

Investigation Report No. 2686

File No.	ACMA2011/1624
Licensee	TCN Channel Nine Pty Ltd
Station	TCN Sydney [TCN]
Type of Service	Commercial television
Name of Program	<i>NRL First Preliminary Final</i>
Date of Broadcast	23 September 2011
Relevant Legislation	Subclause 4(2) of Schedule 2 to the <i>Broadcasting Services Act 1992</i> Paragraph 7(1)(j) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>
Relevant Code	Clauses 1.16, 1.18, 1.20, 1.21 and 7.15 of the <i>Commercial Television Industry Code of Practice 2010</i>

Investigation conclusion

Breach of clause 7.15 [effort to resolve complaint] of the *Commercial Television Industry Code of Practice 2010* (the Code).

No breach of the licence condition set out at paragraph 7(1)(j) of Schedule 2 to the *Broadcasting Services Act 1992* (the BSA), which requires compliance with clause 4 of Schedule 2 to the BSA.

No breach of clauses 1.16 [distinction between commercials etc and program material], 1.18 [distinction between paid material and other program material] or 1.20 – 1.21 [disclosure of commercial arrangements] of the Code.

The complaints

Over the period 24 September – 4 October 2011, the Australian Communications and Media Authority (the ACMA) received six complaints about material broadcast on TCN during the coverage of the first NRL Preliminary Final on 23 September 2011. The material related to a legislative proposal to introduce a mandatory pre-commitment (MPC) system for poker machine gambling. The complainants' concerns can be summarised as follows:

- the material appeared to be an advertisement from Clubs NSW or Clubs Australia, which were running a campaign against the proposed legislation, however no authorisation details were broadcast; and
- the material was, as described by one of the complainants, 'paid political propaganda from the commentators posing as opinion'.

It was considered that the complainants had raised issues in relation to a licence condition, namely paragraph 7(1)(j) of Schedule 2 to the BSA. Under section 147 of the BSA, if a person believes that a commercial television licensee has breached a licence condition, the person may make a complaint to the ACMA about the matter. Under section 149 of the BSA, the ACMA must, subject to certain conditions, investigate the complaint. Accordingly, the ACMA opened an investigation into the matter.

Subsequently, the ACMA received two more complaints from members of the public who had first directed their complaints to the licensee of TCN, TCN Channel Nine Pty Ltd, under the Code. The complainants considered that the licensee's response to their complaints was inadequate. Under section 148 of the BSA, a person may make a complaint to the ACMA about a matter, if the person has first made a complaint to a licensee about program content or compliance with a relevant code of practice, and considers the licensee's response to be inadequate. Under section 149 of the BSA, as noted above, the ACMA must investigate the complaint. Accordingly, the ACMA added to the existing investigation an examination of the licensee's compliance with relevant provisions of the code of practice. These were determined to be clauses 1.16, 1.18, 1.20, 1.21 and 7.15 of the Code.

The program

The program was live coverage of a sporting event, namely the first Preliminary Final of the 2011 National Rugby League (NRL) premiership competition. The competing teams were the Manly Warringah Sea Eagles and the Brisbane Broncos. The commentators were Ray Warren (nicknamed 'Rabbits') and Phil Gould, also known as 'Gus'.

The material impugned was broadcast immediately before commencement of the second half, as the teams were running onto the field.

The audio was as follows:

RAY WARREN

Back at the football stadium, finals football continues. The first preliminary final, with Manly leading 16 to 4. Forty minutes of football, perhaps, left. The Eagles are rocking. Not only has the Manly Football Club been doing great work on the field this season, they've also been very busy working with the community off the field. With significant funding from the Manly Leagues Club and Harbord Diggers, for whom a lot of these kids played, the Sea Eagles established The Eagle's Nest, in conjunction with the Royal Far West Health Service. Eagle's Nest is a multi-purpose room where staff run adolescent mentoring programs with the assistance of the Manly players. The ongoing financial

assistance of registered clubs across Australia ensure [sic] this, and many other worthwhile programs, continue, but they are under threat from the new untested technology the Federal Government plans to introduce. Funding from clubs is the lifeblood of many community programs and initiatives that we all enjoy. So for more information go to wontworkwillhurt.com.au. As Manly come back in front of 31,894 the crowd figure.

At 16 - 4. Well, you're very much a part of the club industry these days, Gus, and it is true, they do a lot for the community. And if they keep hitting the clubs, the ones who are going to suffer are the ones at the bottom of the ladder.

PHIL GOULD

Yes, the proposed mandatory pre-commitment that they've put forward is a rubbish policy. It won't work, it won't solve the problem they say they're going to target, and it will do irreparable damage to the hospitality industry. It won't work, and it will hurt. You're 100% right. I've never seen a more stupid policy in all my life.

[Whistle blows and play in second half begins]

RAY WARREN

Well, that's an endorsement.

