Investigation report no. BI-649

| Summary |  |
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| **Licensee [service]** | TCN Channel Nine Pty Ltd [Nine] |
| **Finding** | Breach of clause 3.5.1 [privacy] |
| **Relevant Code** | Commercial Television Industry Code of Practice 2015 (revised in 2018) (the **Code**) |
| **Program [type]** | *A Current Affair* [current affairs] |
| **Date of broadcast** | 21 March 2022 |
| **Date finalised** | 31 March 2023 |
| **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 and the ACMA’s approach to assessing content |

Background

In July 2022, the Australian Communications and Media Authority (the **ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* (the **BSA**) into an episode of *A Current Affair.*

The episode was broadcast on Nine by TCN Channel Nine Pty Ltd (the **Licensee)** at 7 pm on 21 March 2022 and included a report about a viral online video regarding a dispute between a man and his neighbour in regional New South Wales (the **Report**).

The ACMA received a complaint, made by a representative of the neighbour, alleging that the Report breached the neighbour’s privacy.

The ACMA has investigated the Licensee’s compliance with clause 3.5.1 [privacy] of the Code.

Issue: Privacy

Finding

The ACMA finds that the Licensee breached clause 3.5.1 of the Code.

Reasons

In assessing compliance with clause 3.5.1, the ACMA is assisted by its Privacy Guidelines for Broadcasters 2016 (the **Guidelines)**.[[1]](#footnote-2)

The ACMA generally considers 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 of these 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 three questions is yes, then there may be no breach.

The Report

The Report concerns the circumstances surrounding an online video (the **Online Video**) [[2]](#footnote-3) going viral after it was posted by a 19-year-old man (the **Man**) living in a small community in regional New South Wales.

The Report included an on-camera interview with the Man interspersed with video footage of an altercation between the Man and his neighbour (the **Neighbour**) that appeared to have been recorded in the early evening on a mobile phone by a friend of the Man.

Thevideo footage shows the Neighbour entering the Man’s backyard, by climbing over a fence, apparently to complain about the placement of a floodlight at the back of the Man’s home. The Man responds to the complaint and then repeatedly asks the Neighbour to leave his property. The Man’s friend informs the Neighbour that he is being recorded and the Neighbour then approaches the Man’s friend in an intimidating manner. The Man intervenes and following a brief scuffle, strikes the Neighbour who falls backwards onto the ground where he remains motionless. Subsequent footage shows the Neighbour lying prostrate on his back apparently unconscious. Further footage showed a brief close-up of the Neighbour leaning over a gate which shows that he has a cut to his nose and blood on his face and on the back of his hand. The Neighbour appears to object to being filmed and lashes out at the camera at which point the footage ends.

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

For the ACMA to make a finding that clause 3.5.1 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 was apparent or could be reasonably ascertained. The question of whether a person was 'identifiable' is considered on a case-by-case basis, having regard to the context and content of the particular broadcast.

The ACMA considers that the Neighbour was identifiable by the following material presented during the Report:

* The presenter of the Report (the **Presenter**) referred to the Neighbour by his full name and subsequently referred to him by his given name on two occasions.
* The video footage showing facial detail of the Neighbour:
  + the Neighbour and the Man standing on a driveway having a conversation
  + a brief, close-up of the Neighbour leaning over a dividing fence
  + a sequence, leading up to the physical altercation and shown on multiple occasions, that included a close-up of the Neighbour’s face
  + the Neighbour falling to the ground while attempting to climb over a fence when entering the Man’s property.

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

The Guidelines adopt a broad interpretation of ‘personal information’ that includes information of a sensitive and personal nature that is usually factual in nature but need not be secret or confidential. Personal information includes an individual’s name and address. It can also include information about personal relationships and domestic or family life.

The altercation that was the subject of the Report stemmed from an ongoing neighbour dispute (the **Dispute**). The ACMA considers the Dispute was a personal affair between the Man and his Neighbour and that communicating information about the fact of the Neighbour being involved in the Dispute communicated personal information about the Neighbour.

