ASSESSMENT OF BROADCASTING STANDARDS AUTHORITY DECISIONS

Introduction

I have been asked to conduct an assessment of the decisions of the Broadcasting Standards Authority released during 2005. The terms of reference are as follows:

- the legal robustness of the decisions, ie the degree to which the decisions and the process by which they were reached accords with accepted principles of media law, public law and the New Zealand Bill of Rights Act;
- the quality of the legal reasoning in the decisions;
- the consistency of the legal reasoning in the decisions.

I have viewed all decisions of the BSA released during the assessment period, and selected 75 for closer study. Rather than examine each decision individually, I shall deal with the themes which I see arising from them. I have borne in mind the following considerations:

(i) The decisions are public documents available for perusal by anyone; lawyers, media personnel and members of the general public. It is important that the decisions be such as to justify public confidence in the Authority and its processes.

(ii) It is important, as with any judicial decision, that the parties can see that their arguments have been properly considered and can understand why the decision was made as it was, whether or not they agree with it.

(iii) BSA decisions are appealable to the High Court, which treats appeals as if they were appeals from the exercise of a discretion. As it has been put by the Court of Appeal[1]:

> the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong.

To ensure the effective disposal of the appeal it is important that the BSA sets out its reasons clearly in its decision, so that the Court is able to understand how the decision was arrived at. It is obviously also desirable that the principles applied, and the factors taken into account, by the Authority are the right ones.

I can say immediately that my overall conclusion is that from a legal point of view the BSA decisions are very good. They exhibit an appropriate level of rigour and analysis, and are based on principles which are legally sound. My quibbles are minor.

I shall deal with the following matters:

- Structure
- Language
- The standards
- Reasoning
- Consistency
- Relationship with the Law
- Accuracy
- Balance
- Bill of Rights Act
- Orders

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[1] *Comalco NZ Ltd* v *Broadcasting Standards Authority* (1995) 9 PRNZ 153 at 161-162

Structure

Although some of this falls within Mr Tully's terms of reference,[2] I thought I should comment on the structure of the decisions from a legal point of view. It is important that all decisions of a judicial or quasi-judicial body adopt a consistent structure so that readers, lay and legal, are able to locate the various elements of the decision easily. Familiarity is an important element of understanding and analysis. The BSA decisions all follow the following order.

Headnote

I applaud the Authority's use of headnotes. They contain a brief summary of the facts, a summary of the findings on each complaint, and a note of any order made. This makes relevant decisions easy to find when one is doing a search, and ensures that the reader moves into the more detailed reading of a decision with an understanding of what he or she can expect there. I thought that almost invariably the headnotes were an accurate reflection of the decisions, although I did note one, *Egg Producers Federation* and *Canwest*[3] which I thought did not quite capture the essence: the headnote separates out accuracy and fairness whereas the decision itself conflates them, and neither could I find any statement in the decision that "beak trimming comment verged on unfairness". But one out of 75 is scarcely evidence of a serious deficiency.

Broadcast
Complaint

A clear and accurate statement of facts is important. One cannot properly understand the decision without it. Moreover, the facts, and the determination on them, are what in most people's minds form the precedent which the decision establishes. The facts are remembered as a benchmark against which to compare future broadcasts.

I thought that under both of these headings (Broadcast and Complaint) the BSA set out the facts of the decision clearly, but remarkably economically. Even in the most complex cases it was seldom necessary to extend to two pages. Sometimes the whole recitation took well under a page, a pleasant contrast to many court judgments these days. In virtually all cases, I found I needed no more information to understand the decision. In one or two, though, I could have done with more detail. For example in *Steadman* and *TVNZ*[4], I am still a little unclear about the privacy complaint in relation to Dr Davies, Dr Madlener's wife. One has to infer what most of that was about. That is a pity as it does appear to be an illustration of the topical subject of filming in a public place.

Standards

Not all readers will have a copy of the relevant Broadcasting Code to hand when they read the decision, so it is important that the relevant standards be set out fully in the decision. That was done in every case.

The Pleadings

It was helpful to have the broadcaster's response to the complainant summarised, followed by the complainant's referral to the Authority, and the broadcaster's response to the Authority if any. In earlier decisions of the Authority those "pleadings" were attached to an appendix at the end of the BSA decision. While there are some arguments for doing it that way (one gets to the substance of the BSA decision more quickly), I prefer the new approach

[2] [Editor's note: due to unforeseen circumstances, Mr Tully's report did not eventuate.]
[3] 2004 – 220 (the battery hens case)
[4] 2004 – 189

where they come **before** the determination. One can follow the progressive refinement of the issues involved, and the reader is enabled to grasp very clearly the issues with which the BSA is left to deal.

The Authority's Determination
The actual determinations are briefly but clearly written, and clearly itemised under headings relating to each of the various standards. Each standard is directly and specifically addressed. If there are several complaints relating to the same standard, they are sub-headed in italics. I thought the use of headings and subheadings was excellent. Not only does it make for easy reading and comprehension, it ensures clear and precise analysis and proper focus on each relevant standard in turn. An appellate court can readily perceive the path followed to the eventual decision.

Holding
The decision of uphold or not is clearly stated in bold. It is important that this stands out, and it does.

Orders
If any aspect of a complaint is upheld, there is then a summary of the submissions made in relation to orders, and the Authority's reasoning on what orders are appropriate. The orders made by the Authority are set out in bold at the end.

Conclusion
I think it would be difficult to improve on the structure and format of the decisions. They flow logically and are very easy to understand. The use of headings and sub-headings is excellent.

Language

Although this again falls rather within Mr Tully's terms of reference,[5] I think the style and language of the decisions are appropriate to judicial decision-making.

- There is a fine balance to be drawn between language which is readily accessible to the lay person, and yet precise and accurate enough to withstand legal challenge. I thought the Authority's decisions strike that balance well.
- It is important that legal writing does not stray into irrelevance, yet on the other hand does not leave out anything of importance. I thought the BSA decisions pass this test.
- It is important that legal writing be objective and that it exhibit neither prejudice nor emotion. When condemnation of a broadcast is justified it is important that that be done clearly, as strongly as necessary, and yet with appropriate restraint. I thought the BSA's form of expression meets that criterion too.

The Standards

Introduction
The jurisdiction of the BSA depends on the Broadcasting Act 1989, section 6, which provides that a complaint must constitute an allegation that the broadcaster has failed to comply with section 4. Section 4 provides:

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

[5] [Editor's note: due to unforeseen circumstances, Mr Tully's report did not eventuate.]

(a) the observance of good taste and decency; and
(b) the maintenance of law and order; and
(c) the privacy of the individual; and
(d) the principle that when controversial issues of public importance are discussed, reasonable efforts are made or reasonable opportunities are given to present significant points of view either in the same programme or in other programmes within the period of current interest; and

(e) any approved code of broadcasting practice applying to the programmes.

In fact all complaints are made under section 4 (1)(e) in that they all complain about a breach of a code rather than of the statutory provisions. This in fact is required by the BSA's website which provides:

> Formal complaints must claim that a particular broadcast breached one or more of the standards set out in one of the codes of broadcasting practice.

