REVIEW OF BROADCASTING STANDARDS AUTHORITY DECISIONS

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June 2013

I: INTRODUCTION

1. In March 2013 the Broadcasting Standards Authority requested a panel of three to provide an external review of ten of its decisions.[1] We were asked to include an assessment of:

   1.1 The legal robustness of the decisions and the quality of the legal reasoning;

   1.2 How well the board dealt with the boundary or balance between the broadcasters' freedom of expression and harm of the broadcast to individuals or society;

   1.3 Style and structure – readability and clarity of the decisions;

   1.4 The degree to which the decisions provide guidance and useful clarity on the Authority's' approach; and

   1.5 Consistency of approach (where possible given small sample size).

2. The panel watched or listened to each of the relevant broadcasts, and we met several times to discuss the written decisions of the Authority.

3. As a preliminary comment, we commend the Authority on its well-written, accessible and thorough decisions. The Authority deals with a large number of complaints each year, and has built up considerable institutional expertise, supported in many cases by empirical research and careful stakeholder engagement. Its decisions reflect a healthy and robust commitment to high standards and thoughtful analysis, and the Authority delivers decisions in a timely manner at a fraction of the cost of comparable processes in the courts. Our overall assessment is that the Authority does a very good job, and none of our comments should be taken as indicating any fundamental concerns with the Authority's approach.

II: CLARITY OF GUIDANCE

4. The first topic we address is the clarity of guidance provided in the Authority's decisions. In common with all similar bodies the Authority must deal with the tension between the need for clarity and precision and the danger of over-prescription. Prescriptive rules are usually clearer and more

[1] These are listed in Appendix 1.

certain, but do not always deal adequately with unforeseen circumstances and changes in technology or practice. Open-textured (standard-based) guidance is more flexible, but delivers less certainty. In some cases, this can lead to repeat complaints or industry confusion. In the broadcasting context many of the relevant concepts are inherently open-textured and difficult to define: balance, fairness, decency and privacy are just some examples. It is trite that every case is different, and the Authority cannot fetter its discretion in advance or adopt an unduly rigid approach.

5. Acknowledging all these points, it is obviously desirable for the Authority to provide as much guidance and certainty as practicable. The starting point is the Code of Broadcasting Practice, which is the reference point for all analysis. Beyond this the Authority has various mechanisms available to help provide clarity. These are well-known to the Authority, and already employed to varying extents in the decisions. They are:

   5.1 Clear articulation of the relevant test or principles that provide the basis for decision in each case;

   5.2 Concise synthesis of previous decisions when articulating the relevant test;

   5.3 Illustration of the test with reference to previous decisions; and

   5.4 Advisory opinions.

6. As to the first, so far as possible the Authority should strive to express the controlling principle for any decision in the form of a concise and neutral rule, test, or set of principles. The Code of Broadcasting Practice is the starting point, but there is a need for clear articulation of the tests that flow from each standard. For example, the Authority expressed the relevant requirements of the fairness standard this way in the Alasdair Thompson case:[2]

   > *"... a broadcast will be unfair if the excerpts broadcast do not fairly represent the content of the interview, or if the interview is edited in such a way that it excludes necessary clarifications made, or distorts the interviewee's views by excluding crucial elements of his or her argument.*"

7. Articulating the test in this way provides a focal point for the Authority's analysis, assists clarity and consistency across decisions, and helps broadcasters and complainants know in advance the standard the Authority will apply. In many instances the Authority does this very well, and we note below some areas where we see scope for improvement.

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2 *Francis, Gouge and Thompson and TVWorks Ltd*, 3 April 2012, at [122] (minority decision).

