



**Australian
Broadcasting
Authority**

Investigation Report No 1432

File No.	2004/1314
Licensee	Channel Seven Sydney Pty Ltd
Station	ATN 7
Type of Service	Commercial Television
Name of Program	Today Tonight
Date/s of Broadcast	15 April 2004
Relevant Legislation/Code	Clauses 4.3.1, 7.9 and 7.12 of the Commercial Television Industry Code of Practice 1999

Investigation Conclusion

The ABA finds that the licensee, Channel Seven Sydney Pty Ltd:

- breached clause 4.3.1 of the Commercial Television Industry Code of Practice 1999 (the Code) by failing to present factual material accurately; and
- breached clauses 7.9 and 7.12 of the Code by failing to provide a substantive written response to the complainant and failing to advise the complainant that it could make a complaint to the ABA about the matter if it considered the response inadequate.

The Complaint

On 16 July 2004 the Australian Broadcasting Authority (the ABA) received a complaint from Minter Ellison Lawyers, on behalf of its client Ray White Real Estate Pty Ltd (complainant), regarding a segment entitled *Homeshock* broadcast by Channel Seven Sydney Pty Ltd (the licensee) on the *Today Tonight* program on 15 April 2004.

The complainant alleged that the licensee breached clause 4.3.1 of the the Code in that it failed to present factual material accurately and represent viewpoints fairly. In particular, the complainant claimed that:

- the segment implied that the misrepresentation was deliberate on the part of the Principal of Ray White's real estate franchise in Altona, Mr D, despite a finding made by the Victorian Civil and Administrative Tribunal (VCAT) that the misrepresentation was unintentional;
- the segment erroneously suggested that Mr D had direct conduct of the sale of the property and had personally made the misrepresentation to the purchasers;
- the segment portrayed the couple who purchased the property as being unaware of the demolition order, despite the fact that the contract for sale included relevant Council letters relating to outstanding works; and
- the reporter suggested that Mr D had only paid the outstanding compensation monies after *Tonight Tonight's* involvement in the matter.

Although the complainant did not raise the issue of complaints handling, the ABA notes that clauses 7.9 and 7.12 of the Code are relevant in this matter in respect of whether the licensee's written response to the complaint was "substantive" and whether the licensee notified the complainant of the option of approaching the ABA.

Matters not considered by the ABA

The complainant indicates that Mr D had agreed by phone to be interviewed at his office where the relevant documents were held. However, 15 minutes later, the reporter arrived at Mr D's home unannounced. The complainant alleges that the interview was then conducted in a manner which deliberately depicted Mr D in a bad light with the reporter standing outside a closed door making "loud and loaded remarks". This aspect of the complaint has not been investigated by the ABA as it is not covered by the Code.

The complainant also alleged that the reporter failed to provide Mr D with a fair opportunity to respond to the complaint following the doorstep interview. The ABA has not investigated this aspect of the complaint as there is no requirement under the Code that current affairs programs must be neutral on every issue or give equal time to both sides of an argument. Such programs are entitled to take a stance and present a particular point of view.

The Program

The segment concerned the failure of a real estate agent to advise the purchasers of a property that the house was subject to a demolition order. The segment was introduced by the host, Naomi Robson, as follows:

Imagine buying a dream home only to discover you have been tricked and the house you thought was perfect was in fact under a demolition order. That's what happened to one devastated family....

The segment featured an interview with the couple who purchased the property; an attempted interview with the Principal of the Ray White real estate in Altona, Mr D; and a spokesman for the Consumer Law Centre. The reporter is shown attempting to interview Mr D at his home with Mr D closing the front door.

The reporter indicated that ultimately, the house was not demolished. Rather, the purchasers carried out extensive renovations to correct the building defects.

This matter was the subject of a claim made to VCAT by the purchasers of the property against the D Group Pty Ltd (the company which owns the Ray White franchise) alleging misleading conduct. On 24 November 2004, VCAT found that the respondent's conduct was misleading and deceptive, albeit not intentionally, and ordered it to pay \$7,500 in damages to the purchasers.

