Investigation report no. BI-657

| Summary |  |
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| **Licensee [Service]** | Tasmanian Digital Television Pty Ltd [Nine] |
| **Finding** | No 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** | 14 March 2022 |
| **Type of service** | Commercial - television |
| **Attachments** | A—The ACMA’s approach to assessing content |
| **Date finalised** | 1 September 2023 |

Background

On 11 November 2022, the Australian Communications and Media Authority (**the ACMA**) commenced an investigation under the *Broadcasting Services Act 1992* into a segment of *A Current Affair* (**ACA**).

The ACA segment was broadcast on Nine by Tasmanian Digital Television Pty Ltd (the **Licensee**) on 14 March 2022. The report was about an employment dispute (the **Report**).

The ACMA received a complaint with allegations that the Report breached the privacy, accuracy, impartiality, and corrections requirements in the Code.

The ACMA assessed the complaint and declined to investigate clauses 3.3.1 [accuracy], 3.3.3 [corrections] and 3.4.3 [impartiality] of the Code. These reasons were communicated to the complainant.

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

Issue: Privacy

Relevant Code provision

**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.

Finding

The Licensee did not breach 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?
* 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 was about an employment dispute. The introduction set up a central question – a former employee of a business (the **Former Employee**) claimed that he was fired from a managerial role for being ‘too fat’. The employer and owner of the business (the **Employer**) denied this claim.

The report included video footage of an interview with the Employer and an ACA reporter (**ACA Reporter**) on the veranda of the Employer’s residential property. The footage showed the ACA Reporter knocking on the Employer’s front door, then knocking on a back door, before walking up the stairs of the Employer’s rear veranda. The footage then showed the Employer standing on the veranda answering questions from the ACA Reporter (**Veranda Interview**). Various excerpts from the Veranda Interview were replayed throughout the Report.

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

For the ACMA to make a finding that clause 3.5.1 of the Code had been breached, a particular person must have been identifiable from the broadcast.

A person will be identifiable if, from the broadcast, their identity was apparent or could reasonably be 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 broadcast.

The Employer and his wife (the **Employer’s Wife**) were both identified by their names in the Report. The Employer was identified by reference to his full name and the Employer’s Wife was identified by reference to her first name and her marital status, which was sufficient to distinguish her from any other person.

The Employer was further identified by the inclusion of footage of the Veranda Interview and in photos included elsewhere in the Report, in which his face was clearly depicted.

**Did the broadcast material disclose personal information?**

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.

Personal information disclosed about the Employer

The ACA Reporter disclosed personal information about the Employer, including his full name and position as owner and manager of the business that was central to the employment dispute in the Report. The Report also included information about the Employer’s marital status.

The Licensee submitted that this material did not relate to the Employer’s personal or private affairs as it was publicly available information. The Licensee submitted that no other information relating to the Employer’s personal or private affairs was disclosed in the Report and that the Employer’s residential address was not visible in the video footage.

Noting the broad interpretation of ‘personal information’, the ACMA considers that the broadcast material disclosed personal information about the Employer in the form of his name, occupation and marital status.

Personal information disclosed about the Employer’s Wife

As noted above, the ACA Reporter referenced the Employer’s Wife’s first name and marital status in the Report on one occasion:

Well, we just had a big pow wow with [Employer], his wife [Employer’s Wife’s first name] and a PR rep he’s hired for some much needed crisis management.

The Licensee submitted that the broadcast material referencing the Employer’s Wife was not material relating to her personal or private affairs because it was available in the public domain. The Licensee submitted that the information was publicly available on a social media site, a media article and a booking.com listing for the business (‘managed by [Employer’s Wife’s name]’).

The Licensee submitted that it was factually accurate to report on the ACA Reporter’s conversation with the Employer and the Employer’s Wife, as participants in a relevant off-camera interview. The Licensee also submitted that the Employer’s Wife’s first name ‘is not personal or private information in this context, particularly given her involvement in the business that was the subject of the Report’.

Noting the broad interpretation of ‘personal information’, the ACMA considers that the broadcast material disclosed personal information about the Employer’s Wife in the form of her name and marital status.

**Was consent obtained from the Employer and the Employer’s Wife?**

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.[[2]](#footnote-3)

In the following section we consider whether consent was given for the broadcast of personal information about the Employer and his wife.

The Employer

The Employer’s concerns about privacy and consent are detailed below.

