

Investigation Report No. 2813

File No.	ACMA2012/722
Licensee	Channel Nine South Australia Pty Ltd
Station	NWS Adelaide
Type of Service	Commercial television broadcasting service
Name of Program	<i>Channel Nine News</i>
Date of Broadcast	16 February 2012
Relevant Code	Clauses 4.3.5 and 4.3.5.2 of the <i>Commercial Television Industry Code of Practice 2010</i>

Investigation Conclusion

The Australian Communications and Media Authority finds that Channel Nine South Australia Pty Ltd:

- breached clause 4.3.5 of the *Commercial Television Industry Code of Practice 2010*; and
- breached clause 4.3.5.2 of the *Commercial Television Industry Code of Practice 2010*.

The term 'de-registered midwife' in this investigation report is the term used in the broadcast. The midwife has advised that she was not de-registered but terminated her registration, herself, in January 2010.

The complaint

The Australian Communications and Media Authority (the ACMA) received a complaint regarding the program, *Channel Nine News*, broadcast on 16 February 2012 by Channel Nine South Australia Pty Ltd, the licensee of NWS (the licensee).

The complainant was concerned that the program contained footage of himself and his family and was broadcast without their knowledge or concern for their privacy.

The investigation has considered the licensee's compliance with clauses 4.3.5 and 4.3.5.2 of the *Commercial Television Industry Code of Practice 2010* (the Code).

The program

Channel Nine News is broadcast nationally at 6:00pm weeknights. The relevant news item was titled, 'Birth Inquiry' and was introduced as follows:

A deregistered midwife at the centre of investigations into four fatal home births is continuing to help deliver babies. Nine News can reveal [LB] was at the scene of another complicated home birth sparking a fresh inquiry.

The news item featured footage of the exterior of the complainant's house, the midwife LB walking through the front gate of the complainant's house, the faces of the complainant and LB inside and taken through a window from the outside, and the complainant leaving his house with two of his children (whose faces were pixelated). It also included a comment from the complainant which was made on the footpath outside his house and LB walking down the street.

A table of the transcript and visual content of the news item is at Attachment A.

Assessment

The ACMA's assessment is based on a letter of complaint from the complainant to the ACMA, correspondence between the licensee and the complainant, a submission from the licensee to the ACMA and a copy of the broadcast provided by the licensee. Other sources used have been identified where relevant.

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

Australian Courts have considered an 'ordinary, reasonable' reader (or listener or viewer) to be:

A person of fair average intelligence, who is neither perverse, nor morbid or suspicious of mind, nor avid for scandal. That person does not live in an ivory tower, but can and does read between the lines in the light of that person's general knowledge and experience of worldly affairs¹.

In considering compliance with the Code, the ACMA considers the natural, ordinary meaning of the language, context, tenor, tone, and any inferences that may be drawn. In the case of factual material which is presented, the ACMA will also consider relevant omissions (if any).

¹ *Amalgamated Television Services Pty Limited v Marsden* (1998) 43 NSWLR 158 at pp 164-167.

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

Issue 1: Material relating to a person's personal or private affairs or which invades an individual's privacy

Relevant Code clause

The relevant clause of the Code is clause 4.3.5:

- 4.3 In broadcasting news and current affairs programs, licensees:
 - 4.3.5 must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast;
 - 4.3.5.1 subject to the requirement of clause 4.3.5.2, a licensee will not be in breach of this clause 4.3.5 if the consent of the person (or in the case of a child, the child's parent or guardian) is obtained prior to the broadcast of the material;

The *Macquarie Dictionary* (Fifth edition) provides the following definitions:

Personal: of or relating to a particular person; individual; private [...]

Private: relating to or affecting a particular person or a small group of persons; individual; personal [...]

Affairs: matters of interest or concern; particular doings or interests [...]

Privacy: the state of being private; retirement or seclusion [...]

Guidance on this Code clause is also been given in the ACMA's *Privacy Guidelines for Broadcasters 2011* (the Privacy Guidelines).

Submissions

The submissions of the complainant and licensee are at Attachments B and C respectively.

Finding

The licensee breached clause 4.3.5 of the Code.

Reasons

In assessing the licensee's compliance with clause 4.3.5 of the Code, the ACMA must determine whether:

- > a person was identifiable from the broadcast material; and if so,
- > the broadcast material related to a person's personal or private affairs or invaded a person's privacy.

If the answer to both of the above questions is yes, then there is a potential breach of clause 4.3.5 of the Code, unless there is an identifiable public interest reason for broadcasting the

material, or the material was broadcast with the consent of the person concerned (or in the case of a child, a parent or guardian).