8. The second is the synthesis of previous decisions when expressing the relevant test. Whenever possible, the Authority should strive to reconcile and synthesise previous decisions into a concise statement such as the one above in para [6]. This helps promote consistency across decisions, and assists in the quality of reasoning. The Authority should see itself as developing a coherent body of rules/principles over time, while retaining the flexibility to deal with new or unusual cases appropriately. In the earliest days of the Authority it was inevitable that each case would need to be seen in isolation. With the degree of expertise and institutional knowledge now established, the Authority is well-placed to adopt a more systematic approach.

9. Third, it is helpful when the Authority fleshes out the relevant principles with concise illustration referring to previous decisions. Many of the issues addressed by the Authority resolve into boundary-setting exercises. It is not always easy or possible to define a bright-line test in advance. But case illustration can be a helpful way of giving meaning to the principles articulated by the Authority. For example, in the *Target* case the Authority illustrated the concept of seclusion with reference to three previous cases:[3]

> *"[18] An interest in seclusion was ... found to exist in the following circumstances:*
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> - *a magazine editor who had been accused of "luring young girls into his bedroom for trial photo shoots" was secretly filmed inside a rented apartment which, he was told, belonged to one of the models;*
> - *a doctor who had been accused of misconduct was secretly filmed in his surgery by a former patient;*
> - *a psychologist who had been accused of sexual misconduct and professional incompetence was filmed at his office with a hidden camera.*

10. This is an example of the Authority drawing on its own expertise in a way that assists the reader and the industry to understand the boundaries. At the same time, we acknowledge and accept the point made by the Authority in the Michael Laws case that context is critical, and caution must always be used in interpreting previous decisions.[4]

11. Fourth, there is the potential for the Authority to issue advisory opinions. There is a specific statutory mandate to do so, and the privacy principles, issued by way of successive advisory opinions in 1992, 1996, 1999 and 2006, have been a particularly successful example of this.[5] The Authority's work in this area has been influential in the High Court, and the panel felt that consideration might be given to further use of the advisory opinion

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3 *CP and TVWorks*, 19 December 2012, at [18].
4 *Blissett and Radioworks*, at [30].
5 See Penk, Tobin and Brookbanks, *Privacy Law in New Zealand* (2010), at 213.

mechanism, for example in the area of consent in the reality TV genre. That is the first of two specific topics we now turn to consider.

Consent in the reality TV genre

12. Reality TV has grown over the last decade to become a major component of broadcasting in New Zealand, as in other countries. It is relatively cheap and easy to produce, popular, and supports local production companies. However, it can have serious effects on individuals' privacy, economic interests and dignity, and can cause real harm. It has presented a number of challenges for the law and regulators around the world, and a body of case law and scholarship has developed internationally.[6] Questions include whether these programmes should be treated more like a news programme, or as entertainment; how to define privacy interests in a public place; and what rules should govern consent.

13. The panel considered three reality TV programmes: a *Target* show featuring electricians in a private home;[7] an episode of *Noise Control* featuring an intoxicated woman outside a private party;[8] and an episode of *The Inspectors* in which a fish and chip shop received a "D" food safety grade.[9] Our main comment relates to the issue of consent.

14. In our view, there is scope for the Authority to provide greater guidance on the topic of consent in this context. This is perhaps best demonstrated by the *Noise Control* case. The particular episode featured a Council Noise Control Officer attending a loud party in Auckland. The complainant was the host of the party, and accompanied the Officer out onto the footpath to discuss the complaint, remonstrating with him in a spirited way suggesting she had consumed a reasonable amount of alcohol. Her behaviour was by no means extreme or outrageous, but she told the authority the broadcast humiliated and distressed her, and her daughter had been taunted at school with accusations that her mother was an alcoholic.

