THE 'BALANCE' STANDARD

John Burrows, April 2015

Background

I have been asked to review a group of recent Broadcasting Standards Authority (BSA) decisions on what is often called the 'balance' standard. The standard is statutory. Section 4 of the Broadcasting Act 1989 provides:

> 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.

The word 'balance' does not appear in the statutory provision, but adequately captures its intent.[1] The requirement is mandatory, and applies to 'every' broadcaster. It is not confined to news and current affairs programmes, although only has sensible application in that context. The provision can only be removed or amended by Act of Parliament.

This requirement of balance can be seen as part of the wider ideals of impartiality and objectivity which many believe should lie at the heart of good journalism. The ideals came to prominence, it would appear, at the beginning of the 20th century as a reaction to the self-interested aggressive media of an earlier time.[2] When Joseph Pulitzer endowed the Columbia Journalism School in 1903 he said that 'journalists must see themselves as working for the community, not commerce, not oneself, but primarily for the public'. In 1938 Henry Steed, a former editor of *The Times*, reinforced that vision by saying that 'the underlying principle that governs, or should govern, the Press is that the gathering and selling of news and views is essentially a public trust.'

This idea of journalism as public trust involves the notion that in a democracy there needs to be an informed citizenry. The public have a right, not just to news which is accurate and impartial, but also exposure to a range of viewpoints on controversial matters so that they can form their own views in an informed manner. The requirement of balance is encapsulated in the latter part of this ideal.

At the time of the early New Zealand broadcasting legislation in 1961, broadcasting was solely a state activity. The Broadcasting Corporation Act of that year required that broadcasters have 'due regard to the public interest', and emphasised accuracy and impartiality in the presentation of news.[3] There was an express balance requirement too, but not of the present kind; it was, rather, an aspiration that programmes *as a whole* maintained 'a proper balance in their subject matter'.[4] Paul

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[1] In a symposium on the standard held by the BSA in May 2006 some commentators believed the word 'balance' should be dropped as not adequately expressing what was required: see for example Jim Tully at page 39 of the proceedings *Significant Viewpoints: Broadcasters Discuss Balance* available on the BSA website.
[2] The history is outlined in Richard Sambrook, *Delivering Trust: Impartiality and objectivity in the Digital Age,* Reuters Institute for the Study of Journalism, http://orca.cf.ac.uk and the New Zealand Law Commission, *The News Media Meets 'New Media'* NZLC IP 27 (2011), chapter 4.
[3] Broadcasting Corporation Act 1961 s10(2)(c).
[4] Ibid s10(2)(b).

Norris noted that 'there was much anguish over how to interpret this clause…'[5] It was repeated in the same language in the Broadcasting Authority Act 1968.[6]

The Broadcasting Act 1976, passed after the advent of private broadcasting, introduced a provision substantially the same as the one currently in force. Both the state broadcaster and private broadcasters were subject to the same requirement. They were to maintain standards which were generally acceptable in the community, and in particular were to have regard to (among other things) 'the principle that when controversial issues of public interest are discussed, reasonable efforts are made to present significant points of view either in the same programme or in other programmes within the period of current interest'.[7] The provision mirrors one which appeared in Australian broadcasting codes at about the same time. The only differences from the 1989 provision presently in force are: (i) in 1976 the broadcaster had to 'have regard to' the principle whereas today the broadcaster is 'responsible for maintaining' it – a more directive requirement; and (ii) 'or reasonable opportunities are given' has been added in the current version. Both those changes are minor.

So we can effectively say that we have had the same 'balance' standard for nearly 40 years. It is mandatory and it applies equally to all broadcasters.

Rationale

The principal rationale for the requirement remains as valid today as it always was: the need for an informed citizenry who are provided with accurate news and a variety of views on important topics so that they can make up their minds in a considered way. This rationale has been repeated by the BSA in many recent decisions. For example in *McMillan and TVNZ Ltd* (2013-025) the majority said at [18]:

> The balance standard exists to ensure that competing arguments are presented, where necessary, to enable a viewer to arrive at an informed and reasoned opinion.

However this is not the only rationale for the balance requirement.

A second is that without some such requirement there is a danger of power imbalance. Persons in positions of power usually have readier access to the media, and more know-how and advice as to how to use it, than the average citizen. They are sometimes able to promulgate their views with an effectiveness and domination not available to others. This justification is not put as often as it might be, but was referred to in the minority opinion in the *McMillan* case at [37]:

> The balance standard requires the broadcaster to publish ideas it may not wish to, and constrains the format it can adopt. *It ensures issues are not dominated by the powerful.*

A third rationale is that New Zealand has an increasingly diverse population. People of many ethnicities and cultures live here. People from different backgrounds may have different perspectives on issues. On issues of public significance it can be important that those differing perspectives are heard. Our duty to our fellow citizens requires it if we are to live in a respectful and harmonious society.

[5] BSA symposium, note 1 above, page 28.
[6] Section 10.
[7] Section 24(1)(e) (Corporation) and section 95(1)(d) (private).

These arguments are all valid and reasonable. They argue strongly for the retention of the balance standard. Such a standard appears in the codes of other media. Thus the *Press Council Statement of Principles* provides:

In articles of controversy or disagreement, a fair voice must be given to the opposition view.

(The Press Council statement provides for exceptions for long-running issues where every argument cannot be presented on every occasion, and where balance is to be judged on a number of stories rather than a single report.)

The *Code of Standards* of the recently created Online Media Standards Authority provides:

> **Balance on Controversial Issues** Taking account of the context in which the content is published publishers should make reasonable efforts to ensure that where the content deals with controversial issues of public importance it makes due reference to a reasonable range of significant viewpoints on the issue.

The changing context

However maintenance of this standard in broadcasting is becoming increasingly difficult. Broadcasting has changed dramatically over the years, and continues to do so. It is becoming difficult to keep up. Those whose task it is to enforce the balance standard are finding the requirements of the 1989 Act more and more challenging. The developments may be summarised thus.

First, at the time the Act of 1976 was passed there were not many news media in New Zealand. The Broadcasting Corporation, a state organisation, provided the only television service. Although private radio had commenced there were far less radio stations than today. Most people subscribed to their local newspaper – then, as now, there were no national dailies. There was not much competition among the media. Even in 1989, the date of the current Broadcasting Act, private television had only just begun.

Today there is a proliferation of news sources. Private television competes with the state channels for viewing audience. There are many radio stations. And, above all, there is a huge range of 'new' media accessible via the internet – online news services, blogs, and social media. All of these are accessible on computers, be they laptops, tablets, or smartphones. Anyone who compares these sources has access to a wide spectrum of viewpoints, opinions, and different interpretations of the facts – a host of information on which to base their own opinion. Is this an argument for saying that balance within one particular broadcast is now unnecessary? What, then, of people who are still not internet confident, or simply do not have the time or inclination to consult more than one trusted source of news? (Such research as there is suggests that this is in fact the position of many people.)