The Report disclosed facts about the Dispute that included personal information about the Neighbour:

* that the Neighbour had previously complained to the Man about the placement of the floodlight and about another matter relating to the placement of sandbags on an adjoining property
* that the Neighbour approached the Man’s friend in an intimidating manner and failed to leave the property when requested to do so
* that after a scuffle the Neighbour was punched by the Man, apparently knocked out and suffered a cut to his nose as a result of the altercation
* that the Neighbour had expressed remorse about the altercation and wanted to apologise to the Man
* that Police spoke to both men but no formal complaint was made.

In addition, the Presenter disclosed personal information about the Neighbour including his full name on one occasion and his given name on two occasions, his age on two occasions, and partial details of his residential address by naming the town in which the Neighbour was living.

**Was the person's consent obtained—or that of a parent or guardian?**

The Code allows personal information to be broadcast if the person provides implicit or explicit consent to the material being broadcast.

The Guidelines provide that consent must be given voluntarily, be informed, and given by a person with legal capacity and an understanding of the use to which the material will be put.[[3]](#footnote-4)

The complainant submitted that the Neighbour refused to make a statement to the Presenter and did not provide consent to the Licensee broadcasting material about him.

The Licensee submitted that the circumstances of the incident suggest that the Neighbour gave implied consent to being recorded on video and was made aware on multiple occasions that he was being recorded and continued to behave ‘inappropriately’. The Licensee further submitted that if a person has given implied consent to being recorded then it is reasonable to assert that the person has also consented to any use of the footage. Even if the ACMA were to accept that the Neighbour consented to being recorded on video by the Man’s friend (which it does not), it does not follow that this consent extended to the Man publishing the footage online or to allowing the Licensee to broadcast the material. There is no evidence to support a conclusion that the Neighbour consented to the broadcast of the video by the Licensee. In these circumstances, the ACMA accepts the submission by the complainant that consent was not given to broadcast the personal information outlined above.

The Licensee further submitted that it was lawful for the Man to record the incident and to post the footage online. The ACMA makes no comment about the actions of the Man in relation to posting the video footage online because it is not relevant to assessing whether the Licensee obtained the consent of the Neighbour to broadcast the footage.

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

The Licensee submitted that the broadcast material should not be regarded as relating to the Neighbour’s personal or private affairs because it was available in the public domain as the Man had published the footage of the incident online and had attracted a large global audience:

Both [the Man] and [the Neighbour] are clearly identifiable in the Viral Video. On that basis, Nine maintains the material included in the Report is clearly not private, in that it is not material relating to either [the Man’s] or [the Neighbour’s] personal or private affairs nor an invasion of [either of their] privacy.

The ACMA accepts that the Online Video published by the Man was material that was available in the public domain at the time of the broadcast.

The Code includes the following Note:

The broadcast of material that is publicly available or recorded in a public place will generally not be material relating to a person’s personal or private affairs or an invasion of privacy.

The Guidelines acknowledge that broadcasting material obtained from online or social media sites, where there are no access restrictions, may not be an invasion of privacy, however, the Note does not provide a blanket exemption to the privacy obligations under the Code or allow material to be broadcast merely because it is already in the public domain. The ACMA considers the nature of the material and the context in which it became publicly available in determining whether broadcast material should be regarded as relating to a person’s personal or private affairs.[[4]](#footnote-5)

Relevantly, the Guidelines acknowledge that broadcasting material obtained from online or social media sites, where there are no access restrictions, may not be an invasion of privacy, although the following should be considered:

The relevant content may be of a nature that indicates it has been put in the public domain without the affected person’s knowledge or consent—for example, material that is inherently offensive and appears to have been uploaded by someone other than the affected person. [[5]](#footnote-6)

The Licensee made a further submission that the Note should take precedence over the information in the Guidelines because the Guidelines expressly state that they are purely for assistance and do not alter the Code. The ACMA agrees that the Guidelines are purely for assistance, but considers that notes in the Code are also only intended to provide guidance in interpreting a relevant clause.

There appears to be no indication in the Online Video, and the Licensee has made no submission, that the Neighbour gave his express permission for the Online Video to be uploaded by the Man. As outlined above, the ACMA does not accept the Licensee’s submission that the Neighbour gave implied consent to the publication of the Online Video.

The Licensee further submitted that the context of the incident involving the Neighbour and the Man made it lawful for the Man to record the incident and to post the footage online without the consent of the Neighbour:

[The Man] did not require [the Neighbour’s] consent to publish the footage online – there is no law nor regulation that requires it. By virtue of [the Man’s] actions, the footage became (very) public.

