Investigation report no. BI-402

| Summary |  |
| --- | --- |
| **Broadcaster** | Australian Broadcasting Corporation  |
| **Station** | ABC Comedy |
| **Type of service** | National Broadcasting—Television |
| **Name of program** | *Tonightly with Tom Ballard*  |
| **Date of broadcast** | 15 March 2018 |
| **Relevant code** | ABC Code of Practice 2011 (revised 2016)  |
| **Date finalised** | 25 July 2018 |
| **Decision** | No breach of Standard 5.1 [inform participants]No breach of Standard 5.2 [refusal to participate]No breach of Standard 7.1 [harm and offence must be justified] No breach of Standard 7.3 [appropriate classification] |

Background

In April 2018, the Australian Communications and Media Authority (the ACMA) commenced an investigation of two complaints under the *Broadcasting Services Act 1992* (the BSA), about a segment on *Tonightly with Tom Ballard* (the program).

The program was broadcast on ABC Comedy by the Australian Broadcasting Corporation (ABC) on 15 March 2018 from 9.00 pm to 9.30 pm and was classified MA 15+.

The ACMA received a complaint (Complaint 1) in early April 2018, alleging the language and segment was highly offensive, in particular, by referring to Mr Kevin Bailey as ‘a cunt.’ In late April 2018, the ACMA received a further complaint (Complaint 2) which included a complaint about the unfair treatment of Mr Bailey and a lack of impartiality.

The ACMA has investigated the ABC’s compliance with Standard 5 (fair and honest dealing) and Standard 7 (harm and offence) of the ABC Code of Practice 2011 (revised 2016) (the Code).

The ACMA has not investigated compliance with Standard 4 (impartiality) of the Code as the ACMA considers that Standard 4, which applies to ‘news and information’, does not apply to satire.

The segment

*Tonightly with Tom Ballard* is a comedy program, described as:

A comedy show that smacks and unpacks the latest trends, news, inputs, life hacks and gossip and serves them up for you as a nightly dose of hot, must-see entertainment […] Tom Ballard hosts this ground breaking new comedy show that will literally fix everything that is wrong with the world. Panellists Bridie Connell, Greg Larsen and Greta Lee Jackson tackle the big issues of the day.[[1]](#footnote-2)

On 15 March 2018, the program included a segment in which comedian Greg Larsen impersonated a public servant from the Australian Electoral Commission. The segment took the form of a ‘mock interview’ that discussed re-naming the electorate of Batman to ‘Batman was-a-cunt’. This was said to be a reference to John Batman’s ‘role in the founding of Melbourne without shying away from the terrible things he did’, specifically, ‘because of his involvement in the murder of Tasmanian Aboriginal people’.

During the segment, posters of The Australian Greens and Australian Labor Party by-election candidates in the division of Batman were digitally altered to replace the name of the electorate, ‘Batman’, with ‘Batman-was-a-cunt’. Unlike the other candidates, the election poster for the Australian Conservatives candidate, Mr Bailey, did not refer to the electorate. The audience was informed by Greg Larsen that he had therefore ‘improvised’ and altered the poster to read ‘Kevin Bailey is a cunt’. A poster was shown with the additional text. Greg Larsen then announced that he was ‘breaking’ from his character as a public servant to explain that he altered Mr Bailey’s poster in this way because Mr Bailey had refused a request for an interview.

Coarse language was used throughout the program as Tom Ballard discussed topical news events, politics and politicians. This included breaking from his monologue to respond to the audience to say ‘fuck you’ to persons off-screen.

The program was preceded by a consumer advice warning:

The following program is classified MA for mature audiences 15 years and over. It may contain coarse language, sexual references and adult themes.

A transcript of the segment is at **Attachment A**.

Assessment and submissions

When assessing content, the ACMA considers the meaning conveyed by the material, including the natural, ordinary meaning of the language, context, tenor, tone, images and any inferences that may be drawn. This is assessed according to the understanding of an ‘ordinary reasonable’ viewer.

Australian courts have considered an ‘ordinary reasonable’ 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.[[2]](#footnote-3)

Once the ACMA has ascertained the meaning of the material that was broadcast, it then assesses compliance with the Code.

This investigation has taken into account the complaints (**Attachment B**) and the ABC’s response to the complainants, and submissions to the ACMA (**Attachment C**). Other sources are identified in this report where relevant.

Issue 1: Fair and honest dealing

Relevant Code provisions

**Standards:**

*Dealing with participants*

**5.1** Participants in ABC content should normally be informed of the general nature of their participation.

**5.2** A refusal to participate will not be overridden without good cause.

The relevant Principles are:

Fair and honest dealing is essential to maintaining trust with audiences and with those who participate in or are otherwise directly affected by ABC content. In rare circumstances, deception or a breach of an undertaking may be justified. Because of the potential damage to trust, deception or breach of an undertaking must be explained openly afterwards unless there are compelling reasons not to do so.

Finding

The ABC did not breach Standard 5.1 or 5.2 of the Code.

Reasons

Complainant 2 submitted to the ABC:

During the segment, candidates for the by-election were depicted and a highly offensive slur was directed towards the Australian Conservatives candidate, Mr Kevin Bailey AM. Mr Larsen states in the segment that he was at least partly motivated by Mr Bailey's decision to decline to be interviewed by him. It is unclear whether Mr Larsen also approached the Labor or the Greens candidate for interviews.

Complainant 2 submitted to the ACMA:

The notion that an individual will be subjected to abuse if they do not agree to an interview seems to me to be a clear breach of the ABC's Code with respect to fair and honest dealing.

In its submission to the ACMA, the ABC noted:

[…] the standards in section 5 are not applicable to the issue raised in the complaint to the ACMA. Mr Bailey was not a participant in the program. No allegation was made about him which required him to be given a fair opportunity to respond. No assurances or undertakings were made to him. There was no use of secret recording or other types of deception.

The treatment of an individual who declines an offer to participate in a program, but is nevertheless referred to in the program, may be contemplated by the Principles of the Code under ‘fair and honest dealing’. The Principles refer to those who ‘are otherwise directly affected by ABC content.’ In this instance, the ACMA considers that Mr Bailey has been otherwise ‘directly affected’ by the segment.

However, whatever the Principles might contemplate, the Standards under the Code that apply to the broadcast (5.1 and 5.2) are limited to those persons who appear in, or otherwise participate in a program. They do not apply to those who elect not to participate, but are otherwise directly affected by their decision to decline to participate.

The ACMA assesses the ABC’s compliance with Standards rather than the Principles[[3]](#footnote-4).

Standard 5.1 refers to participants in ABC content being ‘informed of the general nature of their participation’.

The segment included posters of Mr Bailey and other by-election candidates. Although Greg Larsen referred to Mr Bailey and ‘spoke directly to him’ through the camera, the segment did not include any material in which Mr Bailey directly took part.

Standard 5.2 prevents the ABC from overriding a refusal to participate without good cause. In other words, the ABC may disregard a person’s refusal to participate in ABC content and make them participate, ‘with good cause’.

This is not what occurred in the present case. As noted above, Greg Larsen made Mr Bailey the subject of the segment, by naming him and ‘speaking to him’ through the camera.

The ACMA does not consider that this constitutes a form of participation contemplated by Standard 5.2.

Accordingly, the ABC did not breach Standard 5.1 or 5.2.

Issue 2: Harm and offence

Relevant Code provisions

**Standards:**

**7.1** Content that is likely to cause harm or offence must be justified by the editorial context.

[…]

**7.3** Ensure all domestic television programs – with the exception of news, current affairs and sporting events – are classified and scheduled for broadcast in accordance with the ABC’s Associated Standard on Television Program Classification.

The relevant Principles are:

The ABC broadcasts comprehensive and innovative content that aims to inform, entertain and educate diverse audiences. This involves a willingness to take risks, invent and experiment with new ideas. It can result in challenging content which may offend some of the audience some of the time. But it also contributes to diversity of content in the media and to fulfilling the ABC’s function to encourage and promote the musical, dramatic and other performing arts. The ABC acknowledges that a public broadcaster should never gratuitously harm or offend and accordingly any content which is likely to harm or offend must have a clear editorial purpose.

The ABC potentially reaches the whole community, so it must take into account community standards. However, the community recognises that what is and is not acceptable in ABC content largely depends upon the particular context, including the nature of the content, its target audience, and any signposting that equips audiences to make informed choices about what they see, hear or read. Applying the harm and offence standard, therefore, requires careful judgement. What may be inappropriate and unacceptable in one context may be appropriate and acceptable in another. Coarse language, disturbing images or unconventional situations may form a legitimate part of reportage, debate, documentaries or a humorous, satirical, dramatic or other artistic work.

The Associated Standard: Television Program Classification and Principles are:

The guiding principle in the application of the following classifications is context. What is inappropriate and unacceptable in one context may be appropriate and acceptable in another. Factors to be taken into account include: the artistic or educational merit of the production, the purpose of a sequence, the tone, the camera work, the intensity and relevance of the material, the treatment, and the intended audience.

**Standard 7.3.1** Television Classifications

[…]

**MA15+ – MATURE AUDIENCE**

*(Not suitable for people under 15 years)*

[…]

MA15+ programs, because of the matter they contain or because of the way it is treated, are not suitable for people aged under 15 years.