Secondly, this competition, and the resultant drive for audience ratings, has led to new types of broadcasting. The unregulated 'new' media (blogs, social media and the like) have probably contributed, not just by providing other sources of news, but also by creating an expectation of daring and liveliness. Talkback radio has been around for a while, but has become more challenging. Now, on both radio and television, much news commentary consists of short provocative segments – so short in fact that real balance is hardly possible. Some 'news' programmes provide entertainment as much as information; some are humorous; some are 'edgy'. In some the presenter, rather than being the impartial informer, enters the arena as a one-sided participant in the debate. 'Factuals' (documentaries about real life) strive for dramatic effect. Even in what we may describe as true news and current affairs programmes there is a variety of style: breakfast television, for

example, is different from the evening news. These different styles appeal to different audiences. Yet the Broadcasting Act balance requirement applies to them all equally. One size is supposed to fit all.

Developments in the law external to the Broadcasting Act pose different problems. Section 14 of the New Zealand Bill of Rights Act 1990, passed a year after the current Broadcasting Act, codifies the right of freedom of expression. That provision must be applied by the BSA. In every case where it has to consider whether it should uphold a complaint that broadcasting standards, including the requirement of balance, have been breached, the BSA must consider whether such a limitation on freedom of expression can be justified in a free and democratic society. Marginal cases are likely to go in favour of the broadcaster. This tipping of the balance towards greater liberty in broadcasting is in many ways welcome, but it does not make life any easier for complaints authorities. To reconcile the requirements of the Bill of Rights with those of the Broadcasting Act often requires a subtle balancing exercise.

All of this raises the question of whether it is time to change our Broadcasting Act. The balance provision has been there in much the same form for 39 years. The United States abandoned its balance requirement in 1987. Should we do the same? I suspect not many would advocate that. If the public were to be asked whether they prefer a balanced or an unbalanced media, there can be little doubt what the answer would be. The balance standard remains high on the BSA's complaints list. The BSA's Annual Report for 2014 reveals that there were 30 complaints on lack of balance, placing it fourth among the complaint categories. Trained journalists, proud of their craft and conscious of its public interest role, value the need for objectivity and impartiality, of which balance is an integral part. As we have seen, even the most modern codes of journalistic practice continue to have a balance provision.

Perhaps there is a stronger argument for saying that the legislation should be more nuanced, and that different requirements should apply to different kinds of broadcaster and different kinds of programme, and that account should be taken of the ready availability of information due to the internet. The 'one size fits all' nature of the current provision is one of the main sources of difficulty. As I shall show later, some other jurisdictions have gone some distance down that track. However to craft a form of words which could achieve this satisfactorily would be very difficult indeed. Inevitably some arbitrary lines would be drawn.

The codes

In fact in New Zealand the Codes of Broadcasting Practice themselves grapple with this diversity problem. It is interesting to note that that the statutory balance standard in section 4 of the Broadcasting Act is by far the most detailed of the standards in that section, and there is consequently less room for manoeuvre in Codes. But Codes have been made, and they impose some glosses on the statutory provision. The Radio Code, for instance, provides in the guideline to Standard 4 that the assessment of whether a reasonable range of views has been allowed for takes account of (among other things):

- the programme type (eg talk or talkback which may be subject to a lesser requirement to present a range of views).

The Pay TV Code provides that *factual* content which clearly approaches the issues from a particular perspective does not need to be balanced, but must be fair.

The Free-to-Air TV Code is the main focus of the following discussion. It, and the Radio Code which substantially mirrors it, are the Codes which have been in issue in all the decisions I have been asked to review. The Free-to-Air TV Code provides as follows:

Standard 4 – Controversial Issues – Viewpoints

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 (eg authorial documentaries, public access and advocacy programmes);
- whether viewers could reasonably be expected to be aware of views expressed in other coverage.

These code provisions gloss section 4 of the Act in a number of ways.

First, they confine the balance requirement to news, current affairs and factual programmes. The Act does not do so, although it could be said that this limitation is implicit within it.

Secondly, the requirement of the Act that other views be 'presented' can be reduced if viewers could reasonably be expected to be aware of them. That is a fairly liberal interpretation, but one which can be justified by something approaching necessity. If a matter has been the subject of ongoing discussion for a long time it would be bizarre to require that all significant views be fully 'presented' every time it is raised.

Thirdly, and most significantly, the 'particular perspective' guideline is assuming real prominence in recent BSA decisions. This guideline might at first seem to be engrafting an exception on to the statutory provision: is not a programme presenting only one person's view the very converse of balance? But it can be justified, I think, on the basis that it does not absolve the broadcaster from all semblance of balance; rather it reduces what is necessary to satisfy it – although sometimes that appears to be very little.

The 'particular perspective' guideline, as interpreted in the BSA jurisprudence, has led to the view that the important consideration is that the audience must not be misled or misinformed by the omission in the programme of other perspectives. That in turn depends on what the style of presentation has led the audience to *expect*. If it is obvious to the audience that the view being presented is only one person's view, and that it does not tell the whole story, the broadcaster has a much reduced duty of balance. If on the other hand they expect a balanced debate and do not get it, they have been misinformed. They may even be misled or deceived into thinking that what is presented to them is all there is to it. I do not think the framers of the Act saw it in quite that way,

but they lived in a different era. The new rationale does contribute to making the Act work sensibly in the modern age.

The decisions

The majority of the ten BSA decisions I have been asked to review centre on just this question. They involved programmes where the emphasis was on one 'particular perspective'. The expectation of viewers (or listeners), and whether they were misled or misinformed by the limited coverage, is often central to the reasoning. In some of them, particularly the most recent, the pressures placed on the balance standard by new and innovative forms of broadcasting are very apparent, and are acknowledged by the BSA.

I shall deal with the decisions in chronological order so as to trace the development of the BSA's thinking.

Brooking

In *Brooking and Television New Zealand Ltd* (2009-012) the programme *Breakfast* featured an interview with Garth McVicar of the Sensible Sentencing Trust. Mr McVicar criticised a sentence recently imposed by a judge for a firearms offence, saying it was too lenient. He and the presenter continued to discuss sentencing policy in general. Mr Brooking complained, alleging that only one point of view had been presented, the presenter appearing to agree with Mr McVicar. The BSA, whose membership was different from that of the present Authority, upheld the complaint. It used an early version of the 'expectation' test:

> The Authority considers that the programme did not give viewers any sense that Mr McVicar's views on sentencing were debateable or contentious.

