Investigation report no. BI-608

| Summary |  |
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| **Licensee [Service]** | Queensland Television Ltd [Nine] |
| **Finding** | Breach of the licence condition at paragraph 7(1)(h) of Schedule 2 to the *Broadcasting Services Act 1992* [use of broadcasting services in the commission of an offence] |
| **Relevant legislation** | *Broadcasting Services Act 1992*  *Invasion of Privacy Act 1971* (Qld) |
| **Program [type]** | *A Current Affair* [current affairs] |
| **Date of broadcast** | 21 May 2021 |
| **Date finalised** | 5 August 2022 |
| **Type of service** | Commercial—television |
| **Attachments** | **A** – extracts from the complaint to the ACMA  **B** – extracts from the Licensee’s submissions to the ACMA  **C –** relevant provisions  **D –** transcript of extracts of the telephone conversation |

Background

*A Current Affair* is a current affairs program broadcast nationally by the Nine Network on weeknights and Saturdays from 7.00 pm to 7.30 pm. The edition of the program broadcast by Queensland Television Ltd (the **Licensee**) on 21 May 2021 included a segment (the **Report)** featuring an interview with an 18-year-old trainee nurse who had experienced adverse symptoms, including blood clots, following a first dose of the Astra Zeneca Covid-19 vaccine (the **Vaccine**).

The Report included extracts of a video and audio recording of a telephone conversation between the trainee nurse and a representative of the Therapeutic Goods Administration (the **TGA representative**). The comments made by the TGA representative were audible from the mobile phone speaker and were accompanied by open captions.

The ACMA received a complaint alleging that the Licensee breached its licence conditions by contravening Queensland privacy legislation through recording and broadcasting the telephone conversation without the consent of the TGA representative.

In June 2021, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* (the **BSA**) into the broadcast*.*

Commercial television broadcasting licences include a condition at paragraph 7(1)(h) of Schedule 2 to the BSA (the **licence condition**) that the licensee will not use broadcasting services in the commission of an offence against another Act or a law of a State or Territory.

The ACMA has investigated whether the Licensee has breached the licence condition by using its broadcasting services in the commission of an offence against subsection 44(1) or subsection 45(1) of the *Invasion of Privacy Act 1971* (Qld) (the **IP Act**).

Extracts from the complaint are at **Attachment A** and extracts from the submissions made by the Licensee are at **Attachment B.**

## Issue 1: Did the Licensee breach the licence condition by using a broadcasting service in the commission of an offence against subsection 44(1) of the IP Act?

Relevant legislative provisions

Extracts of all relevant provisions are at **Attachment C**.

Invasion of Privacy Act 1971 (Qld)

Section 44   Prohibition on communication or publication of private conversations unlawfully listened to

1. A person is guilty of an offence against this Act if the person communicates or publishes to any other person a private conversation, or a report of, or of the substance, meaning or purport of, a private conversation, that has come to his or her knowledge as a result, direct or indirect, of the use of a listening device used in contravention of section 43 ….

**Finding**

The Licensee did not breach the licence condition by using broadcasting services in the commission of an offence against subsection 44(1) of the IP Act.

Reasons

To determine whether the Licensee breached the licence condition, the ACMA must first be satisfied that the Licensee committed an offence against subsection 44(1) of the IP Act. The ACMA must be satisfied that:

* there was a private conversation, and
* the private conversation came to the knowledge of the Licensee as a result, direct or indirect, of the use of a listening device, and
* the listening device was used in contravention of section 43 of the IP Act, and
* the Licensee communicated or published the private conversation.

If all of the above criteria are met, the ACMA must also be satisfied that none of the exceptions under subsection 43(2) of the IP Act were applicable.

The ACMA can then determine if the Licensee used its broadcasting service in the commission of the offence.

**Was there a private conversation?**

## Section 4 of the IP Act defines a private conversation as:

… any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so.

The complainant alleged that the TGA representative did not consent to the telephone conversation being overheard and recorded by the Licensee and submitted:

… at the outset of the call, [the TGA representative], sought confirmation as to who [the TGA representative] was speaking to, and as to who was present. [the TGA representative] was informed that only family were present.

The Licensee submitted that the trainee nurse did not advise the TGA representative that ‘only family were present’ to hear the telephone call:

On the relevant occasion, the TGA Representative phoned [the trainee nurse’s] sister’s phone. The sister answered, then handed the phone to [the trainee nurse]. The phone was put on loudspeaker. Nine agrees that the TGA Representative did ask questions of [the trainee nurse] to establish who she was (even though it was the Representative who had called, in response to the trainee nurse’s initial query). [The trainee nurse] verified her name and date of birth on the call, as well as her case number. Nine does not accept that the TGA Representative asked [the trainee nurse] who else was present at the time of the call, or for confirmation as to the identity of the other persons present. The Nine journalist present does not recall ever hearing any such queries being made.

The Licensee submitted that the telephone call was not a private conversation as defined by section 4 of the IP Act because it was conducted in circumstances in which the TGA representative ‘ought reasonably to expect’ that the conversation may be overheard, recorded, monitored, or listened to by some other person, without their consent. In particular, the Licensee submitted that the TGA representative was aware that the conversation was being conducted via the mobile phone speaker and that other persons were present. The Licensee also submitted:

Concerns expressed in the call by the TGA Representative were expressed to be only for the protection of [the trainee nurse] and her own information.

The ACMA obtained an unedited copy of the footage of the interview from the Licensee to examine the circumstances of the telephone conversation.

The unedited footage did not appear to be a complete recording of the phone call. While it recorded the conversation between the TGA representative and the trainee nurse, it did not include the initial conversation with the trainee nurse’s sister, who answered the telephone call from the TGA representative. The ACMA is therefore unable to confirm that the TGA representative sought confirmation as to who was present, or that the TGA representative was advised that ‘only family were present’.

The unedited footage confirms that the TGA representative asked the trainee nurse to provide information to confirm her identity. The TGA representative explained that the reason for the request was because of cases in which the media or other interested parties contact the TGA and pretend to be patients in order to surreptitiously retrieve information for their own uses. The unedited footage indicates that the TGA representative said, ‘It’s really to protect you’.

The ACMA does not accept the Licensee’s submission that concerns expressed by the TGA representative were solely to protect the privacy of the trainee and considers that it was implicit in the comments made that the TGA representative was also expressing a desire for a private conversation. Against that background, the ACMA considers that the circumstances set out below, indicated a desire on the part of the TGA representative for the words spoken in the relevant conversation to be heard only by the TGA representative, the trainee nurse and her sister (who was known to be present and likely to be able to listen on speaker phone). Namely, the TGA representative:

* initiated the telephone call to provide the trainee nurse with confidential information about her case
* asked the trainee nurse for information to confirm her identity at the outset of the call
* made comments that indicated a desire to protect the privacy of the trainee nurse
* made comments that indicated a desire that information held by the TGA not be disclosed to media representatives and others under false pretences.

The ACMA accepts that the TGA representative was likely aware that the telephone conversation was being conducted on a mobile phone speaker because the TGA representative responded to a question asked by the trainee nurse’s sister who was present in the room. However, the ACMA is satisfied that there was nothing else to indicate to the TGA representative that the conversation might be overheard by another person (beside the trainee nurse’s sister) without the TGA representative’s consent.

The ACMA rejects the Licensee’s further submission that the ACMA has mischaracterised the TGA representative’s concern regarding the trainee nurse’s personal information being exploited by the media, and that the line of questioning was only to exclude persons from the media who did not have the nurse’s consent to listen in. The ACMA does not accept that one can extrapolate from the absence in the recordings of any enquiry from the TGA representative as to who was listening in on the call, or from the absence of any statement by trainee nurse to the effect that only her sister was present, that the TGA representative impliedly consented to the call being overheard by others who had the nurse’s consent. Rather, the ACMA is satisfied that the logical inference from the relevant circumstances attending the telephone conversation, as described above, is that the TGA representative desired the words spoken in the telephone conversation to be heard only by herself, the trainee nurse, and the trainee nurse’s sister.

