

**IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY**

**CIV-2011-485-1110  
[2012] NZHC 131**

BETWEEN                      ATTORNEY GENERAL OF SAMOA  
                                         Plaintiff  
  
AND                              TVWORKS LIMITED  
                                         Defendant

Hearing:            6-7 October 2011

Counsel:            J E Hodder SC and V L Heine for Plaintiff  
                                 S Bacon and C Bradley for Defendant  
                                 A Scott-Howman for Broadcasting Standards Authority

Judgment:        13 February 2012

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**JUDGMENT OF WILLIAMS J**

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In accordance with r 11.5, I direct the Registrar to endorse this judgment with the delivery time of 3.30pm on the 13 February 2012.

Solicitors:  
Chapman Tripp, Wellington  
Luke Cunningham & Clere, Wellington  
Izard Weston, Wellington

## **Introduction**

[1] In September and November 2010, TV3's *Campbell Live* aired two items in relation to the aftermath of the 2009 tsunami in Samoa. It was broadly alleged that the Samoan Government had badly mismanaged international aid funding in the intervening 12 months leaving many tsunami victims without adequate housing, water reticulation and other forms of basic support. The implication was that aid had been squandered by an incompetent and/or corrupt government.

[2] The Samoan Attorney-General (the Attorney) filed separate and detailed complaints with TVWorks Ltd, the owner of the TV3 channel in respect of both items. The Attorney alleged breach of the Free-to-Air Television Code of Broadcasting Practice (the Code).

[3] TVWorks rejected the Attorney's complaints and duly referred them to the Broadcasting Standards Authority (BSA) on 16 December 2010. On 5 May 2011, the BSA also dismissed both complaints. The Attorney now appeals to this court.

## **The items**

[4] The first item aired on *Campbell Live* on 27 September 2010. This was timed to coincide with the first anniversary of the tsunami.<sup>1</sup>

[5] In the introduction, presenter John Campbell noted that the Samoan Government had received a total of SAT\$192 million (NZ\$107 million) in donations and international aid, "more than has been previously declared". Mr Campbell asked in dramatic fashion: "Where has all the aid money gone?".

[6] In the item, Mr Campbell visits affected communities in Samoa. Locals say that they have little or no water supply, that new housing is substandard, and that they receive little or no assistance from the government. Mr Campbell interviewed the Deputy Prime Minister, Misa Telefoni for an hour in connection with the item. A

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<sup>1</sup> The tsunami struck Samoa on 29 September 2009.

short excerpt from that interview was included the item. The full, unedited, tape of the interview has since been destroyed.

[7] The Samoan Prime Minister, Tuilaepa Lupesoliai Sailele Malielegaoi was not interviewed by *Campbell Live* but he also appears in the item courtesy of an outtake from the TVNZ pacific affairs programme *Tagata Pasifika*. In that programme, the Prime Minister joined in celebrating Samoa's success in the World Rugby Sevens Series. He says, in that unrelated interview, that Samoa's success meant the 2009 tsunami was "no longer a newsworthy issue".

### **The first complaint**

[8] In accordance with s 6 of the Broadcasting Act 1989 (the Act), the Attorney filed a formal complaint with TVWorks on 26 October 2010. It was a comprehensive document running to eight pages. The complaint accused TV3 of presenting an "unfair, unbalanced and inaccurate" item. The complaint continued:

The item presented the Government of Samoa as having either misused or mismanaged money provided in donations and aid. It expressly said that the Government has left its own people to live in substandard and insanitary conditions. It aired a heavily edited and out of context quote from the Prime Minister of Samoa which left viewers with the very clear impression he no longer believes the tsunami is an issue of importance.

[9] The complaint suggested that the potential impact of this item on international aid and goodwill could be significant.

[10] The Attorney then argued that the item had breached Standard 5 of the Code. Standard 5 requires broadcasters to ensure that news, current affairs and factual programming is accurate in relation to all material points of fact, and/or does not mislead.<sup>2</sup>

[11] The Attorney complained that the first item was inaccurate in three ways:

- (a) it overstated the amount of aid either donated or available to be used by the government for housing and water reticulation. *Campbell Live*

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<sup>2</sup> Standard 5 will be set out in full below including its three associated guidelines.

variously set donations and foreign aid at SAT\$192 million and SAT\$79 million when in fact only SAT\$57.09 million had been pledged of which only SAT\$35.1 million had been received by the relevant date. The Attorney argued that other money had been provided but this was all either tagged by the donor for other purposes or spent directly in Samoa by the donor;

- (b) it failed to point out that reticulated water was still unavailable to a number of communities because they had moved into the hills where no reticulation infrastructure existed making piped water completely impractical for them;
- (c) it failed to point out that while the houses built by the Samoan Government would have been substandard in New Zealand, they were designed along the lines of traditional fale, had long been considered satisfactory in Samoa's context, and had been approved in a consultative process.

[12] The Attorney complained further that the item was misleading in that it encouraged viewers to believe that the Samoan Government had no recovery plan, was slow in responding to the disaster, and lacked concern for the living standards of the Samoan people.

[13] The Attorney also complained that the item was not impartial as required by Standard 5 because no effort was made to find out why there was no water reticulation in new hill settlements, why open fale were being built, or what particular areas the government was focussing on in the use of aid funding. In addition, too few opportunities were given to the government to respond to the views expressed.

[14] The Attorney then complained that the item breached Standard 6 of the Code relating to fairness. Standard 6 provides that broadcasters should deal fairly with any person or organisation taking part or referred to in a news item.<sup>3</sup>

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<sup>3</sup> The full standard and its associated guidelines will be addressed below.

[15] The Attorney complained that *Campbell Live's* treatment of the Deputy Prime Minister was unfair in that the item only used 20 seconds of an interview that lasted an hour. In addition, the Attorney complained that *Campbell Live* had cynically extracted the Prime Minister's 'no longer newsworthy' comment from a completely different programme and used it out of context. A perfectly innocuous comment, when heard in context, was made to appear callous and uncaring. *Campbell Live* tried to show that the Prime Minister did not care about the tsunami or its victims anymore. In fact, the Attorney complained, the Prime Minister was only expressing concern in the *Tagata Pasifika* interview that journalists were trying to attribute the rugby success (in part) to the tsunami, when he believed that the team's success should stand alone.

[16] The Attorney complained that the tactics employed against both the Prime Minister and the Deputy Prime Minister amounted to unfair dealing with them and the Samoan Government.

### **The second item**

[17] The second item aired on TV3 on 1 November 2010. It was a follow-up to the first item. Its focus was the increasingly (in the editorial view of the item) rhetorical question: "Where has the tsunami money gone?". Mr Campbell said on air that the Samoan Government was outraged by *Campbell Live's* first story.

[18] In this second item Mr Campbell refers to some of the government's recovery efforts ("yes, there are new roads and electricity"). An attempt is made to accurately calculate the assistance received and Mr Campbell concludes that it was somewhere between SAT\$150 and 160 million. This number is then contrasted with the Samoan Government's much lower calculations.

[19] In the item Mr Campbell returns to Samoa and speaks again to affected locals. Olasepu'u Vaelupe, the former mayor of Malaela Village says that his village has been devastated by the tsunami but had received "nothing".

[20] Other locals spoke to *Campbell Live* of substandard housing and water supply. The item acknowledges the Government's argument that the simple open-style fale it had built for victims was traditional and acceptable housing to most Samoans. But then footage is shown of modern western-style homes on another part of the coast to accentuate the contrast between the standard of tsunami assistance and at least some modern Samoan homes. The implication is that the government's contention was false.