It concluded that the programme should have presented the opposing view – that sentences are generally adequate. That would not have required another interviewee; it would have been enough for the presenter to engage in some such device as 'devil's advocate' questioning. Earlier programmes broadcast by the broadcaster dealing with the court case, the black market in firearms and changes to the Sentencing Act, were not in point.

The BSA's thinking seems clearly to have been that any balancing views would need to come from the same broadcaster, and would need to be 'in the period of current interest'. This is despite the fact that most viewers would have been well aware of the existence of a long-running debate about sentencing.

> [U]pholding this complaint would ensure that when an interviewee only puts forward one perspective on a controversial issue, broadcasters make reasonable efforts to either challenge that perspective or present the alternative view in another programme within the period of current interest. (Paragraph [29])

The decision applies the standard fairly strictly. (It should be noted that the Code and Guidelines were slightly different then, but not in any way that is material to the decision.)

Axford

The remaining nine decisions are by the BSA as currently constituted. The first is *Axford, Bate and Oldham and Television New Zealand* (2011-115). The presenter Bryan Bruce presented a documentary about the life of Christ which challenged the traditional view in the scriptures, and suggested that the early Christians had rewritten the story of the crucifixion to blame the Jews for

Christ's death. The documentary had been compiled after much research, a visit to Israel, and interviews with experts. Complaints were laid about lack of balance. The BSA did not uphold the complaints. It held, first, that the subject of the programme was not a controversial issue of public importance. It was of historical interest, but did not have 'topical currency' and was not of 'public importance' in contemporary life. That conclusion by the BSA has been questioned by other commentators, and I confess that I find it rather surprising myself. However the BSA having so found, that finding would itself have been enough to dispose of the complaint. The finding involves that the threshold for the balance standard was not met. But the BSA (as it typically does) nevertheless went on to give other reasons. The documentary was clearly authorial, and was approached from Mr Bruce's perspective only. Viewers would not have been misled or deceived by the omission of other viewpoints (paragraph [16]). Moreover the traditional view of the scriptures is so well known that viewers must have been aware of it. Furthermore, Mr Bruce's approach in dismissing the traditional view could be taken as an acknowledgement of its existence.

The decision applies a more liberal approach than did *Brooking.* However on a subject such as this, where the opposing view (the gospel accounts), has been universally known for centuries, any heavier touch would have been unrealistic. The decision opens the door to a finding that where the existence of views opposed to that put forward in the broadcast is universally well known the requirement to acknowledge them is minimal, and in an extreme case may be non-existent.

Bolot

The next decision is *Bolot, Finlay and Gautier and Radio New Zealand Ltd* (2013-008). Five programmes on *Nine to Noon*, *Checkpoint* and *Sunday Morning with Chris Laidlaw* between 19 and 25 November 2012 dealt with the Arab-Israeli conflict in the Gaza Strip. Complainants alleged that the programmes were biased in favour of the Palestinian perspective. The BSA declined to uphold the complaints. It held that the balance standard applied: the relevant segments of the wider programmes under consideration could be categorised as news or current affairs; and the subject matter, the Gaza conflict, was a controversial issue of public importance in this country, even though the events were based elsewhere. So the threshold for the balance standard was reached. But the broadcaster had clearly met its obligation to provide balance. In the period 15 – 25 November it had broadcast 250 items on the conflict, and the BSA found that it had gone to considerable lengths to present significant viewpoints. The decision is the only one in the batch under review where, even though an individual programme may have presented only one viewpoint, the broadcaster itself had maintained balance through other programmes in *the period of current interest.* In fact that justification is very seldom pleaded, an interesting observation in itself.

Early Childhood Council

In *Early Childhood Council Inc and Television New Zealand Ltd* (2013-017) a programme on *Breakfast,* called 'Daycare vs Homecare', contained an interview with the president of the Home Education Learning Organisation (HELO). It put forward a strong case for children being cared for at home, rather than in daycare facilities. There was no corresponding case put for daycare. Nor was the broadcaster able to point to any other broadcasts around the same time which did so.

The BSA upheld the complaint of lack of balance. It noted the difficulties of classifying some items on programmes such as *Breakfast* which, it said, 'are increasingly light-hearted and lifestyle-based'. But it said the item did fall within the category of current affairs, so the balance standard applied. The appropriate level of balance had not been attained. The item did present a 'particular perspective', and in some contexts that might have saved it. But here the way the item was presented was wrong.

It was framed as a debate. The segment was called 'Daycare vs Homecare', and the presenter introduced it by saying, 'Do we send our kids to daycare or keep them at home with a nanny?' Thus the *expectation* of viewers was that they would get a debate, whereas what they in fact got was one side of the story. Had it been made clear that the item presented one perspective only, it would have been enough to simply acknowledge that another view existed. But here it was framed as a debate.

> It ought to have been better balanced than it was. Alternatively, it needed to be framed more carefully so that viewers were not expecting a debate, only to get something closer to an advertorial… (Paragraph [35])

The BSA also noted that the question in such cases is:

> ...how viewers would reasonably have perceived or understood the programme in question, and whether they were likely to have been deceived or misinformed by the omission or treatment of a significant perspective. (Paragraph [13])

To me there is something less than fully satisfying about this reasoning in this particular case. Whether the audience expected a debate or not, it must have been perfectly clear to them that they had heard only one side of an argument and that there was another side to it as well. It is difficult, therefore, to say that they were *deceived*. The real point is that they had been deprived of what lies at the heart of the balance standard, enough information to see all sides of the argument and make up their own minds. That alone would have been reason enough. Be that as it may, the test of expectation is now firmly established in the jurisprudence of the balance standard, and is proving a useful tool in the difficult task of fitting the balance standard to the rapidly escalating demands of modern broadcasting.

Garrett

Garrett and Radio New Zealand (2013-048) is not dissimilar to the *Early Childhood Council* decision. It involved a complaint about a *Nine to Noon* programme which discussed the 'three strikes' legislation. The legislation had been in force for about three years. Both the participants on the 20-minute programme were opposed to the three strikes principle. The BSA upheld the complaint of lack of balance. The introduction to the programme asked whether the legislation was succeeding in its target. Listeners would have expected a balanced debate on the subject, and did not get it. It was not necessary that equal time be given to the other side; adequate balance might have been attained by devil's advocate questioning, or simply by acknowledging the existence of significant perspectives. The broadcaster had attempted to get an interview with the Minister of Justice, but that was declined. In the circumstances that was not enough.

This decision seems correct. It shows that the balance standard continues to have teeth in appropriate cases. The arguments for and against the three strikes legislation are nowhere nearly as well known, and not as readily accessible to ordinary members of the public, as was the case in *Axford.* Of particular interest is the BSA's use in *Garrett* of the *expectation* argument. The programme had been introduced by asking whether the legislation was targeting serious criminals as intended.

