Investigation report no. BI-624

| Summary |  |
| --- | --- |
| **Broadcaster [Service]** | Australian Broadcasting Corporation [ABC] |
| **Finding** | Breach of Standard 6.1 [privacy] |
| **Relevant code** | ABC Code of Practice 2019 |
| **Date finalised** | 29 September 2022 |
| **Program** | *Newshour* [current affairs] |
| **Date of broadcast** | 11 May 2021 |
| **Type of service** | National broadcasting—television |
| **Attachments** | **A** – extracts from the complaint to the ACMA  **B** – extracts from the broadcaster’s submissions to the ACMA  **C** – relevant provisions |

Background

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

The Program was broadcast by the Australian Broadcasting Corporation (the **ABC**)on 11 May 2021 at 5:00 pm.

The ACMA received a complaint alleging that a report broadcast during the Program about dating app scams (the **Report**) included a breach of the complainant’s privacy.

The ACMA has investigated the ABC’s compliance with Standard 6.1 of the ABC Code of Practice 2019 (the **Code**).

Issue: Privacy

**Standard 6.1. Privacy:**

Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances.

Relevant extracts of the Code are at **Attachment C**. The ACMA also takes account of the relevant principles set out in the *Privacy Guidelines for Broadcasters* (the **ACMA’s Privacy Guidelines**).[[1]](#footnote-1)

Finding

The ACMA finds that the ABC breached Standard 6.1 of the Code.

Reasons

In assessing compliance with Standard 6.1, the ACMA is assisted by the ACMA’s Privacy Guidelines.

The ACMA will consider the following questions:

* Was a person identifiable from the broadcast material?
* Did the broadcast material disclose personal information, or intrude upon the person’s seclusion in more than a fleeting way?

If the answer to both questions is yes, then there is a potential breach of the Code’s privacy provisions.

The ACMA will then consider:

* Was the person’s consent obtained – or that of a parent or guardian?
* Was the broadcast material available in the public domain?
* Was the invasion of privacy in, and proportionate to, the public interest?

If the answer to any of these is yes, then there may be no breach found.

The complaint to the ABC stated:

My specific picture and profile was shown on National TV in the segment as a woman scrolled through [the dating app].

This was noticed by my family and has caused significant issues […] This is illegal use of my picture in a public domain that I was not consulted with before showing.

The ABC has submitted:

The complainant would be familiar with the photograph he used for his [dating app] profile. Casual viewers of the News Hour program, and viewers unfamiliar with the photograph, would not be able to identify him […] While the ABC considers it highly unlikely that the complainant was identifiable from the broadcast material, the broadcast did not disclose personal information or intrude upon the complainant’s seclusion in more than a fleeting way. As the two threshold questions are not answered in the affirmative, there cannot be a potential breach of standard 6.1. In any case, the material was obtainable by the ABC because it was not protected by access restrictions and was in the public domain. Correspondence from the complainant indicates that he consented to his information being put on the app and the material was not disclosed on a confidential basis or to a limited or closed circle of recipients. The material fleetingly used by the ABC in this broadcast was not an invasion of privacy.

***Was a person identifiable from the broadcast material?***

For the ACMA to make a finding that Standard 6.1 of the Code has been breached, a particular person must be identifiable from the broadcast.

A person will be identifiable if, from the broadcast, their identity is apparent or can reasonably be ascertained. This is considered having regard to the context and content of the broadcast. Pixelation of a person’s face will not necessarily be sufficient to de-identify that person – for example, where they are identifiable from other details in the broadcast.

The Report was comprised largely of the studio presenter and expert guest discussing the ramifications of the rise in online scamming appearing on dating apps. A montage sequence of people using mobile phones to view dating apps, with faces and names of subscribers to those dating apps appearing on-screen, punctuated this discussion.

In the Report, the relevant footage was of a woman sitting down and scrolling through images on her phone. The phone screen was at an angle to the camera, but visible to the viewer. The camera angle was a wide shot of the woman and the camera did not zoom in on the phone screen.