There was also a visual on screen while part of the above was being broadcast, over vision of the teams running out onto the field for the second half of the match:



Assessment

The investigation is based on:

- submissions from the complainants;
- submissions from the licensee;
- a copy of the broadcast provided to the ACMA by the licensee; and
- responses to Notices issued under section 173(b) of Part 13 of the BSA.¹

Other sources used have been identified where relevant.

The ACMA is satisfied that it obtained sufficient evidence on which to base findings in respect of the issues examined.

¹ Section 173(b) of the BSA empowers the ACMA to give a notice, for the purposes of an investigation, summoning a person to provide documents or information to the ACMA. It is a criminal offence to refuse or fail to produce a document required by the ACMA under section 173, or to refuse or fail to answer a question that a person is required by the ACMA to answer under section 173.

Issue 1: Identification of political matter

Relevant legislation

Schedule 2 to the BSA: Standard conditions

7 Conditions of commercial television broadcasting licences

(1) Each commercial television broadcasting licence is subject to the following conditions:

(j) the licensee will comply with the requirements of clauses 3, 3A, 4, 5 and 6.

Given the complaints, the relevant clause is subclause 4(2):

4 Identification of certain political matter

(2) If a broadcaster broadcasts political matter at the request of another person, the broadcaster must, immediately afterwards, cause the required particulars in relation to the matter to be announced in a form approved in writing by the ACMA.

Clause 1 provides definitions of 'person', 'political matter' and 'required particulars':

person includes a political party, a corporation and any other association (whether incorporated or unincorporated).

political matter means any political matter, including the policy launch of a political party.

required particulars, in relation to a political matter that is broadcast, means:

(a) if the broadcasting was authorised by a political party:

(i) the name of the political party; and

(ii) the town, city or suburb in which the principal office of the political party is situated; and

(iii) the name of the natural person responsible for giving effect to the authorisation; and

(b) if the broadcasting of the political matter was authorised by a person other than a political party:

(i) the name of the person who authorised the broadcasting of the political matter; and

(ii) the town, city or suburb in which the person lives or, if the person is a corporation or association, in which the principal office of the person is situated; and

(c) the name of every speaker who, either in person or by means of a sound recording device, delivers an address or makes a statement that forms part of that matter.

Licensee's submissions

The licensee relevantly submitted that:

- It was not asked to broadcast the material by any other person and as such it was not required to provide the 'required particulars' and
- the decision to broadcast the material was made by the management of the Nine Network and was based on the management's own view that the proposed MPC legislation might harm the ongoing viability of NRL Clubs.

Finding

The licensee complied with subclause 4(2) of Part 2 of Schedule 2 to the BSA and therefore did not breach the licence condition at paragraph 7(1)(j) of Schedule 2 to the BSA.

Reasons

It is not in dispute that the material impugned was broadcast without any particulars such as the name and details of the person or party authorising the broadcast. In order to determine whether the broadcast should have been accompanied by these particulars, two matters need to be determined:

- whether the licensee broadcast political matter; and
- whether the licensee broadcast the matter at the request of another person.

If the answer to either of the above questions is 'No', then the licensee did not need to cause such particulars to be announced.

Did the licensee broadcast political matter?

In determining whether material that has been broadcast is political matter, the ACMA has regard to:

- the content of the broadcast;
- the overall presentation of the material including the tone, style, and emphasis;
- the nature and style of any accompanying audio or visual material; and
- the context surrounding the broadcast.

MPC had been a controversial topic for several months at the time of the broadcast, and was the subject of proposed Federal Government legislation. Accordingly, the ACMA considers that MPC was a political issue at that time. While the material broadcast contained information, such as details of the Eagle's Nest project, it also sought to influence viewers to oppose MPC. The ACMA therefore considers that the material in the broadcast relating to MPC constituted political matter.

Was the political matter broadcast at the request of another person?

The 'political matter' provisions of the BSA do not exist to prevent comment on matters that may be of a political nature. The relevant question is whether the political matter was broadcast *at the request of a person other than the licensee*. If so, then the 'particulars' required by subclause 4(2) must be announced.

On the evidence available to the ACMA, the following sequence of events took place before and after the broadcast:²

- On 11 July 2011, Mr David Gyngell, the CEO of Nine Network Australia (Nine), asked Nine's Director of Corporate and Regulatory Affairs, Mr Scott Briggs, to arrange a meeting with Mr Anthony Ball, of Clubs Australia/Clubs NSW. Mr Briggs sent an email to Mr Ball, inviting him to a meeting to 'discuss some potential on-air support for your current campaign – particularly during the NRL coverage'.

² The account is derived from the licensee's submissions and responses to the s173 Notices from Nine, Clubs NSW/Clubs Australia and National Rugby League Ltd (the NRL). Only relevant events are included.

- This meeting took place at 9:30 am on 14 July 2011. Mr Gyngell advised Mr Ball that Nine was 'intending to promote the charitable work of NRL Clubs and highlight the impact of the proposed reforms' and Mr Ball was asked to provide any relevant information.
- At 11:46 am that same day, Mr Karl Bitar, head of government affairs at Crown Ltd, sent an email to Mr Briggs which included the following passage:

I heard the meeting with Anthony Ball went well which is good. Let me know if you need my help with any of that. I spoke to Ball beforehand and told him that given what Gyngell is offering he has to make sure Clubs do the right thing by Nine in the future.