[…]

In these circumstances the footage itself as well as the fact of the dispute it depicts, and the identity of [the Neighbour] and the role he played, are publicly available and can no longer be considered private or personal matters.

As outlined above, the ACMA makes no comment about the actions of the Man in relation to posting the video footage online. Whether or not the Man was legally entitled to post the Online Video is separate to the issue of whether the Licensee was permitted under the Code to broadcast the footage without the Neighbour’s consent.

The Licensee made a further submission that the Code was not breached because the nature of the material in the Online Video was not ‘inherently offensive’ to the Neighbour. The privacy protections under the Code are not limited to restricting the broadcast of ‘inherently offensive’ material. As outlined above, the Guidelines refer to the broadcast of ‘inherently offensive’ material as an example where the broadcasting of material already in the public domain may result in a breach of the Code. The example is not intended to be exhaustive.

The ACMA considers that the use of the Online Video in the broadcast by the Licensee breached the privacy of the Neighbour, notwithstanding that the material was in the public domain, because the material included personal information that was published online without evidence that the Neighbour consented to this publication. Accordingly, the Licensee was required, under the Code, to consider whether it was in the public interest to disclose this personal information on national television. That is considered below.

The ACMA’s review also identified that the Report included additional video footage of the altercation that was not published as part of the Online Video. The additional footage was therefore not available in the public domain.

Furthermore, the broadcast included other personal information about the Neighbour, not in the Online Video, including the Neighbour’s name, age, and part of his residential address, and it is not evident that this information was in the public domain.

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

The Code provides that a Licensee may broadcast material relating to a person’s private or personal affairs if it is in the public interest to do so.

The Guidelines advise that the question of whether something is in the public interest will depend on all the circumstances, including whether a matter is capable of affecting the community at large so that the audience might be legitimately interested in or concerned about what is going on.

The Licensee submitted:

[There is a] public interest in reporting certain occasions of anti-social and aggressive behaviour within the community, such as that depicted in the Viral Video. The prospect of one’s inappropriate conduct becoming widely known in the community acts to dissuade others from engaging in such conduct.

[,,,]

There is no legal basis nor basis under the Code pursuant to which [the Neighbour] would be entitled to restrict the publication of his name or face in connection with a report of his conduct in these circumstances.

The ACMA accepts that there is a public interest in reporting certain cases of anti-social behaviour and that certain facts relating to this particular case made it suitable for reporting. There was also a separate public interest in providing information to the public about the circumstances and context in which the video became viral.

However, the ACMA does not agree that there is no basis under the Code under which the Neighbour would be entitled to object to the publication of his name and face in connection with the Report. The issue for consideration is whether the disclosure of the neighbour’s personal information was proportionate and in the public interest.

The Guidelines outline that the principle of proportionality requires that any disclosure of personal information in the public interest should directly or indirectly contribute to the public’s capacity to assess an issue of importance to the public, and its knowledge and understanding of the overall subject.[[6]](#footnote-7) The information disclosed should be proportionate and relevant to those issues.

The Presenter introduced the Report by describing the incident as ‘a petty neighbourhood dispute in a small community in regional New South Wales that went global’. Against that background, and taking into account the level of sensitivity, the ACMA considers that the disclosure of some of the personal information about the Neighbour relating to the Dispute was in, and proportionate to, the public interest as it contributed to public knowledge and understanding of the origins and outcome of the altercation depicted in the Online Video.

However, the ACMA considers that in broadcasting information about the Dispute it was not in the public interest for the Neighbour to be identified and therefore, the disclosures in the Report of the name of the Neighbour and the disclosure of part of his residential address was not proportionate to the public interest in this particular case. This is because the disclosure of this personal information did not assist the public to assess or understand the overall issue of public interest.

The ACMA also notes that the lack of obscuration techniques, such as blurring or pixelation, with respect to the Neighbour’s face, meant that he was readily identifiable from the video that was broadcast. The ACMA considers that while it was in the public interest to report on the altercation, there was no public interest reason to broadcast unobscured footage of the face of the Neighbour.

