TO: Broadcasting Standards Authority

FROM: Russell McVeagh

DATE: 16 April 2014

SUBJECT: Interpreting "election programme" and other associated provisions

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Introduction

1. The Broadcasting Standards Authority ("**BSA**") and the Electoral Commission ("**Commission**") are independent Crown entities. Each has responsibilities of constitutional importance in relation to what politicians and others may do in respect of broadcasting before elections and during election periods.

2. The Broadcasting Act 1989 ("**Broadcasting Act**") gives the BSA and the Commission certain responsibilities in respect of the regulation of "election programmes"; as a result, the Broadcasting Act requires both bodies to form a view as to the meaning of the defined term "election programme" and other associated provisions.

3. You have noted in the past that the BSA and the Commission have interpreted that language differently in relation to the same specific incidents.

4. In light of the impending general election in September 2014, you have sought our guidance as to the proper approach to be taken, including relevant considerations. You have specifically sought our views as to whether the BSA should adopt the Commission's approach to the interpretation and application of the key concept of "election programme" which is an important gateway concept for both agencies.

5. This opinion:

   (a) outlines the relevant statutory background;

   (b) sets out a framework for the interpretation of the meaning of "election programme" under section 69 of the Broadcasting Act;

   (c) considers the impact of the New Zealand Bill of Rights Act 1990 ("**NZBORA**") on the proper interpretation and application of the Broadcasting Act;

   (d) considers two recent examples of election programming, and discusses the practical effect of the examples; and

   (e) applies what we believe to be the correct framework to the two examples.

6. In summary:

   (a) we advise that a principal reason for the difference of approach between the BSA and the Commission is that the BSA interprets "election programme" by reference to section 14 of NZBORA (freedom of expression), whereas the Commission sees limited, if any, role for that provision;

(b) the two approaches can, and do, lead to different results in individual cases, as illustrated by two recent complaints; and

(c) we advise that the BSA should not adopt the approach of the Commission, precisely because that approach gives inadequate effect to section 14 of NZBORA.

Statutory background

7. The Broadcasting Act regulates the broadcasting of "election programmes" (all section references below are to provisions of the Broadcasting Act).

Part 6 of the Broadcasting Act: Parliamentary election programmes

8. Much of the relevant regulation, insofar as the Commission is concerned, is set out in Part 6 of the Broadcasting Act. Part 6 sets out:

(a) the extended definition of "election programme";

(b) the restrictions surrounding the broadcast of election programmes; and

(c) the duty of the Commission to report an offence to the Police.

9. Under section 69, "election programme" is relevantly defined as:

> a programme that—
>
> (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
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> (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
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> (c) advocates support for a candidate or for a political party; or
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> (d) opposes a candidate or a political party; or
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> (e) notifies meetings held or to be held in connection with an election

10. Section 70(1) provides that, subject to specified exceptions, a broadcaster may not permit the broadcasting of an election programme within or outside of an election period.

11. For the purposes of section 70, section 69(1) defines an "election period" as:

> ... the period—
>
> (a) beginning with writ day; and
>
> (b) ending with the close of the day preceding polling day

12. As to the exceptions to the prohibition in section 70(1), in general terms section 70(2) sets out:

(a) exceptions that provide that nothing in section 70(1) applies to certain election programmes broadcast within an election period (section 70(2)(a) to (c));

(b) an exception that provides that nothing in section 70(1) applies to "any advertisement placed by the Electoral Commission, a Registrar of Electors, a Returning Officer, or other official for the purposes of the Electoral Act 1993" (section 70(2)(d));

(c) an exception that provides that nothing in section 70(1) applies to "any non-partisan advertisement broadcast, as a community service, by the broadcaster" (section 70(2)(e)).

13. In addition, section 70(3) provides that "[n]othing in subsection (1) restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes".

14. Under section 80, it is an offence for a broadcaster (among others) to fail to comply with the prohibition in section 70(1).

15. Both the Commission and BSA have statutory powers in respect of programmes that are (or may be) election programmes under section 69.

16. As to the Commission's statutory powers, section 80A provides that:

> Where the Electoral Commission believes that any person has committed an offence against section 80, the Electoral Commission must report to the Police the facts upon which that belief is based.