- On 15 July 2011, Mr Briggs sent an email to Mr Matthew Callander, Nine's NRL coverage executive producer, saying that he needed to see him early the following week 'about an initiative Gyng wants us to put together for the NRL'.
- On 19 July 2011, Nine's Managing Director, Mr Jeffrey Browne, rang Mr David Gallop, the CEO of the NRL, and asked for information about Leagues Club funding of football and contact details of the CEOs of NRL football clubs. Mr Gallop understood that Mr Browne was 'looking to write to the relevant football clubs to show his support for the leagues club campaign'. The NRL supplied the information to Mr Browne.
- On 20 July 2011, Mr Browne sent substantially identical letters to the CEOs of 17 NRL Clubs. The letters each read in part:

I am writing to you in relation to Government moves to introduce a pre-commitment regime around the use of poker machines. I know your Club is opposed to these measures and I would like to offer Nine's support for your Club in its campaign.

As the broadcast rights holder for the NRL, Channel Nine is acutely aware of the important role the Rugby League Clubs play in ensuring the ongoing viability of the competition and we want to support you in your endeavours.

I understand that the Government's proposed changes will significantly reduce the ability of Clubs to continue to provide financial support not only to the NRL Competition, but to many organisations and charities that benefit from activities.

Channel Nine accepts a positive obligation to assist you in communicating to the public the extremely important role Rugby League Clubs play in the community. By informing the public of the key messages, we can try and ensure that debate about the proposed changes is properly informed, balanced and that the community understands that many local sporting organisations and charities are heavily reliant on this revenue.

To that end, I invite you to provide me with examples of the community contribution which your Club makes, so that we may highlight some of those initiatives during our NRL coverage over the coming weeks.

- On 19 August 2011, Nine received a response to this letter from Manly-Warringah Sea Eagles Limited, giving details of its work with community partners and charities, including the project Eagle's Nest.
- On 14 September 2011, Mr Briggs forwarded the letter to Mr Callander, asking him to highlight the work of Eagle's Nest in the forthcoming Preliminary Final.
- On 21 September 2011, a rough run sheet was drawn up for the broadcast to take place two days later, showing 'Ray v/o Eagles Nest plug' as a scheduled item. A senior producer in Nine's Sports area sent Mr Callander a draft script for the 'Clubs plug'.

- At 4:02 pm on 21 September 2011, Mr Briggs emailed Mr Ball, asking him for his mobile number and other contact details, saying that Mr Callander would be calling Mr Ball to discuss some of the pokies spots we are planning for this weekend.
- Mr Ball responded, and Mr Briggs forwarded the information to Mr Callander, commenting that Mr Ball can help with info and should be able to help with talent.
- At 2:20pm on 23 September 2011, Mr Callander contacted Mr Ball, asking him what the best website was 'for more info', and Mr Ball responded with the URL: www.wontworkwillhurt.com.au.³
- Mr Ball later sent an SMS to Mr Callander, saying:

Keen to hear what you have planned for the footy coverage.

Mr Callander did not respond to the message.
- Mr Callander contacted Mr Gyngell in relation to the content of the script. Mr Gyngell told Mr Callander to promote the work of Eagle's Nest and tell viewers that this work would be threatened by the proposed MPC legislation. Mr Callander then finalised the script (see Appendix).
- Mr Warren was presented with the script immediately prior to the broadcast that evening, and asked if he would be prepared to read it during the broadcast. Mr Warren indicated that he was, as the material reflected his own opinion on the matter. The material was then broadcast.
- On 24 September 2011, Mr Warren took part, as co-presenter, in a program, *Dead Set Legends*, broadcast on the radio station 2MMM. The broadcast included the following:

DAN GINNANE (co-presenter)

Last night I was at the game and got a lot of messages, what's going on with Rabs and Gus talking about poker machines? Did I miss something last night? Did you go on some sort of political expedition or something?

RAY WARREN

You could say that, as I've said to you in the past, these things are handed to me by my peers. The production people that put football together, and they were handed something by one of their peers so you can imagine who that was and it was handed down to me, now the choice is there for me to read it or not read it but it so happens that I agree with it, so I read it and it was a directive from up top that it was read by at least somebody so I read it ...

DAN GINNANE

So this was a paid message? It was an advertisement essentially?

³ The website www.wontworkwillhurt.com.au is the website of an anti-MPC campaign funded by Clubs Australia, the Australian Hotels Association, the Australasian Casino Association and the Gaming Technologies Association. www.wontworkwillhurt.com.au/about-us, accessed 17 October 2011.

RAY WARREN

I don't know whether it was a paid message or not. I don't know. I think it was an ad, if you like it sounded like an ad, I think it was done on behalf of the rugby league who is fully supportive of the clubs out there ...