The material presented in the Report indicated that the origin of the altercation was a neighbourhood dispute, the Neighbour expressed remorse about his conduct, and no action was taken by police. This was sufficient to provide the public with an understanding of the issues and to promote the public interest in dissuading others from engaging in anti-social conduct. Neither the Report nor the Licensee’s submissions provided evidence that the Neighbour posed an ongoing risk to public safety that might justify disclosing his name and details of his location in the public interest. Consequently, there was no legitimate reason to identify the Neighbour by name or to disclose his residential location to the public.

**Conclusion**

Accordingly, considering all the matters raised above, the ACMA finds that by broadcasting this information, the Licensee breached clause 3.5.1 of the Code.

Attachment A

Complaint

***Complaint to the Licensee dated 22 March 2022:***

They ran a story on a viral video and named [...] when he had refused to make a statement. They have not respected our privacy,

[…]

***Complaint to the ACMA dated 6 May 2022***

I lodged a complaint when they named […] (whom I am a representative of) in a story they ran, when he refused to talk to them or make a statement.

[…]

I am not satisfied with their response.

Attachment B

Licensee’s submission to the ACMA 28 July 2022

[…]

**The Report**

1. The Report concerned the fact that video footage of a dispute between two neighbours in regional New South Wales had ‘gone viral’ meaning that it had been posted on the internet where an unusually large number of people had viewed it (the **Viral Video**). The Report included the Viral Video and also examined the circumstances in which it had been posted online, where it has attracted a large global audience.
2. The incident the subject of the Report involved an altercation between [the Man] and [the Neighbour]. [the Neighbour] is physically much larger and much older than [the Man]. [the Man] […] As the Report explains, after an initial exchange, [the Man] and his […] friend began filming the encounter. [the Neighbour] who is apparently on another neighbour’s property, climbs the fence and comes onto [the Man’s] property without permission. [the Man] and the friend refer multiple times to the fact they are filming and repeatedly ask [the Neighbour] to leave, but he refuses to do so. When [the Neighbour] approaches the […] friend in an aggressive and intimidating manner, [the Man] steps between them warning [the Neighbour] not to touch her, and to get off his property. [the Neighbour] continues to advance. The encounter culminates in a physical altercation, in which [the Man] appears to swing a punch which knocks [the Neighbour] to the ground.
3. [the Man] uploaded the Viral Video to the internet, The Report includes an interview with [the Man] in which he discloses that the Viral Video had received more than 400,000 views at that time, including people around the world who had sent messages. He expresses his surprise at how many people had viewed the Viral Video and reacted to it.
4. The faces of both [the Man] and [the Neighbour] are visible in the Viral Video and in the excerpts of the Viral Video included in the Report. The Report also includes interviews with [the Man] and the full names of [the Man] and [the Neighbour]. The Report includes the Reporter explaining that [the Neighbour] had been offered an opportunity to respond and providing the substance of what he said to the Reporter.

[…]

**Privacy**

[…]