Whether a person was identifiable from the broadcast material

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

Complainant

The ACMA notes that the broadcast material contained the following verbal and visual information pertaining to the complainant's identity:

- the reporter's announcement of the suburb in which the complainant lives;
- numerous shots of the exterior of the complainant's house, including cars (with the numberplates pixelated) and garage;
- footage of the face of the complainant inside the house through a window (2 seconds);
- footage of the complainant and his two children (with the children's faces pixelated) walking through the front yard of the house (4 seconds); and
- footage of the complainant on the street making a comment about LB (4 seconds).

While the broadcast did not name the complainant, the ACMA considers that the complainant's identity was apparent from the broadcast.

Children

The ACMA notes that the newborn baby was not named or visually identified and the faces of the complainant's older children were pixelated in the broadcast.

In cases where no other identifying material is included in the broadcast, pixelating an image can be sufficient to protect someone's identity. However, in this instance, the ACMA considers that pixelating the faces of the complainant's older children was an inadequate technique as their identity was apparent or could be easily ascertained from the broadcast through the footage of their home, and of their father who was identifiable from the broadcast, as discussed above.

Whether material was used that related to a person's personal or private affairs

The ACMA's Privacy Guidelines state that:

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

In this case, the focus of the broadcast was the deregistered midwife, LB, who continued to practise.

The licensee has submitted that the only information relating to the complainant and his family arising from the broadcast was that the complainant and his wife had a baby; the birth occurred at home; and a deregistered midwife attended the birth and the birth of one of the

complainant's other children. The licensee contended that none of this information could be properly categorised as 'private' as it 'lacks the essential quality of confidence'.

The ACMA does not accept the licensee's submissions. It considers that personal information need not be secret or confidential in order to be private. The ACMA is satisfied that the licensee used material relating to the personal and private affairs of the complainant and his newborn child. In this regard, it is noted that:

- the broadcast contained sensitive personal medical information about the birth of the complainant's newborn child by referring to 'another complicated home birth' and announcing that 'paramedics had arrived at the [suburb] house... responding to a 000 call after a baby was born not breathing'. This information was something that an ordinary, reasonable viewer would consider private;
- the broadcast included information that the complainant was using the midwifery services for the birth of his child of an unregistered midwife who was under investigation. This information was also something that an ordinary, reasonable viewer would consider private; and
- the visual identification of the complainant and his children could have been avoided without the news story losing any coherence or meaning.

In conclusion, the circumstances surrounding the newborn child's birth are issues relating to the health of the child which is clearly information of a personal or private nature to both the complainant as a parent, and the child.

There is no evidence to suggest that this private medical information about the baby was in the public domain.

Accordingly, the ACMA finds that the broadcast used material relating to the personal or private affairs of the complainant and his newborn child in terms of clause 4.3.5 of the Code.

Whether material was used that invaded an individual's privacy

The ACMA considers that an invasion of privacy may occur when there is an unwanted or uninvited intrusion upon a person's private affairs or seclusion. The Privacy Guidelines state that:

A person's seclusion may be intruded upon where:

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

...

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

In this case, the broadcast material included footage taken of the complainant and his children in their home and surrounds, and the complainant on his front footpath. The complainant and his family did not willingly put themselves into the public domain nor place themselves in a position to be the subject of public comment. Further, they were not filmed as incidental participants in a public event, the footage was not fleeting and the event did not occur in a public place such as a park or shopping centre to which the public has open and unrestricted access.

The complainant submitted that he repeatedly advised the reporter that he did not give his consent for the use of the footage of himself, his children and his property.

In response to the Preliminary Investigation Report, the licensee referred to United Kingdom, United States and New Zealand law cases. The ACMA notes that broadcasting privacy protections in these jurisdictions do not apply in Australia and, to the extent that they deal with similar concepts, they were considered in the review of the Privacy Guidelines.

In this case, the footage of the complainant inside his home was taken at close range or using a long lens over a two day period. The segment also contained prolonged footage of the complainant's house taken at night and in daylight. It then featured the complainant and his older children (faces pixelated) walking out the front door and into their front yard, and another shot of him alone on the outside footpath, holding a camera as he turned to answer a question from the news crew.

The ACMA is satisfied that the complainant would have had a reasonable expectation that his activities within his home would not be observed by others. Further, a person of ordinary sensibilities would consider the broadcast of such footage to be at least offensive and likely highly offensive, regardless of the intimate circumstances of a birth and the medical emergency. In these circumstances, the ACMA considers that the licensee invaded the privacy of the complainant and his children by prying into their home.

In respect of the footage of the complainant on the footpath and within the sphere of his home, the ACMA considers that, subject to the issue of consent, the elements of a breach were met. In the context of the intimate circumstances of the birth and medical emergency, the complainant would have had an expectation of privacy and the broadcast of his activities would be at least offensive and likely highly offensive to a person of reasonable sensibilities.

