



Australian
Communications
and Media Authority

Privacy guidelines for broadcasters

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Canberra

Red Building
Benjamin Offices
Chan Street
Belconnen ACT

PO Box 78
Belconnen ACT 2616

T +61 2 6219 5555
F +61 2 6219 5353

Melbourne

Level 32
Melbourne Central Tower
360 Elizabeth Street
Melbourne VIC

PO Box 13112
Law Courts
Melbourne VIC 8010

T +61 3 9963 6800
F +61 3 9963 6899

Sydney

Level 5
The Bay Centre
65 Pirrama Road
Pyrmont NSW

PO Box Q500
Queen Victoria Building
NSW 1230

T +61 2 9334 7700 or 1800 226 667
F +61 2 9334 7799

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Written enquiries may be sent to:

Manager, Editorial and Design
PO Box 13112
Law Courts
Melbourne VIC 8010
Email: candinfo@acma.gov.au

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Privacy guidelines for broadcasters

Introduction—balancing privacy and public interest

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

These guidelines are intended to:

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

The guidelines do not deal with unlawful, unethical or distasteful journalistic practices. Nor do they deal with federal or state privacy and privacy-related laws.

They provide general guidance in relation to code privacy obligations and do not vary the terms of any particular broadcasting code of practice. Examples used in these guidelines are illustrative only.

Privacy is a matter of enduring relevance to the community.

While digital technologies and social media may be changing the ‘privacy environment’ and presenting challenges that legal experts have grappled with in recent times², the community continues to value privacy safeguards in broadcasting.³

The various broadcasting codes of practice can be found on the [ACMA website](#). Their privacy provisions reflect the balance that should be struck between the media’s role in informing the public and an individual’s expectation of privacy.

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

² For example, the Australian Law Reform Commission Final Report into Serious Invasions of Privacy in the Digital Era (September 2014); The South Australian Law Reform Institute Final Report: A Statutory Tort for Invasion of Privacy (March 2016); The NSW Parliamentary Research Service research paper Revenge Pornography, Privacy and the Law (August 2015).

³ *Contemporary community safeguards inquiry—Consolidated report*, ACMA, March 2014, www.acma.gov.au/~media/Broadcasting%20Investigations/Report/pdf/ACMA_Contemporary%20community%20safeguards%20inquiry_Consolidated%20report_March%202014%20pdf.pdf.

Some codes offer express privacy protections only in the context of news and current affairs broadcasts.⁴ Other codes offer privacy protections for all broadcast content.⁵ Some codes also provide that a complaint about privacy can only be made by the person (or a representative of the person) who considers their privacy was intruded upon.⁶

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

The outcome of any investigation will depend on the facts and context of the particular broadcast.

A potential breach of code privacy provisions may be investigated by the ACMA in the exercise of its discretion.⁷ This will generally occur when:

- > a code privacy complaint has been made to a broadcaster in accordance with the applicable code
- > the broadcaster has not responded within 60 days or the complainant considers the broadcaster's response inadequate⁸
- > a complaint is then made to the ACMA.

The general principle

Generally, the codes protect against the broadcast without consent, of material that:

- > relates to a person's personal or private affairs or private life⁹—for example, by disclosing their personal information; or
- > invades a person's privacy or intrudes into their private life—for example, by intruding upon their seclusion;

unless it is in the public interest to broadcast the material.¹⁰

⁴ Subscription Narrowcast Television Code of Practice 2013; Subscription Broadcast Television Codes of Practice 2013; Commercial Television Industry Code of Practice 2015; Commercial Radio Code of Practice 2017; and Subscription Narrowcast Radio Code of Practice 2013.

⁵ SBS Codes of Practice 2014 (revised in 2016); ABC Codes of Practice 2011 (revised in 2016); Community Television Code of Practice; Codes of Practice Open Narrowcast Radio; and Community Radio Broadcasting Codes of Practice 2008.

⁶ Commercial Television Industry Code of Practice 2015; SBS Codes of Practice 2014 (revised in 2016).

The ABC Code of Practice 2011 (revised in 2014) limits complaints in relation to privacy provisions to people who have 'sufficient interest in the subject matter of the complaint'.

⁷ Sections 151 and 170 of the BSA.

⁸ Sections 148 and 150 of the BSA.

⁹ The commercial free-to-air, commercial radio and subscription broadcasting codes of practice refer to material relating to a person's private or personal affairs or which invades a person's privacy, the ABC Code refers to intrusions into a person's private life, and the SBS Code refers to intrusions upon privacy.