1. In this case, the Viral Video was both publicly and widely accessed (being posted on the internet and having receiving in excess of 400,000 views prior to the broadcast of the Report). The Viral Video is still publicly available online and, as at today’s date, has been viewed 715,000 times and shared 41,900 times. Both [the Man] and [the Neighbour] are clearly identifiable in the Viral Video. On that basis, Nine maintains the material included in the Report is clearly not private, in that it is not material relating to either [the Man’s] or [the Neighbour’s] personal or private affairs nor an invasion of [either of their] privacy.
2. Further, there cannot be said to be any reasonable expectation on the part of [the Neighbour] in these circumstances. The Report relates to and includes depiction in which [the Neighbour] enters [the Man’s] property without permission, and without lawful excuse, and refuses to leave when asked. Although private property, it is a circumstance in which a trespasser is being filmed (and aware he is being filmed), with the consent of the property owner. He could easily leave, as he is being asked to do, or cease his inappropriate behaviour, but elects not to. The altercation takes place outdoors, where it could potentially be observed by anyone on neighbouring property. In addition, [the Neighbour] elects to behave in an intimidating and unwelcome manner towards [the Man] and his friend, while aware at all times that he is being filmed, with his conduct finally prompting [the Man] to strike him.
3. In these circumstances, Nine does not consider that any of [the Neighbour’s] unauthorised entry onto the premises, his identity nor his conduct, could reasonably be material relating to [the Neighbour’s] personal or private affairs or which invaded [the Neighbour’s] privacy. For these reasons, the Report does not contain any material the subject of the restrictions in clause 3.5.1 and there can be no basis for any allegation of non-compliance with that clause.
4. Whilst Nine maintains the material was not private, even if it were, there is additionally a public interest in reporting certain occasions of anti-social and aggressive behaviour within the community, such as that depicted in the Viral Video. The prospect of one’s inappropriate conduct becoming widely known in the community acts to dissuade others from engaging in such conduct. Indeed, in this case, the enormous impact of the Viral Video on the internet, prior to the Report, suggests that it resonated with a very large number of people.
5. [The Man] is perfectly entitled to tell people what happened to him on his own property, and who did it, and the Viral Video itself is an objective record of what transpired, evidencing the accuracy of [the Man’s] account of events. […]. There is no legal basis nor basis under the Code pursuant to which [the Neighbour] would be entitled to restrict the publication of his name or face in connection with a report of his conduct in these circumstances.
6. By continuing to engage and remain on the premises, despite knowing he is being filmed, [the Neighbour] impliedly consents to the filming of his conduct, and must reasonably know, or be recklessly indifferent to, the fact that the recording is being made for the purpose of showing it to third parties.

[…]

**Licensee’s submission to the ACMA 16 December 2022**

[…]

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

[…]

1. The Preliminary Report seems to suggest that the fact [the Neighbour] was on [the Man’s] premises, behaving in a particular way, is also private information if [the Neighbour] is identified. Nine has some concerns about this reasoning - although the complaint is expressed as one of privacy, it appears to be more the case that [the Neighbour] and the Complainant would prefer people not know about the manner in which [the Neighbour] conducted himself towards [the Man], and how [the Man] responded, which is not a bona fide privacy complaint.
2. If a person elects to enter a neighbour’s property without consent, it cannot be the case that that person can have their actions protected by “privacy” simply because they would prefer others did not know about them. In this case, if [the Man] had not had the foresight to film [the Neighbour], he would still have been free to describe the incident to anyone he wished (be that police, community members or the media). […] The fact he had the foresight to record the incident was, ultimately, the best way of substantiating his claims. He elected to post that material online where it was viewed by many hundreds of thousands of people (around 400,000 prior to the broadcast of the Report and many more since). Whether or not one personally agrees with the posting of such footage on social media, the fact remains that in this case, [the Man’s] actions in posting the footage online were entirely lawful, permissible and not in breach of any code or regulation, including as to privacy. [The Man] did not require [the Neighbour’s] consent to publish the footage online – there is no law nor regulation that requires it. By virtue of [the Man’s] actions, the footage became (very) public. In fact, [the Man] had the capacity online to reach a greater audience than that even available to the metropolitan broadcast Licensee of a television station.
3. In those circumstances, the footage itself as well as the fact of the dispute it depicts, and the identity of [the Neighbour] and the role he played, are publicly available and can no longer be considered private or personal matters. They are quite lawfully and permissibly in the public domain. [The Neighbour] has no recourse whatsoever against [the Man] for the publication of that information online – it was filmed with the consent of [the Man] on his own property, it was not obtained unlawfully or improperly (such as with hacked data), it contains no information protected by law (such as in the case of an intimate image distributed without consent), and the fact the incident was filmed does not change the nature of whether the dispute itself, and [the Neighbour’s] involvement in it, can be considered private.
4. From the moment that material was lawfully posted online and attracted an audience, [the Neighbour] was publicly identified in connection with the Dispute, and his conduct. That information was publicly available and ceased to be private at that point. The question of consent therefore does not arise because the material ceases to be material relating to [the Neighbour’s] personal or private affairs. Whilst of course some types of information may involve different considerations, in this case, [the Neighbour] cannot reasonably argue his identity and involvement in the incident were private.
5. The Preliminary Report refers to the Guidelines, quoting that “relevant content may be of a nature that indicates it has been put in the public domain without the affected person’s knowledge or consent.” However, the full extract from the Guidelines includes the following relevant additional words “for example, material that is inherently offensive and appears to have been uploaded by someone other than the affected person.” In this circumstance, the footage is not “inherently offensive” to [the Neighbour] […]. The Guidelines expressly state that they are purely for assistance and do not vary the terms of the Code. Nine submits that precedence should be given to the terms of the Code, in particular the note to Clause 3.5.1 clarifying that the intention of the clause is that “the broadcast of material that is publicly available or recorded in a public place will generally not be material relating to a person’s personal or private affairs or an invasion of privacy.”
6. Whether or not precisely the same portions of footage that were available online were included in the broadcast is irrelevant, because it is [the Neighbour’s] identity and the fact of [the Neighbour’s] involvement in the dispute that is in issue - not every frame of the vision. Once the fact of [the Neighbour’s] involvement and his identity were in the public domain, they ceased to be private.
7. The Preliminary Report asserts that “the personal information about the neighbour relating to the dispute… the neighbour’s name, age and part of his residential address was not in the public domain.” The Preliminary Report however contains no evidentiary basis for this assertion. [The Neighbour] was clearly identifiable in the Viral Video. His name and town therefore may well have been known to many viewers of the Viral Video, been tagged or referred to in the comments of one of the various posts including the Viral Vision, or referred to in other media reports about the post. Nine does not know but notes the ACMA makes this statement as an assumption, without any factual or evidentiary basis.
8. Further, the Preliminary Report fails to consider that the relevant information was equally [the Man’s] information, and was published with his consent. The incident happened to [the Man], on his property, involving him. He gave the footage to Nine and consented for it to be broadcast as part of a report about a matter of public interest – that is, the conduct to which he was subjected, on his premises, without his consent, by his neighbour [the Neighbour].

