

## REVIEW OF ACCURACY DECISIONS 2022

### Background

The BSA has asked me to review five recent decisions on the accuracy standard. I shall begin by briefly summarising the context in which those decisions have been made.

Today an overwhelming amount of information, and many different perspectives and shades of opinion, are available to us. This material comes to us via internet sites, social media, and of course the mainstream media. Some of the material is inaccurate; some of that inaccuracy results from honest misunderstanding, some from deliberate intention to mislead. Opinions can be found on almost every topic, and the spectrum of opinion is wide, ranging from one extreme to another.

Such is freedom of expression and the marketplace of ideas. As far as *opinion* goes it is good that we have that freedom. It enables us to survey a range of opinions, consider them, and shape our own.<sup>1</sup> (That, at least, is the theory of it. Sometimes it does not quite work that way: instead sometimes there is adherence to one opinion to the exclusion of everything else, and constant communication with others who share the same view. The silo effect of social media is well known.<sup>2</sup>) But overall the freedom to express opinions, and the richness of debate it can engender, is an important ingredient of a democratic society. It must be preserved.

Even more important, though, is the freedom to supply and receive *information*. To be good citizens it is essential that we know what is going on around us. Without the media, it has been said, we would live in an invisible environment. But there is a crucial qualifier. The only useful information is accurate information. False facts are not only not useful, they can be harmful; in some contexts they can be extremely damaging.

We currently live in a fragile world where that is the case. Seldom in living memory have we been confronted with events where falsity of information can cause such harm. Pre-eminent among those events is the Covid-19 pandemic. Four of the five cases for review involve it. It has given rise to false

---

<sup>1</sup> J S Mill said "He who knows only his own side of the case knows little of that".

<sup>2</sup> And, unfortunately, silos can lead to increasing polarisation, and intolerance of opposing views. The abuse and "cancellation" which can follow result in some moderate voices withdrawing from the debate.

information about such things as the efficacy and safety of vaccination, and to some extreme conspiracy theories. A deal of this misinformation has originated outside the country, but has gained traction within it. There are people who believe it, in particular people who for various reasons have lost faith in authority.

This misinformation is for the most part spread on social media and the internet. How these purveyors can be regulated, if indeed they ever can be, is one of the big questions of the 21<sup>st</sup> century. But false information can be spread via the mainstream media too, particularly by broadcasting. It is often not appreciated how many overseas television channels are accessible in New Zealand, and what a range of information and opinion – some of it fairly extreme - they represent. Most of them are received here via Pay-TV, but some can be accessed on free-to-air television. Local radio talk shows can also sometimes pose challenges for the programme host.

Unlike social media and most of the internet, broadcasting is regulated. The BSA has a role of considerable importance. The codes it administers, and its decisions on them, give the public a measure of confidence that, in an unstable communications environment, broadcasters can be trusted to tell the truth. The New Zealand Media Council fulfils a similar role with regard to print journalism and some websites. These two regulators play a crucial part in the effort to maintain reliable sources of news in New Zealand.<sup>3</sup>

### **The Accuracy Standard**

In all three broadcasting codes the accuracy standard is as follows.

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact
- does not mislead

The following features are significant.

(i) The standard only applies to *news, current affairs* and *factual programming*. None of those three terms admits of ready definition. The BSA has taken a broad view, and effectively treats the standard as applying wherever the audience would expect they are receiving accurate information. It has been applied to such programmes as *Seven Sharp, The Project, The Panel, The AM*

---

<sup>3</sup> I note also the *Stuff* fact-checking project on medical misinformation, *The Whole Truth*.

*Show*, and the “*Mike’s Minute*” segment of *Mike Hosking Breakfast*. Four of these feature in the five decisions under review.

(ii) It applies only to statements of fact, and not to statements which are clearly distinguishable as analysis, comment or opinion.

(iii) It applies only to material points of fact, and not to technical or unimportant errors which do not significantly affect the audience’s understanding.<sup>4</sup>

(iv) The accuracy requirement is not absolute. The broadcaster will be excused inaccuracy if it has made reasonable efforts to ensure that the programme is accurate and not misleading. This is a recognition of the realities of modern broadcasting, and the time and resources available to journalists to verify their facts.

(v) The standard contains two limbs. The broadcaster should try to ensure that the programme is factually *accurate* and *does not mislead*. The absence of a conjunction linking the two limbs gives a degree of flexibility in relation to the connection between “accurate” and “not misleading”.

All of these points have arisen in the five decisions for review.

I shall analyse each of the decisions separately, and then make some general comments.

