

Investigation Report No. 2431

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| File No. | ACMA2010/1173 |
| Licensee | Channel Seven (Sydney) Pty Ltd |
| Station | ATN Sydney |
| Type of Service | Commercial Television |
| Name of Program | <i>Seven Nightly News</i> |
| Date of Broadcast | 20 May 2010 |
| Relevant Legislation/Code | Clauses 1.9.6 and 4.3.5 of the <i>Commercial Television Industry Code of Practice 2010</i> . |

Investigation Conclusion

The licensee of ATN, Channel Seven (Sydney) Pty Ltd, in relation to the broadcast of *Seven Nightly News* on 20 May 2010, did not breach clauses 1.9.6 or 4.3.5 of the *Commercial Television Industry Code of Practice 2010*.

The complaint

On 7 June 2010, the Australian Communications and Media Authority (the ACMA) received an unresolved complaint ('the first complaint') about a 'breaking news' story in *Seven Nightly News*, broadcast on 20 May 2010 by Channel Seven Sydney Pty Ltd, the licensee of ATN ('the licensee').

On 24 October 2010, the ACMA received a further unresolved complaint ('the second complaint') about the same news story.

The story concerned the resignation of a member of the New South Wales Legislative Assembly as Minister for Transport and Roads ('the Minister') and Seven's investigation of his attendance at a club ('the KK Club').

The substance of the first complaint was:

I have received an unsatisfactory response to a complaint I made to Channel 7 expressing my concern that on 21st May, Channel 7's News Report chose to exposed [sic] [the Minister's] private life in what I believe to be a homophobic manner.

I feel this contravenes [sic] an unnecessary invasion of his privacy inline [sic] with the Commercial Television Industry Code of Practice 2010.

... I feel Channel 7's choice to expose him was a provocative act which was intended to cause severe ridicule to him on the grounds of his sexual preference.

...

This is an obvious political and moral attack on a man due to his life choices of attending sex of [sic] premises venue. No one but [the Minister] needs to be aware of this lifestyle choice.

With regard to Clause 1.9.6, I feel there has been a homophobic element in the choice to exposure [sic] this man's private life in order to ridicule him. This was a private matter and this type of exposure was likely to force his resignation due to his embarrassment.

The ACMA has investigated the first complaint against clauses 1.9.6 (proscribed material) and 4.3.5 (privacy) of the *Commercial Television Industry Code of Practice 2010* (the Code).

The substance of the second complaint was:

Channel 7 quotes Clause 4.3.5 of the Commercial Television Industry Code of Practice...[which] deals with the broadcasting of private material about a public figure.

They believe the news item raises questions about [the Minister's] fitness for public office. I struggle to comprehend how [the Minister's] sexuality could make him unfit for any of the offices he held during his time as a Minister of the NSW State Parliament.

When interviewed [the Minister] stated that at no time whilst he was Minister for Police, or Minister for Transport and Roads was he ever compromised.

Rather than relying on Mr Barrie Unsworth's comments as to whether [the Minister] had compromised himself perhaps it would have been fairer to all parties had an Ethicist been consulted.

You would know, and as I know, there are now and have been bisexual members of both houses of Parliament, State and Federal. I am 81 years and in all my years of taking an interest in politics I have never heard of any politicians, past or present, being outed in the public interest or for their fitness for office.

The ACMA has investigated the second complaint against clause 4.3.5 (privacy) of the Code¹.

The program

The *Seven Nightly News* program is broadcast nationally on weeknights from 6:00 pm – 6:30 pm.

A full transcript of the news bulletin broadcast on Thursday, 20 May 2010 ('the bulletin') is provided at Attachment 'A'.

The bulletin reported on the Minister's resignation following the licensee's investigation into his use of a ministerial car to visit a "gay sex club" (the KK Club). It included references to recent incidents within his portfolio and footage of him reportedly leaving the club.

The ACMA has assessed the complaint against the relevant provisions of the Code, drawing upon the following material:

- a copy of the broadcast provided by the licensee,
- the complainants' submissions,
- the licensee's letters of response to the complainants and its submissions to the ACMA, and
- the ACMA's *Privacy Guidelines for Broadcasters* (2005 edition) (the *Guidelines*).