However this does not matter, because the major codes, that is to say, the Radio and Free-to-air Television codes, both effectively repeat paragraphs (a) to (d) of section 4, and add further standards besides. There are, however, significant differences between the television and radio codes, and I hope I may be excused a brief diversion to mention them.

First, the Radio Code follows the words of the Act exactly, in that the first four standards apply "in programmes and their presentation". However, the Television Code provides that those standards apply "in the preparation and presentation of programmes". (Other standards in the Radio Code are inconsistent about this). Particularly in relation to standards 3 and 4, this could make a difference, in that radio might be able to argue that conduct in the information-gathering stage is not covered by the standards. I hope they would not so argue.

Secondly, the guidelines in the Radio Code are much sparser than those in the Television Code. In part this is due to the differences between the two media, but not entirely. This lesser guidance could mean that the BSA has greater discretion in the application of the standards when dealing with complaints about radio.

Thirdly, the Radio Code has a separate standard which does not appear in the Television Code – "social responsibility". The Act does not require this, and it is so open-ended that it hardly means anything. It is only given shape at all by the guidelines which accompany it. I note that certain matters such as denigration are dealt with under this standard for radio, but under another (fairness) for television.

As long as broadcasters submit their own drafts of codes, which is highly desirable from a buy-in point of view, such discrepancies are inevitable, but from the point of view of the development of concepts and consistency across broadcasting, I think the discrepancies are unfortunate. Thus "fairness" means a slightly different thing in relation to television than it does in relation to radio, in that "social responsibility" has taken over some of its content in relation to radio.

Addressing the Standards: General

In most cases the complaint relates to several standards. Where this happens, each one is generally dealt with separately, and the Authority addresses it and arrives at a separate conclusion on it. If a standard has several elements, each element is itemised separately, even though a finding on only one will decide the case. Thus in *Barraclough* and *Canwest*[6] (the Emma case), the Authority, in addressing Principle (i) of the Privacy Standard, said:

> Principle (i) contains two elements. There must be a disclosure of private facts, and that disclosure must be offensive and objectionable. In the present case, irrespective of whether any private facts about the

[6] 2005 - 024

> boys were disclosed, the Authority finds that the disclosure was not one which a reasonable person of ordinary sensibilities would find highly offensive and objectionable. The item reported that in order to stay with the boys and their family, Emma had lied to them about the circumstances under which she had left home. The Authority finds that the programme did not lay any blame on the boys for Emma's actions, and they were not presented in a bad light. Accordingly, broadcasting their association with Emma was not highly offensive and therefore no breach of privacy occurred.

That commendably brief extract says all that is necessary.

If a complainant complains about a number of matters under the same standard, each one is dealt with separately[7]. Each allegation is addressed briefly and clearly.

Addressing the Standards: Overlaps

However, it is inevitable, given the open-ended nature of most of the standards, that there will often be overlap between them. For example, doorstepping and hidden cameras may raise issues of both privacy and fairness; in some cases fairness is difficult to separate from balance, or fairness from accuracy, or accuracy from balance. Where possible I think it is desirable for the BSA to attempt to deal with them separately, and generally it does so. The standards are regarded by the Codes as different, and therefore in theory have different content. But I agree that sometimes separation is not readily possible, and to try to do so would simply involve unnecessary repetition. So I note that on a number of occasions the BSA does conflate two standards. Thus in *Dr X* and *Prime* [8] (the case of the oral surgeon) the Authority said:

> The Authority has already found that the item was inaccurate and arising directly from those inaccuracies a majority found the items also unfair to Dr X. It was these inaccuracies that were the essence of the fairness complaint…the programme's unfairness arises from its inaccuracies rather than the failure to seek Dr X's comments.

In a few other cases, of which *Egg Producers Federation* and *Canwest*[9] is an example, the Authority combined fairness and accuracy under a single heading and directed its discussion to both standards in combination.

To summarise, in general I think it is better to keep the standards separate where possible. It focuses discussion better, makes the decision more understandable, and conduces better to the development of consistent principle. Nevertheless, I acknowledge that sometimes it is not readily possible, and would lead to considerable artificiality.

I was a little unsure whether the Authority ever decides a complaint under a standard other than the one complained of. I assume that the Authority could request a complainant to amend his or her complaint accordingly, but I did note that in one case the Authority saw fit to note that even though a privacy complaint could not succeed, it rather thought that a complaint on the grounds of unfairness might have done. In *Davies* and *TVNZ*[10] the Authority said:

> While finding that the item did not amount to a breach of Standard 3 (privacy), the Authority expresses some sympathy for the complainant. The Authority is of the view that there was an element of unfairness in the item, which left the impression that Mr Davies was guilty of unlawful conduct when this had neither been established nor pursued by the relevant authorities.
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> Further, Mr Davies made two requests that he not be shown in the broadcast. The Authority is unclear why the broadcaster chose to show him unpixelated in these circumstances, particularly since other

[7] A good example is *Wasan International* and *TVNZ,* 2004 – 145 (the Asia Down Under Case) ; see also *Hunter* and *TVNZ* 2004 – 158 (the Scott Watson case)

[8] 2005 – 052. see also *Fraser* and *TVNZ* 2004 – 203 (the mastectomy case)

[9] 2004 – 220 (the battery hens case)

[10] 2005 – 017 (Coastwatch)

> people in the programme had their identities protected. In the light of these matters the Authority observes that a complaint under the fairness standard may well have had more merit.

Was there nothing that could be done for Mr Davies?

The Guidelines

In the relevant codes each standard is followed by guidelines. Clearly the standards are regarded as the main principles, and the guidelines as subsidiary to them. Complainants are told on the BSA website that "the wording of the standard or principle is the most important – complainants should cite a guideline only if it is relevant". Thus it is the standards which are breached, not the guidelines. Yet there is degree of ambivalence here, I think. Many of the guidelines are framed as quite precise rules. Most of them are considerably more precise than the standard they exemplify. Indeed some of the more open-ended standards, such as Fairness and Social Responsibility, would have little content without the guidelines. In other words, some of the guidelines look rather more like rules, and the standards more like mere headings. On at least one occasion I noted the Authority itself slipping into describing a guideline as a principle[11]. And the Privacy standard is accompanied by "principles"" which are like the "guidelines" in the other standards.

In fact the Authority relies closely on the guidelines in many decisions. For example, in *Laing* and *TVNZ*[12] it addressed all discussion on one aspect to guideline 6(b) of the Fairness standard, and applied it just like a rule.

This reliance on the literal wording of guidelines is particularly noticeable in relation to Standard 1, Good Taste and Decency. Guideline 1(a) to that standard reads:

> 1(a) Broadcasters must take into consideration current norms of decency and taste in language and behaviour bearing in mind the context in which any language or behaviour occurs. Examples of context are the time of the broadcast, the type of programme, the target audience, the use of warnings and the programme's classification. The examples are not exhaustive.