## **The Decisions**

I shall deal first with the one decision that was not related to the pandemic, then the two pandemic decisions where the accuracy complaint was upheld, and finally the two where the complaint was not upheld.

### ***Cumin and Discovery NZ Ltd – 2021-068 (13 October 2021)***

A short item on *The Project* dealt with the Israeli – Palestinian conflict. It consisted of an interview between Ms Kanoa Lloyd, a host of the programme, and Mr Mike McRoberts, who as a reporter had covered the conflict. The interview was of a general nature, and included questions about the reasons for the conflict, whether there was any analogy with the colonisation of New Zealand, whether it was a “fair fight”, and the difference between an Israeli airstrike and rockets fired from Gaza.

---

<sup>4</sup> The second limb does not say a misleading statement has to be material, but probably that qualifier is there by implication. A statement would not be misleading if it was immaterial.

On a screen behind Ms Lloyd and Mr McRoberts pictures and film were shown. They depicted rocket and missile attacks, and also included several maps dated 1946, 1947, 1967, and 2021, showing 'Israeli land' and 'Palestinian land'. Mr Cumin complained on the ground that the maps were inaccurate.

A number of international sources had categorised some of the maps as inaccurate. The BSA found that there was indeed "sufficient evidence to suggest that the maps include inaccuracies, particularly the first map".

The BSA then considered whether the broadcaster had made reasonable efforts to ensure that the maps were accurate. The BSA acknowledged that the matter was complex and it would have been difficult for the broadcaster to determine accuracy. But, given that Israeli and Palestinian land entitlement is highly contested and a matter of great sensitivity, the broadcaster could have taken more steps than it did "to ensure these graphics were more nuanced, to reflect a more accurate impression..."

However the BSA then went further and asked whether, despite the inaccuracies, the maps would have misled a viewer. It found they would not. The maps, like all the visuals in this item, were in the background and the maps were only shown for a short time – 15 seconds in total. There was no time for a viewer to study them in detail. Ms Lloyd and Mr McRoberts did not refer to them. Moreover it is not in dispute that there has been dispossession of Palestinian land, even though the maps may have misrepresented the nature of that.

The BSA thus declined to uphold the complaint.

I agree with the conclusion that a viewer would not have been misled. The maps and other visuals were in the nature of "wallpaper". In my first viewing of the segment I did not concentrate on them at all. I was listening to Mr McRoberts. Like, I assume, many others, I cannot listen and read carefully at the same time. Even on a second viewing I was unable to study the maps in any detail – there was not enough time. Given the wide scope of the interview, which ranged well beyond just issues of land, I thought it served a useful purpose which was not disturbed by the inaccuracies.

Two points are of interest.

### *1. The two-limb test*

*First*, I assume that when the BSA asked whether the inaccuracies would have misled the viewer it was relying on the second limb of the accuracy standard. The decision does not expressly say so, but that is the impression given by the wording. Under the heading “*Did the programme mislead the audience?*” para [16] reads “...we then turned to considering whether the programme would have misled the audience.”

The second, “does not mislead”, limb of the standard has an interesting history. The limb was added to the “accuracy” limb in 2008. It was then linked to it by the conjunction “and/or”. Not only is “and/or” an ungainly construction, it has been criticised by grammarians as often leading to confusion and ambiguity. Presumably for that reason it was dropped in 2016, and in the current version the two limbs are not linked by any consonant at all. That, if I may say so, makes things even more ambiguous and uncertain. (Incidentally I note that the “and/or” formulation is still used in the Codebook Commentary on the standard.)

So what is the relationship between the two limbs? It is usually assumed that they refer to two different things, the first covering inaccurate facts, the second the situation where even though one cannot point to any express inaccuracy the broadcast is misleading by reason of omission or the way it has been edited. The Codebook Commentary assumes this: “The audience may be misinformed *in two ways*: by incorrect statements of fact...and/or by being misled...” In *Cumin* the BSA repeats that.<sup>5</sup>

But in fact in *Cumin* the BSA seems to be using the second limb in a quite different way, by saying that even though a programme contains inaccuracies the broadcaster can be excused if those inaccuracies are not misleading. This is to treat the two limbs as cumulative, not as alternatives. In the past it has been customary in this sort of case to say that the inaccurate facts were *not material* rather than they did not mislead. (It is interesting to note that in *Cumin* the BSA uses as its test of “misleading” whether the matter is likely “to significantly affect the audience’s understanding of the programme as a whole”<sup>6</sup>. Yet that is precisely the same test as Guideline 9b of the Code uses to define materiality.)

