

# Review of the Privacy Guidelines for broadcasters

## Consultation paper

AUGUST 2011

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Published by the Australian Communications and Media Authority

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# Review of the privacy guidelines for broadcasters

## Background to the review

The *Privacy Guidelines for Broadcasters 2005* (the guidelines) were made by the ACMA in August 2005 to assist broadcasters to better understand their obligations relating to privacy as set out in the various broadcasting industry codes of practice.

This is the first review of the guidelines since their commencement. The review was foreshadowed in the ACMA's decision in Investigation 2027.

## The draft revised guidelines

The draft revised guidelines are available on the ACMA's website for public comment. Information on making a submission is set out below.

In reviewing the guidelines, the ACMA has considered:

- > the relevant provisions of the broadcasting codes of practice
- > the ACMA's broadcasting investigations concerning privacy since August 2005
- > qualitative and quantitative research into attitudes to privacy, commissioned by the ACMA between May and September 2010
- > the Australian Law Reform Commission's report 108 *For Your Information: Australian Privacy Law and Practice*
- > developments in the law.

## The broadcasting codes of practice

The *Broadcasting Services Act 1992* (the BSA) establishes a co-regulatory scheme that sets out roles for industry and government in regulating broadcast content.

The scheme allows the commercial, subscription and community sections of the broadcasting industry to develop codes of practice and submit those codes to the ACMA for registration. Before registering a code, the ACMA must be satisfied that:

- > the code provides appropriate community safeguards for the matters that it covers
- > the code was endorsed by a majority of providers of broadcasting services in that section of the industry
- > members of the public have been given an adequate opportunity to comment.

The codes for the national broadcasters, ABC and SBS, are developed by the broadcasters themselves and notified to the ACMA pursuant to section 8 of the *Australian Broadcasting Corporation Act 1983*, and section 10 of the *Special Broadcasting Services Act 1991*.

The co-regulatory scheme gives broadcasters an opportunity to respond to any complaints that citizens might have about non-compliance with codes of practice. Where citizens are dissatisfied with the broadcaster response, they may complain to the ACMA, which will then investigate the matter.

Each code currently registered by, and notified to, the ACMA contains obligations for broadcasters with respect to privacy. Relevant extracts of the current codes can be found at **Appendix 2** of this document.

## Investigations

Since August 2005, the ACMA has completed 43 broadcasting investigations concerning privacy. Breaches were found in three cases and in a further matter no finding was recorded.

The ACMA has reviewed its decisions to identify matters not adequately dealt with in the 2005 guidelines. Key issues identified include:

- > the need for guidance on when material used in a broadcast invades an individual's privacy as distinct from when it relates to someone's personal or private affairs
- > issues surrounding consent, especially in relation to children and other vulnerable people.

These matters have been addressed in the revised guidelines and the case studies have been updated to include some of the ACMA's related recent decisions.

## Community research

In the period May to September 2010, the ACMA commissioned qualitative and quantitative research into community attitudes to broadcasting and media privacy. The findings provide an important community perspective on privacy issues that arise in broadcast news and current affairs programs and radio competitions.

Broadcasting clips and scenarios were presented to research participants to encourage open discussion and the presentation of different community perspectives. A short national survey provided representative measures on key aspects of privacy.

The research was intended to complement other sources of information and to help ensure that the ACMA is informed about community concerns and expectations for protecting individual privacy. In general terms, the research confirmed that the ACMA's approach to the codes (as reflected in the draft revised guidelines) is in step with current community attitudes.

The research reports *Community research into broadcasting and media privacy* (2011) and *Australians' views on privacy in broadcast news and current affairs* (2011) have been published on the [ACMA website](#).

# Invitation to comment

## Making a submission

The revised guidelines are released for public comment.

The ACMA has made this consultation paper available online in a format that will facilitate comment at <http://engage.acma.gov.au/privacyguidelinesreview>.

