

# Privacy guidelines for broadcasters

DECEMBER 2011

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Published by the Australian Communications and Media Authority

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# Privacy guidelines for broadcasters

## Introduction

Privacy protections specific to broadcasting are set out in the various broadcasting codes of practice that are developed by industry and registered by or, in the case of the national broadcasting codes, notified to, the ACMA.<sup>1</sup>

These codes can be found on the [ACMA website](#). Their privacy provisions reflect the balance that must be struck between the media's role in informing the public and an individual's expectation of privacy.

A breach of these code privacy provisions will be investigated by the ACMA when:

- > a code privacy complaint has been made to a broadcaster in accordance with the applicable code
- > the broadcaster has not responded within 60 days or the complainant considers the broadcaster's response inadequate<sup>2</sup>
- > a complaint is then made to the ACMA.

These guidelines are intended to

- > increase general awareness of the privacy obligations under the various broadcasting codes
- > assist broadcasters to better understand their privacy obligations under these codes.

The guidelines deal only with the codes. They do not deal generally with unlawful, unethical or distasteful journalistic practices. Nor do they deal with privacy and privacy-related laws generally.

Some codes offer express privacy protections only in the context of news and current affairs broadcasts. Other codes offer privacy protections in respect of all broadcast content. Moreover, the privacy protections offered differ.

The precise privacy obligations to which each broadcaster is subject will depend on the terms of the applicable code.

The outcome of any investigation will depend on the facts of the case.

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<sup>1</sup> The codes of practice relating to commercial television and the radio and community broadcasting sectors are developed by broadcasters and registered by the ACMA under section 123 of the *Broadcasting Services Act 1992* (BSA). The ABC codes of practice are developed and notified to the ACMA under section 8 of the *Australian Broadcasting Corporation Act 1983* and the SBS codes of practice are developed and notified to the ACMA under section 10 of the *Special Broadcasting Service Act 1991*.

<sup>2</sup> Sections 148 and 150 of the BSA.

## The general principle

Generally, the codes protect against the broadcast of material that:

- > relates to a person's personal or private affairs—for example, by disclosing personal information; or
- > invades a person's privacy—for example, by intruding upon his or her seclusion.<sup>3</sup>

## Investigation steps

When investigating the alleged breach of a code privacy provision, the ACMA—once satisfied that the broadcast attracted code privacy protections—will consider the elements of a breach:

- > 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 the above questions is yes, then there is a potential breach of code privacy provisions.

The ACMA will then consider:

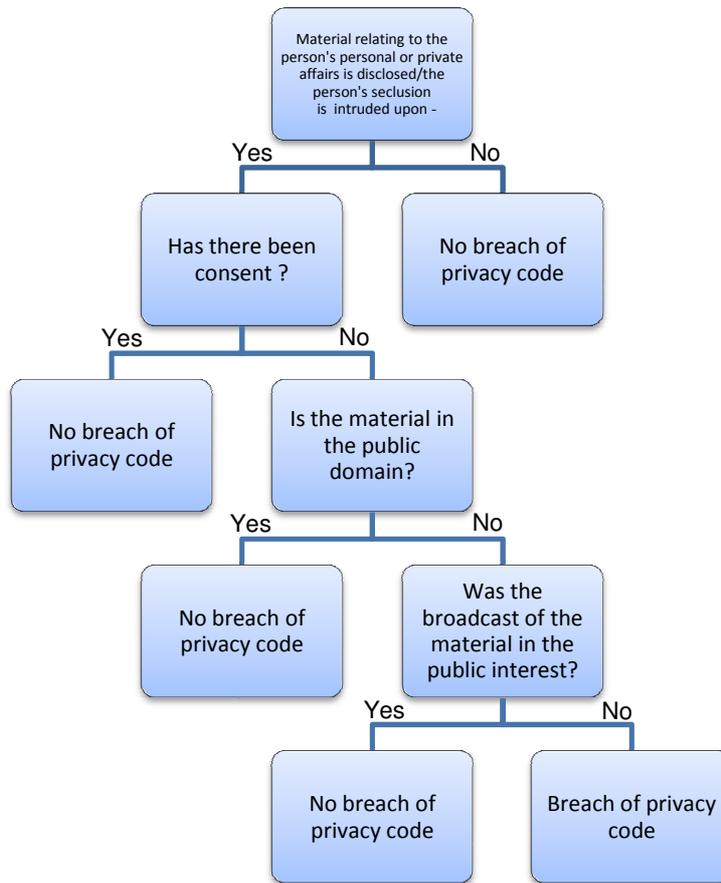
- > Was the person's consent obtained—or that of a parent or guardian?
- > Was the broadcast material readily available from the public domain?
- > Was the invasion of privacy in the public interest?