So might it have been better for the BSA to justify its decision on lack of materiality rather than absence of misleading? It may not have been. Some

---

<sup>5</sup> At para [10]

<sup>6</sup> At para [10], quoting from the Codebook Commentary.

readers of the decision might interpret a finding that the inaccuracies were immaterial as meaning that they were unimportant or trivial. In a matter as internationally sensitive as this that might be unwise. The alternative route of “not misleading” avoids that connotation, and may in fact better capture the essence of the reasoning. The ambiguity of the two-limb standard opens that avenue. Sometimes ambiguity is beneficial.

## *2. Finding, not uphold*

*Secondly*, the decision shows that the BSA can make a finding of inaccuracy and insufficient care while not going to the extent of a formal uphold. That enables the BSA to issue a caution, as indeed it did in this case: “This decision should remind broadcasters of the care required when supporting an expert’s view with graphics, especially in relation to the Israel-Palestine conflict.”<sup>7</sup> This case sends a signal that in matters of high importance and sensitivity, particularly internationally, considerable care is required of a broadcaster to get its facts right. But there was a recognition that that can be a big ask in a matter as complex as this one was, particularly when one only has a five-minute time-slot. A “finding” rather than an uphold was appropriate.

### ***Burne-Field and NZME Radio Ltd – 2020 – 040 (14 September 2020)***

The second decision for analysis, and the first of the Covid-related decisions, involved *Mike’s Minute*, a segment of *Mike Hosking Breakfast*.

Mr Hosking is well-known for his strong views, and his robust manner of delivering them. This form of broadcasting serves a useful purpose: it makes the audience think. This was acknowledged by the BSA. “...there is value in [Mr Hosking’s] approach for the purpose of generating discussion and public discourse.”<sup>8</sup>

On this occasion Mr Hosking was speaking about the Covid pandemic, and criticising the Government’s measures for containing it. In the course of his comments he said that many people who die with Covid were dying anyway. “In Italy, 99.2 percent died with underlying health issues. In other words the very things that were killing them anyway at over 1600 per day.” He also said

---

<sup>7</sup> At para [21]

<sup>8</sup> At para [9]

“There are very few – a very, very few – who you could argue die specifically of the virus.”

Ms Burne-Field complained under the accuracy standard.

The broadcaster said in its submissions that audiences treat “*Mike’s Minute*” as an opinion piece. They were therefore likely to take this piece as being Mr Hosking’s analysis and opinion rather than an unqualified statement of fact. It pointed out that on previous occasions the BSA had so held in relation to other programmes of Mr Hosking<sup>9</sup>.

The BSA did not spend time discussing whether the statements in this case were fact or opinion. It simply held that the statements were misleading, and that they were misleading *by omission*. The broadcaster had overstated the position described in the sources relied on and, as the BSA puts it in its summary of the decision, “conflated its own conclusions, drawn from a study into Italy’s Covid-19 figures, with the figure of 1600 deaths per day, which was based on 2018 population data and ignored both cause of death and the notion of ‘excess mortality’.” It found also that the broadcaster had not made sufficient efforts to avoid this misleading impression.

The Authority urged broadcasters to take care when sourcing and interpreting statistics. It emphasised the importance of data literacy.<sup>10</sup>

### *Comment*

I think the BSA reached the right decision. It asked for the sources on which Mr Hosking based his assertions, and subjected them to close analysis. The Authority clearly demonstrated how the statistics contained in them had been presented in a misleading way. The BSA’s reasoning in response to the broadcaster’s submissions was rigorous and persuasive. The very high public importance of the issue, and the potential harm which could be caused by the broadcast, was also acknowledged by the Authority. The accuracy bar must be set high in such a context. I return to this point in the general comments part of the review.

However given the submissions of the broadcaster and the BSA’s holdings in two previous decisions involving Mr Hosking, I was a little surprised that the BSA did not spend time traversing the fact/opinion distinction. Programmes

---

<sup>9</sup> *Woolrych and Glennie and NZME Radio Ltd* – 2019-100. See also *Wilson and NZME Radio Ltd* -2019-067

<sup>10</sup> At para [21]

like Mr Hosking’s which are mostly opinion often contain an admixture of factual assertions, and in determining a complaint it may be necessary to decide whether a statement is one or the other. While there can be marginal cases where it is difficult to decide what category a statement falls into, usually it is easy enough.