Code provisions

The relevant provisions of the Code are clauses 4.3.1, 7.9 and 7.12:

- 4.3 In broadcasting news and current affairs programs, licensees:
 - 4.3.1 must present factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program.
- 7.9 Where a Code complaint is made about material broadcast by a station within thirty days of its broadcast, the licensee must provide a substantive written response
- 7.12 In all cases, a licensee's substantive reply will also advise the complainant that he or she may refer the matter to the Australian Broadcasting Authority if not satisfied with the licensee's response.

Assessment

The ABA sought and received a tape of the relevant segment from the licensee and comments in regard to the program's compliance with the relevant clauses of the Code.

The ABA assessed the allegations against the Code's requirement to 'present factual material accurately having regard to the circumstances at the time of preparing and broadcasting the program.'

Issue 1: Presenting factual material accurately

In assessing the complaint, the ABA considered the accuracy of the factual material; the information relied on by the licensee in presenting the factual material; and the extent to which the licensee could have reasonably judged that the factual material was accurate, including verifying that material with the complainant.

Licensees are not required to include all factual material available to them, however, the omission of factual material that could substantively alter the presentation of the report may be sufficient to constitute a breach.

1. Implication that the misrepresentation was deliberate on the part of Mr D
Complainant's submissions

The program implies that the misrepresentation was deliberate on the part of Mr D. Although the program refers to the findings of VCAT on this issue, it fails to state that VCAT found that the misrepresentation was unintentional.

Licensee's submissions

The program merely sets out the facts...The program did not make any comment as to whether or not the misrepresentations were deliberate or whether or not Ray White Altona, Mr D or the real estate agent dealing with [the purchasers] was actually aware of the Building Infringement Notices at the time the relevant misrepresentations were made.

Finding

The ABA finds that the licensee did not present factual material accurately in this instance. Accordingly, the licensee breached clause 4.3.1 of the Code.

Reasons

The reporter made the following comments regarding 'misrepresentation':

What agent [Mr D] didn't tell them was that much of this home that he advertised was under a Council demolition order because those renovations were illegal.

Initially [the purchasers] said Mr D agreed that he misrepresented the property but later the company story changed.

Chris Field from the Consumer Law Centre says that tough laws similar to new auction laws are needed to discourage agents from misleading potential buyers.

[The purchasers] took Mr D to VCAT where he was found to have misrepresented the property and ordered to pay \$7,500 compensation.

The transcript of VCAT's proceedings clearly states that the "conduct was misleading and deceptive, albeit not intentionally". By omitting the reference to "not intentionally", the ABA is satisfied that the comments made by the reporter did not present factual material accurately. The ABA considers that the statements could lead an average viewer to the conclusion that Mr D deliberately misled the purchasers by failing to advise them of the demolition order.

It is unclear whether the licensee obtained a copy of the transcript of the VCAT proceedings prior to broadcasting the segment. The ABA is of the view that licensees should carefully research and report facts. In this instance, VCAT's decision was an integral part of the segment. Consequently, the ABA is of the opinion that the licensee should have ascertained the exact wording of the decision before it reported on the case.

The ABA is satisfied that, as the main theme of the segment was the misrepresentation of the property by Ray White, the inaccuracy is significant enough to warrant a breach finding.

2. *Suggestion that Mr D had personally made the misrepresentation to the purchasers*

Complainant's submissions

With respect to Mr D's involvement, the program suggests that he was himself the real estate agent who had direct conduct of the sale and personally made the misrepresentation. That was quite unfair to Mr D. It was an employee who handled the sale and made the representation complained of. The purchasers did not deal with Mr D in relation to the purchase. He only became involved at a later stage. He had no dealings with the [purchasers] prior to the relevant contract being signed.

Licensee's submissions

As the owner and manager of Ray White Altona, Mr D was responsible to [the purchasers] for what had been told to them in relation to the meaning of clause 15. This was clearly [the purchasers'] view and is also reflected in the VCAT findings against Mr D's company.

Finding

The ABA finds that the licensee did not present factual material accurately in this instance. Accordingly, the licensee breached clause 4.3.1 of the Code.