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

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<sup>3</sup> The examples in the general principles have been taken in substance from Gleeson CJ's formulation in *ABC v Lenah Games Meats Pty Ltd* [2001] 208 CLR 199 at [42] and [125] (referred to in ACMA Investigation Report 2027, 2009) and affirmed in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 [114–118]. They are also discussed by the NSWLRC in Report 120 at 4.3–4.4.

Figure 1 Steps to determining a breach of the code privacy provisions



## Identifiable person

For the codes to be breached, a particular person must be identifiable from the broadcast. That person can be a private individual or a public figure.

A person is identifiable if, from the broadcast (including audio or visual material), the person's identity is apparent or can reasonably be ascertained.

For examples, refer to case studies 1, 2, 5 and 7 at the Appendix.

## Personal information

Personal information can include facts about a person's health, personal relationships, financial affairs, sexual activities, and sexual preferences or practices. It can also include information about a person's racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, criminal record and other sensitive personal matters.

This information need not be secret or confidential in order to be private.

For examples, refer to case studies 2 and 5 at the Appendix.

## Seclusion

A person's seclusion may be intruded upon where:

- > he or she would have a reasonable expectation that his or her activities would not be observed or overheard by others; and
- > a person of ordinary sensibilities would consider the broadcast of these activities to be highly offensive.<sup>4</sup>

Depending on the circumstances, this may include everyday activities and it will usually include sexual activities.<sup>5</sup>

The invasion must be more than fleeting. It is possible for this to occur in a public space.

For examples, refer to case studies 3 and 7 at the Appendix.

## Consent

If consent is obtained prior to the broadcast of material, then the person waives his or her claim to privacy protection.<sup>6</sup>

Consent can be express, such as when obtained in writing. It can also be implied; for example, where a person is a willing participant in an interview.

If a person has actively drawn attention to material that would usually be considered private, this may be taken as consent.

There will be no waiver if consent is obtained by deception.

Consent to the broadcast of private information or material that would breach privacy may be withdrawn before it is first broadcast, if in all the circumstances it is reasonable to do so.

The use of material that has been surreptitiously obtained will be an indicator that the person has not (at least at the time the material was obtained) consented to the broadcast. Consent to the use of such material can be obtained after recording but before broadcast.

The absence of an objection will not automatically be taken to be consent.

For examples, refer to case studies 4, 5, and 7 at the Appendix.

## Children and vulnerable people

Special care must be taken in the use of material concerning a child (a person of 16 years or under) or a vulnerable person. A person's vulnerability may be intrinsic (for example, where a person has a mental illness or difficulty communicating in English)

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<sup>4</sup> This formulation has been informed by Gleeson CJ's test in *ABC v Lenah Games Meats Pty Ltd* [2001] 208 CLR 199 where he says: 'The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private'. See also ALRC Report 108 [74.83] and recommendation 74-2.

<sup>5</sup> *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (119).

<sup>6</sup> That consent should be 'informed consent'—voluntarily given by a (legally) competent person with an understanding of the matters agreed to.

or it may be situational (for example, where a person is bereaved or has been involved in a distressing event).

Subject to the relevant code, a parent or guardian's express consent should be obtained before using material that invades a child's privacy. However, parental consent alone will not always be sufficient for a broadcaster to comply with its code privacy obligations. Extra care must be taken before naming or visually identifying a child in matters concerning the child's health, welfare or personal information, or where the child or his or her immediate family is involved in criminal matters or court proceedings.<sup>7</sup>

Even where consent is obtained, there may be circumstances where a person of ordinary sensibilities would consider the use of material that invades a child's or vulnerable person's privacy to be highly offensive.

For examples, refer to case studies 6 and 8 at the Appendix.

## Public figures

Public figures such as politicians, celebrities, prominent sports and business people and those in public office do not forfeit their right to privacy in their personal lives.<sup>8</sup> However, it is accepted that public figures will be open to a greater level of scrutiny of any matter that may affect the conduct of their public activities and duties.