The structure of the accuracy standard’s wording has relevance here too. As discussed above, the standard has two limbs:

- is accurate in relation to all material points of fact
- does not mislead

The first limb clearly specifies that it is concerned with accuracy of *facts*. The second does not. That may lead some to think that the second limb applies to both fact and opinion. But that cannot be right. The very word “mislead” implies that facts are involved. The Codebook Commentary says the purpose of the standard is to protect the public from being significantly *misinformed*. And the Commentary follows High Court authority in saying that “misled” means being given “a wrong idea or impression *of the facts*”<sup>11</sup>. Any other view could lead to a weakening of the protection accorded to opinion.

Nothing the BSA says in its decision is at odds with that. Indeed it said that the broadcast could mislead listeners “about the *facts* behind Mr Hosking’s relatively strong views”<sup>12</sup>. It also spoke of “a selective or misleading interpretation of the *factual* sources relied on.”<sup>13</sup>

It may simply be that the Authority felt the fact/opinion distinction had been thoroughly canvassed in its earlier decisions, and there was no need to go through it all again. And it was clear enough in this case that the programme did give a misleading view of *facts*. However the omission to discuss it, and distinguish this decision from the two earlier ones, was a bit unusual.

### ***Naughton and Mainland Television Ltd & Daystar Television – 2021-103 (16 February 2022)***

Mainland Television is a regional broadcast network based in Nelson which broadcasts a number of channels. One of these is a pass-through of Daystar, an American faith-based network. The programme the subject of the complaint

---

<sup>11</sup> *Attorney General of Samoa v TVWorks Ltd*, CIV-2011-485-1110

<sup>12</sup> At para [19]

<sup>13</sup> At para [20]



was a Daystar programme. It was long, and consisted of an interview by the hosts, Marcus and Joni Lamb, of two doctors, Dr Judy Mikovits and Dr Lawrence Palevsky. The subject was the Covid-19 pandemic and, in particular the efficacy and safety of vaccines. The doctors made three assertions:

- The vaccines are harmful. They themselves contain a substance which causes serious illness. Unvaccinated people are dying because they have been exposed to “that deadly spike protein” by vaccinated people. “The vaccinated people are making the people sick.”
- Covid-19 and the vaccines are part of a plot by the authorities. The term “plandemic” was used several times in the programme.
- Sunshine, vitamins and alternative medicines are effective to prevent and treat Covid-19.

The BSA found that these statements were inaccurate. It also found that the broadcasters had not made reasonable efforts to ensure accuracy. The BSA therefore upheld the complaint under the accuracy standard.

### *The findings*

First, it was decided that the programme fell within the category of news, current affairs and factual programming. As previously indicated, the BSA has taken a broad view of the category, as indeed it must to deal effectively with misinformation. Here the introduction to the programme proclaimed that that it was “a blockbuster programme exposing the truth.”

Secondly, the BSA was satisfied that the programme contained statements of fact to which the accuracy standard applied. Daystar had submitted that the programme content reflected the honest opinion of the two doctors and was therefore not caught by the accuracy standard. The BSA noted that while many statements by experts can be categorised as opinion, experts often make statements of fact too. Here the matters complained about were presented as statements of fact. The hosts added to this impression by describing the doctors as “fighting for truth” and “having the courage to speak the truth”. While sometimes the borderline between fact and opinion can be difficult to discern, it seems to me that in this case it was very clear.

Thirdly, in considering whether the broadcaster had made reasonable efforts to ensure accuracy the BSA investigated the credentials of the two doctors. It found they were both known for spreading misinformation. One had appeared in a documentary which had been removed from YouTube, Vimeo and Facebook. The other was known for spreading misinformation about vaccines even before the pandemic, and his theories had been debunked in international publications. The BSA said that “we consider that the broadcaster cannot rely on [the two doctors] as experts to demonstrate they made reasonable efforts to ensure the accuracy of the programme”<sup>14</sup>. I completely endorse that in relation to Daystar, but would have liked a little discussion on how it applied to Mainland. They did not put the programme together, and probably would be largely unaware of its content until it was broadcast. However the effect of the decision is that they took a risk in transmitting Daystar’s programme, and bore the consequence of its inadequacies.

Fourthly, the BSA determined that the inaccuracies were so serious that orders beyond a simple uphold were required. It ordered that Mainland and Daystar each pay costs to the Crown in the amount of \$500. Given mitigating factors including the limited degree of control Mainland had over the broadcast, it was felt that no additional order was required. But it ordered that Daystar broadcast a comprehensive summary of the upheld aspects of the Authority’s decision. Little enough one might think, but nevertheless a marker that the inaccuracies were serious enough, in the context of the pandemic and the drive to get people vaccinated, to merit action beyond an uphold. They also serve as a warning to others that such misinformation is taken seriously.

