

Investigation Report No. 2557

File No.	ACMA2011/489
Licensee	Television Sydney (TVS) Limited
Station	TSN31, Sydney
Type of Service	Community television
Name of Program	<i>4WD TV</i>
Date of Broadcast	17 February 2011
Relevant Legislation	Clause 4(2) of Schedule 2 to the <i>Broadcasting Services Act 1992</i>

Investigation conclusion

The licensee of TSN31, Television Sydney (TVS) Limited, breached clause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992* [identification of certain political matter].

The complaint

On 4 March 2011, the Australian Communications and Media Authority (the ACMA) received a written complaint alleging that Television Sydney (TVS) Limited, the licensee of TSN31 (TVS), is not operating in accordance with its licence conditions.

The complainant alleged that during the *4WD TV* program, at approximately 7.40 pm on 17 February 2011, a political advertisement for the Outdoor Recreation Party (ORP) was broadcast without the relevant authorisation statement.

The service

TVS is licensed to provide a community television broadcasting service to represent the community interest of the general geographic area of the Sydney TV1 licence area.

On TVS' website it states:

At TVS we are committed to providing an outlet for programs for all the communities of Sydney and our aim is to maximise the number of programs made here in Sydney. We like to be engaging and thoughtful; featuring issues that other television channels often ignore. We encourage innovative program styles where creative producers explore new formats and showcase emerging talent. Genuine not-for-profit community based program makers receive free program airtime.¹

The program

The *4WD TV* program is a 30 minute television program broadcast three times per week on TVS. It is described on the licensee's website as being 'dedicated to all things four wheeling' and as featuring 'stories covering 4WD education and safety, hints and tips, trip and track reports, product tests and reviews, repairing and modifying your rigs as well as club reports, events and competitions'.² The program is broadcast on a number of other commercial and subscription television channels throughout Australia and New Zealand.

Each *4WD TV* program appears to feature a number of segments that deal with different topics. Some of these segments appear to be unique to each episode and others appear to be recurring segments. The topics featured on TVS' 17 February 2011 broadcast of the program (episode 255) included segments on a 'Father and Child' swag weekend held by the Geelong 4WD Club, mud racing at Calder Park in Victoria, installation of extreme performance chips into 4WDs, a feature on a viewer's 4WD, a promotion for the Eldee Station 'Easter Family Event' in New South Wales and roof racks.

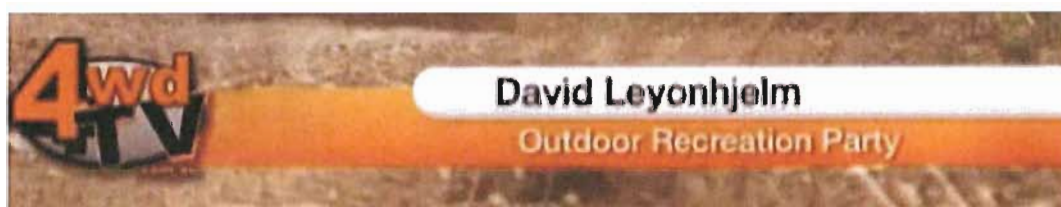
The opening titles of the segment in episode 255 referred to in the complaint featured the following title:

¹ <http://www.tvs.org.au/get-involved/about-tvs> [accessed on 26 May 2011].

² <http://www.tvs.org.au/> [accessed on 14 April 2011].



In the first few seconds of the ORP segment, a blurb appeared across the bottom of the footage as follows:



The ORP segment then showed a series of images of 4WDs in various scenarios, including driving on what appeared to be national park tracks, people fishing on beaches, people purchasing guns and people shooting guns. The audio soundtrack included a male voiceover and the Lucky Wonders' song, *Please don't break me down*, was played as background music throughout the segment. A full transcript of the narration is at **Attachment A**. There were no closing credits to the segment.

Assessment

The assessment is based on:

- the complainant's email to the ACMA dated 4 March 2011;
- written submissions from the licensee dated 22 March 2011, which included:
 - a copy the *4WD TV* program broadcast on 17 February 2011 (episode 255);
 - a copy of an edited version of episode 255 of the *4WD TV* program which was broadcast on 19 and 20 February 2011;
 - a copy of the DVR log of TVS' broadcast on 17 February 2011 from 7.30 pm to 8.00 pm; and
 - copies of correspondence between:
 - the licensee and the producers of the *4WD TV* dated 18 February 2011; and

- the licensee and several members of the public who made complaints about the ORP segment between 18 February 2011 and 22 February 2011.
- further written submissions from the licensee dated 8 April 2011 and 16 May 2011, which included responses provided by both the licensee and a producer of the *4WD* TV program;
- a copy of episode 255 of the *4WD* TV program which was accessed from the program's website (<http://www.4x4earth.com.au/watch-4wdtv/?e=255>) on 14 April 2011; and
- the licensee's response to the ACMA's preliminary investigation report, dated 9 June 2011 (received by the ACMA on 24 June 2011).