Other consulted sources are identified where relevant.

'Ordinary, reasonable viewer' test

In assessing content against the Code, the ACMA considers the meaning conveyed by the relevant material. This is assessed according to the understanding of an 'ordinary reasonable viewer'.

¹ Neither of the complainants were satisfied with the licensee's response to their complaint and referred the matter to the ACMA for investigation. Sections 148 and 149 of the *Broadcasting Services Act 1992* set out the ACMA's jurisdiction in relation to complaints made under codes of practice.

Australian courts have considered an 'ordinary, reasonable viewer' to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs.²

The ACMA asks, what would the 'ordinary reasonable viewer' have understood this program to have conveyed? It considers the natural, ordinary meaning of the language, context, tenor, tone, inferences that may be drawn, and in the case of factual material, relevant omissions (if any).

Once this test has been applied to ascertain the meaning of the broadcast material, it is for the ACMA to determine whether the material has breached the Code.

In this case, the ACMA is satisfied the 'ordinary, reasonable viewer' would have understood the bulletin to be about:

- the Minister's resignation in response to the licensee's revelations to him that it had material concerning his visit to a gay club, as well as information about aspects of his personal life; and
- the Minister's performance in matters of politics, government and public administration, and certain political incidents in the lead up to his resignation.

Through the detailed description of the services offered by that club, and the inference that the Minister had attended it on more than one occasion, the bulletin also strongly implied that he had engaged in extra-marital, homosexual activity. In common parlance, it 'outed' the Minister.

Issue 1: Proscribed material - Sexual Preference

Code issues raised by the complaint

Proscribed material

1.9 A licensee may not broadcast a program ... which is likely, in all the circumstances, to:

...

1.9.6 provoke or perpetuate intense dislike, serious contempt or severe ridicule against a person or group of persons on the grounds of ... sexual preference.

...

1.10 ... none of the matters in clause 1.9 will be contrary to this Section if:

² *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at 164-167.

1.10.3 said or done in broadcasting a fair report of, or a fair comment on, any event or matter of identifiable public interest.

Complainant's submissions

The first complaint is set out above. The complaint alleges that the program ridiculed the Minister on the grounds of sexual preference.

Licensee's submissions

The licensee's submissions are set out in full at Attachment B.

Finding

The licensee did not breach clause 1.9.6 of the Code during the bulletin broadcast in *Seven Nightly News* on 20 May 2010.

Reasons

The ACMA adopts the following general approach when it assesses broadcast material against clause 1.9.6 of the Code.

When a statute or code uses words or terms which it does not define, the ACMA considers common dictionary definitions, interpretations given by court and tribunal decisions, as well as the context in which the words are used in the statute or code.

'likely, in all the circumstances'

The phrase, 'likely, in all the circumstances', imposes an objective test³ and implies a real and not a remote possibility; something which is probable.⁴

'person or group of persons'

The complaint is that the Minister was attacked and ridiculed on the basis of his sexual preference.

The broadcast material and the complainant's submissions do not suggest the complaint concerns a group of persons.

The ACMA considers that the broadcast material relates to an individual person, the Minister.

'on the grounds of'

The provocation or perpetuation of intense dislike, serious contempt or severe ridicule must be based on one or more of the grounds specified by clause 1.9.6 of the Code.

³ *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352 at 356-357 [16].

⁴ See the discussion in *Re Vulcan Australia Pty Ltd and Comptroller-General of Customs* (1994) 34 ALD 773 at 778.

In the ACMA's view there must be an identifiable causal link between the identified ground and the intense dislike, serious contempt or severe ridicule for clause 1.9.6 of the Code to apply.

The complainant identified the ground as 'sexual preference'.

As the bulletin reveals the Minister's attendance at a club "for men who prefer men", the ACMA is satisfied that the relevant ground, for the purpose of clause 1.9.6 of the Code, is sexual preference.

'intense dislike' 'serious contempt' and 'severe ridicule'

The meaning of the words 'intense', 'serious' and 'severe' indicate that the Code proscribes very strong dislike, contempt or ridicule. The Code sets a high test for proscribed material and it is not sufficient that the program induced a mild or moderate reaction.