> [L]isteners would have anticipated an informative discussion of the pros and cons of the legislation; the framing of the item in this way created an expectation of a balanced debate. (Paragraph [18])

> The balanced debate they expected did not eventuate, and they were left unable to arrive at an informed and reasoned opinion themselves. (Paragraph [34])

McMillan

The next case is the most significant of the group. It was a split decision, and it contains more extended discussion than in any other decision of the modern pressures on the balance standard. It is *McMillan and Television New Zealand Ltd* (2013-025).

The programme *Seven Sharp* presented the predictions of a climate scientist about the effects of climate change by the year 2100, and included the opinion of a health expert about associated health risks. The state of affairs they predicted was drastic. A complaint was laid that the projections were extreme, and less alarmist viewpoints should have been presented as a counterbalance. By a majority the BSA declined to uphold the complaint.

The BSA noted that the style of *Seven Sharp* is to apply comedy and entertainment techniques to serious issues.

> This type of programming and format is increasingly common in New Zealand television, and raises new questions about the application of broadcasting standards which only apply to 'news and current affairs'… (Paragraph [5])

The majority opinion traced the changes in broadcasting since the 1989 Act, describing them as 'dramatic'. The requirement for balance:

> ...must reflect the present broadcasting environment in New Zealand, and it must reflect the increased flows of information which now pass over us on topics of all kinds… What we now have is a proliferation of broadcast media, and indeed media which is consciously delivered from a political perspective, and a more discriminating viewing public. (Paragraph [25])

The majority then said that while viewers and listeners must be left to make up their own minds on controversial issues and must have sufficient information on which to do so, the purpose of the balance standard is:

> …to ensure that viewers or listeners are not misled; that they are not given false information; that their views are not wrongly shaped. (Paragraph [26])

This is effectively a reformulation of what I have previously called the 'expectation' principle: if a programme presents only one perspective, it must be made clear to the audience that that is what it does; they must not be led to believe that it is a balanced account.

In the present case the majority found that viewers would not expect balance in an item such as the one under consideration. It was obviously focused on only one point of view. It did not purport to be a balanced examination. Moreover almost everyone knows that global warming has long been a contentious issue. There would not be many people unaware of the debate swirling around it.

The majority then went on to make an important statement which recognises the limitless quantities of information now available to us:

> We think a programme can be an advocacy piece and it can be unbalanced and it can give information that is incomplete, so long as the nature of the programme and its purpose is obvious, and there is other balancing information available to the viewer or listener. *That other information can come from a variety of other sources or places. It may be found in other broadcasts at or around the same time, it may be in newspapers or elsewhere. It may*

> *be something which is visible to everybody in the universe of information.* (Paragraph [29]; emphasis added)

At the end of their opinion the majority expressed the same point with even greater force.

> We do not want to see the impact of programmes of this kind dampened down by some contrary view of which everybody is aware, having to be expressed internally within the programme. (Paragraph [32])

These paragraphs make two significant advances which had only been hinted at in previous decisions. First, the balance requirement can be satisfied by information readily available through other media, and not just the broadcaster itself. Secondly, the programme in question need not refer to that balancing information, at least where its existence is very well known. These advances, critically important though they are, will not apply in more than a few cases where the subject of the broadcast is well documented and familiar to everyone.

One member of the BSA, Ms Mary Anne Shanahan, took a different view in the *McMillan* case. She would have upheld the complaint. She agreed that programmes which clearly present a particular perspective, as this did, do not require the same degree of balance as programmes which purport to provide an objective examination of an issue. But, she said, even in a 'particular perspective' programme it is important that there be a clear acknowledgment that there are other points of view. In this programme there was not.

> There was no acknowledgment that there is disagreement or that there are alternate views… There is a large amount of information in the public domain presenting different – or even fundamentally opposed – views, to those expressed in the *Seven Sharp* item. In an appropriate case the existence of such information may well be a weighty factor, supporting a finding that a broadcaster complied with the balance standard where only minimal reference was made to opposing views. However in this item there was nothing – no reference or context given at all as to the place of these experts in the debate. (Paragraphs [44] to [45])

The fundamental difference between the majority and minority views is a narrow but important one. The majority believed that the public would know of the existence of the competing arguments, so there was no point in telling them in the programme in question. The minority, on the other hand, felt this could not be taken for granted. Those applying the standard 'cannot assume a sophisticated, all-knowing, informed audience'. While many viewers would be aware of the competing arguments, there may be many others who were uninformed (paragraph [46]).

However taking the majority view as the leading one, we can now at this point assert that a programme giving only one side of an argument complies with the balance standard if:

- it is clear that it is presenting just one perspective, so that the audience is not expecting a balanced debate;
- full information about competing views is available to the public, even if it be in media external to the broadcaster; and
- the existence of competing views is acknowledged in the programme, or is so well known that there is no need to refer to it.

This is taking us to the limits of liberal interpretation of section 4 of the Act. I shall return to this topic in my concluding comments.

McQueen

The next case was decided three months after *McMillan. McQueen and TVWorks Ltd* (2013-081) involved a segment on *Campbell Live* which contained an interview with a woman who had contemplated taking the life of her mother as she suffered in the final days of terminal cancer. A complaint alleged that the programme failed to present other significant views on euthanasia and was thus unbalanced. The BSA did not uphold the complaint. The item was clearly focused on one woman's perspective, and the audience would not have expected an even-handed analysis of the arguments for and against euthanasia. The issue had been the subject of widespread debate, and the range of significant viewpoints was well known. There was no need to rehearse them again. Yet, unlike in *McMillan,* the BSA did regard it as a requirement that the programme should acknowledge the existence of those other arguments.

> We consider that it was sufficient for the item to acknowledge the debate and the existence of other perspectives, without discussing those perspectives in detail. (Paragraph [11])

It cited four comments from the programme to support the conclusion that the broadcaster had done that adequately. Whether this signals an acceptance of the minority view in *McMillan* or simply illustrates that each case depends on its own facts is not certain.

However perhaps the main interest of *McQueen* lies in a tantalising snippet in paragraph [9]. Many BSA decisions state that for the balance standard to apply the subject matter must be an issue of 'public importance', it must be 'controversial' and it must be 'discussed'. Those criteria appear in the words of both the Act and the Codes. If any of them are not met the threshold for the application of the standard is not reached. In paragraph [9] of *McQueen* the BSA said:

> We do not consider that the *Campbell Live* item amounted to a 'discussion' of [the euthanasia] issue, such that it was required to present alternative views.