The complainant stated that ‘my partner and I were watching the program when we saw my profile come up on the screen’ and further that, ‘my partner saw it independently while I did as we were watching the news article. I did not point this out to her’.

The complainant’s image was displayed for approximately one second in the beginning of the overlay footage of various people scrolling through dating apps on their mobile phones, and other footage of people looking at mobile phones and again for one second toward the end as the footage was repeated.[[2]](#footnote-2) The image was a black and white photo of a person wearing dark glasses, under which the complainant’s first name and age could be seen.

The ACMA accepts the ABC’s submission that the ‘image displayed is held at an angle which makes identification more difficult’. The ACMA also accepts that it would be difficult as a casual viewer of the program, and as a viewer unfamiliar with the photograph, to identify the complainant. The ACMA understands ‘casual’ to define a viewer who may not be paying close attention to the broadcast.

In the sequence that contained the complainant’s image, immediately preceding that image, a fair-skinned face could be seen in front of a white background, with easily identifiable facial features. This image stayed on-screen for approximately 1-2 seconds. In comparison, also on-screen for 1-2 seconds, the complainant’s black and white image was held at an angle and was more difficult to identify, especially as half of the face was heavily shadowed.

The ABC has submitted that the complainant’s facial features ‘were not shown clearly at all’ and that despite the image on the mobile phone screen being positioned in the centre of the video frame, ‘resolution and clarity do not increase on a larger sized screen’ and ‘as the screen size increases’ distorting effects tend ‘to *increase* compared to a standard sized screen’. The ACMA accepts these submissions but considers the complainant’s hairstyle, distinctive sunglasses, and jawline were sufficiently clear so that the complainant was likely recognisable to an associate. That the image of the complainant was repeated twice in the report would have further increased that likelihood.

The complainant told the ACMA that he recognised his image while watching the report. Despite some distorting effects, the ACMA considers that these were insufficient to conceal the complainant’s identity. Given the accompanying first name and age of the complainant were also visible, the ACMA considers that it was likely the identity of the complainant could be ascertained, particularly by people who had a familiarity with the complainant’s appearance.

Accordingly, the ACMA is satisfied that the complainant was identifiable in the report.

***Did the broadcast material disclose personal information, or intrude upon a person’s seclusion in more than a fleeting way?***

Personal information can include information about personal relationships and domestic or family life, sexual activities, and sexual orientation or practices, and other sensitive personal matters and private affairs. This information need not be secret or confidential in order to be private.[[3]](#footnote-3)

The first name and age of the person were disclosed in the report below the image of the complainant.

The complainant’s presence on the app indicated that, at some point, he was a member of that dating service. Further, the relevant footage was of the woman in the report, who was a user of the dating app scrolling through images on her mobile phone. This footage, although brief, included her swiping the image of the complainant and ‘matching’ with him. Given a match only occurs when both participants have ‘liked’ the profile of the other, this implies that the complainant was, at some point, also an active member on the dating app. Since the app is designed to match users into intimate interpersonal relationships, the ACMA considers that a person’s membership and use of a dating app constitutes sensitive personal information.

The ABC has noted that due to the popularity of dating apps in Australia an individual’s membership of a dating app does not indicate anything about their intimate activities rather, only indicates that at some point they may have been interested in dating. The ABC also submitted that the information conveyed about the complainant was ‘entirely devoid of specific detail’. However, the ACMA notes that a person’s decision to utilise dating apps does reveal sensitive personal information given it reveals the method they intend to use for the purposes of dating; and this can, as in the case of the broadcast, reveal information about their gender preferences and sexuality; and disclose how people publicise themselves to enhance their appeal to others.

Consequently, the ACMA considers that, in the case of the broadcast of the Report, personal information of the complainant was disclosed.

***Was the person’s consent obtained?***

The complainant submitted that they did not consent to their image being used in the report and the ABC did not dispute this.

