inconsistent with community standards relating to family violence against women. The Complainant submitted that they previously complained to the Licensee about the audio clip in 2021 (**the 2021 complaint to the Licensee**) and January 2023 (**the 2023 complaint to the Licensee**).

On 27 April 2023, the ACMA commenced an investigation under the *Broadcasting Services Act 1992* (**BSA**) into the Licensee's compliance with Code 3.2 of the Codes.

The Licensee

Since 8 October 1990, the Licensee has held a long-term community radio broadcasting licence to represent the general geographic area community interest in the Warrnambool RA2 licence area. The service operated by the Licensee is '3WAY FM' and its callsign is 3WAY.

The ACMA's approach to assessing content

When assessing content, the ACMA considers the ordinary meaning conveyed by the material, including the natural, ordinary meaning of the language, context, tenor, tone and any inferences that may be drawn. This is assessed according to the understanding of an 'ordinary reasonable' listener. Australian courts have considered 'an ordinary, reasonable person' to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. An ordinary, reasonable listener 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

Assessment and submissions

This investigation has considered the following information and submissions:

- > the Complaint received by the ACMA on 25 February 2023
- > the audio clip, obtained by the ACMA from the Licensee's website on 30 March 2023
- > submissions received from the Licensee on 7 June 2023 and 13 August 2023
- > Station Community Engagement Survey data submitted by the Licensee in 2019
- > the Licensee's program proposal form, obtained by the ACMA from its website on 22 June 2023.

Other sources are identified in this report where relevant.

¹ Amalgamated Television Services Pty Limited v Marsden (1998) 43 NSWLR 158 at pp 164–167.

Issue 1: Did the Licensee breach Code 3.2 of the Codes?

Relevant code

- 3.2** We will attempt to avoid censorship where possible. However, in our programming decisions we will consider our community interest, context, degree of explicitness, the possibility of alarming the listener, the potential for distress or shock, prevailing Indigenous laws or community standards and the social importance of the broadcast.

Finding

The ACMA's finding is that the Licensee breached Code 3.2.

Reasons

Licensee's submissions

In June 2023, the Licensee submitted that the audio clip contains parts of a music track and a female voice from a 'fake orgasm scene' in a movie.² It also submitted that:

- > for 10 to 15 years, it broadcast the audio clip at 4:00 pm on a weekday during the introduction of Program 1, and on an ad-hoc basis during Program 2 which is broadcast from 8:00 pm to 10:00 pm on a weekday
- > it did not receive complaints about this until the Complainant first complained in 2021
- > in 2021, following receipt of the 2021 complaint to the Licensee, it stopped broadcasting the audio clip
- > in 2022, the presenter of Program 1 chose to broadcast the audio clip again, which caused the Complainant to complain again in January 2023
- > in early 2023, it decided that the audio clip did not demonstrate 'disrespect or violence against women', as alleged in the 2023 complaint to the Licensee, and that it may be broadcast on both Program 1 and Program 2
- > in May 2023, to resolve the situation 'in the best interests of the station', it arranged with the presenter of Program 1 to stop broadcasting the audio clip.

Analysis

The ACMA's analysis of the content of the audio clip, the Licensee's programming decisions, and consideration of Code 3.2 factors is set out below.

Content of the audio clip

A transcript of the audio clip is as follows:

Male: [Program name]. It's hit -

Female: Yes

Male: After hit -

² *When Harry Met Sally* (1989).

[Hitting sound effect]

Female: Yes

Male: After hit. [Weekday], only on 3WAY FM 103.7.

The ACMA considers that the ordinary, reasonable person would have understood the audio clip to portray simulated sexual conduct with violent elements. This is because it contains:

- > a percussive sound effect that the ordinary, reasonable person would take to portray hitting
- > repetition of the word 'hit' in a male voice, playing on the use of 'hit' meaning popular or successful,³ that would reinforce the ordinary, reasonable person's understanding that the audio clip is intended to portray hitting
- > repetition of the word 'yes' in a female voice, timed to follow the hitting sound effect and the word 'hit', in a tone that the ordinary, reasonable person would understand to portray a sexual response to the hitting.