The Authority follows those criteria very closely in decisions on the standard. In many of the cases, it itemises them as a list. Thus in *Mackie* and *TVNZ*[13] (Seven Periods with Mr Gormsby) it said:

> On this occasion the relevant contextual factors include
> - the time of the broadcast at 9.35 pm;
> - the AO classification of the programme;
> - the visual and verbal warning preceding the programme;
> - the adult target audience for the programme;
> - the satirical nature of *Seven Periods with Mr Gormsby*.

This itemisation of the contextual factors in accordance with the guidelines appears in many decisions[14] and in many of them the programme's satirical or humorous "type" has been seen as the saving grace[15]. I have no real concern about this, but I think it does carry a danger that broadcasters may come to believe that if they can tick off all the contextual items, and in particular if the programme is satirical, they have satisfied the standard and cannot be found in breach of it. I have seen a number of such claims made in the media

[11] *Simmons* and *Canwest* 2004 – 193 (the Exclusive Brethren case)
[12] 2004 – 204 (the Film & Television School case); see at paras [87] and [96]
[13] 2005 - 087
[14] Eg *Panasiuk* and *TVNZ* 2005 – 060 (Eating Media Lunch); *Salas* and *TVNZ* 2005 – 074 (Seven Periods with Mr Gormsby);*Duncan and Canwest* 2005 – 106 (God's Creatures); *McCoskrie* and *Canwest* 2004 – 201 (The Simpsons); *Wolf* and *TVNZ* 2005 – 008 (Eating Media Lunch); *Francis* and *Canwest* 2005 – 638(the Rove promo)
[15] In addition to the decisions in 12, see *Harris* and *The Radio Network* 2004 – 184 (World City) and *Noble* and *RNZ* 2005 – 001 (Off the Wire) where the satirical nature of the programme was virtually decisive.

about the recent Southpark episode involving the Virgin Mary. That is not so of course, and the Authority does not mean it to be. In some of its decisions it has confirmed that contextual factors are merely things to be taken into account, and are not decisive[16]. There could be a programme which is satirical, where warnings are given, where the time is late in the evening etc, which is still so offensive that it would breach the standard. In view of some of the misunderstandings I have seen developing among broadcasters and other media, I think it may be useful for the Authority to reinforce that message from time to time.

Beyond the Guidelines

The guidelines are just exemplars of the relevant standard. They are not exhaustive. The standard is thus wider than the sum of the guidelines. Occasionally the BSA has to make decisions on a standard which fall outside the guidelines expressly listed. Of all the standards, Fairness is the one where I would expect this to happen most often, and this indeed seems to be the case. The trouble is that "fairness" is so open-ended as to be almost indefinable, and decisions on it are bound to involve a degree of subjective judgment. That is why the Authority is composed of four persons who are expert in their fields. Their judgment is likely to be sounder and better informed than that of others. However, unless carefully monitored, decisions falling outside the guidelines are in danger of being criticised by broadcasters as being subjective and unpredictable. It is thus important that decisions on new aspects of fairness be carefully explained. I think that is done well in the case of *Mahurangi Christian Community Trust* and *TVNZ*[17] where the Authority explained that the cumulative effect of four matters led to the item as a whole being unfair. The two and a half page explanation of the majority is persuasive, even though only one of the guidelines is mentioned, and that in relation to only one of the four matters.

My reading of the decisions on Fairness is that in making decisions of this kind outside the guidelines in the relevant codes, the Authority has over time effectively established three further guidelines of its own.

Firstly, the Authority seems likely to find unfairness in cases where inaccurate statements have been made about the complainant, and where the inaccuracy reflects adversely on his or her reputation, or renders him or her likely to be the subject of criticism. In such a situation, the damage to reputation and standing is the additional element which takes the case out of the Accuracy standard and places it within the Fairness one. Examples are *Fraser* and *TVNZ*[18] (where it was alleged that a doctor had not used proper procedures in a case where a woman had a breast tumour); *Hager* and *TVNZ*[19] (where an article by Mr Hager was misrepresented); *Continental Car Services* and *TVNZ*[20] (where there had been an allegation of restrictive trade practice against the car company), and *Dr X* and *Prime* [21] (where there had been misuse of expert evidence suggesting that an oral surgeon had been at fault).

Secondly, the Authority is likely to find unfairness if a complainant has not been given an opportunity to respond to allegations made in the programme against him or her. There are at least four instances in the decisions I reviewed[22].

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[16] In *McArthur* and *Canwest* 2005 – 111 (Popetown) the Authority clearly implied that satire which contains offensive language, nudity, etc can be a breach of the standard.

[17] 2005 – 212 (the Berekah Retreat)

[18] 2004 - 203

[19] 2004 - 148

[20] 2005 - 081

[21] 2005 – 052 See also *The Warehouse* and *Canwest* 2004 -202 (flammable pyjamas)

[22] *Laing* and *TVNZ* 2004 – 204 (NZ Film and Television School); *Dujmovic* and *Canwest* 2004 – 216 (Phenomena Academy); *Daly* and *TVNZ* 2004 – 130 (the Manawatu floods); *OK Gift Shop* and *Canwest* 2004 – 199 (imported jade)

Thirdly, there seems to be a principle developing that hidden cameras and covert filming are unfair unless such activity can be justified in the public interest. In *OK Gift Shop* and *Canwest*[23] (the imported jade programme), the Authority said explicitly that

> Hidden filming will be unfair unless there are overriding public interest factors.

The Authority seems to base this on Guideline 6(c) of the Fairness standard[24]. Perhaps "misrepresentation or deception" in accordance with that guideline is involved in covert filming, although I am not so sure about that; it could be argued that those concepts involve active misleading, such as telling untruths, rather than just silence. However that may be, covert filming is now often being treated as an example of unfairness.

Given the emergence of these "principles" might it be useful to publish them? They are quite fundamental to good journalistic practice. Not all broadcasters can be expected to read all decisions of the Authority, and I think it may be useful to consider in general how principles consistently applied by the Authority which do not form part of any guidelines in the relevant code could best be disseminated. I do not know whether the issuing of a policy statement, or an article in the newsletter, or a book by some independent person outside the Authority, would be the best way of going about it.

Before leaving the question of the guidelines, I return for a moment to that open-ended standard, Social Responsibility, which appears in the Radio Code. I do not know how far that is supposed to extend beyond the five guidelines which follow it. Perhaps it is just a convenient "hold-all" for five principles which did not conveniently fit anywhere else, but if it is to go further than the listed guidelines, I think there would need to be a very clear explanation.