[21] The item also refers to the Government's (apparently comprehensive) Tsunami Report and its four year recovery plan.<sup>4</sup> But having made reference to these matters, Mr Campbell then alleges that only SAT\$9 million had been allocated to housing and that this project was now complete.

[22] In a climactic conclusion, *Campbell Live* explained that the Prime Minister Mr Malielegaoi had agreed to an interview the following day but then had abruptly cancelled it. Late in the evening, Mr Campbell and camera crew then "door-stepped" the Prime Minister who had been attending a function at a restaurant. The Prime Minister is filmed leaving the function and getting into his vehicle – repeatedly refusing to be interviewed or to answer any of the questions being put to him 'on the fly', as it were, by Mr Campbell. After briefly remonstrating with Mr Campbell for lacking good manners, the Prime Minister winds up the window of his vehicle and drives off in the glare of camera lights, leaving Mr Campbell's unanswered questions hanging in the night air.

### **The second complaint**

[23] The Attorney complained about the second item on 23 November 2010. The Attorney once again relied on Standard 5 of the Code requiring reasonable efforts to be made to prevent items being inaccurate or misleading. The Attorney argued that the broadcast asked a rhetorical question: "Where has the tsunami relief money gone?" – without attempting to answer it by reference to the wide range of recovery projects set out in the Tsunami Report.

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<sup>4</sup> *Tsunami: Samoa*, 29 September 2009 (Government of Samoa, 2010).

[24] The Attorney complained that Mr Vaelupe, former mayor of Malaela Village, was wrong in saying the village had received nothing from the Government. In fact at least 22 houses had been built for Malaela families, and Mr Vaelupe had been involved in aid distribution. His own wife and daughter benefitted. Similar complaints to those in respect of item one were also made in respect of the treatment of housing and total aid received in item two.

[25] The Attorney also complained pursuant to Standard 6, which requires fair dealing with any person. The Attorney argued that the door-step interview of the Prime Minister was not fair dealing. The Attorney argued that the Prime Minister had rightly postponed the planned interview because *Campbell Live* had failed to give him sufficient notice of the issues that would be discussed. The Prime Minister was entitled to be cautious given the way in which the Samoan Government was treated in the first item. In light of this, the Attorney argued that the late night door-stepping attempt at an interview could not be justified.

#### **The BSA's decision**

[26] As I have said, TV3 considered and dismissed both complaints in accordance with s 7 of the Broadcasting Act. It is not necessary to traverse that decision in any detail because the issues are addressed in the later BSA decision.

[27] On 16 December 2010 the Attorney referred the complaints to the BSA. The BSA also dismissed the Attorney's complaints in a consolidated decision addressing both complaints at once.<sup>5</sup>

[28] The BSA began by suggesting that there were some matters raised in the complaint that could not be dealt with under the accuracy standard (Standard 5) because they were too complex to admit of a black and white view as to whether what was said was in fact accurate:<sup>6</sup>

In our view, both stories would have left viewers with the impression that, following the tsunami, the Samoan Government had not taken sufficient

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<sup>5</sup> *Attorney-General of Samoa v TVWorks Ltd* BSA 2010-188, 5 May 2011.

<sup>6</sup> At [117]-[118].

action with regard to restoring the water supply to affected areas, and rebuilding houses in those areas. The tenor of both items implied that the Government had mismanaged or misspent aid money and donations.

The complainant argued that the items were inaccurate in this respect. However, it is not the role of this Authority, nor are we able, to determine what action by the Samoan Government would have been “adequate” following a catastrophic natural disaster, and similarly whether or not the Government had mismanaged tsunami relief money. Accordingly, we find ourselves ... having to decline to determine the following inaccuracies alleged by the complainant:

- That the Government had not taken sufficient action to restore the water supply for affected locals.
- That the Government’s public housing subsidy was inadequate, and the houses being rebuilt were substandard.
- That the amount of aid received had been publicly undervalued.

[29] The BSA suggested that the complaint should have been made under the balance standard – Standard 4:<sup>7</sup>

In our view, these matters would have been more appropriately addressed as matters of balance, considering whether the Government’s perspective on these matters was adequately presented. The Attorney General did not raise Standard 4 (controversial issues - viewpoints) in his original complaints so we do not have jurisdiction to consider it now.

[30] The BSA went on to consider and dismiss the remaining Standard 5 issues. It found as follows:

- (a) the aid figures referred to in the first broadcast (SAT\$192 million and SAT\$79 million) were taken from the Tsunami Report provided by the Samoan Government. The Attorney said that the correct figure is SAT\$31 million, but did not provide any evidence in support. The Tsunami Report does not clearly distinguish between different forms of monetary assistance (i.e. loans vs donations), and *Campbell Live* was entitled to rely on that report,<sup>8</sup>

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<sup>7</sup> At [119]. Standard 4 provides as follows: “When discussing controversial issues of public importance in news, current affairs or factual programmes, broadcasters should make reasonable efforts, or give reasonable opportunities, to present significant points of view either in the same programme or in other programmes within the period of current interest.” It is accompanied by two guidelines but it is unnecessary to set them out here.

<sup>8</sup> At [121] - [123].



- (b) the broadcasts contained some information about the Government's broader recovery efforts. In the first broadcast, the Deputy Prime Minister made general comments about the Government's efforts. In the second broadcast, Mr Campbell referred to there being new roads and electricity, a relief programme, and a housing project. Accordingly, the omission of further information from the Tsunami Report was not misleading;<sup>9</sup>
- (c) when Mr Campbell said in the second broadcast that "the Government gave them [the village of Malaela] nothing", viewers would have realised that he was simply repeating the personal views and experiences of the former mayor. The comment was therefore opinion and exempt from the accuracy standard.<sup>10</sup>

[31] The BSA also dismissed the Standard 6 (fairness) complaints in the following findings:

- (a) the Deputy Prime Minister was given a fair and reasonable opportunity to comment in the first broadcast, despite only 20 seconds of his hour long interview being broadcast. Mr Campbell clearly put the water supply issue to the Deputy Prime Minister, and his response was included in the broadcast. The Deputy Prime Minister also made some general comments about the Government's position. He came across as measured and composed. Accordingly, the editing of Deputy Prime Minister's interview did not result in him being treated unfairly;<sup>11</sup>
- (b) the Prime Minister's statement in the first broadcast, that the "tsunami [was] no longer a newsworthy issue", was not unfairly edited. He replied as quoted. While that response may have imparted a different message than was intended, that is a hazard that the Prime Minister is reasonably subject to, should have appreciated, and has the ability to

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<sup>9</sup> At [124] - [128].

<sup>10</sup> At [129] - [130].

<sup>11</sup> At [132] - [134].

respond to (via the media). In any event, most viewers would have realised that the statement was made in relation to a different issue.<sup>12</sup>

- (c) the “door-stepping” of the Prime Minister in the second broadcast was not unfair, despite the strict approach usually taken to such interviews. The Prime Minister is an elected politician, who (unreasonably) postponed a formal interview scheduled to take place the following day. Mr Campbell was justified in door-stepping the Prime Minister in the circumstances.<sup>13</sup>

### **The appeal**

[32] The Attorney challenges the BSA decision on both procedural and substantive grounds.