Whether consent was obtained from the person

The complainant submitted that he was not aware that he was being filmed at the time he made the comment on the street. The licensee provided details of its interactions with the complainant and contended that, whether or not the complainant was aware of a camera operating, 'it is difficult to see how it could possibly be considered that in those circumstances he could have any reasonable expectation of privacy in respect of those comments.'

The ACMA's Privacy Guidelines state that:

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

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

...

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

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

The licensee submitted that the complainant did not forbid the use of footage of himself but rather in his comments to the reporter, camera, crew and chief of staff, the complainant:

- expressed concern only for the privacy of his children and visitors to the house; and

- made comments defending home births.

The ACMA is not satisfied that these actions on the part of the complainant amount to consent to the use of footage of himself, especially in circumstances where:

- he also questioned why the crew was present;
- on more than one occasion he requested that the crew leave his property;
- he requested that the crew not film his family;
- his wife made it clear that she did not want the crew present; and
- he discussed the issue of home births over the telephone, out of view of the camera.

The ACMA does not consider that an assumption can be made that consent was given by the complainant by simply making comments over a two day period to the crew, regardless of whether he was aware that he was being filmed.

Further, the complainant's telephone calls of 16 February with the reporter and with the Chief of Staff, (referred to in the Licensee's submissions at Attachment C) in which he made enquiries as to whether his family and friends had been filmed and asked the reporter to leave, and in which he referred to the presence of the reporter and asked that his children not be shown, were consistent with a withdrawal of any implied consent for the footage of his family, including himself, to be used. This occurred within a reasonable time frame before the broadcast.

Accordingly, the ACMA considers that consent was not provided by the complainant to the licensee to broadcast the footage which intruded upon his seclusion.

The ACMA is of the view that the cumulative impact of the use, without his consent, of material relating to the complainant's personal or private affairs, and the use of footage of the complainant's family and himself taken at his home over a two day period by the licensee's television crew despite the complainant's repeated requests for the television crew to leave, resulted in the complainant and his family's privacy being invaded.

Whether there is an identifiable public interest reason for the material to be broadcast

The broadcast of such material will not breach the Code if there is a clear and identifiable public interest in its being broadcast. The public interest is assessed at the time of the broadcast.

Whether something is in the public interest will depend on all the circumstances, including whether a matter is capable of affecting the community at large so that citizens might be legitimately interested in or concerned about what is going on.

The Privacy Guidelines identify a number of issues which may be in the public interest:

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

The licensee submitted that there was 'clear public interest in reporting on matters relevant to coronial proceedings ... and the risks involved with people choosing to give birth at home and the support services available to persons who make such choice.'

The ACMA accepts that the broadcast of a report dealing with an unregistered midwife continuing to practice raises matters of public interest and that there was an identifiable public interest reason for a broadcast about that issue. However, the ACMA does not consider that there was a public interest reason to broadcast the footage of the complainant and his family, his home and information about his newborn child, as was done here. For example:

- the identities of the complainant and his newborn child and other children were not material to the report about LB's deregistration and the inquiry into her conduct. The concealment of their identities would not have altered the focus of the report; and
- the identification of the complainant and the children could have been avoided without the segment losing any coherence or meaning.

In response to the Preliminary Investigation Report, the licensee submitted that once a decision is made that an issue is in the public interest, it is not appropriate to excise certain material from the broadcast.

The approach taken by the ACMA in relation to public interest is set out in the Privacy Guidelines:

Any material that invades a person's privacy in the public interest must directly or indirectly contribute to the public's capacity to assess an issue of importance to the public, and its knowledge and understanding of the overall subject.² It should be proportionate and relevant to those issues, and not disclose peripheral facts or be excessively prolonged, detailed or salacious.

The ACMA is satisfied that while the issue of reporting on a deregistered midwife is in the public interest, the footage depicting the complainant on the footpath outside his home, and through a window and exiting his house with his children was not proportionate and relevant to the story on the deregistered midwife.

The ACMA does not accept the licensee's submission that the vision of the house, identification of the suburb and the footage of the complainant and his children were relevant to the subject of the story. The ACMA is satisfied that the news item could have referred to the deregistered midwife attending to a home birth without identifying the complainant and his children, including his newborn baby.

Accordingly, the ACMA finds that the licensee breached clause 4.3.5 of the Code.