Given that the TGA representative had indicated that she did not want information to be disclosed to the media under false pretences, and the presence of Nine’s representatives was not disclosed or otherwise evident, it was reasonable in the circumstances for the TGA representative to believe that the conversation would not be overheard via the mobile phone speaker by members of the media or other persons (beside the trainee nurse’s sister) without consent.

Accordingly, the ACMA considers that the telephone conversation between the TGA representative, the trainee nurse and her sister was a private conversation as defined by section 4 of the IP Act.

**Did the private conversation come to the knowledge of the Licensee as a result, direct or indirect, of the use of a listening device?**

The private conversation came to the knowledge of the Licensee because its representatives were present with the trainee nurse when she was contacted by the TGA representative, and the conversation was audible via the mobile phone speaker. However, the private conversation also came to the knowledge of the Licensee as a result of its being recorded by its representatives. A listening device is defined in section 4 of the IP Act as:

… any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place.

The extracts of the private conversation shown on the program were recorded using a video camera operated by the Nine camera crew. The ACMA is satisfied that the recording was made by a ‘listening device’ because the video camera was relevantly an instrument or device capable of being used to record a private conversation simultaneously with that conversation taking place. The footage shown on the program had an audio as well as a visual component.

Accordingly, the ACMA considers that the private conversation came to the knowledge of the Licensee as a direct result of the use of a listening device.

**Did the Licensee use a listening device in contravention of section 43 of the IP Act?**

A person commits an offence under subsection 43(1) of the IP Act, if the person uses a listening device to overhear, record, monitor or listen to a private conversation.

The ACMA considers, for the reasons set out above, that the telephone call between the trainee nurse and the TGA representative was a private conversation that was overheard and recorded by the Licensee’s employees or agents on a listening device.

Subsection 49A of the IP Act expressly contemplates that a corporation may be a ‘person’ who commits an offence against the IP Act. This may occur through the conduct of employees of the corporation acting on its behalf. The ACMA is satisfied that a commercial television licensee can be a ‘person’ for the purposes of section 43 of the IP Act. Consequently, the ACMA considers that the Licensee used a listening device to overhear and record a private conversation.

**Did any of the exceptions in subsection 43(2) apply?**

To determine whether the Licensee contravened subsection 43(1) of the IP Act, the ACMA must also consider whether any of the exceptions provided for by subsection 43(2) are applicable.

Paragraph 43(2)(a) provides that it is not an offence to record a private conversation where the person using the listening device is a party to the private conversation.

Subsection 42(2) of the IP Act provides that the phrase ‘a party to a private conversation’ refers:

(a) to a person by or to whom words are spoken in the course of a private conversation; and

(b) to a person who, with the consent, express or implied, of any of the persons by or to whom words are spoken in the course of a private conversation, overhears, records, monitors or listens to those words

The trainee nurse was one of the persons ‘by or to whom words’ were spoken ‘in the course of a private conversation’. The ACMA accepts the Licensee’s submission that the trainee nurse consented to the Licensee recording the telephone conversation with the TGA representative. Therefore, under paragraph 42(2)(b) of the IP Act, the Licensee was a ‘party to a private conversation’ between the trainee nurse and the TGA representative.

The effect of paragraph 42(2)(b) is that, because of the consent given by the trainee nurse, the Licensee was a ‘party to’ the private conversation, irrespective of whether the TGA representative knew that was occurring (or consented to that occurring).

The use of the listening device by the Licensee fell within the exception under paragraph 43(2)(a) of the IP Act because the Licensee was a party to the private conversation. Therefore, the ACMA considers that the Licensee did not contravene section 43 of the IP Act, and consequently, that an element of the offence provided for by subsection 44(1) of the IP Act is not established.

Accordingly, the ACMA’s finding is that the Licensee did not breach the licence condition set out in paragraph 7(1)(h) of Schedule 2 to the BSA by using a broadcasting service in the commission of an offence against subsection 44(1) of the IP Act.

## Issue 2: Did the Licensee breach the licence condition by using a broadcasting service in the commission of an offence against subsection 45(1) of the IP Act?

## Relevant legislative provisions

Invasion of Privacy Act 1971 (Qld)

**45 Prohibition on communication or publication of private conversations by parties thereto**

1. A person who, having been a party to a private conversation and having used a listening device to overhear, record, monitor or listen to that conversation, subsequently communicates or publishes to any other person any record of the conversation made, directly or indirectly, by the use of the listening device or any statement prepared from such a record is guilty of an offence against this Act -….

**Finding**

The Licensee breached the licence condition by using its broadcasting service in the commission of an offence against subsection 45(1) of the IP Act.

Reasons

To determine whether the Licensee breached the licence condition, the ACMA must first determine whether the Licensee’s conduct contravened subsection 45(1) of the IP Act. The ACMA must be satisfied that:

* there was a private conversation, and
* the Licensee, through its employees or agents, was a ‘party to a private conversation’, and
* the Licensee, through its employees or agents ‘used a listening device to…record…that conversation’, and
* the Licensee subsequently communicated or published a record of the conversation made by the use of the listening device.

If all of the above elements of the contravention are satisfied, the ACMA must also be satisfied that none of the exceptions provided for by subsection 45(2) of the IP Act were applicable to the publication by the Licensee.

If none of the exceptions apply, the ACMA can then determine if the Licensee used its broadcasting service in the commission of the offence.

The complaint to the ACMA was that the program was an ‘unauthorised broadcast’ of a conversation.

As outlined above in the discussion of Issue 1, the ACMA is satisfied that the telephone conversation between the TGA representative and the trainee nurse was a private conversation, the Licensee was a party to the private conversation, and the Licensee used a listening device to record that private conversation. The remaining elements of the offence are considered below.

**Did the Licensee subsequently communicate or publish a record of the conversation made by the use of the listening device?**

The Licensee subsequently published a record of the private conversation by including 5 extracts of the recording of that conversation in the Report that was broadcast. A transcript of these extracts is provided at Attachment D.

**Did any of the exceptions in subsection 45(2) apply to the publication?**

Relevantly, subsection 45(2) of the IP Act has the effect, amongst other things, that it is not an offence under subsection 45(1) to publish a private conversation where:

1. all parties to the private conversation consent to the publication, or
2. the publication is made in the course of legal proceedings, or
3. the publication is not more than is reasonably necessary –
   1. in the public interest, or
   2. in the performance of a duty of the person making the communication or publication, or
   3. for the protection of the lawful interests of that person.

The ACMA considers that three of these exceptions are not applicable to the broadcast of the Report. The exception under:

* paragraph 45(2)(a) was not applicable because the TGA representative did not consent to the publication of the recording of the private conversation;
* paragraph 45(2)(b) was not applicable because the private conversation was not published in the course of legal proceedings;
* subparagraph 45(2)(c)(iii) was not applicable because the private conversation was not published for the protection of the lawful interests of the Licensee.

Accordingly, the ACMA has assessed whether the exceptions at subparagraphs 45(2)(c)(i) or (ii) were applicable to the broadcast of the Report.

***Was the publication not more than was reasonably necessary in the public interest***

Subsection 45(1) of the IP Act aims to protect the privacy of private conversations by making it an offence to publish a record of a private conversation obtained by the use of a listening device without the consent of all parties to the private conversation. The exception under subparagraph 45(2)(c)(i) makes it lawful to publish a record of a private conversation where it is not more than is reasonably necessary in the public interest to do so.

The IP Act does not provide a statutory definition of the words ‘reasonably necessary’ or ’in the public interest’. The primary meaning of ‘necessary’, used as an adjective, is something that cannot be dispensed with.[[1]](#footnote-2) The adverb ‘reasonably’ modifies the strictness or exactitude of the adjective ‘necessary’ to some extent, while importing an objective test that the necessity of publication be agreeable to reason or sound judgement, not exceeding the limits prescribed by reason. While ‘reasonably necessary’ in this statutory context does not mean absolutely necessary, there must be a need for publication that goes beyond mere desirability or convenience. An assessment of whether publication of a record of a private conversation is reasonably necessary in the public interest imports an element of judgement as to whether the relevant public interest could be properly satisfied by other means without resort to disclosure of a record of a private conversation without the consent of all parties to the private conversation.