***Was the broadcast material available in the public domain?***

The broadcaster submitted that,

… the material was obtainable because it was not protected by access restrictions and was in the public domain. Correspondence from the complainant indicates that he consented to his information being put on the app and the material was not disclosed on a confidential basis or to a limited or closed circle of recipients.

The ACMA considers that not all material that is available online will cease to be personal or private merely because it has been made publicly available through the absence of privacy settings or otherwise. Account will be taken of the nature of the material, the context in which it has been posted online and the existence of access restrictions.

In this case, the dating app’s privacy policy states that ‘the main sharing of members’ information is, of course, with other members’.[[4]](#footnote-4) This therefore affords members some expectation of privacy. Furthermore, the fact that use of the dating app requires membership means the app itself is limited to a restricted user group. Whilst open to a wide range of people, membership in the app is defined around a specific objective (i.e dating and the formation of interpersonal relationships). Therefore, the app does not constitute an open forum which any casual person can view or participate in. Due to the sensitive information that members provide on the app there is a corresponding expectation that this information should remain protected from people other than dating matches who have gone through the membership process and who are therefore part of the restricted user group.

We also note the complainant submitted they had not been on the dating app for more than three years. However, the ACMA notes that in the absence of him actively deleting his profile, the complainant’s personal information remained on the app and was subject to the discovery of other users.

The ABC submitted that,

… through the Terms of Use, users agree that not only will their content [be] viewed by “other members”, it may also be viewed “by any person visiting or participating in the Service (such as individuals who may receive shared Content from other members [of the dating app])”. The Privacy Policy outlines numerous other organisations with which members’ information may be shared (service providers; partners; [name of company] that owns and operates various online dating services companies; legal authorities), and also describes sharing functionality specifically designed to allow member profiles to be shared outside of the dating app’s services.’

The ACMA does not accept that the sharing of information (as contemplated above) means a member’s profile is in the public domain.

In terms of information shared with other organisations, the privacy policy notes that ‘all of our service providers and partners must agree to strict confidentiality obligations’.

Regarding the sharing functionality that allows members to share the profile of other members outside of the service, the ACMA understands that when a profile is shared with someone who is *not* currently a member of the dating app, they are sent a person’s name and provided a link to their device’s app store to download the app should they wish to see more information about that person. If they wish to view the profile, they would be required to download and become a member of the dating app.[[5]](#footnote-5)

For these reasons, the ACMA considers a member would expect that the personal information they share on the dating app would only be used outside the dating app conditionally by a limited number of external parties in confidence, and not be publicly available outside the online dating service.

When a person joins a dating app with an advertised singular purpose and restricted access, they are making a decision to provide this information to other members using the dating app. Thus, the ACMA considers a decision to air this information to a national audience is an encroachment on an individual’s expectation that this information be confined to the user group within the app and a limited number of external parties under specific conditions.

For these reasons, the ACMA considers that the broadcast material was not available in the public domain.

***Was the invasion of privacy in, and proportionate to, the public interest?***

The ABC submitted that the Report presented ‘an extended live interview’ with the Deputy Chair of the ACCC, ‘to discuss younger Australians being targeted in online dating scams – an important matter of public interest’. The ACMA acknowledges the clear public interest in reporting on online scamming – but also notes that there are limits to the type of information that should be disclosed. The ACMA considers that it was possible to report on the ramifications of online scamming using dating apps without disclosing the faces, names and ages of ‘random’ members using the apps, without their consent.

The important information conveyed in the report related to the consequences of online scamming. This was relayed verbally during the interview. The accompanying overlay footage offered no factual or supporting information to the content discussed. The purpose of the footage was likely to offer a general visualisation of dating apps and this objective could have been achieved through the use of blurred images that would not have required the consent of people who used the app. Nor could it be said that the breach of privacy involved was ‘proportionate in the circumstances’, as Standard 6.1 requires it to be.

As the ACMA considers that there was no public interest justification for disclosing the complainant’s face in the report, the ACMA’s finding is that the ABC breached Standard 6.1 of the Code.