For an example, refer to case study 7 at the Appendix.

## Material in the public domain

Using material that is already in the public domain will generally not be an invasion of privacy.

This includes the use of material obtained from online social media sites, unless access restrictions have been breached. However, the absence of access restrictions, while an important consideration, will not be determinative. Account will be taken of the nature of the material and the context in which it has been published.

Using material that has previously been disclosed by a person on a confidential basis, or to a limited or closed circle of recipients, may be an invasion of his or her privacy. Its private nature may be implied even if there was no express request to keep it confidential.<sup>9</sup>

For an example, refer to case study 8 at the Appendix.

## Public interest

The broadcast of private information or material that invades privacy, without consent, will not breach the codes if there is a clear and identifiable public interest in the material being broadcast. The public interest is assessed at the time of the broadcast.

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<sup>7</sup> Clause 4.3.5.2 of the Commercial Television Industry Code of Practice 2010 includes this requirement.

<sup>8</sup> Public figures are entitled to a 'residual area of privacy' in relation to private information that they have not put in the public domain—*Campbell v MGN Ltd* [2004] UKHL 22.

<sup>9</sup> See the court's comments in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 [122] and the NSWLRC Report 120 at 5.27–5.28.

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 citizens might be legitimately interested in or concerned about what is going on.<sup>10</sup>

Public interest issues include public health and security; criminal activities; corruption; misleading the public; serious anti-social behaviour; politics; government and public administration; elections; and the conduct of corporations, businesses, trade unions and religious organisations.

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

Any material that invades a person's privacy in the public interest must 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.<sup>11</sup> It should be proportionate and relevant to those issues, and not disclose peripheral facts or be excessively prolonged, detailed or salacious.<sup>12</sup>

In the case of public figures, the broadcast of material that invades the person's privacy may be in the public interest if it raises or answers questions about any of the following:

- > the person's appointment to or resignation from public office
- > the person's fitness for office
- > the person's capacity to carry out his or her duties<sup>13</sup>
- > conduct or behaviour that contradicts the person's stated position on an issue.<sup>14</sup>

However, it is unlikely to be in the public interest if it is merely distasteful, socially damaging or embarrassing.

For examples, refer to case studies 1, 3, 6 and 7 at the Appendix.

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<sup>10</sup> See *London Artists v Littler* (1969) 2 QB 375 at 391.

<sup>11</sup> 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.

<sup>12</sup> *Campbell v MGN Ltd* [2004] UKHL 22 at 164–165.

<sup>13</sup> This approach was taken in the ACMA's investigation 2431 concerning a news report on the resignation of a NSW Minister of Parliament (case study 7 at Appendix 1).

<sup>14</sup> See NSWLRC Report 120 at 5.25 and *Campbell v MGN* [2004] UKHL 22 at 82.

# Appendix—Case studies

## Case study 1

**Breach—invasion of privacy with no public interest reason for broadcasting the material (commercial television current affairs program)<sup>15</sup>**

### ***The broadcast material***

A segment of a current affairs program concerned a woman who took other women into her care and performed ‘exorcisms’ on them in the belief that they had become victims of satanic abuse. It included footage of several ‘exorcisms’ and a number of interviews.

The relevant part of the segment involved footage of ‘exorcism’ rituals taking place inside the woman’s home. Most of the footage showed a woman (the complainant) screaming and shouting, and being forcibly restrained by other women as an ‘exorcism’ is performed. The complainant was not identified by name, but her face was clearly visible for a number of seconds on six separate occasions.

### ***The ABA’s findings***

The Australian Broadcasting Authority (ABA) concluded that the segment involved a serious invasion of privacy based on the following combination of circumstances:

- > the footage was filmed on private property and not in a public area
- > the complainant was shown in an extremely personal and sensitive situation
- > the complainant was not a public figure and did not willingly or knowingly put herself into the public domain, or place herself in a position to be the subject of public comment
- > the sequences showing the complainant were numerous and prolonged, and the complainant’s face was clearly visible during these sequences
- > the visual identification of the complainant could have been avoided without the segment losing any coherence or meaning
- > it was broadcast against the express wishes of the complainant.

It found that while there was an identifiable public interest reason for broadcasting the segment as a whole, there was no identifiable public interest reason to disclose the complainant’s identity (by showing her face). Furthermore, the complainant had contacted the licensee before the broadcast and expressly requested her face not be shown.