Submissions may also be made by email to [privacyguidelinesreview@acma.gov.au](mailto:privacyguidelinesreview@acma.gov.au) or by post to:

The Project Manager  
Review of the ACMA Privacy Guidelines for Broadcasters  
Broadcasting Investigations Section  
Australian Communications and Media Authority  
PO Box Q500  
Queen Victoria Building NSW 1230

Submissions are due by **Friday 7 October 2011**. If you wish to discuss the review, please contact Cecilia Rice, Project Manager, on 02 9334 7855.

## Effective consultation

The ACMA is working to enhance the effectiveness of its stakeholder consultation processes, which are an important source of evidence for its regulatory development activities. To assist stakeholders in formulating submissions to its formal, written consultation processes, it has developed [Effective consultation: A guide to making a submission](#). This guide provides information about the ACMA's formal written public consultation processes and practical guidance on how to make a submission.

## Publication of submissions

In general, the ACMA publishes all submissions it receives.

The ACMA prefers to receive submissions that are not claimed to be confidential. However, the ACMA accepts that a submitter may sometimes wish to provide information in confidence. In these circumstances, submitters are asked to identify the material over which confidentiality is claimed and provide a written explanation for the claim.

The ACMA will consider each confidentiality claim on a case-by-case basis. If the ACMA accepts a claim, it will not publish the confidential information unless authorised or required by law to do so.

## Release of submissions where authorised or required by law

Any submissions provided to the ACMA may be released under the *Freedom of Information Act 1982* (unless an exemption applies) or shared with other Commonwealth Government agencies under Part 7A of the *Australian Communications and Media Authority Act 2005*. The ACMA may also be required to release submissions for other reasons including for the purpose of parliamentary processes or where otherwise required by law (for example, under a court subpoena). While the ACMA seeks to consult submitters of confidential information before that information is provided to another party, the ACMA cannot guarantee that confidential information will not be released through these or other legal means.

# The guidelines

## Introduction

There is no general right to privacy under Australian law.

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.<sup>1</sup>

These codes can be found on the ACMA website at [www.acma.gov.au](http://www.acma.gov.au). Their privacy provisions reflect the balance that must be struck between the media's role in informing the public and the citizen's expectation of privacy.

A breach of these code privacy provisions will be investigated by the ACMA when:

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

These guidelines are intended to assist broadcasters to better understand their privacy obligations under the various broadcasting codes. They deal only with those codes. They do not deal generally with unlawful, unethical or distasteful journalistic practices.

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 of the case.

## The general principle

In essence, each of the codes protect against the broadcast of material that invades a person's privacy either by:

- > disclosing personal information; or
- > intruding upon his or her seclusion.<sup>2</sup>

## Investigation steps

When investigating the alleged breach of a code privacy provision, the ACMA will first 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?

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<sup>1</sup> The codes of practice relating to commercial television and radio and community broadcasting sectors are developed by broadcasters and registered by the ACMA pursuant to section 123 of the *Broadcasting Services Act 1992*. The ABC codes of practice are developed and notified to the ACMA pursuant to section 8 of the *Australian Broadcasting Corporation Act 1983* and the SBS codes of practice are developed and notified to the ACMA pursuant to section 10 of the *Special Broadcasting Service Act 1991*.

<sup>2</sup> The general principles have been taken in substance from Gleeson CJ's formulation in *ABC v Lenah Games Meats* 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]. They are also discussed by the NSWLRC in Report 120 at 4.3–4.4.