Fifthly, to the argument that the complainant was a channel-surfer rather than a member of the target audience of the programme, the BSA delivered a decisive answer: “There is no audience to which it is appropriate to target inaccurate or misleading or unbalanced news, current affairs or factual information.”<sup>15</sup>

Another matter to which attention should be drawn is that in cases like this which deal with a subject which arouses considerable passion and which has international currency, it is important that the broadcaster’s arguments should

---

<sup>14</sup> At para [45]

<sup>15</sup> At para [26]

not be dismissed out of hand. In this decision the BSA used extensive research materials to demonstrate the falsity of the doctors' claims. There are 38 footnotes to the decision, citing numerous international articles and other literature. The result is that the decision is very persuasive and difficult to refute. I shall say more about this in the general comments at the end of the report.

So I have little to criticise in the reasoning in this decision. The result was pretty clear, I think.

### ***Gilchrist and Discovery NZ Ltd – 2021 – 130 (20 December 2021)***

On the *AM Show* the host Ryan Bridge interviewed a woman who had been a vaccine sceptic but was now an advocate. She had been vaccinated, and Mr Bridge said “and yet you’re still here”. At the conclusion of the interview he said that Medsafe had approved the vaccine. “They’re responsible for the regulation of therapeutic products in New Zealand and they’ve given the vaccine the same approval as everyday medicines like Panadol and Nurofen that we use regularly.” The complainant said that this statement was “incorrect and very misleading”.

The BSA noted that there were differences between Panadol and Nurofen and the Pfizer vaccine: the first two were sold over the counter and were available at supermarkets, whereas the vaccine had to be administered by a qualified practitioner; and the approval of the vaccine was provisional whereas Panadol and Nurofen had full approval. However the BSA found that these differences were not material in that they were “unlikely to significantly affect a viewer’s understanding of the segment as a whole”<sup>16</sup>. In other words the overriding message of the programme was clear to all: the vaccine is safe.

This decision is the shortest of those I have been asked to review. The BSA took less than a page to deal with the accuracy complaint. It noted that provisional approval did not mean that Medsafe had doubts about the vaccine’s safety, but just that it would continue to monitor it. And it referred to an earlier

---

<sup>16</sup> At para [10]

decision of its own<sup>17</sup> where it acknowledged world-wide consensus on the safety of the Pfizer vaccine. In the short decision in *Gilchrist* there are 21 footnotes, a number referring to expert publications by such authorities as Medsafe and the Immunisation Advisory Centre. Short it may be, but the decision is robust.

I have no difficulty with this decision. It is a good illustration of “materiality”, and contrasts with the *Cumin* decision where the BSA appeared to deal with the matter as one of “not misleading”. Either route is possible; materiality is the more well - trodden.

I shall deal later in this report with the challenges posed for the accuracy standard by short programme segments aimed at a general audience.

### ***NZDSOS Inc and Television New Zealand Ltd 2022-005 (26 April 2022)***

This is probably the most important decision of the five I have been asked to review.

*Seven Sharp* interviewed Dr Nikki Turner, Medical Director of the Immunisation Advisory Centre, to discuss the composition and safety of the Pfizer vaccine. In the short time available to her (three and a half minutes), Dr Turner outlined the contents of the vaccine, saying it was a little piece of genetic material “wrapped in a coat of fat” together with some salt and sugar. There was also a product called polyethylene glycol in it. A very few people have allergic reactions to it, but it was safe for almost everybody, she said. It was safe for people on medication, or with major medical problems, or with problems with the immune system. It was also recommended highly for pregnant or breastfeeding people.

New Zealand Doctors Speaking Out with Science (NZDSOS) complained under the accuracy standard. They said that Dr Turner had not fully stated the contents of the vaccine; that safety studies were still going on so it was premature to say it was safe for everyone; that Dr Turner had not referred to serious side-effects in some people; that there were as yet no specific tests to justify the statement that the vaccine was safe in pregnancy; and that it was

---

<sup>17</sup> *Donald and Television New Zealand* 2021-033, cited at para [10]

not possible yet to make an informed calculation that the risks of not taking the vaccine outweighed the risks of taking it.

NZDSOS also said that there were as yet no experts in this field, and that Dr Turner's expertise could not be generalised to include this entirely new vaccine. Moreover expert opinion was the "lowest tier of evidence".