The ordinary use of the words ‘in the public interest’ varies with the context and circumstances of their use but generally refers to something done to benefit the general community or in the pursuit of a public good. In the context of current affairs and news programs, the term ‘public interest journalism’ is commonly used to describe programs that seek to provide a benefit to the general public by providing information about issues that impact on the well-being of the community.

The ACMA considers that the words ‘not more than is reasonably necessary’ limit the scope of the information that may be lawfully published.

The Licensee has submitted, citing a decision of the New South Wales Court of Criminal Appeal,[[2]](#footnote-3) that the word ‘necessary’ in the current statutory context, should be read as meaning ‘appropriate’.

The statutory context of the provision considered in the case relied upon by Nine, is materially different to section 45 of the IP Act and as a consequence, the issues that had to be addressed in that case, and other cases that have applied it, do not arise under the IP Act.

Accordingly, the ACMA remains of the view that, in the phrase ‘reasonably necessary’, the word “necessary” is intended to have its primary dictionary meaning, rather than to be read (as may be fitting in some other statutory contexts) as meaning ‘appropriate’.

However, taking into account the Licensee’s further submissions on this point, the ACMA has considered whether applying a test of ‘reasonably appropriate’ would lead to a different outcome in this case. The ACMA is satisfied that reading the words ‘reasonably necessary’ to mean ‘reasonably appropriate’ would produce the same result in the particular circumstances of this case. The word ‘appropriate’ means suitable or fitting for a particular purpose.[[3]](#footnote-4) It imports a value judgment, which by force of the qualifying adverb ‘reasonably’, must be made on objectively reasonable grounds, as to the extent of disclosure of a private conversation required to serve the public interest. That assessment is to be made according to the relevant circumstances at the time of publication. As explained further below, sufficient disclosure of information to serve the public interest had already been made prior to the broadcast of the relevant program, and would further be made in the course of the relevant program (without disclosure of excerpts of the relevant private conversation), as to warrant a finding that it was neither reasonably necessary, or reasonably appropriate, to disclose parts of the relevant private conversation for the purpose of informing the public on matters of public health and safety in the public interest.

The public interests claimed to be served by publication

The exception in subparagraph 45(2)(c)(i) permits publication of a record of a private conversation only to the extent that the content of the private conversation is reasonably necessary (or reasonably appropriate) to serve the public interest.

The Licensee submitted:

The Report indisputably related to important matters of public interest. It concerned a young, healthy woman, on no medication and with no history of adverse reactions to vaccines, who experienced concerning symptoms after receiving the Astra Zeneca vaccine, as part of the nation-wide response to the global COVID-19 pandemic.

[…].

Limited excerpts from the conversation were included in the broadcast. [,,,]. The excerpts were not more than was reasonably necessary in the public interest. The excerpts selected each related directly to the issues of public interest in the Report, including whether the TGA would confirm that [the trainee nurse’s] symptoms were related to the Astra Zeneca vaccine and whether [the trainee nurse’s] symptoms would be recorded as such, and reflected in the data about adverse reactions to the vaccine. The excerpts themselves also evidenced the nature and tone of the communication from the TGA, which was itself a relevant matter of public interest.

[…].

The name of the TGA Representative was among the portions of the conversation omitted from the Report, both as an example of material not reasonably necessary in the public interest, and for editorial reasons. The Report was not itself critical of the TGA but was merely an accurate report of the experiences [the trainee nurse] had, including when attempting to engage with and obtain information from the TGA.

The ACMA accepts that the Report, as a whole, addressed issues of public interest including the risk of blood clots associated with the Vaccine, the capacity of the medical profession to treat adverse reactions to vaccines, and the role of the TGA in approving vaccines and investigating adverse reactions to vaccines. The program host introduced the Report with the following comments:

Debate is raging about Australia’s vaccine hesitancy and there is plenty of finger pointing going on. […] But there is no point pretending the blood clotting associated with Astra Zeneca is a non-issue for Australians.

The trainee nurse explained that on two occasions medical staff at a hospital emergency department had dismissed concerns that the trainee nurse’s symptoms were consistent with an adverse reaction to the Vaccine, and instead had treated the trainee nurse for pneumonia. The blood clots were subsequently identified by the hospital after the trainee nurse’s general practitioner had insisted that further tests be conducted. The age of the trainee nurse (18 years) enhanced public interest in the case because the trainee nurse received a first dose of the Vaccine one week before the Australian Technical Advisory Group on Immunisation (ATAGI) published advice recommending that the Vaccine be limited to people aged over 50 years.[[4]](#footnote-5)

The ACMA accepts the broadcast of the trainee nurse’s story was in the public interest. However, the ACMA must also consider whether the broadcast of extracts of the private conversation was ‘not more than was reasonably necessary in the public interest’. In other words, did the publication of this information contribute to the public’s knowledge and understanding of the issues involved in the overall subject and was that information not more than was reasonably necessary to further the public’s knowledge and understanding of the issue.

The ACMA has considered whether the publication was not more than was reasonably necessary (or reasonably appropriate) in terms of the two public interest grounds outlined by the Licensee in its submission. The first ground related to reporting on the outcome of the TGA investigation. The second ground related to the tone of the communication by the TGA.

Reporting on the outcome of the TGA investigation

The ACMA accepts the Licensee’s submission that there was a public interest in the media reporting on the outcome of the TGA investigation including whether the TGA would confirm that [the trainee nurse’s] symptoms were related to the Vaccine and whether her symptoms would be recorded […] and reflected in the data about adverse reactions to the vaccine’. This is because the information had the potential to contribute to the public’s knowledge of the risks of the Vaccine and to the public’s understanding of the role of the TGA in the administration of vaccines in Australia.

Public interest in the trainee nurse’s case was reflected in media reports leading up to the broadcast of the Report at 7pm on 21 May 2021. A media monitoring report obtained by the ACMA suggests the story had received extensive national coverage between 17 and 21 May 2021, and that most of the news items had mentioned that the TGA was investigating whether the blood clots were caused by the Vaccine. [[5]](#footnote-6)

The ACMA noted that the complainant alleged that the Report was ‘an unauthorised broadcast of a conversation’ and also advised that the information disclosed by the TGA representative during the phone call was not of concern as it was already in the public domain.

The ACMA’s view is that the publication was more than was reasonably necessary (or reasonably appropriate) in the public interest in reporting on the outcome of the TGA investigation. This is because by the time the Program was broadcast on 21 May 2021, the TGA had published information that allowed the Licensee to report the outcome of the TGA’s assessment of the trainee nurse’s case without publication of the private conversation between the TGA representative and the trainee nurse.

On 20 May 2021, the TGA published its weekly *Covid-19 Vaccine Weekly Safety Report* (the **TGA Report**) which included information about six new incidents of blood clots following the Vaccine. The information indicated that the TGA had assessed one case, involving an 18-year-old Queensland woman, that met the criteria for thrombosis with thrombocytopenia syndrome (TTS) or blood clots.[[6]](#footnote-7)

On 20 May 2021, and on the following day when the Report went to air, national broadcast and online media outlets reported that the TGA had confirmed that the trainee nurse suffered blood clots as a result of taking the Vaccine. [[7]](#footnote-8)

The presenter of the Program made closing remarks explaining the outcome of the TGA investigation without reliance on the footage of the private telephone conversation with the TGA representative:

The TGA has updated its data. [The trainee nurse’s] case has been added to the list of 24 Australians who have suffered blood clots out of 2.1 million jabs of Astra Zeneca.

The Licensee further submitted:

Nine considers that the use of the words “not more than” is an imposition of an upper limit, indicating that some degree of use will be permissible, up to the point at which the use ceases to be reasonably appropriate in the public interest. If that were not the case, those words could arguably have been omitted from the provision.

The ACMA agrees that the words ‘not more than’ indicate a limit on the information that may be lawfully published but does not accept the Licensee’s contention that some level of disclosure is always permissible.