Reasoning

It is important that the reasoning by which a decision is reached be logical and convincing. The challenge is to achieve that logic and clarity without going to too much length. Many judgments of the Courts exhibit the latter vice, but the Authority's do not. Overall I thought the Authority's decisions combined logic and precision with economy of words, and that the arguments were persuasive. A good example is to be found in *Johnston* and *TVNZ*[25], (the Shannon case). The part of the judgment dealing with privacy is as follows:

> The essence of a privacy complaint is that private facts were broadcast about identifiable individuals [Privacy Principle (i) is set out]. In the present case, the Authority considers that no private facts were disclosed in the broadcast. The Authority observes that Shannon's lifestyle was widely publicised in the media at the time of his death, as were the names of his family. Consequently, the connection between the complainant's family and Shannon was not a private fact and no breach of privacy occurred. Mr Johnston also argued that the broadcast had invited viewers to intrude on the family's interest in solitude or seclusion [Privacy Principle (iii) is set out]. The Authority notes that this principle applies only to situations where the filming or taping for a programme is intrusive, for example, secretly filming someone in their home. As the family were not filmed or featured in the programme, the Authority concludes that there was no interference with their privacy in this respect. Accordingly, the Authority finds that Standard 3 was not breached.

Although this is brief, it is very clear and convincing, and I do not think that any more could usefully be added.

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[23] 2004 – 199. See also *Mahurangi Christian Community Trust* and *TVNZ* 2005 – 212 (Berekah Retreat) and the *Dujmovic* case (in 20 above)
[24] The *OK Gift Shop* case
[25] 2005 - 022

In some types of case it is more difficult to articulate reasons, even briefly. This is particularly so when an open-ended concept is in question such, for example, as whether a publication is "highly offensive". Concepts like that are not readily susceptible of close definition, and sometimes reasons for decisions on them are hard to formulate. They are essentially matters of impression, and require the exercise of moral judgment. Sometimes it is difficult to do more than state that, in the Authority's view, the facts fall within the concept as a matter of impression.

I did notice a tendency when a case like this was fairly clear-cut, not to spend too much time elaborating reasons, even though it might have been possible to go to greater length. Thus, in *Birchfield* and *Radio Network*[26] where a radio station said it believed a competitor's revenue would be cut in half, the Authority dealt with the complaint quite tersely as follows:

> In relation to good taste and decency the words used were not obscene, conveyed no obscenity and raised no issues at all of poor taste or indecency…in relation to fairness, the words complained about were mild and objectively inoffensive teasing of another local radio personality. No issue of fairness arises.

The Balance standard requires that the issue discussed be "a controversial issue of public importance". In quite a number of cases where the decision on that question was fairly obvious, the Authority simply stated its impression, without explanation. Thus, in *Blue Water Marine Research Ltd* and *Canwest*, it said:[27]

> In the Authority's view the item examined the question as to whether fish feel pain and if so how a sport such as big game fishing might come to be regarded in the near future. The Authority finds that this was a controversial issue of public importance.

In *Rupa* and *TVNZ*[28] the Authority had to deal with a programme showing a dispute between a tenant and a rental agent. In relation to the Balance standard it said simply:

> In the Authority's view the dispute between the complainant and the rental agent was not a controversial issue of public importance.

And in *Wishart* and *TVNZ*[29] (the case of the Tamihere interview) the Authority said:

> The argument in question raises issues about the credibility about a serving member of parliament and former Cabinet Minister. This in the view of the Authority is a controversial issue requiring balance.

It is not difficult to disagree with those assessments. But in cases where the matter was not so clear-cut, one would perhaps expect more reasons to be given for the impression formed, provided of course that it was reasonably possible to do so. In *Robinson* and *TVNZ*[30] (the Monster of Berhampore case) the Authority did spend more time discussing the concept of controversial issue of public importance; the case was a significant one, involving allegations that a church had dealt poorly with allegations of sexual harassment.

In general, I almost always found the reasons given for decisions clear and convincing. There were bound to be a few exceptions however. Thus in *Pridham* and *TVNZ*[31] (the Fear Factor case), the Authority said while it considered that the item could "fairly be described as distasteful" it did not offend current norms of good taste. Some readers might find that confusing, or indeed a contradiction in terms. There were also a few paragraphs which I had

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[26] 2004 - 213
[27] 2004 - 223
[28] 2005 - 034
[29] 2005 – 059. See also *Cahill* and *TVNZ* 2005 – 075 (the Michael Jackson case)
[30] 2005 - 082
[31] 2005 - 004

to read a number of times before I fully understood them. One was in *Banks* and *TVNZ*[32] (the Civil Union Bill Poll). Paragraph 51 of the decision reads as follows:

> The complainant contended that the poll was unbalanced in its presentation. The Authority, however, is of the view that the poll is not itself something to which the Balance standard can be applied. This is because the requirement of balance applies only to the way in which a controversial issue is being discussed and presented throughout an item or programme as a whole. It cannot sensibly apply to individual components which make up just part of the programme such as a viewer poll which itself only reflects the opinions of those viewers who chose to participate.

I think I see what this is driving at, but it might have been possible to put the point a little more clearly. But now I am becoming pedantic. The instances of such passages was very few indeed and the standard of clarity overall was high.

Minority Reasons

It is important that the Authority should summarise the reasons of a dissenting minority in cases where that has happened. There was a time when New Zealand's highest court, the Privy Council, used to produce only one single judgment with no dissents. That was never satisfactory, because it tended to lead to compromise. The advantages of giving both majority and minority reasons are fourfold. Firstly, it enables the reasons held by various members to be strongly expressed. Secondly, it makes it clear that the case is close to the line, which is useful for purposes of further guidance. Thirdly, if the case goes on appeal, it enables the issues to be perceived and defined more clearly, Finally, if the dissent is a compelling one, it may lead to the Authority as a whole changing its collective mind in a future case.

Consistency

Consistency of decision is one of the law's strongest requirements. It is fundamental to the nature of law. It wins the confidence of the public. Few things bring the law into greater disrepute than two complainants getting opposite results on similar facts. Moreover, consistency provides guidelines for broadcasters.

Maintaining consistency is probably more difficult for the Authority than it is for some other judicial bodies. This is so for two reasons. Firstly, its membership changes relatively frequently. Secondly, it would require a significant effort on the part of anyone to maintain a knowledge of all the Authority's decisions going back to its inception. (This again raises the issue which I mentioned before of whether a publication analysing the decisions and the principles arising from them might be a good thing.)

Consistency is attained in law by following precedents. In the decisions which I have reviewed, the Authority has certainly done this where possible. I am in two minds as to how often the Authority should actually cite its former decisions. To do so regularly could give an impression of legalism which can be off-putting to lay readers. But at least where the point involved is an important or controversial one, I do think it is helpful for the Authority to cite its earlier decisions where that point was established. This was certainly done in some of the decisions I reviewed. I found at least nine[33] where former decisions were cited and quotations given from them. But even where that was not done expressly there was clear evidence that the Authority does conduct itself on the basis of consistent principle. I found on

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[32] 2005 - 008

[33] *Fraser* and *TVNZ* 2004 – 203 (the mastectomy case); *Simmons* and *Canwest* 2004 – 193 (Exclusive Brethren); *Berney* and *Canwest* 2005 – 120 (Popetown); *McCoskrie* and *Canwest* 2004 – 201 (The Simpsons); *Dr X* and *Prime* 2005 – 052 (oral surgeon); *Turner* and *TVNZ* 2004 – 188 (Coastwatch); *Wilkinson* and *TVNZ* 2005 – 117 (Distraction); *Road Transport Drivers and Canwest* (truck drivers)*; Luiten* and *Canwest* 2005 – 063 (Campbell Live and the no-show pie)

a number of topics – and the subject of costs is a very good example – that having read the relevant decisions, I was able to itemise without difficulty what were effectively a set of rules that the Authority was applying.