Reasons

In addition to the statements quoted above referring to Mr D, the ABA notes the following comments made by the reporter:

The couple contacted local Ray White agent Mr D.

The pair began to suspect this guy from Ray White wasn't alright.

Henry [Mr D], how can anyone trust you to sell them a house now?

The segment also showed a photo of Mr D on four occasions. In view of this information, the ABA considers that the licensee did not present factual material accurately by giving Mr D's name and photo showing him as the agent who sold the property.

As noted above, it is unclear whether the licensee obtained a copy of the transcript of the VCAT proceedings. The ABA is of the view, however, that the licensee should have clarified the name of the Ray White agent who actually sold the property either with the complainant or the purchasers of the property.

The ABA is satisfied that the inaccuracy depicting Mr D as the agent who misled the purchasers is significant enough to warrant a breach finding given that the segment focused on the misrepresentation of the property.

3. *Portrayal of the purchasers as being unaware of the demolition order, despite the fact that the contract for sale included relevant Council letters relating to outstanding works*

Complainant's submissions

Our client also instructs us that whilst [the purchasers] are portrayed in the program as being unaware of any outstanding works on the property, the relevant documentation indicates that the contract for sale of the property specifically

included letters from the Council relating to outstanding works. This was also acknowledged by [the purchasers] in their submissions to the VCAT.

Licensee's submissions

The fact that the demolition orders were attached to the contract was not disputed by [the purchasers] in their submission to VCAT. However, the VCAT orders against the D Group reflect that the attaching of the demolition orders wasn't sufficient to nullify the responsibility of Ray White Altona for the representations that had been made about the property and the effect of contract clause 15.

We do not believe that the failure to mention that the orders were attached to the contract was a significant error of fact that would amount to an inaccuracy.

In response to the preliminary findings, the licensee submitted in a letter dated 27 January 2005 that the purchasers had maintained that they were unaware of the demolition order after the contract had been signed. In this respect, the licensee does not consider that the segment's portrayal of the purchasers being unaware of the demolition order to be an inaccurate representation of the facts. Furthermore, the licensee contends that it is inappropriate for the ABA to prefer one version of events over another.

Finding

The ABA finds that the licensee did not present factual material accurately in this instance by omitting to point out that the demolition order was attached to the contract. Accordingly, the licensee breached clause 4.3.1 of the Code.

Reasons

The ABA notes that the attachment of the demolition order to the contract is not in dispute by either the complainant or the licensee. The complainant appears to be concerned that the segment failed to mention this.. The following quotes highlight this concern:

Purchasers: When we came to sign on the dotted line...the agent said that the only other thing that's changed is this clause here. We asked him two or three times, now what does it mean? He said all it means is before you move in and the work's done, you just get the Council to inspect the work done and sign off on it.

Reporter: What agent [Mr D] didn't tell them was that much of this home that he advertised was under a Council demolition order because those renovations were illegal.

The ABA takes the view that minor errors of fact may not amount to a breach of the Code if they are not material enough to affect the conclusions that can reasonably be drawn from the story. The ABA therefore assesses errors on a case-by-case basis having regard to the seriousness of the error, and its potential impact on the presentation of the story.

The ABA notes that the principle 'caveat emptor' or 'buyer beware', is an accepted notion in conveyancing. Namely, that buyers should familiarise themselves with every aspect of the property, before purchasing it. In this instance, the ABA considers that the licensee's failure to point out that the demolition order was attached to the

contract has substantially altered the presentation of facts. Such an omission could lead an average viewer to believe that the purchasers were blameless in their ignorance of the order. Moreover, the ABA is of the view that the omission further confirms the perception that the agent had deliberately misled the purchasers.

Given that the main theme of the segment was the misrepresentation of the property, the ABA is of the view that the omission is significant enough to warrant a breach finding.

4. Suggestion that Mr D had only paid the outstanding compensation monies after Today Tonight's involvement in the matter

Complainant's submissions

The reporter also suggested that Mr D did not pay the outstanding monies until Today Tonight was involved. We are instructed that the final payment had in actual fact already occurred prior to the reporter contacting Mr D.