### *The decision*

The BSA delivered a careful decision which declined to uphold the complaint. It first noted that the accuracy standard does not apply to opinion. There was some opinion in Dr Turner's account, but a reasonable listener was likely to perceive the information she supplied as fact. The accuracy standard therefore applied. On this occasion the BSA took pains to explain the difference between opinion and fact, and quoted at some length from the explanation in the Codebook Guidance on the subject.<sup>18</sup>

The BSA then quoted the well-known principle that a determination under the accuracy standard involves a two-stage process: first whether the programme was inaccurate or misleading, and then, if so, whether the broadcaster made reasonable efforts to ensure accuracy.<sup>19</sup> That accords with the Codebook Commentary on the standard which says there are two steps, the first step being the determination on inaccuracy, and the second the question of reasonable efforts by the broadcaster. That formulation derives from High Court authority.<sup>20</sup>

In this case the BSA reversed the order of the inquiry and held first that the broadcaster had made reasonable efforts and secondly that the programme was accurate anyway.<sup>21</sup> That reversal of order was not problematic. All the well-known two-step process is saying is that you cannot uphold a complaint under the accuracy standard solely by finding that the broadcaster did not take reasonable care; you must first find that the broadcast was inaccurate. In a case like the present where the BSA does not uphold the complaint, finding both that the programme was accurate and that reasonable care was taken, it

---

<sup>18</sup> At paras [11] – [12]

<sup>19</sup> At para [13]

<sup>20</sup> *Radio New Zealand Ltd v Bolton* HC Wellington CIV-2010-485-225 19 July 2010

<sup>21</sup> At para [14]

surely cannot matter in which order the BSA presents those findings in its decision.<sup>22</sup>

### *Reasonable efforts*

In *NZDSOS* the Authority's discussion of what constitute reasonable efforts by a broadcaster is of great importance. It said it was not the broadcaster's (or the Authority's) role to conclusively establish the vaccine's safety. It was beyond TVNZ's expertise to determine the accuracy of the specialist scientific issues involved. One could not expect it to commission a systematic review of controlled trials. Deferring to an expert was all one could expect in the circumstances. In this case it was reasonable to rely on Dr Turner as an authoritative source. Her experience and expertise covered Covid issues, and the broadcaster had no reason to question her statements.<sup>23</sup>

That decision is realistic and sensible. The message the broadcast delivered was important in the context of the pandemic and the need to get people vaccinated. It is hard to see what else a broadcaster could reasonably do than rely on someone of Dr Turner's standing and expertise. This is not to say that the onus on the broadcaster is a light one. It must obviously take care to choose as its expert someone who is well qualified in the area. It might take a careful search to find the right person. There could possibly also be situations where it might be prudent to interview more than one expert – for example if the topic under discussion involves more than one scientific aspect. The BSA's comment that the broadcaster did not have "any reason to question Dr Turner's statements" is important too. It has particular relevance to pre-recorded interviews, but may not be easy to apply: what kinds of things might alert the broadcaster to the need to check what was said? What is the onus on the broadcaster if the interview is live?

Yet, despite these questions, the BSA's holding in this case that the use of Dr Turner as an expert satisfied the "reasonable efforts" requirement is extremely helpful.

---

<sup>22</sup> See also *GL and MediaWorks TV Ltd -2018-002* (24 August 2018) where the BSA was unable to reach a decision on accuracy, but held that the broadcaster had made reasonable efforts to get its facts right. The complaint under the accuracy standard was thus not upheld.

<sup>23</sup> At paras[15]-[18]

## Accuracy

The BSA found that the programme was accurate and not misleading. It noted that the vaccine's safety has been repeatedly accepted by medical authorities around the world, and had been acknowledged in previous decisions of its own<sup>24</sup>. It said, significantly, that given the short duration of the interview and its "explainer" nature, viewers would not expect a high level of detail.<sup>25</sup> Moreover the audience was of laypersons most of whom would have no understanding of technical and scientific minutiae.

However the Authority then dealt specifically, and in some detail, with the complainant's objections to the programme. In three and a half carefully crafted pages it provided convincing answers to them.<sup>26</sup> Much research must have gone into this. The discussion is accompanied by many footnotes which refer to numerous articles and authoritative publications. It is an impressively rigorous critique. It was important, I think, to do this. The complainants were doctors and their views deserved consideration and respect. Moreover in a matter of this public importance the BSA cannot be seen to be dismissive in its decision making.

This in my view is one of the BSA's most persuasive decisions. It must have consumed considerable time and resource. But at this time when public health and safety were in issue it had to be done.

