

1.5 KEY CONTENT INVESTIGATIONS

LEAD/SUPPORT: CATHY RAINSFORD | JENNY ALLEN

The Australian Communications and Media Authority (ACMA) has a broad discretion to commence an investigation into possible breaches of broadcasting codes of practice, licence conditions and program standards.

KEY ISSUES

- Various recent media reports have raised issues about Nine Radio licensees' compliance with the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2022 (the Disclosure Standard).
- The ACMA has one investigation underway into *Ben Fordham Live* – Radio 2GB Sydney Pty Ltd – broadcast on 3 August 2023.

- [REDACTED]
- [REDACTED]
- [REDACTED]
- Whether investigations will be opened will depend on the outcome of our analysis of that information.
 - Broadly, the Disclosure Standard requires commercial radio licensees to:
 - disclose if a presenter agreement exists and the licensee broadcasts material in a current affairs program that:
 - promotes the name, products or services of the sponsor; or
 - includes an interview with someone from the sponsor about a matter that concerns the sponsor, its products, services or interests; or
 - a sponsor requests; or
 - is based on or similar to material that was provided by the sponsor; or
 - directly promotes an issue that is directly favourable to the sponsor.
 - these disclosure announcements must be made at the time of, and as part of, the broadcast material
 - keep a register of commercial agreements if the licensee broadcasts current affairs programs. This register must be publicly available on the licensee's website, and accessible via a link on the licensee's homepage
 - a disclosure announcement is not required if the material is:
 - a news broadcast or bulletin; or
 - an advertisement that is clearly distinguishable to a reasonable listener as an advertisement.

- With respect to presenters, a commercial agreement is an agreement, arrangement or understanding between a sponsor (or their agent) and a current affairs presenter (or their associate) that provides for the presenter, in exchange for consideration, to:
 - promote the sponsor
 - promote the sponsor's products, services or interests
 - refrain from making a negative comment about the sponsor
 - provide services for publicity, promotion or public relations for the sponsor
 - provide other things or other services for the sponsor in exchange for consideration of \$25,000 or more a year, unless the agreement only provides for the presenter to:
 - write for books, magazines and newspapers
 - perform or appear in a film, TV program or theatrical production
 - provide voice-over services for an advertisement
 - provide non-commercial services where the sponsor is a registered entity (i.e. a charity).
- Licensees must keep their online register up-to-date with respect to any presenter who is on-air for more than an average of 3 hours per week over any 4-week period but are not required to notify the ACMA when they make changes to their register.

Previous breaches of the Disclosure Standard

- The last investigation into compliance with disclosure standards was finalised in March 2021. That investigation, into the *Alan Jones Breakfast Show*, also broadcast on 2GB, found breaches of two provisions of the Broadcasting Services (Commercial Radio Current Affairs Disclosure) Standard 2012 (the 2012 Disclosure Standard), being the version of the Disclosure Standard in place at that time.
- The provisions that were breached concerned on-air disclosure and the accuracy of the licensee's register of commercial agreements.
- Following the breach findings, the ACMA issued the licensee with a remedial direction on 25 March 2021, to:
 - conduct training on the requirements of the 2012 Disclosure Standard
 - establish systems, processes and practices (SPPs) to ensure ongoing compliance with the 2012 Disclosure Standard
 - report to the ACMA on the training delivered, the SPPs developed and the accuracy of the register of agreements.
- On 16 December 2021, the ACMA advised the licensee that it had fully complied with the requirements of the remedial direction.
- Prior to that investigation, the only previous breach finding was made under a previous version of the standard in 2010 and concerned the requirement to maintain the online register. In that case, the ACMA found that Harbour Radio Pty Ltd (the previous licensee for 2GB), Radio 4BC Brisbane Pty Ltd and Radio 6 PR Perth Pty Ltd breached the requirements of the standard.
- In that matter, the ACMA agreed to measures from all licensees intended to improve compliance with the standard, including correcting the errors identified in the investigation and improving staff training.

Recently published high-profile investigations

Kyle and Jackie O (KIIS FM) – Mpox comments - broadcast in August 2022

The broadcast

- The broadcast included discussion about Mpox (then known as Monkeypox), in which Kyle Sandilands referred to Mpox as the 'big gay disease'.