In the tribunal decision of *Kazak v John Fairfax Publications Limited*, the NSW Administrative Decisions Tribunal (ADT) quoted the following dictionary definitions of 'serious contempt' and 'severe ridicule':⁵

'serious' means 'important, grave (Oxford); 'weighty, important' (Macquarie);

'contempt' means 'the action of scorning or despising, the mental attitude in which something or someone is considered as worthless or of little account' (Oxford); 'the feeling with which one regards anything considered mean, vile, or worthless' (Macquarie);

'severe' means 'rigorous, strict or harsh (Oxford); 'harsh, extreme' (Macquarie);

... 'ridicule' means 'subject to ridicule or mockery; make fun of, deride, laugh at' (Oxford); 'words or actions intended to excite contemptuous laughter at a person or thing; derision' (Macquarie).

The complaint about the bulletin is expressly concerned with 'severe ridicule'. The meaning of this term was considered by the ADT in *Bums v Laws (No 2)*⁶:

... 'severe' is a qualifier but there is no sharp dividing line between 'ridicule' and 'severe ridicule'. In any case where the issue arises, a value judgement must be made.

The ACMA is required to assess whether the bulletin was likely in all the circumstances, to provoke or perpetuate intense dislike, serious contempt or severe ridicule against the Minister on the ground of his sexual preference.

The material may have provoked feelings of dislike, contempt or ridicule in some viewers.

⁵ [2000] NSWADT 77 at [40].

⁶ [2007] NSWADT 47 at [120].

However, the ACMA considers the material was not likely to provoke or perpetuate intense dislike, serious contempt or severe ridicule in the ordinary reasonable viewer against the Minister on the ground of sexual preference.

Information about sexual preference was provided factually, without adverse comment, and in the context of an account of the Minister's activities leading to his resignation. The bulletin did not include expressions of dislike, contempt or ridicule in association with the Minister.

As the ACMA finds no breach of clause 1.9.6, it is unnecessary to consider clause 1.10.3 of the Code in Issue 1.

Issue 2: Privacy - News and current affairs

Code issues raised by the complaint

Privacy - News and current affairs programs

4.3 In broadcasting news and current affairs programs, licensees:

4.3.5 must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast.

4.3.5.1 subject to the requirements of clause 4.3.5.2, a licensee will not be in breach of this clause 4.3.5 if the consent of the person (or in the case of a child, the child's parent or guardian) is obtained prior to the broadcast of the material.

Complainants' submissions

The first and second complaints are set out above. Each alleges that the program invaded the Minister's privacy. The second complaint queries how the news item raises questions of the Minister's fitness for public office.

Licensee's submissions

The licensee's response to the ACMA on the first complaint is at Attachment B. It has made no further submissions to the ACMA in response to the second complaint.

The licensee submitted that the Guidelines set out a number of examples which may justify an intrusion into an individual's privacy on public interest grounds, one of which is 'matters of politics, government and public administration'. The licensee submitted that the material raised questions as to the Minister's fitness for office and capacity to carry out his duties, affecting public confidence. The licensee's submissions also addressed the following matters:

- the Minister's use of the resources of public office, including the ministerial car;

- the Minister's handling of the Sydney Metro project and the recent F3 traffic snarl within his portfolio;
- the Minister's keeping a 'secret' while holding senior positions as Police Minister and on the New South Wales Crime Commission, making him potentially vulnerable to compromise or blackmail;
- the Minister's presentation of himself to the electorate, including as a family man; and
- the requirement for Ministers to exhibit honesty, transparency and accountability, and the highest standards of propriety and discretion.

The submissions also addressed the accuracy of the material, the Minister's expectation of privacy, and consent. They also included statements made by the Premier and a former Premier after the broadcast, in support of the public interest arguments for the broadcast.

Finding

The licensee has not breached clause 4.3.5 of the Code.

Reasons

The Code - interpretation of clause 4.3.5

Clause 4.3.5 prevents licensees from broadcasting material which:

- uses material relating to a person's personal or private affairs, or
- which invades an individual's privacy.

If it is found that material falling under either limb has been broadcast, a breach of clause 4.3.5 of the Code will occur unless there is an identifiable public interest reason for broadcasting the material.