## General comments

1. These decisions contain many points of interest, among them:

- The use of the "not misleading" limb of the accuracy standard as an alternative to the materiality requirement
- The use of a finding of inaccuracy and lack of reasonable effort to send a signal to broadcasters without actually upholding the complaint
- A warning about the care needed when using statistics
- A statement of what is required of broadcasters to satisfy the "reasonable efforts" test in programmes involving expert subject matter

---

<sup>24</sup> *Donald and Television New Zealand Ltd* Decision no 2021-033; and *Marshall Television New Zealand Ltd* Decision no 2021-138

<sup>25</sup> At para [20]

<sup>26</sup> At para [21]

Some of these will provide useful guidance for broadcasters in the future, particularly the last. I repeat my hope, expressed in earlier reviews, that if time and resource allow a manual or index be compiled of “leading decisions” like this one so that they are readily accessible and do not slip from memory as time marches on.

2. All five decisions involved subject matter of very high public importance – international conflict in *Cumin*, and the Covid pandemic in the others. Particularly in relation to Covid and the measures taken to combat or control it, the mainstream media do not just have a freedom, they have a social duty, to keep the public well informed. This is no easy task. The styles of modern broadcasting do not make it any easier. News and commentary are presented to us in bite-sized pieces. Of the four Covid-related decisions, the relevant segments in three of them were short. The total times, including interviews, were *Burne-Field* 2.48 minutes; *Gilchrist* 7.43 minutes (including about 3 minutes of host and panel discussion); *NZDSOS* 5.09 minutes (the interview with Dr Turner occupying 3.30 minutes). In *Cumin* the total time was 6.08 minutes (the interview with Mr McRoberts lasting 5 minutes). Moreover in an effort to reach the widest audience they were presented in light “infotainment”- type programmes.

In this format there is no time to go into any depth, and the audience of ordinary New Zealanders cannot be expected to have a deep knowledge of any scientific and technical detail. Moreover interviews in such programmes are mostly not scripted, and some are live. So broadcasters and interviewees just have to do their best to get the essential messages across simply and in terms of general principle, knowing that there are sceptics out there who will be ready to challenge what they say. It is not an enviable task.

The BSA have taken a realistic approach. They have by and large forgiven small errors and omissions which do not interfere too much with the central message, and in *NZDSOS* said that where expert input is used the crux of the broadcaster’s responsibility is to pick a reputable expert. It is hard to see how the BSA could have handled it differently. If they had imposed higher standards there would be a risk that broadcasters would shy away from important and



controversial topics altogether. The public good is not served by rulings which have a chilling effect.

3. The BSA's task is a challenging one. In critical times like the ones we have been experiencing there are a number of pressures on decision-makers in the media environment. These are some of them:

- The subject matter of all five decisions under review is of world-wide concern. Decisions of the BSA on them may well be read overseas and feed into the international controversies which circulate in such times.
- The subject matter, particularly the pandemic, has created dissension and division in New Zealand, and some groups are going to be unhappy with decisions whichever way they go.
- The antipathy shown to media representatives at various protest meetings recently is unsettling. The voices may be those of a small minority, but they are loud. More concerning is a recent report by scholars at AUT which finds that trust in the media generally is declining.<sup>27</sup> Some people are thus probably going to be unhappy with a series of decisions – indeed any decisions - which find in the media's favour.
- The BSA is the recipient of some state funding, and its members are appointed by the Government. This may be interpreted by some as demonstrating that the Authority is therefore not independent. 'He who pays the piper calls the tune' is a frequently cited aphorism. This is utter nonsense of course, but there may be some who see BSA decisions which align with Government messaging as evidence of Government control.

All of this means that when deciding cases in times of unrest and dissension decisions need to be rigorously researched and reasoned, and be able to withstand criticism. They must be bullet-proof. The arguments of complainants and broadcasters have to be engaged with and answered convincingly.

This is particularly true of the accuracy standard. It is not like most other standards, which involve questions of community values. The accuracy standard is concerned with something different - getting at the truth. Where

---

<sup>27</sup> M.Myllylahti and G.Treadwell *Trust in News in Aotearoa New Zealand 2022*, AUT Research Centre for Journalism, Media and Democracy

there are competing versions of the truth the Authority needs to be able to explain persuasively on what evidence it has based its findings.

I have already said that I think the BSA has in this regard done a very good job. In its decisions its research is impressively thorough, and its reasoning very persuasive. *Naughton* and *NZDSOS* are outstanding examples.