Issue – Identification of certain political matter

Relevant provisions of the Broadcasting Services Act 1992

Schedule 2

1 Definitions

In this Schedule:

[...]

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 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.

[...]

4 Identification of certain political matter

- (1) In this clause, broadcaster means:

[...]

- (c) a community broadcasting licensee;

[...]

- (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.
- (3) A broadcaster must, in relation to political matter broadcast at the request of another person, keep a record of the name, address and occupation of the person or, if the person is a company, the name and the address of the principal office of the person for the required period and must give to the ACMA any particulars of the record that the ACMA, by written notice, requires.
- (4) For the purpose of this clause, a person authorises the broadcasting of political matter only if the person is responsible for approval of the content of the political matter and the decision to present it for broadcasting.

Complainant's submissions

The complainant submitted on 4 March 2011 that:

[The ORP segment in the *4WD TV* program] urges viewers to vote for some candidate standing for the Outdoor Recreation Party in the Upper House [in the NSW State Election 2011]. Unlike every other political ad I have seen in the past many years, this one did not end with a statement of "Authorised by ..." and "Spoken by...". The ad was shown at approx 1940 h on Thursday 17 February 2011 on TVS.

Licensee's submissions

TVS submitted on 8 April 2011 that:

TVS strives to ensure that all provisions of the [*Broadcasting Services Act 1992*] which relate to Community Television are strictly adhered to. These include (but are not limited to) such specific rules which relate to advertorial content, hourly advertising limits, classification time zones, and all other regulations. All our staff are trained to recognise potential breaches of the Act, and upon identifying potential areas of concern, will bring them to the attention of TVS management for consideration (both verbally and in a written report).

In the event of a program being flagged for such potential breaches, the program is put on hold and is prevented from being broadcast until such time as the issue in question has been resolved.

Our staff, as stated, are trained in identifying such breaches, including those concerning political advertising. In defence of TVS, the segment in question I believe was not in and of itself immediately identifiable as potentially breaching the regulations, and as stated, was not clearly identified until after its first airing, after which time the potentially breaching segment was immediately removed. I believe that the fact that no other channel in Australia identified this segment as being a potential breach might further support this opinion.

Immediately upon taking action to correct the potential breach, all staff were again reminded of the need to remain alert for potential breaches of the act, with specific reference to political advertising, being relevant at that time.

In its 8 April 2011 submission, the licensee included the following statement from a producer of *4WD TV*:

I invited the candidate [from the Outdoor Recreation Program] to speak to our viewers [of the *4WD TV* program] about the issues, what the problem was and how it could possibly be resolved.

[...]

4wd TV has on a number of occasion[s] aired presentations from other competitive political candidates including the Shooters Party and the Game Council who also gave information relevant to our viewers, spoke about their policies, their concerns, upcoming elections and relevant actions to be taken.

TVS submitted on 16 May 2011 that:

After accepting a program for transmission on our channel, TVS monitors the programs submitted to us to ensure that the original spirit of the program originally accepted is maintained. Having said this, TVS does not engage in editorial control over those programs which have been accepted to air on the channel. TVS is a transmission organisation primarily, and does not engage in program production. TVS however does run quality control standards over all programs to try and ensure that the rules and regulations which are imposed on community broadcasters are adhered to by the programs which we transmit.

[...]

TVS does not engage in editorial control over those programs which have been accepted to air on the channel. Determination of topics and stories is made by the producers of the programs.

[...]

TVS did not have editorial control over the *4WD* program. The only time TVS exercises editorial control is when it identifies a potential [breach] of our licence conditions. TVS ingest³ operators and volunteers are briefed and trained to check programs and draw attention to possible breaches to [the] Program Manager. If programs are in breach of our code [of] practice and ACMA licensing regulation and relevant broadcast laws then the producer is contacted to rectify the content before broadcast. Programs that are generated from originating cities ie Ch31 Melbourne are usually checked closely in the state of origin then rechecked again when

³ This industry term refers to staff who ensure that programs are broadcast ready.

ingested in Sydney. The potential breach was overlooked by a volunteer ingest operator in Sydney. The TVS Program Manager and CEO, TVS have editorial control over the content broadcast on TVS and had the problem been identified during the ingest process we would have acted before broadcast. We took remedial action the moment a potential problem was identified. We consider that our internal processes and checks were not satisfactory and have taken steps to remedy this through training of volunteers, staff and Producers on broadcasting regulations.