15. Because the relevant events took place in a public place, and because the complainant had not raised privacy in her original complaint, the Authority considered the case as an issue of fairness rather than breach of privacy. The Authority reached the view that the complainant had been treated unfairly because she accompanied the Officer on to the footpath without being adequately informed of the nature of the programme or her participation in it. She had therefore not given informed consent. The broadcaster was unhappy with the Authority's decision, calling it "*a serious departure in process from*

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6 See for example Westerman, "As Seen On TV: Your Compromising Cameo on National Reality Programming", (2013) 12 J. Marshall Rev. Intell. Prop. L. 403; Dehn, "Reality TV and the New Reality of Media Law", (2006) 23 Del. Law. 14; Natalya King, "Privacy and Reality Television: Issues for Producers and Involuntary Participants" in Penk, Tobin and Brookbanks, *Privacy Law in New Zealand* (2010), 297.

7 *CP and TVWorks*, 19 December 2012.

8 *SP and TVWorks*, 5 May 2011.

9 *FS and Television New Zealand*, 19 December 2012.

what has been clearly understood by the industry for many years".[10] That was based on the broadcaster's understanding that the Authority classified reality TV programmes as analogous to news stories, and that in most cases openly filming in a public place would be enough to inform a participant that they are being interviewed for a news item that may be broadcast nationwide. The Authority rejected that submission, and did not endorse the suggestion that all reality TV programmes are analogous to news stories. Although the Authority largely found unfairness on the basis of lack of consent, it stated, "*we have not made a finding that her consent was required*."[11] That apparent contradiction highlights the potential uncertainty in this area.

16. In light of this case, members of the panel felt it would be desirable for the Authority to attempt greater guidance on the topic of consent in reality TV. In many cases reality TV shows are in substance entertainment, and the panel felt it would be reasonable to require explicit informed consent for *all* identifiable and substantive participants, whether filmed in a public place or not. Given clear advance guidance, there is no reason the industry could not comply with a general requirement to obtain a signed waiver, or explicit filmed consent, in all cases where a substantive participant will be identifiable.

Fairness and balance in news / current affairs / documentaries

17. We considered four cases in this category: TV3's treatment of Alasdair Thompson;[12] Campbell Live's use of a hidden camera to film interactions with a reporter wearing a burka;[13] Media 7's piece critical of an Australian reporter's story on the war in Afghanistan;[14] and Brian Bruce's documentary "*Jesus – the Cold Case*",[15] which contained accusations against the Christian church of fostering the anti-Semitism that led to the Holocaust.

18. We preface our comments by acknowledging that fairness and balance frequently conflict with the imperatives of modern broadcasting. Fairness can be expensive, difficult, and unattractive (even boring) for audiences. This makes the Authority's role in defining and promoting fairness all the more important.

19. We considered that the Media 7 case might have been assisted by a concise statement of what the fairness standard requires in this context. The controlling principles the Authority applied were spread through paragraphs [16], [19] and [21]. A synthesis of these paragraphs, and previous decisions of the Authority, might have been along these lines:

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10 *SP and TVWorks*, 5 May 2011, at [82]
11 Ibid, at [69].
12 *Francis, Gouge and Thompson and TVWorks*, 3 April 2012.
13 *JS and TVWorks*, 1 May 2012.
14 *Charley and Television New Zealand*, 4 December 2012.
15 *Axford, Bate and Oldham and Television New Zealand*, 20 December 2011.

> *"The fairness standard requires broadcasters to give any person criticised in a broadcast a reasonable opportunity to respond, and for any such response to be summarised adequately in the broadcast. The fairness standard is flexible, and all the circumstances must be taken into account. Greater latitude is given to broadcasters when the subject-matter is an expression of opinion regarding a public figure or professional in the public domain, or when the presentation is satirical or comedic. However personal abuse is presumptively unfair, and the standard of fairness must be commensurate with the seriousness of any allegations made.*

20. Whether or not that statement fully captures the Authority's approach, the clarity of the Authority's decision would have been assisted by a summary of that sort at the start of the analysis section.

21. Similarly, in the *Alasdair Thompson* case, a reader wishing to understand the Authority's approach to fairness would need to reconcile paragraphs [36], [39], [63], [65] (majority) and [110]-[113], [122] (minority). A single synthesis of the relevant enunciations of the fairness standard would have assisted the clarity of the decision. This is all the more important in a controversial decision producing a dissenting view.