The limitation of ‘not more than’ turns on whether the publication is reasonably necessary (or reasonably appropriate) in the public interest in the circumstances of each case. The wording of the provision comfortably permits a finding in appropriate cases that publication of some part of a record, or indeed any part of a record, of a private conversation was more than was reasonably necessary (or reasonably appropriate) in the public interest

Accordingly, the ACMA considers that once the TGA Report was published, publication by the Licensee of parts of the private conversation between the TGA representative and the trainee nurse was no longer “not more than was reasonably necessary” (or reasonably appropriate) in the public interest to report on the outcome of the TGA investigation.

Reporting on the tone and nature of communication by the TGA

As outlined above, the Licensee submitted that extracts of the telephone conversation evidenced the nature and tone of the communication from the TGA, which was itself a relevant matter of public interest.

The ACMA accepts that there may be a public interest in the media providing information to the community about how the TGA communicates to the public the outcome of its investigations into adverse events following Covid-19 vaccinations. However, the ACMA is not satisfied that publication, to evidence the nature and tone of the communication, was not more than was reasonably necessary (or reasonably appropriate) in the public interest in this case.

The Report did not provide any information or indication to viewers to explain how or why the tone of the TGA’s communication during the private telephone conversation is a matter of public interest.

The Licensee submitted:

The Report was not itself critical of the TGA but was merely an accurate report of the experiences [the trainee nurse] had, including when attempting to engage with and obtain information from the TGA.

The reporter that presented the Report (the **Reporter**) explained that the trainee nurse was anxious to know whether the TGA would confirm whether or not the blood clots were caused by the Vaccine. The trainee nurse provided the following context for the telephone call:

[Trainee nurse]: On discharge, from the Hospital, they gave me the 99.9% that it is from the vaccine and now ultimately, I am just waiting for TGA.

The ACMA considers that the inclusion of the extracts of the private telephone conversation may have made the Report more interesting for viewers by humanising the experience of the trainee nurse but is not satisfied that their inclusion was not more than was reasonably necessary (or reasonably appropriate) in the public interest.

Comments by the Reporter and by the trainee nurse during the on-camera interview demonstrated that information about the communication of the TGA could be provided to viewers without broadcasting the extracts of the private telephone conversation. The Reporter and trainee nurse recounted the advice provided by the TGA representative and made comments suggesting that the trainee nurse was satisfied by the information provided by the TGA:

[Reporter]: So yes, they [the TGA] will be counting you now as one of those [who suffered] side effects of the vaccine.

[Trainee nurse]: Yes. I am not surprised at all. The doctors at the hospital pretty much told us that.

At the end of the Report the trainee nurse said:

[Trainee nurse]: I think that people should follow the TGA guidelines. I am not an anti-vaccinator’.

The reporter said:

[Reporter]: [The trainee nurse] now has peace of mind just knowing what almost put her in intensive care’.

The ACMA notes that the section of the audio in which the TGA representative self-identified was bleeped out by the Licensee but considers that some viewers may have been able to identify the TGA representative by the voice. The ACMA considers that publication of audio of the voice of the TGA representative was more than was reasonably necessary in the public interest because the extracts did not serve to improve public understanding about the tone and nature of TGA communication.

In these circumstances, the publication of the extracts of the private telephone conversation was more than was reasonably necessary (or reasonably appropriate) in the public interest.

The Licensee further submitted:

Nine clarifies that its submission is that the inclusion of the extracts in the report were for the sake of accuracy for the purpose of improving public knowledge and understanding of the tone of TGA. Whilst the Report itself did not contain editorial commentary either critical or supportive of the TGA, it remained a significant matter of public interest for the public to also be accurately informed as to the manner and tone of the TGA communication. A less accurate report of the relevant aspects of the conversation (for example a description of it spoken by a reporter) would not have been able to effectively convey this information to the public. The best and most appropriate means of doing this was with the use of some carefully selected excerpts of the recording itself. For these reasons, the use of the relevant excerpts was clearly not more than was reasonably necessary in the public interest, in the relevant context.

The ACMA does not accept the Licensee’s contention that the publication of the excerpts of the private conversation served a significant matter of public interest because it provided an accurate means to inform the public about the tone and manner of TGA communication. An audio recording of a private conversation necessarily provides an accurate record of the tone and manner of that conversation but that is not of itself a sufficient ground for its publication. The relevant test is not whether publication of an audio record was an accurate record or more informative to viewers than other records but whether publication of any part of a record of a private conversation was not more than was reasonably necessary (or reasonably appropriate) in the public interest. The audio excerpts may have provided an accurate record of the tone and nature of the private conversation but as outlined above, the publication of these records did not educate viewers in any meaningful way about the nature and tone of TGA communication and therefore it was not the case that the publication served to inform or improve public knowledge about a matter of public interest.

Accordingly, the ACMA’s view is that the publication by broadcast of Extracts 1 to 5 of the private conversation between the TGA representative and the trainee nurse did not fall within the exception provided for by subparagraph 45(c)(i) of the IP Act.

**Was the publication not more than is reasonably necessary (or reasonably appropriate) – in the performance of a duty of the person making the communication or publication?**

The Licensee submitted:

Additionally, each of those excerpts were included in the performance of a duty by [the trainee nurse] – to inform the public about her experience – and by Nine, in discharging its duty to keep the community informed about a matter of public interest, in this case, a young healthy [person] who had experienced an adverse reaction to a COVID-19 vaccine and […] experiences when […] she attempted to seek help and answers from both medical professionals and the TGA.

The ACMA considers that the publication was more than was reasonably necessary (or reasonably appropriate) in the performance of a duty held by the Licensee ‘to keep the public informed of a matter of public interest’ and in the performance of a duty held by the trainee nurse ‘to inform the public about her experience’.

The IP Act does not include a statutory definition of the word ‘duty’. Therefore, the ACMA has adopted its ordinary meaning – that which one is bound to do by a moral or legal obligation, or by one’s position or occupation.[[8]](#footnote-9)

The ACMA considers that the Licensee had no obligation to publish the extracts of the private conversation between the TGA representative and the trainee nurse.

As outlined above, the ACMA accepts that it was in the public interest to broadcast the outcome of the TGA’s investigation into the trainee nurse’s case. However, following the publication of the TGA Report, the Licensee had no duty to publish the extracts of the private conversation because the outcome was already in the public domain, and the Report was not critical of the TGA representative’s responses to the trainee nurse’s questions or of the TGA’s approach to interacting with the public more generally.

Subparagraph 45(2)(c)(ii) refers to the performance of a duty of the person making the communication or publication. The ACMA’s considers that the Licensee was the ‘person’ who communicated and published the private conversation by broadcasting extracts on the Program. The ACMA does not accept the Licensee’s submission that publication was reasonably necessary (or reasonably appropriate) in the performance of a duty held by the trainee nurse. This is because the trainee nurse was not ‘the person making the communication or publication’ of the relevant records of a private conversation.

Accordingly, the ACMA considers that the publication of extracts of the private conversation between the TGA representative and the trainee nurse did not fall within the exception under subparagraph 45(2)(c)(ii) of the IP Act.

**Conclusion**

In summary, the ACMA finds that the conduct of the Licensee satisfied the elements which constitute a contravention of subsection 45(1) of the IP Act, and that none of the exceptions provided for by subsection 45(2) of the IP Act were applicable to the publication by the Licensee.

Paragraph 7(1)(h) of Schedule 2 to the BSA imposes a licence condition that the Licensee will not use its broadcasting service in the commission of an offence against another Act or a law of a State or Territory. Accordingly, the ACMA’s finding is that the Licensee, in broadcasting extracts of the private conversation between the trainee nurse and the TGA representative, used its broadcasting service in the commission of an offence against subsection 45(1) of the IP Act, and thereby breached the licence condition set out at paragraph 7(1)(h) of Schedule 2 to the BSA.