...

The director, Mr D, sent a letter to [the purchasers] on the 23 January confirming a verbal discussion in which he had explained that due to personal circumstances, he was unable to pay the lump sum, but would make three month payments of \$1250. The first of these was made on 27 January 2004 and the second on the 24 February 2004. [The purchasers] were able to go back to the tribunal if they disputed this arrangement, which they did not. The final payment was sent on 5 April 2004...[the purchasers] advised that this was not received and a stop cheque order was placed on 13 April and on the same day, cash was delivered to the Bennetts.

Licensee's submissions

The segment makes it clear that when *Today Tonight* began investigating the matter a week earlier there was still an amount owing by Mr D that, according to the VCAT Orders, was due to be paid by 22 January. However, it is clear from the segment that [the purchasers] received the final payment prior to Mr D being approached for an interview at his home.

Certainly the segment did not go into the details of Mr D's alleged 'financial difficulties' nor his claim that the cheque must have been lost in the mail. However, we believe that the content of the segment in relation to the payment of the monies due is all factually accurate.

Finding

The ABA is of the preliminary view that the licensee did not breach clause 4.3.1 of the Code.

Reasons

There does not appear to be any dispute regarding the date on which the final damages payment was made, ie, 13 April. The point of contention is whether the reporter suggested that Mr D only made the payment when *Today Tonight* commenced investigating the matter.

The reporter made the following comments in respect of the damages payment:

Why haven't you paid them the money you owe them?

But when we spoke to the couple last week, Mr D hadn't coughed up all the money.

But just one day after we showed up, Mr D paid up.

When did you find out about our involvement with the story [Mr D]?

The money was due in January, what took so long?

The ABA considers that these comments suggest that Mr D only made the final payment when he discovered that *Today Tonight* was involved. Whether this is true or not is not a matter for the ABA to adjudicate. The issue is whether Mr D was motivated to make the payment. In circumstances such as this, it is not possible for the ABA to prefer one version to the other.

Issue 2: Did the licensee provide a substantive written response to the complainant within 30 working days

On 20 April 2004, the complainant lodged a detailed complaint with the licensee. An unsigned response was provided by the licensee on 1 June 2004 stating:

While we thank you for your letter, we do not find the version of events set out in your letter is supported by the Order dated 20 November 2003 made by the Victorian Civil and Administrative Tribunal in this matter. Clearly the VCAT favoured the submissions made by [the purchasers] which we have had the benefit of review.

We note your other comments, however we believe the report was fair and reasonable.

Finding

The ABA is of the preliminary view that the licensee breached clauses 7.9 and 7.12 of the Code.

Reasons

The ABA notes that the licensee's response did not specifically address the four issues raised by the complainant in its letter of 20 April 2004. It merely refuted the complainant's allegations in three sentences. The ABA considers that the response was not substantive in terms of Code 7.9. Further, the ABA notes that the response did not advise the complainant that it could make a complaint to the ABA about the matter if it considered the response inadequate.

Action Taken

The licensee has advised that once the ABA has issued its final investigation report regarding this matter, it will provide a copy of the decision to key personnel involved in news and current affairs, along with an explanation of the decision and directions to ensure that future programs are consistent with the ABA's findings in this matter.

Given the licensee's proposals, the ABA does not propose to take any enforcement action in this instance.

Decision

I, Andree Wright, Director, Industry Performance and Review Branch, being the appropriate delegated officer of the Australian Broadcasting Authority, determine for the above reasons that the licensee, Channel Seven Sydney Pty Ltd, in relation to the broadcast of a segment on *Today Tonight* on 15 April 2004;

- breached clause 4.3.1 of the Commercial Television Industry Code of Practice 1999 by failing to present factual material accurately; and
- breached clauses 7.9 and 7.12 of the Commercial Television Industry Code of Practice 1999 by failing to provide a substantive written response to the complainant and failing to advise the complainant that it could make a complaint to the ABA about the matter if it considered the response inadequate.

Signed: -----
Andree Wright

dated this day of January 2005