The ABA found the broadcast of the material breached the privacy provision of the Commercial Television Industry Code of Practice 1999.

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<sup>15</sup> ABA Investigation Report 1471, May 2005.

## Case study 2

### **Breach—identification of woman and use of material obtained without consent (commercial radio current affairs talkback program)<sup>16</sup>**

#### ***The broadcast material***

A woman caller to the program discussed her husband whom, she said, was known to the presenter because he and her husband had been to school together. The caller named her husband and the presenter stated he recognised the name.

The caller provided more details about her husband's private life. She said he was having an affair and identified the woman as someone the presenter would also know. The caller stated the full name of the woman (the complainant).

Over the next few minutes, the caller gave more personal information about the complainant, including her marital status and the number of children she had. The presenter interjected and made comments about the complainant including, 'she's a tart', and 'taking your old man off you—that's shocking'. He finished the segment with the comment, 'I always thought he was a good bloke and I always thought she was a good lady. Just shows how you can be fooled, eh?'

#### ***The ABA's findings***

The Commercial Radio Code of Practice does not require a licensee to obtain consent from everyone who is named on air. However, the ABA noted that the context in which the person's name is used in a broadcast is important.

The ABA noted that most talkback presenters will 'dump' a caller if the caller appears likely to stray into unacceptable terrain but, in this case, the presenter actively encouraged the caller to name the complainant, and continued to encourage the disclosure of information on the complainant and her family.

The ABA found:

- > the material naming the complainant and alleging that she was 'the mistress' of the caller's husband and was 'playing up with him' invaded the complainant's privacy
- > the broadcast of information about the complainant's family, without consent, invaded the complainant's privacy.

The ABA therefore found the broadcast material breached the privacy provisions of the Commercial Radio Code of Practice.

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<sup>16</sup> ABA Investigation Report 1254, May 2003.

## Case study 3

### No finding—invasion of privacy (commercial television news program)<sup>17</sup>

#### ***The broadcast material***

A television news story reported a boating accident where two elderly people were killed and other family members were seriously injured.

The news story included 12 seconds of footage showing a survivor sobbing on an ambulance stretcher while the ambulance officers wheeled him to an ambulance. The man appeared distraught, and became agitated and angry towards the news crew who were filming him at close range. The footage showed the man jumping off the stretcher and loudly remonstrating with the news crew. It also showed him being restrained by police officers who attended the accident scene.

The news reporter verbally described the man's conduct, stating, 'the loss was too much to bear for the distraught boat owner. The 48-year-old man had purchased the boat today, losing his mother and father in a massive explosion ...'

#### ***The ACMA's findings***

The ACMA made a detailed assessment of the privacy issues presented by the circumstances of the complaint, which included the following:

- > The event that was broadcast occurred in a public place in full view of people following a boat explosion that killed two people
- > The surviving person was filmed in a public place. The footage showed the person in a state of distress and openly expressing his grief
- > The footage of the person was filmed in close range to him and clearly identified him
- > The person very clearly and strongly remonstrated at the news crew for filming him. The footage showed the person getting off the stretcher while shouting abuse to the news crew and forcefully throwing a towel in the direction of the cameras
- > The person was not a public figure and did not willingly put himself in a position to be the subject of public comment or observation
- > The visual identification of the person could have been excluded from the news story without the story losing its coherence or meaning.

The ACMA considered that, in this case, the continuing lengthy footage of the survivor's expressions of intense grief, over his vehement objections to being filmed, invaded his capacity or opportunity to grieve privately.

The ACMA acknowledged there was an identifiable public interest matter in boating safety and reporting on a boating accident, which may include showing images of survivors. However, the public interest in the story as a whole did not justify the broadcast of extended footage showing a distressed survivor who clearly objected to being filmed.

However, the ACMA made a 'no finding' decision on whether the material breached the privacy clause of the Commercial Television Code largely because it considered that the 2005 Privacy Guidelines focused on material *relating to a person's private affairs* (information privacy) and did not provide adequate guidance on the code element dealing with *material which invades an individual's privacy* (seclusion).

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<sup>17</sup> ACMA Investigation Report 2027, June 2009.