Attachment A

Complaint

***Complaint to the broadcaster dated 11 May 2021***

At 5.49 pm on the 11th May there was an article run on internet scammers using dating apps to con money from matches on online dating apps. My specific picture and profile was shown on National TV in the segment as a woman scrolled through the [dating app].

This was noticed by my family […] This has had a significant impact on my life. This is illegal use of my picture in a public domain that I was not consulted with before showing.

***Extract of the complaint to the broadcaster dated 10 June 2021***

[…] People who have seen it were all able to clearly identify that it is me. […]

***Extract of the complaint to the ACMA dated 13 July 2021:***

ABC ran an article on dating app scammers who connect with people and steal their money and during the segment showed a woman using the [dating app] and they use a picture of me, my dating profile picture and also show my name on the screen in the article. All of this is clearly visible, used without any consent whatsoever on my behalf and has gone on to create significant stress and issues in my life as I've not been on a dating app in over 3 years.. […]

***Extract of the complaint to the ACMA 31 August 2021***

[…] my name and image is clearly identifiable in the segment that was broadcast. ABC has admitted using my image as a “fleeting reference” and this was done without any form of consent from myself. They have admitted using my image and my information without my consent which contravenes their own broadcasting standards.

Anyone that knows online dating will know that [dating app]. This segment was targeted at young people on dating apps so the assertion that people watching would not be aware is an insult to everyone watching the segment. My image is clear for all to see. How on earth did I see it if it’s not able to be seen? […]

***Extract of correspondence between the complainant and the ACMA 24 June 2022***

[…] my partner and I were watching the program when we saw my profile come up on the screen. […]

***Extract of correspondence between the complainant and the ACMA 4 August 2022***

[…] My partner saw it independently while I did as we were watching the news article. I did not point this out to her. She then raised it with her family who were able to identify me easily.

Everyone who has since seen it (people she has shown it to and people I have shown it to) easily and immediately recognised the image on the screen was mine. The image is easily identifiable. […]

Attachment B

Broadcaster’s response and submissions

***Extract of the ABC response to the complainant dated 31 August 2021:***

[…] While we have given consideration to your concerns, the ABC does not agree with your characterisation that the broadcasted footage depicting your profile was illegal and/ or defamatory in any way.

Your image was used as a fleeting reference in the context of an important story on a topic of considerable public interest. The ABC also maintains the view that you are not identifiable in the brief depiction of your profile during the broadcast.

The news segment, so far as we are aware, has not been available for viewing since it was initially broadcast on 11 May 2021 and is not available to be viewed online. Nevertheless, the ABC acknowledges that you considered this segment to be hurtful, and we wish to assure you that it was never the ABC's intention to cause you any distress. […]

***Extract of the ABC submission to the ACMA dated 6 December 2021***

[…] The ABC accepts that the complainant identified himself in the broadcast material.

The news story in question presented an extended live interview with [the] Deputy Chair of the ACCC, to discuss younger Australians being targeted in online dating scams – an important matter of public interest. It included overlay footage of various people scrolling through dating apps on their mobile phones, and other footage of people looking at mobile phones. The complainant has identified that his image was displayed for approximately one second at 0:55 in the footage provided and again for one second at 4:02 as the overlay footage was repeated.

The image that the complainant has identified as himself appears to be a stylized black and white photo of a person wearing dark glasses. An indistinct name and age are displayed in white font at the bottom of the photograph: on close scrutiny, this can be discerned. The phone on which the image is displayed is held at an angle which makes identification more difficult.

The complainant would be familiar with the photograph he used for his [dating app] profile. Casual viewers of the News Hour program, and viewers unfamiliar with the photograph, would not be able to identify him. The ABC and the ACMA are in no position to know whether the profile photograph resembles the complainant’s contemporary appearance.

To the extent that the complainant was potentially identifiable from the broadcast material, the personal information disclosed in the footage consisted of a first name and age used by the complainant on the dating app, and the existence of his profile on a dating app at one time. That personal information was not disclosed in more than an indistinct and fleeting way. As noted above, it appeared on screen for approximately one second on two occasions across the duration of this 5 minute news story.