Issue 2: Exercise special care using material relating to a child's personal or private affairs

Relevant Code clause

The relevant clauses of the Code are clause 4.3.5 and 4.3.5.2:

- 4.3 In broadcasting news and current affairs programs, licensees:
- 4.3.5 must not use material relating to a person's personal or private affairs, or which invades an individual's privacy, other than where there is an identifiable public interest reason for the material to be broadcast;

² This test is drawn from case law—*Alworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 263; *London Artists v Littler* (1969) 2 QB 375 at 391

- 4.3.5.1 subject to the requirement of clause 4.3.5.2, a licensee will not be in breach of this clause 4.3.5 if the consent of the person (or in the case of a child, the child's parent or guardian) is obtained prior to the broadcast of the material;
- 4.3.5.2 for the purpose of this clause 4.3.5, licensees must exercise special care using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child. The consent of a parent or guardian should be obtained before naming or visually identifying a child in a report on a criminal matter involving a child or a member of a child's immediate family or a report which discloses sensitive information concerning the health or welfare of a child, unless there are exceptional circumstances or an identifiable public interest reason not to do so;
- 4.3.5.3 'child' means a person under 16 years old.

Submissions

The submissions of the complainant and licensee are at Attachments B and C respectively.

Finding

The licensee breached clause 4.3.5.2 of the Code.

Reasons

Clause 4.3.5.2 of the Code recognises the vulnerability of children and requires licensees to 'exercise special care before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child'.

Clause 4.3.5.2 of the Code also requires (except in the circumstances specified) that 'the consent of a parent or guardian should be obtained before naming or visually identifying a child in a report on a criminal matter involving a child or a member of a child's immediate family, or a report which discloses sensitive information concerning the health or welfare of a child [...]'.

The ACMA considers that these are two distinct obligations.

Exercise special care before using material relating to a child's personal or private affairs in the broadcast of a report of a sensitive matter concerning the child

In assessing the licensee's compliance with the first component of clause 4.3.5.2, the ACMA must determine whether:

- material was used that related to a child's personal or private affairs;
- the broadcast involved a report of a sensitive matter concerning a child; and
- special care was exercised before using the material.

As indicated above, the ACMA has found that the broadcast used material relating to the personal or private affairs of the complainant's newborn child and that there was no identifiable public interest reason for doing so in terms of clause 4.3.5 of the Code.

The *Macquarie Dictionary* (Fifth Edition) relevantly defines 'sensitive' as:

5. (of an issue, topic, etc.) arousing strong feelings or reaction.

The *Privacy Act 1988*³ defines 'sensitive information' as including 'health information about an individual'.

The ACMA considers that the licensee used material in the broadcast of a report of a sensitive matter concerning the child. In this regard, the ACMA is of the view that the broadcast of the circumstances surrounding the child's birth, namely that, the birth was complicated, he was "born not breathing" and that an ambulance was called, amounted to sensitive information concerning the health of a child.

The ACMA considers that the licensee did not exercise special care in broadcasting such information. The licensee did not attempt to hide the identity of the complainant and by extension the identity of his newborn baby. As indicated above, the identification of the complainant and his child could have been withheld without the message of the segment being diluted, namely, that a midwife continued to practise despite being deregistered.

In response to the Preliminary Investigation Report, the licensee submitted that it is not aware of any circumstance where the birth of a child not breathing has been said to be 'sensitive' either in respect of a child or otherwise, and referred to a definition of 'sensitive' as 'involving work, duties or information of a highly secret or delicate nature'.

The ACMA does not accept the licensee's submission. As indicated above, the *Privacy Act 1988* defines 'sensitive information' as including 'health information about an individual'. In this case, the ACMA is satisfied that the medical condition of the child born not breathing amounts to 'sensitive matter' in terms of clause 4.3.5.2 of the Code.

Accordingly, the ACMA finds that the licensee breached clause 4.3.5.2 of the Code.

Consent of a parent or guardian should be obtained before naming or visually identifying a child in ... a report which discloses sensitive information containing the health and welfare of a child, unless there are exceptional circumstances or an identifiable public interest reason not to do so

The licensee has submitted that it did not use the name or image of the child.

The ACMA accepts that the report in this case did not name or visually identify the newborn child.

Accordingly, the distinct obligation to obtain the consent of a parent or guardian in that context does not arise.

³ Section 6

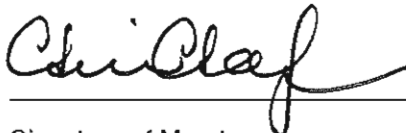
Decision

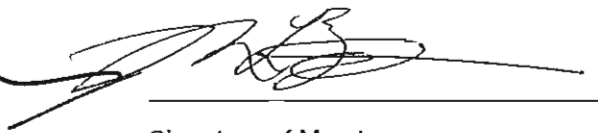
The Australian Communications and Media Authority determines for the above reasons that Channel Nine South Australia Pty Ltd, in relation to the broadcast of *Channel Nine News* on 16 February 2012:

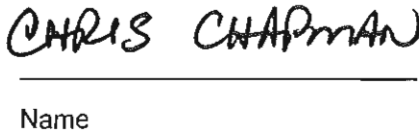
- breached clause 4.3.5 of the *Commercial Television Industry Code of Practice 2010*; and
- breached clause 4.3.5.2 of the *Commercial Television Industry Code of Practice 2010*.