[33] At the procedural level, the Attorney says that the BSA was required to hold a formal hearing or seek written submissions; that the BSA failed to consider Standard 4 relating to balance when it was required to; and that the BSA failed to take an active and inquisitorial approach to the complaint, rather it wrongly adopted an entirely passive role in the proceeding.

[34] At the substantive level, the Attorney mounted three attacks: first, that the BSA had misinterpreted or failed to properly consider the nature of its complaints; second, it took into account irrelevant factors in assessing TV3’s treatment of the Prime Minister and Deputy Prime Minister; and third, that the BSA was, in any event, plainly wrong in each of its conclusions.

[35] I will address the procedural arguments first before returning to the substantive.

[36] As a preliminary point, it is important to note that s 18(4) directs me to hear and determine this appeal as if the BSA’s decision had been made in the exercise of a

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<sup>12</sup> At [135] - [137].

<sup>13</sup> At [138] - [144].

discretion. This is not therefore a broad merits appeal. The appellant can only succeed if the BSA erred in law, took into account irrelevant factors, failed to take into account relevant factors, or was plainly wrong.<sup>14</sup>

[37] These standards require a measure of deference to the expertise of the BSA. It will not be enough if I simply have a different view on the merits to that of the BSA. Rather I must be satisfied that the BSA has made a mistake of principle or was plainly wrong (there seems little difference between these two ideas) before allowing this appeal.

### **Procedure**

[38] As I have said the three arguments mounted under this heading relate to natural justice, the exclusion of the balance standard, and failure to engage actively. I will address each argument in turn.

#### *Natural justice - submissions*

[39] The Attorney argued that the Broadcasting Act required a formal hearing as a default position. In a case of this complexity, the Attorney argued, that default position should have prevailed. The Attorney argued that since the BSA had never held a hearing in relation to any of his complaints, that amounted to a rigid and illegal policy. At a second level the Attorney argued that the Broadcasting Act required the BSA, in the absence of a formal hearing, to provide the Attorney with a reasonable opportunity to make written submissions and such opportunity was not given.

[40] For its part the BSA explained, by way of background, that in the year ending June 2011 it had received 250 complaints and issued 236 decisions, all of them within 20 working days of the complaint being received. The BSA argued that in the vast majority of cases, written submissions are sufficient to properly consider the complaint. The BSA explained that in the ordinary course, a complainant's referral

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<sup>14</sup> *May v May* (1982) 1 NZFLR 165 (CA); *Television New Zealand Ltd v Viewers for TV Excellence Inc* [2005] NZAR 1 (HC) at [19].

documents will include submissions; the broadcaster is asked for submissions in response; and if a broadcaster makes additional submissions, these are put to the complainant for further response. The complaint is then considered at a meeting of the BSA which occurs once every five weeks. The BSA denied any policy against formal hearings, and asserted that a hearing would be held where circumstances required it but this case was not such a case. The BSA added that no-one had actually sought a hearing in this case.

*Natural justice – analysis*

[41] The controlling provision in this issue is s 10(1) of the Act. It provides as follows:

The Authority may, if it thinks fit, consider and determine any complaint referred to it under section 8 without a formal hearing, but, in that case, –

- (a) shall give the complainant and the broadcaster a reasonable opportunity to make submissions to it in writing in relation to the complaint; and
- (b) shall have regard to all relevant submissions made to it in writing in relation to the complaint.

[42] There was no dispute that formal hearings must be held by the BSA where that format is necessary to complete a proper inquiry into the complaint. Section 10 implies as much. The BSA's self-imposed 20 working day time limit for issuing decisions must not act as any kind of administrative disincentive against a proper inquiry. That said, I do not agree with the Attorney's argument that formal hearings are the default position. That does not appear to be the way s 10 is constructed at all. Rather on its face, it gives the BSA two inquiry options – a hearing or a paper-based consideration of the complaint. If it chooses the latter then the subsection requires that the broadcaster be given a reasonable opportunity to make written submissions and that regard be had to them. I do not read in the subsection a preference for one format over the other.

[43] The issue is whether a formal hearing is required in this case. I agree with the BSA that it was not. There were no issues of credibility where the BSA would benefit from seeing witnesses in person. And while accuracy in some of the aid

figures quoted was an issue, resolving that did not require a hearing. The real allegations here were of misleading selectivity – inclusion of some material while other material more favourable to the government was excluded. It must be remembered that the admitted material was principally found in one Government report. While the Attorney says that other information would have assisted, it was largely supplementary in nature and could have been acquired without the need for a formal hearing. Looked at overall, I am not satisfied that the issues involved required oral submissions or *viva voce* evidence.

[44] Of course that is not an end of the matter because, as I have said, if a formal hearing is not held, the BSA must “give the complainant and the broadcaster a reasonable opportunity make submissions to it in writing in relation to the complaint.”<sup>15</sup> The Attorney says no opportunity was given.

[45] The Attorney made his reference to the BSA on 16 December 2010. He provided a brief summary of the complaints in his covering letter, and a response to TVWorks’ decision comprising approximately two and a half pages. He attached to that letter, the formal complaint to TVWorks, TVWorks’ decision, and a news story from the *Samoa Observer* dated 12 December 2010.

[46] The BSA acknowledged receipt on 20 December 2010. This appeared to be a standard form letter. It provided in part as follows:

The following is an outline of the process from here:

- I have sent a copy of your letter to the broadcaster, TW Works Limited for comment. I have also requested a recording of the broadcast for the Authority.
- If the broadcaster makes any comments I will forward them to you and ask for your final submissions. You are not required to make any further comments at this stage, but may do so if you wish.
- If you do make any final submissions, I will forward them to the broadcaster.
- Once the broadcaster has made its final submissions, the matter will be placed before the Authority for determination.

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<sup>15</sup> Broadcasting Act 1989, s 10(1)(a).

[47] On the same day, the BSA wrote an equally standard form letter to TVWorks attaching the Attorney's reference to the BSA and seeking "...a copy of the original complaint, your decision on the referral, your comments on the referral, and the recording of the broadcast ...".

[48] The return correspondence from TVWorks was not included in the common bundle but it is plain from the BSA's next letter to the Attorney – on 21 March 2011 – that TVWorks made no further submissions. The letter to the Attorney provided:

The broadcaster has not made any further comments in relation to your complaint ...

The matter will now be put before the Authority at its next meeting on 6 April 2011.

[49] The Attorney argued that the effect of the BSA's complaint procedure was that TVWorks' failure to provide submissions effectively shut down the process, leaving no further opportunity for the Attorney to make submissions.

[50] For two reasons I do not think that is correct on the facts.

[51] First, the Attorney took the opportunity to provide comments on TVWorks' original decision in its first letter of complaint of 16 December 2010. These were essentially submissions.

[52] Second, and more importantly, the BSA did not at any stage say that the door was closed on further submissions. The 16 December 2010 letter specifically said "you are not required to make any further comments at this stage, *but may do so if you wish.*" The door was open to the Attorney to make further submissions – the level of his engagement was for him to set. Rather than file further submissions, he chose to rest on the submissions made on 16 December. That was a perfectly valid choice in light of TVWorks' silence.

#### *Exclusion of Standard 4 - arguments*

[53] Section 4(1)(d) and (e) of the Broadcasting Act provide as follows:

- (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with—

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- (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.

[54] The standard in s 4(1)(d) above is reflected in Standard 4 of the Code which provides as follows:

When discussing controversial issues of public importance in news, current affairs or factual programmes, broadcasters should make reasonable efforts, or give reasonable opportunities, to present significant points of view either in the same programme or in other programmes within the period of current interest.

