

External review of decisions of the Broadcasting Standards Authority

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for the Broadcasting Standards Authority

Introduction

1. The Broadcasting Standards Authority (BSA) commissioned me as an external reviewer to review seven decisions issued by the BSA under the Election Programmes Code and asked me to provide my assessment of:
 - a. The legal robustness of the decisions, including the Authority's assessment of freedom of expression, and in particular the importance of political speech;
 - b. Whether the Authority's application of the relevant standard(s) to the complaints was reasonable and appropriate;
 - c. Whether the Authority reached the right outcome in each of the decisions, with reference to the standards considered;
 - d. If I did not consider the Authority reached the right outcome, whether the Authority's reasoning nevertheless supports the outcome reached;
 - e. Any perceived deficiencies in the Authority's reasoning;
 - f. The degree to which the decisions provide useful guidance and clarity on the Authority's approach to election programme complaints; and
 - g. Consistency of approach (where possible given the small sample size).

2. I was also invited to give an overall assessment of the soundness of the Authority's decisions and any suggestions for changes and/or improvements to the way in which the decisions have been written, or the reasons expressed.

3. Finally, I was asked to identify the principles in the decisions that I consider could form the basis of guidelines to be included in the Election Programmes Code when it is revised.

4. The BSA provided the following decisions for review:
 - *Allen and Mediaworks TV Ltd* (2014-106)
 - *Curtis and Television New Zealand Ltd* (2017-065)
 - *Rameka and Māori Television Service* (2017-070)
 - *Lupton and Māori Television Service* (2017-071)
 - *Cullen and Television New Zealand Ltd* (2017-072)
 - *Brown and Mediaworks TV Ltd* (2017-074)
 - *Thomas and Sky Network Television Ltd* (2017-082)

Summary

5. This review finds that there is significant inconsistency in the approach taken by the Authority to structure and the Bill of Rights in the seven recent Election Code decisions examined. However, it is recommended that the approach taken in two of the decisions: *Rameka* and *Lupton*, is an excellent model for the Authority to use in future decisions relating to the code. The recommendation details the ideal structure to be used.
6. It is recommended that submissions should not be sought from broadcasters, but only from the party and the complainant. Instead, broadcasters can be *invited* to provide submissions if they wish. Additionally, if *information* is required from broadcasters it can be sought by the Authority. But it will be rare that relevant information is required from the broadcaster in order to determine the complaint.
7. The review reveals that the approach taken by the BSA to the accuracy standard has also been inconsistent. It finds that the *Allen* decision is flawed and should no longer be used as a precedent for decisions which involve determining the difference between accuracy and opinion. It is recommended that a much stronger base dealing with the difference between fact and opinion should be built and used to reason to a robust conclusion.
8. The review concludes that promises as to future conduct are not capable of being tested against any accuracy standard during an election period. It is recommended that a revised Election Code should take account of this.
9. The review notes that the fast-track process developed for the 2017 election worked well on the whole. It commends the Authority for developing and using an effective fast track procedure, even outside an election period.
10. These suggestions are identified for consideration when the Election Programmes Code is revised:
 - a. Combining relevant standards from Other codes with those in the Election Code to create a 'one-stop' standards document;
 - b. Redrawing of Standard 9, the accuracy standard, to combine it with E2: Distinguishing Factual Information from Opinion or Advocacy, and E4: Misleading Programmes. Inclusion of a direction that the accuracy standard does not apply to factual promises as to future conduct;
 - c. Devising a General Standard as to debate, advocacy and expression;

- d. Consideration to be given to whether Standard 2: Programme Information and Standard 7: Alcohol, are applicable in the election programme context;
- e. Standard 6: Discrimination and Denigration in the Other codes, to be combined with E3: Denigration;
- f. Removal of E5: the Opening and Closing Address Standard.

Background

11. The Broadcasting Act 1989 established the Broadcasting Standards Authority (BSA), and gives legal force to codes of practice developed by broadcasters themselves together with the Authority under a form of co-regulation. Under the Act, broadcasters have responsibilities to maintain standards consistent with:¹

- (a) the observance of good taste and decency; and
- (b) the maintenance of law and order; and
- (c) the privacy of the individual; and
- (d) the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
- (e) any approved code of broadcasting practice applying to the programmes.

12. The Authority must encourage the development and observance by broadcasters of the codes referred to above and these should cover: the protection of children; the portrayal of violence; fair and accurate programmes and procedures for correcting factual errors and redressing unfairness; safeguards against the portrayal of persons in programmes in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age, disability, or occupational status or as a consequence of legitimate expression of religious, cultural, or political beliefs; restrictions on the promotion of alcohol; presentation of appropriate warnings in respect of programmes, including programmes that have been classified as suitable only for particular audiences; and the privacy of the individual.² The Authority currently administers and enforces three codes which do this – a Radio code, a Free-to-Air Television code, and a Pay Television code (the 2016 codes).³

13. In relation to election programmes specifically, the Authority must receive and determine complaints that election programmes did not meet one or more of the standards in (a) to (c) and (e) above. The Election Programmes Code was developed in order to carry out this function.⁴

¹ Broadcasting Act 1982, s 4(1).