¹⁰ The general principle has been taken in substance from Gleeson CJ's formulation in *ABC v Lenah Games Meats Pty Ltd* [2001] 208 CLR 199 at [42] and [125] (referred to in ACMA Investigation Report 2027, 2009) and affirmed in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 [114–118]. It is also discussed by the NSW Law Reform Commission Report 120 at 4.3–4.4.

Investigation steps

When investigating the alleged breach of a code privacy provision, the ACMA will consider the elements of a breach:

- > Was a person identifiable from the broadcast material?
- > Did the broadcast material disclose personal information, or intrude upon the person's seclusion in more than a fleeting way?

If the answer to both of the above questions is yes, then there is a potential breach of code privacy provisions.

The ACMA will then consider:

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

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

Identifiable person

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

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

Pixelation of a person's face will not necessarily be sufficient to de-identify that person—for example, where they are identifiable from other details in the broadcast.

For examples, refer to case studies 1, 2, 5, 7 and 8 in the Appendix.

Personal information

Personal information can include a person's residential address or telephone number, facts about a person's health, genetic or biometric information, information about personal relationships and domestic or family life, personal financial affairs, sexual activities, and sexual orientation 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.¹¹

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

Personal information will usually be factual in nature. However, it may include opinions based on facts or presented as if based on facts—for example, an opinion on a person's sexuality, religion or health status, or an expert's prognosis of a person's health or welfare.

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

¹¹ These categories of personal information are illustrative only.

Seclusion

A person's seclusion may be intruded upon where:

- > they would have a reasonable expectation that their 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.¹²

Depending on the circumstances, this may include everyday activities and it will usually include sexual activities.¹³

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

For examples, refer to case studies 3, 8 and 11 in the Appendix.

Consent

If consent is obtained prior to the broadcast of private material, then the consenting person can have no expectation of privacy in relation to that material. When given, consent should be voluntary, informed, specific, current and given by a person with legal capacity and an understanding of the use to which the material will be put.

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

If the affected person's consent to broadcast private material is obtained by deception, it is not true consent.

Consent to the broadcast of material that would invade privacy or intrude into a person's private life may be withdrawn before it is first broadcast, if in all the circumstances it is reasonable to do so.

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

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

Consent to an interview concerning an individual's personal affairs or private life may not amount to consent to the use in a broadcast of additional personal information or of material intruding upon their seclusion—for example, material not disclosed in the interview that has been obtained without consent or for a different purpose.

For examples, refer to case studies 4, 5, 8 and 11 in the Appendix.

¹² This formulation has been informed by Gleeson CJ's test in *ABC v Lenah Games Meats Pty Ltd* [2001] 208 CLR 199 where he says: 'The requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private'. See also ALRC Report 108 [74.83] and recommendation 74–2.

¹³ *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (119).

Material in the public domain

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

This may include the use of material obtained from online or social media sites where there are no access restrictions.

However, the absence of access restrictions, while an important consideration, may not be determinative. Account will be taken of the nature of the material and the context in which it has been published.

The relevant content may be of a nature that indicates it has been put in the public domain without the affected person's knowledge or consent—for example, material that is inherently offensive and appears to have been uploaded by someone other than the affected person.

Using material that has previously been disclosed by a person on a confidential basis, or to a limited or closed circle of recipients, may be an invasion of their privacy. Its private nature may be implied, even if there was no express request to keep it confidential.¹⁴

For examples, refer to case studies 9 and 11 in the Appendix.

Children and people in vulnerable circumstances

Code privacy provisions apply to material used in a broadcast that concerns people in vulnerable circumstances, as well as children.

Vulnerable circumstances may be intrinsic (for example, where a person has a disability or difficulty communicating in English) or situational (for example, where a person is bereaved or has been involved in a distressing event).

The Commercial Television Industry Code of Practice 2015 expressly requires that special care be taken in the use of material concerning a child. 'Child' is defined in that code to mean a person under the age of 15.

Where broadcast material concerns both an adult and a child, code privacy obligations and public interest considerations may be assessed separately for the adult and the child.

Subject to the relevant code, a parent or guardian's express consent should be obtained before using material that invades a child's privacy. Parental consent alone will not always be sufficient for a broadcaster to comply with its code privacy obligations.

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

In each case, careful account should be taken of the nature of the material proposed for use and the potential consequences of its use.

¹⁴ See the court's comments in *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 [122] and the NSWLRC Report 120 at 5.27–5.28.