#### Guidelines

- 4a No set formula can be advanced for the allocation of time to interested parties on controversial issues of public importance. Significant viewpoints should be presented fairly in the context of the programme. This can only be done by judging each case on its merits.
- 4b The assessment of whether a reasonable range of views has been presented takes account of some or all of the following:
- the programme introduction;
  - whether the programme approaches a topic from a particular perspective [e.g. authorial documentaries, public access and advocacy programmes];
  - whether viewers could reasonably be expected to be aware of views expressed in other coverage.

[55] The Attorney argues that the BSA focussed only on its complaints under Standards 5 and 6, and failed to take a broader perspective on the complaint. In doing so, the Attorney argued, the BSA overlooked his over-arching complaint that the broadcast were “unfair, unbalanced, and inaccurate”. The Attorney argued that imbalance and “misleading selectivity” may also result in breaches of Standards 5 and 6; and that Standard 4 did no more than reproduce s 4(1)(d) making the balance

obligation applicable in all cases irrespective of the Code. The Attorney argued further that the complaints made should not be treated as “pleadings”, and that the BSA is required by the statute to consider the matter with as little technicality and formality as is necessary to complete a proper consideration of the complaint.

[56] For its part, TVWorks argued that the BSA was precluded from applying Standard 4 because this would have exposed it to allegations of breach of natural justice. Counsel referred to the decision in *Hooker v Television New Zealand Limited*.<sup>16</sup> TVWorks argued that it had not addressed Standard 4 or its various particulars in submissions, because the Attorney had not expressly relied on them in the complaint, preferring instead to specify, in great detail, its complaints under Standards 5 and 6. TVWorks argued that the same applied to the BSA’s consideration of the same complaint.

#### *Exclusion of Standard 4 – analysis*

[57] There are three decisions dealing directly with the parameter of a complaint. I have already mentioned *Hooker v Television New Zealand Limited*. In that case, Mr Hooker appealed against TVNZ’s dismissal of his complaint about the show *Strip Search*. He complained to TVNZ, the BSA, and on appeal to this court that the show should have been classified AO rather than PGR. Mr Hooker filed further submissions to the BSA in an attempt to expand the complaint. He sought to bring in two other standards under a previous iteration of the Code: decency and taste (then Standard G2); and effect upon children (then Standard G12).

[58] The BSA refused to consider these additional allegations. Smellie J upheld that approach:<sup>17</sup>

While section 10(1)(b) requires the Authority to have regard to “relevant submissions made” all submissions are required by subsection (1)(b) to be relevant “to the complaint”. The appellant argued that section 10(1) in its entirety enabled him to introduce allegations of breaches in respect of G2 and G12 before the tribunal. I hold, however, that the correct construction of

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<sup>16</sup> *Hooker v Television New Zealand Ltd* HC Auckland AP138/01, 13 June 2002.

<sup>17</sup> At [10].



section 10(1)(a) and (b) restrict the Authority's jurisdiction to a consideration of the original complaint.

[59] In *TV3 Network Services Ltd v Holt*,<sup>18</sup> Rodney Hansen J referred to *Hooker* with approval. In that case TV3 appealed a BSA decision holding that footage of a stabbing was graphic, distressing, and in breach of (then) Standard V12 requiring "careful editorial discernment" in news and current affairs programmes. Rodney Hansen J upheld TV3's appeal. During the course of his reasoning he referred to the *Hooker* decision in these terms.<sup>19</sup>

I recognise the force in [Smellie J's] reasoning and the difficulties which would arise if complainants were able to change the essential nature of their complaint when it came before the Authority. In this case, however, the complainant *did not specify a standard in her complaint. The applicable standard was chosen by TV3.* There would have been no injustice if the Authority had determined the complaint by reference to other relevant standards, provided that it had given the parties notice of its intention to do so, and an opportunity to make further submissions. That would have been consistent with s 10(2) which requires that in considering complaints, the Authority shall provide for as little formality and technicality as is permitted by the requirements of the Act, a proper consideration of the complaint and the principles of natural justice. (my emphasis)

[60] The third decision is that of McGechan J in *Television New Zealand Ltd v Ministry of Agriculture and Fisheries*.<sup>20</sup> In that case, TVNZ appealed a BSA decision upholding (in part) MAF's complaint about a current affairs item on BSE or "mad cow disease". The BSA found that the item lacked balance relying on one of the 12 examples provided by MAF, and two further examples identified by the BSA itself. On appeal, TVNZ argued that the BSA could not go beyond the case put by MAF. McGechan J dismissed that argument.

[61] The relevant passage from the judgment is lengthy but bears recording in full – there are obvious parallels with the current case before me:<sup>21</sup>

At risk of fatuity, the Authority is bound by the terms of the statute. It deals only with the complaint made. It considers the subject matter of the complaint, whatever that subject matter may be. A complaint does not

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<sup>18</sup> *TV 3 Network Services Ltd v Holt* [2002] NZAR 1013 (HC).

<sup>19</sup> At [27].

<sup>20</sup> *Television New Zealand Ltd v Ministry of Agriculture and Fisheries* HC Wellington AP89/95, 13 February 1997.

<sup>21</sup> At 30-32.

trigger powers to conduct some general inquisition and directions on unrelated topics.

...

The statutory scheme requires "formal" complaints to be in writing: s 5(f). The scheme of the complaint – what it is about – is determined by the written word reasonably interpreted. There is no requirement for particularity. The range can be from the very general to the very particular, or indeed a mixture.

The complaint letter (27 September 1994) has a scheme and wording of its own. It commences with a very general allegation of failure to maintain standards consistent with s 4(1)(d), the terms of which are reproduced labelled the "principle of balance", and adds allegations of breaches of principles of fairness and accuracy. It then says "specifically" there was breach of Code paragraphs G1, 6, 124, 15 and 16. Under subheadings it restated those various code paragraph numbers and requirements. It opens under each with further generalised allegations. Under code G6, presently relevant, it alleges in general terms that the programme was "blatantly biased in its approach and contents" ... "no genuine attempt was made to get balanced coverage of both points of view". It alleges "dissidents and those holding minority views" were given more weight and coverage than "mainstream majority opinion"; and "doubt was cast on the credibility and integrity" of those defending MAF's position. Then (and the words chosen are significant) it states "For example:", and proceeds to list the 12 features previously noted, some highly specific. The letter ends with general allegations, including "lack of balance" in the programme.

Objectively read, the complaint alleges general lack of balance, followed by examples. They are merely examples. They are not said to be exhaustive. It is not a case of a generality followed by a "namely", or even an "in particular". It is not as if the complaint alleged general lack of balance, and then stated "the respects in which lack of balance occurred are as follows,". This is not an accident. When the writer intended to be specific, that occurred. The word "specifically" was used in identifying particular code provisions. In the result, there is room, within words used for reference to other breaches, not included within the "examples" put forward, and for such to be taken into account in the course of investigation.

There was of course, a potential danger of breach of natural justice if this was done. There can be no doubt natural justice was required s 10(2)(c). If the Authority identified other matters, outside previously stated examples, which it proposed to take into account, it was necessary to give both sides (and particularly the broadcaster) notice and an opportunity to answer. Failure to do so would mean the decision would be open to judicial review. However, that obligation did not exclude from the outset an ability to take into account a relevant item.