Material classified MA15+ deals with issues or contains depictions which require a more mature perspective. This is because the impact of individual elements or a combination of elements is considered likely to be harmful or disturbing to viewers under 15 years of age. While most themes may be dealt with, the degree of explicitness and intensity of treatment will determine what can be accommodated in the MA15+ category – the more explicit or more intense material, especially violent material, will be included in the MA15+ classification and the less explicit or less intense material will be included in the M classification.

**Themes:** The treatment of themes with a high degree of intensity should not be gratuitous.

[…]

**Language:** Coarse language may be used.

Coarse language that is very strong, aggressive or detailed should not be gratuitous.

Finding

The ABC did not breach Standard 7.1 or Standard 7.3 of the Code.

Reasons

Complainant 1 submitted to the ABC:

[…] the comedians referred to Kevin Bailey using the c-word. Kevin Bailey is a highly respected and upstanding member of the Australian community. He doesn't deserve this kind of attack from a tax payer funded broadcaster. […].

I am writing to express my outrage at the inappropriate and utterly offensive content aired on your program "Tonightly with Tom Ballard".

Kevin Bailey is a highly respected and upstanding member of the Australian community. […]

I am extremely disappointed that he was subjected to such disrespectful profanity and believe that he deserves an apology.

The ABC responded:

Audience and Consumer Affairs has finalised an investigation in response to complaints that this sketch did not comply with the ABC’s harm and offence standards. Audience and Consumer Affairs’ investigation report sets out the review of the material against the relevant sections of the ABC’s editorial policies and is provided below for your reference. All complaints were carefully considered. No breaches of editorial standards were identified.

Complainant 2 submitted to the ABC:

[…] candidates for elected office expect to be criticised and parodied. But this ABC segment clearly crossed a line. It was particularly offensive given Mr Bailey has a record of service to the nation, including in the armed forces. I believe that the ABC owes Mr Bailey an unconditional apology for broadcasting abuse of him in this manner.

I also ask that you investigate whether the use of coarse language was appropriate for this program's classification and whether the appropriate content warnings were broadcast.

The ABC responded by providing a copy of the ABC’s internal ‘Audience and Consumer Affairs Investigation Report’. The ABC also responded:

ABC Audience and Consumer Affairs has finalised an investigation in response to complaints, including those raised directly by you. I attach the report, which sets out the review of the material against the relevant sections of the ABC's editorial policies and the appropriate classification standards. You can be assured that all complaints were carefully considered, and no breaches were found […]

[…] there was certainly no intention to cause anyone personal offence through an absurd comedy sketch.

**Compliance with Standard 7.1 [harm or offence must be justified]**

To assess compliance with Standard 7.1, the ACMA asks the following questions:

1. Does the material have the intrinsic capacity to be likely to cause harm or offence?

If it has no capacity to be likely to cause harm or offence, then the matter ends there. If the answer to question 1 is ‘yes’, then the following further questions arise:

2. What factors are there moderating any harm or offence?

3. What is the editorial context?

4. Does the editorial context justify the likely harm or offence?

1. *Does the material have the intrinsic capacity to be likely to cause harm or offence?*

Complainants 1 and 2 submitted that the segment caused offence, in particular, by way of the personal attacks on Mr Bailey.

The segment repeatedly used verbal and written coarse language in the form of ‘cunt’. Some examples include:

GREG LARSEN: The electorate of Batman shall henceforth be renamed ‘Batman-was-a-cunt’.

GREG LARSEN: John Batman was a-low-dog-cunt.

TEXT: Vote 1 Alex Bhathal for Batman-was-a-cunt

TEXT: How to vote for Ged Kearney. Action. Integrity. Real Change. Labor for Batman-was-a-cunt. Labor

GREG LARSEN: Kevin Bailey is a cunt.

GREG LARSEN: This is what happens when you fuck with Greg man.

The ACMA considers the segment contained two separate forms of offensive content. The repeated use of the word ‘cunt’ and the singling out of Mr Bailey. The repeated use of the word ‘cunt’, and, in particular, its use to refer to a named individual, has the intrinsic capacity to cause offence.

The ABC submitted to the ACMA that:

The word ‘cunt’ is generally considered to be stronger coarse language. However, the degree to which individuals are likely to find it offensive differs and has changed over time.

The ACMA accepts that the offensiveness of coarse language changes over time. The word ‘cunt’ is widely recognised as an offensive term at the strong end of the spectrum. The word was used verbally on six occasions in the segment and appeared as on-screen text four times. These multiple uses added to its impact and therefore its capacity to cause offence.

The ACMA notes the ABC’s acknowledgement that the segment contained ‘strong coarse language used in connection with identified individuals and as such was likely to cause harm or offence’.

As the answer to this question is ‘yes’, the ACMA then asks the following further questions.

1. *What factors are there moderating any harm or offence?*

The Code indicates that due regard should be had to the nature of the content under consideration.

In this case, the offence in the segment was moderated by the nature of the program which is a satirical comedy program in which the humour is often blunt, crude and sarcastic.

The offensive language used in the segment was partially moderated by its scripted, comedic nature. Tom Ballard’s repeated interjections and comedic attempts to end the conversation highlighted the unacceptable nature of Greg Larsen’s suggestions.

The ABC stated the word ‘cunt’ was:

… used for a clear comedic purpose. It was not used in an aggressive manner; rather it was spoken unremarkably and without emphasis, in the manner of ‘everyday language’.

With respect to the singling out of Mr Bailey, the ABC pointed to several elements of the segment which they said served to mitigate the potential offensiveness:

Tom Ballard's vehement objections (albeit in a feigned, comedic manner) which signalled to the audience that the program fully understood that genuinely calling a candidate a cunt is an entirely inappropriate and unjustified thing to do.

[…]

The way that the joke had been carefully set up by the gags and performance elements that preceded it, involving a specifically written and performed character explaining the issue and his proposed solution, then deliberately over explaining the other two posters, all as a lead up to the final poster punch line.

The ABC has submitted, that:

Greg Larsen's tone was persistently matter-of-fact as he explained his 'elegant solution', and why he had to 'improvise' for Mr Bailey's poster. As well, Tom Ballard's repeated (comic) objections and remonstrations emphasised that the program acknowledged the absurdity and inappropriateness of Greg Larsen's approach.

The ACMA agrees the offence was partially moderated by an awareness that Greg Larsen was not a public servant from the Australian Electoral Commission. The audience was also made aware that the augmented election posters were not real but were simply props that allowed the segment to make a strong satirical point.

The Code also indicates that due regard should be had to the program’s target audience.

Here, the program’s target audience was younger adults who could be expected to be familiar with the program’s crude and irreverent approach to comedy that had been established over the course of the previous 63 episodes. Moreover, the program was broadcast after 9.00 pm on the ABC’s dedicated comedy channel. Audience expectations regarding offensive content, at that time and on that channel, would be quite different to that of an earlier program on a channel of more general appeal.

1. *What is the editorial context?*

The Principles in the Code note that ABC content may at times be offensive to some. Any content which is likely to offend should have a clear editorial purpose.

The humorous and irreverent tone of the program was established at the outset when Tom Ballard insulted Federal ministers and made crude jokes about the plight of ‘white refugees’. ABC Entertainment & Specialist advised that the ‘mock’ interview structure is a standard part of *Tonightly with Tom Ballard:*

[T]he program commonly includes these sorts of fake interviews where Greg Larsen (or Bridie Connell or Greta Lee Jackson) play a character being interviewed by Tom Ballard, and that over the course of the series, Greg Larsen's comedic persona has been established as that of an 'unreasonably angry man'.

The Batman segment occurred a few days before the Batman by-election, during episode 64 of the program. The ABC submitted that the content was editorially justified as the audience was familiar with the comedic tone and approach of the show, and that topical matters are often discussed:

This sketch itself was a provocative piece of comedy stimulated by coverage of the Batman by- election. The sketch found its humour in the exaggerated contrast between Greg Larsen's dour persona, his outrageously inappropriate proposal for renaming the electorate, and his disproportionate response after an interview request was declined. The sketch played on recurring comedic tropes involving exaggeration and insensitivity that would be familiar to the program's target audience. The language was used to amplify these themes.

[...]

The program's satire and comedy targets a wide range of people, issues and institutions over time. This was the 64th episode of the program and its audience can be expected to be familiar with its established comedic tone and approach; the segments, characters and sketches it routinely presents; and its use of coarse language.

1. *Does the editorial context justify the likely harm or offence?*

In considering whether the material is justified by its editorial context. within the meaning of the Code, the ACMA is required to have regard to the general framing and latitude of the Code provisions for offensive material. This requires careful judgement and the weighing-up of a number of interrelated factors.

Under the Code, coarse language, disturbing images and unconventional situations may form a legitimate part of satire. The Code also emphasises the importance of freedom of expression:

The Standards are to be applied in ways that maintain independence and integrity, preserve trust and do not unduly constrain journalistic enquiry or artistic expression.

The segment appeared in a comedy program, directed at a mature audience, which clearly signposted its irreverent style. The program contained content which may have challenged some viewers, reflecting the particular comedic style of its host and included material that was intended to be satirical.