² Broadcasting Act 1982, ss 21(e) and (f).

³ These are contained in a Broadcasting Standards in New Zealand Codebook and took effect in April 2016: https://bsa.govt.nz/images/codebook/160304_12_BSA_CODE_OF_CONDUCT_BOOK_FINAL.pdf accessed 12.5.18. Codes are reviewed every five years.

⁴ <https://bsa.govt.nz/images/assets/Codes/Election-Programmes-Code-May-2011-Edition-English.pdf> accessed 12.5.18. The code took effect in May 2011.

Complaints made under the Code go direct to the Authority.⁵ Formal complaints allege that the broadcaster has failed in its responsibility to maintain one or more of the broadcasting standards in the code.

The Election Programmes Code

14. The Authority has noted that typically election programmes are short broadcast promotional or campaign clips for political parties or candidates.⁶ The Broadcasting Act defines an election programme as a programme that is broadcast on TV or radio during an ‘election period’ and encourages or persuades, or appears to encourage or persuade voters to vote, or not to vote, for a political party or the election of a constituency candidate; or advocates support for, or opposes, a constituency candidate or political party; or notifies meetings held or to be held in connection with an election.⁷ Complaints can only be made in relation to election programmes broadcast on television or radio during the general election period, which begins with writ day and ends with the close of the day preceding polling day for national general and by-elections.⁸ The Election Programmes Code is therefore unlike the 2016 codes in that it applies spasmodically, approximately every three years at least, and whenever by-elections are being held.
15. Importantly, the Court of Appeal has recently held that election programmes are only those that are broadcast for political parties or candidates.⁹ Therefore, the Election Programmes Code is also unique among the BSA Codes in that it does not really apply to broadcasters at all although it does apply to broadcasts. Programmes initiated by broadcasters themselves or other third parties are not covered by the Election Programmes Code,¹⁰ but nonetheless must still comply with the relevant broadcasting standards for Radio, Free-to-Air TV or Pay TV.¹¹ Complaints made about the content of such other programmes which relate to elections, such as news and current affairs coverage, satire and comment, do not go directly to the BSA but must go to the broadcaster in the first instance, and then to the Authority if the complainant remains dissatisfied. I discuss the difficulties this position may give rise to as regards consistency and purpose of the BSA codes below.

⁵ Broadcasting Act 1989, s 8(1).

⁶ <https://bsa.govt.nz/standards/election-programmes-code/guidance-for-complainants> accessed 12.5.18.

⁷ Broadcasting Act 1989, s 69(1). A programme includes visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text.

⁸ Broadcasting Act 1982, s 69(1).

⁹ *The Electoral Commission v Watson & Jones*, [2016] NZCA 512, [2017] 2 NZLR 63, at [89]-[99], especially [95].

¹⁰ Although they may be subject to the jurisdiction of the Electoral Commission.

¹¹ Third party produced election advertisements may be governed by the Electoral Commission using its powers under the Electoral Act. Additionally, complaints about the content of such advertisements may be made to the Advertising Standards Authority.

16. The Election Programmes Code contains the following standards:

E1 – Election Programmes Subject to Other Codes

An election programme is subject to all relevant provisions of the Codes of Broadcasting Practice for television and radio except for the requirement to present a range of significant viewpoints on issues of public importance. Robust debate, advocacy and expression of political opinion are a desirable and essential part of a democratic society and broadcasting standards will be applied in a manner which respects this context.

E2 – Distinguishing Factual Information from Opinion or Advocacy

An election programme may include debate, advocacy and opinion, but factual information should be clearly distinguishable from opinion or advocacy.

E3 – Denigration

While an election programme may oppose a political party, or candidate, it may not include material which denigrates a political party or candidate.

E4 – Misleading Programmes

An election programme may not imitate an existing programme, format or identifiable personality in a manner which is likely to mislead.

E5 – Opening and Closing Address

A party opening or closing address must be clearly identifiable as a party political broadcast made by, or on behalf of, a specified political party.¹²

17. The Authority does not have any special statutory duty as regards time limits for dealing with complaints made under the Election Programmes Code. However, it developed a special fast-track procedure for the 2017 election based on an ideal turn-around for complaints of 8-10 days, with allowance for more complex complaints.¹³ Non-urgent complaints would still be dealt with under the normal processes.

¹² In 2017 the Broadcasting Act was amended under the Broadcasting (Election Programmes and Election Advertising) Amendment Act 2017, which removed the requirement for Television New Zealand and Radio New Zealand to provide time for opening and closing addresses. This meant that Standard E5 Opening and Closing Addresses did not apply during the 2017 General Election and appears to no longer have any effect.

¹³ https://bsa.govt.nz/images/Fast-track_complaints_process_for_election-related_content.pdf accessed 13.5.18.