22. In the *Noise Control* case, a reader wishing to understand the controlling principles would need to read paragraphs [50] to [57], then [69] to [74], then [84] to [87]. In any case it ought to be possible to summarise the relevant principles in a single paragraph, or a handful of paragraphs at most. This should form one block of text, so the reader is presented with a readily accessible explanation of the controlling test.

23. As to the substance of the decisions:

    23.1 In relation to *Jesus – the Cold Case*, the panel felt that what the programme set out to do – to revisit the crucifixion as a cold case – and what it ended up doing – accusing the Christian church of fostering the persecution of the Jews throughout the centuries were two different things. The programme was portrayed as the work of an "investigator", cloaked in objectivity and fairness – rather than an opinion piece. The second part of the programme made a forceful attack on the Christian church, and the panel felt some balance was necessary. Given the centrality of religion to many people's lives, the panel found it difficult to agree with the Authority's conclusion that this was not a "*controversial issue of public importance*".

    23.2 In relation to the *Media 7* case, the panel considered the broadcast had at the very least tested the boundaries of acceptable standards of fairness. The reporter stated, "*It's a little bit disturbing that there's this kind of narrative for political reasons and perhaps in the case [of] some journalists, for reasons of ego or for less altruistic*

reasons ..."[16] This was a direct attack on the integrity of the *Dateline* reporter, and the panel was not convinced a genuinely fair opportunity to respond had been afforded.

23.3 In relation to the *Alasdair Thompson* case, the panel was concerned that Mr Thompson was treated unfairly, despite the self-inflicted nature of many of his wounds. The panel thought the broadcaster presented a distorted picture of the views expressed by Mr Thompson in the initial interview, and omitted essential elements of Mr Thompson's position. Moreover, the follow-up studio items mischaracterised Mr Thompson's statements in a way that was detrimental to him, and ultimately cost him his job. While there is a clear place for lampooning and hyperbole, the starting premise was a misrepresentation of Mr Thompson's stated views.

III: APPROACH TO THE NEW ZEALAND BILL OF RIGHTS ACT

24. The New Zealand Bill of Rights Act 1990 has the potential to affect the work of the Authority in two main ways. The first is when the Authority defines the test or principles that apply to a relevant standard. The second is when it applies the relevant test to a set of facts.

Bill of Rights analysis when defining the relevant test

25. Most of the commentary to date has been on the second issue, focusing on the level of individual facts, but there is real potential for the Bill of Rights to be relevant at the point when the Authority defines its approach to each of the broadcasting standards. Any relevant test should be defined in a way that limits expression only to the extent justified in terms of s 5 of the Bill of Rights. This might lead the Authority to adjust or revise a test to be more protective of expression in certain cases. For example, the test might be defined to recognise the special status of political speech or commentary on public affairs.

26. A potential example arises from the Michael Laws case. In that decision a majority of the Authority upheld a complaint on the grounds of good taste and decency, and found it sufficient that Mr Laws' comments "*had the potential to distress or offend*".[17] It may be questioned whether that threshold is too low in the context of an expression of opinion on a matter of public importance. A Bill of Rights analysis would focus attention on the test, and might well result in the test being redefined in a way more protective of legitimate expression.

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16 *Charley and TVNZ*, 4 December 2012, at [15].
17 *Blissett v RadioWorks* at [48].

27. In the previous section we commented that the Authority might usefully focus on synthesising its analysis more frequently into concise statements of principle. The Bill of Rights would be relevant to that exercise, and could in some cases result in the redefinition of tests in order to promote free expression.

