

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 26/92

Dated the 26th day of May 1992

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

R.W. SMITH

of Auckland

Broadcaster

AOTEAROA RADIO

I.W. Gallaway Chairperson

J.R. Morris

R.A. Barraclough

L.M. Dawson

DECISION

Introduction

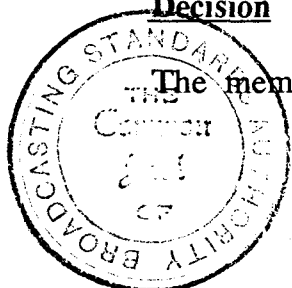
Mr Ray Smith, a hot air balloonist who, according to a newspaper report, frightened animals while flying was referred to in a talkback session on Aotearoa Radio, hosted by the Rev. Hone Kaa, late in the evening of 6 February 1992.

Six days later Mr Smith requested both a copy of the tape and a transcript of the programme. He was advised, first, that Mr Kaa was overseas and, later, when Mr Kaa returned, that the tape had been recycled.

As he was dissatisfied that he had not received a copy of the tape or a transcript, Mr Smith referred the complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989. He said that Radio Aotearoa had not complied with the Radio Code of Broadcasting Practice which requires that a recording of talkback programmes be kept for 28 working days and he complained that the comments which had been broadcast were defamatory and an invasion of his privacy.

Decision

The members of the Authority have read the correspondence (summarised in the



Appendix). As is the Authority's usual practice, the complaint has been determined without a formal hearing.

After being advised that he had been referred to in a possibly defamatory way on Aotearoa Radio on 6 February 1991, Mr Smith requested a copy of the tape from the station on 12 February. The broadcaster later advised him that the tape had been re-used and when he referred the complaint to the Authority, Mr Smith alleged the unavailability of the tape breached the Radio Code of Broadcasting Practice and that a defamatory broadcast had breached his privacy.

The Authority assumed that the reference to privacy amounted to an allegation that the broadcast breached standard 1.1(k) of the Radio Code which requires broadcasters:

- (k) To respect the privacy of the individual.

Because the tape has been recycled, the Authority has not listened to a tape of the broadcast. Indeed, the absence of the tape appears to be the kernel of Mr Smith's complaint. In these circumstances, the Authority considers that it is unable to determine the privacy complaint. The Authority would note however, on the information supplied by the complainant, that a breach of the privacy standard would appear not to have been established.

With reference to the complaint about the unavailability of a tape of the broadcast, standard 6.1 of the Radio Code reads:

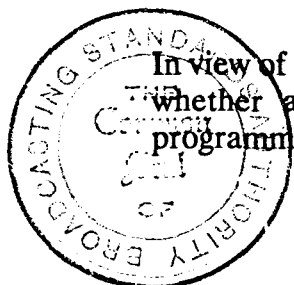
- 6.1 For a period of **28 working days** after broadcast, radio stations shall hold a recording of all talkback and open line programmes and a copy or tape of news and current affairs items.

Aotearoa Radio, in its correspondence, refers to the period of 14 days. The Authority would point out that the period was increased from 14 days to 28 working days in April 1990 and that the Independent Broadcasters Association advised its members of the change in May 1990. However, the Authority understands that Aotearoa Radio is not a member of that Association. Nevertheless, the increase in the time during which tapes must be retained is a matter which does not affect Mr Smith's complaint as he first requested a copy of the tape by fax on 12 February 1992. That request was made six days after the broadcast and, accordingly, was well within the time limit imposed by the now out-dated version of standard 6.1 referred to by the broadcaster's chief executive.

Standard 6.1 of the Radio Code is part of an approved code of broadcasting practice issued by the Authority under s.4(1)(e) of the Broadcasting Act 1989 which reads:

- (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -
- (e) Any approved code of broadcasting practice applying to the programmes.

In view of the wording of this provision, the Authority was initially required to determine whether a standard referring to the retention of tapes was a standard involving programmes and their presentation.



Complicating the Authority's decision was s.30(1) of the Act which reads:

- (1) The Authority may from time to time make and promulgate rules in relation to the retention by broadcasters of recordings of programmes broadcast by them.

The Authority has not promulgated rules under s.30 but the specific reference to the retention of tapes in that provision would suggest that it might not be a matter to be covered in a Code of Broadcasting Practice issued under s.4(1)(e). The Authority would note that this complaint is the first it has received under standard 6.1 and thus it has not been required to consider the issue previously. It acknowledges that a complaint under standard 6.1 may well have very serious overtones and that the issue should be clarified.

Having examined carefully the provisions in the Act and in particular s.4(1)(e), the Authority concluded that it was indeed permissible to include rules about the retention of tapes (such as that contained in standard 6.1 of the Radio Code) under the provision in the Act referring to codes of broadcasting practice. The Radio Code is an approved code of broadcasting practice and the wording in s.4(1)(e), "applying to programmes", includes the retention or otherwise of tapes of programmes. The Authority acknowledges that this is not an entirely satisfactory outcome and, to ensure that the question does not recur, it intends to proceed to promulgate rules about the retention of tapes under s.30 of the Act.

