

Investigation Report no. BI-671

Summary	
Licensee	Orange Community Broadcasters Limited
Station	2OCW
Type of service	Community Broadcasting
Relevant legislation	Paragraph 9(1)(b) of Schedule 2 to the <i>Broadcasting Services Act 1992</i> (BSA) [prohibition on advertising]
Decision	The Licensee breached paragraph 9(1)(b) of Schedule 2 to the BSA

Background

On 14 April 2023, the Australian Communications and Media Authority (**ACMA**) received a complaint about Orange Community Broadcasters Limited (**Licensee**).

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

On 26 May 2023, the ACMA commenced an investigation under section 149 of the BSA into the Licensee's compliance with the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA [prohibition on advertising].

The Licensee

Since 28 March 1998, the Licensee has held a long-term community radio broadcasting licence to represent the general community interest in the Orange RA1 licence area.

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

The expiry date of the Licensee's current licence is 21 January 2028.

Assessment and submissions

This investigation has considered the following information and submissions:

- > the complaint received by the ACMA on 14 April 2023 (**the Complaint**).
- > screenshots of the station program's (the **Program**) Facebook posts dated 7 and 11 April 2023 received from the complainant
- > screenshot of the Program presenter's business' (**Venue A**) Facebook post dated 28 March 2023 received from the complainant
- > audio file received from the complainant of the Program broadcast on 11 April 2023
- > copy of recording received from the Licensee, of the Program broadcast on 11 April 2023
- > written submission received from the Licensee on 26 June 2023
- > the Licensee's response to the ACMA's preliminary investigation report, received on 7 August 2023.

Other sources are identified in this report where relevant.

Did the Licensee breach the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA [prohibition on advertising]?

Relevant licence condition

Schedule 2

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 [...]

Finding

The ACMA's finding is that the Licensee breached the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA.

Reasons

The complaint

On 14 April 2023, the ACMA received a complaint about the Licensee.

The Complaint alleged that one of the Licensee's presenters is advertising Venue A and the acts being booked at the venue. This raised concerns about the Licensee's compliance with the prohibition on advertising.

The complaint alleged this occurred on 11 April 2023.

Relevant submissions

On 9 May 2023, the Licensee submitted a copy of the recording from the Program broadcast on 11 April 2023.

On 26 June 2023, the Licensee submitted that it does not have a sponsorship agreement with the presenter's business trading as Venue A.

Relevant Guidelines

What is an advertisement?

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 (**Sponsorship Guidelines**) note that the BSA 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'.

- > 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.¹

Qualifications to the prohibition on advertising

Subclauses 2(1) and 2(2) of Schedule 2 to the BSA provide for a number of qualifications to the general prohibition on advertising. If one of these qualifications applies, then the relevant material is not taken to be advertising for the purposes of the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA.

The qualifications apply if the material broadcast is:

- > accidental ('without being planned') or incidental ('secondary to the subject of the broadcast' and 'a minor part').
- > community information or community promotional material ('provides information about community events or promotes community services').
- > promoting the licensee's community broadcasting service.
- > a sponsorship announcement ('contains an acknowledgement of financial or in-kind support by the sponsor of the licensee or a program').

The broadcast of gig guides

Relevant to the matters considered in this investigation, the Sponsorship Guidelines note that the broadcast of gig guides is a common feature on community broadcasting services. Licensees often broadcast interviews with music artists and concert performers, including information about upcoming concerts, gigs and performances in the local area – for example, dates, venues, costs and telephone numbers for tickets

However, care should be taken to ensure that discussions do not move from the general (for example, a review of a song) to the specific (for example, the promotion of the purchase of the music, scheduled concerts or where tickets may be obtained).²

Analysis

Based on the Licensee's submission to the ACMA on 26 June 2023, the ACMA understands that the Licensee did not have a sponsorship agreement or receive any compensation from Venue A. However, the 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.

¹ [Community Broadcasting Sponsorship Guidelines 2008](#) – p. 3.

² See p. 11 of the [Community Broadcasting Sponsorship Guidelines 2008](#).