Bill of Rights analysis in specific cases

28. This is the area that has attracted the greatest attention so far. In 2006 Professor Burrows noted that the Authority tended to use a standard clause when upholding a complaint, stating that the Bill of Rights had been taken into account and given its full weight.[18] Professor Burrows was generally comfortable with that approach, concluding it would be "*tedious and unhelpful*" for the Authority to weave the Bill of Rights into its discussion in all or most of its cases.[19] He suggested the Authority continue to use the boilerplate clause in most cases but engage in more explicit analysis of the Bill of Rights in a few less usual cases with an issue of difficulty, novelty or importance in the interpretation or application of the criteria.[20]

29. A number of High Court decisions took different views, but ultimately the High Court has settled on the conclusion that the Bill of Rights must be considered in every case where a complaint is upheld.[21] As to the appropriate Bill of Rights method, a legal paper in 2008,[22] and a review of the Authority's decisions in 2012,[23] both took the view that the Authority should alter its approach to the Bill of Rights. Following this, the Authority has moved to a new approach that affords freedom of expression a prominent place at the start of its analysis, and which weaves the Bill of Rights analysis throughout the decision. Under this new approach it is usual for the Authority to begin with a series of statements about the importance of freedom of expression. This recitation can have an almost liturgical quality to it, but in some cases appears to affect the Authority's substantive approach. The following lengthy example is from the *Alasdair Thompson* case, which led the Authority to begin its analysis by emphasising that it would require a "*strong justification*" before upholding the complaint:

> *[26] Consideration of the Bill of Rights Act is fundamental to our consideration and evaluation of these complaints. The complainants have asked us to hold that the broadcasts ought not to have been produced and presented in the way in which they were. They say that in some cases, material that was not broadcast ought to have been broadcast, and in other cases, material that was broadcast should not have been broadcast.*

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18 Burrows, "Assessment of Broadcasting Standards Authority Decisions" April 2006.
19 Ibid, at p 18.
20 Ibid, at p 19.
21 See *Television New Zealand Ltd v West* CIV-2010-485-002007, 21 April 2011, Asher J at [86].
22 Geiringer and Price, "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Finn and Todd, *Law Liberty, Legislation* (2008).
23 Price, "The BSA and the Bill of Rights, a Practical Guide", May 2012.

They wish us to hold that the broadcaster erred in undertaking the broadcasts as it did. We are being asked to limit the right of freedom of expression which is provided for in the Bill of Rights Act. In terms of that Act, if we are to uphold a complaint we must impose only such limit on the broadcaster's right of freedom of expression as is reasonable and we must be able to demonstrate that our limitation is justified. Put simply, we must be able to show that the harm done by the broadcast justifies any limitations imposed by upholding any part of the complaints under the nominated standards. When we speak of any harm being done by the broadcast, this need not be related to a particular person or persons, although it often is. The harm can be in a wider sense and the Act recognises that there is a general harm in limiting the right of freedom of expression in a democratic society. If we are to impose limitations, we have to show that they are counterbalanced by other adverse consequences which would arise if limitations were not imposed.

[27] When we apply these principles, we must do so on a case by case basis. Each case will be different and the weightings will be different. We need to attribute a value to what was broadcast and we need to attribute a weight to the consequences that occurred, or may have occurred, in a particular case. In an open and democratic society, limitations on what can be said and on what can be expressed are not to be imposed without careful consideration.

[28] The right to free expression includes the freedom to seek, receive, and impart information and opinions of any kind in any form. In the broadcasting standards context, the broadcaster has the right to impart such information, while the audience has a corresponding right to receive it.

[29] The broadcasts, the subject of these complaints, involved a public figure being interviewed and the views he expressed being challenged. The interviewing of public figures by journalists is an important feature of life in a democratic society. Such interviews take numerous different forms and have numerous different purposes. At one end of the spectrum, these interviews may be little more than opportunities for a public figure to express his or her views and have them conveyed to the public with little in the way of challenge. At the other end of the spectrum, there are those interviews in which a public figure is tested and challenged and has his or her position strengthened or weakened by that testing process.