Satire is often used to critique the shortcomings of a society, and, if framed appropriately, can be a legitimate part of a robust environment for political debate. Further, satire is a provocative and often sophisticated genre with a long history of presenting social taboos in exaggerated form, often as a central conceit, to make social or political points. Under the terms of the ABC Code, the ABC has significant latitude to broadcast challenging material of this nature.

The use of strong coarse language to satirically rename the division of Batman challenged contemporary Australia’s attitude to an historical figure and events. The segment sought to highlight the marked inconsistencies with respect to John Batman’s historical legacy by employing particularly strong language. In that context, the language used in the comedic reimagining of the electorate’s name, although offensive (and deeply so to some viewers) was editorially justified.

Following the reimagining of the Batman electorate, there was a point of transition in the segment. It began as a broad discussion about changing the name of the electorate to ‘Batman-was-a-cunt’, aided by various digitally altered campaign posters. The focus of the segment then narrowed to focus solely on Mr Bailey and his poster was altered to read ‘Kevin Bailey is a cunt’. This focus was likely to have been offensive to Mr Bailey as well as part of the audience.

The ABC acknowledged the possible offence to Mr Bailey in its submission and noted that an apology had been offered:

To the extent that Kevin Bailey may have found the sketch personally hurtful and offensive, we note that the ABC's Director of Entertainment & Specialist, […], personally phoned Mr Bailey after the segment aired to apologise for any personal offence caused by the sketch.

The ABC submitted that ‘genuinely calling a candidate a cunt is an entirely inappropriate and unjustified thing to do’. However, the ABC stated that calling Mr Bailey a ‘cunt’ was editorially justified, in this context, because the comedic nature of the segment signalled to the audience that the program fully understood the inappropriateness of the language directed at the candidate. This signalling was reinforced by host Tom Ballard’s repeated remonstrations of Greg Larsen, and request to ‘take that down immediately’ when shown the Kevin Bailey poster.

The ACMA notes that the editorial context altered when Mr Larsen said:

Fuck it. I am breaking character here because, I tried to get an interview with Kevin Bailey. I was like ‘hey man, let’s have an interview. We’ll do a thing about … a funny package about the election. I wasn’t even going to make fun of you. I was going to make fun of the Greens. But then you refused the interview so this is what happens. This is what happens when you fuck with Greg man.

The ABC’s investigation report acknowledged two possible effects of the ‘breaking character’ moment:

While we note ABC Entertainment & Specialist's view that Greg Larsen's breaking character moment served to mitigate the potential offensiveness of the Kevin Bailey joke, this element could also be considered to compound the offensiveness of the segment. In our view, this aspect of the joke was nonetheless editorially justified. It operated to expose Greg Larsen’s alternative character to the audience as wholly inappropriate and comically vindictive, adding a further layer of outrageousness and building the comic effect.

The ABC’s further submission stated the ‘breaking character’ moment is better described as ‘changing character’:

Changing character moments have featured in a number of episodes and are always scripted to provide a comedic escalation, as was the case in the Batman sketch. The cast of Tonightly never genuinely ‘break’ character; this expectation is well established for the audience such that anything said after a cast member changes character is clearly within the ongoing context of the sketch and not the cast being themselves.

The ABC argued the ‘changing character’ moment could only be considered highly offensive if it was viewed as a genuinely personal reaction to a rejection for interview. The ABC submitted that the program’s consistent approach to characterisation meant regular viewers would have understood Greg Larsen’s statement, made after ‘changing character’, was not sincere or heartfelt. It was not Greg Larsen’s ‘personal reaction’ to a disappointment.

The ACMA accepts the ABC’s submission that the Greg Larsen comedic persona has been established in the program as that of an ‘unreasonably angry man.’ The ACMA also accepts the program employs ‘changing character’ moments to comic effect and that the ordinary reasonable viewer would be familiar with this approach.

The combination of Greg Larsen commenting ‘fuck it I am breaking character’ and his explanation for breaking character, may have made it difficult for some viewers to distinguish between Greg Larsen himself being angry and Greg Larsen the character, being ‘the angry man’. Greg Larsen pointed and directed his words down the camera at Mr Bailey, suggesting that his behaviour was a personal reaction to being denied access to an interview.

Some viewers would not have recognised this as a ‘changing character’ moment and may have interpreted it as a genuine and personally motivated attack on Mr Bailey. In this regard, it can be noted that there are limits to the licence granted by comedic context and this sketch came close to those limits by singling out an individual in an offensive way.

However, on balance, the ACMA considers that the ordinary reasonable viewer would have interpreted this part of the segment as being driven by comic intent rather than personal malice, and therefore would have understood that it was not a gratuitously offensive personal attack.

The ACMA considers the offensive use of strong coarse language and the focus on an individual were editorially justified in this instance. In coming to this conclusion, the ACMA took account of the mitigating factors that included: the comedic context, audience expectations, the use of signposting and consumer advice warnings, and the program’s broadcast at 9.00 pm on a dedicated comedy channel.

Accordingly, the ABC did not breach Standard 7.1 of the Code.

**Compliance with Standard 7.3 [appropriate classification]**

Standard 7.3 requires that domestic television programs, with the exception of news, current affairs and sporting programs, are classified and scheduled in accordance with the ABC’s Associated Standard on Television Program Classification.

The program was classified as MA 15+ with accompanying consumer advice that the program ‘may contain coarse language, sexual references and adult themes’. The Code provides that coarse language may be used in the MA 15+ classification but ‘coarse language that is very strong or aggressive or detailed should not be gratuitous’.

As previously noted, the program is an adult comedy program, broadcast on the ABC’s comedy channel. The MA 15+ classification provides guidance to audiences that the program content is for mature audiences. In this instance, the consumer advice specifically alerted audiences to the presence of coarse language.

The ABC outlined in its report that:

We are satisfied that this language usage did not exceed what is permitted in MA15+ classified programs. We are further satisfied that appropriate efforts were made to provide audiences with information about the nature of the content through the use of a prominent classification label and appropriate viewer advice.

The ABC submitted that:

The content of the program was clearly signposted. It was classified MA15+ with consumer advice warning of adult themes, sexual references and coarse language. The sketch in question appeared more than half way through the program, well after its mischievous and irreverent tone had been clearly established.

The segment included the repeated verbal use and visual display of coarse language in the form of the word ‘cunt’, including in connection with a named individual. Depending on the context of its usage, ‘cunt’ is usually considered to be strong coarse language. Its use in connection with identified individuals arguably gives it a higher impact – that is, very strong.

In order to comply with the requirements of the MA 15+ classification, very strong coarse language should not be gratuitous. Material that is gratuitous is included without justification, a defensible story-line or artistic merit.

The ABC responded to the complainants:

The word 'cunt' is considered to be stronger coarse language. However, the word was not used in an aggressive manner in this sketch; as noted above, it was employed in a matter of fact style, emphasising Greg Larsen[‘s] obliviousness to likely reaction to his proposal. It was not used in a gratuitous manner, but was used deliberately as a comedic tool to amplify the impact of the sketch.

The ACMA has noted above that coarse language in the form of ‘cunt’ has a strong impact, and its repetition and its visual as well as verbal use will add to that impact. However, the MA 15+ classification category can accommodate strong and very strong coarse language, when there is an editorial context.

The election posters, including the image ‘Kevin Bailey is a cunt’ were utilised in order to make a comedic point that drew on matters that were being covered in the program, including the recognition of alleged historical crimes. To this extent it cannot be considered to be gratuitous.

Towards the end of the segment, Greg Larsen pointed down the screen and spoke directly to Mr Bailey saying ‘this is what happens when you fuck with Greg man’. The coarse language in the form of ‘fuck’ was used to explain his actions. Even though the statement was directed at Mr Bailey, it was not delivered as an attack. This mitigated the impact of the coarse language.

For these reasons, the ACMA considers that the coarse language used in the segment could be accommodated in the MA 15+ classification.

Accordingly, the ABC did not breach Standard 7.3 of the Code.