- On 27 September 2011, Mr Ball sent Mr Gyngell an email which included the following:

Hi David, just wanted to thank you for helping with the Footy telecast. Rabs and Gus nailed it and made a real impact. We'll win this thing and it's great to be able to call on friends like you. It won't be forgotten.

- On 28 September 2011, Mr Gyngell responded:

Thanks mate happy to help.

Having carefully examined the evidence available to it, the ACMA has formed the view, on the basis of this sequence of events, that it was Nine, not any other person, which took the initiative that led to the broadcast of the impugned material, and that the contribution of others (Manly-Warringah Sea Eagles Limited, Clubs NSW/Clubs Australia and the NRL) was at the request of Nine, not the other way round. It is noted in this respect that, according to the evidence:

- It was Nine, not Clubs NSW/Clubs Australia, which initiated the meeting which took place with Mr Ball on 14 July 2011;
- Nine approached the NRL for information for the broadcast, not the other way round (specifically, the names of NRL Clubs using Leagues Club funding);
- Nine approached Manly-Warringah Sea Eagles Limited, not the other way round, to obtain information for the broadcast (specifically, information about its community projects);
- Nine approached Mr Ball, not the other way round, to obtain information for the broadcast (specifically, the most appropriate website to refer to for viewers wishing to obtain 'more info' about MPC);
- the documentation does not evince any request to Nine from any other person for the material to be broadcast, or any specific reference to such a request;⁴ and
- Nine's communications, both internal and external, consistently refer to the matter as Nine's initiative, eg in Mr Briggs's email to Mr Callander of 15 July 2011 ('an initiative Gyng wants us to put together') and Mr Briggs's email to Mr Ball of 21 September 2011 ('pokies spots we are planning') (emphases added).

Accordingly, the licensee did not broadcast political matter 'at the request of another person'.

⁴ In that respect, the ACMA notes Mr Ball's email to Mr Gyngell of 27 September 2011, in which he refers to 'call[ing] on' 'friends like you'. Mr Ball has submitted:

I did not 'call on' David Gyngell to do anything.

There was no assistance requested. I was thanking David Gyngell and Channel Nine for helping our cause in a broad sense.

My phrase 'call on friends' was intended to mean 'it's great to have friends ...'

The ACMA is satisfied with this explanation, noting that there is no specific reference to a request to broadcast material, here or in any other part of the evidence available to the ACMA.

Observations

While the ACMA has not found a breach, the ACMA notes that the purpose of subclause 4(2) is to provide transparency around the broadcast of political matter.

There is no prohibition on a licensee running its own political campaign, but the licensee did not make clear, in the broadcast impugned, that the script had been prepared by Nine management and was broadcast at the initiative of Nine management. Nor did the licensee make clear that the website to which it directed viewers for 'more information' was a website of a campaign funded by Clubs Australia and other Industry associations which considered that their revenue would be negatively affected by the introduction of MPC.

Where political matter is broadcast during a current affairs program on commercial television, it is subject to the requirements of Section 4 of the Code, including a requirement for factual material to be broadcast accurately and for viewpoints to be represented fairly. It is, in the ACMA's view, anomalous that these requirements do not apply to political matter broadcast during other kinds of programs – including sports programs.

The ACMA proposes to raise this matter with Free TV Australia in anticipation of the next code review.

Issue 2: Distinction between commercials etc and program material

Relevant code provision

Commercial Television Industry Code of Practice 2010

Presentation of Broadcast Material

- 1.16 A commercial, community service announcement, program promotion or station promotion must be readily distinguishable by viewers from program material.
- 1.17 Clause 1.16 applies to material broadcast:
 - 1.17.1 between programs;
 - 1.17.2 in a commercial break within a program;
 - 1.17.3 as a visual or audio superimposition over a program.

Licensee's submissions

The licensee submitted that it did not receive payment or any valuable consideration from any person or entity for the broadcast of the material.

Finding

The licensee did not breach clause 1.16 of the Code.

Reasons

The first issue is whether the impugned material fits one of the categories outlined in clause 1.17. The material was not broadcast between programs (clause 1.17.1) or in a commercial break within the program (clause 1.17.2). However, one of the components (the on-screen URL) was broadcast as a visual superimposition over footage of the teams

running onto the field for the second half of the match. This material fits the category at clause 1.17.3.

The next issue is whether the on-screen URL constituted a 'commercial, community service announcement, program promotion or station promotion'. It is clear that the visual superimposition was neither a program promotion nor a station promotion. Consideration of whether it was a commercial or community service announcement follows.

The material referred to is the following:



This was on-screen while the following words, spoken by Mr Warren, were being broadcast:

... In conjunction with the Royal Far West Health Service, Eagle's Nest is a multi-purpose room where staff run adolescent mentoring programs with the assistance of the Manly players. The ongoing financial assistance of registered clubs across Australia ensure this, and many other worthwhile programs, continue, but they are under threat from the new untested technology the Federal Government plans to introduce. Funding from clubs is the lifeblood of many community programs and initiatives that we all enjoy. So for more information go to wontworkwillhurt.com.au.