The complaint to the ACMA on 16 May 2022 states:

[ACA Reporter] trespassed onto my private back veranda to confront me with a camera at 8am in the morning.

In a letter to the Licensee, dated 7 May 2022, the Employer states:

[ACA Reporter] trespassed into my private back garden in *Hobart* […] and upstairs onto my private back veranda at 8am in the morning to catch me off guard and push a camera into my face. [ACA Reporter] was aware that as a private citizen I had no preparation or media training and would be unable to offer any clarity or defence.

In a letter to the Licensee, dated 14 June 2022, the Employer states:

Please advise where it was in the public interest to enter my private back yard and enter my private back veranda without my permission to catch me as a private citizen off guard at 8am in the morning? You then edited the footage to the most disparaging effect.

The Guidelines state that consent can be implied, such as when a person is a willing participant in an interview. On 30 November 2022, the Licensee submitted that the Employer provided implied consent for the material to be broadcast:

The Complainant was aware that the Interview had been recorded as it was filmed overtly by a camera person and the reporter announced himself as a representative of Nine. It is evident from the circumstances that the Complainant understood that he was speaking to a reporter from A Current Affair who was interviewing him on camera. The Complainant participated in the Interview and at no time did he ask the reporter to leave his property or indicate that he did not consent to Nine recording the Interview.

The Complainant was aware that the reporter was preparing the Report for broadcast on A Current Affair. The reporter had expressly indicated as much to the Complainant prior to, and after, conducting the Interview.

Following the Interview, the Complainant, his wife [the Employer’s Wife] and a public relations representative also participated in a further off-camera discussion regarding the subject matter of the Report. The Complainant had the benefit of advice from his public relations representative. At no time during that discussion did any participant indicate that the Complainant did not consent to the Interview being recorded or broadcast.

At all times from prior to the Interview up to broadcast of the Report, the Complainant had a copy of the reporter’s contact details. The Complainant corresponded with the reporter by email on multiple occasions. At no stage in correspondence did the Complainant indicate that he did not consent to the Interview being broadcast.

The Complainant was aware that the Interview (or portions of it) were likely to be broadcast as part of the Report as the factual matters canvassed in the Interview were core to the subject matter of the dispute between the Complainant and [the Former Employee].

[…]

On 9 February 2023 the Licensee provided more information to support its submission that the Employer provided implied consent for the Veranda Interview to be broadcast:

On or about 2 March 2022, [ACA Reporter] spoke with [the Employer], [the Employer’s Wife] and [the Employer's] public relations representative in person, in […]. This conversation occurred off-camera. Again, [the Employer] provided [ACA Reporter] with certain information relating to his version of events with respect to the subject matter of the Report. During this discussion, [the Employer] also considered whether he would provide a further on-camera interview. [The Employer] ultimately decided not to do so.

A transcript of the Veranda Interview is as follows:

ACA Reporter: [Employer], did you call [the Former Employee] fat?

The Employer: No I didn’t.

ACA Reporter: You didn’t?

The Employer: I didn’t do that. [the Former Employee] applied for the wrong job. It was as simple as that. It really is as simple as that. He applied for the wrong job.

[break to other footage]

The Employer: He applied for a General Manager job. The actual job… do we have to?

ACA Reporter: Yes.

[break to other footage]

ACA Reporter: Did you give [the Former Employee] a chance to move the couch? That’s all, did you give him a chance?

[break to other footage]

The Employer: I asked him if he was able to. I asked him if he was able to. Can I please sit down with you? Isn’t that the best way of doing it?

[break to other footage]

ACA Reporter: I’ve asked you for that and you declined and you sent me a statement that didn’t address the issue. You did not say, I did not call him fat.

[break to other footage]

The Employer: I did not call him fat. I did not call him fat. None of that happened. None of that happened at all.

As indicated in the Guidelines, the absence of an objection will not automatically be taken to constitute consent. The ACMA has reviewed records of verbal and email communication between the Complainant and the ACA prior to the broadcast date of 14 March 2022. The ACMA accepts that the Employer did not appear to object to ACA’s use of the Veranda Interview before the broadcast was aired.

Some viewers may have considered the Employer to have been an unwilling participant in the Veranda Interview. We note that there is some evidence to support that conclusion:

* While the Employer appeared to answer the ACA Reporter’s questions, the Employer had previously declined an interview via email and asserted that he was caught ‘off guard’ on his ‘private back veranda’ at ‘8am’.
* The Employer appeared to be surprised, flustered and ambushed by the ACA Reporter’s presence and appeared to be reluctant to answer questions, which was evident when he asked whether he had to continue with the Veranda Interview:

The Employer: He applied for a General Manager job. The actual job… do we have to?