Attachment A

**Extracts from the complaint to the ACMA dated 25 May 2021:**

[…]

**A Current Affair unauthorised broadcast of conversation concerning thrombosis with thrombocytopenia TTS- COVID19 vaccine**

1. On 19 May 2021, the Therapeutic Goods Administration’s (TGA) Regulatory Assistance Service received a request to call back [the trainee nurse], an 18-year-old female from Queensland who had reported a case of thrombosis with thrombocytopenia (TTS) potentially arising from the administration of the AstraZeneca COVID-19 vaccine.
2. During a discussion between [names of employees] in advance of the call, both agreed that it would be important to confirm the identity of the caller given the personal information to be discussed during the call. Consequently, [name of employee], at the outset of the call, sought confirmation as to who [name of employee] was speaking to, and as to who was present. [name of employee] was informed that only family were present.
3. On 21 May 2021, a segment was broadcast by the Nine Entertainment Co (**Nine**) in its ‘A Current Affair’ program (**ACA**) concerning [the trainee nurse] and TTS. The broadcast segment included footage of [the trainee nurse] speaking with [name of employee], using the ‘speaker’ function on [the trainee nurse’s] mobile phone. The recorded conversation included several comments from [name of employee] concerning [the trainee nurse] case, the inclusion of that case in the TGA’s TTS statistics, and the number of adverse events reported to the TGA concerning COVID-19 vaccines.
4. We have been advised that the information in the report is not of concern, as it is already in the public domain. The TGA is, however, concerned about the manner in which the information was collected, including the efforts to mislead [the TGA representative] as to who [name of employee] was speaking to, and the absence of any consent from [the TGA representative] to the recording of the discussion. […]

**Relevant Legislation**

Under subclause 7(1)(h) of Schedule 2 to the *Broadcasting Services Act 1992* (Cth) (**BSA**), a commercial television broadcasting licence granted under the BSA is subject to a condition that ‘*the licensee will not use broadcasting services in the commission of an offence against another Act or a law of a State or Territory*’. As outlined above, we consider that there are grounds to believe that the broadcast of the recorded conversation between [the trainee nurse] and [name of employee] contravened the *Invasion of Privacy Act 1971* (Qld) (**IPA**), being a law of the State of Queensland.

**Attachment B**

**Extracts of the Licensee’s submission**

[…]

**Response to the ACMA’s Questions**

*Details of how the recording of the relevant conversation between [the trainee nurse] and the TGA representative was made or obtained by the Licensee including…whether an agent or agents of the Licensee were present and recorded the relevant conversation at the time it occurred, or whether the recording of the relevant conversation was made by [the trainee nurse] and subsequently provided by [the trainee nurse] to the Licensee.*

1. Nine representatives were with [the trainee nurse], conducting an on-camera interview, at the time the TGA Representative happened to call [the trainee nurse’s] sister’s telephone, asking for [the trainee nurse]. There were a number of people present, including some Nine representatives. The phone was put onto loudspeaker mode, in order that all present could hear the conversation. [the trainee nurse] was a party to the conversation and consented to the recording of the conversation (see paragraphs 24-25 below as to parties). A recording of the conversation was made with the knowledge and consent of both [the trainee nurse] and Nine. Excerpts of the conversation (Attachment B) were included in the Report, with the consent of both [the trainee nurse] and Nine.

*When and how the Licensee obtained [the trainee nurse’s] consent to record and/or to broadcast the relevant conversation. If express consent was given orally or in writing, please provide a copy of the written consent, or the precise terms of the consent given orally; or, if the Licensee relies on implied consent, please give details of all the relevant facts and circumstances from which implied consent can be inferred.*

1. [the trainee nurse’s] consent was obtained at the time of the relevant conversation, both expressly and impliedly. Express consent was given verbally by [the trainee nurse] to Nine. To the best of the recollection of the relevant Nine staff, [the trainee nurse] said words to the effect of “*I’m still waiting on them [the TGA] to call me back. Hopefully they call while you are here and you can hear it*.” [the trainee nurse] was asked words to the effect of “*Can we record it*?” and she said words to the effect of “*Yes, that would be great.*”
2. Nine submits the fact of [the trainee nurse’s] consent is also plainly evident in viewing the Report, and is able to be readily inferred from the circumstances. This includes her active participation in the interviews forming the basis for the Report, which includes footage of [the trainee nurse], visibly aware she is on camera, participating in the relevant conversation, whilst holding up her phone which is on loudspeaker. [the trainee nurse] consented to the inclusion of her information, including the conversation, in the Report as broadcast. These circumstances clearly evidence consent, noting that Nine has not been made aware by the ACMA of any basis for an allegation to the contrary.

*Whether the Licensee or an agent of the Licensee advised or encouraged [the trainee nurse] (either before or during the relevant call), to inform the TGA representative (who, at the outset of the call, sought confirmation as to who [the trainee nurse] was speaking to, and as to who* w*as present) that only family of [the trainee nurse] were present during the call.*

1. The ACMA’s question appears to be premised on the acceptance of assertions that:
2. the TGA Representative did in fact, “*at the outset of the call, seek confirmation as to who she was speaking to [sic], and as to who was present*”; and
3. That the TGA Representative was in fact informed “*that only family of [the trainee nurse] were present during the call*.”

Nine disputes this version of events, noting Nine has not been informed by the ACMA of the existence of any evidence in support of these assertions.

1. On the relevant occasion, the TGA Representative phoned [the trainee nurse’s] sister’s phone. The sister answered, then handed the phone to [the trainee nurse]. The phone was put on loudspeaker. Nine agrees that the TGA Representative did ask questions of [the trainee nurse] to establish who [the trainee nurse] was (even though it was the Representative who had called, in response to [the trainee nurse] initial query). [the trainee nurse] verified [the trainee nurse’s] name and date of birth on the call, as well as [the trainee nurse’s] case number. Nine does not accept that the TGA Representative asked [the trainee nurse] who else was present at the time of the call, or for confirmation as to the identity of the other persons present. The Nine journalist present does not recall ever hearing any such queries being made.
2. The TGA Representative did state that the reason for asking [the trainee nurse] to confirm [the trainee nurse’s]identity was for the protection of [the trainee nurse’s] own information, saying words to the effect of *“we sometimes do get people from the media or other interested people who pretend that they’re people …with cases, just to try to get information for their own uses*”, telling [the trainee nurse] that “*it’s really just to protect you*.” [the trainee nurse] was not pretending to be someone else, nor pretending to be a person “with a case” - [the trainee nurse] was indeed the person whose personal details were the subject of the conversation.
3. Nine likewise is not aware, and does not accept, that [the trainee nurse] informed the Employee that “only family of [the trainee nurse] were present during the call.” Further, Nine did not “advise or encourage” [the trainee nurse] to do so. There is therefore no evidentiary basis for any allegation of misrepresentation. Nine considers the reason for the question about alleged “advice or encouragement” is unclear - even if such conduct had occurred (which is denied), it is of no relevance to any substantive issue under the IPA in the present investigation, for the reasons set out below.

*Does the Licensee accept that the relevant conversation was a private conversation, as defined in section 4 of the IPA, because the TGA representative desired the words to be heard only by herself and [the trainee nurse], or if not, please explain the material facts and circumstances on the basis of which the Licensee asserts that the relevant conversation was not a private conversation?*

1. The IPA defines a private conversation in section 4, as follows: […]
2. Nine does not concede that the relevant conversation was a private conversation for the purposes of the present investigation. The definition relevantly states that it *“****does not include*** *words spoken by one person to another person in circumstances in which* ***either of those persons*** *ought reasonably to expect the words may be overheard, recorded, monitored or listened to by* ***some other person, not being a person who has the consent****, express or implied, of* ***either of those persons*** *to do so”* [emphasis added].
3. Even on the Complainant’s own account of events, the TGA Representative was clearly aware of the presence of other persons during the conversation (evidenced by the assertion in the complaint that they enquired about the identity of the other people present, and were aware the phone was on loudspeaker). Although Nine disputes the Complainant’s version of events, it evidences an admission by the Complainant that the TGA Representative was aware of other persons being able to hear the conversation, could tell the phone was on loudspeaker and consented to continue the conversation despite this. During the conversation, the TGA Representative also responded directly to questions asked by others in the room, namely [the trainee nurse’s] sister. These circumstances mean the conversation was not a private conversation as defined by section 4.
4. It is also contextually relevant that the private and sensitive information being discussed during the conversation was in fact [the trainee nurse’s] private and sensitive information, including her medical condition and symptoms, her date of birth and other identifying details. [the trainee nurse] consented to the disclosure of [the trainee nurse’s] personal information to Nine, and in respect of the information ultimately included in the Report, to the public at large. Concerns expressed in the call by the TGA Representative were expressed to be only for the protection of [the trainee nurse] and [the trainee nurse’s] own information. The complaint also concedes that information from the TGA Representative contained in the Report was “not of concern” being already in the public domain.
5. If, for example, the call was recorded by the TGA, as may be the case with calls from certain regulatory or government agencies, then Nine submits that would also be relevant to any determination of whether the call was a private conversation for the purposes of the IPA.