Attachment A

Transcript of segment in *Tonightly with Tom Ballard*, broadcast on ABC Comedy on 15 March 2018

|  |  |  |  |
| --- | --- | --- | --- |
| **Time** | **Video** | **Audio** | **Text on screen** |
| 16:46 | Tom Ballard to camera in studio.Still image left of screen. Map of federal electorate of Batman. | TOM BALLARD: But there is another issue in Batman surrounding the very name of the electorate itself. Music ‘Batman’ themeThat’s right, worth it. | ‘Batman By-Election 2018’ |
| 16:55 | Tom Ballard to camera in studio.Still image of side profile sketch of John Batman. Tom Ballard leans forwards to kiss image of John Batman. | TOM BALLARD: Batman is named after John Batman. Seen here being a little bit hot…[laughter] Mwah |  |
| 17:06 | Full screen image of Herald Sun newspaper: on left, background image of Kearny election advertisement; on right, image newspaper print. Enlarged and bolded extract of newspaper text in centre of screen over the top of image. | TOM BALLARD voice over [VO]:Batman’s legacy has been under fire because of involvement in the murder of Tasmanian Aboriginal people.  | ‘HERALD SUN’ 14/03/2018 on top left of screen. ‘Herald Sun’‘The Electorate is named after John Batman…whose legacy has been under fire…because of his involvement in the murder of Aboriginal People’‘KEARNEY. ACTION, INTEGRITY’ |
| 17:11 | Full screen image of The Age newspaper, image of Batman Park trellises. Enlarged and bolded text in centre of screen over the top of image. | TOM BALLARD VO:And there have been calls to change the name of the seat.  | ‘THE AGE’ 16/02/2017 on top left of screen. ‘The Age’‘Bye Bye Batman? Melbourne founder’s name to be erased from electorate, history’ |
| 17:13 | Tom Ballard to camera in studio | TOM BALLARD: In fact both Batman candidates have said they’ll back the change if they’re elected, on Saturday.To discuss this issue I am joined by Greg Larsen from the Australian Electoral Commission.  |  |
| 17:20 | Camera directed at Greg Larsen who is facing Tom Ballard. | TOM BALLARD: Greg do you think the name of Batman should be changed?  |  |
| 17:22 | View across desk of Tom Ballard and Greg Larsen. Writing on bottom left of screen. | GREG LARSEN: Well Tom, as a representative of the Australian Electoral Commission it is my duty not to have an opinion on this matter or any political matter.My duty is simply to enforce democracy and uphold the will of the people.TOM BALLARD: OK. What is the will of the people? What do people think? | Greg LarsenAustralian Electoral Commission |
| 17:37 | Camera directed at Greg Larsen who is facing Tom Ballard. | GREG LARSEN: Well, we’ve gleaned the public perception on this matter. Many people in the district want to acknowledge the contribution that John Batman had made to the founding of Melbourne. But, by and large, most people do support a name change.  |   |
| 17:51  | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: OK, right. What are you going to change it to, Superman? [laughter] | Tonightly with Tom Ballard |
| 17:53 | Camera directed at Greg Larsen who is facing Tom Ballard. | GREG LARSEN: I’m not sur...I’m not sure I understand the reference.  |  |
| 17:58 | Camera directed at Tom Ballard. | TOM BALLARD: What do you…Superman, he is another comic book hero, like Batman, you know? | Tonightly with Tom Ballard |
| 18:02 | View across desk of Tom Ballard and Greg Larsen.  | GREG LARSEN: I don’t read comic books. I like to read instruction manuals and OH... OH&S documentation in my spare time.TOM BALLARD: I guess Spiderman’s out too then?GREG LARSEN: I’m not sure what a man made out of spiders has to do with it. | Tonightly with Tom Ballard |
| 18:16 | Camera directed at Tom Ballard. | TOM BALLARD: No, he’s not made out of spiders … forget it.Alright, what’s your solution then to this whole problem. |  |
| 18:20 | Camera directed at Greg Larsen, who is facing Tom Ballard. | GREG LARSEN: Well, it’s difficult to make everyone happy. According to the will of the people, we do need to preserve and acknowledge the history of John Batman and his role in the founding of Melbourne, as I said. But, we also cannot shy away from the terrible things he did. So, in the interests of compromise, and in the interests of true democracy, I have come up with a solution that addresses all of these concerns. |  |
| 18:41 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: Right, and what’s that? [laughing]GREG LARSEN: The electorate of Batman shall henceforth be renamed ‘Batman-was-a-cunt’.TOM BALLARD: [laughter pushing hands away] What…Wow…wha…wow.Alright, that sounds like an...like an awful idea. That’s terrible. You…that’s too long for a name first of all for an electorate. GREG LARSEN: Well, it’s actually a lot shorter than the original name I had thought of.TOM BALLARD: What was that? [laughter] | Tonightly with Tom Ballard |
| 19:12 | Camera directed at Greg Larsen who is facing Tom Ballard. | TOM BALLARD: [laughter]GREG LARSEN: [smiling] John Batman was a-low-dog-cunt. |  |
| 19:15 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: [hand gestures] Noooo. You can’t say this Greg. This is…awful solution. And people are not going to go for this, not going to be on board at all I think. GREG LARSEN: Oh…yeah…TOM BALLARD: What do people think about this? GREG LARSEN: [nodding] People Hate it.TOM BALLARD: Yup.GREG LARSEN: They absolutely hate it. But in this case democracy has failed.TOM BALLARD: Right? GREG LARSEN: Because this is an elegant solution to a complicated problem. [Tom Ballard laughs into his hands] And logistically it will be very easy to do. We don’t need to make major changes to the name, just simply add on additional words at the end.TOM BALLARD: OK.GREG LARSEN: I’ve done a mock…a couple of mock-ups to show you what I mean.  | Tonightly with Tom Ballard |
| 19:42 | Full screen image of Alex Bhathal’s Batman by-election campaign poster for the Greens Party. | GREG LARSEN VO: Here’s a campaign, some campaign material for Alex Bhathal .TOM BALLARD VO: YupGREG LARSEN VO: Um and now let’s take a look at a mock-up of what it would look like…if…a the... if name was changed.TOM BALLARD VO: OK. | Your vote is powerful, how to vote GreensVote 1 Alex Bhathal for Batman by-election 17 MarchHello I’m Alex Bhathal[writing below illegible] |
| 19:51 | Full screen image of augmented Alex Bhathal’s Batman by-election campaign poster for the Greens Party. | GREG LARSEN VO: We can see there that I’ve added at the end of Batman.TOM BALLARD VO: You’ve just put it in … GREG LARSEN: I’ve added the words ‘was-a-cunt’.TOM BALLARD: ‘… was-a-cunt’ | Your vote is powerful, how to vote GreensVote 1 Alex Bhathal for Batman-was-a-cuntBy-election 17 MarchHello I’m Alex Bhathal[writing below illegible] |
| 19:58 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: Yes. No, I’ve seen what you’ve done there. That’s pretty awful actually. GREG LARSEN: [interjecting] would you like to see another example.TOM BALLARD: Not really, no, I think we get…GREG LARSEN: [interrupting] Well I’ve got another example I would like to show because I think it is important. TOM BALLARD: OK, alright. | Tonightly with Tom Ballard |
| 20:08 | Full screen image of Ged Kearney’s Batman by-election campaign poster for the Labor Party. | GREG LARSEN VO: Here’s Ged Kearney’s campaign poster.TOM BALLARD VO: [overlap with Greg Larsen] Ged Kearney …yes…yes…a-hah... GREG LARSEN VO: Now let’s take a look at an artist’s rendition.  | How to vote for Ged Kearney. Action. Integrity. Real Change. Labor for Batman LaborRight side example of ballot paper [illegible below] House of Representatives Electoral Division of Batman ‘1’ Ged Kearney. [other names blurred] |
| 20:12 | Full screen image of Ged Kearney’s Batman by-election campaign poster for the Labor Party. | GREG LARSEN: As what it might look like as we see there. TOM BALLARD VO: [interjecting]: Yep…OK…yeah…a cunt…on there...OK. I see what you’ve done there. Thank you very much. I think we get the point.GREG LARSEN VO: [interjecting - inaudible]  | How to vote for Ged Kearney. Action. Integrity. Real Change. Labor for Batman-was-a-cunt. LaborRight side example of ballot paper, [illegible below] House of Representatives Electoral Division of Batman-was-a-cunt ‘1’ Ged Kearney. [other names blurred] |
| 20:17 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: We can pull down the graphic. Thank you very much Greg. Thank you for your time. GREG LARSEN: [continues talking over TOM BALLARD - inaudible] It’s quite clever… [yelling and pointing] I have one more post…really... I have one more poster to show you. TOM BALLARD: [talking over the top] I’d really rather not have one at all actually. GREG LARSEN: [talking over the top] This is from the Australian Conservatives. | Tonightly with Tom Ballard |
| 20:22 | Full screen image of Kevin Bailey Poster.  | GREG LARSEN VO: Now this was an issue because there is no Batman anywhere on that poster.TOM BALLARD VO: Yep...rightGREG LARSEN VO: So I’ve had to improvise. And put … | Kevin Bailey Australian Conservatives. A better way for Victoria [illegible] website |
| 20:30 | Full screen image of augmented Kevin Bailey poster. | GREG LARSEN VO: … Kevin Bailey is a cunt.TOM BALLARD VO: [Yelling] Nooo! You can’t do that.  | Kevin Bailey is a cunt Australian Conservatives. A better way for Victoria [illegible] website |
| 20:32 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: Take that down immediately. [pointing emphatically at desk] Greg that is unacceptable. OK. Regardless of what you think of his politics, that is completely beyond the pall. GREG LARSEN: Alright. | Tonightly with Tom Ballard  |
| 20:39 | Greg Larsen to camera in studio. | GREG LARSEN: [pointing finger and looking directly down the camera raised voice] Fuck it. I am breaking character here because, I tried to get an interview with Kevin Bailey. [gesticulating] I was like ‘hey man, let’s have an interview. We’ll do a thing about … a funny package about the election. [pointing directly at camera raised voice] I wasn’t even going to make fun of you. I was going to make fun of the Greens. But then you refused the interview so this is what happens. This is what happens when you fuck with Greg man. TOM BALLARD: [off screen] OK.GREG LARSEN: Yeah [two thumbs up] |  |
| 20:54 | Wide view of set showing Tom Ballard and Greg Larsen at the desk.  | TOM BALLARD: Greg Larsen you are a terrible person. You’re worse than John Batman [pointing at Greg]. Get the fuck out of here, Greg Larsen [pointing to exit]. [Greg Larsen exits screen] | Tonightly with Tom Ballard |

Attachment B

Complaints

Complaint 1

***Extracts of complaint to the ABC dated 20 March 2018:***

I am writing to express my outrage at the inappropriate and utterly offensive content aired on your program "Tonightly with Tom Ballard".