[30] In our view, when a person puts himself or herself into the public arena and wishes to speak on matters of public interest, he or she has to expect to be challenged. Sometimes it might not happen, but when it does it has to be accepted. Some people, when being interviewed, flourish when challenged and the challenge brings sharpness and piquancy to their responses. Others become defensive and yet others become aggressive in ways that are unhelpful to the arguments they seek to make. There are many shades and differences of response. The testing of people by questioning and challenge is commonplace and well understood in public

life and in places such as the Courts. Those who enter these environments and work there have to expect that one day the discomfort of challenge may come upon them.

[31] Mr Thompson was the public face of a large association of employers and manufacturers in New Zealand. His comments formed part of a political debate in the public domain as he endeavoured to represent that organisation. Mr Thompson has extensive experience as an advocate for employers in media and political environments, and has often appeared on radio, television and in newspapers. He was the CE of the EMA for 12-and-a-half years, and before that he was mayor of the Thames Coromandel area for nine years. Further, we have been informed by Mr Thompson's counsel that he has previously been heavily involved in politics, including being a parliamentary candidate and vice president of a political party. In addition, he has been the spokesperson for a number of charities on a voluntary basis.

[32] It is apparent that Mr Thompson wanted to use the interview as a platform for the exposition of his views and he did not want to be diverted from his intended programme, nor did he want to, or expect to be, challenged in what he intended to say. It is understandable that he would have wanted an opportunity to retrieve the situation which had developed since his morning radio interview, but of course every such opportunity carries with it the danger that the situation may be made worse.

[33] We have judged the speech, on this occasion, to have high value. The value was not just in the issues being debated but also arose substantially from the challenge of a public figure and a prominent organisation. When public figures, who have to expect challenge, are challenged, this is a legitimate process and it is one which should not be limited without strong justification. We now move to consider whether, in this case, there was any such justification.

30. Notably, this analysis preceded any discussion of the relevant standards (fairness, accuracy, balance). Arguably this reverses the logical sequence. The Authority's overriding task is to conclude whether the broadcasting standards have been breached—in this case whether the broadcast was unfair, unbalanced, or inaccurate. Those questions should be addressed first in our view, rather than lengthy discussions of free expression. Undoubtedly the Bill of Rights may be relevant to defining the appropriate tests. However, we did not think the newer approach of inserting Bill of Rights discussion at the front of the analysis was ultimately helpful. Indeed, in the *Alasdair Thompson* case, we think it arguably affected the result. Paragraph [33] of the decision began with the premise that the stories were "high value" expression, and that "strong justification" would be required to justify any limit. Instead of asking, "was this fair?" the question became "is there a *strong justification* to limit the broadcaster's freedom?" That focus diverted attention away from the real issue.

31. For our part, we essentially favour the approach outlined by the High Court in *TVNZ v West*.[24] In our view, when considering specific fact situations:

31.1 A Bill of Rights analysis is required only if the Authority reaches a preliminary view that it will uphold a complaint. Where the decision is to decline a complaint there will be no limit on freedom of expression, and it is unnecessary to undertake that analysis;

31.2 The issue is whether upholding the complaint can be demonstrably justified in a free and democratic society. In other words, the Authority must ask whether the limit resulting from upholding the complaint is outweighed by the importance of free expression in the particular case;

31.3 In doing so, the Authority should carry out the proportionality exercise in relation to the decision as a whole, rather than looking at each breach individually;

31.4 It is not necessary for the Authority to go through a detailed analysis of the balancing factors: a succinct summary is sufficient.

32. In other words, at the specific factual level what is required is a short and direct analysis of whether a decision upholding a complaint is a justified limit on free expression, and why. If the Bill of Rights is employed at the level of defining the relevant test, it should be rare for the Authority to conclude that upholding a complaint would be an unjustified limitation. But the analysis would provide an important cross-check in particular cases.