In its 16 May 2011 submission, TVS also provided further statements from a producer of 4WD TV:

4wd TV's control of the content of 4wd TV like any producer, draws broadly on available topics, concepts, ideas, stories, interests and parallel activities to develop a broad, educational, inspiring and educational program for [its] core community viewers; 4wd drivers and outdoor enthusiasts. After gaining an understanding of the relevance of the ORP policies to the political, recreational and future pursuit of activities by common 4wd drivers, [SC] (host and producer of 4wd TV) accepted a request from an ORP candidate to present their view of the relevant political (land, vehicular and other) issues and concerns facing our direct community. Whilst the decision to air the segment initially fell on [SC], over all decisions concerning content are approved by [4WD TV producers] based on experience, discussions and ongoing relations with 4wd association groups, staff members at 4wd TV and other contacts with the 4wd industry.

[...]

TVS's control of the content of 4wd TV sits solely within the realm of constitutional vetting of the program as guided by the interpreted ACMA regulations. As such their role as discussed above is solely a 'post production' assessment that is 100% outside the scope of productive artistic development, content and decision making of the finalised pre airing program. Verbal content of the segment was developed 100% by the ORP candidate David [Leyonhjelm]. 4wd TV then took 100% control of the editing and production of the segment which included selecting the music, selecting the visual footage accompanying the voice over and editing of the voice over which included cutting the content as seen appropriate by the production staff in light of the nature and content of our program in general and the length of time available for the segment. 4wd TV staff take the initial steps in cutting together the story and [SC] has the final say on the production.

[...]

David [Leyonhjelm] of the ORP developed and presented the verbal material as his own ideas, policies and thoughts and performed the voice over himself. 4wd TV staff and [SC] took control of cutting this verbal content to match the flow, content and nature of 4wd TV and to fit within the given time allowed as determined by the length of other stories within the same episode. Content that 4wd TV deemed unnecessary, repeated, contradictory, not relevant to the viewers or not within the nature of the program were omitted.

[...]

The style of the presentation was developed by two independent parties; the ORP (David [Leyonhjelm]) and 4wd TV (staff and [SC]). To the best of our understanding, David presented the voice over with a style that he felt to be clear, professional and easily received by constituents who may be interested in the content, effected by the content or unaware of the brevity of the content. The music, visual content and production style were controlled by the

4wd TV team with no further consultation with David and in light of the points made within the above dialogue as to the actions of 4wd TV that effectively decided the length, content and style of this segment.

TVS submitted on 22 March 2011 that:

The Producer having been made aware of [the] unintentional breach of the Act, fully withdrew the political content from the program for all future broadcasts on TVS.

[...]

TVS is scheduling several training sessions for Community Program producers to focus on compliance issues of the [*Broadcasting Services Act 1992*] [...] in May and June 2011.

[...]

TVS volunteers and staff have reviewed their screening and ingest process and have been alerted that the usual checklist processes for ensuring material as screened on [*4WD TV*] is closely adhered to.

In response to the ACMA's preliminary investigation report, TVS submitted on 24 June 2011 that:

TVS acknowledges the preliminary finding that it was an unintentional breach(p.11) and that TVS has made every effort to respond to the investigation in a full and comprehensive manner. It is acknowledged in the report TVS acted quickly to ensure other CTV stations were aware of the program content and subsequently edit and withdrew the program from broadcast.

Finding

The delegate finds that TVS broadcast a political announcement without the required particulars and, accordingly, breached clause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992* (the Act).

Reasons

It is not in dispute that the ORP segment was broadcast without any particulars such as the name and details of a person or party authorising the broadcast. In its 8 April 2011 submission TVS stated that:

[TVS believes] that as [the producer of *4WD TV*] was not aware that the segment might be considered a political announcement, nor was it his intention that the segment be so; this would give weight to why it was not tagged [emphasis added].

In order to determine whether the broadcast should have been accompanied by these particulars, two matters need to be decided:

- 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.

What is political matter?

The definition at clause 1 of Schedule 2 to the Act defines political matter as:

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

In determining if a matter that has been broadcast is political matter, regard is had 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.

Was the material in the 17 February 2011 4WD TV broadcast 'political matter'?

In respect of the ORP segment broadcast in the 4WD TV program on 17 February 2011, it is noted that the segment provided information about:

- the perceived impact of Commonwealth and New South Wales government policies regarding national parks, fisheries and gun ownership;
- the political policies, objectives and philosophies of one particular party registered for election in the New South Wales 2011 state election, namely the ORP;
- background information in relation to one particular candidate nominated for election in the New South Wales 2011 state election; and
- details of how to vote for one particular party registered for election in the New South Wales 2011 state election, namely the ORP.