It is also important that where the Authority wishes to differ from one of its earlier decisions on the grounds that the facts of the present case are slightly different, it should make it clear that it is doing so. This is the process of "distinguishing" precedent. I did not find many examples of this but there were a few. One was *Francis* and *CanWest* [34] (the Rove Live promo), where the Authority said:

> The Authority acknowledges that it has upheld complaints about the pronunciation in radio broadcasts of the words Whakatane and Whakamarama which have emphasised the first syllable of each word (see Decision Nos 2000-182 and 2001-138). It considers that the reasoning in those earlier decisions is not applicable to the current situation. In those instances, the emphasis was solely on the first syllable, repeated with increasing intensity, and the broadcasts were simply a blatant attempt to justify the use of a swear word in time when school children would be listening. As noted above, not only did this broadcast appear in the PGR time band, the intention of the promo was clearly designed to be humorous rather than deliberately provocative or offensive.

Where the public might perceive inconsistency between decisions, it is important for the Authority to say why in fact they differ.

So, overall, I thought that the decisions were self-consistent, and that one could see reliance on what were effectively principles. The only anomaly I perceived in the group of decisions under discussion was in relation to covert filming. The principle the Authority has laid down is that there is a presumption that covert filming is unfair unless the public interest justifies it[35], but in *Dujmovic* and *Canwest*[36] (the Phenomena Academy case) it was held that the covert filming there was not unfair because "it showed no material that placed the Academy or Mrs Wang in a negative, embarrassing or compromising light." I found that a little difficult to reconcile with the earlier pronouncements in the Fairness context. It seems to me that what was being applied in *Dujmovic* was rather an offensiveness test which is appropriate in the Privacy arena but not the Fairness one. However that may be, this required more explanation than it received.

Going back in time, however, I thought I perceived inconsistency between one of the modern decisions and a much older one. In *Harris* and *Canwest*[37] there was a statement to the effect that a breach of privacy claim cannot be founded on the presentation of untrue facts. The Authority said:

> There is an essential difference between broadcasting an incorrect and potentially damaging implication and broadcasting a true but private fact. Untrue implications by definition cannot be facts.

This is not immediately reconcilable with the earlier decision *Mr X* and *HB Media* 161/97 where the Authority held that a breach of privacy claim would lie in respect of an untrue statement about two young people that they had had a baby. In that case, the Authority said:

> With respect to Principle (i) the Authority considers the public disclosure of private facts about two identifiable individuals – regardless of the veracity of those facts – is offensive and objectionable to a reasonable person and is therefore in breach of principle. It is not a defence in the Authority's opinion for the broadcaster to claim that the announcer did not know that the facts were untrue.

[34] 2005 - 03
[35] See above n 21
[36] 2004 - 216
[37] 2005 – 049 (the wrong man at the vending machine)

The point involved here is a very important one, and inconsistency in decisions, even though they are nearly a decade apart, is undesirable. But it does raise the question of how one maintains an effective record of precedent.

Relationship with the Law

It is not the task of the BSA to apply the principles of media law as such. Its task is to consider complaints about breaches of the Broadcasting Act and the codes of broadcasting practice. It is not the Authority's job to enforce the law as such. Standard 2 which requires broadcasters to be responsible for maintaining standards which are consistent with the maintenance of law and order means only that programmes must not depict, glamorise or encourage crime. The Authority made that point in *Robinson* and *TVNZ*[38].

However while the Authority does not enforce the law as such, the relationship between its jurisdiction and the common law does not seem to me to be an easy one. It would send an unfortunate message if the Authority held conduct to be "acceptable" under the code if in fact it was contrary to the law.

I think *Trespass* raises the most difficulty. If reporters or camera operators doorstep, or otherwise engage in unauthorised entry onto private land, such conduct may well be a trespass at common law and may sometimes even be a criminal offence under the Trespass Act or the Summary Offences Act. Trespass is not the province of the Authority, as it has clearly pointed out[39]. It can only deal with such matters under the Privacy and Fairness standards. Yet it would not be entirely satisfactory if the Authority were to hold that unauthorised entry on to private property did not infringe the Fairness or Privacy standards when in fact such entry was a breach of the law of trespass. Some might construe this as condoning an illegality. It involves the further difficulty that whereas public interest is a defence to a privacy claim under the BSA's principles, I do not know of any case which holds that public interest can be a defence to trespass at common law. (Quite fortuitously I have just seen the *Balfour* decision, which is outside the review period, but which raises this issue squarely). I am afraid I do not know how best to handle this problem.

Defamation is likewise outside the Authority's jurisdiction. It is my reading of the Authority's decisions that it will almost always find that a defamatory broadcast breaches the Fairness and Accuracy standards. That is highly desirable, and it is good for a complainant who has been defamed to be able to clear his or her name in the Authority's relatively inexpensive forum without the need for an expensive court action.

Name Suppression, and other suppression orders by a Court, can pose problems as well. By and large the Authority should be able to deal with breaches of such orders by using the Privacy standard. *YZ* and *The Radio Network*[40] was such a case, although there the Authority found that the radio station had not identified the person concerned in any event.

Privacy is becoming a very live issue at common law as a result of the *Hosking* case. I think it is important that the Authority in exercising its privacy jurisdiction works in harmony with the common law. It would be unfortunate if broadcasters had to conform to different privacy requirements according to whether the case came before the courts or the BSA. The courts are aware of the Authority's jurisdiction, and have referred to it a number of times in cases involving the fledgling tort. I think we can expect lawyers, and judges too, to find the

[38] 2005 – 082 (the Monster of Berhampore)
[39] *Freedman* and *TVNZ* 2005 – 095 (The Funeral Director from the Dark side)
[40] 2004 – 171 (election candidate with name suppression)

Authority's decisions useful, although of course not binding, largely because of the great variety of fact situations they throw up.

The decisions under review demonstrate a useful consistency of in the application of principle. They make important points on what are likely to be controversial issues at common law. Thus:

- a picture of someone in a public place is unlikely to give rise to a successful privacy complaint[41];
- it is not a private fact if someone is shown being apprehended for wrongdoing in a public place[42];
- a person's privacy is not invaded if they are not identifiable by people outside the small circle of family and friends who could be expected to know the facts anyway[43];
- while public convictions may become private over time, this will depend on the seriousness of the crime, the time which has elapsed, and the current circumstantial context[44];
- a person is unlikely to be able to allege an intrusion into seclusion and solitude in the nature of prying if they are filmed by a visible camera, particularly if it is in a public place[45].