*If the Licensee asserts that it did not contravene subsection 44(1) of the IPA because either (or both) the relevant conversation was not recorded by the use of a listening device in contravention of section 43 of the IPA, or the broadcast of the relevant conversation was made with the express or implied consent of a party to the conversation, in accordance with paragraph 44(2)(a)(i) of the IPA, please explain the material facts and circumstances relied on to support the assertion(s).*

1. Nine maintains that if the conversation was a private conversation (which is not conceded), it was not recorded in contravention of section 43, because it was made by a party to the conversation pursuant to section 43(2)(a).
2. Section 42(2) of the IPA defines who a party is, and states: […]
3. Each of [the trainee nurse] and the Representative were clearly parties to the conversation, pursuant to s42(2)(a). [the trainee nurse’s] sister was another party to the conversation pursuant to s42(2)(a), as she also spoke words in the course of the conversation. Therefore, any person who, with [the trainee nurse] consent, overheard, recorded or listened to the words is a party to the conversation pursuant to section 42(2)(b). [the trainee nurse] gave consent to Nine to overhear, listen and record the conversation, and [the trainee nurse] participated in that process. Therefore, each of [the trainee nurse], [the trainee nurse’s] sister and Nine are parties to the conversation and each could have lawfully recorded it pursuant to section 43(2)(a).
4. Section 44 prohibits the communication of a record obtained through use of a listening device in contravention of s43. In this case, there was no contravention of s43, so the prohibition in s44 cannot, and does not, apply.

*In respect of the relevant conversation, does the Licensee accept that it was, in accordance with subsection 45(1) of the IPA, a person who, having been a party to a private conversation and having used a listening device to record that conversation, subsequently broadcast part of that conversation? If not, please explain the material facts and circumstances on the basis of which the Licensee asserts that this was not the case. If so, please explain why the parts of the relevant conversation that broadcast were not more than was reasonably necessary in the public interest (in accordance with subparagraph 45(2)(c)(i) of the IPA).*

1. Sections 45(2)(c)(i) and (ii) permit the communication of a relevant record made by a party, provided the communication is not more than is reasonably necessary in the public interest, or is not more than is reasonably necessary in the performance of a duty by that person. Nine maintains that even if the conversation was a private conversation recorded by a party, sections 45(2)(c)(i) and (ii) clearly apply.
2. Limited excerpts from the conversation were included in the broadcast (set out in Attachment B). The excerpts were not more than was reasonably necessary in the public interest. The excerpts selected each related directly to the issues of public interest in the Report, including whether the TGA would confirm that [the trainee nurse’s] symptoms were related to the Astra Zeneca vaccine and whether her symptoms would be recorded as such, and reflected in the data about adverse reactions to the vaccine. The excerpts themselves also evidenced the nature and tone of the communication from the TGA, which was itself a relevant matter of public interest.
3. Additionally, each of those excerpts were included in the performance of a duty by [the trainee nurse]– to inform the public about her experience – and by Nine, in discharging its duty to keep the community informed about a matter of public interest, in this case, a young healthy [person] who had experienced an adverse reaction to a COVID-19 vaccine and [their] experiences when [they] attempted to seek help and answers from both medical professionals and the TGA.
4. The name of the TGA Representative was among the portions of the conversation omitted from the Report, both as an example of material not reasonably necessary in the public interest, and for editorial reasons. The Report was not itself critical of the TGA, but was merely an accurate report of the experiences [the trainee nurse] had, including when attempting to engage with and obtain information from the TGA.

**Conclusion**

1. For the reasons above, Nine maintains there can be no issue as to Nine’s compliance with the IPA (including without limitation sections 44 and 45), and that Nine has at all times complied with subclause 7(1)(h) in Schedule 2 of the BSA.

**The Licensee’s further submission in response to the ACMA’s preliminary investigation report**

[…]

1. Nine maintains that the ACMA erred in its preliminary finding that the conversation was a “private conversation” for the purposes of the IPA, for the following reasons:
2. There can have been no reasonable expectation that the conversation would not be overhead by anyone other than [the trainee nurse] and her sister, in the circumstances;
3. The concern expressed by the TGA Representative was only to ensure that any disclosure of information by the TGA was to the correct person to whom that information related, for the purpose of the protection of that person’s own information;
4. The TGA Representative was clearly aware from the point it was put on speaker that the conversation could be overheard by one or more unknown people, but did not make any enquiries as to the identities of those persons. One can infer this was precisely because insofar as the TGA Representative was concerned, it was [the trainee nurses’] information and any others present were evidently people who had [the trainee nurses’] consent to overhear the conversation;
5. The Preliminary Report states (emphasis added):

“*Given that* ***the TGA representative had expressed a desire that information not be disclosed to the media under false pretences****, and the presence of Nine’s representatives was not disclosed or otherwise evident, it was reasonable in the circumstances for the TGA representative to believe that the conversation would not be overheard via the mobile phone speaker by members of the media or other persons (beside the trainee nurse’s sister) without consen*t.”

1. Nine maintains that the ACMA’s statement that “*the TGA representative had expressed a desire that information not be disclosed to the media under false pretences*” mischaracterises the actual nature of the exchange. The TGA Representative expressed that “*the reason for*” her request that [the trainee nurse] confirm her identity, is to ensure that she was in fact speaking to [the trainee nurse], that the trainee nurse’s] information not be disclosed to anyone else who might be pretending to be [the trainee nurse] (ie. any other person including media who did not have [the trainee nurse’s) consent), and to protect the [trainee nurse’s] personal information, not for any other reason.
2. The relevant portion of the conversation transpires as follows:

TGA Representative: “…Am I speaking to [the trainee nurse]?”

[the trainee nurse]: “You are speaking to [the trainee nurse]”.

TGA Representative (emphasis added): “*Ok, ok, so I was just wondering if you could um provide me with some sort of um you know evidence of who you are and* ***the reason for that*** *is that we sometimes do get people you know from the media and just other interested people who pretend that they’re people who have* [inaudible] *cases and try to get additional information for their own uses, so* ***it’s really to protect you***.”[[9]](#footnote-10)

1. In respect of the ACMA’s preliminary finding that (emphasis added):

“*it was reasonable in the circumstances for the TGA representative to believe that the conversation would not be overheard via the mobile phone speaker by members of the media or other persons (beside the trainee nurse’s sister)* ***without consent****;*”

Nine notes that there was in fact consent – consent given by [the trainee nurse] (to whose confidential information the conversation solely related) for the persons present to hear the conversation.