If that is correct a personal perspective programme would not engage the balance standard at all. A finding that there was no discussion would be the end of the matter. But the BSA then immediately moved to more familiar, and probably safer, ground by saying that the requirement of balance is merely *lessened* if the programme is clearly from a particular perspective. That is what the Guideline to the Code says. Yet the 'no discussion' point deserves more in-depth analysis. It is raised again in the *Easte* and *Sabin* cases. I shall revisit it there.

Quayle

Quayle and Television New Zealand (2014-072) involved a *Sunday* programme which reported on a proposal to decline funding for a drug needed to treat a rare blood disorder. It contained interviews with two people with the disorder and a health professional. Mr Quayle complained on the ground that the programme portrayed Pharmac as irresponsible and heartless, and did not go into the reasons funding had been declined. The BSA declined to uphold the complaint. It found that the item was 'transparently presented from the perspective of people who opposed Pharmac's proposal'. All that was required to provide balance, therefore, was:

> …to acknowledge the controversy or debate and the existence of other perspectives, without discussing those perspectives in detail. (Paragraph [18])

The programme had done this. It had referred several times to the cost of the drug, and had read an accurate summary of a written statement provided by Pharmac. Most viewers would have understood the need of the drug agency to prioritise, and the impressions of Pharmac that they took

away from the programme 'would not have been misinformed'. The decision seems to be a straightforward application of the principles established by the BSA in earlier decisions.

Easte

Easte and Mediaworks TV Ltd (2014-093) is a classic illustration of the difficulty of applying the balance standard to rapidly evolving new styles of broadcasting. The *Paul Henry Show* ran a segment on Auckland's tram service. Its thrust was that the trams were a very costly project which had been unsuccessful; the trams were 'gathering dust' in a shed. The programme contained a lively discussion between the host and a reporter, and included graphic depictions and satire. It was, the BSA said, intended to be humorous and engaging.

> Its late-night timeslot means its content is often more edgy and challenging than would be usually expected of a news programme. (Paragraph [5])

The BSA declined to uphold a complaint that the programme was unbalanced. The following strands of reasoning appear in the decision:

- There seems to be doubt as to whether the item was a 'discussion' for the purposes of the balance standard. (Paragraph [15])
- Be that as it may, the programme did not purport to be a serious and even-handed examination of the issue. It was transparently presented from one critical perspective as to how the Council had chosen to spend a lot of money. The audience would not have expected an examination of other views. (Paragraph [16])
- In any event efforts which were reasonable in the circumstances had been made to get another view; Waterfront Auckland had declined a request for comment. (Paragraph [17])
- The tram service is an ongoing matter which is likely to attract other coverage, and viewers could access information elsewhere if they wanted to. (Paragraph [17])

This concentration of a number of alternative reasons into a short space means that none of them are developed fully. But we can at least say that the familiar principles of audience expectation, and absence of misleading, were confirmed. They were at the core of the decision. Significant also is the acknowledgement, as in *McMillan*, that the existence of further information in other media sources can be taken into account.

Two of the other arguments in the decision are more controversial. The first is a cryptic suggestion that it may even be enough if further information and debate is *likely* to occur in the media. That rather speculative suggestion is less satisfying. The second is the point made in *McQueen* that a brief one-sided coverage of an issue may not amount to a 'discussion' of it. As in *McQueen*, however, that point was not developed, and was not the basis of the decision.

Sabin

The final decision is *Sabin and Mediaworks TV Ltd* (2014-078). *Campbell Live* interviewed the leader of an American group advocating the legalisation of cannabis. He noted that some states had voted to legalise cannabis. He put a case that there are tax advantages in doing so. Mr Sabin complained on the basis that this contentious allegation 'should be matched like for like' to provide balance. The BSA declined to uphold the complaint. It found that the programme was clearly from the perspective of one individual, and that:

> …one person's explanation of the US political landscape… while of interest, and while it may later inform debates here – did not amount to a discussion of a controversial issue of public

> importance which triggered the requirement to present alternative views in a local context. (Paragraph [11])

What is not clear from this passage is whether there was no *discussion,* or whether the subject matter was not *'a controversial issue of public importance*'. However, whichever it was, this finding was enough to decide the case, and other points discussed by the Authority were of hypothetical interest only.

However the Authority did go on to say that the cannabis debate had been long-running in New Zealand: it was reasonable to assume that most viewers would be aware of it, and the range of views about it. If reform were to be considered here:

> ...it is inevitable that there will be further coverage, and that may well address and counter the specific points about taxation benefits made by the interviewee. (Paragraph [14])

This is a reassertion that even if the broadcaster does not present opposing views itself, it can be sufficient if they are discoverable from other sources. The assumption that future publicity *may well address* the issues echoes the point made in *Easte,* and is drawing a fairly long bow, but is not a ground of decision.

Finally, the decision touches on, but does not really address, a potentially important point. The Act and Code apply the balance standard to 'controversial issues of public importance'. But what was the 'issue' in *Sabin*? Was it the general subject of legalisation of cannabis, or the much narrower issue of the taxation benefits of legalisation? It was the latter in relation to which Mr Sabin appears to have wanted counter-argument. He said it should be matched 'like for like'. This question of an 'issue within an issue' was no more than adverted to in the BSA decision, and given the approach taken by the Authority it was not necessary to tackle it head-on. Some day it may have to be. The question of how one frames the *issue* could be determinative of the outcome of a complaint.

Summary

In summarising the position arrived at in these decisions, two things must be borne in mind. First, the decisions are fact- and context-dependent. Programmes differ so much in style and content that it is dangerous to try to formulate firm rules. Any principles we extract from the decisions must be subject to that consideration. Secondly, the BSA is not a court. It is a tribunal, only one of whose members needs to be a lawyer. It has a heavy load of complaints to deal with. So we cannot approach its decisions with the same degree of legal analysis that we give to judgments of the High Court. As Justice Asher has put it we must not excessively judicialise it.[8] Yet there needs to be reasonable consistency of decision so that broadcasters have some guidance. While decisions are not binding, as court decisions are, it is nevertheless legitimate to try to formulate the principles which emerge from the decisions.

That said, we may summarise the present position as follows.

- It continues to be acknowledged that the purpose of the balance standard is to ensure that viewers and listeners are exposed to competing arguments on important issues to enable them to arrive at their own informed and reasoned opinion.
- A programme may present a one-sided particular perspective provided it is very clear that that is what it is, and viewers are not misled into thinking it tells the whole story.

