ELECTION PROGRAMMES

PRELIMINARY

Law and background

Part 6 of the Broadcasting Act 1989 is concerned with regulating the broadcasting of election programmes. This is, and always has been, a fraught area. Broadcasting has been seen as the most effective way for a political party or a candidate to reach a wide audience, and there are concerns that parties which can command greater resources should not capture a disproportionate share of broadcasting time. The law has been amended a number of times over the years, and each amendment has been the occasion of vigorous debate in Parliament.

It cannot be pretended that the present law is as clear as it needs to be. It is open to differing interpretations, and that is not desirable in an area where the users of the legislation need certainty as to what can and cannot be done.

For present purposes the important provisions of the Broadcasting Act are as follows.

Section 70(1) provides:

> (1) Except as provided in subsections (2) and (2A), no broadcaster shall permit the broadcasting, within or outside an election period, of an election programme.

There are several exceptions, the most important of which for our purposes are that subsection (1) does not apply to opening and closing addresses during time allocated by the Electoral Commission; or to election programmes paid for with money allocated by the Electoral Commission; or to paid programmes promoting a candidate, and authorised by that candidate. (It is not without interest to note that the introduction version of the 1990 Bill which inserted these provisions confined the section 70 prohibition to *paid* broadcasts. That limitation was removed at select committee, although they forgot to amend the section heading as well. This goes some way to explaining the unsatisfactory nature of this part of the law.)

Section 70(3) provides:

> (3)Nothing in subsection (1) restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.

The expression "election programme" is central to the scheme of this part of the Act. It is thus defined in section 69(1):

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

The term "election period" is defined as the period between writ day and the end of the day preceding polling day.

The roles of the Electoral Commission and the Broadcasting Standards Authority

A failure to comply with section 70 is an offence punishable by a fine not exceeding $100,000 (section 80). If the Electoral Commission believes that such an offence has been committed it must refer the matter to the Police (section 81).

By contrast, the Broadcasting Standards Authority (BSA) is not concerned with failures to comply with section 70. It has no jurisdiction to hear a complaint that a programme infringed section 70. But it may need to decide whether or not a programme is an election programme in two situations. First, the general broadcasting standards and codes apply to election programmes as much as any other, with one exception: the requirement of balance does not apply to an election programme. Secondly, there is a special code of broadcasting practice which applies to election programmes. Among other things it proscribes impersonation and other sorts of misleading conduct, and the denigration of opposing parties or candidates. If a complaint is laid under this

code, the BSA will need to decide whether the programme was an election programme before it can find against the broadcaster.

Regrettably, in the first case to be discussed below, the Electoral Commission and the Broadcasting Standards Authority have reached different conclusions as to whether a particular programme was an election programme. If the matter was uncertain before, it is even more so now.

THE PRIME MINISTER'S HOUR

On 30 September 2011, in the lead-up to the general election, Radio Live made an agreement with Mr Key, the Prime Minister, that he would host a one-hour live programme. Mr Key described the show as "election free". He read the weather, he reacted to the music being played, and he interviewed a number of well-known people such as Richie McCaw and Sir Peter Jackson. He was referred to as "the Prime Minister". At one point he read a tweet describing him as "a legend" (which he laughed off). He made a comment in response to another tweet that he would speak to someone about getting the broadcast time of "Coronation Street" changed. At the end of the hour he talked briefly to Paul Henry, saying he was "working for the nation" and, in response to a question, made brief comment about the recent down-grading of New Zealand's credit rating. It is common ground that these quasi-political fragments were not of themselves enough to change the nature of the programme.

Complaints were made to both the Electoral Commission alleging a breach of section 70(1), and to the Broadcasting Standards Authority alleging a breach of the election programme code. The Commission found that the programme was an election programme, the BSA that it was not.

The question was a narrow but difficult one: did the programme "encourage or persuade, or appear to encourage or persuade", voters to vote for a party or a candidate? The Commission believed it did. The show gave Mr Key exposure, and an opportunity to raise his profile and associate himself with some well-known people in the lead-up to an election. Listeners would see this as an

encouragement to vote for him. We may describe this as the view that the programme was "implicit electioneering".

The BSA took a different view. They believed that implicit electioneering was not enough, and that sections 69 and 70(1) require that there be overt and direct encouragement to voters to vote for a party or candidate. "The words 'encourage', 'persuade', 'advocate' or 'oppose' are verbs which are associated with activity."[12] The BSA concluded that the broadcast did not contravene section 70(1). We may describe the BSA view as that sections 69 and 70(1) require "overt electioneering".