The Election Programmes Code and Freedom of Expression

18. The Authority has recognised that generally it is required to consider whether there is good reason to limit the right to freedom of expression when it makes decisions about complaints. This applies to its interpretation of all the codes. The Authority has kept its approach to this issue under constant review and has responded to relevant decisions of the courts and to numerous recommendations made by external reviewers over the years in an attempt to refine and establish an accessible and robust approach which meets its legal obligations under the NZ Bill of Rights Act 1990 (NZBORA).¹⁴ However, a review carried out in 2017 noted that the BSA decisions it had examined revealed ongoing inconsistency in the approach taken to freedom of expression. It recommended at the least that the BSA adopt a consistent approach to the location and framing of its references to freedom of expression.¹⁵ However, that review went further and recommended adoption of a structured approach where, if the BSA intends to uphold a complaint, it should weigh up whether the limit to freedom of expression is justified under NZBORA, and noted that if the complaint is to be dismissed this analysis will not be required.¹⁶
19. Aside from the matter of what general approach to freedom of expression the BSA should take in applying all of its codes, it is fundamental and manifest that the Election Programmes Code and application of it should take special account of freedom of expression. This is recognised at the outset in the Code itself, where Standard E1 mandates that ‘Robust debate, advocacy and expression of political opinion are a desirable and essential part of a democratic society and broadcasting standards will be applied in a manner which respects this context.’ The Court of Appeal has stated that election programmes ‘must be assessed from the perspective of the reasonable observer who is sensitive to the importance of free speech and the exceptionally high value of political speech in a democracy. This calls for a robust approach.’¹⁷
20. Standard E1 also states that relevant provisions of the Codes apply to Election Programmes *except for the requirement to present a range of significant viewpoints on issues of public importance.*

¹⁴ See the summary of previous reviewer’s comments and positions beginning 2006, presented in the 2017 review report of Kensington Swan : External review of the decisions of the Broadcasting Standards Authority, May 2017, 6-7, at paras 28-29.

¹⁵ Kensington Swan : External review of the decisions of the Broadcasting Standards Authority, May 2017, 6-7, at para 171.

¹⁶ Kensington Swan : External review of the decisions of the Broadcasting Standards Authority, May 2017, 6-7, at para 150.

¹⁷ *The Electoral Commission v Watson & Jones*, [2016] NZCA 512, [2017] 2 NZLR 63, at [89]. In this decision, the Court held that a satirical protest song and video were neither an election programme nor an election advertisement and therefore broadcast was not unlawful.

Programmes which set out to persuade voters one way or another characteristically do not present a range of viewpoints and largely involve advocacy. A requirement for a range of viewpoints in these programmes will not be relevant and should not apply.

21. Therefore, interpreting the 2016 codes in relation to Election Programmes excludes consideration of viewpoint balance, and requires special cognisance of the election context generally, when, every three years approximately in New Zealand, the need for democratic debate, made possible by virtue of freedom of expression, is heightened. The Authority has also recognised the importance of this context in developing a special fast-track procedure for election complaints in 2017, as noted above.

22. In the light of this background, I turn now to examine the seven decisions referred for review by the Authority. I have read each decision and also viewed the broadcast material relevant to each.

The Decisions

Allen and Mediaworks TV Ltd (2014-106) (Allen)

23. In this decision, the Authority did not uphold a complaint made by Allen about a National party advertisement run prior to the 2014 election. In the advertisement, John Key stated that if elected, the party would ‘start paying off debt’. The complainant argued that the advertisement was misleading and deceptive because Treasury had released a Pre-Election Fiscal Update which suggested debt would increase each year until after the end of term for any new government. Allen suggested that Standards E1, E2, and E4 applied. The Authority determined the complaint on the basis of Standard E1, focusing on accuracy (under Standard 5 of the Free-to-Air Television Code), and determined that the other Standards did not apply. It held that the advertisement was not inaccurate because election advertisements are, by their very nature, not factual, but rather, highly political, often hyperbolic vehicles for advocacy and influence.

24. I have been asked to first address the legal robustness of the decision, including the Authority’s assessment of freedom of expression, and in particular the importance of political speech. Unfortunately, there is some lack of robustness in the decision, first in the generalised finding by the Authority that election advertisements are not ‘factual’. In this regard, I support the view of Steven Price in a blog comment he published about the *Cullen* decision which I discuss below,¹⁸ that taking this position converts all factual promises made in election promotional material into

¹⁸ Steven Price: BSA and ASA to political parties: “sure, lie all you like,” 21 September 2017, <http://www.medialawjournal.co.nz/?p=682>, accessed 13.5.18.

opinion and removes any possibility of challenge based on factual accuracy. In defamation law, the courts have, over centuries, confronted the need to determine fact from opinion and have established a consistent approach to the distinction. However, *Allen* reveals confused reasoning by the BSA as to the dichotomy, and this is because the election programme contained statements what do not fit the dichotomy at all, it involved something that was neither purely fact nor opinion.