The issue

- The ACMA received 2 anonymous complaints alleging that comments made by Mr Sandilands, during a discussion about Mpox, were derogatory and offensive.

Action taken by the ACMA

- In November 2022, the ACMA commenced an investigation.
- The investigation was finalised on 24 July 2023 and the investigation report published on 10 August 2023.
- The investigation found that the broadcast breached the decency provision of the Commercial Radio Codes of Practice 2017.

Enforcement action

- Following the breach finding, the licensee agreed to incorporate the findings of the investigation into the training and reporting regime already in place under the enforceable undertaking (EU) that was accepted following the conclusion of the investigation into comments about the Paralympics (details of that investigation are below).
- The ACMA considered this action was appropriate given the broadcast had occurred prior to the finalisation of the Paralympics investigation.
- The report received in September 2023, pursuant to the Paralympics EU, included references to training that incorporated the findings from the Mpox investigation.

Kyle and Jackie O (KIIS FM) – Paralympics - 2 broadcasts in September 2021

The broadcasts

- The broadcasts included discussion about the 2020 Paralympic Games in which the hosts talked about certain techniques used in competition by Paralympians and how Paralympians and disabled athletes compared with other Olympians and able-bodied athletes.
- The second broadcast included a discussion about the public response to the comments made by host Kyle Sandilands during the first broadcast. [REDACTED]

The issue

Action taken by the ACMA

- In December 2021, the ACMA commenced an investigation.
- The investigation was finalised on 16 December 2022 and the investigation report published on 28 March 2023.

- The investigation found that the broadcasts breached the decency provision of the Commercial Radio Codes of Practice 2017.

Enforcement action

- Following the breach finding, the ACMA accepted an EU from Australian Radio Network (ARN), the parent company of the licensee, containing the following provisions:
 - ARN has employed, and will continue to employ for a period of at least 2 years, a second back-up censor, to assist the primary censor to monitor compliance with the Code for the Program
 - within 3 months, the ARN Legal Department will deliver a dedicated Code compliance training session, including the topic of sensitivity towards others (including those with disabilities) and their differences, to the Program hosts, producers, censor and other staff involved in the creation and presentation of the Program (Program Staff)
 - within 6 months, ARN will expand its online Code compliance training to include a section on the topic of sensitivity towards others (including those with disabilities) and their differences. This will be completed periodically by all ARN content staff (not just the Program staff)
 - ARN will conduct an independent assessment of the existing controls to prevent further breaches of the decency Code provision and provide a report within 3 months of the date of the EU to the ACMA that includes:
 - submissions on how any previous recommendations to prevent breaches of the decency Code provision have been implemented by the Licensee
 - additional recommendations for further improvements to minimise the risk of future breaches.
 - every 6 months, for a period of 2 years commencing on the date of the EU, ARN will provide a report to the ACMA detailing the:
 - content of meetings that have been held involving the 'censor/s' and Program staff, about complaints or other expressions of concern received
 - engagement activities undertaken, and sensitivity training delivered to Program staff
 - new systems and processes implemented post this investigation finding.
- The 3-month report was received in June 2023. The first 6-month report was received in September 2023, and included references to training that incorporated the findings from the Mpox investigation.
- The next 6-month report is due in March 2024 and is also expected to include references to training that incorporates the findings from the Mpox investigation.

Current complaint assessments

7News Spotlight – De -Transitioning – broadcast on 3 September 2023

The broadcast

- On 3 September 2023, the program focused on case studies of transgender young people who spoke about regretting their decision to transition.

The issue

- As at 21 September 2023, the ACMA received 81 enquiries about the matter alleging that the report contained inaccurate content, lacked impartiality and caused distress. Under

the co-regulatory framework, those with contact details were referred to the broadcaster for consideration.

Action taken by the ACMA

- As at 21 September 2023, the ACMA has received 44 complaints from complainants who either did not receive a response or were not satisfied with the licensee's response. The ACMA will assess these complaints, the licensee's response and the broadcast against the relevant Code provisions, to decide whether to take further action.
- Under the broadcasting industry codes of practice, current affairs programs are not required to be impartial. The ACMA will, therefore, not assess aspects of these complaints that allege the program was biased or lacked impartiality.