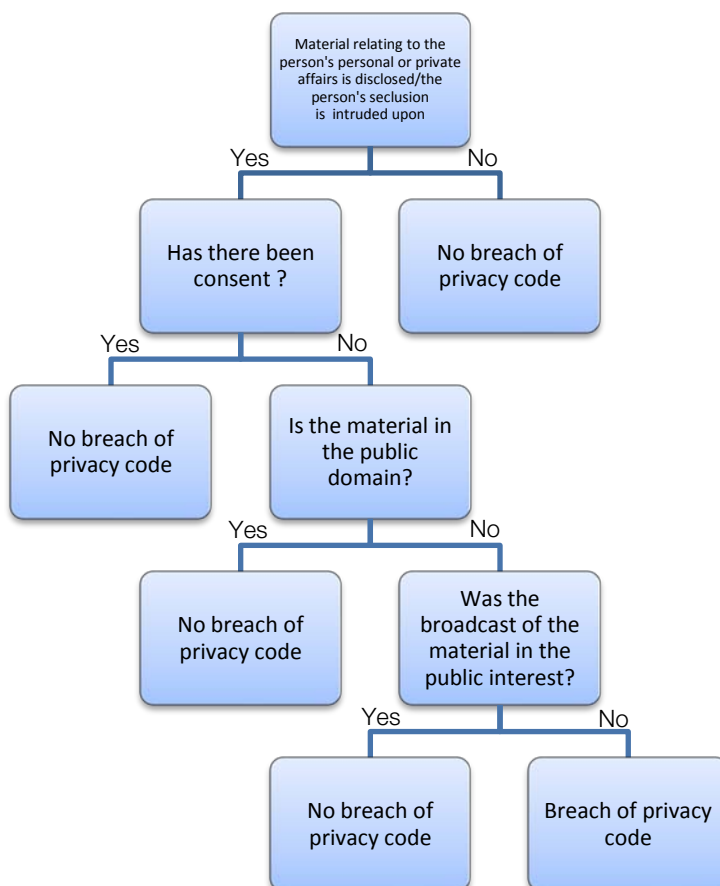
If the answer to both of the above questions is yes, then there will be a potential breach of code privacy provisions.

The ACMA will then consider:

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

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

Figure 1 Steps to determining a breach of the code privacy provisions



## Identifiable person

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

Public figures such as politicians, celebrities, prominent sports and business figures and those in public office do not forfeit their right to privacy in their personal lives.<sup>3</sup> However, it is accepted that public figures will be open to a greater level of scrutiny of any matter affecting the conduct of their public activities and duties.<sup>4</sup>

<sup>3</sup> Public figures are entitled to '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.

<sup>4</sup> This was considered in the ACMA investigation 2431 concerning a news report on the resignation of a NSW Minister of Parliament (case study 7 at Appendix 1).

For examples, refer to case studies 1, 2, 5 and 7 at Appendix 1.

## Personal information

Personal information can include facts about a person's health, personal relationships, financial affairs, sexual activities, sexual preferences or practices.<sup>5</sup> 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.

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

For examples, refer to case studies 2 and 5 at Appendix 1.

## Seclusion

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 inappropriate or offensive.<sup>6</sup>

Depending on the circumstances, this may include everyday activities and it will usually include sexual activities.<sup>7</sup>

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

For examples, refer to case studies 3 and 7 at Appendix 1.

## Consent

If informed 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.

There will be no waiver if consent is obtained by deception.

The use of material that has been surreptitiously obtained will be an indicator that the person may have had an expectation of privacy, and has not (at least at the time the material was obtained) consented to the broadcast.

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

For examples, refer to case studies 4, 5, and 7 at Appendix 1.

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<sup>5</sup> *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (119).

<sup>6</sup> This formulation has been informed by Gleeson CJ's test in *ABC v Lenah Games Meats* 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.

<sup>7</sup> *Jane Doe v Australian Broadcasting Corporation* [2007] VCC 281 (119).

## Children and vulnerable people

Special care must be taken in the use of material concerning a child (a person of 16 years or under) or a vulnerable person.

A parent or guardian's consent should always be obtained expressly before using material that invades a child's privacy.<sup>8</sup> However, parental consent alone will not always be sufficient for a broadcaster to comply with its code privacy obligations.

Extra care must be taken before naming or visually identifying a child in matters concerning the child's health, welfare or personal information, or where the child is involved in criminal matters or court proceedings.