[8] *Television New Zealand Ltd v West* [2011] NZHC 435; [2011] 3 NZLR 825 at [98]

- Views contrary to those presented in the programme in question may be located in other programmes of the same broadcaster, or anywhere in other media or information sources.
- While it will usually be necessary to acknowledge the existence of other views in the programme in question, even that may not be necessary if their existence is very well-known.
- Section 14 of the New Zealand Bill of Rights Act 1990, the freedom of expression provision, is an important element in decision making on all broadcasting standards, including the balance standard.[9]

The position was thus summarised by the majority in *McMillan:*

> We are not willing to take from a broadcaster the freedom to express a one-sided view where it is obvious that is what they are doing, and it is clearly for the purpose of entertainment and stimulation of discussion. For us to say that on occasions such as this there has to be some internal balance, in our view, reduces editorial freedom and interferes with the principle of freedom of expression. We do not think that anybody was misled. (Paragraph [32])

Ironically, the more blatantly and overtly one-sided a programme is, the more chance it has of being safe from challenge, because the less chance the audience has of being misled.

Reconciliation with the Act

We may well wonder what the framers of the original Act in 1976 would have thought of this. Even when the provision was re-enacted in 1989 there would have been no conception of how matters would develop. It is convenient to set out the relevant part of section 4(1) of the 1989 Act again:

> Every broadcaster is responsible for maintaining… standards that are consistent with –
>
> (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.

It is fairly clear that the legislators assumed that each broadcaster would itself present a range of views in its *own* programmes.

Section 4 is a provision of an Act of Parliament. Codes, and decisions of the BSA, cannot depart from it. At the very least our Codes and BSA decisions have placed a substantial gloss on it.

- It is not easy to translate a requirement that a number of significant points of view be broadcast by the broadcaster into a requirement that a one-sided perspective be obvious for what it is. The 'expectation' and 'no misleading' principles do not clearly emerge from the words of the Act.
- The requirement that points of view be 'presented' has become a requirement that they be *acknowledged*, unless they are very well known to everyone, in which case even that may not be necessary.
- The requirement that the particular broadcaster must present the other points of view does not apply if those points of view are available in other media.

Liberality of statutory interpretation is not unusual in other contexts, but here it is taken to its limits.

[9] The Bill of Rights will be discussed below at pages 15-16.

Liberal construction can be justified in a number of situations.

The first is when it is necessary to give effect to the clear purpose of the Act's provisions. It is difficult to argue that justification here, because the purpose of section 4(1)(d) is to present the audience with a range of views so that they can make up their own minds; some would say the 'particular perspective' approach does not advance that objective.

The second is where the liberality is justified to achieve consistency with the Bill of Rights. Indeed section 6 of the New Zealand Bill of Rights Act 1990 provides that wherever an enactment can be given a meaning that is consistent with the Bill of Rights that meaning must be preferred. There is no doubt that the freedom of expression provision in the Bill of Rights has often been relied on in BSA cases, including balance cases, to justify not imposing constraints on a broadcaster. The question as to whether section 4(1)(d) 'can' be given the meanings thus placed on it receives a hesitant, but probably affirmative, answer.

Thirdly, there are situations where the march of time has posed such difficulties for the application of an out-of-date statute that some boldness is required in interpreting it. Advances in digital technology have posed such problems for many Acts – among them our copyright legislation, the Privacy Act 1993, the Official Information Act 1982, the Films Videos and Publications Classification Act 1993 and, of course, the Broadcasting Act 1989 (in many contexts, not just the present one). Such Acts have to be made to work sensibly in a new and totally different environment, and this would not be the first occasion on which heroic interpretation has been employed to achieve that end.

In my view the BSA has had little choice but to take the course it has, and I think the resulting principles are workable and sensible. They take a realistic view of the modern world of information, and the expectations of a new audience attuned to very different ways of getting information than were those who wrote the legislation. They also accord with freedom of expression.

Freedom of expression

On this last point, as I have said, section 14 of the New Zealand Bill of Rights Act 1990 (BORA) has played a strong part in the BSA decisions. The freedom of speech it codifies can only be limited if such a limitation is reasonable, and can be justified in a free and democratic society (BORA section 5). A BORA analysis involves a proportionality assessment which weighs the value of the speech in question against the damage to the balance standard were the complaint not to be upheld. BORA is not always referred to by name in the BSA decisions, but its ideal of freedom of speech almost invariably is. Justice Asher has said in a High Court case that the BSA must undertake a BORA analysis whenever it is considering upholding a complaint.[10] In fact the strongest references to freedom of speech in the BSA balance cases are in those where it declines to uphold – in other words where it finds the programme did not infringe the balance requirement. There have been some strong statements. I have already quoted the passages from the majority judgment in *McMillan.* There are similar endorsements in *Axford* and *Easte*:

> In our view the type of speech engaged on this occasion amounted to intellectual opinion on an historical and religious topic, which we consider is of high value in our democratic, tolerant and largely secular society. The right to comment on and to challenge different ideas and beliefs, including religious beliefs, is important because it contributes to the

[10] The *West* case (note 8) at [90]. Steven Price's very helpful analysis of BORA as it is applied by the BSA is available on the BSA website.

> advancement of knowledge and self-fulfilment of the speaker, which are core values underpinning the right to freedom of expression. (*Axford*, paragraph [9])
>
> This item, in our view, carried high value. It is legitimate and important for the expenditure of public money to be scrutinised and subject to robust criticism. …Strong justification, in terms of the harm caused by the broadcast, is required to restrict the broadcaster's right to have these types of discussions, and the audience's right to be exposed to critique on how rate-payers' money is being spent by councils. (*Easte*, paragraph [9])

This emphasis on freedom of speech has done much to set the BSA on the course it has adopted. However there is another aspect of BORA which is unique to cases involving the balance standard. The very rationale of the balance standard is consistent with freedom of expression in that it requires the presentation of *more* views than are present in the programme under complaint. It advocates more speech rather than less. In some of the decisions upholding the complaint that has been noted. In the *Early Childhood Council* case the Authority said:

> We are satisfied that upholding the balance complaint would not unreasonably restrict the broadcaster's right to freedom of expression because requiring the presentation of more information in the form of an alternative viewpoint, promotes, rather than hinders, the free flow of information and free speech principles. (Paragraph [36])

The minority in *McMillan* made the same point (paragraph [37]). However a different dimension of freedom of expression is engaged when the Authority declines to uphold a complaint: that is the dimension of editorial freedom, the right of the media to present facts and opinions in the manner they wish. Section 14 of the Bill of Rights emphasises this in upholding the freedom to impart information and opinions *of any kind in any form.* This is the dimension most often addressed in the balance cases. This duality is yet another subtlety of the Bill of Rights.

International comparisons

So the Codes and decisions of the BSA show how that body is handling the demands placed by the modern broadcast media on traditional broadcasting standards. In the light of these local developments it is interesting to compare how matters stand internationally.