Opinion

The arguments are quite finely balanced, and it is not difficult to see how different agencies have reached different views. After much consideration I have reached the view that the BSA view is the correct one, for the reasons which follow.

The language of the Act

The natural meaning of the statutory words is always the starting point in the task of statutory interpretation. The relevant words in this case are "encourage" and "persuade". The Oxford dictionary defines "persuade" as "induce (someone) to do something through reasoning or argument". "Encourage" it defines as "persuade (someone) to do or continue to do something by giving support and advice". Both of those definitions require something over and above just greater exposure or heightened profile. They require an element of active incitement. In other words, in the present context they require what I have called "overt electioneering". Nor do the words "appear to" add much. They still require that the programme *appears* to involve active incitement, in other words that listeners would assume from Mr Key's words and conduct that he was *actively* and *overtly* encouraging or persuading them to vote for him.

The natural meaning of the words supports the conclusion of the BSA.

Interpretative aids

It is well accepted that an interpreter can refer to various supplementary aids to clarify the meaning of statutory words. A number are relevant here. None of them alone amounts to much, but taken collectively they add support to the natural meaning of the words.

First, the present definition of "election programme" was inserted in the Act in 1996. It replaced an earlier 1990 definition which had read "used or appearing to be used to promote or procure the election of.." The substitution was clearly deliberate, because it was inserted in the Bill at select committee stage. The new wording is stronger. Whereas "procure the election of..." might possibly cover Mr Key's programme, "encourage or persuade" is much less apt to do so.

Secondly, if Parliament had intended that implicit electioneering was enough, there are forms of words they could have used which would have conveyed the message much more clearly. One appears in section 197(1)(g) of the Electoral Act 1993: "intended or likely to influence any person as to the candidate or party for whom he or she should or should not vote". "Encourage or persuade" goes much further than "likely to influence". One assumes such differences in wording are deliberate.

Thirdly, section 75(2) of the Broadcasting Act lays down the factors to which the Electoral Commission must have regard when allocating time and money to the parties. Paragraph (f) of that subsection provides that one of those factors is "the need to provide a fair opportunity for each political party.... to *convey its policies to the public*" (italics supplied). So what is desired is a fair opportunity not just to gain exposure, but to actively provide substantive reasons why voters should vote for this person or party. Something very similar appears in a statement by the Honourable Jonathan Hunt when explaining the purpose of the Bill to the House in 1990: "...all parties should receive equitable treatment *in getting their message across*" (italics supplied). (508 NZPD 2614 (1990). That is more than just exposure.

Fourthly, it is accepted that when applying a statutory definition one needs to keep in mind what is being defined. That is not circular reasoning: it simply means that ambiguities in the definition may be resolved by looking at the natural meaning of the words the subject of the definition. (An example is *Millard v Turvey* [1968] 2 QB 390.) Here what is being defined in section 69 is an "election programme". Not many ordinary people would say that what Mr Key was involved in was an "election programme". It was not about the election. Its content did not refer to it.

Taken cumulatively, these aids lend support to the meaning most naturally conveyed by the Act's words, namely that active incitement, or "overt electioneering" is required.

Purpose

It is of course axiomatic that the words of an enactment must be interpreted in the light of the enactment's purpose. Section 5 of the Interpretation Act 1999 requires it. This rule means that if the purpose of an Act is clear, an interpreter can depart from the most natural meaning of the Act's words and give them a less usual secondary meaning which gives better effect to the purpose.

It might be said that "implicit electioneering" is a secondary, but *possible,* meaning of the words in question. The argument might run that if Mr Key's personality was attractive to listeners, that alone might "encourage" them to vote for him or his party. (That may be a stronger argument under MMP where all of us can vote separately for candidate and party.) Thus, it might be argued, mere heightened profile is enough to constitute "encouragement" and "persuasion".

If we assume that that is so, *should* we adopt this secondary meaning, as in fact the Electoral Commission did? One difficulty in so doing is that it assumes a clear understanding of what the purpose of Part 6 of the Broadcasting Act is. Fairness to candidates and parties is an obvious purpose, but fairness in what respect - air time, without more, or the opportunity to present their policies, or, in Hon Mr Hunt's words, "to get their message across"? That is essentially

question-begging. There are dangers in assuming purpose when the words of the Act do not expressly state what it is.

However even assuming that the secondary meaning of "encourage" and "persuade" would better advance the Act's purpose, two further matters need to be addressed to see whether that meaning *should* be adopted.