Kevin Bailey is a highly respected and upstanding member of the Australian community. Last year he was made a MEMBER (AM) IN THE GENERAL DIVISION OF THE ORDER OF AUSTRALIA For significant service to Australia-Timor Leste relations, to philanthropic organisations, to the financial planning sector, and to the community. He has spent his entire adult life serving his country, his community, his family and his fellow man.

I am extremely disappointed that he was subjected to such disrespectful profanity and believe that he deserves an apology.

It is vital that every TV network takes responsibility for the language shown on their programs. While I understand this show aired at a time when young ears wouldn't have been exposed, all networks must be aware in this era of the internet how quickly anything can be shared to a wider audience. Most Australians expect that the government funded network to conduct themselves with decorum and refrain from vulgarity such as this.

ABC should be a network that holds itself to a high standard not only in its programming, but also in how its programs contribute to public debate. The kind of vulgarity and personal attacks shown on this program begs the question of whether the ABC upholds the ideals of politics and of journalism.

***Extracts of complaint to the ACMA dated 11 April 2018:***

I have written to the ABC but feel I received an unsatisfactory response. My complaint is related to the offensive language used on "Tonightly with Tom Ballard" where the comedians referred to Kevin Bailey using the c-word.

Kevin Bailey is a highly respected and upstanding member of the Australian community. He doesn't deserve this kind of attack from a tax payer funded broadcaster.

The ABC phoned Kevin to offer an apology but then claimed that they didn't do anything wrong. I believe they should be penalised and made to offer a public unreserved apology to Mr Bailey.

It is vital that every TV network takes responsibility for the language shown on their programs. While I understand this show aired at a time when young ears wouldn't have been exposed, all networks must be aware in this era of the internet how quickly anything can be shared to a wider audience. Most Australians expect that the government funded network should conduct themselves with decorum and refrain from vulgarity such as this.

The ABC should be a network that holds itself to a high standard not only in its programming, but also in how its programs contribute to public debate. The kind of vulgarity and personal attacks shown on this program begs the question of whether the ABC upholds the ideals of politics and of journalism.

Complaint 2

***Extracts of complaint to the ABC dated 20 March 2018:***

I write to express my concerns about an episode of Tonightly with Tom Ballard which Iunderstand was broadcast on the ABC on 15 March 2018.

[…]

The episode featured Mr Greg Larsen posing as a representative of the Australian Electoral Commission who is suggesting the electorate of Batman be re-named ahead of the weekend by-election.

During the segment, candidates for the by-election were depicted and a highly offensive slur was directed towards the Australian Conservatives candidate, Mr Kevin Bailey AM. Mr Larsen states in the segment that he was at least partly motivated by Mr Bailey’s decision to decline to be interviewed by him. It is unclear whether Mr Larsen also approached the Labor or Greens candidate for interviews.

[…]

As I have stated publicly, candidates for elected office expect to be criticised and parodied. But this ABC segment clearly crossed a line. It was particularly offensive given Mr Bailey has a record of service to the nation, including in the armed forces. I believe that the ABC owes Mr Bailey an unconditional apology for broadcasting abuse of him in this manner.

I also ask that you investigate whether the use of coarse language was appropriate for the program’s classification and whether appropriate content warnings were broadcast.

***Extracts of complaint to the ACMA dated 26 April 2018:***

I write with a formal complaint regarding a segment of an episode of *Tonightly with Tom Ballard* which was broadcast on the ABC on 15 March 2018. I have previously written to the ABC with a complaint about this segment and I am dissatisfied with the response I received from the ABC.

[…]

During the segment, candidates for the by-election were depicted and a highly offensive slur was directed towards the Australian Conservatives candidate, Mr Kevin Bailey AM. Mr Larsen states in the segment that he was at least partly motivated by Mr Bailey’s decision to decline to be interviewed by him. It is unclear whether Mr Larsen also approached the Labor or the Greens candidate for interviews. The notion that an individual will be subjected to abuse if they do not agree to an interview seems to me to be a clear breach of the ABC’s Code with respect to fair and honest dealing. The fact that only one candidate was singled out for abuse also raises questions over whether the ABC has behaved impartiality.

Candidates for elected office expect to be criticised and parodied, but this ABC segment clearly crossed a line. It was particularly offensive given Mr Bailey has a record of service to the nation, including in the armed forces. Mr Bailey was the only candidate singled out for abuse. In this context, I contend that the use of strong language was gratuitous and therefore in breach of the ABC’s Code.

Attachment C

ABC’s responses and submissions

***Extracts of the ABC’s response to complainant 1:***

Audience and Consumer Affairs has finalised an investigation in response to complaints that this sketch did not comply with the ABC’s harm and offence standards. Audience and Consumer Affairs’ investigation report sets out the review of the material against the relevant sections of the ABC’s editorial policies and is provided below for your reference. All complaints were carefully considered. No breaches of editorial standards were identified.

Thank you for giving the ABC the opportunity to respond to your concerns. Should you remain dissatisfied, you may be able to pursue your complaint with the Australian Communications and Media Authority, [www.acma.gov.au](http://www.acma.gov.au/). […]

**ABC Audience and Consumer Affairs Investigation Report**

***Tonightly with Tom Ballard:* series 1, episode 64, broadcast 15 March 2018**

**Complaints**

A sketch about re-naming the electorate of Batman included repeated use of coarse language and directed a highly offensive slur towards an Australian Conservatives candidate, Mr Kevin Bailey AM.

**Relevant standards**

Audience and Consumer Affairs have carefully considered the complaints and comments provided by ABC Entertainment & Specialist, which has editorial responsibility for this program. Audience and Consumer Affairs reviewed the segment and assessed it against the ABC’s editorial standards for harm and offence, specifically:

*7.1 Content that is likely to cause harm or offence must be justified by the editorial context.*

*7.2 Where content is likely to cause harm or offence, having regard to the context, make reasonable efforts to provide information about the nature of the content through the use of classification labels or other warnings or advice.*

*7.3 Ensure all domestic television programs – with the exception of news, current affairs and sporting events – are classified and scheduled for broadcast in accordance with the ABC’s Associated Standard on Television Program Classification.*

The principles which accompany the ABC’s harm and offence standards note that the ABC potentially reaches the whole community, so it must take into account community standards. However, the community recognises that what is and is not acceptable in ABC content largely depends upon the particular context, including the nature of the content, its target audience, and any signposting that equips audiences to make informed choices about what they see, hear or read. What may be inappropriate and unacceptable in one context may be appropriate and acceptable in another. Coarse language, disturbing images or unconventional situations may form a legitimate part of reportage, debate, documentaries or a humorous, satirical, dramatic or other artistic work.

**Content description and comments from ABC Entertainment & Specialist**

The program was broadcast at 9.00pm on ABC COMEDY. It was classified MA15+, meaning it is not suitable for viewers aged under 15 years. The classification symbol was displayed on screen prior to the program commencing and viewers were advised visually and verbally that the program contained coarse language and sexual references.

The sketch which prompted complaints involved host Tom Ballard interviewing comedian Greg Larsen about a proposal to change the name of the Batman electorate. ABC Entertainment & Specialist has advised that the program commonly includes these sorts of fake interviews where Greg Larsen (or Bridie Connell or Greta Lee Jackson) play a character being interviewed by Tom Ballard, and that over the course of the series, Greg Larsen’s comedic persona has been established as that of an ‘unreasonably angry man’.

In this sketch, Greg Larsen played the role of a spokesperson for the Australian Electoral Commission who was being interviewed to discuss calls to change the electorate’s name. His character was quickly established as officious and humourless. He was oblivious to Tom Ballard’s suggestions that the seat be renamed after other comic book heroes, explaining that in his spare time he liked to read instruction manuals and OH&S documentation. Asked how the seat should be renamed, Greg Larsen acknowledged that it was difficult to make everyone happy and the solution needed to acknowledge John Batman’s role in the founding of Melbourne without shying away from the terrible things he did *‘so in the interests of compromise and in the interests of true democracy, I’ve come up with a solution that addresses all of these concerns … The electorate of Batman shall henceforth be renamed “Batman was a cunt”’*. Tom Ballard declared the suggestion *‘awful’, ‘terrible’,* and in any case, too long for an electorate name, prompting Greg Larsen to respond that it was shorter than his original idea, which he said was *‘John Batman was a low dog cunt’.* Tom Ballard continued to protest as Greg Larsen declared it *‘an elegant solution to a complicated problem’,* claiming it would also be a simple change to make because the additional words could simply be appended to the electorate name. Over Tom Ballard’s objections, Greg Larsen displayed ‘*an artist’s rendition’* of campaign material for the Greens and ALP candidates showing how the electorate name would appear and persistently explaining the changes he had made.

