8 December 2025

The Board
Broadcasting Standards Authority
Wellington

Attention: Stacey Wood/Helen Cruse

Email: StaceyW@bsa.govt.nz /HelenC@bsa.govt.nz ***By Email Only***

Broadcasting Standards Authority ("BSA") Jurisdiction

Introduction

1. You have asked for our opinion on the issue raised by The Platform Media NZ Limited (**PNZ**), through its lawyers, Franks Ogilvie, in their submission letters of 24 October 2025 (**First FO letter**) and 12 November 2025 (**Second FO letter**) (together, **the FO submissions**). The FO submissions are a response to the BSA's draft Provisional Interlocutory Decision in the matter *WK v The Platform Media NZ Limited* [BSA ID 2025-063] (**BSA Provisional Decision**), considering a complaint (**the complaint**) about comments made by Mr Plunket, the owner and founding editor of PNZ, via PNZ's "The Platform"[1] and to the complainant's submissions in the matter. The BSA Provisional Decision was originally issued to the parties for comment, in confidence, but has since been widely publicised.

2. The issue raised in the FO submissions, which has also been the subject of commentary in various online forums, including The Platform itself, and on which you have asked for our advice, is whether the BSA has jurisdiction under the Broadcasting Act 1989 (**the Act**) to hear and determine a complaint in respect of a programme live streamed over the internet. The FO submissions argue that the BSA's jurisdiction is confined to traditional transmission over radio waves or satellite or terrestrial television networks (which we refer to in this letter as **traditional radio and television**).

3. To the extent that the FO submissions canvas issues which do not go to the question of the BSA's jurisdiction (e.g., in paragraphs 12 and 15 of the Second FO letter), those may be for the BSA to consider when it finalises its decision. However, we have not been asked to comment on them here and do not do so.

4. We have considered the Act in detail together with various other materials and somewhat related legislation that governs "content" in its widest sense, such as the Copyright Act 1994, Privacy Act 2020 and Films, Videos, and Publications Classification Act 1993, as well as technology related statutes such as the Telecommunications Act 2001.

5. We have also considered what Parliament intended in 1989 when the Act was passed, by an extensive review of the debates recorded in Hansard on introduction and passing of the Broadcasting Bill 1988 (which became the Act). Parliamentary debates on subsequent amendments have also been reviewed.

[1] https://theplatform.kiwi/ accessed 4 November 2025

6. As you know, arising out of that Hansard review, together with Helen Cruse of the BSA, we also reviewed the September 1986 report of the *Royal Commission on Broadcasting and Related Telecommunications*, which was referenced in the Parliamentary debates as the genesis of the legislation.

7. As we explain below, our view is that the BSA does have such jurisdiction. We therefore disagree with the position put forward in the FO submissions.

Analysis

8. The BSA will have jurisdiction over The Platform if PNZ is a *broadcaster* under the Act. Since, under the Act, a broadcaster generally [2] is simply someone who broadcasts, the critical definition is that of *broadcasting*. It is therefore necessary to carefully analyse that definition in the context of the Act as a whole, taking into account the Act's expressed purpose, Parliament's intentions, and usual rules of statutory interpretation.

9. The key definitions in section 2 of the Act for the purposes of this analysis are:

> ***broadcaster*** *means, subject to subsection (2),[3] a person who broadcasts programmes*
>
> ***broadcasting*** *means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes—*
>
> *(a) made on the demand of a particular person for reception only by that person; or*
>
> *(b) made solely for performance or display in a public place*
>
> ***programme***—
>
> *(a) means sounds or visual images, or a combination of sounds and visual images, intended—*
>
> *(i) inform, enlighten, or entertain; or*
>
> *(ii) to promote the interests of any person; or*
>
> *(iii) to promote any product or service; but*
>
> *(b) does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text*

10. We have no doubt that when the definition of *broadcasting* refers to *transmission* (which term is not defined in the Act), in conjunction with the phrase *means of telecommunication* (also not defined), that encompasses the conveyance of digital material over the internet. While the Act was passed in 1989 when the internet as we know it now was only just becoming available in New Zealand, *transmission* and *telecommunication* were well understood at the time given the regulatory regime set out in the Telecommunications Act 1987 (since replaced by the Telecommunications Act 2001) and applied to both radio **and** physical (wired) networks.