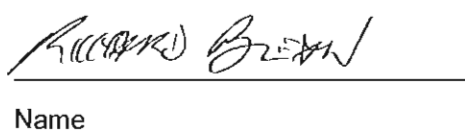
The Common Seal of the Australian Communications and Media Authority was affixed to this document in the presence of:




Signature of Member


Signature of Member


Name


Name

Dated this 6th day of November 2012

Attachment A

Transcript and visual content of news item broadcast on 16 February 2012

Verbal material	Visual material
<p>Presenter: Good evening. A deregistered midwife at the centre of investigations into four fatal home births is continuing to help deliver babies. Nine News can reveal [LB] was at the scene of another complicated home birth sparking a fresh inquiry.</p>	<p>The front of the complainant's house (footage taken from the street).</p>
<p>Reporter: On her phone and anxious to avoid our cameras, [LB] rushes inside for another home birth which almost went horribly wrong.</p>	<p>LB walking through the front gate of a house talking on a mobile phone.</p>
<p>Reporter: Paramedics arrived at the [suburb] house...</p>	<p>The front of the complainant's house (footage taken from the street).</p>
<p>Reporter: ... just before six last night...</p>	<p>A car parked in front of the garage of the house (footage taken from outside the front fence).</p>
<p>Reporter: ...responding to a 000 call after a baby was born not breathing.</p>	<p>A side view of the house (footage taken from outside the front fence).</p>
<p>Reporter: Fortunately the infant survived but the...</p>	<p>The front of the complainant's house (footage taken from the street).</p>
<p>Reporter: ...scare forced the controversial former midwife to bunker down.</p>	<p>The complainant and LB behind a window in the house (close shot).</p>
<p>Reporter: [LB] can we talk to you?</p>	<p>LB behind a window in the house (close shot).</p>
<p>Reporter: The baby's father emerged this morning in good spirits...</p>	<p>The complainant and his two children (with the children's faces pixelated) walking out the front door of the house and into front yard (footage taken from the street).</p>
<p>Reporter: ... and offering his full support.</p>	<p>The complainant walking down the footpath alone, holding a camera</p>
<p>Complainant: This isn't the first baby she's delivered for us so yes we do trust her.</p>	<p>The complainant turning on the footpath holding a camera.</p>
<p>Reporter: [[LB], who has practised since the mid 1980s, is no longer authorised to deliver babies...</p>	<p>LB walking down a footpath surrounded by people with a cameraman behind her filming.</p>
<p>Reporter: ...but she can act as an assistant.</p>	<p>Photograph of LB holding the hands of a woman sitting naked in a bath.</p>
<p>Reporter: Today the Health Department launched an investigation ...</p>	<p>The front of the complainant's house (footage taken from the street).</p>
<p>Reporter: ...into yesterday's birth.</p>	<p>LB walking behind a car in front of the garage of the complainant's house (footage taken from the street).</p>

Reporter: [LB]'s involvement is also likely be examined by police who already have a separate inquiry underway into the death of a baby born at [suburb] in October. In that case [LB] refused to answer questions in the Coroner's Court out of fear of incriminating herself.

LB walking down a footpath with other women.

Reporter: A silence she maintains.

Reporter to LB: Have you got anything to say?

LB walking behind a car in front of the garage of the complainant's house (footage taken from the street).

Reporter: [LB] is also at the centre of a coronial inquest into other fatal home births in 2007 and 2009 after which she deregistered herself as a midwife. She also attended a failed birth in Western Australia last year.

The reporter standing outside on the street.

Reporter: The coroner has reserved his findings until the police investigation ...

LB walking down the footpath with other women.

Reporter: ...has concluded.

LB walking through the front gate of a house talking on a mobile phone.

Complainant's submission

The complainant relevantly submitted to the licensee in a letter of 17 March 2012 that:

On 15 Feb 2012, my wife went into active labour with our third child. This was a planned homebirth and we chose to have Mrs [LB] attend. Upon my wife birthing our son naturally and with no interventions it was identified that his breathing was compromised whereby I rang 000 in order to have paramedic support should this be required. Whilst on the call to 000 my son's breathing regulated however I was unable to cancel the Ambulance and paramedics arrived within 5 minutes of the birth, whilst I was still on the phone to 000. The paramedics assessed the situation, deemed that no medical support was required and left without providing any medical care or examining our newborn these facts would have been known to channel Nine, however they were not included in the report...