ABC Entertainment & Specialist has provided the following comments about this aspect of the sketch:

*The humour of this joke came from the inherently inappropriate nature of the name, the juxtaposition of this humourless bureaucratic character with such an outrageous proposal, and the fact that the character appeared to be entirely oblivious to how offensive and unfeasible his solution was. The joke played out as the character insisted on showing and describing (in excessive/unnecessary detail) two mock-up campaign posters where ‘-Was-A-Cunt’ had been added to the name Batman, despite Tom’s (feigned and comedic) objections.*

Tom Ballard comically attempted to bring the interview to a close but Greg Larsen insisted on showing him one more poster. He explained that the poster for Australian Conservatives candidate Kevin Bailey did not display the electorate name so *‘I’ve had to improvise and put Kevin Bailey is a cunt’.* Tom Ballard objected more vigorously, saying *‘No! You can’t do that! Take that down immediately! Greg, that is unacceptable, OK? Regardless of what you think of his politics that is completely beyond the pall’.* Greg Larsen then broke character – dropping the AEC persona and reverting to his established angry comedic persona. Speaking directly to camera, he angrily explained that he had selected Kevin Bailey because he had refused a request for an interview and *‘this is what happens when you fuck with Greg man!’* Greg Larsen gave himself two thumbs up and leaned back in his chair as Tom Ballard responded, *‘Greg Larsen you’re an appalling person! You’re worse than John Batman! Get the fuck out of here Greg Larsen!’*

ABC Entertainment & Specialist has commented:

*The humour of this section was based on the absurdity of the ‘Kevin Bailey Is A Cunt’ poster being presented by Greg’s character as a reasonable or acceptable thing do so. The idea that an AEC representative could go so far down this ridiculous path as to not only create the two ‘Batman-Was-A-Cunt’ posters, but also the (much worse) ‘Kevin Bailey Is A Cunt’ poster, is funny. And then adding the supposed justification/explanation from Greg (still playing a character – but a different one; his usual angry character, who would be very familiar to the audience by this point), which was so patently misguided and ridiculous (i.e. it’s ridiculous to think that someone would respond to having their interview request denied by labelling the person who denied the interview a cunt on national television) that it was funny.*

ABC Entertainment & Specialist point to several elements of the sketch which they say served to mitigate the potential offensiveness of the Bailey joke:

* Tom Ballard’s vehement objections (albeit in a feigned, comedic manner) which signalled to the audience that the program fully understood that genuinely calling a candidate a cunt is an entirely inappropriate and unjustified thing to do.
* The breaking character moment, which explained to the audience why one candidate had been singled out.
* The way that the joke had been carefully set up by the gags and performance elements that preceded it, involving a specifically written and performed character explaining the issue and his proposed solution, then deliberately over explaining the other two posters, all as a lead-up to the final poster punchline.

**Audience and Consumer Affairs findings**

Standard 7.1

The sketch contained strong coarse language used in connection with identified individuals and as such was likely to cause harm or offence. Audience and Consumer Affairs has considered whether the editorial context nonetheless justified the presentation of this content.

At a high level, the context in this case was a comedy program aimed at adults, broadcast in a 9pm timeslot on a comedy channel. *Tonightly with Tom Ballard* is described on ABC Television’s website as ‘a comedy program that smacks and unpacks the latest trends, news, inputs, life hacks and gossip’, with presenter Tom Ballard ‘bolder and more scathing than ever’. The program’s satire and comedy targets a wide range of people, issues and institutions over time. This was the 64th episode of the program and its audience can be expected to be familiar with its established comedic tone and approach; the segments, characters and sketches it routinely presents; and its use of coarse language.

This sketch itself was a provocative piece of comedy stimulated by coverage of the Batman by-election. The sketch found its humour in the exaggerated contrast between Greg Larsen’s dour persona, his outrageously inappropriate proposal for renaming the electorate, and his disproportionate response after an interview request was declined. The sketch played on recurring comedic tropes involving exaggeration and insensitivity that would be familiar to the program’s target audience. The language was used to amplify these themes.

We agree with ABC Entertainment & Specialist that elements of the sketch operated to mitigate its potential offensiveness. Importantly, coarse language was not used in an aggressive manner. Indeed, Greg Larsen’s tone was persistently matter-of-fact as he explained his ‘elegant solution’, and why he had to ‘improvise’ for Mr Bailey’s poster. As well, Tom Ballard’s repeated (comic) objections and remonstrations emphasised that the program acknowledged the absurdity and inappropriateness of Greg Larsen’s approach.

While we note ABC Entertainment & Specialist’s view that: Greg Larsen’s breaking character moment served to mitigate the potential offensiveness of the Kevin Bailey joke, this element could also be considered to compound the offensiveness of the segment. In our view, this aspect of the joke was nonetheless editorially justified. It operated to expose Greg Larsen’s alternative character to the audience as wholly inappropriate and comically vindictive, adding a further layer of outrageousness and building the comic effect.

Furthermore, one of Greg Larsen’s personas established over the course of the series has been that of an unreasonably angry man. His closing remarks in this sketch were another instance of him acting inappropriately and disproportionately in response to disappointment, demonstrating smug self-satisfaction and a lack of sensitivity to others’ likely reactions. The program’s established audience would have understood this as a continuation of an ongoing joke across episodes of the program, not to be taken seriously.

Having regard to all of these factors, we are satisfied that the content of this sketch was justified by its editorial context.

To the extent that Kevin Bailey may have found the sketch personally hurtful and offensive, we note that the ABC’s Director of Entertainment & Specialist, […], personally phoned Mr Bailey after the segment aired to apologise for any personal offence caused by the sketch.

*Conclusion*

No breach of standard 7.1.

Standards 7.2 and 7.3

We have also considered whether the program was correctly classified and scheduled for broadcast. As noted above, the program was classified MA15+ with consumer advice warning of coarse language and sexual references. This consumer advice signals to viewers which elements of the program most contributed to its classification. Coarse language may be used in programs classified MA15+, but coarse language that is very strong, aggressive or detailed should not be gratuitous.

The word ‘cunt’ is considered to be stronger coarse language. However, the word was not used in an aggressive manner in this sketch; as noted above, it was employed in a matter of fact style, emphasising Greg Larsen obliviousness to likely reaction to his proposal. It was not used in a gratuitous manner, but was used deliberately as a comedic tool to amplify the impact of the sketch. We are satisfied that this language usage did not exceed what is permitted in MA15+ classified programs. We are further satisfied that appropriate efforts were made to provide audiences with information about the nature of the content through the use of a prominent classification label and appropriate viewer advice.

The ABC’s Associated Standard: Television Program Classification provides that programs classified MA15+ may be scheduled for broadcast on ABC COMEDY (ABC2) anytime between 8.30pm and 5.00am. This program was broadcast at 9.00pm. Its scheduling at this time did not breach the ABC’s standards.

*Conclusion*

No breach of standard 7.2 or 7.3.

***Extracts of the ABC’s response to complainant 2***

I can assure you the material was reviewed by the program terms prior to broadcast and posting, ensuring both complied with the ABC’s editorial standards on harm and offence and also the appropriate classification standards.

While personal views on the use of coarse language and other potentially offensive content will differ widely across the community, the classification standards and the ABC's harm and offence standards exist to ensure that broad community standards and audience expectations are consistently considered.

The principles underpinning the ABC's standards acknowledge that:

"The community recognises that what is and is not acceptable in ABC content largely depends on the particular context, including the nature of the content, its target audience, and any signposting that equips audiences to make informed choices about what they see, hear or read. Applying the harm and offence standard, therefore, requires careful judgement. What may be inappropriate and unacceptable in one context may be appropriate and acceptable in another. Coarse language, disturbing images or unconventional situations may form a legitimate part of reportage, debate, documentaries or a humorous, satirical, dramatic or other artistic work."

The comments in relation to Mr Kevin Bailey were part of a broader comedy sketch which was primarily concerned with exploring the implications of re-naming the electorate of Batman.

There was certainly no intention, in the context of an absurd comedy sketch, to make any comments which could be reasonably understood as a serious and genuine criticism of Mr Bailey. *Tonightly* does not purport to be a news and information program.

The Director of Entertainment & Specialist, […], has contacted Mr Bailey, explained the context and apologised for any personal offence caused by the sketch.

***Extracts of the ABC’s submission to the ACMA 18 May 2018***

We make the following submissions:

1. It is not clear to us how the original complaint to the ABC could be understood to include a complaint about compliance with Fair and Honest Dealing standards.
2. We question whether the complainant has standing to make a complaint about compliance with Fair and Honest Dealing standards in relation to this material. The ABC Code of Practice makes clear that complainants wishing to raise concerns about compliance with these standards must indicate their interest in the subject matter; relevant questions are included to aid understanding. The complainant has not indicated any specific personal interest in the subject matter. To the extent that the complainant found this sketch objectionable, the relevant issues are more appropriately addressed against standard 7.1.

The ABC made direct contact with Mr Bailey to apologise for any personal offence caused by the sketch. He has not made a complaint about the program and nor have the other candidates featured in the sketch.