33. As to the required level of sophistication, we respectfully agree with Professor Burrows that it is important to keep things simple. The Authority's decisions should be understandable by people who are not legally trained. Fully-blown proportionality analysis would not meet that standard. Moreover, as Professor Burrows said, lengthy discussions of whether a limitation is reasonable or justified in a democratic society are not always particularly informative. Even when undertaken at the highest levels of the Court system, such analyses can be difficult to follow.

34. For these reasons we respectfully think a modification of the Authority's approach to the Bill of Rights would result in a more straightforward and understandable approach, without any harm to freedom of expression.

IV: STRUCTURE OF DECISIONS

35. While we found the Authority's decisions in general to be very well-written and accessible, we offer some suggestions for the Authority's consideration.

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24 *Television New Zealand Ltd v West* CIV-2010-485-002007, 21 April 2011, Asher J.

Fundamentally, we think the Authority could aim for a slightly simpler, cleaner structure along the following lines:

35.1 **Introduction**. A short section introducing the case in a few sentences.

35.2 **Facts**. A concise summary of the broadcast, including relevant factual findings where necessary (to the extent this is applicable given that the Authority resolves almost all cases on the papers). In general we think all relevant facts should be brought out in this section, rather than additional facts being spread throughout the decision. We do not think it is necessary to describe the way in which the original complaint to the broadcaster was made and dealt with – the relevant arguments on both sides can be referred to in the "submissions" section to the extent they are relevant before the Authority.

35.3 **Relevant standard / test**. As discussed, we think the Authority should aim for a concise statement of the relevant test, illustrated with reference to previous cases as appropriate. In situations where the Authority is called on to reconsider its approach, it would be appropriate to review the test through a Bill of Rights lens. In terms of structure, we think the authority should always set out the relevant test *before* undertaking its analysis. In at least one case we reviewed, the test was not fully described until after the Authority reached its conclusion.[25]

35.4 **Summary of submissions**. We think it is sufficient to summarise the main points made by the complainant and broadcaster. It should not be necessary to go through a blow-by-blow account of the submissions made, or the complaint process with the broadcaster, so long as the essence is captured.

35.5 **Analysis / decision**. This should contain a brief articulation of why the Authority considers the relevant test is met or not met.

35.6 **Orders**.

35.7 **Bill of Rights analysis**. If the Authority decides to uphold a complaint, it should assess whether the limit that decision constitutes on freedom of expression is justified under the Bill of Rights.

36. In cases involving multiple standards, the third to fifth sections could be repeated. Obviously no one structure will fit all cases, but we think a generic

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[25] *Blissett and RadioWorks* at [48].

template along the lines above might help streamline the Authority's decisions.

V: CONSISTENCY OF APPROACH

37. We considered two decisions under this heading, both involving talkback radio hosts. The first was a complaint against Willie Jackson and John Tamihere,[26] and the second a complaint against Michael Laws.[27] In the first, Willie Jackson expressed support for striking workers on the Auckland waterfront, saying among other things, "*I hope they get aggressive down there at the wharf*", "*don't stand by and wave your flags. Go and bust some pickets over some of these scabs*", and "*I'm into militant action*". In the second, Michael Laws criticised other journalists saying among other things, "*If I had a gun I'd shoot them, put them out of their misery, because they have gone rabid and they may infect others. ... the Herald on Sunday for example ... no idea why somebody just hasn't taken a shotgun there and cleaned out the entire news room. ... they're all completely mad, so you know, you just lay your bait, put down a bit of cyanide somewhere in a news room, and you know just hope there isn't too much collateral birdlife that's killed.*"

38. In both cases the Authority dismissed complaints based on the law and order standard. We respectfully agree that neither case posed a serious threat to law and order. However a majority of the Authority found that Michael Laws' comments breached the good taste and decency standard.