# Consent and public domain

1. The ACMA has formed that view that it is irrelevant whether [the Neighbour] consented to be recorded, because the only relevant consideration is whether consent was given to broadcast. Nine maintains this is a misconstruction of the relevant provision.
2. If a person has given consent to be recorded, or has been recorded in circumstances clearly evidencing implied consent, that fact must be relevant. In those circumstances,it is entirely reasonable to assert that the person has also consented to any use of the footage, unless in the circumstances, the consent was clearly conditional (that is, the consent was expressly conditional or clearly limited in the particular circumstances, such as the case where someone records an intimate image for a partner but does not consent to its broader distribution).
3. In this case, [the Neighbour] was allegedly trespassing on someone else’s property. It is clear from the Viral Video footage that [the Neighbour] knew at all times he was being recorded. He could at any time have (a) left the property, (b) ceased his […] conduct, (c) asked for the camera to be put away or (d) enquired what use was intended to be made of the footage. He did none of those things. In the circumstances, [the Man] was entirely within his rights to film [the Neighbour], and to make whatever use he wished of the footage, whether that was giving it to police, putting it online or broadcasting it on national television. Simply because [the Neighbour] was upset or embarrassed that the incident was shown to the community, does not give rise to a claim of privacy.
4. The broadcast did not contain any personal information about [the Neighbour] other than his name, age and the details of the Dispute. It did not include information about his health, his family circumstances, his finances or any other information not directly relevant to the Dispute. While a person’s name may, in some circumstances, be considered personal information, it cannot be the case that an accurate report of conduct by a named person of a certain age, is an automatic breach of their privacy unless they consent to the report. Persons caught behaving in ways they would prefer others not know about would never give such consent.
5. If Joe Blow, aged 24, started a fight outside a pub and was hit in the face, but no charges were laid, Nine and every other media outlet would be perfectly entitled to report that information. Dozens of these sorts of reports are published by all media every day. If there was lawfully obtained video footage of the incident, Nine would be perfectly entitled to broadcast that footage. […] Nine would not be entitled, arguably, to broadcast other personal information about Joe Blow unless there were a public interest reason for that information. It cannot be the case that every person involved in a dispute in public, or which becomes public, must not be identified unless they give consent.
6. Nine is not aware of any authority or precedent suggesting it has ever been the case that in order to report on a dispute, one must obtain consent from both parties to the dispute in order to identify the parties and report the dispute.