United States

The United States used to have the Fairness Doctrine. It was introduced by the Federal Communications Commission (FCC) in 1949. It required the holders of broadcast licences to present controversial issues of public importance, and to do so in a balanced way. Some of the language in which the doctrine was couched is familiar to us in New Zealand. However the FCC abandoned the doctrine in 1987, on the ground that they believed it unconstitutional. It had been introduced when access to the airwaves was a scarce resource. By 1987, with the proliferation of new types of broadcasting, anyone could find a forum to publicise and promote their individual views. The FCC felt that the Fairness Doctrine actually restricted journalistic freedom to the detriment of the public and 'to the degradation of the editorial prerogative of broadcast journalists'.[11] This constitutional perspective is of relevance to the way the BSA uses the Bill of Rights, and is basically consistent with it, although the BSA has of course lacked the ability to dispense with the statutory balance requirement.

[11] See the account in Stuart N Brotman, *Communications Law and Practice* Law Journal Press 1995 at 2.04.

The jurisdictions most like our own – Australia, Canada and the United Kingdom – do retain a balance requirement. However in all of them distinctions are drawn between different types of broadcaster.

Australia

In Australia, for instance, the state TV channels and the commercial channels operate under different rules. For example the ABC code requires impartiality.[12] It notes that a democratic society depends on contrasting opinions, and that the ABC aims to equip audiences to make up their own minds. Commercial TV, on the other hand, only has an obligation to deal fairly with any viewpoint it presents. It does not have to present other, different, perspectives. The difference is thus expressed by ACMA:

> A broadcaster operating under statute with public funds is legitimately expected to contribute in ways that may differ from commercial media, which are free to be partial to private interests.

Pay TV has no requirement of impartiality at all.

Viewers can presumably choose the style, and hence the broadcaster, they prefer.

The ACMA code for the ABC provides that there should be opportunities over time for principal relevant perspectives on matters of contention to be expressed. Assessing impartiality requires consideration of a number of factors including: the content; the circumstances in which it is published; *the likely audience expectations* of the content; the degree to which the matter is contentious; and the range of principal relevant perspectives.[13] The italicised words are familiar to us in New Zealand.

ACMA decisions show that the state broadcaster is held fairly strictly to the code requirements. By way of example, in decision 3107 (14 March 2014), the ABC had broadcast a programme about the fluoridation of water. It took a pro-fluoride stance. ACMA declined to uphold a complaint of lack of impartiality, but only because: (i) the programme had acknowledged the existence of controversy and thus of other views; (ii) the line it took was supported by evidence; and (iii) the ABC indicated that it was prepared to put the contrary view in subsequent programmes. That is probably a more stringent approach than would be taken here, but it must be seen in the light of the special position of the state broadcaster.

Canada

Canada draws a similar distinction. The CBC, the state broadcaster, is subject to the *CBC Code: Journalistic Standards and Practice*.[14] It has a balance standard:

> We contribute to informed debate on issues that matter to Canadians by reflecting a diversity of opinion. Our content on all platforms presents a wide range of subject matter and views.

[12] The codes can be found on the website of ACMA, www.acma.gov.au.
[13] ABC Code and associated guidelines, clause 4.
[14] Full information about the Code of Journalistic Standards and Practice and the decisions of the Ombudsman can be found at www.ombudsman.cbc.radio-canada.ca.

> On issues of controversy we ensure that divergent views are reflected respectfully, taking into account their relevance to the debate and how widely held those views are. We also ensure that they are represented over a reasonable period of time.

Complaints about non-compliance can be made to the CBC Ombudsman. The Ombudsman decisions reveal that it takes the obligation of balance over time seriously. (See for example: 'Covering Gaza', 7 October 2014.) However this is within reason; it has held, for example that climate change doubters do not merit equal air time to the opposite view. If it did this would be a 'false equivalence': 'Wild Weather', 13 January 2015.

Private broadcasters have their own code which is administered by an industry funded, self-regulatory body, the Canadian Broadcasting Standards Council.[15] Their code contains a balance provision too, but it is more open-ended, and therefore flexible, than the state code:

> Recognising in a democracy the necessity of presenting all sides of a public issue, it is the responsibility of broadcasters to treat fairly all subjects of a controversial nature.

The decisions of the CBSC have consistently held that it is for broadcasters themselves to determine the content of their programmes. Programme hosts are entitled to hold and express their own opinions, even if unpopular. Even though the code says all sides of an issue should be presented, broadcasters are not required to bring together all views in a single programme. (See for example decisions 0985, 23 October 2013 and 2124, 10 November 2012.) However in cases of clear unfairness the complaint will be upheld (see for example decision 0630, 15 August 2012).

United Kingdom

In the United Kingdom a distinction is also drawn between categories of broadcaster, although it is more limited than that in the two other jurisdictions: regional radio has a less demanding requirement than that which applies to television and national radio.[16]

However the UK codes also adopt another categorisation to mitigate the difficulty of a 'one size fits all' doctrine. They draw a distinction according to the importance of the subject matter. The distinction is between matters of major controversy, and matters less than major. This is required by Act of Parliament, section 320 of the Communications Act 2003.

'Due impartiality' must be preserved on '*matters of political or industrial controversy and matters relating to current public policy*'. This does not always require an opposing argument to be presented. Whether it does or not depends on factors such as 'the nature of the programme; the programme's presentation of its argument; the transparency of its argument; the audience it is aimed at, and what the audience's expectations are'. This is little different from the New Zealand position as it has been developed by the BSA. It is interesting to note the audience expectation criterion with which we are familiar here. As in New Zealand too, it is recognised that presenters of 'personal view' or 'authored' programmes may present their own views. But in such a case alternative viewpoints must be adequately represented either in the programme itself, or in a series of programmes taken as a whole. A 'series of programmes' is defined to mean programmes in the same service. This is a stronger requirement than is adopted in New Zealand, although it applies only when it is the *presenter* who is putting forward the personal view.

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[15] Full information about the CBSC codes and decisions can be found at www.cbsc.ca.

[16] For full information about the Ofcom codes and guidance notes, and links to relevant decisions, see www.stakeholders.ofcom.org.uk. The guidance notes are detailed and particularly helpful.

However a higher standard applies when the programme deals with matters which can be categorised as 'major':

> In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes.

This clearly imposes a higher standard than we apply in New Zealand. In particular it requires a range of views to be presented by the same broadcaster in linked programmes. However this rigorous standard applies only when truly important issues are in question. So there is differentiation by content as opposed to the single absolute standard which applies by statute in New Zealand.