Broadcasts concerning child welfare or protection may be in the public interest. Such material will require careful consideration of the justification for, and, as applicable, the extent of any intrusion into the private life of a child.

In reporting on public interest issues concerning the activities, actions or behaviour of another party, such as a child's parents, the use of material disclosing the child's personal information or intruding upon the child's seclusion should be proportionate to the particular public interest issues raised in the broadcast.

For examples, refer to case studies 6, 7 and 9 in the Appendix.

Public figures

Public figures such as politicians, celebrities, prominent sports and business people and those in public office do not forfeit their right to privacy in their personal lives.¹⁵

However, it is accepted that public figures will be open to a greater level of scrutiny of any matter that may affect the conduct of their public activities and duties.

For an example, refer to Case study 8 in the Appendix.

Public interest

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

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 the audience might be legitimately interested in or concerned about what is going on.¹⁶

Public interest issues include:

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

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

¹⁵ Public figures are entitled to a 'residual area of privacy' in relation to private information that they have not put in the public domain—*Campbell v MGN Ltd* [2004] UKHL 22.

¹⁶ See *London Artists v Littler* (1969) 2 QB 375 at 391.

Any material that invades a person's privacy in the public interest should 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.¹⁷ The information disclosed should be proportionate and relevant to those issues, and not include peripheral facts or be excessively prolonged, detailed or salacious.¹⁸

Whether an invasion of privacy or intrusion into a person's private life is justified in the public interest will generally depend on the public interest matters raised in the broadcast.

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

- > the person's appointment to or resignation from public office
- > the person's fitness for office
- > the person's capacity to carry out his or her duties¹⁹
- > conduct or behaviour that contradicts the person's stated position on an issue.²⁰

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

For examples, refer to case studies 1, 3, 6, 7, 8 and 11 in the Appendix.

¹⁷ This test is drawn from case law—*Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 263; *London Artists v Littler* (1969) 2 QB 375 at 391.

¹⁸ *Campbell v MGN Ltd* [2004] UKHL 22 at 164–165.

¹⁹ This approach was taken in the ACMA's investigation 2431 concerning a news report on the resignation of a NSW Minister of Parliament (Case study 8 in the Appendix).

²⁰ See NSWLRC Report 120 at 5.25 and *Campbell v MGN* [2004] UKHL 22 at 82.

Appendix—Case studies

Case study 1

Breach—invasion of privacy with no public interest reason for broadcasting the material (commercial television current affairs program)²¹

The broadcast material

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

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

The ABA’s findings

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

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

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

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

²¹ ABA Investigation Report 1471, May 2005.

Case study 2

Breach—identification of woman and use of material obtained without consent (commercial radio current affairs talkback program)²²

The broadcast material

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

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

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

The ABA's findings

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

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

The ABA found:

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

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

²² ABA Investigation Report 1254, May 2003.

Case study 3

No finding—footage of a grieving accident survivor indicating his objection to being filmed (commercial television news program)²³

The broadcast material

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

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

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

The ACMA's findings

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

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

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

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

However, the ACMA made a 'no finding' decision on whether the material breached the privacy clause of the Commercial Television Code largely because it considered that the 2005 Privacy Guidelines focused on material *relating to a person's private*

²³ ACMA Investigation Report 2027, June 2009.

affairs (information privacy) and did not provide adequate guidance on the code element dealing with *material which invades an individual's privacy* (seclusion).

Case study 4

No breach—footage obtained using a hidden camera did not relate to personal or private affairs and no invasion of privacy occurred (commercial television current affairs program)²⁴

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

The broadcast material

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

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

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

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

The ACMA's findings

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

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

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

It recommended that broadcasters should seek express consent before:

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

²⁴ ACMA Investigation Report 2283, March 2010.

Case study 5

Breach—identification of an individual and sensitive personal information broadcast without knowledge or consent (commercial radio prank call)²⁵

The broadcast material

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

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

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

The ACMA's findings

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

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

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

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

²⁵ ACMA Investigation Report 2059, December 2008.

Case study 6

Breach—invasion of privacy of a child and special care not used (commercial television current affairs program)²⁶

The broadcast material

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

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

The ACMA's findings

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

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

The ACMA found the broadcaster did not exercise 'special care' in broadcasting the material about the child's personal or private affairs because it did not attempt to hide the identities of the boy or the other children. The reporter's interview with the children clearly revealed their faces for a prolonged period.