11. The words ***or other*** *means of telecommunication* [emphasis added], are a typical statutory phraseology that caters for future (i.e., *other*) developments, particularly where dealing with areas of changing technology. The leading case of *R v Misic*[4] is a relevant example of this. In that case the Court of Appeal held that a computer program was a *document* for the purposes of the Crimes Act 1961 because it fell within the phrase *Any paper, parchment,* ***or other material*** *used for writing or printing, marked with matter capable of being read.* [emphasis added]

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[2] There is a more limited definition of *broadcaster* in section 69(1) for the purposes of Part 6 of the Act, *Electoral Broadcasting*.
[3] Subsection 2 is not relevant to this analysis.
[4] [2001] NZCA 71

12. There are three critical points that follow:

    12.1 The Telecommunications Act 1987, as its name suggests, regulated wired and non-wired telecommunications networks. It is logical to assume that the same meaning was intended to be attributed to the phrase *means of telecommunication* when it was used in the Broadcasting Act only two years later. The internet was then and still is made up of a series of interconnected telecommunications networks.

    12.2 Further, if Parliament had intended to confine broadcasts only to programmes transmitted over traditional radio and television, as the FO submissions suggest, then the Act would have said so. It did not. Other parts of the Act refer specifically to radio and television by name, so wording the definition of *broadcasting* more widely in this way and not mentioning television at all must have been intentional. The phrase *other means of telecommunication* therefore must be taken as an intentional extension beyond traditional radio and television.

    12.3 Various provisions introduced into the Telecommunications Act 2001 by the Telecommunications (New Regulatory Framework) Amendment Act 2018 specifically refer to broadcasts being made other than via traditional radio or television (see sections 85A((b) and 103(b) for example). Since the Telecommunications Act 2001 defines *broadcast* by reference to the Act, this must mean that in 2018 when these amendments were made, it was recognised that the definition of *broadcast* in the Act extended beyond traditional radio and television transmission. Section 103 actually refers to *facilities for broadcasting … that enable programmes to be transmitted* ***along a line or lines*** [emphasis added]. In other words, by 2018 at least, Parliament had accepted that broadcasts were being transmitted over telecommunications networks that were not traditional radio or television networks.

13. We are strengthened in this view, that the definition is not confined solely to traditional radio and television transmission, by reference to section 69(1) of the Act, which creates a narrower specific definition of *broadcaster* for the purposes of the Electoral Broadcasting regime, confining that regime solely to *television broadcasters* and *radio broadcasters*. So, for example, the so called election broadcast "blackout periods" set out in section 71 of the Act only apply to *television broadcasters* and *radio broadcasters*. The only conclusion that can be drawn from this is that a narrower definition was needed because the main definition of *broadcaster* in section 2 of the Act extended beyond traditional radio and television transmission. To put it another way, if the main definition were confined to traditional radio and television, there would have been no need for the definition in section 69(1). The main definition must be wider. It should be noted that this narrower definition was inserted in 2017. Obviously, the internet was a well known quantity at that stage.[5]

14. Continuing with the definition of *broadcasting*, the definition of *programme* is also broad, and would capture all types of video and audio content available online, as well as traditional linear TV and radio programmes.

15. Turning to the next part of the definition, in our view, a device that can receive internet transmissions is a *receiving apparatus* for the purposes of that definition. This would include Smart TVs with built in internet connectivity and applications, older TVs in combination with set top boxes or other means of enabling an internet transmission to be displayed (e.g., Apple TV, Google Chromecast), internet enabled computers and smartphones, and associated wearables such as smartwatches that can display programmes.

16. Looking at this another way, given that many devices that are referred to as televisions are now designed to receive transmissions via satellite signals or via internet packet delivery over telecommunications networks (i.e., they are effectively computers connected to such networks) , we do not see that the term

[5] The narrower definition of *broadcaster* was inserted by the Broadcasting (Election Programmes and Election Advertising) Amendment Act 2017 and renders inapplicable the comments on the Act in *Electoral Commission v Watson* [2016] NZCA 512 referred to in the First FO letter. In any case, the song and video that were the subject of that decision were to be broadcast over traditional radio so the question of whether broadcasting included internet transmission was not relevant. The reference at para [20] of that case to radio **and** *television* was therefore obiter and not the result of any analysis of the definition. It cannot be taken as authority for the proposition that the Act is confined solely to traditional radio and television as the Court did not consider that issue.

receiving apparatus of itself can be used to confine the definition of *broadcasting* solely to programmes delivered over radio waves or traditional satellite or terrestrial television.

17. Taking that a step further, if the FO submissions were correct and the words *or other means of telecommunication* actually meant just television as it was understood in 1989, then linear television programmes that are increasingly delivered via the internet (e.g., TVNZ+) would not be covered. That cannot be the case.