Recent complaint assessments

The Voice Referendum

- As at 21 September 2023, the ACMA had received 21 complaints and enquiries regarding broadcasts about the Voice referendum. We received:
 - 13 contacts about ABC broadcasts. Three complainants had not been to the broadcaster and we referred them to the ABC in the first instance. We assessed 10¹ complaints and decided to take no further action. In making this assessment we noted that the accuracy provisions apply to material facts and not statements of opinion and impartiality does not require that every perspective receives equal time, nor that every facet of every argument is presented
 - 6 contacts about commercial and subscription licensees. None of these had been to the broadcaster and we referred them to the broadcaster in the first instance
 - 1 contact about ABC and SBS broadcasts and we referred them to the broadcaster in the first instance
 - 1 contact about the rules regarding political matter for the Voice Referendum.

7News Spotlight – Trial and Error – broadcast on 4 June 2023

The broadcast

- On 4 June 2023, the program dealt with the substance of the allegation that Mr Bruce Lehrmann sexually assaulted Ms Brittany Higgins in 2019, Mr Lehrmann's refutation of it, the associated ACT criminal trial, and Ms Higgins' interactions with Network 10 journalist Lisa Wilkinson.

The complaint

- The complaint alleged that the program breached the Commercial Television Industry Code of Practice 2015 because it contained significant factual inaccuracies, misrepresented viewpoints [REDACTED]

Action taken by the ACMA

- The ACMA declined to investigate the complaint on the basis that it contained matters that appeared to be highly contestable and that it appeared likely that there was considerable overlap between the subject matter of the *Spotlight* broadcast, and therefore, the substance of the complaint to the ACMA, and civil proceedings currently under way.

¹ 5 of the 10 complaints were from the same complainant.

- When exercising its discretion to investigate matters, the ACMA has regard to a number of public interest considerations, including whether the matter is the subject of current legal proceedings that may be complicated or compromised by opening an investigation.

Further complaint received

- On 29 September 2023, the ACMA subsequently received a further, separate complaint about this broadcast. Assessment of that complaint is currently underway.

The Project – with panellist Reuben Kaye – broadcast in February 2023

The broadcast

- On 28 February, comedian Reuben Kaye made a joke involving Jesus on the Channel Ten current affairs panel program *The Project*.
- The relevant comment was made while addressing derogatory posts the comedian had received on social media.

The issue

- The ACMA received more than 270 enquiries about the matter and under the co-regulatory framework, those with contact details were referred to the broadcaster for consideration.
- Complainants who were not satisfied with the licensee's response brought their complaints to the ACMA, alleging that the joke was inappropriate and offensive to Christians.

Action taken by the ACMA

- The ACMA assessed the complaints, the licensee's response, the broadcast and the relevant Code rules and decided to take no further action, noting:
 - the comments were unlikely to meet the high threshold required to perpetuate or provoke, 'intense dislike', 'serious contempt', or 'severe ridicule' against a group of people because of their religious beliefs
 - on the following night, a panellist on the program offered an on-air apology
 - the comment has made in a spontaneous context, consequently it was unlikely that the distress provisions of the Code, which require provision of a warning prior to the segment, would apply in these circumstances.

BACKGROUND

Approach to content complaints and investigations

- The final report of the Environment and Communications References Committee's Inquiry into Media Diversity (released in December 2021) referred to the ACMA's oversight of broadcast media as 'slow, complex, onerous for complainants and often inconclusive'.
- On 26 September 2022, Ms Zoe Daniel MP, Independent Member for Goldstein, called for another Media Diversity inquiry. In that speech she repeated the 2021 claim about the ACMA process being onerous for complainants and inconclusive, calling on the ACMA to have powers to 'initiate its own inquiries'.
- In relation to complaints about content, the ACMA must operate within the co-regulatory framework established under the *Broadcasting Services Act 1992* (the BSA). This framework provides for broadcasters to have an initial opportunity to respond to audience complaints and take action when they identify they have breached their code of practice.