It is considered that the ORP segment which TVS broadcast went beyond merely informing viewers and sought to influence them to support the ORP. In this regard, it is noted that there were numerous negative statements about the Commonwealth and New South Wales Governments' handling of a number of issues throughout the narration of the ORP segment. For example, the narrator stated that 'governments intrude into our outdoor recreation activities far more than they did in the past' and that 'rural property owners face draconian restrictions on what they can do with their land'. The narration seeks to establish that the ORP offers an alternative and to persuade viewers to support the ORP at the upcoming state election.

It is considered that the content of the broadcast was political as it served to inform *and* influence the audience. This was further enhanced by the overall presentation of the broadcast, which had an advertorial style. In particular, it is noted that the type of full screen slide used during the opening sequence of the segment which featured the words 'Outdoor Recreation Party', was not used for any of the other segments featured in the program. The editing of the segment, from the choice of 'anguished'⁴ music, to the editing of the images, supported and enhanced the statements made in the narration, adding to the overall effect. In terms of context, it is noted that the ORP segment was broadcast less than six weeks before the New South Wales 2011 state election and included a number of references to the election and voting processes. Accordingly, it is considered that the ORP segment was political matter.

⁴ A review of The Lucky Wonders' *Please Don't Break Me Down* song in 2010 in BMA Magazine (<http://www.bmamag.com/articles/cd-reviews/20100414-lucky-wonders-thirteen-oclock-vitamin-rec/>) described the song as 'anguished' [accessed on 14 April 2011].

Was the broadcast at the request of another person?

The 'political matter' provisions of the Act do not exist to restrict 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. The issue is therefore about transparency.

The obligation to identify certain political matter will only arise where the political matter was broadcast at the request of another person, being a person who is not the licensee. Whether or not the political matter was broadcast at the request of another person is a question of fact to be determined on the available evidence. The question is not whether the *program* was broadcast at the request of another person but whether the *political matter* was broadcast at the request of another person.

In deciding whether the political matter, specifically the ORP segment contained in the *4WD TV* program broadcast by TVS on 17 February 2011, was broadcast at the request of another person, the following facts are noted:

- TVS does not 'engage in editorial control' unless it identifies a potential breach of its licence conditions; and
- the producers of *4WD TV* determine the content of the program.

From the information provided in TVS' 8 April 2011 submission, it would appear that the segment originated from meetings in 2010 between a producer of *4WD TV* and members of the ORP. A producer of *4WD TV* provided the following statement in the licensee's 16 May 2011 submission:

After gaining an understanding of the relevance of the ORP policies to the political, recreational and future pursuit of activities by common 4wd drivers, [SC] (host and producer of 4wd TV) accepted a request from an ORP candidate to present their view of the relevant political (land, vehicular and other) issues and concerns facing our direct community.

As such, it is apparent that the ORP candidate made the request to broadcast the political matter (the ORP segment). However, for political matter to be broadcast 'at the request of another person' within the meaning of the Act, the person must have been responsible for approval of the content of the political matter and the decision to present it for broadcasting.

In this regard, it is noted that the ORP candidate did not have full authorisation over the content of the ORP segment. The *4WD TV* production team had control over the editing and production of the segment 'which included selecting the music, selecting the visual footage accompanying the voice over and editing of the voice over which included cutting the content as seen appropriate by the production staff in light of the nature and content of [the] program in general and the length of time available for the segment'. In editing and producing the ORP segment, the *4WD TV* production team had 'no further consultation with [the ORP candidate]'.

While it is clear that the *4WD TV* production team had significant control over editing and producing the segment, the delegate notes that:

- the ORP candidate developed and approved the script for the ORP segment, he 'developed and presented the verbal material as his own ideas, policies and thoughts and performed the voice over himself';

- the accompanying audio and visual material, added by the *4WD TV* production team, served to support and enhance the content supplied by the ORP candidate; and
- the *4WD TV* production team edited the narration to omit certain verbal content, however, the edits did not appear to alter the nature of the content.

It is considered that while the *4WD TV* production team edited the content and added accompanying audio and visual material, in developing and approving the script, the ORP candidate was primarily responsible for the content of the ORP segment.

While it is noted that the *4WD TV* producers presented episode 255 of the *4WD TV* program to TVS for broadcasting, it is the decision to present the political matter for broadcast rather than the program that is in question. As the ORP candidate requested that the political matter be broadcast and provided the script and voice over, it is considered that the ORP candidate made the decision to present the political matter for broadcast, as the verbal content is the critical component of the political matter.