Approximately 1 hour after the paramedics left our address, Mrs [LB], the birth attendant, went to her car to retrieve some personal effects at which time she was accosted by your News crew who failed to identify themselves as being from channel Nine. Shortly thereafter a reporter and cameraman presented at our front door asking to speak to Mrs [LB], this request was denied and at no point did the News crew request to speak to me or any other person on site. The News crew's actions and questions give the clear message that they were there to talk to Mrs [LB] and no-one else. After being denied access via the front door, the News crew then proceeded down the driveway and attempted to look/film into our property through the kitchen window. A camera was then set up on the road directly in-front of our house for approximately 5 hours and during this time the flow of traffic in our street was restricted and a potential hazard was created. From this vantage point footage was taken of the inside of the house through a small hall window and images of both myself and Mrs [LB] inside my house were used in the News broadcast.

[...]

The following day, at approximately 7:45 am on 16 Feb, the reporter and cameraman again presented at our front door asking to speak to Mrs [LB]. I advised the reporter that Mrs [LB] was no longer on site and asked them to leave my property. As with the night before, the reporter did not ask to speak to me, nor did she ask for any details of the birth or the reason for the call to 000. After being asked to leave our property, a News vehicle was stationed in our street for the majority of the day during which time I was filmed walking to my letterbox with my other 2 children; this footage was taken without my consent and used in the News broadcast later that evening.

[...]

I instructed the reporter that I do not give consent for the use of footage of me, my property or any members of my family and expressly forbade the use of footage of my children. During this conversation I was being filmed again without my knowledge or consent and only found out when this footage, along with dialogue was used in the News broadcast.

[...]

No other person apart from Mrs [LB], including myself was a person of interest in this story. I am not a public figure and did not willingly put myself in the public domain. On multiple occasions across various phone conversations and a face to face discussion with the reporter I expressly forbade the showing of my face and those of my family members. I am thankful that, on my instance, the faces of my 2 eldest children were blurred during the broadcast.

I was informed that regardless of my complaints, Channel Nine was going to run a News story using footage taken at my property.

The News footage visually identified me three separate times and excessively used footage of the front of my residence including a panoramic shot across the front of the house. The footage made both myself and my property clearly identifiable not just within South Australia but nationally, a fact I found out when I was informed that the footage had been syndicated interstate when concerned family members across the eastern seaboard contacted us to confirm all was well. In my opinion the footage of both me and my house was unnecessary and added nothing to the coherence of the News segment and channel Nine's pursuit of Mrs [LB].

[...]

Licensee's submissions

The licensee submitted to the complainant in a letter of 11 April 2012 that:

...As a general comment, the crew assigned to cover the story undertook all filming from the public road, which they are lawfully entitled to do. In addition, [the reporter] and a cameraman were in an unmarked car, and parked several doors down from your home. They endeavoured to maintain a respectful distance from your house so as not to impede access to your visitors.

On 15 February 2012, [the reporter] and a cameraman came to your front door asking to speak with [LB]. They were not filming at this time. You asked them to leave your property and they did so immediately. They did not proceed down the driveway looking to film through a window. Please note that there is a clear directive to all Channel 9 journalists and cameramen that they must leave private premises immediately upon being asked to do so, I am assured by both staff that this directive was complied with on this occasion.

Footage of you was subsequently obtained from a street vantage point, but such footage was only used as [LB] was in the frame also. No intimate or personal activity by you was featured. It is apparent from the footage that [LB] was trying to ascertain whether our cameraman was still waiting for her to exit the property – which he was. Hence the reference to [LB] 'bunkering down'.

[...]

You subsequently approached our cameraman (and then joined by [the reporter]) carrying your own camera. [The reporter] understood that you were trying to intimidate her and her cameraman to leave the area. Once again, [the reporter] explained that the interest was in speaking with [LB]. You subsequently stated:

'This isn't the first baby she has delivered for us – so yes we do trust her'.

At the time that [the] footage was taken both [the reporter] and the cameraman formed the view that you were aware you were being filmed.

[...]

[The reporter] made one final attempt to speak with [LB] by telephone by calling you. After this failed, she finished her 'piece to camera' and then departed immediately.

Both [the cameraman] and [the reporter] advise that at no stage did [you] ask for your face not to be shown. Such a request would most certainly have been taken seriously and likely referred to me for consideration. It also seems incongruous with what appears to be your statement on camera. Your children's faces were pixilated as a matter of course in these circumstances, as minors. Both [the cameraman] and [the reporter] understood your concerns to be the benefits of homebirths generally and the absence of any wrongdoing by [LB].

The licensee submitted to the ACMA in a letter of 12 June 2012 that:

Compliance with clause 4.3.5

[...]

It is Channel 9's position that:

1. There was no use of material relative to anyone's private affairs...; and
2. [the complainant] provided consent for the disclosure of the extent of the personal information contained in the broadcast; and
3. In any event there was clearly an identifiable public interest reason for broadcasting the information in the story.