In addition, under clause 4.3.5.1, a breach will not occur if the consent of the person is obtained prior to broadcast of the material.

Material relating to person's personal or private affairs or which invades an individual's privacy

The broadcast of 20 May 2010 contained information about the Minister's activities and included footage of him leaving the KK Club, together with information about the services available there.

The information relating to and footage of the Minister's visit to the KK Club which was broadcast did not relate to the conduct of his Ministerial duties. The broadcast included reference to the Minister's visit to the KK Club taking place "on Tuesday night, taking advantage of Parliament's recently introduced family-friendly hours", but the related events did not take place during Parliament's sitting hours or on Parliamentary premises. The Minister was not discharging official duties at the relevant time.

Personal or private affairs

Information about a person's sexual preference and activities is generally regarded by the ACMA as 'material relating to a person's personal or private affairs'.

It is also the ACMA's view that, consistent with the judgment in *Jane Doe v Australian Broadcasting Corporation & Ors*⁷, limited disclosure about sexual preference and activities, on a confidential basis or to a "trusted circle", does not deprive such information of its personal or private nature.

Invasion of privacy

Where conduct occurs in a public place, is not particularly sensitive or takes place in the presence of others, it does not necessarily follow that broadcasting related footage will not involve an invasion of privacy. So, too, while surreptitious filming may suggest an expectation of privacy, it does not necessarily follow that broadcasting that footage will invade an individual's privacy. Each broadcast must be considered in its own context and on its own merits.

In its investigation report No 2027, the ACMA noted:

An activity or conduct that a person is engaged in can be considered as private (such that it should not be broadcast) where that type of activity or conduct is something that an ordinary reasonable viewer would consider to be private, would have a reasonable expectation that such activity should be unobserved...⁸

It is true the Minister entered and exited the KK Club via a busy public road, and he could have been observed inside the club by other club patrons. However, the ACMA is satisfied that the footage and information relating to the Minister's out-of-hours conduct attending premises offering sexual services is something that an ordinary reasonable viewer would consider private. Although a limited number of people may have been aware of the Minister's conduct, there is no evidence that these matters were in the public domain.

Accordingly, in this case the ACMA is satisfied that the broadcast used material relating to the Minister's personal or private affairs and invaded his privacy.

The ACMA discerns from the licensee's submissions that it does not dispute that its broadcast breached both limbs of the privacy provisions set out in clause 4.3.5.

⁷ [2007] VCC 281 at [119] and [120-123];

⁸ ACMA Investigation report no 2017, p.4

Consent prior to broadcast of the material

Clause 4.3.5.1 of the Code provides that a licensee will not be in breach of clause 4.3.5 if the person's consent – express or implied - is obtained before the broadcast of the material.

The Guidelines note:

If consent is given by an individual to the use of private material then that individual has, in effect, waived their right to claim a breach of privacy. Consent must be informed and can be express or implied.⁹

In respect of public figures, the Guidelines continue:

The broadcast of private material about a public figure may be considered reasonable:

- if the person has actively drawn media attention to material that would usually be considered private, and can thus be held to have consented to its broadcast; ...

The licensee submitted that the Minister had a chance to consider the material and chose to resign and apologise; the licensee informed the Minister of its proposed broadcast well before it went to air and gave him the opportunity to respond to the material; and the Minister did not himself raise issues of privacy.

There is no evidence that prior to its broadcast the Minister actively drew attention to, or gave his consent to the disclosure of, the material relating to his personal or private affairs or which invaded his privacy. The ACMA is not satisfied that merely informing the Minister of the impending broadcast in what clearly must have been extremely stressful circumstances for the Minister, and simply receiving no response, can be construed as consent to the broadcast of material which related to his personal or private affairs or which invaded his privacy.

Identifiable public interest

Clause 4.3.5 permits a licensee to use material which relates to a person's personal or private affairs, or which invades an individual's privacy, where there is 'an identifiable public interest' for the material to be broadcast.

In its submissions (Attachment B), the licensee asserts that there were public interest justifications for the broadcast of the material.

The Guidelines state:

The broadcast of private material about a public figure may be considered reasonable:

⁹ The Guidelines p 3.