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

For an example, refer to case study 6 at Appendix 1.

## Material in the public domain

Using material that is already in the public domain will generally not be an invasion of privacy. This includes the use of material obtained from online social media sites, unless access restrictions have been breached.

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 his or her privacy. Its private nature may be implied even if there was no express request to keep it confidential.<sup>9</sup>

## Public interest

The use of material in a broadcast will not be an invasion of privacy if there is a clear and identifiable link between it and the public interest at the time of broadcast.

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.

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

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.<sup>10</sup> It should be relevant to those issues, and not disclose peripheral facts or be excessively prolonged, detailed or salacious.<sup>11</sup>

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<sup>8</sup> Clause 4.3.5.2 of the Commercial Television Industry Code of Practice 2010 includes this requirement.

<sup>9</sup> 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.

<sup>10</sup> This test is drawn from case law: *Allworth v John Fairfax Group Pty Ltd* (1993) 113 FLR 254 at 263; *London Artists v Little* (1969) 2 QB 375 at 391.

<sup>11</sup> *Campbell v MGN Ltd* [2004] UKHL 22 at 164–165.

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 duties.<sup>12</sup>
- > conduct or behaviour that contradicts the person's stated position on an issue.<sup>13</sup>

However, it 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 and 7 at Appendix 1.

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<sup>12</sup> 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 7 at Appendix 1).

<sup>13</sup> See NSWLRC Report 120 at 5.25 and *Campbell v MGN* [2004] UKHL 22 at 82.

# Appendix 1—Case studies

## Case study 1

**Breach—invasion of privacy with no public interest reason for broadcasting the material (commercial television current affairs program)**<sup>14</sup>

### *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’ is 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.

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<sup>14</sup> 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)<sup>15</sup>**

#### ***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.

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<sup>15</sup> ABA Investigation Report 1254, May 2003.

## Case study 3

### No finding—invasion of privacy (commercial television news program)<sup>16</sup>

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

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<sup>16</sup> ACMA Investigation Report 2027, June 2009.

## 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)<sup>17</sup>**

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 show 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 high 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.

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<sup>17</sup> 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)<sup>18</sup>**

#### ***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 give 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.

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<sup>18</sup> 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)**<sup>19</sup>

### ***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 skating 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 made no 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.

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<sup>19</sup>ACMA Investigation Report 1882, September 2008.

## Case study 7

### **No breach—use of material relating to personal or private affairs of a public figure permitted in the public interest (commercial television news program)<sup>20</sup>**

#### ***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.

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<sup>20</sup> ACMA Investigation report 2431, December 2010.

# Appendix 2—Current obligations for broadcasters with respect to privacy

Code	Provision
<b>National television and radio broadcasting</b>	
<b>ABC Code of Practice 2011</b>	<p><b>6. Privacy</b></p> <p><b>Principles:</b> Privacy is necessary to human dignity and every person reasonably expects that their privacy will be respected. But privacy is not absolute. The ABC seeks to balance the public interest in respect for privacy with the public interest in disclosure of information and freedom of expression.</p> <p><b>Standards:</b></p> <p><b>6.1</b> – Intrusion into a person’s private life without consent must be justified in the public interest and the extent of the intrusion must be limited to what is proportionate in the circumstances.</p>
<b>SBS Codes of Practice 2006</b>	<p><b>1.9 Privacy</b></p> <p>The rights of individuals to privacy should be respected in all SBS programs. However, in order to provide information to the public which relates to a person’s performance of public duties or about other matters of public interest, intrusions upon privacy may, in some circumstances, be justified.</p>
<b>Television broadcasting</b>	
<b>Commercial Television Code of Practice 2010</b>	<p><b>News and Current Affairs Programs</b></p> <p><b>4.3</b> – In broadcasting news and current affairs programs, licensees: [...]</p> <p><b>4.3.5</b> – 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.</p> <p><b>4.3.5.1</b> – subject to the requirements 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 broadcast of the material;</p> <p><b>4.3.5.2</b> – for the purposes of this clause 4.3.5, licensees must 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. 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;</p> <p><b>4.3.5.3</b> – “child” means a person under 16 years.</p>
<b>ASTRA Subscription Broadcast Television Code of Practice 2007</b>	<p><b>2.2 News and Current Affairs Programs</b></p> <p><b>2.2(c)</b> – In broadcasting news and current affairs programs licensees must not use material relating to a person’s personal or private affairs, or which invades an individual’s privacy, other than where there are</p>