The fact that a person has at some point had a [dating app] profile says nothing about a person’s sexual or other intimate activities and a person of ordinary sensibilities would not consider the fleeting broadcast of a [dating app] profile to be highly offensive. Dating apps are used by a significant portion of the Australian population. It has been reported that as many as a third of Australians have used online dating, and this rises to half the population among millennials.

While the ABC considers it highly unlikely that the complainant was identifiable from the broadcast material, the broadcast did not disclose personal information or intrude upon the complainant’s seclusion in more than a fleeting way. As the two threshold questions are not answered in the affirmative, there cannot be a potential breach of standard 6.1.

In any case, the material was obtainable by the ABC because it was not protected by access restrictions and was in the public domain. Correspondence from the complainant indicates that he consented to his information being put on the app and the material was not disclosed on a confidential basis or to a limited or closed circle of recipients. The material fleetingly used by the ABC in this broadcast was not an invasion of privacy.

While the ABC does not agree that the broadcast of this footage was a breach of the Code, ABC News will not use the overlay in future coverage. […]

***Extract of the ABC submission to the ACMA dated 25 August 2022***

The ABC does not agree with the ACMA’s preliminary finding for the reasons set out below.

**Was the complainant identifiable from the broadcast material?**

[…] the ACMA suggests the complainant’s “hairstyle, distinctive sunglasses, and jawline were relatively clear”, and that the resolution of large screens commonly used to view broadcast television would have increased the likelihood of identification.

When material is viewed in broadcast quality, its resolution and clarity do not increase on a larger sized screen compared to a standard sized screen. It is not the case that viewers watching the story on a large screen would have been more able to identify the complainant; the image would not have been markedly clearer. In fact, when footage is blurry or otherwise indistinct, the effect tends to increase as the screen size increases. In this case, the distorting effects of the viewing angle, the shadowing, the high contrast nature of the image, its brevity, its relatively small size within the frame, and elements within the image that obscured the complainant’s face (such as the large sunglasses), would have prevented identification even on a large screen.

Furthermore, the ABC submits that the complainant’s hairstyle, sunglasses and jawline were not shown clearly at all, due to the distorting effects noted above; and none of these elements could accurately be described as ‘distinctive’, given the lack of clarity.

**Reliance on complainant’s account of recognition by others**

[…] The ABC agrees that the test for determining whether a person is identifiable is not whether an ordinary reasonable viewer would recognise them; as the ACMA notes, this would confine the application of standard 6.1 to public figures. However, the ABC is concerned by the importance the ACMA has placed on the complainant’s account of having shown the broadcast to people he knew. This account is unverified and ought not to be relied upon as evidence that the complainant was identifiable in the broadcast. If it is the case that the complainant showed the broadcast to people he knows, neither the ABC nor the ACMA are in any position to ascertain (a) what the people were told before viewing the broadcast, (b) whether any emphasis was put on the image in question (for example, by pausing the recording at that point), (c) what the people were asked after viewing the broadcast, and (d) whether the people were already familiar with that particular image of the complainant (such as by seeing it in other contexts, if – for example – the complainant had used it as a profile picture on other social networking services). The fact that the complainant showed the picture to these people will also have primed them to recognise him. In the context of the program we would contend that it would be extremely unlikely it would have occurred to them that it was him. Accordingly, the ABC requests that the ACMA reconsider its apparent reliance on this aspect of the complainant’s submission.

**Dating app’s user privacy expectations**

The ABC agrees with the ACMA’s view that “not all material that is available online will cease to be personal or private merely because it has been made publicly available through the absence of privacy settings or otherwise”, and that it is necessary to consider “the nature of the material, the context in which it has been posted online and the existence of access restrictions”.

Different social networking services have different approaches to privacy. User expectations of the privacy of their images and profile information will differ from service to service and will depend on whether any access restriction functionality has been used. For example, a Facebook user’s expectations of privacy in relation to a photo they have made visible only to their friends will differ considerably to their expectations in relation to the same photo if they share it publicly; and their expectations will be different again if they post the same photo onto Twitter or Snapchat or use it as a profile picture on the [dating app].