25. Under the established approach in defamation law, to state something in a bare and undisputed manner, is to state a fact. The Authority's own guidelines state that a fact is verifiable – it can be proved right or wrong.¹⁹ However, to present a statement accompanied by a qualification or conditional tone is to state an opinion. Thus, to state that 'National will start paying off debt' is to make something that looks like a factual statement, whereas to state 'I think National will start paying off debt' or 'National should start paying off debt' is to state an opinion. The statement is also not hyperbolic, as suggested in *Allen*. It is not overstated, or exaggerated. It is an unadorned statement that National *will do* something. That means the statement 'National will start paying off debt' appears to be a statement of fact, but, importantly, it is really a promise as to future conduct.
26. Therefore, *Allen* would have been more robust if the Authority had found that the statement was a statement that was a promise as to future behaviour. Such promises are unique in that they are not opinion but they are not pure fact either. Essentially, such statements cannot be subject to the accuracy standard because they relate to the future and the Authority does not have sufficient information pre-election to verify whether they are true or not. No one, including the Authority, can know whether National would be caught in a lie until they had a chance to do what they have promised. This interpretation has the outcome that promises based on future behaviour simply cannot be tested by the accuracy standard, and they cannot be tested as opinion either. However, factual statements about past behaviour, such as 'National eliminated poverty during its last term,' can and should be tested under the accuracy standard.
27. It is clear that, in taking the approach it did, the Authority was very concerned to ensure that political speech is encouraged during the election period in particular. However, generalising that parties which promote their policies never use factual statements is an imprecise approach. *Allen* reveals some reluctance to determine whether the accuracy standard can apply to promises about future conduct. Generalised statements about the perceived nature of political advertising do not resolve this. The decision would have been more robust if the question had been directly and

¹⁹ <https://bsa.govt.nz/standards/complaints-process-and-other-guidance>, accessed 31.5/18.

clearly confronted. Although the complainant might have been frustrated to hear that a promise about future behaviour cannot be tested under the accuracy standard, the Authority could have reasoned that if there was, as the complainant suggested, information which indicated National would not be able to live up to its promise once elected, then the public would not be misled. Promises as to future conduct can be the subject of robust debate in the run up to the election, and the public can make up their own minds based on all the information available. That is freedom of expression at its best.

28. Therefore I do not think the Authority applied E1 correctly to the complaint. I do believe, however, the outcome was correct, because the Authority is not able to test the accuracy of promises which relate to future behaviour. Those fall to be tested in the public arena during the election period.

29. In *Allen*, the Authority deals with freedom of expression in a rather unfocused way but most specifically in the last paragraph of its treatment of E1, where it notes that:²⁰

‘A high value is placed on political speech, meaning that a correspondingly high threshold must be reached before the Authority would intervene. We are satisfied that viewers were not misled, and we consider that upholding the complaint would unjustifiably restrict the right of the National party and of the broadcaster to free political expression.’

30. Although the Authority is clearly attempting to express NZBORA issues as accessibly as possible, there are some ambiguities here. It is unclear what ‘correspondingly high threshold’ is being referred to.

31. Additionally, it is unclear that the *broadcaster’s* right to free political expression is engaged here. The Court of Appeal made it clear in *Watson* that election programmes (which contain the relevant expression) can only be those of the candidate or party. Therefore, the only form of right which might attach to broadcasters in these circumstances is that to engage in commerce by receiving payment to run the ad or programme. That is not a right which has any clear recognition in the law currently, and certainly is not in the NZBORA.

32. Overall, because of the approach taken to promises as to future behaviour, and because of these ambiguities, I do not believe ordinary people would get a clear picture of the process of reasoning that has been undertaken by the Authority in relation to freedom of expression.

²⁰ *Allen and Mediaworks TV Ltd* (2014-106, [11]).

33. In general, the reasoning of the BSA as to why it did not apply the other standards put forward by the complainant is robust. For the reasons outlined above, however, I do not find the arguments made in relation to E2 convincing.²¹ It would have been more appropriate to argue that the promise was clearly delineated from any opinion in the advertisement and so there was no breach.
34. Finally, I note that the Authority declines to uphold the accuracy standard.²² It then declines to uphold the remainder of the complaint.²³ The final wording before the sign off, however, is that the Authority declines to determine the complaint. This cannot be correct. It has determined part of the complaint and not upheld that part.

Curtis and Television New Zealand Ltd (2017-065)

35. In contrast to the *Allen* decision discussed above, the *Curtis* decision is much more impressive in its structure, layout, treatment of freedom of expression, accessibility and robustness of reasoning.
36. In *Curtis*, the complainant argued that a National party election programme run prior to the 2017 election was misleading under E4 of the Election Programmes Code. E4 directs that an election programme may not imitate an existing programme, format or identifiable personality in a manner likely to mislead. The programme in this case depicted a group of happy runners dressed in blue, running energetically through a New Zealand landscape, while a voiceover discussed what National had done to get the economy working and stated it would deliver a better future for all New Zealand. The ad concluded with the blue runners passing a decrepit group of struggling runners in red, green and black with their legs tied together, and, as the voiceover concluded the choice was simple, to keep NZ moving forward, or risk it all on who knows what, the struggling group, clearly representing the better-known non-National political parties standing in the election, collapsed in a heap. The Authority found that E4 did not apply to the facts of the complaint, because the programme did not imitate any existing programme or formats and did not identify any identifiable personality. The programme concluded with clearly identified messages for the National party. However, the BSA went further and determined the second part of the standard even though this was not necessary. It found the public would not have been misled by any suggestion that National had been and was a single party in government. Rather, the programme simply encouraged voters to give their vote to National.

²¹ *Allen and Mediaworks TV Ltd (2014-106,)*, [13].

²² *Allen and Mediaworks TV Ltd (2014-106,)*, [11].