17. We note in passing that on its wording section 80A requires the Commission to have formed the belief that an offence against section 80 *has* been committed; it is not sufficient for it to have formed the belief that a person *might* have committed such an offence.

Part 3 of the Broadcasting Act: Broadcasting standards and election programmes

18. As to the BSA's statutory powers, section 21(1)(b) provides that the BSA is required to "receive and determine complaints that election programmes did not meet one or more of the standards in section 4(1)(a) to (c) and (e)". In turn, section 3 of the Broadcasting Act provides that the phrase "election programme" in section 21 means "a programme broadcast under Part 6". That, in turn, brings the definition of "election programme" in section 69 (which is found in Part 6) into play.

19. The standards in section 4(1)(a) to (c) and (e) that the BSA must apply are as follows:

> (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with—
>
> (a) the observance of good taste and decency; and
>
> (b) the maintenance of law and order; and
>
> (c) the privacy of the individual; and
>
> ...
>
> (e) any approved code of broadcasting practice applying to the programmes.

20. As to section 4(1)(e), the most relevant code is the Election Programmes Code of Broadcasting Practice, May 2011 Edition ("**Election Programme Code**"), which sets out five standards (E1 to E5) in respect of election programmes.

21. In addition, Standard E1 of the Election Programme Code provides that the other relevant codes of broadcasting practice will apply "except for the requirement to present a range of significant viewpoints on issues of public importance."

22. It will be clear, therefore, that election programmes are governed by specific broadcasting standards, and so the BSA must form a view in respect of a complaint where those standards are, or may be, in issue as to whether the programme is, or is not, an election programme. In doing so it must use the same definition as the Commission uses, ie the definition set out in section 69 of the Broadcasting Act.

Differing approaches to the interpretation of the Broadcasting Act

23. Having reviewed the approaches of the BSA and the Commission to past complaints received in respect of election programmes, it is apparent that a key difference relates to the proper role of NZBORA in the interpretation and application of the Broadcasting Act. In essence, contrasting approaches are:

(a) The BSA appears to view section 69 of the Broadcasting Act as legislation which should be interpreted in light of NZBORA, in particular the right to freedom of expression set out in section 14 of NZBORA.

(b) The Commission appears to view Part 6 of the Broadcasting Act as effectively forming a code in relation to the regulation of parliamentary election programmes, and appears to believe that this is to be read on its own terms, without reference to NZBORA.

24. As a result, it is necessary for us to form a view as to the impact (if any) of NZBORA on the proper interpretation and application of the term "election programme".

Methodology for determining the effects of NZBORA on other enactments

25. NZBORA applies to the Broadcasting Act by virtue of section 3(a) of NZBORA. In addition, the BSA and the Commission perform public functions within the meaning of section 3(b) of NZBORA,[1] and so are bound to act consistently with NZBORA, subject to the override provided in section 4 of NZBORA, discussed below.

26. Sections 4 to 6 of NZBORA determine its application and effects on other enactments. They provide:

> **4 Other enactments not affected**
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> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) Decline to apply any provision of the enactment—

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1 *Television New Zealand v Viewers for Television Excellence Inc (Wellington)* [2005] 1 NZAR 1 at [51] (stating that the determination of complaints under the Broadcasting Act is a public function).

> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

27. There are two somewhat differing views expressed in the academic literature and in judicial decisions as to how to approach the relationship between sections 4, 5 and 6.

28. The first approach to the interpretation of the sections is described by Tipping J in *Hansen v R*.[2] That approach requires the court first to ascertain Parliament's intended meaning of the legislation. The second step is to determine whether Parliament's intended meaning is prima facie inconsistent with the right in question. If an apparent inconsistency is found, the next step is to determine whether the inconsistency is a justified limitation on the right by virtue of section 5. If the inconsistency is justified, Parliament's intended meaning is justified, and will prevail. If the inconsistency is not a justified limitation on the right, the court must then consider the legislation in light of section 6 and determine whether it is reasonably possible for the words to have a different meaning, that is either consistent, or less inconsistent, with the right. If they can, that meaning will prevail. If not, and there is no reasonably possible interpretation of the legislation which does not conflict with section 14 of NZBORA, Parliament's intended meaning will apply by virtue of section 4.[3]