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

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

²⁶ACMA Investigation Report 1882, September 2008.

Case study 7

Breach—disclosure of personal or private affairs of children (national current affairs program)²⁷

The broadcast material

The current affairs program reported on the adequacy of child welfare regulations regarding children born through international surrogacy arrangements using the illustrative example of a person acquitted of criminal charges involving children.

The ACMA's findings

The broadcast's discussion of a parent's private life, which involved the disclosure of specific information about the use of a surrogate from a particular country, inherently intruded into the private lives of the children.

The ACMA's finding considered that:

- > the intrusion into the children's lives involved the non-consensual disclosure of specific and sensitive personal information concerning their birth and parentage
- > this intrusion was not justified in the public interest as the issues canvassed within the broadcast could have been explored without disclosing this sensitive material
- > the broadcast also revealed private information about the children, which was not justified, as it was peripheral and not directly relevant or proportionate to the public interest.

Broadcasts concerning child welfare or protection may be in the public interest. However, such material requires careful consideration of the justification for, and extent of, any intrusion into the private life of a child. Of particular significance will be whether the intrusion is necessary to provide the audience with an adequate understanding of the public interest matter raised in the broadcast.

²⁷ACMA Investigation Report—unpublished due to privacy considerations.

Case study 8

No breach—use of material relating to personal or private affairs of a public figure permitted in the public interest (commercial television news program)²⁸

The broadcast material

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

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

The ACMA’s findings

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

The ACMA noted the following:

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

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

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

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

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

²⁸ ACMA Investigation report 2431, December 2010.

Case study 9

No breach—use of material obtained from a social networking website (commercial television news program)²⁹

The broadcast material

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

The ACMA's findings

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

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

The ACMA considers that the finding does not mean that licensees are free to broadcast any material available on the internet without risk of breaching the code. Not all material on the internet will cease to be personal or private merely because it has been made publicly available through the absence of privacy settings or otherwise.

While the ACMA considers that the use of privacy settings on social networking sites is an important consideration when assessing whether material obtained from these sites constitutes private material, it may not be determinative. In each case, the ACMA will assess a licensee's compliance with its code obligations, having regard to the specific circumstances of the broadcast.

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

²⁹ACMA Investigation Report 2584, December 2011.

Case study 10

Breach—broadcasting the words of an identifiable person without consent (commercial radio program)³⁰

The broadcast material

The segment included a prank telephone call made by the program's presenters to staff at a hospital in London where Her Royal Highness, the Duchess of Cambridge was being treated for acute morning sickness. A recording of the telephone call was broadcast.

The ACMA's findings

The ACMA found that the relevant code covered telephone calls including prank calls and that, the identity of the employees of the hospital could be reasonably ascertained from the broadcast, noting that:

- > their voices were clearly audible
- > the name of the hospital concerned was in the public domain and specifically identified during the prank call
- > the content broadcast was inherently and overwhelmingly likely to be highly newsworthy and its publication detrimental to the interests of the employees
- > the employees were identified by the hospital because of the prank call.

Accordingly, the licensee breached clause 6.1 by broadcasting the words of identifiable persons in circumstances where those persons:

- > were not informed in advance that their words may be broadcast
- > would not have been aware that their words may be broadcast
- > did not give their consent to the broadcast of the words.

³⁰ACMA Investigation Report 2928, February 2014.

Case study 11

Breach—intrusion upon a person’s seclusion (commercial television current affairs program)³¹

The broadcast material

The current affairs program reported on an altercation between a woman and her ex-husband’s current partner. The program broadcast audio excerpts of a recording of the altercation.

The ACMA’s findings

The ACMA was satisfied that the broadcast used personal information of the ex-husband and his current partner without their consent, as well as material that intruded upon their seclusion in more than a fleeting way.

The ACMA noted that:

- > the details of the incident formed a central subject of the broadcast, and the recorded conversation between the two women featured prominently
- > the current partner would have had an expectation of privacy in relation to the conversations and activities taking place in her partner’s home
- > the fact that she remained in the home while a mobile phone recording was being taken did not constitute implied consent to being recorded or to its subsequent broadcast
- > a person of reasonable sensitivities would consider the use of material recorded at her partner’s home during an altercation following a marital breakdown to be highly offensive.

Although the current partner agreed to a television interview and confirmed that an altercation had occurred, this did not amount to consent to use additional personal information or the recorded material in the broadcast.

³¹ACMA Investigation Report—unpublished due to privacy considerations.