1. The Preliminary Findings concede that the TGA Representative is aware the call is on speaker, and is aware of the presence of at least one other person in the room. The recordings provided to the ACMA confirm that at no point after putting the phone on speaker does the TGA Representative make any enquiry as to who can now overhear the call, nor does [the trainee nurse] make any statement to the effect that only her sister is present. There is therefore no basis for the ACMA’s finding that the only other person to whom the TGA Representative consented to overhear the call was [the trainee nurse’s] sister.
2. Nine maintains this is evidence that the TGA Representative impliedly consented to the call being overheard by others, provided they were others who had [the trainee nurse’s] consent to so overhear it. This is consistent with the primary concern expressed by the TGA that it wanted to ensure that it was not disclosing information to someone who did not have [the trainee nurse’s] consent to know that information.
3. The only evidence of any enquiry by the TGA Representative as to who was in the room is an assertion contained in the complaint (on a second-hand basis) and for which there is no direct evidence, alleged to have been made prior to the phone being given to [the trainee nurse] and being put on speaker (despite there being no need for such an enquiry if the phone were not on speaker). The available evidence before the ACMA does not support that assertion; that evidence includes the recordings, and recollections of the journalist present (also noting Nine’s disclosure obligations to the ACMA, which do not apply to the complainant). While possible, common sense also suggests that it is unlikely any such enquiry would have been made prior to the point at which the TGA representative was able to verify that she was in fact speaking to [the trainee nurse].
4. Therefore the evidence before the ACMA upon which it ought properly to rely[[10]](#footnote-11) is that, despite knowing the phone was on speaker with others present, the TGA Representative did not take steps to ascertain who else may or may not have been present with [the trainee nurse], but simply took steps to confirm that the person to whom she was speaking was the correct person whose confidential information was being discussed (and who had the right to consent to the public disclosure of that information, if she wished.) This is consistent with the concept that the TGA Representative’s concern, quite properly, was not to disclose [the trainee nurse’s] information to anyone other than [the trainee nurse],but was not concerned by anyone else to whom [the trainee nurse] had evidently given consent to overhear the conversation.
5. We maintain in those circumstances that there is clearly no evidentiary basis to find a reasonable expectation that the conversation could only be overheard by [the trainee nurse] and one other person, being [the trainee nurse’s] sister. The reference to “media” is in a significantly different context than that to which the ACMA relies upon in the preliminary findings. The conversation was not a “private conversation” pursuant to section 4 of the IPA, and therefore any reproduction of the excerpts were not in breach of the IPA.

**Response to preliminary finding as to “not more than reasonably necessary in the public interest”**

1. Even if the conversation was a “private conversation” (which is denied for the reasons above), the ACMA erred in finding the excerpts were more than was permissible under the exception in s45(2)(c)(ii). The words 'reasonably necessary' direct consideration of whether the impugned conduct exceeded what was objectively appropriate in the circumstances. The authorities establish that:
2. 'necessary' means 'reasonably appropriate and adapted' rather than 'essential or unavoidable';[[11]](#footnote-12)
3. 'reasonably' imports an objective test;[[12]](#footnote-13)
4. In its reasoning in the preliminary report, the ACMA appears to have construed the words as imposing a higher threshold than “reasonably appropriate”. The preliminary report states relevantly:

“ The primary meaning of “necessary”, used as an adjective, is something that cannot be dispensed with. The adverb “reasonably” modifies the strictness or exactitude of the adjective “necessary” to some extent, while importing an objective test that the necessity of publication be agreeable to reason or sound judgement, not exceeding the limits prescribed by reason.

While “reasonably necessary” in this statutory context **does not mean absolutely necessary**, there must be a need for publication that **goes beyond mere desirability or convenience.**

An assessment of whether publication of a record of a private conversation is reasonably necessary in the public interest imports an element of judgement as to **whether the relevant public interest could be properly satisfied by other means** without resort to disclosure of a record of a private conversation without the consent of all parties to the private conversation.”

The preliminary report goes on to include the following findings:

“…once the TGA Report was published, it was no longer not more than was reasonably necessary in the public interest [to use the excerpts]”

… and

“…information about the communication of the TGA **could** be provided to viewers without broadcasting the extracts of the private telephone conversation.”

1. The phrase “reasonably necessary” can be considered in the context of similar provisions[[13]](#footnote-14) in surveillance devices legislation which are helpful in the understanding of s45(2)(c)(i) of the IPA. In the context of the phrase “reasonably necessary for the protection of lawful interests” the Courts have observed that the proper construction of the term “necessary” means “appropriate, but not essential”. The inclusion of the qualifier “reasonably” therefore imposes a requirement that the action be “reasonably appropriate”, importing an objective test[[14]](#footnote-15).
2. The Preliminary Report omits any consideration of the work to be done by the inclusion of the additional phrase ‘not more than’. Nine considers that the use of the words ‘not more than’ is an imposition of an upper limit, indicating that some degree of use *will be* permissible, up to the point at which the use ceases to be reasonably appropriate in the public interest. If that were not the case, those words could arguably have been omitted from the provision.
3. The ACMA has erred in its finding that once the TGA published its report on 20 May 2021, the use of the recorded excerpts ceased to be not more than was reasonably necessary in the public interest.
4. The IPA contains nothing to suggest that the mere fact information might be available from another source, would therefore mean that any use whatsovever of any part of a recording would be more than was reasonably necessary in the public interest. In applying this reasoning, Nine respectfully submits that the ACMA is applying an incorrect definition of ‘reasonably necessary’. The suggestion that as soon as the relevant information became available from another source (although arguably only a portion of the information), it automatically rendered any use of any part of the recording impermissible under the IPA, suggests that the ACMA is applying a definition of ‘absolutely necessary’ or ‘unavoidable’(ie.only if no other source of information was available). The ACMA ought to be applying the correct definition of ‘reasonably appropriate’ (reflecting that although the core information might be available elsewhere, using carefully selected excerpts of the recording were the best and most accurate means of reporting it, and therefore reasonably appropriate in the circumstances).
5. The ACMA has accepted that there was a relevant public interest in reporting on the outcome of the TGA investigation including how [the student nurse’s] case would be reflected in the data. The Preliminary Report acknowledges that there had been significant media reporting of [the student nurse’s] case, prior to the relevant broadcast, reflecting the public interest in various aspects of the subject matter.
6. The recorded excerpts were the contemporaneous record of the first substantive contact that [the student nurse] had with the TGA, and were the primary confirmation of the manner in which the TGA would intended to reflect [the student nurse’s] case in the data. Simply because portions of that information subsequently became available in another form, Nine does not agree that its limited use of relevant excerpts of the recording must (or did) therefore cease to be not more than was reasonably necessary or appropriate.
7. Likewise, the fact that in the ACMA’s view Nine *could* have reported the TGA outcome without using any of the recording, whilst a relevant consideration, is certainly not determinative of reasonable necessity and does not mean that the use of the excerpts was more than was reasonably necessary in the public interest. To illustrate that point, one might argue that Nine could simply have had a reporter behind a desk narrating whole report, and not include any interviews, footage, audio or other material at all. The inclusion of interviews and first-hand accounts (and conversations) is not merely because that might be more interesting to viewers but also because those materials are necessary to convey to viewers all the relevant information beyond mere words, including for example aspects such as tone, expression, fluency, nuance, body language and context, all of which play significant roles in human communication.
8. The Preliminary Report states (emphasis added): “*Furthermore, the following submission by the Licensee suggests that the extracts were only included in the broadcast for the sake of accuracy* ***and not to*** *improve public knowledge and understanding of the tone of TGA communication*:

‘The Report was not itself critical of the TGA but was merely an accurate report of the experiences [the trainee nurse] had, including when attempting to engage with and obtain information from the TGA.’

1. Nine respectfully submits that this misconstrues Nine’s relevant submission. Nine clarifies that its submission is that the inclusion of the extracts in the report were for the sake of accuracy for the purpose of improving public knowledge and understanding of the tone of TGA. Whilst the Report itself did not contain editorial commentary either critical or supportive of the TGA, it remained a significant matter of public interest for the public to also be accurately informed as to the manner and tone of the TGA communication. A less accurate report of the relevant aspects of the conversation (for example a description of it spoken by a reporter) would not have been able to effectively convey this information to the public. The best and most appropriate means of doing this was with the use of some carefully selected excerpts of the recording itself. For these reasons, the use of the relevant excerpts was clearly not more than was reasonably necessary in the public interest, in the relevant context.
2. The TGA representative’s identity was obscured, not because the identifiability of the speaker is a relevant element of any provision of the IPA, but as a further reflection of steps taken by Nine to ensure the use of excerpts were not more than reasonably necessary in the public interest. Nine submits that the ACMA has erred in suggesting that simply because the speaker might have been identifiable from her voice, to people who knew her well enough to recognise it, that meant that any publication of any excerpt in which the TGA Representative’s voice could be heard was more than was reasonably necessary in the public interest, because “the extracts did not serve to improve public understanding about the tone and nature of the TGA conversation.”
3. Nine submits that the relevant extracts plainly did serve to improve public understanding about the tone and nature of the TGA conversation, and the use was not more than was reasonably appropriate for that purpose. The excerpts themselves are on their face demonstrative of the tone and nature of the TGA conversation and the most effective means of conveying that information to the public. The ACMA’s reasoning suggests that any excerpt could not be used if the speaker’s voice could be heard, which suggests a far higher threshold than “not more than reasonably necessary” has been applied by the ACMA in reaching its preliminary findings.
4. In a practical real-world context, the decisions of what is in the public interest, where the threshold of “not more than reasonably necessary” might be, and which excerpts might be within the threshold and which might exceed it, are ones that must be made by professional producers and journalists, using their expertise, experience, professional skill and editorial judgement, in the particular context of each broadcast in all the circumstances at the relevant time, cognisant of the seriousness of the potential consequences of breaching the relevant legislation. For the purposes of exercising its functions under the BSA, Nine submits the ACMA should consider that context as the framework upon which the objective test of “reasonableness” is being applied.