29. The alternative approach favours first determining the scope of the relevant right or freedom, then determining the different interpretations of the legislation which are properly open. If there is only one interpretation that is properly open, then that will apply, but if there is more than one interpretation that is properly open, the court must determine which interpretation impinges the least upon the relevant right, and must, according to section 6, adopt that interpretation of the legislation. Having adopted that interpretation, the court is required to identify the extent (if any) to which that interpretation impinges on the right or freedom. Then, the court must determine if any such limitation can be demonstrably justified in a free and democratic society. If it cannot, there is a breach of NZBORA, but the meaning survives by virtue of section 4.[4]

30. Central to both approaches is to determine whether or not the language of the statute can reasonably accommodate the rights set out in NZBORA. Where the legislation can accommodate NZBORA, it must be interpreted consistently with the rights (and reasonable limits) contained therein.

Freedom of expression

31. The right at issue in this case is the right to freedom of expression in section 14 of NZBORA. Section 14 provides:

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2 *Hansen v R* [2007] 3 NZLR 1; [2007] NZSC 7 at [92] per Tipping J.

3 *Hansen v R* [2007] 3 NZLR 1; [2007] NZSC 7 at [92] per Tipping J.

4 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [17]-[18].

> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

32. The courts recognise that it "goes without saying that the values protected by the right to freedom of expression articulated in section 14 of NZBORA are fundamental and significant".[5] The breadth of the right is also generally recognised by the courts:[6]

> Under s 14 of NZBORA, everyone has the right to freedom of expression, including the freedom, to seek, receive and impart information and opinions of any kind in any form. This right is as wide as human thought and imagination. Censorship of publications to any extent acts as pro tanto abrogation of the right to freedom of expression. The rationale for such abrogation is that other values are seen as predominating over freedom of expression.

33. The phrase "freedom of expression" in section 14 has not been defined in the case law. However, it is read broadly, and section 14 has been held to affect the scope of legislation in cases concerning the wearing of gang patches,[7] the classification of films,[8] the application of broadcasting standards,[9] and the burning of the New Zealand flag.[10] When questions of freedom of expression arise, the scope of the right will affect the proper scope and interpretation of the legislation.

34. Case law applies section 14 of NZBORA in various statutory contexts. The cases set out below at 35 to 40 demonstrate the approach commonly taken by the courts in interpreting legislation in light of section 14 of NZBORA. Courts consistently limit the scope of statutory provisions to allow for a more NZBORA consistent application. This is particularly the case when the provision creates criminal penalties, as in *Brooker v Police* and *Morse v Police*, which will be discussed below at 38 to 39.

35. In *Moonen v Film and Literature Board of Review*[11] and in *Living Word v Human Rights Action Group Inc (Wellington)*,[12] the Court held that the proper interpretation of provisions of the Films, Videos, and Publications Classification Act 1993 was affected by section 14 of NZBORA. The cases both concerned a decision by the Film and Literature Board of Review as to whether particular publications were objectionable under the Films, Videos, and Publications Classification Act 1993.

36. The effect of consideration of section 14 of NZBORA in both these cases was to read the relevant statutory terms narrowly. In *Moonen*, the Court of Appeal considered the proper meaning to be given to the phrase "promotes or supports". The Court held that the Board was required to give the expression the available meaning which impinged as little as possible on the right to freedom of expression.[13] The Court noted that the meaning of the words was restricted to the effect of the publication, and not the purpose or the intent of the person who creates or possesses the publication.[14] It was emphasised that depiction and description of a prohibited activity did not of themselves constitute promoting or supporting that activity.[15] The Court did not make a decision on

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5 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC) at [95].

6 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [15].

7 *Schubert v Wanganui District Council* [2011] NZAR 233.

8 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA); *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA).

9 *Television New Zealand v Viewers for Television Excellence Inc (Wellington)* [2005] 1 NZAR 1.

10 *Morse v Police* [2012] 2 NZLR 1; [2011] NZSC 45.