[62] I would synthesise the essential principles contained in the three cases as follows:

- (a) the BSA cannot enquire beyond the terms of complaint;

- (b) it is permissible to fill gaps (as per *MAF*), or cross boundaries between Code standards (as per *Holt*) but only if these things can be done within the wording, reasonably interpreted, of the original complaint, and if a proper consideration of the complaint makes that approach reasonably necessary; and
- (c) where the BSA proposes to gap fill or cross boundaries between Code standards, the broadcaster must be given an opportunity to make further submissions on any new questions raised before any final decision is made.

[63] In the current appeal each of the complaints begins with a short section entitled *Overview*. Under that heading, the first complaint provides:

... TV3 in fact presented an unfair, unbalanced and inaccurate portrayal of Samoa post-tsunami. The item presented the Government of Samoa as having either misused or mismanaged money provided in donations and aid. It expressly said that the Government has left its own people to live in substandard and insanitary conditions. It aired a heavily edited and out of context quote from the Prime Minister of Samoa which left viewers with the very clear impression he no longer believes the tsunami is an issue of importance.

We strongly reject each of those representations.

[64] There is no overview section in the second complaint, however, the introductory paragraphs are similar. They include the allegation that “This second report was a further unfair, unbalanced and inaccurate portrayal of Samoa post-tsunami.”

[65] These overview sections are each followed by a second heading – in the first complaint *The item’s claims*, and in the second complaint, *The November item’s claims*. There follows a summary of the claims made in each of the items, and then the following in emphatic terms “For the reasons given below we reject these claims. It is our view that in putting this item to air TV3 breached Standards 5 and 6 ...”

[66] From there, in each case, detailed particulars are given of the breaches of Standards 5 and 6. In both complaints particulars run to several pages of argument and factual detail.

[67] The Attorney's referral letter of 16 December 2010 reiterates the focus of the complaint:

In our view each of these items breaches Standards 5 and 6 of the Free-to-Air Television Code of Broadcasting Practice ...

[68] I agree with the Attorney that the substance of Standard 4 relating to balance is expressly covered by s 4(1)(d) anyway so that the broadcaster must at all times maintain balance in accordance with the formula in that subsection. Balance is a pervasive requirement with or without the Code. But the Attorney's complaint is comprehensive and detailed and the BSA's inquiry is restricted to the parameters set by its words. The single reference to "unbalanced" in each of the complaints is not enough to import Standard 4 into the terms of the complaint. On a fair reading of each complaint, it cannot be said that the Standard 5 and Standard 6 particulars were intended only to be examples allowing, on the reasoning of McGechan J, the importation of other examples relating to balance. That is just not how either complaint reads. On the contrary, the complaints articulate with great confidence and clarity that the entire foci are Standards 5 and 6.

[69] I conclude that the BSA did not fall into error when it refused to consider Standard 4.

*Inquisitorial powers – submissions*

[70] The Attorney argues that the BSA took an overly passive approach in dealing with his complaint. In particular it was argued that the BSA wrongly evaded its responsibility to make necessary findings in a way that could be said to give proper consideration to the complaint.

[71] The Attorney argues that it was open to the BSA to reach findings without the need for formal evidence or alternatively the BSA could have used its investigatory powers to obtain evidence needed.

[72] In response the BSA accepted that it was open to it to seek further evidence but rejected the contention that it was under any positive obligation to do so in order to make necessary findings of the fact.

[73] TVWorks followed suit. TVWorks argued that the complaints were not made out on the available information and dismissal was therefore an appropriate option to the BSA. Although the BSA could have sought information, there was no requirement to do so. Whether the BSA should have investigated further is a matter for it. TVWorks also argued that the Attorney was a sophisticated complainant who was legally represented throughout. He could simply have provided any extra material he thought relevant, or requested the BSA to inquire further. It was significant, in TVWorks' submission, that the Attorney took none of these steps.

*Investigatory powers – analysis*

[74] The Attorney referred to a Court of Appeal decision in *Comalco New Zealand Ltd v Broadcasting Standards Authority*.<sup>22</sup> In that decision the Court of Appeal ordered discovery of eight documents relating to the preparation of the particular broadcast even though those documents were not before the BSA when it made the decision under appeal and judicial review. McKay J for the Court reasoned as follows:<sup>23</sup>

Comalco was remiss in not asking the Authority to obtain the pre-broadcast material, possibly because it saw a formal hearing as providing the appropriate answer. The Authority elected to proceed without a formal hearing, and while it had the power to do this, it did not obtain all the material required to make a proper assessment of balance in the selection and editing process. Comalco made its written submissions, but failed to ask the Authority to obtain the documents now in issue. The failure of the Authority to require the production of the pre-broadcast records and documents was not put forward in the review proceedings as being a denial of natural justice such that its decision should be set aside. It nevertheless meant that the Authority reached its decision without having access to all the possibly relevant material. Its decision is now the subject of an appeal ... If those issues are to be properly determined on appeal, the High Court will need to have the additional material before it.

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<sup>22</sup> *Comalco New Zealand Ltd v Broadcasting Standards Authority* (1995) 9 PRNZ 153 (CA).

<sup>23</sup> At [161].

[75] While it is possible to read that passage as support for the proposition that there will be circumstances where the BSA must actively acquire documents not placed before it by the parties, that does not seem to be the focus of McKay J's reasoning. His point is that if the argument on appeal is that the pre-broadcast material in the possession of the broadcaster at the time of broadcast showed selective and unbalanced reporting, then this material will need to be before the court on appeal to properly resolve that controversy. In this case that possibility could have arisen if the tape of the unedited interview with Deputy Prime Minister Telefoli had remained extant. In theory at least, there must be circumstances where, if the BSA fails to obtain that additional material, it will have failed to properly consider the complaint in terms of s 10(2)(b). This possibility is hinted at by Courtney J in *Television New Zealand Ltd v K W*,<sup>24</sup> and by me in *Radio New Zealand v Bolton*.<sup>25</sup> The *Comalco* case, meanwhile, never proceeded to a full hearing, but appears to have settled, so we do not know whether the pre-broadcast documents did make a difference there.

[76] In the end, answering the question of whether the BSA carries such an inquisitorial obligation in any particular case will always be fact-reliant. In this case, whether further inquiry might be required, and if so its extent, will depend on a substantive consideration of the application of Standards 5 and 6. I turn now to consider those matters beginning with Standard 5.

### **Substantive grounds – Standard 5**

#### *Submissions*

[77] It is useful to begin by reiterating the three bases upon which the BSA dismissed the Standard 5 complaints:

- (a) it could not positively determine whether the Samoan Government had responded adequately to the tsunami – especially in relation to water supply and housing issues – or properly managed the aid

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<sup>24</sup> *Television New Zealand Ltd v K W* HC Auckland CIV-2007-485-1609, 18 December 2008 at [32].

<sup>25</sup> *Radio New Zealand v Bolton* HC Wellington CIV-2010-485-225, 19 July 2010.

funding provided – the issues were simply too complex for a true/false inquiry;

- (b) the aid figures referred to in the item were not inconsistent with the Government's own tsunami report, or any other evidence available to the BSA, and *Campbell Live* was entitled to rely on that Government supplied report in the circumstances; and
- (c) the broadcasts were not misleading in that they contained sufficient reference to broader relief efforts and countervailing propositions.