4. The BSA's decision-making must be consistent with the New Zealand Bill of Rights Act 1990. This requirement has been reinforced in High Court decisions and various review reports. In none of the decisions under review is the Act mentioned by name, but in all of them there is somewhere in the decision, usually near the beginning, a passage outlining the required approach. The passages differ in length from decision to decision, but their essence is the same. A typical example is that in *Naughton*:<sup>28</sup>

The right to freedom of expression is an important right in a democracy and it is our starting point when considering complaints. We weigh the right to freedom of expression against the harm that may have potentially been caused by the broadcast. We may only intervene when the limitation on the right to freedom of expression is reasonable and justified, in light of actual or potential harm caused.

Where the balance is to be struck in this weighing exercise is dependent on the context and subject matter. In a number of the decisions on the pandemic the Authority makes a point of emphasising the heightened importance of accurate information during the pandemic. Thus in *NZDSOS* it said:<sup>29</sup>

The value of the programme is high given it is disseminating health information relating to the current COVID-19 pandemic. The public interest in the health information means it is important to ensure accuracy.

In two of the decisions, *Burne-Field* and *Cumin*, the Authority, having set out the Bill of Rights requirement at the beginning of the decision, returned to it at the end to show how it influenced the final determination, thus demonstrating that it was an integral part of the decision-making process.<sup>30</sup> In *Cumin*, the BSA said:

...the value of the expression in the broadcast was substantial. It was an explanation of a complex, contentious issue in a way which was accessible and informative for viewers. Given this, regulatory intervention limiting the broadcaster's freedom of expression is

---

<sup>28</sup> At para [25]

<sup>29</sup> At para [10]

<sup>30</sup> At para [20] of each decision

not appropriate in this instance.

This is always helpful, but is particularly so in cases where the decision is less clear-cut. It adds strength to the reasoning.

Even though these repeated statements about limitation of freedom of expression in the decisions may seem trite, they are important. Not only do they show that the Bill of Rights is front of mind, they also help to inform non-lawyers reading the decision. Present-day advocates of freedom often do not seem to realise that the freedoms in the Bill of Rights Act are subject to limitation. They think unfettered freedom is the order of the day. It isn't. In my experience knowledge of the Bill of Rights Act in the community is fairly patchy.

5. In the decisions under review the BSA cites quite a number of its earlier decisions. For example in *Naughton* twelve cases are cited, and in *NZDSOS* six, several of them being cited multiple times. I strongly support this practice. For one thing, it helps to ensure consistency. Particularly in times as unsettled as the present, broadcasters need to have confidence that the Authority will take a consistent line in its decision making. Changing membership of the Authority makes that doubly important. For another, reference to previous decisions can save time. If the reasoning process has already been gone through previously it can simply be adopted again. There is no point in reinventing the wheel.

I have heard it said that the BSA is not a court, and over-citation of precedents is best avoided lest the process becomes too legalistic. Generally I agree with that, but I do not think the use of earlier decisions in the cases under review was at all overdone. A problem with the use of decisions as precedents, of course, is that if they are a few years old they may be hard to track down.

6. I conclude with a few comments about the style of writing in the decisions. I have said in previous reviews that the BSA writes with a very diverse audience in mind: broadcasters, complainants, other members of the public, lawyers and (in case of an appeal to the High Court) judges. I would add two more to that list – students and academics. It is very hard indeed to pitch it right for all those people. But, if I may say so, I think the BSA does it well. Its summary at the start of each decision is helpful. The fact its decisions always follow the same order helps too. The reader gets to know where to look for things.

In some instances where the subject matter is complex the necessarily brief summaries of the facts can take a while to get one's head around. (I found that was the case in *Burne-Field* where the discussion of statistics took several readings before a reasonable degree of clarity was achieved.) But that is the nature of some subject matters, and not much can be done about it

The BSA customarily uses bullet points when summarising the arguments of the parties and often also in setting out its own reasons. On the one hand this can be helpful in that it separates out each component. On the other it creates a kind of staccato effect which can sometimes obstruct the flow of argument a little. I don't feel strongly about this, but sometimes it may be worth asking whether on some topics extended paragraphs may be better.

The length of the decision of course depends on the complexity and importance of the issues. Generally the BSA gets it right. But of the cases under review I felt in *Burne-Field* more could have been said about the fact/opinion dichotomy. I also hope I was right in interpreting the *Cumin* decision as being based on the "not misleading" limb of the accuracy standard. I think I was, but a few more words of explanation in the decision there would have helped.

7. Overall, I think the BSA does a very difficult job very well. It has to work its way through some very knotty problems in some challenging circumstances. I have very seldom had any problem understanding its reasoning, and I think its decisions are sound and realistic.

John Burrows  
2 May 2022