- The co-regulatory scheme is designed to put responsibilities directly on media to meet community expectations as set out in their respective Codes of Practice. This includes balancing the need for protection from harmful content, such as inaccurate and partial news, with Australia's commitment to supporting free speech. This framework places editorial responsibility for content and the responsibility for resolving audience complaints with the broadcasters who are best placed to respond in the first instance.
- Direct contact with the broadcaster allows for a satisfactory resolution for many complainants. Within the co-regulatory framework, the ACMA operates as a complaints-handling escalation body for those complainants not satisfied with the broadcaster's response.
- It is this framework which results in complainants potentially having to submit complaints to 2 bodies (the broadcaster and then the ACMA), with impacts on the time between the broadcast and the finalisation of any ACMA assessment or investigation. This period of time can be extended because it is often several months after the broadcast that a complaint within the ACMA's jurisdiction is received by it.
- The ACMA, in performing this role, carefully assesses a considerable number of escalated unresolved code complaints every year. These are complaints that have gone to the broadcaster and the complainant has not been satisfied with the response received.
- The ACMA also completes complaint assessments relating to complaints it receives in the first instance about licence compliance and code complaints that have not been previously made to a broadcaster, for example anonymous complaints.
- In the financial year 2022–23 and the current financial year to 31 August 2023, the ACMA has:
 - completed 122 complaint assessments across the commercial, national and subscription sectors
 - commenced 16 investigations.
- It is acknowledged that in some cases the ACMA's assessments and investigations take longer than we, and complainants, might like. Drivers of this include the complexity of investigations (sometimes resulting from the complexity in the Codes the ACMA is applying), timeframes needed by broadcasters to respond to potentially adverse findings, and the overall prioritisation of resources in an environment where the ACMA cannot control demand.
- The ACMA has, over the past 12 months, undertaken a review of our standard operating procedures and is seeking to implement efficiencies across our many activities, including improvements to content investigation processes.
- In cases where the ACMA finds breaches of codes of practice, the ACMA has a set of commensurate formal powers including the ability to accept a court enforceable undertaking to facilitate future compliance with the rules.
- Digital platforms such as YouTube are not currently subject to the same co-regulatory arrangements as Australia's traditional broadcast media. Online platform operators develop and manage their own terms and conditions which users must agree to. Some online platforms are also subject to the voluntary Australian Code of Practice on Disinformation and Misinformation.

Complaints about compliance with codes of practice

- The ACMA has a performance target that 95% of all investigations (not limited to broadcasting investigations) are completed within 6 months.
- The ACMA Annual Report provides combined data for all ACMA investigations:
 - in 2021–2022, of the 157 investigations completed, 85% were completed within 6 months
 - in 2022-2023, of the 149 investigations completed, 88 % were completed within 6 months.

Grounds for opening an investigation

- The ACMA has a broad discretion to open a broadcasting investigation following receipt of a complaint under the co-regulatory framework or, in the absence of a complaint, on its own initiative.
- The ACMA's primary consideration is whether it is in the public interest to investigate. Factors the ACMA is likely to consider when opening an investigation include: the seriousness of the allegations; whether the matter is indicative of a potential systemic issue; concern about safeguards applicable to children; whether opening an investigation is consistent with Parliament's intent for the co-regulatory framework and whether the matter has been the subject of debate within the community indicating a likely level of public interest.
- Factors that the ACMA will consider in investigating a matter without a complaint would include considerations of whether early intervention may deliver a better outcome, if the matter is of considerable and widespread community concern or if the alleged misconduct is ongoing.
- An example of a significant matter investigated on own motion was the ACMA's investigation into broadcast material associated with the Christchurch massacre in 2019.

Grounds for not opening an investigation or taking further action

- After undertaking an assessment, the ACMA may decide to not investigate a complaint or take further action in response to information it has received where the relevant broadcaster has provided a thorough and conscientious response; there is little prospect of the matter constituting a breach of the relevant rules; where an investigation into similar allegations has already been opened; where the allegations do not concern serious matters that are the subject of community safeguards.

Codes developed by the National Broadcasters

- The ABC is required under the *Australian Broadcasting Corporation Act 1983* to develop a code of practice relating to its television and radio programming and notify this code to the ACMA.
- The SBS is required under the *Special Broadcasting Service Act 1991* to develop a code of practice relating to its television and radio programming and notify this code to the ACMA.
- The codes are not 'registered' by the ACMA under the BSA.

Actions available for breach of ABC and SBS codes

- Should the ACMA decide to take enforcement action against the ABC or SBS:

- it may, by notice in writing given to the ABC or SBS, recommend that it take action to comply with the relevant code of practice and take such other action in relation to the complaint as is specified in the notice
- if the broadcaster does not, within 30 days after the recommendation was given, take action that the ACMA considers to be appropriate, the ACMA may give the Minister a written report on the matter. The Minister must cause a copy of the report to be laid before each House of the Parliament within 7 sitting days of that House after the day on which he or she received the report.