## Case study 4

**No breach—footage obtained using a hidden camera did not relate to personal or private affairs and no invasion of privacy occurred (commercial television current affairs program)<sup>18</sup>**

In this case, the ACMA found that, although the broadcast material was obtained by surreptitious filming without the individual's knowledge or consent, it did not invade the individual's privacy or relate to her personal or private affairs.

### ***The broadcast material***

A story called 'Stalkers' was broadcast in a current affairs program and focused on a woman who had allegedly stalked and harassed three sisters living in her neighbourhood.

The broadcaster provided the sisters with a hidden camera that one concealed in her handbag. The sisters secretly filmed their confrontation with the woman.

The first segment of the footage showed the woman speaking to the sisters and opening the door to her apartment (situated in a secure complex). A loud confrontation ensued, following which the sisters were shown running away. One of the sisters revealed blood dripping from her hand.

The other segments of footage show the woman outside her apartment and talking and shouting at the sisters.

### ***The ACMA's findings***

The ACMA found the footage did not relate to the woman's personal or private affairs as the interaction did not disclose sensitive information about the woman, such as her health, personal relationships, financial affairs or private conduct.

The close proximity of the woman's apartment to other apartments in the complex, and the high volume of her confrontation outside and in daylight hours, meant she could have little or no expectation that the confrontation would not be observed or overheard by others.

The ACMA expressed concern about the use of the hidden camera in the circumstances of this case, and about the broadcaster not giving the woman an opportunity to consent to, or avoid, the filming.

It recommended that broadcasters should seek express consent before:

- > entering a person's premises
- > using a listening device to record their conversation
- > (having recorded the conversation) broadcasting the recorded conversation or segments of it.

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<sup>18</sup> ACMA Investigation Report 2283, March 2010.

## Case study 5

### **Breach—identification of an individual and sensitive personal information broadcast without knowledge or consent (commercial radio prank call)<sup>19</sup>**

#### ***The broadcast material***

A radio competition had participants phoning their housemates and convincing them to move out of their shared house, in order to win \$500. The calls were recorded and broadcast the following day.

A male participant called his housemate (who was also his ex-girlfriend) and asked her to leave the house because she was untidy and he was 'sick of her climbing into his bed'. The woman and her family members were identified by their first names. Information about her prior sexual activity was also revealed.

Towards the end of the call, the woman agreed to leave. The radio presenters interrupted, revealing it was part of a radio competition. The woman was surprised and laughed. She believed the call had already been broadcast.

#### ***The ACMA's findings***

The ACMA found the broadcast breached the commercial radio code because the woman was identified by the words used in the broadcast and the broadcaster did not obtain her consent to the recording, or the broadcast, of her conversation.

The conversation was one that the woman would have reasonably considered a private matter since it was a discussion about her current living arrangements and included references to her sexual activity and relationships. She would not have been aware of the recording or broadcast of her words until after the radio presenters interrupted her telephone conversation.

The broadcaster did not inform the woman that the conversation would be broadcast the next day. The broadcaster did not obtain her express consent to the broadcast, nor give her any opportunity to give or withhold her consent to the broadcast.

Although the woman expressed amusement when the radio presenters revealed her conversation was part of a prank-call radio competition, this response did not establish her consent to the broadcast.

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<sup>19</sup> ACMA Investigation Report 2059, December 2008.

## Case study 6

### **Breach—invasion of privacy of a child and special care not used (commercial television current affairs program)<sup>20</sup>**

#### ***The broadcast material***

A current affairs program broadcast a report on school truancy and included interview segments with the mother of a 12-year-old boy who was regularly absent from school without permission. It broadcast footage of her son engaging in anti-social conduct in a skate park with other children (smoking, swearing and fighting), while he should have been at school. The footage also depicted the reporter's interview with the boy and the other children. This footage captured the boys over three days.

The boy's mother verbally consented to an interview about her son's school truancy. The mother was interviewed in her home and her son was filmed in the background of several interview segments. However, the mother said she did not consent to the filming or interview of her son in the skating park.

#### ***The ACMA's findings***

The ACMA found the broadcast material of the 12-year-old boy was personal and private because it contained details of his behavioural problems (including depicting his truancy from school, smoking and fighting), which related to his health, wellbeing and welfare.

The ACMA also applied the code's clause relating to the 'special consideration for children', and found the material on the boy's health, wellbeing and welfare was a 'sensitive matter relating to a child'. The material not only visually identified and named the boy, it also focused on information about his individual development and education.