Programming decisions

In 2022, the Licensee made a programming decision to broadcast the audio clip at 4:00 pm on a weekday during the introduction of Program 1, after it had not broadcast the audio clip during this program for around a year, following the 2021 complaint to the Licensee.⁴

The Licensee broadcast the audio clip during Program 2 in 2023. Noting that the audio clip was not a regular part of Program 2, and was instead selected for broadcast on an 'ad-hoc' basis, the ACMA considers that each instance of the Licensee choosing to broadcast it during this show was a programming decision.

The ACMA notes the Licensee's submission that the presenter of Program 1 'chose of [their] own volition' to broadcast the audio clip again. However, regardless of which individuals are involved in its programming decisions, licensees are ultimately responsible for ensuring that the content they broadcast is compliant with their obligations under relevant legislation and codes of practice.

The ACMA also notes that, based on the Licensee's submissions, in 2023, following receipt of the 2023 complaint to the Licensee, it affirmed its earlier programming decisions by deciding that the audio clip may continue to be broadcast during both Program 1 and Program 2.

Consideration of Code 3.2 factors

The ACMA has considered relevant Code 3.2 factors in relation to the Licensee's programming decisions to broadcast the audio clip.

Community interest

The Licensee is licensed to represent the general geographic area community interest in Warrnambool RA2, Victoria, which encompasses a range of demographics, views, and needs.

³ https://www.macquariedictionary.com.au/features/word/search/?search_word_type=Dictionary&word=hit, accessed 19 June 2023.

⁴ The information provided to the ACMA indicates that the Licensee first made a programming decision to broadcast the audio clip around 10 to 15 years ago. As it is unclear whether this was before or after the Codes were registered under section 123 of the BSA in 2008, this investigation focuses on the Licensee's recent programming decisions.

Context

Program 1 is a two-hour music program, broadcast at 4:00 pm on a weekday. The ACMA considers that it is unlikely the ordinary, reasonable person would expect to hear simulated sexual conduct with violent elements in the context of this type of program.

Program 2 is a two-hour music program broadcast at 8:00 pm on a weekday. The ACMA considers that it is also unlikely the ordinary, reasonable person would expect to hear simulated sexual conduct with violent elements in the context of this type of program.

In Victoria, the school day generally ends around 3:30 pm,⁵ and 4:00 pm on weekdays is considered a peak time when children are travelling from school.⁶ The ACMA considers that, at 4:00 pm on a Friday, the ordinary, reasonable person would expect that children are likely to be listening to the radio, for example, while travelling in the car or after arriving home.

Relevantly, community engagement data submitted by the Licensee in 2019 supports that a significant proportion of its audience listens to its service around this time of day and while driving.⁷ The ACMA notes that, of the respondents who contributed to the data:

- > 82% reported listening to the Licensee's service between 3:00 pm and 7:00 pm
- > 93% of regular listeners reported listening to the Licensee's service in the car.

Degree of explicitness

The audio clip contains voice acting and sound effects that portray sexual conduct with violent elements (that is, a sexual response to being hit). The ACMA considers that this would be understood by the ordinary, reasonable person.

Prevailing community standards

The ACMA has considered prevailing community standards that, in the ACMA's view, the ordinary, reasonable person would believe to be relevant to the specific content of the audio clip. In doing so, the ACMA acknowledges that diverse audiences in Australia will not necessarily have common tastes and standards. Members of the community may accept that some material they find coarse or offensive would not similarly be judged by others.

Firstly, the ACMA considered prevailing community standards relating to family violence and violence against women. Relevant guidance about general audience expectations would indicate that audiences are 'increasingly aware of and concerned about' these sensitive matters, the portrayal of which may in some contexts be considered 'highly offensive'.⁸

Having regard to the specific composition of the audio clip, as well as submissions received from the Licensee and the Complainant, the ACMA notes the potential for a diversity of views in this instance.