I think it is right for the Authority to continue to draw assistance from the American jurisprudence, for our courts will certainly be doing that. If our courts depart from the American decisions, the Authority should obviously prefer the New Zealand precedents.

Accuracy

In my view the Accuracy standard requires special mention, because I think it is one of the most difficult. Truth is an elusive concept and there are degrees of it. I commend the way in which the Authority has handled the difficult questions to which it can give rise.

There is *first* the question of the burden of proof. For the purposes of the law of defamation the plaintiff does not have to prove that the statement of which he or she complains is false; that is presumed, and it is up to the defendant (usually a media organisation) to prove the truth of what they have published. Even though the issues can be very similar in a complaint to the BSA, I think it is right for the BSA to require that inaccuracy be proved before it upholds the complaint. The very concept of a complaint that the standard of accuracy has been breached would seem to imply that the onus of proof is on the complainant. Where there is no oral hearing and the Authority must deal with matters on the papers, I think this is sometimes not easy. In the decisions I examined, I found the Authority dealt with the problem in a variety of ways:

- In some cases it simply preferred the version of one party over that of the other[46].
- In some cases the Authority accepted the complainant's version of the facts if the complainant had put forward a credible story and the broadcaster produced no evidence to support its position – in other words, if the broadcaster did not refute or dispute the claims of the complainant[47]. While this may look as though it is placing

[41] *Barraclough* and *Canwest* 2005 – 024 (the Emma case); *Davies* and *TVNZ* 2005 – 017 (Coastwatch)
[42] *Turner* and *TVNZ* 2004 – 188 (Coastwatch)
[43] *Pacifica Shipping* and *Canwest* 2005 – 026 (Strike at port)
[44] *Steadman* and *TVNZ* 2004 – 189(Dr Madlener); *Turner* and *TVNZ* (n 40)
[45] *Rupa* and *TVNZ* 2005 – 034 (landlord and tenant dispute); *Barraclough* and *Canwest* (n 39)
[46] Eg *Fraser* and *TVNZ* 2004 – 203 (the mastectomy case)
[47] Eg *Fraser* case (n 44); *Hunter* and *TVNZ* 2004 – 158 (the Scott Watson case); *Dujmovic* and *Canwest* 2004 – 216 (the Phenomena Academy)

the burden of proof on the broadcaster, it is not really: it is simply accepting the uncontradicted version of the complainant.

- In some cases the Authority was able to rely on extrinsic evidence, such as modern published scholarship, or publicly available official material such as United Nations sources[48].
- In other cases, however, the Authority had before it two conflicting stories and was unable to choose between them. Its practice in those cases has been to decline to determine the complaint on that matter. Thus in *Dujmovic* and *Canwest*[49] (the Phenomena Academy case) the Authority said:

> The Authority is faced with conflicting positions on this issue. On the one hand Canwest was given this information by one of the students interviewed for the programme. On the other, Ms Wang and Ms Dujmovic both deny that it was said. The Authority was left with no means of determining which version of events was more likely to be correct and accordingly declined to determine this aspect.

In another case there was a complete lack of evidence. This was *Parre* and *Canwest*[50] (the Zaoui case). It had been alleged on radio that Zaoui had "been put in a cell" in Switzerland. Unable to obtain any evidence either way, the Authority said:

> The Authority is unable to determine whether Mr Zaoui was ever 'put in a cell' during either of his visits to Switzerland. The RSAA decision refers to Mr Zaoui being "detained" but that does not explicitly say whether he was placed in a cell on either occasion. As it is unable to categorically determine the accuracy of this point, the Authority declines to determine this aspect of the complaint.

This gives me pause, but I suspect it is only because I am familiar with the court system, and a court of law does not have this luxury. A court must determine matters before it by finding for one party or the other, and in a case of this kind it would utilise the burden of proof and say that in the presence of conflicting evidence or a total absence of any evidence, the complainant has failed to make out their case. But under section 11 of its Act the Authority does have power to decline to determine a complaint if it considers either that the complaint is "(a) frivolous, vexatious or trivial", or (b) that "in all the circumstances of the complaint it should not be determined by the Authority". I suppose this gives the Authority power to decline in a case like the one we are considering. I say "suppose" because the word 'should' in section 11 is a strong word. I think in the end the BSA's way of resolving such issues does justice, because neither party is a winner or a loser. That more accurately reflects the situation than a finding for one or the other. However, in a very important case, where one of the parties seeks an oral hearing to establish the matter, it may perhaps not be so simple.

A *second* difficulty about accuracy is that a statement which is literally true can still give a wrong impression, usually because it leaves out a vital piece of information and is thus only a half truth. The Authority has had to deal with this type of complaint on a number of occasions, and been required to make the difficult judgment of whether a broadcast summary is misleading because of what it does not say[51].

Conversely a statement can be misleading because of its emphasis, or because it implies more than it says. Broadcasting is particularly susceptible in that pictures can speak louder than words, and can put a slant on something which does not appear on a mere reading of the words. That sort of problem faced the Authority in *Continental Car Services* and *TVNZ*[52] (the case of the used Ferrari). The Authority said in relation to the Accuracy standard:

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[48] Eg *Rangihuna* and *TVNZ* 2005 – 134 (Frontier of Dreams); *Dewar* and *TVNZ* 2005 – 085 (the Chernobyl case)
[49] Above n 45
[50] 2005 - 016
[51] A good example is *Wasan International* and *TVNZ* 2004 – 145 (Asia Down Under)
[52] 2005 - 001

> In the Authority's view the item gave an overall impression that Continental Car Services had prevented Mr Paton from registering his vehicle because it had refused to give him a safety certificate which it already had in its possession. The item implied that in doing so Continental Car Services was engaging in restrictive trade practices. The Authority finds that this overall message was significantly inaccurate.

A similar, and a very difficult, case was *Calcinai* and *TVNZ*[53] (bullying at Taradale High School) where the Authority found that the programme overall was substantially inaccurate, because of what it implied, and the impression it created.

Thirdly, and this is related to the second point, there can be questions of how accurate a broadcaster is expected to be. The media do not have the resources or machinery for gathering all aspects of the story. Whereas the courts can make people talk, the media cannot. Moreover, broadcasters do not have the luxury of time. They are also affected in that their news stories cannot be as detailed as those in a newspaper. The Authority must take into account these facts of broadcasting life and ask whether, even though an item was relatively brief, it was substantially accurate and gave an overall impression which was not misleading. I thought that in the cases where this issue arose, the Authority acknowledged the difficulties in a sympathetic way. In *Sanders* and *TVNZ*[54] (the Meningococcal B Vaccine case) it said:

> In relation to the omission of the information about the manufacturer, the Authority observed that as with all current affairs item on television, there is always available considerably more information than is contained in a broadcast. A programme cannot hope to contain every fact relevant to the issue under discussion. The issue for the Authority is whether the omission or omissions result in a misleading or inaccurate report.