**Public interest and proportionality**

1. The questions of public interest and proportionality only arise if the material is considered to be personal or private information. Nine submits it was not, for the reasons above. However, even if it were, Nine submits that the ACMA’s reasoning on the issue of public interest fails to adequately take into account the circumstances in the present case.
2. The Preliminary Report appears to accept that the reporting of the dispute was in the public interest. The ACMA however considers that it was not proportionate to identify [the Neighbour] in relation to the dispute, by name or image and by “part of his residential address” (i.e. the town).
3. Nine is not aware of any authority or precedent suggesting it has ever been the case under clause 3.5.1 that in order to report on a dispute in the public interest, one must obtain consent from both parties to the dispute in order to identify the parties and report the dispute. Clause 3.5.1 requires that there be “a public interest reason” for the broadcast of the relevant material. However, the ACMA seems to have applied a higher test of “necessary in the public interest”, finding that “it was not necessary for the neighbour to be identified.” This reasoning imposes a threshold of “necessity” which is absent from the wording of the Code, and is higher than the threshold set out at clause 3.5.1(a). The ACMA finds that the information “did not assist the public to assess or understand the overall issue of public interest” with which Nine respectfully disagrees.
4. Nine also notes that the ACMA’s reasoning fails to take into account the fact that [the Neighbour’s] identity was already in the public domain by virtue of the Viral Video. In respect of the reference to the town in which [the Neighbour] lived (described as “part of his address”), Nine notes that is equally part of [the Man’s] address, and [the Man] did consent for his town to be identified in connection with a report that was primarily about him, and an incident he experienced on his own property.
5. The Preliminary Report also relies upon the fact that “the Neighbour expressed remorse about his conduct” as a further basis for its finding that there was “no legitimate reason” to identify [the Neighbour]. However, the ACMA has no evidence before it about the sincerity of such an expression of remorse (noting it was made to Nine in response to a request for comment), or [the Neighbour’s] conduct either before or after the relevant incident. Again, it would be a concerning restriction on reporting of matters in the public interest if it became the case that someone who trespasses on another person’s property in a threatening manner, but then later purports to express remorse, can effectively suppress the publication of their name on the basis of “privacy.” By way of illustration, if [the Neighbour] had hit [the Man] or his friend, both [the Man] and the friend would have been entitled to describe the alleged assault upon them, and name their alleged attacker. The fact that [the Neighbour] did not hit [the Man] does not somehow introduce an element of privacy to the incident.
6. Nine submits there was a public interest reason for the identification of both parties to the dispute. Hypothetically, had Nine broadcast the Report with [the Neighbour’s] face obscured and his name omitted, viewers would not have been able to properly understand the circumstances of the altercation (including the facial expressions by which [the Neighbour] is communicating in much of the footage). But more relevantly, the fact of the dispute and [the Neighbour’s] identity were already in the public domain, so [the Neighbour] would have been identified in any event to anyone who had seen it or cared to look for it. Further, Nine’s report was, in part, about the fact of the dispute having gone viral online – that is, the fact that a local dispute between two neighbours had already attracted a huge international audience. To report the matter without omitting the face and name of someone already identified was therefore proportionate.

[…]

Attachment C

Relevant provisions

**Relevant Code provisions**

3.5 Privacy

3.5.1 In broadcasting a news or Current Affairs Program, a Licensee must not broadcast material relating to a person’s personal or private affairs or which invades a person’s privacy unless:

(a) there is a public interest reason for the material to be broadcast; or

(b) the person has provided implicit or explicit consent for the material to be broadcast (or in the case of a person under 16, a parent or guardian has given implicit or explicit consent).

*Note: The broadcast of material that is publicly available or recorded in a public place will generally not be material relating to a person’s personal or private affairs or an invasion of privacy.*

1. Privacy Guidelines for Broadcasters <https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf> [↑](#footnote-ref-2)
2. The Licensee provided the ACMA with a link to the Online Video. [↑](#footnote-ref-3)
3. Privacy Guidelines for Broadcasters p 8 <https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf> [↑](#footnote-ref-4)
4. Privacy Guidelines for Broadcasters p 9 <https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf> [↑](#footnote-ref-5)
5. Privacy Guidelines for Broadcasters p 5 <https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf> [↑](#footnote-ref-6)
6. This test is drawn from case law—*Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 263; *London Artists v Littler* (1969) 2 QB 375 at 391. [↑](#footnote-ref-7)