²³ *Allen and Mediaworks TV Ltd (2014-106,)*, [14].

37. The structure of the decision is excellent and I found it very accessible. The summary is a well written synthesis of the decision and most helpful even though it is not part of the decision itself. The introduction describes the programme and then the complaint. A brief overview of how election programmes are dealt with follows. The complaint is then deal with by outlining the parties' submissions, followed by a clear analysis by the Authority. The first part of that analysis describes in a very accessible style how the BSA has to take freedom of expression into account and why this is important, especially for an election. The proportionality exercise which is required to be carried out is explained in one of the best and most accessible treatments I have seen.²⁴ That is followed by a brief description of the purpose of the relevant standard, and then the reasoning of the Authority follows.
38. I found this decision to be a model in all respects and also found the reasoning to be very robust, in part because of the first-rate groundwork laid in the manner I have described above. I simply make the following minor comments.
39. I note this decision was made by three members of the Authority rather than the maximum of four, and that a quorum of three is permitted under the legislation.²⁵
40. The Authority thanks the parties involved for their timely response to their request for submissions made under the fast-track process.²⁶ The relevant election period ran from 23 August to 22 September 2017 and the decision was dated 4 September, which indicates the fast-track process worked well.
41. TVNZ made a submission as well as the parties to the complaint. I record that I was most uncomfortable about this part of the decision. TVNZ, a broadcaster with only a commercial interest in the transmission of the programme, made five points in its submission, one of which involved it in giving its interpretation of the political message being put across by the National party.²⁷ I do not believe this to be a valid role of any broadcaster in the context of this Code and I do not believe submissions of this kind made by the broadcaster are relevant or particularly helpful.
42. Overall, as stated above, this decision is a model of excellence in all important respects.

²⁴ *Curtis and Television New Zealand Ltd* (2017-065), [14].

²⁵ Broadcasting Act 1989, s 26(3). In fact, all of the decisions apart from *Allen* were made by a three-person Authority.

²⁶ *Curtis and Television New Zealand Ltd* (2017-065), [8].

²⁷ *Curtis and Television New Zealand Ltd* (2017-065), [12].

Rameka and Māori Television Service (2017-070)

Lupton and Māori Television Service (2017-071)

43. I note that these two decisions relate to the same election programme and that they are almost identical in their substance with adjustments made to take account of the slightly different focus in the complaints. I will therefore deal with them together and highlight different concerns where relevant.
44. Once again, these decisions overall are impressive in structure, layout, treatment of freedom of expression, accessibility and robustness of reasoning, which are similar to those features in the *Curtis* decision.
45. The decisions arose from a campaign clip of the Ban 1080 Party shown during the 2017 election period on Māori Television. The broadcast used a voiceover to outline use and effects of 1080 poison on New Zealand's natural environment. This was illustrated by images of animal carcasses and 1080 baits in water environments. In *Rameka*, the Authority did not uphold a complaint that the election programme was misleading under the Election Programmes Code and the Free-To-Air Television Code, and in *Lupton*, it did not uphold a complaint that it was misleading by inferring there are dead possums and pigs in waterways as a result of 1080, and by implying the poison was deliberately dropped into waterways. In both decisions, the Authority found that the election programme did not contain statements of fact that were misleading, inaccurate, or indistinguishable from opinion. The claims were described by the Authority as statements of political advocacy and opinion, made for the purpose of encouraging voters to vote for the Ban 1080 Party. The Authority, as in *Curtis* discussed above, emphasised the importance and value of political expression, particularly in the lead up to a general election. The high threshold for finding a breach of standards was therefore not met.
46. The structure of both decisions is excellent and also accessible. The summaries were well written and synthesised each decision very well. The introductions described the programme and then each complaint. A brief overview of how election programmes are treated followed. The decisions then took a different approach to that followed in *Curtis* above by moving the discussion of how the BSA has to take freedom of expression into account and why this is important, especially for an election, from its later analysis section, and giving it a separate title of 'Overview – the right to freedom of expression and political speech'. The discussion thus comes earlier and is given special emphasis. The discussion remains excellent and stands out more.

47. The complaints about inaccuracy or misleading tendency are then outlined under their own heading, and this section include the parties' submissions, followed by a clear analysis by the Authority. In both cases when dealing with the accuracy standard under Standard 5 of the Free-to-Air Television Code, the Authority is faced with the question whether the advertisement stated facts rather than opinions, as in *Allen* discussed above. However, in contrast to the less than robust approach taken in *Allen*, the analyses in both *Rameka* and *Lupton* build a much stronger position for making a decision by referring to the Guidance issued for distinguishing fact and opinion in the Authority's own Codebook.²⁸ The decisions suggest a fact is verifiable and notes deciding which is which is not straightforward, and must depend on context, presentation and audience. They also note other relevant factors, such as the language in the item, whether the topic is controversial and whether evidence and proof is provided,²⁹ which must be taken into account. Using this guidance, the Authority then finds that taking the advertisement as a whole and in the broader context of Ban 1080's political policy decision, the parts of the advertisement being complained about were opinion rather than truth. Added to a further reference to the vital importance of free political expression, these reasons lead to a decision not to uphold this aspect of the complaints.