As to whether the Authority can allow different standards from different types of broadcaster I am less sure, but I suspect not. There is no doubt that a major broadcasting corporation has resources available to it which a small radio station does not. But at the end of the day the item, whoever produced it, is either misleading and inaccurate or it is not, and it is the effect on the listening and viewing public that matters rather than the ability and means of the broadcaster. I suspect that concessions cannot be made in this regard.

Fourthly, I am not entirely clear whether a broadcaster will be found liable for inaccuracy if it is merely relaying the words of another. Is it for example, legitimately liable to a complaint if it broadcasts an interview with a politician who makes inaccurate statements of fact; or should the broadcaster be liable only if it in some way adopts the statement as its own? Either way the audience is misled, and either way it is perfectly possible for the broadcaster to publish a correction in a later programme. I do not see this difficult issue raised in the decisions I have reviewed, apart perhaps from one oblique reference in *Fraser* and *TVNZ*[55] (the mastectomy case) where the Authority said:

> The Authority does not agree with TVNZ's responses in relation to TVNZ's defence that it was simply reporting the patient's words. The Authority notes that TVNZ adopted the patient's words rather than simply reporting them; TVNZ presented the May consultation as a matter of fact.

That would suggest that there may be a difference between the two situations.

Fifthly, only facts can be inaccurate. Opinions cannot. However the line between fact and opinion has troubled everyone who has ever dealt with it, from philosophers to judges

[53] 2005 - 051
[54] 2005 - 104
[55] Note 44 above

directing juries in defamation cases. Occasionally the Authority has had to make that call and I have no dispute with the decisions it has made[56].

Balance

The Balance standard, which appears in the Act as well as the Codes, can also be a difficult one. I have no issues with the way in which Authority has dealt with it.

- The requirement of balance only applies in the case of "a controversial matter of public importance". I have already discussed the judgments made by the Authority on this criterion. Perhaps the occasion may arise in future, if it has not already done so in the past, to discuss at length what it means.
- There is an overlap between the Balance and the Fairness standards in that a failure to seek a response from an interviewee can sometimes be dealt with under either head. In a few decisions the Authority subsumed it under Fairness rather than Balance[57]. Some commentators believe that the whole of the Balance standard would be better abolished and subsumed under Fairness. Since it is a requirement of the Act of Parliament this cannot be done, at least for the present.
- The Authority takes the sensible line that balance does not require that equal time be attributed to each of the competing points of view. As it has put it colourfully, it does not require a "stopwatch test". All that is required is that the competing points of view be put adequately and reasonably[58].
- The Authority also takes the view that if one party is unavailable to put its side of the argument, that does not avoid the necessity for the broadcaster to seek other representatives of that point of view.[59] But if it has made all reasonable efforts to obtain them, there is no more it can reasonably be expected to do.[60]
- The Authority takes a reasonable and realistic view of what can be expected by way of balance in a complicated case. A good example is the *Dujovnic* case[61] where the Authority had to determine whether one protagonist had been given a fair opportunity to respond when it was alleged that her English was not good and the interview was somewhat aggressive. Looking at the programme as a whole the Authority determined that enough had been done to secure balance.

I think it would be difficult to challenge the Authority's approach on any of these points.

Bill of Rights Act

Bill of Rights Act jurisprudence is growing in New Zealand, but very slowly. There are three provisions of the Act which are relevant to the Broadcasting Standards Authority.

> **Section 14**
> 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

[56] *Laing* and *TVNZ* 2004 – 204 (The Film and Television School); *Cronin* and *TVNZ* 2004 – 140 (Foreshore and Seabed Bill); *Banks* and *TVNZ* 2004 – 008 (Civil Union Bill)
[57] *Eg Continental car Services* and *TVNZ* 2005 – 081 (the used Ferrari); *Daly* and *TVNZ* 2004 – 130 (Manawatu floods); *Daly* and *TVNZ* 2004 – 130 (Manawatu floods); *Simmons* and *Canwest* 2004 – 193 (Exclusive Brethren)
[58] Eg *Sanders* and *TVNZ* 2005 – 104 (Meningococcal B Vaccine);*Road Transport Forum* and *Canwest* 2005 – 100 (truck drivers); *Wishart* and *TVNZ* 2005 – 059 (the Tamihere interview)
[59] Eg *Egg Producers Federation* and *Canwest* 2004 – 200 (battery hens)
[60] Eg re *Egg Producers* case (n57); *Robinson* and *TVNZ* 2005 082 (Monster of Berhampore)
[61] *Dujmovic* and *Canwest* 2004 – 216 (Phenomena Academy)

> **Section 5**
> Subject to Section 4 of this Bill or 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.
>
> **Section 6**
> 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.

It is obvious that the BSA is concerned with freedom of expression and limitations imposed upon it. The Bill of Rights can be relevant to its decision making in at least two ways.

First, if the statutory standards and other provisions of the Broadcasting Act are ambiguous or unclear, one can argue that they should be interpreted to favour freedom of expression where that is possible. In *TVNZ* v *Minister of Agriculture and Fisheries*[62], McGechan J put it this way:

> The most that can be said is that where questions of interpretation arise the legislation is to be construed most consistently with freedom of expression.

It has been held that the Broadcasting Codes are not themselves statutory provisions[63] so that the interpretive direction in section 6 of the Bill of Rights Act does not apply to them. However, it would be anomalous if one approached them differently from the legislation and I would suggest that in the case of the codes also, if there be true ambiguity or lack of clarity in any of the provisions, they should generally be construed in conformity with freedom of expression as required by section 14 of the Bill of Rights Act.

Secondly, although the judicial authorities differ a little on this[64], the most recent High Court case suggests that every time the Authority upholds a complaint against the broadcaster for breach of a code standard it must be satisfied that the limitation it has thus imposed on the freedom of expression is reasonable and justified. In *TVNZ* v *Viewers for Television Excellence Inc*, Wild J put it thus:[65]

> In my view the act which attracts the BORA obligation is the determination by the Authority of complaints pursuant to the Broadcasting Act. It is that act of decision-making which is implicitly qualified by the requirement not to perpetrate unreasonable limits on rights. I accept that most of the Authority's decisions under the code will pass the justifiable limitations threshold given the content of the code and the relatively tame sanctions available to the Authority to remedy any breach. But that in my view does not eliminate the need for the Authority to consider the impact of its decision on freedom of expression in respect of each specific complaint by subjecting it to a section 5 reasonableness assessment.

In *TVNZ* v *Minister of Agriculture and Fisheries* McGechan J said:[66]

> The most which can be said is that in approaching a decision whether the statutory (including code) standards are met , the Authority should, where room exists, prefer approaches consistent with freedom of speech.

One might also note here the statement by Tipping J in *Moonen* v *Film and Literature Board of Review*[67] that when a decision maker is applying legal standards to a publication, it should favour freedom of expression over objectionability <u>if the case is marginal</u>.