[78] The Attorney argued in response that the BSA was not required to make the positive accuracy determinations identified. It was sufficient, in the Attorney's argument that the BSA or the court could find that the broadcasts left a misleading impression, or failed to impartially convey information in relation to the issues identified. The Attorney argued that this was done by omitting important contextual material, the inclusion of which was necessary for viewers to make up their own minds. This argument of misleading selectivity, in the Attorney's view, applied not just to Standard 4 (the balance standard) but also Standards 5 and 6. The Attorney also argued that, to the extent the BSA found the broadcasts were not misleading because there was sufficient contextual material in the item, the conclusion of the BSA was plainly wrong.

[79] Finally, the Attorney also rejected that the BSA's conclusion that the aid figures included in the item were consistent with the Government's Tsunami Report. The Attorney argued that it was incumbent upon the BSA to seek clarificatory evidence on that point.

[80] TVWorks responded that this is not a case where Standards 4, 5 and 6 overlapped. The BSA was correct when it refused to be put in the position of having to decide whether the Samoan Government's response to the tsunami was adequate. When the Attorney recast this issue in terms of selectivity, it was really (and wrongly) attempting belatedly to rely on Standard 4.

[81] By way of an alternative argument, TVWorks said that the items were consistent with the terms of the government's Tsunami Report, and it was therefore incorrect to say that they were misleading.

[82] TVWorks also argued that the item contained sufficient contextual material to be balanced and impartial anyway.

### **Analysis**

[83] Standard 5 provides that:

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

- (a) is accurate in relation to all material points of fact and/or
- (b) does not mislead.

#### *Guidelines*

5a The accuracy standard does not apply to statements which are clearly distinguishable as analysis, comment or opinion.

...

5c News must be impartial.

[84] The current Code was approved from 1 July 2009. The parties were not able to cite any cases under the current wording. The previous iteration of the Code provided that:

News, current affairs and other factual programmes must be truthful and accurate on points of fact, and be impartial and objective at all times.

#### *Guidelines*

...

5b Broadcasters should refrain from broadcasting material which is misleading or unnecessarily alarms viewers.

...

[85] The BSA's approach in this appeal can be considered in light of two High Court decisions under the previous wording.



[86] The first case is *Television New Zealand Ltd v KW*.<sup>26</sup> *KW* was the subject of a TVNZ broadcast about unlicensed suburban brothels. The complainant alleged that the programme was inaccurate. He maintained that his house was not a suburban brothel and that the only services his wife provided were Chinese massage and foot reflexology. The BSA upheld this complaint; it found that TVNZ breached Standard 5 by inaccurately portraying *KW* as a brothel owner and his wife as a prostitute. TVNZ appealed. It argued that Standard 5 did not require TVNZ's assertions to be absolutely accurate; rather, it was sufficient that TVNZ took reasonable care to ensure that they were accurate. Courtney J rejected TVNZ's submission, and held that accuracy, for the purpose of Standard 5 (then), required objective correctness in factual reporting.<sup>27</sup>

[87] It was, I presume, in response to that decision that the new Code was promulgated with the new Standard 5, requiring only reasonable efforts in achieving accuracy, rather than absolute accuracy.

[88] In *Radio New Zealand v Bolton*,<sup>28</sup> I considered the equivalent to the current Standard 5 in the sister measure to the Television Code – the Radio Code of Broadcasting Practice, which underwent a similar transformation effective from 1 July 2008.<sup>29</sup>

[89] In that case the BSA had found that it could not, on the evidence provided, conclude whether broadcast comments were inaccurate, but held that Standard 5 was still breached because the broadcaster failed to make reasonable efforts to ensure accuracy. I allowed the broadcaster's appeal. I said the following about the reasonable efforts change to Standard 5:<sup>30</sup>

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<sup>26</sup> *Television New Zealand Ltd v KW*, above n 23.

<sup>27</sup> At [20].

<sup>28</sup> *Radio New Zealand v Bolton* above n 24.

<sup>29</sup> Standard 5 of the 2008 version of the Radio Code provided that:

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

- is accurate in relation to all material points of fact; and/or
- does not mislead.

The prior iteration (Principle 6) provided that:

In preparation and presentation of news and current affairs programmes, broadcasters are required to be truthful and accurate on points of fact.

<sup>30</sup> At [47].

The reason for the change does indeed appear to have been a desire to shift focus from what the speaker said, to what the broadcaster could reasonably have done about it. The motivation for this was concern expressed both by broadcasters and the Authority about the absolute nature of the old standard. Any error was actionable no matter how immaterial and no matter whether the broadcaster could reasonably have done anything to prevent it being broadcast.

[90] However, I did not accept that the change rendered strict accuracy irrelevant. I held that the complaint procedure under the Act, at least insofar as it relates to fair and accurate programmes, is a corrective process. It necessarily requires factual error to have been proved before the broadcaster is put to the test.<sup>31</sup> Accordingly, before considering whether reasonable efforts have been made, the BSA must first find inaccuracy.<sup>32</sup>

[91] None of the parties in this appeal challenged the application of those conclusions to the current Standard 5. Rather, the Attorney argued that the strict assessment of accuracy that was required on the facts of *Bolton* and *K W* is not necessary because, on the facts, the items were misleading and biased anyway. Those characteristics were, it was argued, prohibited by the terms of Standard 5.

[92] I agree that since the complaints alleged that the content complained of was inaccurate *and* misleading in terms of Standard 5, that second determination must be made even if the first one as to accuracy cannot.

[93] When will a broadcast be misleading? Essentially, the Attorney says that a broadcast will be misleading *inter alia* when it does not adequately summarise or portray an issue so that viewers can make up their own minds, and when viewers are not left with a wrong impression. I do not understand that this submission is seriously contested: rather, the issue is how it is applied in this case. For completeness, however, I note that the Attorney's submission is consistent with the BSA's treatment of the issue, in this case and in the past.

[94] In this case, the BSA considered whether the broadcasts were misleading (despite being unable to make findings on strict accuracy) in that they did not make

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<sup>31</sup> At [45].

<sup>32</sup> At [57].

sufficient reference to the government's relief efforts. The BSA dismissed that submission, because:

- (a) in the first broadcast, the Deputy Prime Minister commented that the government is "working very, very hard to ensure that [people's] needs are met", and that government was working on infrastructure, including \$5 million being allocated to water supply and 75% of that being spent; and
- (b) in the second broadcast, that Mr Campbell referred to "new roads and electricity", that there is a four-year relief programme, including \$9 million allocated to a housing project now complete.

[95] Commentary on similar complaints is provided by Steven Price in his book *Media Minefield*,<sup>33</sup> and by Professor Burrows in his review of BSA decisions. Professor Burrows explained that:<sup>34</sup>

... a statement which is literally true can still give a wrong impression, usually because it leaves out a vital piece of information and is thus only a half truth. The Authority has had to deal with this type of complaint on a number of occasions, and been required to make the difficult judgment of whether a broadcast summary is misleading because of what it does not say.

[96] McGechan J upheld such a complaint on appeal in the *MAF* mad cow disease case already mentioned.<sup>35</sup> He accepted that the apocalyptic post outbreak scenario described in a TVNZ *Frontline* item was so decontextualised as to be misleading in terms of Standard 5.<sup>36</sup>

[97] I note that since that decision, the requirement to refrain from misleading viewers has migrated from being a guideline under the standard, to a component of the standard itself.

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<sup>33</sup> Steven Price *Media Minefield: A Journalists' Guide to Media Regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington, 2007) at 8-11.