Accordingly, as the Authority decided that standard 6.1 of the Radio Code was properly part of the Code, it concluded that Aotearoa Radio, despite claiming ignorance of the current time period imposed, was in breach of both the outdated version and the current standard.

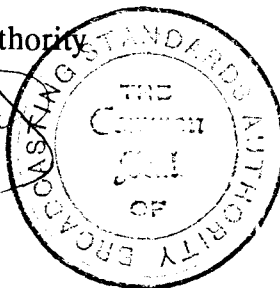
**For the reasons set forth above, the Authority upholds the complaint that Aotearoa Radio failed to hold a recording of a talkback programme broadcast on 6 February 1992 for 28 working days as required by standard 6.1 of the Radio Code of Broadcasting Practice.**

**For the reasons set forth above, the Authority declines to determine the aspect of the complaint that the broadcast breached section 1.1(k) of the Code.**

Having upheld part of a complaint, the Authority may impose an order under s.13(1)(a) of the Broadcasting 1989. Despite the very serious problems which may arise when tapes are not retained, it decided not to do so on this occasion because of the revised procedures put in place by the broadcaster to ensure the availability of tapes in the future and principally because, on the basis of the information supplied by the complainant, there was no apparent breach of the privacy requirement imposed in the Radio Code of Broadcasting Practice.

Signed for and on behalf of the Authority

*Iain Gallaway*  
Iain Gallaway  
Chairperson



26 May 1992

## Appendix

### Mr R.W. Smith's Complaint to Aotearoa Radio

Mr Smith was advised that he was described as a "bank robber" and as a "Ned Kelly" on a talkback programme hosted by Mr Hone Kaa on Aotearoa Radio at about 11.00pm on 6 February 1992. In a fax dated 12 February to Aotearoa Radio, Mr Smith referred to the allegations and requested a copy of the tape of the programme and a transcript of the passages in which he had been named.

### Aotearoa Radio's Response to Mr Smith

In a fax in response, the Manager of Aotearoa Radio (Mr R.R. Waru) said the hosts held copies of the tapes of their programmes and that the host in question was overseas but a copy could be supplied when he returned.

Following further requests from Mr Smith, in a fax dated 26 February Mr Waru advised him that the tape in question had been recycled. He added that the host (Rev. Kaa) said the programme had included a discussion about a newspaper story referring to Mr Ray Smith, a hot air balloonist, who had allegedly frightened some animals while flying in his balloon. Mr Kaa did not recall any references to either "Ned Kelly" or "bank robbers".

### Mr Smith's Complaint to the Broadcasting Standards Authority

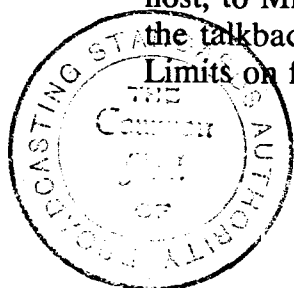
In a letter dated 3 March, Mr Smith referred the complaint to the Authority on the grounds that Aotearoa Radio had not held a tape of the programme for the required period. He also expressed concern about the defamatory nature of the references to him which he described in the Complaint Referral Form as "an invasion of privacy". He also recorded in the Form:

The station is denying the existence of a tape contrary to the Radio Code. I have to assume the tape was destroyed because of incriminating content.

### Aotearoa Radio's Response to the Authority

As is its practice, the Authority sought the broadcaster's response to the complaint. The letter to Aotearoa Radio is dated 12 March and its response, 26 March.

The reply included a memorandum dated 24 February from Mr Kaa, the talkback host, to Mr Waru, the Chief Executive in which Mr Kaa explained that the tapes of the talkback programmes were kept for a fortnight after which they were re-used. Limits on finance and space required their re-use after that time.



He recalled that during the discussion on air, which had followed on from a newspaper article, there had been two calls about Ray Smith of which one was positive. He could not recall either a caller or himself using the terms "Ned Kelly", or a "bank robber". Further, he understood that Mr Ray Smith was also a talkback host on Radio Pacific.

Mr Waru explained to the Authority that all tapes were held for 14 days, as required by the Radio Code of Broadcasting Practice, and although attempts had been made to find the tape following Mr Smith's request of 12 February, by the time Mr Kaa returned to work on 20 February it had been recycled. He added:

There are no grounds for Mr Smith to suggest that the tapes were erased to conceal defamatory material. Mr Kaa is an ordained Minister of the Anglican Church and is hardly likely to allow himself to become involved in such skulduggery.

He concluded by noting that, since receipt of the complaint, a system had been set in place to store all tapes for 30 days.

#### Mr Smith's Final Comment to the Authority

When asked to comment on Radio Aotearoa's response, by telephone Mr Smith stated that he had nothing further to say. He noted that he did not know the informant who had advised him of the comment broadcast by Radio Aotearoa but that his solicitor, who had acted for the informant, described him as a credible

person.