Code	Provision
(Note: this code is currently being reviewed; however, no changes to the privacy provisions are proposed)	<p>identifiable public interest reasons for the material to be broadcast.</p> <p><b>Note:</b> The question of intrusion into private domains, such as bereavement or personal tragedy, is one of real difficulty for all providers of news and current affairs programs. It is a matter of balance between what should be reported in the interests of the general public and what, if reported, would cause an individual or group of individuals' unnecessary anguish. It is noted that ACMA has published advisory Privacy Guidelines for Broadcasters available on the ACMA website at <a href="http://www.acma.gov.au">www.acma.gov.au</a>.</p>
<p><b>ACTA Community Television Broadcasting Codes of Practice 2011</b></p>	<p><b>Respect for Privacy</b></p> <p>This Clause is intended to provide licensees with guidance on the broadcast of material that may have an impact on persons in vulnerable situations. It is intended to address the issues identified in the ACMA's Privacy Guidelines for Broadcasters. As at 1 January 2010, the Guidelines consider two questions:</p> <ul style="list-style-type: none"> <li>&gt; when material relates to a person's private affairs, including: <ul style="list-style-type: none"> <li>&gt; the distinction between public and private conduct;</li> <li>&gt; the treatment of publicly available personal information;</li> <li>&gt; the issue of consent;</li> <li>&gt; the position with respect to public figures; and</li> </ul> </li> <li>&gt; when is the public interest served by disclosure of the material.</li> </ul> <p>In broadcasting programs, licensees will:</p> <p><b>3.5</b> – Not use material relating to a person's personal or private affairs, or which invades an individual's privacy, if the consent of the person (or in the case of a child, the child's parent or guardian) has not been obtained prior to the broadcast of the material, other than where there is an identifiable public interest reason for the material to be broadcast.</p> <p><b>3.6</b> – 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. 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.</p> <p>"child" means a person under 16 years.</p>
<b>Radio broadcasting</b>	
<p><b>Commercial Radio Code of Practice 2010</b></p>	<p><b>Code of Practice 2: News and Current Affairs Programs</b></p> <p><b>2.1</b> – News programs (including news flashes) broadcast by a licensee must:</p> <p style="padding-left: 40px;"><b>2.1(d)</b> – not use material relating to a person's personal or private affairs or which invades an individual's privacy, unless there is a public interest in broadcasting such information.</p> <p><b>2.3</b> – In the preparation and presentation of current affairs programs a licensee must ensure that:</p> <p style="padding-left: 40px;"><b>2.3(d)</b> – the licensee does not use material relating to a person's personal or private affairs, or which invades an individual's privacy, unless there is a public interest in broadcasting such information.</p>

Code	Provision
<b>Community Radio Broadcasting Codes of Practice 2008</b>	<p><b>3.5</b> – We will follow applicable privacy laws by:</p> <ul style="list-style-type: none"> <li>(a) respecting people’s legitimate right to protection from unjustified use of material which is obtained without consent or through an invasion of privacy,</li> <li>(b) only broadcasting the words of an identifiable person where: <ul style="list-style-type: none"> <li>(i) that person has been told in advance that the words may be broadcast, or</li> <li>(ii) it was clearly indicated at the time the recording was made that the material would be broadcast, or</li> <li>(iii) in the case of words that have been recorded without the knowledge of a person, that person has indicated his/her agreement prior to broadcast</li> </ul> </li> </ul>