11 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA).

12 *Living Word v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 (CA).

13 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [27].

14 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [29].

15 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [29].

the particular facts, but instead the decision was remitted to the Film and Literature Board of Review for reconsideration in light of the its decision.[16]

37. In *Living Word v Human Rights Action Group Inc (Wellington)*, the Court of Appeal considered the meaning of "objectionable" for the purposes of section 3 of the Films, Videos, and Publications Classification Act 1993. The legislation defined an objectionable publication as one which "describes, depicts, expresses or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good". The Court held that, so as to remain consistent with section 14 of NZBORA, the restriction on objectionable publications that were likely to cause injury to the public good in section 3(1) should be construed narrowly, so that the likelihood of injury to the public good alone was not sufficient to make the publication subject to censorship.

38. In both *Morse v Police*[17] and in *Brooker v Police*,[18] the Supreme Court held that the proper interpretation of section 4(1)(a) of the Summary Offences Act 1981 was affected by section 14 of NZBORA. Due to the criminal nature of the provision, the Supreme Court in *Morse v Police* noted that if "the limitation of freedom of expression is disproportionate to the statutory purpose of securing public order, the courts (which in their decisions must conform to the NZBORA) are not justified in finding criminal liability".[19] In *Brooker v Police*, Elias CJ suggested that the existence of a criminal offence impacts on freedom of expression in a way which should not be taken lightly:

> The existence of the offence impacts directly on personal freedom and liberty and has the capacity to be a tool to control unpopular and unwelcome speech. In particular, the power to arrest permits prior restraint of freedom of expression. It would therefore be wrong to be complacent about an expansive meaning of s 4(1)(a) because the penalty for transgression is a fine only.

39. *Morse v Police* concerned an individual arrested for disorderly behaviour following her burning of a New Zealand flag at a protest during an ANZAC Day commemorative service. *Brooker v Police* concerned an individual arrested for disorderly behaviour following his protest outside the private home of an individual police officer as he believed that she had treated him badly. In both of these cases, the majority of the Supreme Court held that the proper interpretation of "disorderly" behaviour was behaviour which would tend to be disruptive of the public order in the particular circumstances of the time and place.[20] The proper interpretation of the provision, taking into account section 14 of NZBORA, was that merely causing private annoyance was insufficient to constitute disorderly behaviour;[21] the provision prevents behaviour which interferes with the use of a public place to an extent that goes beyond what a reasonable person in a democratic society is expected to tolerate.[22]

40. In *Schubert v Wanganui District Council*,[23] the High Court held that the appropriate scope of a bylaw promulgated under the Wanganui District Council (Prohibition of Gang Insignia) Act 2009 was properly regulated by reference to section 14 of NZBORA. The bylaw prevented the wearing of gang insignia in particular areas of the Wanganui

16 Note that the Board's eventual decision was in turn appealed to the Court of Appeal in *Moonen v Film and Literature Review Board* [2002] 2 NZLR 754 (CA).

17 *Morse v Police* [2012] 2 NZLR 1; [2011] NZSC 45.

18 *Brooker v Police* [2007] 3 NZLR 91; [2007] NZSC 30.

19 *Morse v Police* [2012] 2 NZLR 1; [2011] NZSC 45 at [40] per Elias CJ.

20 *Morse v Police* [2012] 2 NZLR 1; [2011] NZSC 45 at [111] per McGrath J.

21 *Brooker v Police* 2007] 3 NZLR 91; [2007] NZSC 30 [24] per Elias CJ, [53] per Blanchard J, [92] per Tipping J.

22 *Morse v Police* [2012] 2 NZLR 1; [2011] NZSC 45 at [117] per McGrath J.

23 *Schubert v Wanganui District Council* [2011] NZAR 233 (HC).

district, and was challenged as ultra vires, given its excessive geographical reach. The Court held that the bylaw was an unjustified limit on freedom of expression.

The courts' likely approach to the proper interpretation of section 69 of the Broadcasting Act

41. In light of the above, it is our view that:

(a) A court is likely to seek to preserve freedom of expression as much as possible. Accordingly, it will only regard section 69 as proscribing expression of a type that clearly falls within the mischief that informs the prohibition on the broadcasting of election programmes, namely the active promotion or opposition for electoral purposes of a political party, politician or candidate for office outside of a news programme.