ATTACHMENTS

- Attachment A** Summary of complaints and investigations
- Attachment B** QoN – Senate Estimates Hearing 24 May 2023 – Broadcasting complaints data
- Attachment C** QoN (written) – Senate Estimates Hearing 24 May 2023 – Sky News' Outsiders program
- Attachment D** QoN – Senate Estimates Hearing 24 May 2023 – Misinformation against any News Corp owned media outlets
- Attachment E** QoN – Senate Estimates Hearing 24 May 2023 – Fox vs Dominion case in the United States

Clearing Officer
Cathy Rainsford
General Manager
Content Division
Ph (02) 6219 5500
[REDACTED]

Contact Officer
Jenny Allen
Acting EM
Content Safeguards Branch
[REDACTED]

Date 3/10/2023

Summary of complaints and investigations²

Complaints received* – split by broadcast sector						
	1 July 2022 to 30 June 2023			1 July 2023 to 31 August 2023		
Broadcast Sector	Code compliance	Licence compliance	Total	Code compliance	Licence compliance	Total
Commercial television	41	0	41	8	0	8
Subscription television	2	0	2	0	0	0
Commercial radio	23	0	23	4	0	4
Open narrowcast radio	0	3	3	0	0	0
ABC	49	n/a	49	13	n/a	13
SBS	3	n/a	3	2	n/a	2
Online content service provider	0	14	14	n/a	n/a	0
Total	118	17	135	27	0	27

*The table above refers to *complaints* received in the reporting period. These include Code complaints that have not been resolved by the broadcaster in the first instance and complaints received directly by the ACMA about compliance with licence conditions. It does not refer to *enquiries* received.

** The table that follows refers to *Complaint Assessments completed* in the reporting period. These are undertaken to determine if a complaint is formally investigated.

The numbers in the table above (*complaints received*) and the numbers in the table below (*Complaint Assessments* undertaken) in a reporting period do not match. This is due to a number of factors. The complaints received goes to incoming complaints and the complaints assessed to work done during the period. We may not assess all the incoming complaints received within a period and we also may assess a number of complaints received in a previous reporting period. A single complaint assessment may also relate to multiple complaints about the same program or issue.

² See separate briefs for community broadcasting, and captioning investigations. See separate brief by Gambling Compliance Team about complaints about Online Content Service Providers in 2023-2024.

Complaint assessments completed ³ – split by broadcast sector						
	1 July 2022 to 30 June 2023			1 July 2022 to 31 August 2023		
Broadcast Sector	Investigation opened	No further action	Total	Investigation opened	No further action	Total
Commercial television	4	28	32	0	2	2
Subscription television	3	5	8	0	0	0
Commercial radio	1	12	13	0	1	1
Open narrowcast radio	1	4	5	0	0	0
ABC	1	26	27	0	14	14
SBS	0	3	3	0	1	1
Online content service provider	6	10	16	n/a	n/a	n/a
Total	16	88	104	0	18	18

³ See separate briefs for community broadcasting, and captioning investigations. See separate brief by Gambling Compliance Team about complaints about Online Content Service Providers in 2023-2024.

Environment and Communications

QUESTION ON NOTICE

Supplementary Budget Estimates 2022 - 2023

Infrastructure, Transport, Regional Development, Communications and the Arts

Departmental Question Number: SQ23-003830

Division/Agency Name: Australian Communications and Media Authority

Hansard Reference: Spoken, Page No. 102 (24 May 2023)

Topic: ACMA - Figures for 2GB

Ms O'Loughlin: The other thing I'd add is that it predates the recent decisions by the ABC to establish an ABC ombudsman, who will also be able to deal with complaints that go directly to the ABC, and it will be able to also launch its own investigations, if need be.

Senator ROBERTS: Could I have the last 10 years data on notice, please?

Ms O'Loughlin: We can certainly take that on notice for you.

Senator ROBERTS: How could I compare the way the ABC is treated with other stations, other broadcasters? Could you give me the figures for 2GB?