18. We also consider that internet transmitted programmes of this nature are generally for *reception by the public* as that phrase is used in the definition. If we look at The Platform, it's free access is functionally the same as a radio broadcast. Instead of turning the dial on a transistor radio to a particular radio wave frequency, in the case of the Platform, a listener navigates to https://theplatform.kiwi/live-on-air on their internet connected device and clicks the "play" button. Immediately, as with a traditional radio broadcast, whatever is being discussed at the time is able to be heard. The listener does not choose what they will hear, as is suggested in paragraph 5 of the Second FO letter, any more than a listener to a traditional radio stream chooses what they will hear when they tune in to a particular station. The stream is from that point continuous, just like a traditional radio stream, only ending when the device is turned off. Multiple members of the public will be listening at the same time, just as multiple members of the public are able to listen to a traditional radio broadcast. As The Platform says on its site:

> *Through our website and app, you can listen live for nine hours a day and call in or text our on-air hosts*

"you" refers to any member of the public.

19. There are of course internet transmissions that are not for reception by the public, which would fall outside the definition on that basis alone. A video sent by one person to another by email is an obvious example.

20. As we have said, the words *other means of telecommunication* clearly encompass the internet on their plain meaning. There is no uncertainty there. However even if there were, the modern approach to statutory interpretation[6] is to see whether the application of statutory language to particular facts falls within a statute's purpose – referred to as the "purposive approach."

21. Under section 11 of the Legislation Act 2019, legislation applies to circumstances as they arise - it is "always speaking". Specific terms must be interpreted to encompass facts or circumstances that were not in existence or contemplated at the time a statute was enacted, provided that that interpretation is consistent with the statute's purpose and context (section 10 of the Legislation Act 2019).

22. This is particularly true in areas where there has been technological change since a statute was enacted, as is the case here. Examples of this approach in leading New Zealand cases include:

> *R v Misic*, holding that *document* under the Crimes Act 1961 includes computer programmes and computer discs;[7]
>
> *Dixon v the Queen* in which the Supreme Court held that a digital file is *property* under the Crimes Act 1961;[8]
>
> *Ortmann v USA* Supreme Court finding that a digital file is an *object* under the Copyright Act 1994;[9]
>
> *Ruscoe v Cryptopia Ltd (in Liquidation)* deciding that cryptocurrencies are *property* for the purposes of the Companies Act 1993.[10]

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[6] See *The Changing Approach To The Interpretation Of Statutes* by Professor John Burrows (2002) 33 VUWLR 981
[7] Above n 4
[8] [2015] NZSC 147
[9] [2020] NZSC 120
[10] [2020] NZHC 728

23. As the Court said in *R v Misic*:

> *The words must be construed as `always speaking' … when a statute employs a concept which may change in content with advancing knowledge, technology or social standards, it should be interpreted as it would be currently understood. The content may change but the concept remains the same. The meaning of the statutory language remains unaltered.*[11]

24. With The Platform providing its programming to the public in a functionally equivalent fashion to traditional radio, enabling the BSA to enforce its codes to fulfil the aims set out in section 21(e) of the Act, is consistent with the Act's purpose. Conversely, it would undermine the purpose of the Act to suggest that the same programme, if transmitted via radio waves, is within the BSA's jurisdiction, but when transmitted via the internet, is not.

25. Another good example of this functional equivalence is *iHeartRadio*, a global network that offers the same radio programming over the internet by live stream and over radio waves via affiliated radio stations. The fact that both forms of transmission are referred to as *iHeart**Radio*** [emphasis added] is telling. The word *radio* has expanded to include programmes transmitted over the internet and not just via radio waves. It follows, as a matter of statutory interpretation, that by virtue of this expansion of what is meant by *radio*, internet radio transmission is so functionally analogous to radio wave transmission that it would fall within the ambit of the words *other means of telecommunications* in the definition of *broadcasting.* We note that even the Second FO letter refers to traditional radio as a *live stream*[12] again highlighting the similarity. On a purposive view, this all underscores how illogical it would be to treat the same programme differently, solely because of the different transmission technology used.

26. In this we disagree with the distinction drawn in paragraphs 4 and 5 of the Second FO letter between "one way" delivery for receipt by "passive recipients" (traditional radio and television) vs "two way" (internet). Whether transmitted over radio waves or the internet, radio in New Zealand has had a significant degree of "two way" engagement since the late 1960s and talkback radio has flourished ever since. The suggestion that the act of publication on the internet is "two way" is also unusual. The internet used in the manner that the Platform uses it is a one to many medium, just as traditional radio is. We therefore disagree with the functional distinction that the Second FO letter seeks to draw here. As we have said above, live streaming radio is functionally equivalent whether it occurs over radio waves or the internet.