- ...if the private material raises questions about the person's fitness for office or capacity to carry out his or her public duties or activities, and is accordingly warranted in the public interest.

...

The use of private material without consent may be warranted if there is an identifiable public interest in the material being broadcast.

Not all matters which interest the public are in the public interest.

Whether something is of public interest will depend on the circumstances including, for example, whether a matter is capable of affecting the people at large so they might be legitimately interested in, or concerned about, what is going on or, or what may happen to them or others.

Examples of public interest matters which may justify an intrusion into an individual's privacy include but are not limited to:

- matters of politics, government and public administration

...

Public interest in a story as a whole may not justify use of particular material that intrudes on the privacy of an individual. The broadcast of such material must contribute to the public's knowledge and understanding of the issues involved in the overall subject.¹⁰

Whether there was an identifiable public interest reason for the broadcast of private material

Although the ACMA considers that the Code and Guidelines provide privacy protections to everyday individuals and public figures (including politicians) alike, the Authority also accepts that those holding public office will be open to greater and more frequent scrutiny in their personal lives than other citizens as a very consequence of their public office. In these cases, the public interest exemption to the prohibition of the broadcast of private material is more likely to apply.

To the extent that the Minister's activities were secret, the ACMA also accepts that engaging in covert activity while in a position of public responsibility or administration could make a person vulnerable to being compromised. This would be so even when that secret or activity pertains to something that is not unlawful or criminal. Holders of Ministerial offices and other high public offices, especially in positions relevant to the administration of law enforcement or criminal justice, may have special vulnerabilities in this regard.

However, that mere vulnerability cannot be sufficient to permit the broadcast of otherwise protected material in the absence of, for example, any identifiable

¹⁰ Guidelines pp 3-4.

basis upon which to apprehend actual compromise (which absence was the case here).

Given, however, the then existing public criticism of the Minister and prior questioning about his discharge of his office, the sensitive public roles he held and had recently held, the suddenness of his resignation and the lack of insight that the explanation for his resignation (that is "for personal reasons") provided, a relevant and legitimate public interest arose (namely the need for a deeper explanation of the circumstances behind the resignation). This is so because the community could then be better able to assess whether or not the Minister's discharge of government and/or public administration had or had not been improper or had or had not been compromised.

On balance, the ACMA accepts that in these particular circumstances the linkage between the private material and an identifiable public interest was provided.

The public interest was an identifiable one in that it was capable of articulation (that is, it was more than some bland assertion). This was the only identifiable matter of public interest.

All the other matters touched on by the licensee in its broadcast were not of themselves, individually or collectively, of an identifiable public interest in connection with the private material. They were incorrect, ill founded or irrelevant.

Therefore, in the particular circumstances and for the reasons noted above, the ACMA considers an identifiable public interest was available to permit broadcast by the licensee of the private material.

On this basis the licensee did not breach clause 4.3.5 of the Code as there was an identifiable public interest in broadcasting the material.

Decision

The Australian Communications and Media Authority determines for the above reasons that the licensee of ATN, Channel Seven (Sydney) Pty Ltd, in relation to the broadcast of *Seven Nightly News* on 20 May 2010, did not breach clauses 1.9.6 or 4.3.5 of the *Commercial Television Industry Code of Practice 2010*.

The Common Seal of the Australian Communications and Media Authority was affixed to this document in the presence of:



Signature of Member

CHRIS CHAPMAN

Name (please print)

Signature of Member/General Manager

Richard Lancelot Bean

Name (please print)

Dated this

23rd

day of

December

2010

Attachment A

Full transcript of the 'breaking news' segment: 'DC, Transport Minister, resigns, broadcast in *Seven Nightly News* on 20 May 2010

[Chris Bath, presenter] Good evening, Transport Minister, DC has announced his resignation after Seven News confronted him with questions about his use of his taxpayer-funded car to visit a gay sex club.

Seven's Adam Walters is at Parliament House. Adam, how has this drama unfolded?

[Adam Walters] Chris, a little more than an hour ago DC met with Premier Kristina Keneally to offer his resignation and she accepted it without hesitation. His shock departure follows an investigation by Seven News into how [the Minister] was using his ministerial car to visit a sex club in the Premier's eastern suburbs electorate of Heffron. [the Minister] is a former police minister, as transport minister more recently, he presided over the debacles of the Government's \$500 million Metro rail blow-out to Rozelle and more recently, the F3 traffic debacle on April 12. But *this* was a crisis from which he was never destined to recover.