Some members of the community, such as the Complainant, may relate the content of the audio clip to family violence or violence against women, as it portrays or sexualises a woman

⁵ <https://www2.education.vic.gov.au/pal/school-hours/policy>, accessed 20 June 2023.

⁶ <https://www.vicroads.vic.gov.au/safety-and-road-rules/road-rules/a-to-z-of-road-rules/school-speed-zones>, accessed 20 June 2023.

⁷ As part of the Licensee's 2019 application for renewal of its community radio broadcasting licence, it submitted the results of a Station Community Engagement Survey, undertaken in late 2016. The survey considered responses from 61 regular listeners, 5 occasional listeners, and 14 non listeners. 96% of all respondents reported having listened to the Licensee's service.

⁸ <https://www.acma.gov.au/publications/2022-06/report/what-audiences-want-audience-expectations-content-safeguards>, page 28.

being hit. Noting the sensitivity of these matters, their portrayal in a trivialising context (that is, to promote a music program) is likely to be considered highly offensive, contrary to community standards, and consequently not suitable for broadcast.

However, other members of the community may not relate the content of the audio clip to family violence or violence against women – an alternative interpretation being that the audio clip portrays consensual sexual conduct. Therefore, the ACMA has also considered prevailing community standards relating to the portrayal of sexual conduct, with particular regard to community expectations about the protection of children.

Relevant guidance about general audience expectations would indicate that the broader community considers it important that children be protected from ‘premature exposure to adult experiences’ and ‘content that they may find distressing’.⁹ It follows that the ordinary, reasonable person would believe content portraying these types of adult experiences and potentially distressing matters should not be broadcast when children are likely to be listening. This principle appears to be reflected in the Licensee’s program proposal agreement,¹⁰ which provides that ‘There will be no presentation of offensive material, with strict adherence to station policy on liberal lyrics (i.e. generally not allowed before 10pm).’

The ACMA’s view is that the ordinary, reasonable person would consider sexual conduct with violent elements to be an adult experience, or content that children may find distressing. Therefore, having consideration to prevailing community standards, it should not be broadcast when children are likely to be listening, such as 4:00 pm on a weekday.

Social importance of the broadcast

In some circumstances, the social importance of certain content may support that it should be broadcast, even if it potentially raises concerns with other Code 3.2 factors.

The audio clip is a promotion for a music program. The ACMA considers that this is not a matter of the relevant kind of social importance that would justify broadcasting the content of the audio clip.

Conclusion

The ACMA’s view is that consideration of relevant Code 3.2 factors, being community interest, context, degree of explicitness, prevailing community standards, and the social importance of the broadcast should have prevented the audio clip from being broadcast, particularly at 4:00 pm on a weekday, when children are likely to be listening.

The Licensee made programming decisions to broadcast the audio clip at 4:00 pm and between 8:00 pm and 10:00 pm on a weekday. Accordingly, the Licensee breached Code 3.2.

⁹ <https://www.acma.gov.au/publications/2022-06/report/what-audiences-want-audience-expectations-content-safeguards>, page 21.

¹⁰ <http://3wayfm.org.au/become-a-presenter/>, accessed 22 June 2023.

Agreed actions

On 13 August 2023, the Licensee submitted that it has taken the following actions in response to this investigation:

- > Discussed the importance of Code 3.2 matters with the presenters of Program 1 and Program 2 and arranged with them to stop broadcasting the audio clip permanently
- > Removed copies of Program 1 and Program 2 containing the audio clip from its website.

On 13 August 2023, the Licensee submitted that it would take the following further actions in response to this investigation:

- > Providing mandatory education to its presenters about the Codes, and particularly Code 3.2
- > Reviewing the suitability of presenters to continue presenting if they have breached the Codes
- > Reviewing its program proposal form to require all presenters to obtain approval for 'self-made' program promotions before broadcast
- > Reviewing the programming policy to ensure members of the programming subcommittee have authority to allow or disallow program promotions prepared by presenters
- > Conducting random audits of programs.