**Conclusion as to unsustainability of preliminary breach findings**

1. For these reasons, Nine submits that the ACMA has erred in its finding that the use of the relevant excerpts was more than reasonably necessary in the public interest.
2. Nine respectfully submits that applying the correct threshold to the facts in this case clearly show that:
3. The conversation was not a “private conversation”; and
4. the broadcast did fall withing the exception under section 45(2)(c)(ii) of the IPA; and
5. therefore Nine has not breached s45(1) of the IPA and has not breached the licence condition at paragraph 7(1)(h) of Schedule 2 to the BSA.

**Attachment C**

**Relevant legislative provisions**

**Broadcasting Services Act 1992**

Schedule 2

**7 Conditions of commercial television broadcasting licences**

(1) Each commercial television broadcasting licence is subject to the following conditions:

[,,,]

(h) the licensee will not use broadcasting services in the commission of an offence against another Act or a law of a State or Territory;

**Invasion of Privacy Act 1971 (Qld)**

**4 Definitions**

In this Act—

**listening device** means any instrument, apparatus, equipment or device capable of being used to overhear, record, monitor or listen to a private conversation simultaneously with its taking place.

**private conversation** means any words spoken by one person to another person in circumstances that indicate that those persons desire the words to be heard or listened to only by themselves or that indicate that either of those persons desires the words to be heard or listened to only by themselves and by some other person, but does not include words spoken by one person to another person in circumstances in which either of those persons ought reasonably to expect the words may be overheard, recorded, monitored or listened to by some other person, not being a person who has the consent, express or implied, of either of those persons to do so.

**Section 42 Reference to listening devices and private conversations**

(2) A reference in this part to a party to a private conversation is a reference—

(a) to a person by or to whom words are spoken in the course of a private conversation; and

(b) to a person who, with the consent, express or implied, of any of the persons by or to whom words are spoken in the course of a private conversation, overhears, records, monitors or listens to those words

**Section 43 Prohibition on use of listening devices**

1. A person is guilty of an offence against this Act if the person uses a listening device to overhear, record, monitor or listen to a private conversation and is liable on conviction on indictment to a maximum penalty of 40 penalty units or imprisonment for 2 years.

(2) Subsection (1) does not apply—

(a) where the person using the listening device is a party to the private conversation; […]

**Section 44   Prohibition on communication or publication of private conversations unlawfully listened to**

1. A person is guilty of an offence against this Act if the person communicates or publishes to any other person a private conversation, or a report of, or of the substance, meaning or purport of, a private conversation, that has come to his or her knowledge as a result, direct or indirect, of the use of a listening device used in contravention of section 43 and is liable on conviction on indictment to a maximum penalty of 40 penalty units or imprisonment for 2 years.

**45 Prohibition on communication or publication of private conversations by parties thereto**

1. A person who, having been a party to a private conversation and having used a listening device to overhear, record, monitor or listen to that conversation, subsequently communicates or publishes to any other person any record of the conversation made, directly or indirectly, by the use of the listening device or any statement prepared from such a record is guilty of an offence against this Act and is liable on conviction on indictment to a maximum penalty of 40 penalty units or imprisonment for 2 years.
2. Subsection (1) does not apply where the communication or publication—

(a) is made to another party to the private conversation or with the consent, express or implied, of all other parties to the private conversation, being parties referred to in section 42(2)(a); or

(b) is made in the course of legal proceedings; or

(c) is not more than is reasonably necessary—

1. in the public interest; or
2. in the performance of a duty of the person making the communication or publication; or
3. for the protection of the lawful interests of that person; or

**49A Executive officer may be taken to have committed offence**

1. If a corporation commits an offence against a deemed executive liability provision, each executive officer of the corporation is taken to have also committed the offence if—

(a) the officer authorised or permitted the corporation’s

conduct constituting the offence; or

(b) the officer was, directly or indirectly, knowingly

concerned in the corporation’s conduct.

**Attachment D**

**Transcript of extracts of the telephone conversation**

1. [TGA representative]: Hello so my name is [OBSCURED] and I’m calling from the Therapeutic Goods Administration.
2. [Trainee nurse]: Will I ever get a confirmation that it is from the vaccine?

[TGA representative]: So um, it’s… so, I think 100% is, is a difficult thing to ever say in medicine.

1. [TGA representative]: 100% is a difficult, it’s something that’s quite difficult um to say given the information that we have.
2. [TGA representative]: Unfortunately see we have… we’ve had 20,000 adverse events so far. So…

[the trainee nurse]: I don’t think you’ve had 20,000 blood clots.

[TGA representative]: No, that’s true.

1. [the trainee nurse’s sister] Will it be when they say there’s like 18 blood clots in Australia, will [the student nurse] be on that list as one of them”

[TGA representative]: Um yes so when then the information um you know from the database comes out, yes her um, her case will be ah counted amongst those”

1. https;//www.macquarie dictionary.com.au/features/word/search/?search\_word\_type=dictionary&word=necessary viewed 1 December 2021. [↑](#footnote-ref-2)
2. Sepulveda v R [2006] NSWCCA 379, a case on the application of section 5 of the Listening Devices Act 1984 NSW. [↑](#footnote-ref-3)
3. https;//www.macquarie dictionary.com.au/features/word/search/?search\_word\_type=dictionary&word=appropriate viewed 15 June 2022. [↑](#footnote-ref-4)
4. htpps://www/health.gov.au/news/Atagi-statement-on-astrazeneca-vaccine-in-response=to=new=vaccine-safety=concerns, viewed 26 Oct 2021 [↑](#footnote-ref-5)
5. . The media monitoring report estimated that the commercial television and commercial radio audience associated with these media reports was over 1.5 million people. [↑](#footnote-ref-6)
6. <https://tga.gov.au/media-release/astrazeneca-chadox1-s-covid-19-vaccine>, viewed 26 October 2021 [↑](#footnote-ref-7)
7. A media monitoring report obtained by the ACMA indicated that reports about the outcome of the TGA’s investigation, between 20 May 2021 and the broadcast of the Report on 21 May 2021, reached an estimated audience of over 1 million people. [↑](#footnote-ref-8)
8. https;//www.macquarie dictionary.com.au/features/word/search/?search\_word\_type=dictionary&word=duty viewed 29 October 2021 [↑](#footnote-ref-9)
9. [..] [↑](#footnote-ref-10)
10. [Footnote 2 in the Licensee’s submission] Particularly with regard to the evidentiary principle enunciated in Briginshaw v Briginshaw (1938) 60 CLR 336, which assists administrative decision makers in the application of the relevant standard required in the exercise of the ACMA’s power, given the seriousness of the allegation the subject of the present investigation, and the gravity of the consequences of an adverse finding. [↑](#footnote-ref-11)
11. [Footnote 3 in the Licensee’s submission] *Sepulveda v The Queen [2006] NSWCCA 379 [116] [118].* [↑](#footnote-ref-12)
12. [Footnote 4 in the Licensee’s submission] *Navabi v Ghasemi* [2019] WADC 1 [1]-[2]; *Sepulveda v R* [2006] NSWCCA 379 [118] [↑](#footnote-ref-13)
13. [Footnote 5 in the License’s submission] Section 5(3)(b)(i) Listening Devices Act (NSW) 1984 [↑](#footnote-ref-14)
14. [Footnote 6 in the License’s submission] Sepulveda v R [2006] NSWCCA 379 [117] [↑](#footnote-ref-15)