27. We also do not consider that the Bill of Rights Act 1990 (**BORA**) precludes live streaming being treated as *broadcasting* under the Act. While we agree with the assertion in paragraph 14 of the Second FO letter that the BSA is subject to BORA, in our view, three factors weigh against the implication that a BORA analysis requires the BSA to restrict the definition of *broadcasting* solely to traditional radio and television:

    27.1 Firstly, as we have noted above, there is no ambiguity in the definition of *broadcasting*. While it may have been assumed that live streaming over the internet was not covered, we are not aware of any case that has directly addressed the issue. A court undertaking a review would therefore first have to decide if there is sufficient ambiguity to invoke a BORA analysis at all. In our view there is not. Parliament expected in 1989 that technology would advance beyond radio and television and wished to ensure that the purposes of the Act would not be thwarted by such advances. That is why it chose the words *other means of telecommunication* and did not include the word television. Parliament had full knowledge of what those words meant and could mean in the future, having then only recently passed the Telecommunications Act 1987.

    27.2 Secondly, even if there were ambiguity (which we do not consider there is), any BORA analysis seeking to deny an interpretation of a provision because that interpretation would limit freedom of expression, would first need to take into account the purpose of the statute in question. The purpose of the Act and the BSA's role in giving effect to that purpose, as set out in sections 4, 5 and 21, is ensure that broadcasts do not contain material that breaches good taste and decency, affects the maintenance of law and order or impinges on personal privacy (among other things). Of necessity, this restricts freedom of expression. Therefore all provisions of the Act must be read in this light – as Parliament's adoption of a regime that it considered was a justified limitation on

[11] Above n 4, [31]
[12] Second FO letter, paragraph 4.

freedom of expression and the other BORA rights, as provided for in section 5 of BORA. To put it another way, the words *or other means of telecommunication* should not automatically be read down so as to have no impact on BORA rights when those words are a fundamental part of a regime which Parliament has created to do just that – place justified limitations on BORA rights.

27.3 Thirdly, any court would take account of the fact that, in exercising its functions, including hearing and deciding on complaints, the BSA is bound to take into account, and does take into account, BORA considerations. There is a clear understanding by the BSA that in exercising its jurisdiction it:

> *must … do so in a way which does not unduly restrict freedom of expression – a cornerstone of robust democracies, which is protected in the New Zealand Bill of Rights Act.*[13]

It is therefore open to a court to conclude that the BSA, as the expert body created by Parliament, is well placed to conduct the balancing assessment required under BORA. There is therefore no need to read down the BSA's jurisdiction on BORA grounds.

28. The application of the Act to The Platform is therefore not a *unilateral expansion* of the BSA's jurisdiction as suggested in paragraph 4 of the First FO letter; it is recognition of the fact that the BSA has always had this jurisdiction. We do not consider that a BORA analysis is required given the clear meaning of the definition, and the purpose of the Act, but even if it were, BORA considerations are already adequately dealt with by the BSA itself, so a limitation on its jurisdiction is unnecessary. Therefore, in our view, the BSA has no choice but to decide on the complaint in this matter in accordance with its statutory duty under section 21(1)(ba) of the Act. If such jurisdiction is to be reduced to traditional radio and television, as submitted in paragraph 2 of the First FO letter, then that is a matter for Parliament as are the policy issues referenced in the Second FO letter.

29. Therefore, in the absence of any exception in the Act, any programme conveyed over the internet, which is not specifically targeted for private non-public receipt, will be a broadcast.

30. However, as noted in the Second FO letter, the definition of *broadcasting* does include a potentially relevant exception. Paragraph (a) of that definition states that broadcasting does not include transmission of programmes:

> *made on the demand of a particular person for reception only by that person*

(**the On Demand Exception**).[14]

On Demand Exception

31. We have attempted to understand why the On Demand Exception was included in the Act, and what issue it was trying to address. Unfortunately, we have found nothing in the Parliamentary debates on the 1988 Bill and there appears to be nothing in the pre-cursor Royal Commission report of September 1986 that assists. The exception must have been added to ensure that certain types of transmission, which would otherwise have been caught, were not caught, otherwise there would have been no reason to add it. However, what those transmissions were is unclear.

32. We note that this exception did not appear in the previous Broadcasting Act 1976 but it was present in the 1988 Bill as introduced to Parliament on its first reading. In other words, it was not added as a result of submissions to, or deliberations by, the Select Committee that considered the Bill. It must have been added to address an issue that came to light between 1976 and 1988.