48. In both decisions, reference is made to *Allen* just prior to using the guidelines to reach a decision on the fact/opinion issue.³⁰ The Authority states:

The Authority has previously recognised that election advertisements that promote a party's policy promises are, by their very nature, 'highly political, often hyperbolic vehicles for advocacy and influence'.(Footnote removed). This means that, in order to find a statement is an assertion of fact, the statement needs to be clearly identifiable as such by reference to the factors we have mentioned (that is, it is precise in its language and capable of being proven) – rather than simply expressing the opinions of a campaigning political party in a forum where advocacy, hyperbole and robust criticism of the government are the norm, and expected.

49. This appears to be an attempt to explain *Allen*. In my view, *Allen* should be abandoned in this context as it is fundamentally flawed. The Authority has, in *Rameka* and *Lupton*, endorsed a very robust approach to the difficult problem of determining what is fact and what is opinion, and this approach can be used without the need to refer to *Allen* henceforth. The conclusions reached by

²⁸ <https://bsa.govt.nz/standards/complaints-process-and-other-guidance>, accessed 31.5.18.

²⁹ *Rameka and Māori Television Service* (2017-070), [18]-[19]; *Lupton and Māori Television Service* (2017-071), [17]-[18].

³⁰ *Rameka and Māori Television Service* (2017-070), [20]; *Lupton and Māori Television Service* (2017-071), [19].

the Authority on this issue in *Rameka* and *Lupton* are arguable and also well-supported in the analysis.

50. The approach of the Authority in both decisions to Standard E2 (distinguishing factual information from advocacy) is also supportable and well-reasoned in the analysis, as is the treatment of possible breach of other broadcasting standards in *Rameka* (good taste and decency, fairness and balance).

51. Overall, I also found these decisions to be well-structured and the reasoning to be very robust. The earlier placement of the freedom of expression treatment was an improvement which ensured a stronger and appropriate emphasis on this element within the context of the decisions as a whole. However, I remain uncomfortable with the seeking of and inclusion of submissions by the broadcaster, for the reasons previously noted.

52. The Authority thanks the parties involved for their timely response to their request for submissions made under the fast-track process.³¹ The relevant election period ran from 23 August to 22 September 2017 and the decisions are dated 20 September, which indicates the fast-track process worked well.

Cullen and Television New Zealand Ltd (2017-072)

53. *Cullen* arose from a National Party campaign advertisement that parodied Labour's campaign motto, 'Let's do this' by using a tagline, 'Let's tax this'. The advertisement used a series of brightly coloured images together with cartoon signs dropping into the picture to suggest that a Labour government would impose new taxes, such as a capital gains tax, land tax, regional fuel tax, income tax, water tax and a 'fart tax'. A voiceover concluded: 'There's only one way to stop Labour's taxes. Party vote National'. After Labour announced it would delay implementing the proposed taxes, National released an edited version of the advertisement which noted the new status of the proposed taxes and reinforced the need to still vote National. The complaint argued under Standard E2 of the Code that the election programme was inaccurate and misleading because it was untrue a number of taxes would be introduced or raised by Labour. The Authority did not uphold the complaint.

³¹ *Rameka and Māori Television Service (2017-070)*, [7]-[9]; *Lupton and Māori Television Service (2017-07)*, [7]-[9].

54. The structure of the decision is initially similar to *Rameka* and *Lupton*, discussed above, with a summary, an introduction describing the programme and then the complaint, followed by a brief overview of how election programmes are treated. However, the approach in *Rameka* and *Lupton* of giving a separate section to an ‘Overview – the right to freedom of expression and political speech’ is not followed, and instead, the *Curtis* structure is returned to, with an outline of the complaint coming next, that contains the parties’ submissions and then the Authority’s analysis, in which the first few paragraphs contain reference to the right of freedom of expression and how it will be dealt with. Then, surprisingly, the decision simply refers to *Allen* and uses that decision and that alone, to justify rejecting the complaint:

The Authority has previously recognised that election advertisements that promote a party’s policy promises are, by their very nature, ‘highly political, often hyperbolic vehicles for advocacy’, rather than factual information.¹¹ We consider the same reasoning applies here.

...

it would have been clear to viewers that the advertisement did not contain factual information, but rather National’s own analysis of Labour’s comments, policies and tax announcements.

55. For the reasons outlined in relation to *Allen* above, the reliance in this decision on the reasoning in *Allen* means it lacks robustness and is susceptible to strong criticism. It has *in fact* been strongly criticised by Price, who makes convincing arguments which are not met in the decision.³² As such, the overall quality of the decision is poor.

56. Once again I note my discomfort at the inclusion of submissions from the broadcaster.

57. The Authority thanks the parties involved for their timely response to their request for submissions made under the fast-track process.³³ The relevant election period ran from 23 August to 22 September and the decision is dated 20 September, which indicates the fast-track process worked well.

Brown and Mediaworks TV Ltd (2017-074)

58. This decision can be dealt with briefly as it involves a Standard E2 complaint arising from the same campaign advertisement discussed in *Cullen*. A similar structure is used as in that decision, but this time the Authority includes in its analysis two additional brief paragraphs which reference the

³² Steven Price: BSA and ASA to political parties: “sure, lie all you like,” 21 September 2017, <http://www.medialawjournal.co.nz/?p=682>, accessed 13.5.18.