(b) Therefore, if a court comes to consider the meaning of section 69 of the Broadcasting Act, and in particular to determine whether a programme encourages or persuades, or appears to encourage or persuade, voters to vote for a political party at an election, or advocates support for, or opposes, a candidate or a political party, it is likely that section 69 will be narrowly construed. This will mean, for example, that:

(i) the mere exposure of an individual or political party on a programme, without more, is unlikely to be regarded as encouraging, persuading, advocating or opposing support for that individual or for his or her political party;

(ii) a court is unlikely to regard a broadcast that lampoons or makes satirical comment on a political party, politician, or a candidate for office as falling within the scope of section 69 of the Broadcasting Act unless it is convinced that the dominant purpose of the broadcast is to actively promote or undermine that person or party in an electorally significant way; and

(iii) a court is less likely to regard conduct as falling within section 69 the further away from an election that the conduct occurs.

(c) *Moonen v Film and Literature Board of Review*, discussed above at 35, provides strong authority for a narrow construction of section 69 of the Broadcasting Act. In *Moonen*, the Court of Appeal considered the meaning of the phrase "promotes or supports" in section 3 of the Film, Videos, and Publications Classification Act 1993. The Court interpreted the phrase narrowly, limiting it to publications which had the actual effect of promoting or supporting a prohibited activity. It was noted that that depiction or description of a prohibited activity did not of itself constitute promoting or supporting that activity.[24]

42. Other features of the statutory framework support the idea that NZBORA could legitimately be used to restrict the scope of section 69 of the Broadcasting Act:

(a) The prohibition on the broadcast of electoral programmes applies at all times, not only at election times. Such a broad temporal scope is only appropriate and necessary if it restricts the broadcast of a narrow range of programme types.

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24 *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 9 (CA) at [29].

(b) It is also likely that the section 70(3) exception to liability will be relied upon to inform a court's view of the particular mischief which the statute aims to avoid, namely the active promotion of political parties, politicians or candidates for office outside of news and current affairs programmes and which, in turn, will affect the scope of section 69.

(c) In New Zealand it is not unusual to find broadcast programmes, especially on the radio, which feature current or former well-known politicians as the hosts of, or participants on, the programme. It would be incongruous if mere exposure of an individual through a programme which happened to be categorised as a news programme was acceptable, while exposure through a different kind of programme was unacceptable.

(d) *Brooker v Police* and *Morse v Police*, discussed above at 38 to 39, suggest that as the interpretation of sections 69 and 70 of the Broadcasting Act have the potential to lead to criminal consequences if read broadly, the courts will not lightly accept a broad interpretation, and not unless it is proportionate to the statutory purpose.

The Commission's decisions

43. This section discusses two separate exercises of the Commission's statutory power under section 80A to make a decision to refer, and to actually refer, broadcasts to the Police. In each of those decisions, the Commission did not follow the proper approach to interpretation of the relevant provisions of the Broadcasting Act, in that it failed to take into account fundamental rights and freedoms in its interpretation. We would recommend that you do not follow the approach of the Commission in undertaking your analysis of the phrase "election programme" in section 69 when determining for your purposes whether section 21(1)(b) is triggered.

BSA and Commissions decision in respect of "Prime Minister's Hour with John Key"

44. The first broadcast at issue was a radio programme on RadioLive entitled the "Prime Minister's Hour with John Key" ("**PM Hour**").

45. The PM Hour was broadcast between approximately 2:09pm and 3:00pm on 30 September 2011 and was hosted by the Prime Minister, the Right Honourable John Key.

46. In summary, during the PM Hour, the Prime Minister:

(a) stated early in the show that he was not going to discuss election issues;

(b) read the weather forecast;

(c) interviewed celebrities, namely, Richie McCaw, Sir Richard Branson, Sir Peter Jackson, Lewis Brown; and

(d) engaged in conversation with the show's usual host, Paul Henry, including in respect of a recent downgrading of New Zealand's credit rating.