Conclusions on international comparisons

The conclusion to be drawn from these comparisons is that there is much to be said for drawing distinctions between different categories of broadcaster. In New Zealand we do not. Radio New Zealand's Act, unlike those of Television New Zealand and Māori Television, does impose a function of providing 'comprehensive, independent, impartial and balanced news services and current affairs', but there has never been any suggestion that the BSA treats it differently from other broadcasters in relation to the balance (or indeed any) standard. It is judged by the Broadcasting Act and the ordinary television and radio codes.

'One size fits all' poses its problems, as we have seen. Any sharper differentiation in the Act and codes between types of *broadcaster* is unlikely to be viable in a country of this size. Whether differentiation between types of *programme* (length, style, purpose, format) is feasible may be worth consideration.

Conclusions

I conclude on the position arrived by the BSA decisions. In this new world of ratings-driven broadcasting, the BSA has been faced with a big challenge. Even in the 6 years since the *Brooking* decision the media landscape has been changing rapidly. To maintain high standards of balance by insisting on a literal interpretation of the Broadcasting Act would have led to a well-nigh unsustainable situation. So the BSA has had to apply the standard more flexibly in a way which is realistic in the current climate. That has involved some stretches in interpretation, but given the universe of information and opinion now available from a huge variety of sources, the solutions it has arrived at are not unreasonable. I think the BSA has performed a difficult task well, and in none of the decisions I was asked to review did I think the outcome is wrong. If there are people who think that some of the decisions are too liberal – and there probably are – the fault lies not with the BSA, but with the effect of commercial pressures and audience preferences on broadcasting in this country.

Decision writing

I have left till last a consideration of the BSA's structure and style of decision writing. It is satisfactory. As has often been noted the BSA is not a court, its workload is heavy, and its resources small. One does not expect the extended judicial reasoning which is appropriate in a High Court judgment. The length and style of the decisions are comparable to those of overseas regulatory bodies such as ACMA (Australia), Ofcom (United Kingdom) and the CBC Ombudsman (Canada). They are expressed in language which is accessible to ordinary people, although they perhaps do not have

the conversational quality which is achieved by the CBC Ombudsman (whose decisions are in the form of letters to the complainant).

Most of the decisions I reviewed adopt a standard format. First comes a *Summary* in the form of a headnote. I find those summaries very helpful, even though they are not part of the decision. Then there is an *Introduction*, which briefly describes the nature of the complaint. There follows a section headed *Nature of the item and freedom of expression* which sets out the content of the programme complained about, and usually discusses the 'value' of the speech involved for the purposes of the BORA analysis. Then follows a discussion of whether the broadcasting standard(s) have been breached, and the BSA's reasons for its findings. Particularly when the complaint is upheld, there is often a return at the end to Bill of Rights considerations.

However this format is not invariably adopted. In *McQueen* and *Sabin* the *Nature of the item and freedom of speech* heading was omitted. This did not seem to me to affect the quality of the reasoning.

There are four matters which merit further mention.

First, in some of the decisions a number of alternative reasons are given. A classic example is *Easte.* As I stated in the analysis above there were at least 4 strands in the reasoning. *Sabin* and *Axford* are in the same category. This is not objectionable in itself – in fact it is in accord with the way much legal argument proceeds in New Zealand, both in the way counsel argue cases and in the way even court judgments are written. It may, colloquially, be called a 'belt and braces' approach. I am certainly not suggesting the BSA should cease the practice, because it usually reflects very fairly the matters which were taken into account in arriving at the decision. But in a short decision where all the reasons are of necessity compressed, it can initially be a little difficult for a reader to see what reasons were the really important ones, and which were more in the nature of supporting arguments.

Secondly, some of the decisions contain tantalising dicta – throwaway lines, even – which set one thinking, and wishing there could be more discussion. One is the intimation in a couple of the cases that a programme which contains only one particular perspective may not be a 'discussion' for the purpose of triggering the standard. Another is the suggestion that the *likelihood* of *future* discussion in the media can count towards satisfying the balance requirement (less persuasive). How narrowly or broadly one defines the 'issue' that has to receive balanced treatment is another question: it was raised but not answered in *Sabin.* Another matter that has been little discussed, but could be pivotal, is at what point a programme which is mostly entertainment crosses the line and ceases to be 'news or current affairs'. Of course one does not expect detailed discussion of these thorny questions in decisions where it is not necessary for the decision. I simply note that they have been raised, and wonder whether an opportunity will arise to deal with them in more detail in future.

Thirdly, on a related matter, sometimes the brevity of a decision inevitably means that important arguments are not as fully analysed and reasoned as they would be in a court case. One neither expects nor wants that. However I have intimated earlier, for example in relation to the *Early Childhood Council* case, that in a few instances I did not find the 'expectation' and 'audience misleading' arguments entirely clear. It seems that they can mean different things in different contexts, and those differences were not always fully explored. The outcome arrived at, however, always seemed to me to be right, and one could see why it had been reached.

Fourthly, the treatment of the Bill of Rights Act deserves further mention from the point of view of style rather than content.[17] Justice Asher gave much helpful guidance in *Television New Zealand v West*.[18] He said that while a detailed jurisprudential discussion is not expected, a BORA analysis is required, particularly when the BSA is considering upholding a complaint. The BSA has received much advice over the years on how to conduct that BORA analysis. It has not always been consistent advice, testimony to the very unfortunate complexity which attends this important piece of legislation. Of the most recent commentaries, one commentator has advised that a proportionality analysis should come at the beginning of the decision so that its principles feed into and inform the decision as a whole.[19] Another commentary advises that it is better at the end, so that an analysis as to whether the programme has breached a broadcasting standard can then be tested against the BORA principles.[20] For the most part the BSA has adopted the former approach. For my part I doubt whether, provided the analysis is properly undertaken, it makes any difference to the final outcome at which point in the decision it appears.

In conclusion, then, the BSA's decisions are always sensible in content, and one is always able to see how and why they were reached, even though they sometimes compress a great deal into a few pages. They achieve all that is necessary for a busy tribunal of this kind. As Justice Asher said in the *West* case[21]: 'At the moment Authority decisions are commendably brief and to the point.'[22]

[17] As to content see pages 15-16.
[18] See above note 8.
[19] Steven Price, above note 10, writing in 2012.
[20] Simon Mount, Jim Mora and Raymond Miller, writing in 2013. This review is found in the 2013 research publications on the BSA website.
[21] *Television New Zealand Ltd v West* above note 8 at [98].
[22] In addition to the references in the footnotes above I acknowledge the assistance I have received from other publications on the BSA website: Martin Hirst, *Balancing Act: A Review of the Balance Provision in the New Zealand Broadcasting Standards* (2007); and two guidance documents by the BSA itself: *Balance on Radio* and *Balance on TV* (both 2012).