'Commercial'

The term 'commercial' is defined at clauses 5.4.1-5.4.2 of the code as:

any advertising for a product, service, belief or course of action ... for which a licensee receives payment or other valuable consideration.

The on-screen URL, in context, constituted advertising for a belief (ie that MPC 'won't work' and 'will hurt') and also for a course of action, namely opposition to MPC.

The next issue, accordingly, is whether the material was advertising for which the licensee 'receives payment or other valuable consideration'.

The licensee submitted that it did not receive payment or other valuable consideration for the broadcast of the on-screen URL. However, the following passage is noted from the email from Mr Ball to Mr Gyngell of 27 September 2011:

It's great to be able to call on friends like you. It won't be forgotten. [Emphasis added]

The following passage is also noted, from Mr Bitar's email to Mr Briggs of 14 July 2011:

Given what Gyngell is offering [Mr Ball] has to make sure Clubs do the right thing by Nine in the future. [Emphasis added]

Consideration has accordingly been given to whether these items of correspondence point to an expectation for Nine to receive valuable consideration from Clubs NSW/Clubs Australia in the future, either directly or indirectly.

The licensee, asked to comment, has denied that there was any such expectation:

As the NRL rights holder, Nine is obviously and publicly a supporter of the NRL and its clubs ... Nine did not expect to receive, nor did it in fact receive, any valuable consideration from any person or entity, including Clubs Australia.

Mr Ball's email, quite obviously, expresses appreciation of the stance taken by Nine. There was however never ... any reciprocal arrangement with Clubs Australia.

Similarly, Mr Bitar's opinion that 'clubs [should] do the right thing by Nine in the future' is Mr Bitar's own opinion.

Mr Ball, when asked whether there was a particular anticipated matter he had in mind when he stated to Mr Gyngell that his help 'won't be forgotten', responded 'No'. When asked what he intended Mr Gyngell to understand by this comment, Mr Ball stated 'That we remember our friends and those who support us.'

In light of Mr Ball's explanations of his correspondence with Mr Gyngell and in the absence of evidence that the licensee actually received or was promised some form of valuable consideration for the broadcast, the ACMA finds that the on-screen URL was not a 'commercial'.

'Community service announcement'

Mr Warren, in a radio interview on radio station 3AW on 3 October 2011, referred to the audio material associated with the on-screen URL (ie the script which he read) as a community service announcement:

RAY WARREN

I do community service announcements that are placed in front of me just about every Sunday on the football, or Friday night on the football. I'm entitled to read them, and if I don't want to read them I don't have to. This was no different.⁵

However, the licensee submitted that the material was not a community service announcement and the ACMA agrees with this submission. The term 'community service announcement' is defined at clause 5.5.2 of the code as:

an announcement which promotes a charitable cause or activity or which constitutes a service to the community and which is broadcast free of charge by a licensee.

The anti-MPC campaign is a political cause, the goal of which is to further the interests of one section of the community, namely clubs and other entities which make money from poker machines. It is not in itself a charitable cause or activity, or something which is of service to the community in general.

Conclusion

Due to the operation of clause 1.17, the only component of the material to which clause 1.16 might apply was the on-screen URL. As outlined, the on-screen URL was not a commercial, community service announcement, program promotion or station promotion. Given this, it is not necessary to determine whether the on-screen URL was readily distinguishable from program material.

⁵ *Media Watch* segment, 'Nine investigated for on-air comments', broadcast on ABC TV on 10 October 2011. Transcript at www.abc.net.au/mediawatch/transcripts/s3336406.htm, accessed 22 November 2011.

Issue 3: Distinction between paid material and other program material

Relevant code provision

Commercial Television Industry Code of Practice 2010

Presentation of Broadcast Material

- 1.18 Where a licensee receives payment for material that is presented in a program or segment of a program, that material must be distinguishable from other program material, either because it is clearly promoting a product or service, or because of labelling or some other form of differentiation.

Licensee's submissions

The licensee submitted that it did not receive payment or any valuable consideration from any person or entity for the broadcast of the material.

Finding

The licensee did not breach clause 1.18 of the Code.

Reasons

The audio components of the impugned material were spoken by the regular commentators for the program. Accordingly, they constituted material that was 'presented in a program'.

The first issue is whether the licensee received payment for presenting this material. The courts have interpreted the term 'payment' as including a non-monetary benefit as well as a monetary benefit in the form of cash, cheque or credit. That is, payment in kind (payment other than money) has also been accepted by the courts to constitute payment.

As discussed above, the ACMA has found no evidence that the licensee actually received or was promised some form of valuable consideration for the broadcast.

Accordingly, it is not necessary to determine whether the material about MPC was distinguishable from other program material.