<sup>34</sup> J F Burrows "Assessment of Broadcasting Standards Authority Decisions" (paper commissioned by the BSA, April 2006).

<sup>35</sup> At 14. *Television New Zealand v Ministry of Agriculture and Fisheries*, above n 20. The relevant finding was described as "a lack of balance", rather than inaccuracy, although the standards that applied at that time do not allow direct comparison with the present case. It is unnecessary to attempt to reconcile the standards for the purpose of this discussion.

<sup>36</sup> At 37.

[98] Misleading here must mean to give another a wrong idea or impression of the facts. The BSA carefully traversed the transcript of both items identifying those elements that tended to support the government's position. On balance the BSA said there was enough in each of the relevant respects to keep the item on the right side of the line. Thus, the Prime Minister's comments would, in the BSA's view, have lead *Campbell Live's* audience to understand that the government had made efforts to meet the needs of locals. Similarly, the November item contained enough references to new roads, electricity and housing, and to the Government's Recovery Plan to give a properly contextualised impression.

[99] As to the allegation from the mayor of Malaela that the government had given them nothing, the BSA found that this was personal view and opinion and would be exempt from the requirements of Standard 5.

[100] Having viewed both items myself, I must confess to considerable sympathy for the Attorney's complaint in this respect. Had I been dealing with the matter at first instance, I may well have taken a different view to that of the BSA. But my role on appeal is, as I have said, a limited one. I am constrained to the usual grounds of judicial review with the important addition that if I find a decision to be "plainly wrong", it is open to me to set it aside. In this case whether a wrong impression is given is very much a matter of degree. I do not feel able to conclude that the BSA was plainly wrong in its assessment of the competing elements in the item. On the contrary, I am of the view that the BSA's conclusion was one which was open to it given its careful assessment of the transcript. As can so often be the case, this is a judgment call upon which reasonable minds might well differ. I do not therefore feel able to conclude that the BSA was plainly wrong in this respect.

[101] For completeness, I note that the Attorney also argued that both items were biased in the sense that they lacked impartiality. Bias is a broad concept and will easily overlap at times with Standards 4 and 6. The impartiality obligation is essentially to avoid unfairly or unduly promoting one side of the story at the expense of any other sides that might properly be available – in short, an obligation to be even-handed. In this case I see little difference in substance between the obligation to be impartial and that to avoid misleading viewers. The BSA did not specifically

consider the impartiality requirement – perhaps because it is not a part of the standard but sits at the subordinate guidelines to the standard – but there can be no doubt that my conclusion on impartiality would be consistent with its conclusion on the misleading aspect of Standard 5. Once again it could not be said that such a conclusion amounted to an error of principle, or was plainly wrong.

[102] That leaves finally the debate over aid quantum. This was the only area in which the BSA took the view that it could make an accuracy assessment. The Attorney’s submission was that the government’s Tsunami Report plainly distinguished between different forms of overseas assistance, making it clear that the high aid estimates referred to in the *Campbell Live* items were inaccurate or misleading. The Attorney referred to a table on page 24 of the report which I reproduce as follows:

<b>Development partner</b>	<b>Form</b>	<b>Amount</b>	<b>Remarks</b>
Australia	Budget support	A\$7.5 million	Lightly tagged to Environment and Disaster Management
China	Project support	RMB 40 million	Initial work on schools reconstruction
European Union	Budget support	Euro 4 million	To be received
Japan Trust fund	Project support	US\$1.5 million	Pledged – to be received

New Zealand	Budget support	NZ\$6 million	Lightly tagged to housing
	Through PSSF	NZ\$2 million	Tagged to tourism beach fale operations
	Through CBS	NZ\$2 million	Tagged to interest subsidy scheme – tourism
United States	Project support	SAT 631,000	Tagged to NDMO operations
Relief fund	Budget support	SAT 14.2 million	All sectors
United Nations	Project support	US\$0.45 million	Implementation of its early recovery programme
ADB	Budget support	US\$16 million	Emergency response to financial crisis and tsunami
World Bank	Budget support	US\$23 million	Emergency response to financial crisis and tsunami

[103] I agree with the BSA that this table makes no useful distinction between loans and donations. Indeed this seems to be the most likely explanation for the varying views on quantum. While the table does identify that some funds were pledged but had not yet been received, that proportion is relatively small and could not of itself explain the variation. I accept that the table makes clear that some funds were tagged to particular projects (reducing thereby the overall quantum available for water, housing and electricity), but the broadcaster's point was a different one; that the government's assessment of aid quantum "differed depending on the audience".

[104] I agree with TVWorks that further information was not necessary. As the BSA indicated, TVWorks was invited by the Samoan Government to rely on the Tsunami Report and it was thereby entitled to do so. The table is headed "Donations". There is nothing in this report or the Samoan Government's statements on aid funds to warn TVWorks, or to put it on notice, that there were important

distinctions between the various forms of aid, or that this could explain the differing assessments of aid quantum.

## **Standard 6**

### *Submissions*

[105] For ease of reference, Standard 6 provides that:

Broadcasters should deal fairly with any person or organisation taking part or referred to.

#### *Guidelines*

- 6a A consideration of what is fair will depend upon the genre of the programme (e.g. factual, dramatic, comedic or satirical programmes).
- 6b Broadcasters should exercise care in editing programme material to ensure that the extracts used are not a distortion of the original event or the overall views expressed.

...

[106] The Attorney made three express complaints under Standard 6. The BSA dismissed them as follows:

- (a) the Deputy Prime Minister was given a fair and reasonable opportunity to comment in the first broadcast, despite only 20 seconds of his interview being broadcast. The Deputy Prime Minister's response to the water supply issue was broadcast. The Deputy Prime Minister also made some general comments about the government's position. He appeared measured and composed;
- (b) the Prime Minister's statement that the "tsunami [was] no longer a newsworthy issue" was not unfairly edited. He said what was quoted. While that response may have imparted a different message than was intended, that is a hazard that the Prime Minister is reasonably subject to, should have appreciated, and could respond to (via the media if

required). In any event, most viewers would have realised that the statement was made in relation to a different issue;

- (c) the “door-stepping” of the Prime Minister in the second broadcast was not unfair, despite the strict approach usually taken to such interviews. The Prime Minister is an elected politician, who unreasonably postponed a formal interview scheduled to take place the following day.

[107] On appeal, the Attorney submits that:

- (a) the BSA took into account irrelevant considerations namely: that viewers would not have been left with a “negative impression” of the Deputy Prime Minister personally; that the Prime Minister was a politician used to news media and subject to the democratic process; and in relation to the door-stepping – TVWorks’ right to ask questions on behalf of New Zealand as a donor, its efforts to schedule an interview, and the convenience to TVWorks of the timing of any interview;
- (b) the BSA failed to take into account relevant considerations: the BSA should have sought a tape of the full interview of the Deputy Prime Minister, and assessed whether the broadcasted comments were representative of the overall interview; that the Prime Minister had reason to proceed cautiously, after the first broadcast; and the Tsunami Report covered a large number of issues, and the Prime Minister was justified in wanting to know which issues the interview would focus on; and
- (c) the BSA was plainly wrong in each case.

[108] The Attorney also submits that there was a general, overarching complaint that the broadcasts were unfair to the Samoan Government in breach of Standard 6. No general allegation is made in the complaints; as with Standard 4, specific



breaches of Standard 6 were alleged, and they appear as an exclusive list. Accordingly, I have not considered that particular matter any further.