[The report shows footage of [the Minister] leaving a building and walking along a street, interspersed with the news reporter's comments].

[reporter] This is Transport Minister DC leaving a sex venue in the electorate of Premier Kristina Keneally. The Minister had been in Ken's of Kensington for more than two hours on Tuesday night, taking advantage of Parliament's recently introduced family-friendly hours. [the Minister] excused his driver and drove himself to the gay sauna in his ministerial car. Formerly known as Ken's Karate Klub, or KKK, the establishment charges a \$22 entry fee and assures clients of discretion and security cameras. On its website it offers services for men who prefer men, including a porn lounge, sauna and spa.

[footage showing the webpage of the club while the reporter makes the comments]

Since 1999, [the Minister] has campaigned strongly and successfully as a family man in his Wollongong seat of Keira. He sends constituents Christmas cards featuring his children and wife who is battling cancer. Entitled to an annual Sydney allowance of almost \$45,000, DC also lives in one of two apartments he owns in Potts Point.

[footage showing DC leaving the club is again shown after this comment]

Revelations of his double life came as the Opposition applied more pressure on the Minister to explain his movements on the night of the F3 traffic chaos,

that's when thousands of central coast residents didn't get home to their families until after midnight.

[footage of the traffic during this comment]

[footage of parliament question time]

[Senator Stoner] This house condemns the Minister for Transport and Roads for going missing while most of his senior bureaucrats worked to fix the F3 fiasco.

[reporter] Department of Transport Director General, Les Wielinga, also refused to answer whether he was in contact with [the Minister] during the April 12 meltdown.

[segment of interview, Adam Walters] You're the Director General. Are you pretty confident that your records will reflect close communication with the Minister on that night of the F3 debacle?

[Les Wielinga] As I said Adam, I can't make any comments on that until the inquiry's complete.

[reporter] The Minister went on the attack in Parliament, taking aim at the deputy Opposition Leader

[footage of DC in Parliament]

[DC] 'Mr Speaker, indeed Mr Stoner is out of control'

[Adam Walters] But in the end Chris, circumstances were beyond the control of [the Minister]. A short time ago he issued this statement –

'I have resigned as Minister for Transport and Roads for personal reasons'

[Adam Walters] Not reasons relating to his ministerial duties.

[David Campbell] 'I apologise to my wife, family, colleagues, staff, and community for letting them down'.

He confirms in this statement he will be staying on as the member of his Wollongong seat of Kelra, Chris.

[Chris Bath] Has the Premier had anything to say publicly?

[Adam Walters] Not publicly, as we speak there is growing pressure inside this building [points to State Parliament House] for Ms Keneally to come forward and explain why she was so quick to accept DC's resignation.

[Chris Bath] what damage will this do to her government

[Adam Walters] Ten months before an election Chris, immeasurable damage. Transport, the number one issue going to the polls next year, she now has to find a new minister to defend all over again, the debacles thus far.

[...]

[Chris Bath] Adam, considering [the Minister] campaigned on family values, can he really stay on as an MP?

[Adam Walters] That's going to be the subject of intense debate no doubt. Since 1999, DC has campaigned on family values. We saw that he included his family – his sons, his wife, in campaigning. They feature prominently on Christmas cards. It is now going to become a war between the factions to see if he can recover from this in any way, Chris.

[...]

[Chris Bath] DC has just left Government House after resigning as Transport Minister. It is not clear where he is heading, having earlier released a statement apologising to his family and community. A Seven News investigation caught him using a taxpayer-funded car to visit a sex club.

Attachment B

Clause 4.3.5

Seven notes that Clause 4.3.5 of the Code provides that licensees *'must not use material relating to a person's personal or private affairs, which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast'*.

Seven was at the time of broadcasting the News Report, and remains strongly of the view that there was a clear public interest for the material to be broadcast.