Issue 4: Disclosure of commercial arrangements

Relevant code provision

Commercial Television Industry Code of Practice 2010

Disclosure of Commercial Arrangements

- 1.20 If a licensee enters into a commercial arrangement in relation to a factual program, and the third party's products or services are endorsed or featured in the program, the licensee must disclose the existence of that commercial arrangement.
- 1.21 A licensee will require each presenter it employs to appear in a factual program to inform the licensee of any commercial arrangement under which the presenter agrees to endorse or feature a third party's products or services in the program.
- 1.21.1 If a presenter informs the licensee of the existence of such a commercial arrangement and the presenter endorses or features the third party's products or services in the program, the licensee must disclose the existence of that commercial arrangement.

Licensee's submissions

The licensee submitted that the program was not a current affairs, documentary or infotainment program as defined by clause 1.19, and therefore the provisions of clauses 1.20 and 1.21 do not apply.

The licensee further submitted that it categorises the program as a 'sporting program'.

Finding

The licensee did not breach clause 1.20 or 1.21 of the Code.

Reasons

Clauses 1.20 and 1.21 of the code apply only to 'factual programs'. The first issue therefore is whether *NRL First Preliminary Final* broadcast on 23 September 2011 was a 'factual program'.

'Factual program' is defined at clause 1.19.2 of the code as:

a current affairs, documentary or infotainment program broadcast by the licensee.

'Current affairs program', according to clause 1.19.3 of the code, has the meaning given in clause 4.2 of the code. Clause 4.2 of the code defines 'current affairs program' as:

a program focussing on social, economic or political issues of current relevance to the community.

Whilst the impugned material dealt with a political issue of current relevance to the community, the program itself is not of this kind.

'Documentary program', according to clause 1.19.4 of the code, means a documentary program as defined in the Australian Content Standard. That definition is:

a program that is a creative treatment of actuality other than a news, current affairs, sports coverage, magazine, infotainment or light entertainment program.

As a sports coverage program, the *NRL First Preliminary Final* is excluded from this definition.

'Infotainment program' is defined at clause 1.19.5 of the code as:

a program the sole or dominant purpose of which is to present factual information in an entertaining way, and which employs presenters to do so.

The licensee submitted that the *NRL First Preliminary Final* was not an infotainment program but a 'sporting program'. There is no definition of 'sporting program' in the code although 'live sporting event' is defined at clause 6.12 of the code to include 'live-to-air sporting broadcasts, including breaks immediately before and after the broadcast'.

In the ACMA's view, the definition of 'infotainment program' at clause 1.19.5 of the code suggests that the presenters will have an active involvement in considering how to present the factual information in an entertaining way and will also be doing the actual *presenting* of the factual information to viewers, 'present' being defined in the Macquarie Dictionary (6th edition) to include 'to bring before or introduce to the public' and 'to show or exhibit'. In live sporting events, the commentators do not, generally speaking, 'present' factual material; rather, they merely provide comments, views and opinions on/about the factual information, namely the live sporting action, being presented in visual form. In fact the factual information is being presented to the commentators at the same time it is being presented to the end viewers. This is different from what happens in the kind of program usually referred to as 'infotainment', where the presenters receive the factual information first (before the end viewer) and then consider how to present that information to viewers in an entertaining way.

In view of these considerations, the ACMA is of the view that the *NRL First Preliminary Final* broadcast on 23 September 2011 was not an infotainment program.

Since the *NRL First Preliminary Final* broadcast on 23 September 2011 was not a current affairs, documentary or infotainment program, it was not a 'factual program' as defined in clause 1.19.2 of the code. Accordingly, clauses 1.20 and 1.21 do not apply.

Observations

The ACMA notes that the current code does not require the disclosure of commercial arrangements in relation to live sporting events. The ACMA also notes that the definition of program genres in the Code, in relation to disclosure of commercial arrangements, may be incomplete or inadequate. The ACMA will raise these matters with Free TV Australia in anticipation of the next code review.

Issue 5: Effort to resolve code complaints

Relevant code provision

Commercial Television Industry Code of Practice 2010

Resolution of Complaints

7.15 Licensees will make every reasonable effort to resolve code complaints promptly, except where a complaint is clearly frivolous, vexatious or an abuse of the code process.

Background

As noted, the ACMA received two complaints from members of the public who had directed complaints to the licensee under the Code, and considered that the licensee's response to their complaints was inadequate.

Complaint 1, which had two signatories, was made to the licensee on 24 September 2011. The complaint included:

On Friday 23rd September 2011 we were watching your Rugby league preliminary Final coverage of Manly versus Broncos when we heard the commentators discussing the Government's proposed policy on the poker machines, when they were making derogatory comments on how it was going to have a bad effect on the Clubs.

We must firstly state that neither of us are party members to any political party just feel that this type of blatant 'cash for comment' is totally unacceptable ... We ... would appreciate your advising the commentators to refrain from any political comment.

The complainants received a response from the licensee dated 28 September 2011 which included:

The comments relating to the Federal Government proposed poker machine tax were purely the opinions of the commentators regarding matters directly affecting the NRL community. The comments were part of the program content and were in no way an advertisement; furthermore the Nine Network did not receive any payment or other benefits for the broadcast of the information.