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[62] HC Wellington, AP 89/95, 13 February 1997
[63] *TVNZ* v *Viewers for Television Excellence Ltd* [2005] NZAR 1
[64] cf *TV3 Network Services* v *Holt* [2002] NZAR 1013
[65] para [56] of the judgment
[66] p 34 of the judgment
[67] [2000] 2NZLR 9 at 15

The approach of the Authority whenever it upholds a complaint is to insert a standard clause stating that the Bill of Rights Act has been taken into account and given its full weight. The statement concludes "…for the reasons given above the Authority considers that its exercise of powers on this occasion is consistent with the New Zealand Bill of Rights Act". I could find only two cases where that standard clause was omitted,[68] whether deliberately or by oversight I am not sure. The use of this kind of boilerplate does not carry much conviction, but it is certainly better than nothing in that it indicates that the Bill of Rights has not been forgotten. I could find only one decision where section 14 received any real discussion and that was in the context of the Maori Party electoral case.[69] Section 14 was also mentioned in passing in the reasoning in three other decisions.[70] I have no doubt that some Bill of Rights advocates would say this is insufficient, but I am personally not so sure about that. 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. I think the following points are pertinent.

- The Authority's decisions must be accessible to, and understandable by, many people who are not legally trained. Bill of Rights reasoning can be quite sophisticated, not to say complex, and would not assist the understanding of average readers.
- Many of the complaints the BSA deals with are minor and in many the answer is very obvious. A blatant case of bad taste or an undeniable case of inaccuracy are so obvious that they do not need a reasoned application of the Bill of Rights. It would be expending unnecessary energy and unreasonably lengthening decisions to undertake one.
- At the end of the day, I am not sure that full discussions of whether a limitation is reasonable and justified in a democratic society, or whether it a proportional response, are always particularly informative. Decisions on whether a limitation is reasonable and justified are in the end matters of impression and there is often nothing very useful that one can say to explain the judgment which has been made. I would have to say that a number of the legal analyses of decisions that I have seen, including even a few Attorney-General's Certificates to Parliament, have left me none the wiser as to why the decision was made as it was.
- Even when there is Bill of Rights argument in the courts, the courts often do not subject the Bill of Rights provisions to close analysis.
- The Codes of Practice have already made the judgment that the standards they prescribe are reasonable and demonstrably justified limitations. To take it a further stage and say that the Bill of Rights must also be argued when the application of a particular standard is very clear, seems to be unnecessary.
- The courts tend to take the view on appeals that if a decision by the Authority can be justified under the Bill of Rights Act it does not matter that the Authority has not spelt that out. Thus in the *Viewers for Television Excellence* case, Wild J said:[71]

> I am satisfied that the Authority did undertake such a section 5 proportionality assessment although I accept that it was not expressed as such.

His Honour continued that while the Authority was bound to consider section 14 in its decision-making and also needed to satisfy itself that its determination of the complaint

[68] *Harris* and *Canwest* 2005 – 049 (the wrong man at the machine); *McDonald* and *Canwest* 2004 – 183 (The Telecom inaccurate graphic case)
[69] *The Maori Party* and *Raukawa FM* 2005 - 103
[70] *Berney* and *Canwest* 205 – 128 (Popetown); *Faithfull* and *Canwest* 2005 – 015 (the Steve Crowe case); *Wakeman* and *TVNZ* 2004 – 154 (by-election)
[71] [2005] NZAR 1, at para [57] of the judgment

constituted a justifiable limitation on section 14, "I consider that the Authority did that, although implicitly rather than explicitly".[72]

In the *Ministry of Agriculture and Fisheries* case McGechan J also said that while the Authority did not refer expressly to section 14 in the course of its decision "it did not need to do so".[73]

In conclusion, I do not think the Authority needs to change its practice much in relation to the Bill of Rights. I suggest it continues to use the "boilerplate" clause in most cases, but that it consider engaging in more explicit analysis of the Bill of Rights in a few less usual cases where there is an issue of real difficulty, novelty or importance in the interpretation or application of the criteria.

Orders

I have no difficulty with the BSA's exercise of its jurisdiction here. In none of the decisions I reviewed did it exercise its most far-reaching powers, ie to take a broadcaster off the air, or to suspend advertising, for 24 hours. In the majority of upholds a statement was required to be published, although in cases of minor breaches even that was thought unnecessary, the mere upholding per se being seen as sufficient. In cases where a complaint was upheld by a majority only, the Authority did not require a statement to be made.

The Authority appears to adopt a consistent approach to its costs jurisdiction. The award of costs to the complainant is for the purposes of reimbursement and not punishment.[74] Costs are allowed to a complainant to cover legal costs reasonably incurred; whether such costs were reasonable involves recognition of the essentially informal nature of the BSA procedures.[75] In some cases other expenses (eg the cost of getting tapes and videos to facilitate the complaint) are also recoverable.[76] Full reimbursement would seldom be granted, and in all the decisions I looked at only a proportion of costs was awarded.

Costs to the Crown are only awarded in cases of a *serious* departure from standards, in other words a *significant* breach.[77] In such a case the award of costs to the Crown is effectively a punitive measure, but the Broadcasting Act describes it as "costs" rather than a "fine" and the BSA properly also uses the term "costs", even though in some media circles the term "fine" is colloquially used.

As to suppression of names, I note that the Authority's standard stated policy is that it will generally suppress the name of a complainant only in the case of a claim of breach of privacy[78]. I agree entirely with that general approach. Those who complain should be prepared to front up publicly and as in a court should be prepared to be known. Apart from general considerations of freedom of speech, such a policy helps to ensure that vexatious complaints cannot be made under cover of anonymity. Nevertheless the apparent confinement of anonymity to privacy claims might be a little restrictive. One can envisage an extreme case where for example the fragile mental state of a person who has been traumatised by an event (a violent assault for example) and an unfair coverage of it on

[72] At para [58]
[73] At p 35 of the judgment
[74] *Fraser* and *TVNZ2004 – 203 (the mastectomy case)*
[75] *Continental Car Services* and *TVNZ* 2005 – 081 (the used Ferrari); *Fraser* (n 72); *The Warehouse* and *Canwest* 2004 – 202 (the flammable pyjamas)
[76] *Simmons* and *Canwest* 2004 – 193 (Exclusive Brethren)
[77] *Calcinai* and *TVNZ* 2005 – 051 (bullying at Taradale High); *Dr X* and *Prime* 2005 – 052 (the oral surgeon); *Continental Car Services* and *TVNZ* (n 73)
[78] *Parre* and *Canwest* 2005 – 016 (The Zaoui case)

television might be such as to justify a suppression. The possibility should remain open, and I think that is probably also the Authority's view.

Conclusion

It will be apparent from the tenor of this report that I think there can be very little objection from a legal point of view, or indeed any other point of view, to the way the Broadcasting Standards Authority is performing its statutory task. My quibbles are minor. I am particularly impressed with the succinct yet persuasive nature of the decisions and with the consistency they display. In many areas after reading decisions I was able to summarise in the form of brief rules the principles which the Authority applies. I have given some indication of that in discussions of the Fairness, Balance and Privacy standards and in the section on costs. I would simply repeat the point I have made earlier that where such rules have developed, one should perhaps be thinking of a way of publicising them to make them more accessible.

JF Burrows
April 2006