[13] https://www.bsa.govt.nz/broadcasting-standards/broadcasting-code-book-2022/codebook-introduction-2/ accessed 30 November 2025.

[14] Note that while a definition of *transmit on demand* was introduced into the Act in 2008, this relates solely to funding of content and has materially different wording compared to the On Demand Exception. Parliamentary debates at the time indicated that the 2008 amendment was not intended to change the definition of *broadcasting* and therefore it is not considered relevant to this analysis.

33. In any event, the way in which the general public consumes programmes has changed significantly between 1989 and today. The majority of programmes are now consumed online via various platforms or streaming services, rather than via traditional radio and television.

34. Further, even where programming is viewed in a linear fashion, often it is received over the internet rather than via traditional radio, satellite or terrestrial networks. TVNZ for example makes its linear programming available in this way.

35. So, on the one hand, we cannot confine ourselves to the state of media technology that Parliament had in mind in 1989, but, on the other, trying to interpret phrases, the meaning of which may be shaped by entirely different ways of accessing content, may lead to a different result than that which was intended.

36. There are different ways that the exception can be interpreted, depending on the emphasis placed on various elements:

    36.1 It could be argued that the most important element to the exception is that a person must make a "demand" i.e., take an action or step to that enables the transmission to be received, and that this could be for example accessing an internet site or logging-in to a platform and choosing a programme.

    36.2 Another possibility is that the exception may have been intended to exclude a transmission where the user has some degree of foreknowledge about what the programme is about, and therefore makes an informed personal choice to receive it. The protections set out in the Act are therefore not required because they are making an informed choice. Arguably, a person cannot *demand* something if they do not know what they are demanding.

    36.3 A third possibility is that the exception was designed to ensure that the BSA's jurisdiction did not extend to private communications even where sent over networks generally available to the public. A good example of this at the time the Act was passed in 1989 might be a one to one communication over ham radio. While the radio frequency might be a public one, the On Demand Exception would prevent that communication being treated as a broadcast.

37. A court will strive to give effect to the exception within the purpose of the Act. In our view therefore, the best interpretation of the On Demand Exception is the third possibility (i.e. that it was designed to ensure that the BSA's jurisdiction did not extend to private communications even where sent over networks generally available to the public). This is because:

    37.1 In our view, the critical element of the On Demand Exception is that the programmes are transmitted "*for reception **only** by that person*" [emphasis added], as opposed to reception by the general public. The word *only* must be given meaning but it is not in the first two alternatives above.

    37.2 This confines the scope of the On Demand Exception to a far narrower category and does not unduly restrict the general definition of *broadcasting*. Given that the Act is aimed at protecting the public by enforcing community standards, this is more consistent with the Act's purpose.

    37.3 The first and second possibilities above arguably extend to traditional radio and television broadcasts:

        37.3.1 The only way for a viewer to access a traditional linear programme is to turn on their radio or television and switch to the station or channel and therefore this could be considered a demand in the same way as navigating to a website.

        37.3.2 A person accessing radio or television will generally have a reasonable idea or can assess from programme guides for example, what they are about to receive – i.e. choosing to turn on and watch a particular TV programme.

    37.4 The broader interpretations of the exception (possibilities one and two above) would therefore defeat the purpose of the Act, and a court would not allow such an interpretation.

38. Therefore, the On Demand Exception only excludes transmission where that was specifically requested and received by an individual making the request e.g., by way of personal message or programmes created specifically for a particular person or group of persons, or programmes commissioned by a particular person and then transmitted for that purpose, or other one to one communications. It does not cover live streamed programmes that are available to the public as they are on The Platform.

39. In any case, even if a broader interpretation linked to foreknowledge could be argued, the programmes at issue on The Platform are live streaming. As with traditional radio, the listener who clicks play on The Platform site URL, and anyone else such as family members who are within earshot, have no idea what they will hear when the stream initiates.

Summary

40. In summary, we consider that the definition of *broadcasting* includes live streaming of programmes over the internet and this is not excluded by the On Demand Exception in paragraph (a) of that definition.

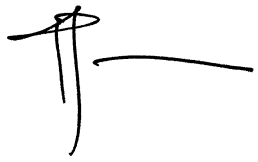
41. The Platform is therefore a site from which *broadcasts* are made and PNZ as its owner and publisher is a *broadcaster*.

42. The BSA therefore has jurisdiction to hear and determine the complaint.

Privilege

43. We understand that this letter may be provided to the parties to the complaint, for comment. As discussed with you, by doing so, the BSA does not intend to, and does not, waive privilege in any discussions with, or other legal advice, to the BSA.

Yours faithfully
LOWNDES JORDAN



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