ACA Reporter: Yes.

* In the Report, the ACA Reporter justified the Veranda Interview by stating he needed to speak to the Employer because ‘the statement he sent us didn’t address the specific allegations’. As indicated in the transcript of the Veranda Interview above, the ACA Reporter stated that the Employer ‘sent me a statement that didn’t address the issue. You did not say, I did not call him fat’.
* The ACMA has reviewed all correspondence between the ACA Reporter and the Employer prior to the broadcast of the Report. This includes an email from the ACA Reporter to the Employer dated 25 February 2022 with the questions put to the Employer and a request for an interview. In that email the ACA Reporter did not ask whether the Employer called the Former Employee ‘fat’, but rather asked about ‘the exact role [the Former Employee] was hired for/applied for, the [financial amount] he accepted from you upon his exit and the impact these allegations have had on you, your family and business’.
* On 27 February 2022, the Employer responded, stating he would not be available for interview but would provide a ‘statement’. The Employer’s statement to the ACA Reporter on 28 February 2022 appeared to answer the ACA Reporter’s questions and therefore addressed the specific allegations:

[the Former Employee] applied for the job of manager at our holiday retreat.

There was a misunderstanding between the parties as to what the job entailed. [The Former Employee] believed it was an office-based role only, however given the size of the business it is primarily grounds maintenance with some office admin.

Unfortunately, this misunderstanding only came to light once [the Former Employee] had arrived in Tasmania.

We discussed the issues that this misunderstanding presented but could not resolve them, so [The Former Employee] ceased to be employed. He asked for compensation, including his expenses to return to Queensland, and I paid this to him. He even sent an email to me in early January 2022 confirming that this payment meant we had reached “a full and final settlement”, and this matter was at an end.

Throughout this process [the Former Employee] was treated respectfully at all times. There was no request by anyone for [the Former Employee] and his family to vacate the accommodation once we had reached agreement on settlement. He left on his own accord.

In its submission*s* of 14 June 2023, the Licensee suggestedthat other evidence tends to support the conclusion that the Employer provided implied consent for the Veranda Interview to be broadcast. This includes the Licensee’s submissions that:

* The Employer was a willing participant in the Veranda Interview because he answered some questions from the ACA Reporter and he did not decline to speak to the ACA Reporter.
* The Employer’s reluctance to answer questions did not rise so high as to indicate that he was not ‘willing’ to participate.
* The Employer did not ask the ACA Reporter to stop filming or to leave his property.
* The Employer did not object to the broadcast of the Veranda Interview during or after a sit-down interview off camera that was attended by the Employer, the Employer’s Wife, and the Employer’s public relations representative.

The ACMA notes the submissions of the Licensee and is of the view that the Employer’s participation in the Veranda Interview probably met the threshold of what could reasonably be considered as the Employer being a ‘willing participant’ in an interview.

While the ACMA does not consider that the absence of an express request (in this case, from the Employer) will generally be probative (noting the Employer was not asked whether he consented to the broadcast of the Veranda Interview) the ACMA accepts that in this case by answering some questions from the ACA Reporter and by not declining to speak to the ACA Reporter, the Employer was a ‘willing participant’ in the interview.

Based on the available information and in all the circumstances, the ACMA considers that the Employer provided implied consent for the Veranda Interview to be broadcast.

The Employer’s Wife

In summary, the Licensee submitted that the Employer’s Wife gave her implied consent for the broadcast of the relevant material because she actively participated in an off-camera discussion with the ACA Reporter, and the discussion itself was not expressed to be ‘not for publication’.

The Licensee submitted that the Employer’s Wife was aware that her name would ‘likely be broadcast as part of the Report as a factual matter relevant to the off-camera discussion’ and the Employer and the Employer’s Wife did not contact the ACA Reporter to indicate that she did not consent to her name being broadcast in the Report.

The ACMA’s view is that there is not enough evidence about the nature of the Employer’s Wife’s participation in the off-camera discussion to deduce whether it was reasonable for the Licensee to infer her consent for the broadcast of her first name and marital status.

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

The Veranda Interview with the Employer

The footage of the Veranda Interview with the Employer was not in the public domain.

Was the Employer’s Wife’s first name and marital status in the public domain?