39. It is undoubtedly correct that many people would find Mr Laws' comments offensive. The decency standard was not in issue in the Jackson/Tamihere case, and was only raised in the Laws case. Despite this point of distinction, the results in both cases raise a potential issue of consistency.

40. On balance, the panel felt attracted to the minority reasoning in the Laws case, and considered the complaint might have been dismissed. Central to the minority argument was the view that the broadcaster's "*outspoken and combative*" style and frequent use of satire were already well known to his audience, with the result that they were unlikely to cause offence. The minority view further argued that satire is an important tool when commenting on political figures and events, and in this case had special significance, given the bizarre circumstances surrounding the "Teapot Affair". It was unlikely that listeners would have taken seriously any calls to arms in the hope of ridding society of journalists. The panel considered these comments might have been applied equally to both the Laws and Jackson/Tamihere cases.

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26 *Bhavnagar and RadioWorks*, 13 November 2012.
27 *Blissett and RadioWorks*, 5 July 2012.

VI: ORDERS / COMPENSATION

41. The decisions reviewed by the panel indicated a general reluctance to make any orders following a breach of the broadcasting standards. In two cases, the panel felt consideration might have been given to making an award of compensation.

42. The first was the case of the fish and chip shop in Dunedin, where the Authority found the broadcaster's actions were "*fundamentally unfair [and] highly damaging to the business owner's reputation and potentially their livelihood.*"[28] The shop owner and his family were subject to abuse.[29] While the complainant did not make any submissions on the topic of compensation, the panel felt this was an appropriate case for the Authority to make such an award.

43. The second was the *Target* case, where an identifiable complainant was found to have suffered a breach of privacy. Again, while he did not make any submissions on orders, the panel felt some compensation may have been appropriate.

VII: CONCLUSION

44. Media regulation is undoubtedly a challenging area, with developing forms of broadcast such as reality television, new technologies, and changes in audience expectations creating a dynamic environment. There have recently been well-publicised inquiries into the reform of media regulation in the United Kingdom,[30] and Australia,[31] and there is some uncertainty about the future regulatory environment in New Zealand following the Law Commission's report *The News Media Meets "New Media"—Rights, Responsibilities and Regulation in the Digital Age.*[32]

45. Against this background, our review of a snapshot of Broadcasting Standards Authority decisions leads us to the view that the Authority is in good health and doing a good job of providing robust accessible guidance to the industry, while resolving complaints in a timely and appropriate manner. The various suggestions contained in this review are not intended to detract from the panel's overall endorsement of the excellent work undertaken by the Authority.

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28 *FS and TVNZ*, 19 December 2012, at [41].
29 Ibid, at [32].
30 See < http://www.levesoninquiry.org.uk>
31 *Report of the Independent Inquiry Into the Media and Media Regulation*, Hon R Finkelstein QC, 28 February 2012.
32 NZLC R128, March 2013.

Appendix One – Decisions Considered

Charley and Television New Zealand Ltd[33] (Media 7)

Axford Bate and Oldham and Television New Zealand Ltd[34] (Jesus – the Cold case)

FS and Television New Zealand Ltd[35] (Environment health and fish and chip shop)

CP and TVWorks Ltd[36] (Target and electricians)

Bhatnagar and RadioWorks Ltd[37] (Willie and JT and Ports of Auckland)

JS and TVWorks Ltd[38] (Hidden cameras and burqas)

Francis, Gouge and Thompson and TVWorks Ltd[39] (Alasdair Thompson)

SP and TVWords Ltd[40] (Noise control)

Blissett and RadioWorks Ltd[41] (Michael Laws and 'rabid' journalists)

Rae, Schaare and Turley and Television New Zealand Ltd[42] (Grieving family)

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33 2012-073.
34 2011-115.
35 2012-036.
36 2012-031.
37 2012-045.
38 2011-122.
39 2011-104.
40 2010-112.
41 2012-006.
42 2010-007.