³³ *Cullen and Television New Zealand Ltd* (2017-072), [6]-[8].

Guidance as to what is fact and what is opinion in the Standards Codebook.³⁴ It then relies on *Allen* and references *Cullen* in order to reject the complaint.

59. Overall, then, *Brown* is a hybrid of *Curtis* and *Cullen*, and although an improvement on the latter, is not as robust as the former.

60. I note that MediaWorks, the broadcaster, appears to have made a very brief and rather disconnected submission, perhaps indicating that it was not clear what its role in the process was. I repeat my discomfort about the submissions of broadcasters being sought in relation to this Code.

61. The Authority thanks the parties involved for their timely response to their request for submissions made under the fast-track process.³⁵ The relevant election period ran from 23 August to 22 September 2017 and the decision is dated 22 September, which indicates the fast-track process worked to ensure the decision was made just before the end of the election period.

Thomas and Sky Network Television Ltd (2017-082)

62. In this decision, the Authority declined to uphold a complaint about good taste and decency which arose from a campaign advertisement for the Ban 1080 Party broadcast at 5.20pm on 9 September 2017 on Prime, during a G-classified fishing programme, *Addicted to Fishing*. The advertisement discussed the use and effects of 1080 poison on New Zealand's wildlife, and a number of stark close-up images of dead deer allegedly poisoned by 1080 were included. The complainant argued the broadcast of these images when children might be watching was in breach of the good taste and decency standard applying under Standard E1 of the Election Programmes Code.

63. The structure of the decision is different yet again, and returns to the approach used in *Rameka* and *Lupton* of giving a separate section to an 'Overview – the right to freedom of expression and political speech', which follows the overview discussing how complaints about election programmes will be dealt with.³⁶ The analysis focuses on the need to take context into account when applying the good taste and decency standard and appears to be robust. The threshold for breach of good taste and decency must be high, especially in relation to political speech and election advertising, and that context is given appropriate weight in the decision.

³⁴ *Brown and Mediaworks TV Ltd (2017-074)*, [16]-[17].

³⁵ *Brown and Mediaworks TV Ltd (2017-074)*, [6]-[8].

³⁶ *Thomas and Sky Network Television Ltd (2017-082)*, [8]-[9].

64. Once again I record my discomfort that the broadcaster's views were sought. In this case, *Sky Television* merely referred to the fact that the advertisement had been reviewed by the Commercial Approvals Bureau (CAB), which is a point of information rather than a submission.
65. The Authority thanks the parties involved for their timely response to their request for submissions made under the fast-track process.³⁷ The relevant election period ran from 23 August to 22 September, however, the decision is dated 27 October, which is outside the election period. In this case, the complaint had apparently been sent by mistake to the broadcaster first, rather than to the BSA directly as required under the Broadcasting Act. Although it did not reach the Authority until 9 October, which was after the end of the election period, the BSA still applied the fast-track process and sought submissions and reached a decision within 18 days.

Discussion and overview

Structure

66. The analysis above reveals there is significant inconsistency in the approach taken by the Authority to structure and the Bill of Rights in the seven recent Election Code decisions. Although generally the structure of the decisions is better than it appeared to be in 2014 (as revealed in *Allen*), the BSA should settle on and use a consistent approach. It is therefore recommended that the structural approach adopted for future elections should be that taken in *Rameka* and *Lupton*. Decisions should begin with a summary which would be a well written synthesis of the decision, and is not part of the decision. This should be followed by the introduction which describes the programme and then the complaint, followed by a brief overview of how election programmes are treated, including reference to the fast-track procedure. An overview of the importance of the right to freedom of expression and political speech should follow under a separate heading, which should also describe in accessible language how the Authority carries out proportional balancing. The complaints should then be outlined in more detail under their own heading, and this section should include submissions from the parties, followed by a clear analysis by the Authority. The analysis should build a sound basis from principle and by use of any guidelines and any previous decisions, for the BSA to reach its conclusion. In general, simply referring to a previous decision alone would not be sufficient. The analysis should conclude with a paragraph such as that used in *Rameka*³⁸ and *Lupton*:³⁹

³⁷ *Thomas and Sky Network Television Ltd* (2017-082), [5]-[7].

³⁸ *Rameka and Māori Television Service* (2017-070), [24].

³⁹ *Lupton and Māori Television Service* (2017-071), [23].

For these reasons, and taking into account the vital importance of free political expression in the lead up to the general election, we agree/do not agree that the right to freedom of expression ought to be limited in this case. We therefore do/do not uphold this aspect of the complaint.

67. This structure should be repeated for discussion of any further parts of the complaint relating to different standards, but comprising only outline, submissions and analysis and conclusion.
68. It must be emphasised that this analysis should not be read as a recommendation for reinstatement of anything akin to the ‘mantra’ approach for which the Authority has been criticised in the past. My recommendation is about consistent use of a basic structure for decision-making, and not content. It is highly desirable in terms of accessibility that those who use the BSA decisions database are able to find their way around decisions easily. Use of an agreed basic structure combined with headings, plain English language and a logical order will provide an appropriate level of predictability about the form decisions will take, but not about the content. Therefore, I make no recommendations as to particular wording to be used to populate the ‘template’ I have outlined above. Determination of content is for the Authority. That is why the wording from *Rameka*⁴⁰ and *Lupton*⁴¹ endorsed above as a suitable conclusion is merely suggested to indicate the sort of conclusion that is appropriate, it is not mandated.