Seven submits that the News Report was consistent with the Code's Privacy Guidelines which make particular reference to the position of public figures as follows:

*'... the broadcast of private material about a public figure may be considered reasonable if the private material **raises questions** about the person's fitness for office or capacity to carry out his or her public duties or activities, and is accordingly warranted in the public interest'* (emphasis added).

The Privacy Guidelines also set out a number of examples of public interest matters which may justify an intrusion into an individual's privacy, one of which is 'matters of politics, government and public administration' which Seven submits are the key themes of the News Report. Seven firmly believes the report raised questions about [the Minister's] fitness for office and that to do so is a hallmark of our vigorous democracy. [The Minister] is a publically elected official and was, at the time of the broadcast, a Minister of the New South Wales Government. He had held extremely important and sensitive positions and portfolios which have a direct bearing on the lives of the citizens of New South Wales. [The Minister] enjoyed these public appointments, as well as the resources of public office, by virtue of the trust placed in him by his constituents and the community to whom he is accountable.

Most recently [the Minister] as the Minister for Transport & Roads held one of the most senior offices in the New South Wales Government. Prior to that, between April 2007 and September 2008, [the Minister] was Minister for Police overseeing the New South Wales Police Force, a position of profound influence in our community involving access to the most sensitive of information concerning law enforcement in the State. As Minister for Police, [the Minister] was ultimately responsible for a multitude of highly sensitive decisions concerning law enforcement impacting upon individuals and the wider community who are subject to its processes.

As Minister for Police, [the Minister] also had responsibility for the New South Wales Crime Commission Act. The principle [sic] functions of the Commission, as stated in its Annual Report, include:

- Investigate matters relating to relevant criminal activity.
- Assemble admissible evidence for submission to the Director of Public Prosecutions.
- Review police inquiries.
- Furnish reports relating to illegal drug trafficking and organised crime.

[The Minister] was Presiding Member of the Commission's Management Committee, the principle [sic] functions of which are stated in the Commission's Annual Report to include:

- Referring relevant criminal activities to the Commission for investigation.
- Referring to the Commission, for review, police inquiries into matters relating to criminal activities.
- Arranging for police task forces to assist the Commission to carry out investigation into matters relating to relevant criminal activities.
- Reviewing and monitoring generally the work of the Commission.

Clearly, [the Minister] held offices and presided over legislated functions of immense public influence requiring the highest standards of propriety and discretion, such that [the Minister] could not through his own actions place in [sic] himself in any situation which could make him susceptible to compromise or blackmail. Furthermore, as a matter of perception it was beholden on [the Minister] not to undermine the public's confidence in the public institutions which [the Minister] serves and has served. The role played by the News Report in raising questions about the way in which [the Minister] has carried out his duties as a member of parliament and government minister is illustrated by the fact that following Seven's broadcast, it has emerged that [the Minister] was previously investigated by the NSW Police at the suggestion of the then Premier Morris lemma and that that investigation has now been referred to the Police Integrity Commission. I attach copies of some of the recent media coverage of this issue.

Seven accurately reported that [the Minister] had frequented [name of club] and the nature of the activities and services at that establishment which are advertised on its website. As [the complainant] himself notes in his email to you dated 7 June, 'the venue he attended is a public venue ...' [The club] is located on Anzac Parade, a busy road in

Sydney's Eastern suburbs. [The Minister] parked his ministerial vehicle nearby. Seven only filmed [name of politician] in a public place, entering and exiting the premises, where he was clearly visible to passers-by. Furthermore, the establishment does not afford patrons privacy within the confines of the premises as they freely mix with one another. The establishment films patrons as they enter and exit the premises. In these circumstances, we believe it was reasonable for [the Minister] to expect that it could become known that he had attended this establishment such that he could become susceptible to compromise or blackmail.

Seven also notes that it did not broadcast any material concerning [the Minister] until [the Minister] had had a chance to consider it and chose to resign and apologise. At that point alone, there existed an additional public interest to broadcast information concerning his resignation, including the reasons for it and the circumstances in which it occurred. It is also important to note that Seven informed [the Minister] of its proposed broadcast well before the News Report went to air and gave him an opportunity to respond to the material which Seven had gathered. [The Minister] did not at that stage or subsequently raise issues of privacy. Nor has Seven received any form of complaint from [the Minister] about the News Report. Rather, the complainant in this instance is a person who seems to be unrelated to [the Minister] and who has apparently without the knowledge of [the Minister] taken it upon himself to raise issues concerning [the Minister's] privacy.