47. In October 2011, the BSA received a written complaint from the New Zealand Labour Party alleging that the PM Hour:

(a) was an election programme under section 69; and

(b) had breached the "Election Programme Code".

48. In a written decision dated 14 October 2011 ("**BSA's PM Hour decision**"), the BSA found that:

(a) the PM Hour was not an election programme under section 69; and, alternatively

(b) even if the PM Hour was an election programme, the applicable broadcasting standards had not been breached.

49. The Commission also received a complaint or complaints alleging that the PM Hour was, among other things, an election programme under section 69.

50. As recorded in detailed written reasons dated 8 February 2012, spanning seven pages, the Commission reached a different conclusion to the BSA. The decision noted the uncommon circumstances of the case and its novelty, and contained a discussion of the policy underlying the Act, and the Electoral Act 1993, but the decision makes no reference to NZBORA. The Commission ultimately took the view that the PM Hour was an election programme under section 69.

51. As a result, on 9 February 2012, the Commission referred the PM Hour to the Police under section 80A (the Commission's decision to refer the PM Hour to the Police, the written reasons underlying that decision, and the subsequent referral of the PM Hour to the Police are referred to below as the "**Commission's PM Hour decision**").

52. In a press release dated Friday 30 March 2012, the Police announced that they would not lay charges against RadioLive under the Broadcasting Act on the basis that "there is insufficient evidence to satisfy the requirements for prosecution".

Commission decision in respect of "Jono and Ben at Ten"

53. The second broadcast at issue was a short skit entitled "The School Terminator" which featured on the episode of "Jono and Ben at Ten" aired on TV3 on 28 June 2013 between approximately 10:05pm and 10:35pm ("**Jono and Ben skit**").

54. The Jono and Ben skit was a comedy skit related to the problems with the Ministry of Education's payroll system, Novopay, which featured a short cameo by the Right Honourable Winston Peters (a Member of Parliament and the leader of the New Zealand First Party).

55. Various problems with Novopay had been the subject of public scrutiny and discussion in the media and in Parliament at or about the time of the Jono and Ben skit.

56. In the last segment of the Jono and Ben skit, when a character representing Novopay is taking money from a teacher, the Right Honourable Winston Peters appears and the following dialogue takes place:

> Rt Hon Winston Peters: "Not so fast!"
>
> School Terminator: "Winston Peters! Are you here to stop Novopay?"
>
> Rt Hon Winston Peters: "Well I can't really stop it right now."
>
> School Terminator: "What exactly can you do?"

> Rt Hon Winston Peters: "I could complain about it [the New Zealand National anthem begins playing] but if you vote New Zealand First at the next election, we can sure set out to fix it up."
>
> Voiceover: [Character dressed like the Commission's mascot, "Orange Guy", appears by Rt Hon Winston Peters] "And remember to enrol to vote. This was an authorised electoral message."

57. In the last frame of the skit the following text appears:

> This message was authorised by Andrew Logan Robinson, 16 West End Road, Auckland.

58. Mr Robinson is a producer of Jono and Ben at Ten, but did not appear in the skit.

59. Having viewed the skit, we have little difficulty in concluding that a court would more likely than not regard it as a spoof touching on an issue of the day that had attracted some media attention, using figures real (Mr Peters) and imaginary (Orange Guy) to create a piece of slapstick comedy. An integral part of what makes the piece a spoof is its (very) superficial appearance of being an electoral advertisement, when it plainly is not (the election being well over a year away). This appearance is generated by the inclusion of Mr Peters, filmed next to Orange Guy, on a topic of current importance with the New Zealand anthem (resonating with the name of the party that he leads) being played in the background, along with other elements such as the "remember to enrol to vote" and "message authorised by Andrew Logan Robinson" lines.

60. In a press release dated 11 September 2013, the Commission announced that it considered that the last segment of the Jono and Ben skit summarised at 56 to 59 above was an election programme under the Broadcasting Act and that it had referred the segment to the Police (the Commission's decision to refer the Jono and Ben skit to the Police, and the subsequent referral of the Jono and Ben Skit to the Police are referred to below as the "**Commission's Jono and Ben decision**").