For the reasons outlined above, I believe we have complied with our Industry Code of Practice, and the requirements of the BSA.

Complainant 2 complained to the licensee on 2 October 2011. His complaint, made via the electronic form, identified the 'Complaint Type' as 'Advertisement' and had the following entry in the 'Complaint Details' field:

Promotion of poker machines without disclosing financial interest.

Political advertising (about poker machine legislation) without appropriate acknowledgement.

Complainant 2 received a response dated 4 October 2011 which included:

The comments relating to the Federal Government proposed poker machine tax represented the opinions of the commentators regarding matters directly affecting the NRL community. The comments were part of the program content and were in no way an advertisement; furthermore the Nine Network did not receive any payment or other benefits for the broadcast of the information.

For the reasons outlined above, I believe we have complied with our Industry Code of Practice, and the requirements of the BSA.

Complainants' submissions

The complainants submitted in their complaints to the ACMA that:

- the licensee's reply contained false information, namely that the material was the opinion of the commentators only; and
- the licensee's response misrepresented the proposed legislation as a tax.

Complainant 1 referred specifically to Mr Warren's comments on *Dead Set Legends* that it was a directive from up top that it be read by at least somebody, so I read it'.

Complainant 2 commented:

In the reply they have made an allegation now shown to be false. That is, that the comments were opinions of the commentators only. It has been since revealed by ABC news⁶ that this was indeed not the case. Channel 9 management had contacted the gambling industry suggesting that comments should be made on the Friday Night football show.

Licensee's submissions

The licensee submitted:

In their complaints, the complainants both alleged that the comments were a form of advertisement. When taken as a whole, it is clear that the purpose of the [paragraph beginning: 'The comments relating to the Federal Government ...'] was to inform the complainants that the comments were opinion and were not advertisements or 'cash for comment'. We maintain that the response provided to both complainants adequately informed them of this fact and that the responses were therefore in accordance with clause 7.15 of the code.

Further we note that .. Ray Warren indicated to the Executive Producer of the program that the script he read reflected his own views on the matter and that is why he agreed to read it. In relation to the comments by Phil Gould, his comments were not scripted and were purely his opinion. For this reason, references to the opinions of the commentators were not incorrect.

The reference to the reforms being a tax was inadvertent and Nine maintains it was not material to the substance of the reply, which was to inform the complainants that the comments were not advertisements. As the comments broadcast did not allege the material was a tax, we maintain the inadvertent reference in the response is not a matter covered by the code. The reference was amended in subsequent replies.

In response to a request from the ACMA, the licensee advised that prior to drafting its response, Nine management reviewed a copy of the broadcast and spoke to Mr Callander, who advised them that 'many of the comments relating to poker reform were unscripted opinion and that the Eagle's Nest component was a scripted read'.

Finding

The licensee breached clause 7.15 of the Code.

⁶ In response to a query from the ACMA, the complainant clarified that what he had heard on the ABC News was a report about one of the letters Mr Browne sent to NRL clubs on 20 July 2011. *The Australian Online* disclosed the existence of this letter on 26 October 2011 ('Nine Network planned campaign against Labor's poker machine reforms', *The Australian Online*, 26 October 2011).

Reasons

The broadcast complained of did not consist only of spontaneous comments from Mr Warren and Mr Gould: there was also a script (prepared at the request of Nine management) read by Mr Warren and a visual superimposition, namely the on-screen URL.

Accordingly, the 28 September 2011 description of the broadcast as 'purely the opinions of the commentators' and the 4 October 2011 statement that 'the comments ... represented the opinions of the commentators' were at best misleading and at worst false. The licensee's responses:

- inaccurately described the broadcast by failing to acknowledge the components to the broadcast apart from the commentators' 'comments';
- failed to explain that the broadcast was an initiative of Nine's management; and
- implied that the material was merely a reflection of the personal views of Mr Warren and Mr Gould.

The licensee has submitted that the responses to the complainants were in accordance with clause 7.15 of the code because they adequately informed the complainants of the fact that the 'comments were not advertisements or "cash for comment" '.

The ACMA accepts that a licensee's response must, as a central feature, address the issue of whether a broadcast complained of has complied with the code or not, and that the licensee did this in its responses in this case. However, the ACMA does not accept that the licensee's obligation to make 'every reasonable effort to resolve code complaints promptly' can be discharged by providing misleading responses to such complaints.

Moreover, the emphasis which the licensee placed on the views of the commentators and its failure to articulate its own role in the formulating the broadcast represents a failure to genuinely engage with viewers' complaints and thereby the co-regulatory framework that assigns primary responsibility for resolving viewer complaints to broadcasters.

Accordingly, given the importance of an accurate description of the material broadcast, the difficulties with the licensee's description of that material (articulated above) and the overall lack of frankness in the licensee's responses, the ACMA finds that the licensee's conduct in responding to the complainants did not amount to making 'every reasonable effort' to resolve the complaints.

With regard to the description of MPC as a 'tax', the ACMA considers that, while this was inaccurate, the error was a peripheral matter, in terms of the purpose of the licensee's response to the complaints and its efforts to resolve them.