The Licensee provided information establishing that the Employer’s Wife’s first name and marital status was in the public domain.

The Licensee noted that, in addition to the Employer’s Wife’s public involvement in the operation of the business on a booking.com listing, media coverage by the Hobart *Mercury* on 1 April 2019 identifies the Employer’s Wife by name in an article regarding a walking trail near Strahan and the Employer’s Facebook profile features a photograph of himself and is titled ‘[Employer and Employer’s Wife]’.

The ACMA considers that the relevant broadcast material was in the public domain.

**Was the broadcast of the Veranda Interview in, and proportionate to, the public interest?**

The Licensee submits that there was a public interest reason for all footage included in the Report to be broadcast:

As the ACMA is aware, the Report concerned a dispute between the Employer’s business and [the Former Employee] regarding whether the decision made by the Employer to terminate [the Former Employee]’s employment was lawful (**Dispute**). [The Former Employee] commenced proceedings with respect to that matter and though he did subsequently discontinue those proceedings, he had not done so at the time the Report was broadcast.

As part of reporting on a Dispute that ultimately became the subject of proceedings, there was clear public interest including the position of both parties to the Dispute. The reporter sought to engage with the Employer to obtain his position on the Dispute by offering a sit-down interview, and by putting specific questions to the Employer regarding allegations made by [the Former Employee].

The Employer did not agree to a sit-down interview, and did not address the specific allegations made by [the Former Employee] in his response to the questions posed. As a result, the reporter conducted the Interview, during which he put specific allegations to the Employer and obtained his response. No other communication between the reporter and Employer up to that time contained the same content.

There was clear public interest in including portions of the Interview in the Report so that viewers could hear details regarding the Employer’s position in the Dispute, in his own words. It enabled viewers to form their own judgement regarding the worthiness of the position of each party to the Dispute in a way that a summary given by a reporter could not.

Nine also notes the general public interest in reporting on matters that ultimately end up the subject of proceedings, and on matters that go to how Australia’s industrial relations laws apply in specific cases (in the case of the Report, the general protections and discrimination provisions).

The ACMA’s position differs from the Licensee’s as the ACMA considers that the Employer had addressed the questions put to him in writing, as outlined in the discussion of consent above.

However, the ACMA accepts that there was an identifiable public interest for broadcasting the Report as a whole, given the nature of the employment dispute.

**Was the broadcast of the personal information about the Employer’s Wife in, and proportionate to, the public interest?**

The ACA Reporter’s reference to the Employer’s Wife was fleeting in the context of the Report. The reference was limited to noting her participation in an off-camera interview about the employment dispute. As established above, the Employer’s Wife is publicly associated with the Business online (‘managed by [Employer’s Wife’s name]’).

The ACMA considers that the inclusion of the Employer’s Wife’s name and marital status in the Report was in, and proportionate to, the public interest.

**Conclusion**

The ACMA’s view is that the broadcast of the Veranda Interview did include personal information about the Employer and the Employer’s wife.

However, in all the circumstances, the ACMA is of the view that the Employer provided implied consent for the broadcast of the Veranda Interview, as the Employer’s reluctant participation probably met the threshold of what could reasonably be considered as the Employer being a ‘willing participant’ in an interview.

The ACMA is satisfied that there was an identifiable public interest for broadcasting the Report as a whole, given the nature of the employment dispute.

For these reasons, the ACMA’s view is that the Licensee did not contravene clause 3.5.1 of the Code by broadcasting the Veranda Interview.

The ACMA is also satisfied that the reference to the Employer’s Wife was fleeting in the context of the Report and that the inclusion of her name and marital status in the Report was in, and proportionate to, the public interest.

For these reasons, the ACMA’s view is that the Licensee did not contravene clause 3.5.1 of the Code for broadcasting the personal information about the Employer’s Wife.

Attachment A

The ACMA’s approach to assessing content

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

Australian courts have considered an ‘ordinary reasonable’ listener or viewer to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person’s general knowledge and experience of worldly affairs.[[3]](#footnote-4)

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

1. Privacy Guidelines for Broadcasters <https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf> [↑](#footnote-ref-2)
2. Privacy Guidelines for Broadcasters p 4 [acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf](https://www.acma.gov.au/sites/default/files/2019-12/Privacy%20guidelines%20for%20broadcasters.pdf) [↑](#footnote-ref-3)
3. *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164–167. [↑](#footnote-ref-4)