From the available evidence, the delegate is of the view that the political matter in the *4WD TV* program on 17 February 2011, the ORP segment, was broadcast at the request of a person other than the licensee, namely a candidate of the ORP. Accordingly, as the political matter was broadcast without the 'required particulars' immediately after the broadcast, TVS breached clause 4(2) of Schedule 2 to the Act. In this regard, it is noted that TVS has acknowledged an 'unintentional breach' and advised that it took immediate steps to rectify the breach.

Action taken

In response to the ACMA's preliminary breach finding, the licensee stated that:

Producer/Program Makers compliance with the Act.

[Due] to the confusion displayed by the 4 WD Producers, TVS immediately emailed to all producers the regulations in regards to political announcements within a day of the alleged breach and subsequently has scheduled several training sessions for community programs producers to focus on compliance issues of the Broadcasting Services Act. TVS has scheduled the first of these sessions to commence 26 July and plans to present several training and compliance sessions for TVS Community Producers on an ongoing basis for 2011. In an attempt to remain [compliant] of the Broadcasting Act the Program Manager and CEO of Television Sydney have recently attended (14 June) the Classification Board's training sessions to ensure that all training for staff remains current and regularly updated on all aspects of the Broadcasting Act.

TVS Screening processes:

TVS volunteers and staff have reviewed their screening and ingest processes and have been alerted that the usual checklist processes for ensuring material is [compliant] with broadcasting standards is adhered to without exception. TVS has also raised the possibility of developing more consistent screening processes across the sector with the new CTV body [the Australian Community Television Alliance].

These statements indicate TVS' commitment to meeting its licence conditions under Schedule 2 of the Act. The ACMA will continue to monitor TVS' performance in this regard.

Decision

I, Desa Bajic, Manager, Community Renewals and Investigations Section, Community Broadcasting Group, being the appropriate delegated officer of the Australian Communications and Media Authority, determine for the above reasons that the licensee, Television Sydney (TVS) Limited, breached clause 4(2) of Schedule 2 to the *Broadcasting Services Act 1992*.

Signed: Desa Bajic

dated this 30th day of June 2011

**Transcript of Outdoor Recreation Party segment broadcast on
17 February 2011**

Governments intrude into our outdoor recreation activities far more than they did in the past. National park tracks are constantly being closed on the pre-text of preventing environmental damage, affecting all sorts of people. All the while the parks are neglected and mismanaged, with feral animals and weeds rampant and uncontrolled fuel loads contributing to destructive bushfires. Recreational fishers face a growing web of regulations, enveloping our most popular and enduring outdoor pastime. With marine parks spreading like a plague, the future of recreational fishing is far from assured. Sporting shooters and hunters are under pressure too. Licensing and registration are a nightmare and there are onerous rules on storage, transport and use of firearms. Rural property owners face draconian restrictions on what they can do with their land with approval required for almost anything. In fact, most aspects of modern life are more highly controlled than ever. Impositions on 4WD users and others who venture off the beaten track need to be seen in the context of an expanding nanny state, with ever expanding limits on personal freedom and responsibility.

Quite simply, the Outdoor Recreation Party is committed to less government control. Policies include free access to public land for recreational purposes. We also believe public land should be actively managed not locked up and neglected. We agree fish populations should be preserved for future fishers, so we support size and bag limits, plus catch and release programs based on scientific data, but we oppose fishing licences and would roll back marine parks established since 1995. We support restoration of the right to own most types of firearms for sport, hunting, collecting, occupation and self-defence, without being treated like criminals in waiting. But these policies merely reflect our philosophy. Whether there is an issue affecting fishers, 4WD users, hunters or groups such as motorcyclists or property owners, our approach is always to favour individual choice and responsibility over government rules, that includes our attitude to environmental preservation. Many outdoor enthusiasts are deeply offended by the suggestion that they care less about the environment than city based activists or those who prance around in koala suits. Our approach assumes humans are not an alien species, but integrally related to the environment. We recognise the enormous benefits to the environment of active management. We describe this as 'smart green, not extreme green'.

The Outdoor Recreation Party previously had a member in the New South Wales Upper House. It wants to regain that seat in the March 2011 State election. The party's leading candidate is Sydney businessman David Leyonhjelm, a keen outdoors enthusiast. David is a former veterinarian and qualified in law. He rides a motorbike, drives a 4WD, owns a rural property and hates government control. To vote for the Outdoor Recreation Party in the upper house just place a 'one' in the box above the line and vote how you like in the lower house.