At the outset it is important to note that the focus of the story was the deregistered midwife [LB]. At the time of the broadcast [LB] had previously been the focus of significant media attention involving her presence at three homebirths whereupon the infants did not survive. The deaths occurred in 2007, 2009 and 2011. The South Australian Coroner held an inquest into the three deaths, such inquests occurring in 2010, 2011 and 2012.

It is noteworthy that since the subject broadcast the Coroner has delivered his findings, and this decision also received a substantial amount of media attention.

The relevance of [the complainant] and his son was to provide context for the information that [LB] continued to attend homebirths despite her deregistered status, and that at this particular homebirth there had been difficulties which resulted in an ambulance being called.

The complainant acknowledges that "no other person apart from [LB], including myself, was a person of interest in this story".

The only information (save for that addressed under section 4.3.5.2 below) relating to [the complainant] and his family arising from the broadcast are that:

1. [The complainant] (and his wife) had a baby;
2. That such birth occurred at home;
3. That deregistered midwife [LB] attended the birth, and had attend the birth of one of [the complainant]'s other children.

It is submitted that none of the above information is material which could be properly categorised as "private". It lacks the essential quality of confidence.

If the information could be categorised as "personal", then we look to the issue of [the complainant]'s consent to the disclosure of this information. [The complainant] attached balloons to his front gate – apparently with the intent to advise the arrival to persons outside of the home. In addition, he stated in public that the birth occurred at home and that [LB] had been at the birth of one of his other children.

It is clear that whereas any consent from [the complainant] was not express, his actions and his statement to camera and journalist [VL] constituted tacit but obvious consent. There is clear public interest in reporting on matters relevant to coronial

proceedings (on foot at the time) and the risks involved with people choosing to give birth at home and the support services available to persons who make such choice. That was the obvious focus of the story and the limited information about the [complainant] family which is outlined at paragraphs 1-3 above was simply a context for the public interest aspect of the story.

Compliance with clause 4.3.5.2

[...]

...The Code prescribes that in the event that the health or welfare of a child is involved, then the name or image of the child ought only be used with consent of a parent or guardian. This part of the sub-clause simply does not arise in relation to the subject broadcast as the child was neither named nor visually identified.

Note that the language of this subclause is very specific and the mere ability to identify a child is not sufficient, it must involve the naming or visual identification of the child. As is evidence from the broadcast, neither action occurred here to give rise to the application of this sub-clause.

(As an aside, the image of a child accompanying [the complainant] was pixelated when he spoke to the camera to protect that child's privacy – in the context of a story to which such image was not relevant nor was there any public interest reason not to do so).

It is submitted that this is not a case where the information broadcast was sensitive, and the limited information which was broadcast – namely that the baby was born not breathing but subsequently was fine – was bare bones but essential information in the context of a story about home birthing risk and the notorious deregistered midwife [LB].

[...]

The licensee submitted to the ACMA in a letter of 20 August 2012 that:

Factual disputes

[...]

The interactions that [the reporter] had with [the complainant] can be summarised as follows:

1. On 15 February 2012 at approximately 10.11pm, [LB] exited [the complainant's] house and promptly returned to the home when she saw the news camera and journalist waiting outside. [The reporter] knocked on the door and it was answered by [the complainant]. She asked if she could speak to [LB]. [The complainant] asked her to leave his property and she did so immediately.
2. On 16 February 2012 [the complainant] commenced a brief conversation with the Channel 9 cameraman. The journalist...approached. At this point in time, [the complainant] had a camera of his own and was taking photographs of [the reporter] and of the NWS cameraman, and questioning why they were present. [The complainant] put his camera directly into the faces of [the reporter] and the cameraman asking "see how it feels, it doesn't feel nice does it?"
3. [The reporter] explained her presence due to the interest surrounding [LB]. The cameraman commenced filming, and part of the conversation was then subsequently broadcast. In order to do this, the cameraman lifted his camera onto the tripod and filmed, which was in plain sight of [the complainant].

4. During this conversation [the complainant] indicated that the newborn was perfectly healthy and invited [the reporter] to “come in and see for herself, without the cameras”. His wife, who was inside the home at that point in time, interjected and said words to the effect of “No, I don’t want them in here”.
5. [The reporter] then had a brief conversation with her Chief of Staff [CS]. She then telephoned [the complainant] who had returned inside. During that conversation [the complainant] told [the reporter] about the benefits of home births in quite some detail and suggested the angle that she should be approaching the story with.
6. [The complainant] made specific enquiry as to whether Channel 9 had filmed his family and friends who were visiting the baby, and [the complainant] assured him that that had not occurred. He again asked her to leave, and she indicated that she would (and did).