61. We are unaware of any Police decision to lay charges under section 80 in respect of the Jono and Ben skit. If charges have not already been laid, the charges can no longer be laid, as the time period within which charges could be laid has expired.[25]

62. The BSA has not received a complaint in respect of the Jono and Ben skit.

63. However, we understand that the BSA's view is that, applying the interpretation the BSA adopted in the BSA's PM Hour decision, it would not regard the Jono and Ben skit as meeting the definition of an election programme under section 69.

Practical effect of decisions

64. As set out at 44 to 63 above, there is a difference in views between the BSA and the Commission as to whether the PM Hour and Jono and Ben skit were election programmes under section 69.

65. Three interrelated effects arise from that difference in views:

(a) First, it creates uncertainty for the BSA, the Commission, broadcasters, and potential complainants as to what the correct legal test is for determining whether a broadcast is an election programme under section 69.

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[25] Criminal Procedure Act s 405; Summary Proceedings Act s 14.

(b) Secondly, the uncertainty as to the correct legal test under section 69 means that broadcasters cannot ascertain with a reasonable degree of certainty whether or not a particular programme will be regarded as an election programme and, therefore, whether:

(i) the programme would be governed by the broadcasting standards that apply to election programmes or the broadcasting standards that apply to 'every-day' programming;

(ii) the programme's broadcast would come within the terms of the prohibition in sections 70(1) and 80; and

(iii) the criminal sanctions imposed by section 80 are applicable.

(c) Thirdly, because a general election will be held in September 2014, there is an increased likelihood of the BSA and Commission facing further complaints that particular broadcasts are election programmes.

Application of the proper approach to the Commission's decisions

66. In our opinion, the Commission's PM hour decision and the Commission's Jono and Ben decision (together "**Commission's decisions**"), did not follow the proper approach to interpretation of the relevant provisions of the Broadcasting Act, in that the Commission's decisions are inconsistent with section 14 of NZBORA. We recommend that you do not follow its approach to the interpretation and application of the phrase "election programme" as illustrated by those decisions.

The Commission's PM hour decision

67. In respect of the Commission's PM Hour decision, the Commission materially misinterpreted the proper meaning of section 69. The Commission failed to adopt and apply an interpretation of election programme that is consistent with the right to freedom of expression protected by section 14 of NZBORA or a justified limitation on that right. Specifically, the Commission held that a situation where politicians have exposed themselves to the public in broadcasting media, without any active encouragement or persuasion that votes should go in that politician's direction, amounts, by virtue of the mere fact of exposure, to a breach of section 69.

68. The better interpretation of section 69 is that it is limited to those programmes which directly or overtly encourage, persuade or advocate voters to vote for a particular party or candidate, or which overtly and directly set voters against a particular party or candidate. Programmes which may, in an incidental, resultant, secondary or consequential way amount to encouragement, persuasion, advocacy or opposition for or to a particular political outcome should not be considered to be captured by section 69.

69. Further, the Commission failed to adopt and apply an interpretation of election programme that is consistent with the common law presumption that penal provisions should be strictly construed.

The Commission's Jono and Ben decision

70. In respect of the Commission's Jono and Ben decision, the Commission materially misinterpreted the proper meaning of section 69. The Commission failed to adopt and apply an interpretation of election programme that is consistent with the right to freedom of expression protected by section 14 of NZBORA or a justified limitation on that right.

Specifically, the Commission held that the Jono and Ben skit was an election programme, failing to consider whether the Jono and Ben skit appeared on a programme of a format that is capable of being an election programme under section 69 given its nature as a spoof commentary piece. Among other textual indicators, the Commission ought to have taken into account the effect of section 70(3) on section 69 of the Broadcasting Act. Section 70(3) provides that nothing in section 70(1) "restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes". When this is considered, the Jono and Ben skit can be seen to fall outside the definition of "election programme" in section 69. Instead, it is better seen as a spoof commentary piece, its broadcast not restricted by the Broadcasting Act.

71. The Commission also failed to adopt and apply an interpretation of election programme that is consistent with the common law presumption that penal provisions should be strictly construed.