[109] TVWorks essentially denies the Attorney's submissions. In particular, it says that the Attorney provides no evidence or arguments as to how the editing of the Deputy Prime Minister's interview was unfair. The Attorney did not ask TVWorks for, or the BSA to use, its s 12 powers to obtain a copy of the interview footage. In any event, the BSA's analysis of the representation of the Deputy Prime Minister and the Prime Minister was correct. The BSA must be able to take into account all of the circumstances of an interview, including the position and skills of the interviewee.

### *Discussion*

[110] Leaving the door-stepping of the Prime Minister to one side, the Attorney's issue is that the Prime Minister's and the Deputy Prime Minister's comments were edited in such a way that they distorted what was said or meant.

[111] In relation to the complaint relating to the Deputy Prime Minister, the mere fact that only 20 seconds of his interview was included in the item does not make it an unfair distortion: the Attorney must establish that the 20 seconds broadcast was not representative of the whole. TVWorks rightly points out that the Attorney has not provided submissions or evidence on why that is so. And while the Attorney or the BSA could have sought the interview footage, TVWorks now advises that it has since been destroyed. It is now impossible to assess what difference the footage would have made, and therefore whether the BSA was wrong in failing to obtain the footage under its s 12 powers. This is singularly unfortunate, as the footage was clearly relevant to the complaint. The Deputy Prime Minister's comments as broadcast were mostly general, and did not respond to many of the specific complaints made by the villagers in the broadcast. If the interview had included more specific, helpful, responses by the Deputy Prime Minister, the editing of the footage could well have been open to criticism. I am frankly surprised the BSA did not obtain the interview tape as a matter of course, on receipt of the Attorney's complaint given the relevant particular alleged.

[112] But on the facts as I now have them, the BSA cannot be said to have erred in the ways the Attorney alleges. The statements that were broadcast did address (albeit briefly and quite generally) the water supply issue, and the ongoing relief efforts. It is obviously relevant that the Deputy Prime Minister was not himself portrayed negatively and that he came across as measured and composed. If that had not been so, the case for unfairness would have been strong even without the tape of the interview.

[113] In relation to the Prime Minister's comment that the tsunami was no longer a newsworthy issue, the issue is whether that comment was unfairly taken out of context. The BSA dismissed this complaint for two reasons: the Prime Minister is democratically accountable, and media savvy, and so (effectively) a higher threshold for unfairness applies; and the viewer would have understood that the comment was broadcast out of context.

[114] It was open to the BSA to conclude as it did, that the viewer would have understood that the comment was out of context – the broadcast explains that the statement was made to TVNZ's *Tagata Pasifika*, and the question to which the Prime Minister responded was not included in the broadcast. Having reached that conclusion, it was unnecessary for the BSA to factor in the Prime Minister's political position and media training in applying Standard 6 to reports of his comments. However, it cannot be said that his position and skill are irrelevant. The Prime Minister, more than most, has the ability to regulate his statements to the media, and to defend himself if and when required. He is after all a senior and experienced politician – the most media savvy of all, in a media savvy profession. To treat that as irrelevant is to ignore reality. In any event he had an opportunity to correct the position in the interview set up during the course of Mr Campbell's second visit. While one can understand the sense in approaching the interview with caution, it is difficult to understand why it was postponed until a date he knew to be after Mr Campbell and crew were due to depart.

[115] That brings me to the door-step interview. The BSA acknowledged its usually strict opposition to such interviews:<sup>37</sup>

... particularly where the interviewee has had little or no experience in appearing on television. [The BSA] has previously stated that door-stepping will normally be found to be unfair unless every alternative legitimate way either to obtain the information sought, or to ensure that a person being investigated is given the opportunity to respond, has been exhausted.

[116] The BSA cited two of its decisions in support: *Riddell v TVWorks Ltd*,<sup>38</sup> and *Willcock v TVNZ*.<sup>39</sup>

[117] The Attorney does not allege that the BSA erred in principle on this count; rather, it says that the BSA wrongly applied those principles to this case in finding that the ambush or door-step interview of the Prime Minister was fair.

[118] The BSA reasoned that:<sup>40</sup>

- (a) the Prime Minister is an accountable politician, and TVWorks was entitled to hold him to account on tsunami issues (on behalf of New Zealand as a donor country);
- (b) TVWorks was duly respectful in its efforts to schedule an interview at a time that suited the Prime Minister. The Prime Minister postponed that interview the night before it was due to take place, on the basis that he had not been provided with a question line in advance;
- (c) it was unreasonable for the Prime Minister to cancel the interview on that basis: he would have been well aware of the nature of the programme and the story; and he had publicly discussed his views in the September broadcast;
- (d) that left TVWorks in a difficult position, as it legitimately sought a response from the Prime Minister, while its crew was still in Samoa;

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<sup>37</sup> *Attorney-General of Samoa v TVWorks* above n 5, at [139].

<sup>38</sup> *Riddell v TVWorks Ltd* BSA 2009-038, 20 October 2009.

<sup>39</sup> *Willcock v TVNZ* BSA 2009-056, 20 October 2009.

<sup>40</sup> At [140]-[144].

- (e) in those circumstances, Mr Campbell's approach to the Prime Minister in the car park after a function was justified and not unfair.

[119] The Attorney says that the BSA wrongly took into account TVWorks' right to ask questions on behalf of New Zealand as a donor, TVWorks' efforts to schedule an interview, and the convenience to TVWorks of the timing of any interview. It was argued that the BSA failed to take into account that the Prime Minister had reason to proceed cautiously after the first broadcast (which the Samoan Government had expressed its concern about), and that the Tsunami Report covered a large number of issues. The conclusion invited was that the Prime Minister was justified in wanting to know which issues Mr Campbell would focus on.

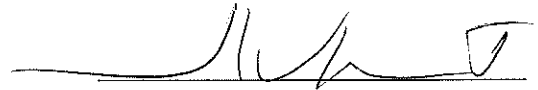
[120] I do not accept that the BSA erred in the respects alleged. When assessing whether TVWorks exhausted alternative legitimate ways of obtaining a response from the Prime Minister, TVWorks' efforts to schedule an interview, while its crew was in Samoa, were clearly relevant. TVWorks' interest in obtaining that response was obvious: since New Zealand was both a major donor to the Samoan relief effort and home to a large Samoan community, there was strong public interest in those efforts in New Zealand. The media has a key role to play in such an assessment. The critical tone of the broadcasts required an ample opportunity to respond and that opportunity was duly given.

[121] And while the Prime Minister was justifiably cautious following the first broadcast, he is Samoa's premier politician. Difficult interviews come with the territory. He was aware of the issues raised by the first broadcast, that broadcast being the subject of a formal complaint on behalf of the Samoan Government. The reality is that the critical tone of the first item demanded a vigorous Prime Ministerial response to even the score up a little. That opportunity was on offer and was not taken. Responsibility for that strategic choice must lie with the Prime Minister, not the broadcaster.

## **Conclusion**

[122] While I have sympathy with at least some of the Samoan Government's arguments on appeal, the BSA's reasoning cannot be faulted in terms of the somewhat narrow compass for review available to me. Ultimately, by limiting the complaint to specific breaches of Standards 5 and 6 the Attorney's case was too restricted in its scope. Had Standard 4 been available, the result may well have been different.

[123] The appeal is dismissed with leave to file brief memoranda as to costs if need be.

A handwritten signature in black ink, appearing to read 'Williams J', is written over a horizontal line.

**Williams J**