Submissions

69. As co-regulators, broadcasters work closely with the BSA to develop the codes and then defend complaints made against them based on the codes. However, in the context of the unique Election Programmes Code, the position of broadcasters appears to be an uncomfortable one. Seeking submissions from the broadcaster as well as the relevant political party is arguably inappropriate. In contrast to complaints made under the Other codes, here it is the political party that will make arguments as to how its election programme should be interpreted or was intended to be interpreted and it is in the best position to do so. Additional submissions by the broadcaster as to this are likely to be irrelevant and based on no more expertise than the views of a member of the public as to meaning and aim of the material. Furthermore, it appears the level of interest and understanding by broadcasters in making submissions on this Code are variable. It is therefore recommended that submissions should not be automatically sought from broadcasters, but only from the party and the complainant. Broadcasters can instead be *invited* to make a submission if they wish to. Further, if information is actually required from broadcasters, such as whether CAB

⁴⁰ *Rameka and Māori Television Service* (2017-070), [24].

⁴¹ *Lupton and Māori Television Service* (2017-071), [23].

was involved in the process, then it can be sought by the Authority. But even that sort of information would add little to the determination which the BSA is required to make.

Allen and the accuracy standard

70. The approach to the accuracy standard has also been inconsistent. Although the BSA is not a court, it usefully and entirely appropriately refers to and uses previous decisions in a de facto system of precedent to inform and support later decisions. However, the *Allen* decision is flawed and should not be used as a precedent for decisions which involve determining the difference between accuracy and opinion. It held that the advertisement which gave rise to the complaint about accuracy was not inaccurate because election advertisements are, by their very nature, not factual, but rather, highly political, often hyperbolic vehicles for advocacy and influence. It did not otherwise build any basis for determining whether the content of the specific advertisement in that case involved statements of fact or opinion. No guidelines or other reasoning were used. A much stronger base dealing with the difference between fact and opinion should be built and used to reason to a robust conclusion. It is recommended that the *Allen* decision should not be used as a precedent in any future decision of the BSA.

Promises as to future conduct

71. Analysis of the *Allen* decision revealed it was an example of a common sort of election programme or advertisement which contain promises that something will happen in the future. This will involve statements such as: 'National will do X if elected', or 'Once elected, Labour is going to do Y'. Such statements are not opinion, but are also not capable of being tested against any accuracy standard during an election period because they are promises about future conduct. I make a recommendation as to how this might be reflected in any update of the Code below.

The fast track process to deal with complaints

72. It appears that the fast-track process developed for the 2017 election worked well on the whole. The parties responded in a timely fashion when requested to make submissions and the Authority's processes allowed it to make a decision within the time limits in all cases except one. In that case, the sending of the complaint to the broadcaster first by mistake did not appear to be caused by the BSA. The Authority nonetheless dealt with the complaint using the fast-track procedure. In using an effective fast track procedure, even where this was outside the election period, the Authority demonstrates and enhances its commitment to the Code and to the importance of freedom of expression in democratic elections.

73. I conclude this review with a discussion of principles which might be applied when the Election Programmes Code is revised.

Principles for inclusion in a revised Election Programmes Code

Combining relevant standards from 2016 codes with those in the Election Code

74. The fact that E1 references the Other codes and makes election programmes subject to those other codes except for the requirement to present a range of significant viewpoints on issues of public importance makes for a clunky and inaccessible document. It would be preferable and much more usable for members of the public to have all relevant standards in one document, so they would not have to cross-reference another code to work out what applies from that code and what does not. Although one of the virtues of the Election Code is its brevity, in this case, putting the standards together would not make the document much longer than the Other codes are already and would make it a 'one-stop' standards document. I suggest some further standards below which should not be included in the revised code.

Accuracy and I promises as to future conduct

75. The accuracy standard should be redrawn to contain a direction that it does not apply to promises as to future conduct.

Inapplicable standards

76. Careful thought should be given to whether the following standards are applicable in the election programme context:

- Standard 2: Programme Information;
- Standard 7: Alcohol.

General Standard as to debate, advocacy and expression

77. The second part of E1: 'Robust debate, advocacy and expression of political opinion are a desirable and essential part of a democratic society and broadcasting standards will be applied in a manner which respects this context', should become the first stand-alone standard in the revised code.

E2: Distinguishing Factual Information from Opinion or Advocacy

78. This standard should be grouped with the Standard 9, the accuracy standard in the Other codes.

E3: Denigration

79. Standard 6 Discrimination and Denigration in the Other codes, should be combined with E3: Denigration.

E4: Misleading Programmes

80. This standard should be included in the revised code and should be grouped with S9, the accuracy standard in the Other codes, and E2 above.

E5: Opening and Closing Address

81. As this standard is no longer relevant, it should not be included in any revised code.

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