Licensee's response to Preliminary Report

In response to the ACMA's Preliminary Investigation Report, the licensee submitted that it had not been obliged to respond to the complaints because they were not complaints 'about a matter covered by the Code', as required by clause 7.2 of the Code. In that respect, the licensee noted the ACMA's preliminary view that no provisions of the code applied to the material broadcast.

The ACMA does not agree.

Clause 7.2 of the Code provides:

- 7.2 The main requirements of this Section⁷ apply to any complaint about a matter covered by the Code which:
- 7.2.1 Is received by a licensee, or lodged in accordance with clause 7.5.3,⁸ not more than 30 days after the relevant broadcast;
 - 7.2.2 Is in the form specified in Clause 7.5; and
 - 7.2.3 Identifies, in sufficient detail:
 - 7.2.3.1 the material broadcast (including by reference, if possible, to the date and time of broadcast of the material, or in the case of a television program series, the particular episode of the series the subject of the complaint);
 - 7.2.3.2 the nature of the complaint; and
 - 7.2.3.3 the identity of the complainant.

Complaint 1 referred to 'cash for comment', a colloquial term for failure to disclose commercial arrangements and distinguish paid material from other program material. Complaint 2 explicitly referred to absence of disclosure ('without disclosing financial interest') and described the material of concern as an 'advertisement' broadcast during a program. Disclosure of commercial arrangements and distinguishing between paid material and other material are both matters covered by the Code (clauses 1.19-1.23 and clauses 1.16-1.18 respectively). The complaints raised these matters. They were therefore about matters covered by the Code, and as such constituted 'Code complaints' for the purposes of clause 7.15 of the Code.

A licensee has an obligation to make every reasonable effort to resolve Code complaints (ie complaints about matters covered by the Code), even if, after analysis by the licensee and/or investigation by the ACMA, it is established that the Code provisions raised by the complainant do not apply to the particular broadcast or were, otherwise, not breached. Clause 7.2 stipulates that a complaint must relate to a matter covered by the Code; it does not require that a complaint have merit, or be substantiated, save that it not be frivolous, vexatious or an abuse of process. To interpret clause 7.2 in any other way would significantly diminish the protections afforded to viewers and fundamentally undermine the effectiveness of the co-regulatory scheme.

For the sake of completeness, the ACMA finds that both complaints met the requirements of clause 7.2 of the Code:

- as outlined above, they were about matters covered by the Code;
- both were made within 30 days of the broadcast;
- both were in a form specified in Clause 7.5—Complaint 1 by mail (clause 7.5.1) and Complaint 2 by electronic lodgement (clause 7.5.3); and
- both identified, in sufficient detail, the material broadcast, the nature of the complaint, and the identity of the complainant.

⁷ Section 7 of the Code, 'Handling of Complaints to Licensees'.

⁸ Clause 5.3 of the Code provides that a 'Code complaint' must be sent by mail to the licensee (clause 7.5.1); sent by facsimile to a licensee's main facsimile number (clause 7.5.2); or made by lodging the electronic form on the Free TV Australia website (clause 7.5.3).

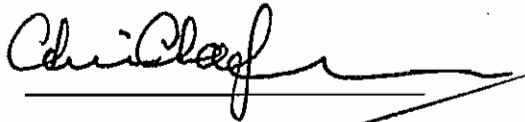
Decision

The Australian Communications and Media Authority determines for the above reasons that the licensee of TCN, TCN Channel Nine Pty Ltd, in relation to the broadcast of the *NRL First Preliminary Final* on 23 September 2011:

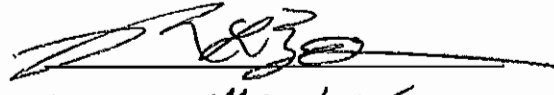
- complied with subclause 4(2) of Part 2 of Schedule 2 to the BSA and therefore did not breach the licence condition at paragraph 7(1)(j) of Schedule 2 to the BSA;
- did not breach clauses 1.16, 1.18, 1.20 or 1.21 of the Code; and
- breached clause 7.15 of the Code.

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





Signature of Member



Signature of Member

CHRIS CHAPMAN

Name (please print)

RICHARD BROWN

Name (please print)

Dated this 19th day of April 2012

APPENDIX

Final script of 'Clubs plug' provided by Nine

Not only has the Manly Football Club been doing great work on the field this season they have also been very busy working with the community off the field.

With significant funding from the Manly Leagues Club and Harbord Diggers, the Sea Eagles established the "Eagles Nest" in conjunction with the Royal Far West health service.

"Eagles Nest" is a multi-purpose room where staff run adolescent mentoring programs with the assistance of Manly players.

The ongoing financial assistance of registered clubs across Australia ensure this and many other worthwhile programs continue but they are under threat from new untested technology the Federal Government plans to introduce.

Funding from clubs is the lifeblood of many community programs and initiatives we all enjoy.

For more info go to:

Won't work will hurt.com.au