The Program broadcast on 11 April 2023 contained the following references to the presenter's venue 'Venue A' and its upcoming gigs:

1. *'Just a bit of local live entertainment news for this weekend. Friday night 14th, sorry start with Thursday, [Venue B], Thursday, [Artist A] are on 8pm at [Venue A]. Friday [Venue A] got [Artist B] from 7pm and [Artist C] on Saturday evening from 8pm. Uhh [Venue A], Friday night the 14th, [Artist D] is in town, he's doing a wedding the next day, so yeah he called us up and asked if he could come and play and we will have him there any day of the week. So [Artist D] fans, good original stuff and fantastic covers get you dancing, come on down there. [Venue C] on Sat 15th from 8pm they've got [Artist E] playing live there.'*

The ACMA considers the above announcement to be a gig guide with the intention to promote and draw attention to the various venues and acts playing in the local area (describing the locations, dates, times, and acts). While the material was complimentary towards the upcoming act at the presenter's venue 'Venue A', the information was general and announced alongside other local venues and acts. The ACMA considers the gig guide announcement as providing community information or community promotional material. Therefore, this announcement meets one of the qualifications to the prohibition on advertising and is not taken to be the broadcasting of an advertisement.

2. *'That one there was [Artist F] who's coming to play at [Venue A] on April 21st ... On the Facebook page for this show, the Facebook page is called [the Program]... If you go to that page on Facebook there's a post about giving away two tickets to see [Artist F]. What you've got to do is buy yourself a couple of tickets, enter that and some lucky listener will get their tickets refunded, two tickets refunded. By simply liking that post and sharing it onto your feed on Facebook. Yeah so that's worth a fair bit there, I'll even probably chuck in a couple of complimentary Jones and Smith whiskeys for the ticket winner as well...'*
3. *'All right, that's going to be one cracker of a gig. As a special treat, it was originally supposed to be a solo show with [Artist F], I've actually out of my pocket, I'm getting a couple of Orange's most talented musicians to join him, [Artist G] on Bass and [Artist H] on drums slash percussion if needed. but definitely on the drums... We'll actually be... [Artist F] is actually coming to stay at my place for a couple of nights and Thursday night, we will hopefully finish trivia nice and early and while trivia is going I'll be setting up the audio for the gig on Friday night...'*
4. *'Thanks again for listening to [the Program]. Go to the Facebook page and like and share the post to win two free tickets to [Artist F] playing at [Venue A] on the 21st. It will be a gig to remember, very different to your normal cover type artist...'*

The ACMA considers that the above announcements:

- > Drew attention to Venue A by promoting its upcoming act, Artist F.
- > Encouraged listeners to like and share a post on the Program's Facebook page for a chance to win free tickets to Artist F's act.
- > Offered free drinks to the winner of the promotion for free tickets to Artist F's act.
- > Promoted Artist F's gig further by way of the presenter indicating that he will be adding more musicians to join the show.

The ACMA does not consider the announcements above as providing community information or community promotional material. The material included specific information about the presenter's venue and its upcoming act (Artist F). The material clearly had the intended purpose to incentivise its listeners with free tickets and drinks to assist in promoting Venue A and its upcoming acts. The ACMA is of the view that the announcements did not happen by mere chance or without being planned. Therefore, in this context, the material is not considered an accidental or incidental accompaniment.

None of the other qualifications apply to the announcements, therefore the announcements were advertising.

Conclusion

The information provided to the ACMA shows that on multiple occasions the Licensee broadcast announcements that were considered advertisements.

Accordingly, the ACMA is of the preliminary view that the Licensee breached the licence condition at paragraph 9(1)(b) of Schedule 2 to the BSA [prohibition on advertising].

Agreed Actions

The Licensee advised the ACMA that it has taken or will take the following actions in response to the ACMA's investigation report:

- > All presenters will be given training to ensure they are aware of their responsibilities to the station and to comply with the BSA.
- > All current presenters are being mentored on the need to ensure that they comply with the regulations concerning sponsorship limits of no more than 5 minutes per hour and no other advertising is to be permitted. This will not preclude the usual "What's On Around Orange" which lists all music at venues and cultural events taking place in the coming days and weeks.
- > All presenters will be required to sign the presenter's agreement every 6 months which includes the provisions of sponsorship requirements and a commitment to adherence of the BSA in all respects.
- > Any planned on-air interviews with the potential to be considered "advertising" must be pre-approved by the Board of Directors prior to going to air.
- > All current presenters and new presenters will be provided with a copy of the Sponsorship Guidelines, and this will also be included in the September Newsletter that will be sent out to members advising them of the results of the AGM held on Saturday 23rd September 2023.
- > The final investigation report from the ACMA will be forwarded to all members so that there can be no misunderstanding of the requirements regarding broadcasting of sponsorship announcements.