1. In any case, the standards in section 5 are not applicable to the issue raised in the complaint to the ACMA. Mr Bailey was not a participant in the program. No allegation was made about him which required him to be given a fair opportunity to respond. No assurances or undertakings were made to him. There was no use of secret recording or other types of deception.

Standard 5.2 provides that a refusal to participate will not be overridden without good cause. Mr Bailey’s refusal to participate was not overridden: he did not participate in the program.  This standard cannot reasonably be interpreted to prohibit ABC programs from featuring references – even significant references – to people who have declined interviews or other forms of participation.

***Extracts of the ABC’s submission to the ACMA 21 June 2018***

**Harm and Offence standards**

The submissions below respond to the discussion in the preliminary report.

1. **Does the material have the intrinsic capacity to cause harm or offence?**

The preliminary finding isolates two aspects of the sketch that had the potential to cause offence – the use of coarse language and the explanation provided for the different treatment of one candidate.

The ABC’s response to complaints acknowledged that a sketch containing strong coarse language used in connection with identified individuals was likely to cause offence, and acknowledged that the explanation provided for the different treatment of one candidate could also be considered to compound the offensiveness of the segment. This assessment is in keeping with the ABC’s Harm and Offence Guidance Note[[4]](#footnote-5) which indicates that this threshold question is posed with the standards and sensitivities of the broad community which the content can potentially reach in mind.

However, careful consideration of the extent of offence likely to be caused is necessary, since this will inform judgements about whether – in the particular circumstances – the offence likely to be caused is justified by the editorial context. All elements of context must be considered in this equation, including the program’s target audience.

1. **What factors are there moderating any harm or offence?**

**Coarse language**

The word ‘cunt’ is generally considered to be stronger coarse language. However, the degree to which individuals are likely to find it offensive differs and has changed over time.

A recent NSW District Court decision considered the offensiveness of the term.[[5]](#footnote-6) In quashing a conviction for offensive conduct arising from use of the word on a sandwich board next to a busy public road, Scotting AC observed:

The impugned word is now more prevalent in everyday language than it has previously been. It is commonplace in movies and television entertainment, although it is not without restriction in that context. The impugned word is of ancient English origin and featured in Shakespeare’s Hamlet. The prevalence of the impugned word in Australian language is evidence that it is considered less offensive in Australia than other English speaking countries, such as the United States. However, that also appears to be changing as is evidenced from the increase in American entertainment content featuring the impugned word.

As noted, the term is ‘commonplace’ in movies and television. Recent Australian research noted that attitudes to language appear to be more subject to variation between demographic groups than attitudes towards other aspects of content, and this is particularly the case for tolerance of the word ‘cunt’ by younger research participants and males.[[6]](#footnote-7) The researchers observed that young men, in particular, consider it to be ‘everyday language’, reflecting how they often speak to their friends in a social setting. The context in which it is used is always relevant to an assessment of its offensiveness, and most of the research participants assessed its use in a humorous context and without aggression in a comedy film, Shaun of the Dead, as mild or very mild.

Repeated use of coarse language can compound its offensiveness. However, it can also emphasise its comedic purpose. In this regard, we note the ACMA’s 2013 finding that the use of the term more than 26 times during the final seven minutes of Funny As: Steve Coogan was central to the comedy of the sketch in which it was used, serving as a sharp and crudely humorous contrast to the type of language usually expected to be used in the circumstance being parodied. This precisely reflects the comical impact of use of the word in the Tonightly sketch: it provided a sharp and crudely humorous contrast to the type of language usually expected from a public official addressing a serious matter of contemporary concern.

Use of the term in connection with identified individuals may render it more offensive, but can also enhance comedic impact. In this regard, we note the ACMA’s 2015 finding that calling the (then) Prime Minister a ‘dumb cunt’ in the context of a comedy routine with satiric intent, where there was no aggressive or threatening delivery, did not breach standard 7.1. The finding observed that ‘[w]hile usage of strong coarse language in reference to elected officials may fall short of the courtesies that many would expect, given the context and the above noted latitude [available to the ABC under the Code to broadcast challenging content which may offend some of the audience some of the time], this does not necessarily mean that such material is offensive to the level that it is not suitable for broadcast’. We note that this investigation was considered by the ACMA to be straightforward in the sense that the ABC was only advised of the existence of the ACMA complaint at the time that the ACMA’s response was sent to the complainant. No compliance comments were sought from the ABC.

The word ‘cunt’ was used repeatedly in the Tonightly segment. It was used directly or indirectly in reference to identified figures, including three candidates contesting the Batman by-election. However, in each instance it was used for a clear comedic purpose. It was not used in an aggressive manner; rather, it was spoken unremarkably and without emphasis, in the manner of ‘everyday language’. Given that the nature of the program had already been clearly signalled to viewers prior to the Batman sketch (including via use of classification advice), and noting that the program is specifically targeted at young adult viewers, the likelihood of such language causing offence is lowered considerably.

**Different treatment of one candidate**

Set up of this sketch

The preliminary finding acknowledges the ABC’s explanation that a factor which moderated the offensiveness of the sketch was the way that it had been carefully set up by the gags and performance elements that preceded it, but does not fully engage with these aspects of the sketch.

The different treatment of one candidate was methodically explained. Greg Larsen’s AEC character displayed the three campaign posters, over-explaining the changes he had made to each of them to reflect his proposed new electorate name. Throughout this extended set-up, the differential treatment of Kevin Bailey’s campaign poster is shown to be quite perchance – the poster simply lacked reference to the name of the seat and therefore could not be modified in the same way as Ged Kearney and Alex Bhathal’s posters. There was no emotion displayed towards any of the three candidates and no suggestion that the differential treatment of Kevin Bailey was motivated by any personal animus: it was merely a quirk of the wording used on the campaign posters that the ‘is-a-cunt’ label was applied to Kevin Bailey, rather than the seat’s namesake, John Batman. The sketch reached its initial comic peak in its different treatment of Kevin Bailey’s campaign poster, inviting viewers to laugh at Greg Larsen’s earnest yet wholly misguided character whose very bad initial idea had just been made worse. All the while, Greg Larsen remained comically oblivious to the different meaning conveyed by the amended Kevin Bailey campaign poster.

The sketch reached its comic peak with Greg Larsen’s final piece to camera. For the purposes of assessing factors that moderated the level of offence likely to be caused, it is important to bear in mind that this scripted segment did not repeat the words that had been applied to Kevin Bailey’s campaign poster. Taking the comic opportunity to explain himself, Greg Larsen’s ‘angry man’ character did not call Kevin Bailey a ‘cunt’. Rather, and as is acknowledged later in the preliminary report, Greg Larsen ‘speaks directly to the audience … to explain his actions, rather than to make a personal attack on Mr Bailey’. This comical restraint, combined with Greg Larsen’s exaggerated and farcical posturing and gesticulation, moderates the likelihood that this aspect of the segment would cause a high level of offence.

Nature of the program

In identifying moderating factors, we feel that the ACMA has misunderstood some aspects of the program and what was meant by ‘breaking character’ in this sketch – a transition which is more accurately described as ‘changing character’.

The first thing to note is that Greg Larsen is always playing a character. Indeed, with the exception of Tom Ballard, this is true of all the program’s regular cast. Some examples can be viewed here - [https://www.youtube.com/watch?v=hkFXf7WdlPQ,](https://www.youtube.com/watch?v=hkFXf7WdlPQ) [https://www.youtube.com/watch?v=4l9eQd6vT4,](https://www.youtube.com/watch?v=4l9eQd-6vT4) [https://www.youtube.com/watch?v=838b6cD-kzc.](https://www.youtube.com/watch?v=838b6cD-kzc) Viewers of the program can be expected to be familiar with its approach, as the same cast regularly appears in an array of different roles. This is similar to the different characters played by the regular cast of Shaun Micallef’s Mad as Hell, although the Tonightly characters are identified by the cast member’s real name, unlike the fancifully absurd names given to characters in Mad as Hell. No reasonable viewer would expect the characters portrayed on Mad as Hell to be anything other than scripted fantasies to amuse the audience; an ordinary reasonable viewer of Tonightly would share the same expectation. Tonightly uses the cast’s real names as an ironic comic device, emphasising through repetition that the character presented is not the cast member appearing as him or herself.

In Tonightly, even when Greg Larsen says he is breaking character or acts as though he has broken character to reveal his ‘true self’, his ‘true self’ is always another character. Greg Larsen is never shown simply being himself. Changing character moments have featured in a number of episodes and are always scripted to provide a comedic escalation, as was the case in the Batman sketch. The cast of Tonightly never genuinely ‘break’ character; this expectation is well established for the audience such that anything said after a cast member changes character is clearly within the ongoing context of the sketch and not the cast being themselves. Another example incorporating Greg Larsen’s ‘angry man’ persona and featuring a concluding changing character moment for comical effect can be viewed here - [https://www.youtube.com/watch?v=EDsJUOHI6Gs.](https://www.youtube.com/watch?v=EDsJUOHI6Gs)

In the Batman sketch, Greg Larsen the AEC representative was taken over by Greg ‘the angry man’ through a changing of character. Given the program’s consistent approach to characterisation, regular viewers would have understood that what Greg Larsen said after shifting character was not sincere or heartfelt. It was not a matter of Greg Larsen disclosing his ‘personal reaction’ to a disappointment. Rather, Greg Larsen presented the audience with an exaggerated and angrily vindictive comic response, in keeping with his established ‘angry man’ character. The idea that Greg Larsen would be so personally upset by a candidate denying him an interview that he would devise an elaborate sketch that allowed him – in deadpan tones – to label that candidate a cunt is absurd and comical, and was recognised as such by the program’s studio audience. This was a scripted scenario and not Greg Larsen genuinely speaking as himself, and the sketch continued as before with Tom Ballard’s comic remonstrations and concluded with Greg Larsen’s ejection from the set.