We note the Honourable Premier of New South Wales, Ms Kristina Keneally, the most senior public State Official, accepted [the Minister's] resignation as Minister of Transport & Roads as soon as it was tendered. She commented that '[the Minister] came to me and told me directly that this was a secret he had been carrying for over two decades'. She also said, 'I think it is appalling that he kept this secret, particularly from his family and his colleagues. It is appalling that he lived a lie'. Ms Keneally also confirmed the morning after the report that she had questioned [the Minister] concerning his vulnerability to blackmail as follows 'it was put to [the Minister] this morning directly if he'd ever even been the subject of a blackmail or intimidation as a result of this secret and he clearly and definitely said no. In relation to [the Minister's] use of his ministerial vehicle to visit the establishment, Ms Keneally said 'I do not believe it is acceptable for him to use the resources of his office, particularly his car, in the fashion that he did'. Seven believes Ms Keneally's comments support our position that the report raised questions about the Minister's fitness for office and was in the public interest.

Former Labor Premier of New South Wales Mr Barrie Unsworth, who we believe as a consequence of his former position and his many years in public service is suitably qualified to comment, was unequivocal in

his assessment of [the Minister]. Mr Unsworth said: 'If you go into public life you're under scrutiny and whatever you do has got to be beyond reproach ... [the Minister] had been the Police Minister and he's been on the State Crime Commission, and he's frequented places where he's easily recognised ... We've got a criminal milieu in this city and he has laid himself open to all sorts of threats and blackmail'. We highlight Mr Unsworth's comments as further confirmation that the potential vulnerability of [the Minister] to blackmail or compromise [sic] has been seen to be very much at issue in relation to [the Minister's] conduct.

Seven's report was also set against the background of widespread public criticism of [the Minister's] handling of the Sydney Metro project and the recent F3 traffic snarl, as well as the extent to which the secret [the Minister] kept from his colleagues and his constituents for more than twenty years raised questions regarding his honesty and transparency as a publically elected official, including in terms of how he presented himself to the electorate.

In Seven's submission, it is beyond doubt that there was a clear and explicitly identified public interest reason for the broadcast of the News Report. In addition, the News Report dealt objectively and appropriately with material relating to [the Minister] private affairs to the extent that it raised questions about [the Minister's] public office and duties and his relationship with his constituents. For these reasons, Seven submits that there has been no breach of clause 4.3.5 of the Code.

Clause 1.9.6

Seven strongly rejects any suggestion that it has contravened clause 1.9.6 of the Code. Whilst the News Report referred, at least implicitly, to [name of politician] sexual proclivities or practices, his sexual preference was not the focus of the report and was not referred to in such a way as to 'provoke or perpetuate intense dislike, serious contempt or severe ridicule' against [name of politician] on the basis of his sexual preference. Rather, to the extent it was concerned with sexual matters at all, the News Report related to the secret behaviour engaged in by [name of politician] and the possible effects of this secrecy on the carrying out of his duties as a state Minister.

The News Report made no criticism or comment on [the Minister's] sexual preference per se, nor did it make any comment about [name of club], its patrons or its business model – Seven was concerned only with [the Minister's] secret acts and his deception of his constituents and the people of New South Wales. In this regard we note that prominent Gay activist ... did not consider Seven to be 'homophobic' in its broadcast of the News report. He has identified the central issue sought to be made in the News Report and commented that 'There are

risks involved. You can't run around having sex in venues as a prominent minister and not expect to be recognised'.

Further, the vast majority of the media coverage which followed the News Report suggests that it in fact provoked a very sympathetic view of [the Minister] and the fact he felt compelled for so many years to lead a 'double life'. Seven is unaware of any person who reacted to its News Report with feelings so strong as 'intense dislike' or 'serious contempt' for [the Minister] on the grounds of his sexual preference.

Seven submits that it was neither its intention nor the effect of the News Report, viewed in all the circumstances, to provoke any such reaction as referred to in clause 1.9.6 of the Code and that accordingly, no breach has occurred.