During his conversations with [the reporter], [the complainant] never asked that his own face not be shown. He only expressed concern of his family being shown and any visitors to the house. All of the vision with respect to [the complainant’s] children was pixelated.

[The complainant] alleges that he ‘expressly forbade the use of footage of his children’ during his conversations with Chief of Staff [CS] on 16 February 2012. This is rejected by the licensee...

The salient parts of the telephone call of [CS] and [the complainant] of 16 February 2012 are as follows:

1. [The complainant] did not ever identify himself by name during the course of the call, despite continued requests to do so by [CS]. It became apparent to [CS] during the course of the conversation that the caller must have been [the complainant], based on his comments about the presence of the Channel 9 journalist in front of his home and comments he made regarding midwife [LB].
2. [The complainant]’s focus was on defending the principle of home births and [LB].
3. [The complainant] asked that his children not be shown in footage and their faces were pixelated in accordance with Channel 9’s standard practices.
4. At no stage did [The complainant] make any comment about the footage of himself or his property...

Therefore, it is the licensee’s position that [the complainant’s] assertion that he expressly forbade the showing of his face is simply untrue.

[...]

Identifiable public interest

[...]

As the High Court in New Zealand have said, the mere fact that the use of an identifiable image may add nothing of significance to the story cannot then detract from the fact that there is an identifiable public interest reason for the material to be broadcast. The fact that the broadcast could have been edited to exclude particular words or images is not to be determinative of whether the publication comes within the protection of the identifiable public interest. The Court, and in this case ACMA,

might find a differently edited broadcast more to its taste, or even more interesting, but they are not to act as a censor.⁴

As the High Court of New Zealand accepted in the *Andrews* case⁵, a television series may provide a certain level of entertainment but nevertheless have a serious underlying purpose. The entertainment aspect is not to be taken as somehow cancelling out that purpose. The fact that the broadcaster might have achieved its objectives without identifying people does not preclude the broadcaster from relying upon what was there seen as a relevant defence of public interest.

Logically the same approach must apply under the standard in the present case. Once the broadcast is properly identified as being in respect of a topic which is properly in the public interest, that conclusion cannot be varied merely because it would have been possible to present the broadcast in another way. If this were so the test would have no work to do. It would always be possible for a bland typewritten news item with no pictorial content to be presented but that would be an inappropriate restriction upon the ability of the licensee to operate pursuant to its licence in the interests of the citizens of this country.

Applying principle to the facts of this broadcast

The material portions of the relevant broadcast comprise the complainant speaking in a public street expressing his own views as to the role of the midwife. He knew he was talking to reporters in a public street, when he knew they were there to report on a news item. Whether or not he was aware of a camera operating, it is difficult to see how it could possibly be considered that in those circumstances he could have any reasonable expectation of privacy in respect of those comments. The whole point in him making those comments was to put his position to the press.

[...]

Insofar as the vision of the house and the identification of the suburb is [sic] concerned, that is information which goes beyond simply the identification of the complainant. However, that material is clearly highly relevant to the proper subject of the story and the public interest associated with the story. The whole point of the story is that it is dealing with assistance given in respect of home births. The fact that such assistance has been given in what might be regarded as ordinary suburbs of Adelaide is best conveyed and most appropriately conveyed by depicting the very premises where such events are occurring.

Similar considerations apply in relation to the depiction of the children, albeit with obscured faces. It was [the complainant] who made the point to the reporter that, "This isn't the first baby she's delivered for us – so yes we do trust her". The viewer of the program may well agree that that is a relevant consideration. It was appropriate for the licensee to illustrate this point...the reason why [the complainant's] views were newsworthy and were reported is because he was the father of a newborn child. He, in turn, gave his views weighted by reference to his past experience by way of early birthing experience. That experience and that view were given weight by the depiction of him with his two children. Given the care that was appropriate to the sensitive topic which was the subject of the broadcast [sic].

⁴ *Andrews v Television New Zealand Limited* High Court of New Zealand CIV 2004-404-3536 at [87]

⁵ [91] and [92]

Suggested breach of 4.3.5.2

As I have referred to above it has commonly been held that the death of a child is a proper matter of public concern. Equally, the birth of a child "born not breathing" which involves the calling of emergency services is a matter of proper concern for the public. This type of information is routinely disclosed about people in accidents and significant events.

In one sense the death of a person has intensely private aspects. That is not to say the death itself is or can be private. The community has a proper and legitimate concern in such matters.

We are not aware of any circumstance where such information has been said to be "sensitive" either in respect of a child or otherwise.

In accordance with common understanding, sensitive has been defined as "involving work, duties or information of a highly secret or delicate nature". To classify this information as being within that category would create a new standard...