The potential for this aspect of the sketch to cause offence is significantly diminished once the recurring themes and methods of the program are factored into the assessment. The ACMA’s preliminary finding accepts the ABC’s submissions that Greg Larsen’s comedic persona has been established across episodes of the program, including his ‘unreasonably angry man’ character. That same program history informed viewers that Greg Larsen only ever appears in character on the program. He does not ‘personally react’ to comic stimuli; he responds in character (and sometimes changes character) for comic effect.

**3. What is the editorial context?**

The ABC’s Guidance Note explains that the most important contextual consideration is the program’s target audience. It continues:

Every station or network or program is directed at a specific audience. Some content is aimed at broad audiences while some is aimed at niche groups. Based on audience feedback and research into community standards … we recognise that different sections of the public can have quite different sensitivities and expectations. Under the [Code of Practice], the ABC can legitimately present challenging content that is aimed at a particular target audience and has the potential to cause offence to viewers … outside that group … Content aimed at people who enjoy edgy comedy has a different context to content aimed at people who enjoy classical music, even though many people enjoy both.

We note that the ACMA has previously accepted that target audience is a legitimate consideration when assessing compliance with harm and offence standards. For example:

* Investigation Report No. 2700 concluded that coarse language in a Kanye West song on triple j would not have fallen outside the expectations of the network’s target audience, and nor would it have been offensive to that target audience;
* Investigation Report No. 2784 acknowledged as relevant the ABC’s submissions that the target audience of a program of live, stand-up comedy entitled Raw Comedy would anticipate that the broadcast would include ‘raw’ elements, take risks and push the boundaries of good taste;
* Investigation Report No. 3059 acknowledged that part of the relevant editorial context for a satirical sketch in The Elegant Gentleman’s Guide to Knife Fighting was the target audience of the program, being in this case viewers who enjoy edgy, dark and sometimes unexpected comedy;
* Investigation Report No. 3115 accepted that the editorial context for coarse language which was likely to offend in the radio program A Rational Fear was that the program was ‘a late night satirical comedy pitched to a target audience as “edgy piss-taking with social and political bite”’;
* Investigation Report No. 3149 considered that the target audience for Q&A would not have been offended by use of explicit sexual terms, even though these terms may have caused offence to some viewers watching the program.

Tonightly with Tom Ballard is an edgy daily, topical comedy program targeted at younger adults and broadcast on the ABC’s dedicated comedy channel. It targets a wide range of individuals, issues and institutions and showcases the talents of a regular cast as well as guest comedians. It has an irreverent and often provocative approach which viewers outside the target audience may find crude and disrespectful.

The program broadcast on 15 March was the 64th episode of the program and its audience can be expected to be familiar with its established comedic tone and approach; the segments, characters and sketches it routinely presents; and its use of coarse language. As is often the case when a provocative comedy program attracts media attention, the ABC receives complaints from people who are not members of the target audience and who would be unfamiliar with the program but for public discussion of it. The ABC treats these complaints respectfully, but the fact that they are received does not alter the editorial context of the program.

The content of the program was clearly signposted. It was classified MA15+ with consumer advice warning of adult themes, sexual references and coarse language. The sketch in question appeared more than half way through the program, well after its mischievous and irreverent tone had been clearly established.

1. **Does the editorial context justify the likely harm or offence?**

**Coarse language**

A dedicated comedy audience, watching a fresh and edgy program targeted at younger adults, is more likely to accept and be relatively unoffended by the word ‘cunt’ in a sketch of this nature.

While the sketch included stronger coarse language, it did so with clear comedic purpose and in an unaggressive ‘everyday manner’. Such usage is less likely to cause a high level of offence. As noted above, recent Australian research has assessed the use of such language in a specific comedic context as having at best a mild impact, and previous ACMA decisions have found no breach of standard 7.1 notwithstanding high frequency of use in a segment and use in direct reference to the (then) Prime Minister. Just as the editorial contexts justified the use of the language in those circumstances, it was similarly justified here.

**Different treatment of one candidate**

The ACMA’s preliminary report states that ‘the ordinary reasonable viewer’ would regard the program informing Kevin Bailey that he had been called a cunt for failing to provide an interview ‘a gratuitously offensive personal attack’. The report further states that these comments, along with the ‘breaking character’ remark, ‘made it difficult for the ordinary reasonable viewer to distinguish between Greg Larsen himself being angry and Greg Larsen the character, being ‘the angry man’’ and says that Greg Larsen’s remarks ‘clearly articulat[ed] that his behaviour was a personal reaction to being denied access to an interview’. The preliminary finding concludes that Greg Larsen’s ‘personal attack’ was not editorially justified.

The ‘changing character’ moment is only likely to be regarded as highly offensive if understood as Greg Larsen’s authentic personal reaction to rejection of an interview request. An audience member familiar with the program would not erroneously draw this conclusion. Across 64 episodes, Greg Larsen, Greta Lee Jackson and Bridie Connell had repeatedly been shown playing a range of different characters under their own names. The cast had never been shown portraying their authentic selves.

The preliminary finding accepts that Greg Larsen’s comedic persona had been established in the program as that of an ‘unreasonably angry man’. As this was the only sketch in which Greg Larsen appeared on screen in the 15 March edition of Tonightly, the ACMA’s acceptance must be based on the nature of the program established over previous episodes. It would be inconsistent if the ACMA did not also accept that, over the course of the program’s run, the cast members only ever appeared in character playing pre-assigned comic roles. Once that fact is accepted, the level of harm or offence likely to be caused by Greg Larsen’s absurd explanations for the differential treatment of Kevin Bailey is significantly diminished. An ordinary, reasonable audience member would understand this moment as simply an escalation of the sketch to serve a comedic purpose and would be unlikely to find it highly offensive.

While an established Tonightly viewer would be better informed about the nature of the program and its approach to characterisation, it is not the case that members of the target audience lacking this knowledge would misread the sketch and conclude that Greg Larsen’s final comments were sincere. Members of the target audience have a broad understanding of comedic devices. Perhaps the most common way in which a comedian will break character is to laugh during a scene in which he or she is trying to maintain a serious composure – see, eg, [http://www.dailymotion.com/video/x2cvgjf.](http://www.dailymotion.com/video/x2cvgjf) Indeed, this familiar scenario is evident earlier in the Batman sketch where both Greg Larsen and Tom Ballard are seen to be struggling to maintain composure, and Tom Ballard unsuccessfully suppresses a laugh before the first punch line is delivered. The final scene was not this kind of breaking character moment. Rather, it depicted an exaggeratedly angry character, posturing and gesticulating in a comically unrestrained fashion. These cues unmistakably signal to viewers that the message is delivered for comedic effect and is not to be taken seriously.

In summary, the editorial justification in this instance was a comical segment about a proposal to rename the seat of Batman in the lead-up to a March by-election. The segment was presented in the form of a mock interview with Greg Larsen playing a scripted role under his own name – both comic devices which had been established as common features of the program. The segment played on expectations of how public officials will behave, and included a comical ‘changing characters’ finale which invited the audience to laugh at the second and more absurd explanation provided for the differential treatment of Kevin Bailey. The entire segment was fanciful and ridiculous and there was no reason for viewers to take any aspect of it seriously. In this context, and given the segment’s lack of intensity and the real likelihood of offence being caused, the segment is properly assessed as not breaching standard 7.1. A finding that this segment was so offensive that it could not be broadcast on an irreverent comedy program would be disproportionate and would unduly constrain artistic expression, contrary to the express provisions of the ABC Code of Practice.

[…]

1. http://www.abc.net.au/tv/programs/tonightly-with-tom-ballard/, accessed on 27 April 2018. [↑](#footnote-ref-2)
2. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-3)
3. Clause 1 of the Code specifies that *‘...the Standards must be applied in accordance with the Principles applying in each section*’. [↑](#footnote-ref-4)
4. <http://about.abc.net.au/wp-content/uploads/2014/07/GNHarmAndOffenceINS.pdf> [↑](#footnote-ref-5)
5. <https://www.caselaw.nsw.gov.au/decision/59a4d308e4b074a7c6e183ee> [↑](#footnote-ref-6)
6. [http://www.classification.gov.au/Public/Resources/Documents/community-standards-and-media-content-research-with-the-general-public.pdf](http://www.classification.gov.au/Public/Resources/Documents/community-standards-and-media-content--research-with-the-general-public.pdf)  [↑](#footnote-ref-7)