The ACMA found the broadcaster did not exercise 'special care' in broadcasting the material about the child's personal or private affairs because it made no attempt to hide the identities of the boy or the other children. The reporter's interview with the children clearly revealed their faces for a prolonged period.

The ACMA considered the application of the 'special care' clause generally, and commented that it applies to children who may be aware of being filmed but lack the capacity, judgement or experience to make an informed judgement about the consequences of being filmed for a television program.

Although there was an identifiable public interest in disclosing material relating to truancy, the child was not suitably de-identified.

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<sup>20</sup>ACMA Investigation Report 1882, September 2008.

## Case study 7

### **No breach—use of material relating to personal or private affairs of a public figure permitted in the public interest (commercial television news program)<sup>21</sup>**

#### ***The broadcast material***

A news bulletin reported on the resignation of a minister of the NSW Parliament for ‘personal reasons’ and detailed the licensee’s investigation into the minister’s (out-of-hours) visit to a gay sex club. The bulletin included references to recent criticisms of the minister’s performance of his duties and footage of him reportedly leaving the club.

Although the footage was apparently taken surreptitiously, it did not show personal or sensitive activity. Through the detailed accompanying description of the services offered by the club, and the inference that the minister had attended it on more than one occasion, the bulletin strongly implied he had engaged in extra-marital, homosexual activity.

#### ***The ACMA’s findings***

The ACMA was satisfied that the broadcast used material relating to the minister’s personal or private affairs and invaded his privacy. It also found there was no evidence that the minister gave his consent to the broadcast

The ACMA noted the following:

- > the information relating to, and footage of, the minister’s visit to the club did not relate to the conduct of his ministerial duties
- > the information implying sexual preference was ‘material relating to a person’s personal or private affairs’ and limited disclosure on a confidential basis did not deprive such information of its personal or private nature
- > the footage and information relating to the minister’s out-of-hours conduct attending premises offering sexual services was something that an ordinary reasonable viewer would consider private
- > there was no evidence that the information was in the public domain.

However, the ACMA also found an identifiable public interest in the invasion of the minister’s privacy.

The broadcast of the private material helped the public understand the reasons for the minister’s resignation in circumstances, including where:

- > the minister had held a series of senior and sensitive portfolios
- > concerns had been raised over his performance in office
- > there had been related calls for his resignation
- > he had suddenly resigned (for personal reasons) offering no deeper explanation of the circumstances behind that resignation.

The ACMA noted that the relevant code provided privacy protections for everyday individuals and public figures (including politicians), but accepted that those holding public office will be open to greater and more frequent scrutiny.

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<sup>21</sup> ACMA Investigation report 2431, December 2010.

## Case study 8

### No breach—use of material obtained from a social networking website (commercial television news program)<sup>22</sup>

#### *The broadcast material*

The news program reported on the sentencing of man for the murder of a woman. The report included 13 photographs of the woman and her family and friends. These photos were accessed from a Facebook tribute page, as well as a post from the woman's 14-year-old nephew, which included his name and Facebook profile photograph.

#### *The ACMA's findings*

The ACMA found that the broadcast material did not relate to a person's personal or private affairs. In arriving at this decision, the ACMA noted that:

- > the photographs were published on an open Facebook tribute page that did not contain any privacy settings to prevent other parties, including the media, from accessing the photographs
- > the Facebook page appears to have been intended to encourage interested people to share their information and thoughts with other users, including interested members of the public at large who could access the site
- > the photographs depicted the woman and her family and friends in everyday, family album-style poses and the activities depicted were not inherently sensitive or personal.

The ACMA considers that the finding does not mean that licensees are free to broadcast any material available on the internet without risk of breaching the code. Not all material on the internet will cease to be personal or private merely because it has been made publicly available, through the absence of privacy settings or otherwise. While the ACMA considers that the use of privacy settings on social networking sites is an important consideration when assessing whether material obtained from these sites constitutes private material, it is not determinative. In each case, the ACMA will assess a licensee's compliance with its code obligations, having regard to the specific circumstances of the broadcast.

The ACMA also found, in relation to the broadcast of the name and Facebook profile photograph of the 14-year-old nephew, that the report did not disclose 'sensitive information concerning the health or welfare of the child' or report on a criminal matter involving a member of his immediate family. There was no breach of the special care obligation in the code.

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<sup>22</sup>ACMA Investigation Report 2584, December 2011.