[…]

The ACMA’s preliminary report describes members’ information as being available only to other members of a “restricted user group”. It is evident from the Terms of Use and Privacy Policy that this is not the case. Through the Terms of Use, users agree that not only will their content by viewed by “other members”, it may also be viewed “by any person visiting or participating in the Service (such as individuals who may receive shared Content from other [dating app] members)”. The Privacy Policy outlines numerous other organisations with which members’ information may be shared (service providers; partners; [name of company] that owns and operates various online dating services companies), and also describes sharing functionality specifically designed to allow member profiles to be shared outside of the [dating app’s] services.

Given these policies, the ABC considers that the [dating app] users would have considerably lower expectations of the privacy of their profile images and other profile information compared to users of other services who have used access restriction functionality to confine visibility of their content to friends or fellow members of a restricted or private group. Using the Facebook example mentioned above, user expectations of the privacy of their [dating app] profile image would be closer to their expectations of an image they posted publicly onto Facebook than an image they posted onto Facebook with visibility restricted to friends only.

It is also relevant to note that the [dating app’s] user base in Australia is very large, and most users would be aware of this. […] This user base is actually much larger than the audience for the News channel program it was shown on. Even users of the [dating app] who don’t realise their profile information can be shared beyond the app’s user base will still have very low expectations of privacy given the very large size of that user base. The ABC considers that it is unreasonable to regard information that a person has willingly made available to such a large user base as private for the purposes of standard 6.1.

**Membership of a dating app as sensitive personal information**

The ACMA’s preliminary report states: “This footage, although brief, included [the woman in the report] swiping the image of the complainant and ‘matching’ with him. Given a match only occurs when both participants have ‘liked’ the profile of the other, this implies that the complainant was, at some point, also an active member on the dating app. Since the app is designed to match users into intimate inter-personal relationships, the ACMA considers that a person’s membership and use of a dating app constitutes sensitive personal information.”

As noted in the ABC’s initial submission to the ACMA, dating apps are widely used within Australia. In view of this, it is difficult to understand how someone’s use of such apps can be regarded as sensitive personal information. If someone is revealed as a dating app user, this does not indicate anything whatsoever about their intimate activities or relationships; it merely indicates that at some point they may have been interested in dating. It is especially relevant in this case that the footage was used as overlay to illustrate the general theme of people using dating apps; the story was not about the woman shown in the footage, or her specific experience with dating apps. Accordingly, even if the complainant was identifiable (which, as noted above, the ABC does not consider to be the case), the information conveyed about him – that he had at one point been interested in dating – was entirely devoid of specific detail. There was no indication as to when the footage had been shot or whether the complainant was still a [dating app] user at that time, and no indication was given as to whether he had ever used the [dating app] to meet someone.

[…].

Attachment C

Relevant provisions

**6. Privacy:**

**Principles:** Privacy is necessary to human dignity and every person reasonably expects that their privacy will be respected. But privacy is not absolute. The ABC seeks to balance the public interest in respect for privacy with the public interest in disclosure of information and freedom of expression.

**Standards:**

6.1 Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances.

1. <https://www.acma.gov.au/publications/2019-11/guide/privacy-guidelines-broadcasters>, accessed 30 March 2022. [↑](#footnote-ref-1)
2. The program included vision of a number of other individuals, which are visible at various points to various degrees. This investigation, however, relates only to the images of the complainant. [↑](#footnote-ref-2)
3. See the ACMA Privacy Guidelines for Broadcasters 2016, p2-3. [↑](#footnote-ref-3)
4. The app’s privacy policy was viewed by the ACMA on 3 May 2022. [↑](#footnote-ref-4)
5. The ACMA bases this understanding primarily on its interpretation of the dating app’s privacy policy viewed by the ACMA on 3 May 2022. [↑](#footnote-ref-5)