Ms O'Loughlin: I'm just looking at some of the complaints data I have in my pack. That tends to be aggregated up to commercial television, subscription television, national broadcasters, rather than individual commercial radio.

Senator ROBERTS: Could I have that, please?

Ms O'Loughlin: We can certainly take that on notice. I've got 2022 and 2023 in my pack, so we might need to do a bit of work on that, but we're happy to take that on notice for you.

Senator ROBERTS: Thank you, and I appreciate the clarity and succinctness of your answers.

Answer:

The data which enables the Australian Communications and Media (ACMA) to provide comparative sector information about complaints received is available for the period 1 July 2015 and 31 May 2023. Information about previous complaints was recorded in a decommissioned database and is no longer readily accessible.

ACMA complaints received 1 July 2015 to 31 May 2023	
Broadcast sector	Complaints received
Commercial Radio	246
Commercial FTA Television	437
ABC	435
SBS	33
Subscription Television	37
Totals	1188

**Environment and Communications
QUESTION ON NOTICE
Supplementary Budget Estimates 2022 - 2023
Infrastructure, Transport, Regional Development, Communications and the Arts**

Departmental Question Number: SQ23-003948

Division/Agency Name: Agency - Australian Communications Media Authority

Hansard Reference: Written, Page No. (06 June 2023)

Topic: ACMA - political vendetta

Senator Sarah Hanson-Young asked:

Is ACMA aware that Sky News' Outsiders program continues to claim that their climate coverage was correct and your finding against them is essentially nothing more than a political vendetta?

Answer:

The Australian Communications and Media Authority (ACMA) is aware that following the publication of the ACMA's investigation report on 26 April 2023, into Sky News Australia's *Outsiders* program, an *Outsiders* episode was broadcast on 30 April 2023 which contained commentary about the ACMA's investigation and findings and the complaints upon which the investigation was based.

Environment and Communications

QUESTION ON NOTICE

Budget Estimates 2023 - 2024

Infrastructure, Transport, Regional Development, Communications and the Arts

Departmental Question Number: SQ23-003939

Division/Agency Name: Agency - Australian Communications Media Authority

Hansard Reference: Written, Page No. (06 June 2023)

Topic: ACMA - Misinformation against any News Corp owned media outlets

Senator Sarah Hanson-Young asked:

Is ACMA currently looking at any other complaints of misinformation against any News Corp owned media outlets?

Answer:

The Australian Communications and Media Authority (ACMA) does not have a regulatory remit concerning print or online news or current affairs.

The ACMA's role is to assess broadcasting content against applicable broadcasting codes of practice. There are no provisions in codes of practice that deal directly with 'misinformation'. To the extent the issue is covered under broadcasting industry codes of practice, it would be dealt with by provisions that require accuracy in news or current affairs.

The ACMA is not currently investigating any complaints alleging the broadcast of inaccurate information on any licensed broadcasting service in which News Corporation is listed as one of the owners.

Environment and Communications

QUESTION ON NOTICE

Budget Estimates 2023 - 2024

Infrastructure, Transport, Regional Development, Communications and the Arts

Departmental Question Number: SQ23-003941

Division/Agency Name: Agency - Australian Communications Media Authority

Hansard Reference: Written, Page No. (06 June 2023)

Topic: ACMA - Fox vs Dominion case in the United States

Senator Sarah Hanson-Young asked:

Given the Fox vs Dominion case in the United States, is ACMA actively monitoring Sky news, particularly the Outsiders program, or any other media outlets, for election and referendum misinformation?

Answer:

There are no provisions in the subscription or commercial television codes of practice that deal directly with 'misinformation'. To the extent the issue is covered under the Commercial Television Industry Code of Practice 2015 or Subscription Broadcast Television Codes of Practice 2013, it would be dealt with by provisions that require accuracy in news or current affairs programs.

The co-regulatory framework places editorial responsibility for news and current affairs content, and the responsibility for resolving audience complaints, with the broadcasters in the first instance. The Australian Communications and Media Authority (ACMA)'s role, within this framework, is as a complaints-handling escalation body.

The ACMA, in performing this role, carefully assesses a considerable number of escalated unresolved code complaints every year. These are complaints that have gone to the broadcaster and the complainant has not been satisfied with the response received.

The ACMA expects broadcasters to comply with the requirements under the various codes.