New Zealand Bill of Rights Act

The New Zealand Bill of Rights Act 1990 (BORA) declares the fundamental rights and freedoms of New Zealanders. It applies to acts done "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law". It cannot be doubted that both the Electoral Commission and the Broadcasting Standards Authority fall within that description. They should therefore apply BORA in their decision-making.

The relevant BORA freedom in this case is section 14, freedom of expression. It is one of the strongest freedoms, particularly in the context of political speech. However, like all the rights and freedoms in BORA, freedom of expression may be subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (BORA section 5). Decision-making bodies should therefore only limit the right to freedom of expression when that is reasonable, and can be "justified in a free and democratic society". A limitation must only be imposed when its objective relates to a pressing concern, and it must be a proportionate response to that concern. It is now well accepted that proportionality is the key. The impairment to the right should be no greater than reasonably necessary. (The authoritative modern statement of the law is to be found in *R v Hansen* [2007] 3NZLR 1 (SCNZ.))

Section 6 of BORA forms part of a scheme with section 5. It provides:

> **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.

This section does not require consistency with BORA rights in their absolute form, but rather consistency with rights as justifiably limited within section 5. In our present context, this effectively means that *if possible* the words of the Broadcasting Act should be read so that they do not impose any greater limitation on freedom of expression than can be justified in a free and democratic society. If that is not possible in that the words of the Act do not permit such interpretation, the inconsistent provisions will prevail over BORA (BORA section 4).

The question is thus whether an interpretation of "encourage" and "persuade'' which assumes that no active incitement is needed, and that mere increased exposure and heightened profile are enough, is consistent with BORA.
In answering this question, it must be remembered that freedom of expression is a powerful freedom, the more so in political and media contexts. Even the courts are very reluctant to find that limitations are justified when dealing with broadcasts. In *Alp v Television New Zealand Ltd* HC Auckland CIV 2011 404 3586, a case involving interviews with candidates in a by-election, Priestley J, citing earlier authority, said:

> In this constitutionally fraught ...area, where courts are invited to make orders which will impact on the media's rights of freedom of expression and editorial independence, judicial intervention should be saved for exceptional and compelling cases.

The same caution is to be exercised by other decision-making bodies.

Of crucial importance is the fact that section 70(1) of the Broadcasting Act prohibits the broadcasting of election programmes "within or outside an election period". The prohibition is thus a blanket one which applies at all times. The definition of "election programme" is also general, applying at all times. It cannot for a moment be suggested that the secondary meaning of the definition of "electoral programme" adopted by the Electoral Commission could be justified if it is to apply at all times. Otherwise any programme raising the profile of a politician or party would be prohibited whenever it was broadcast. Yet politicians often engage in this. Hon John Banks was a talk-show host for years; Hon Rodney Hide participated in "Dancing with the Stars" in 2006; several members of Parliament participated in the TVNZ series "Make

the Politician Work" in 2011. It is desirable that politicians reach the public, and that the public get to know the sorts of people who run the country. Many politicians now use the social media, for example Facebook and Twitter, to keep in touch with the public, and many have websites which present their views on many topics. These avenues probably reach an even wider audience than broadcasting. It would be clearly inconsistent with section 14 of BORA to interpret the relevant statutory provisions as meaning that broadcast programmes which merely raise a politician's profile are always in breach of section 70(1) whenever they are broadcast. Such a limitation could not possibly be justified.

Of course the Electoral Commission would not go as far as that. It was particularly influenced by the fact that Mr Key's show was close to the election. It spoke of Mr Key "being in the midst of contesting a Parliamentary election" [36]; and of the show airing "in the lead-up to the election"[38]. In its guidance at the end of its decision it confines its advice to programmes broadcast "in close proximity to an election"[51]. Presumably this is on the basis that given the context of intense electioneering at such a time, the public's mind will be focussed on who they are going to vote for, and are more likely to see a radio host such as Mr Key as "encouraging" or persuading" them to vote for him than would be the case at a time remote from any election.

Yet it seems to me that, while this is a pragmatic solution, it is problematic in the light of the legislation. At what point of time does the restrictive application of sections 69 and 70 begin? Merely to say that it is when the election is in "close proximity" is too uncertain. It probably infringes the requirement in BORA section 5 that any limit on a BORA right must be "prescribed by law", given that this is pre-eminently an area where everyone - politicians, parties and broadcasters - need to know exactly where they stand. So probably the crucial time is during the "election period" as defined in the Act. However so to find would involve more than an interpretation of the Act; it would effectively involve grafting words on to it. It would, in effect, be saying that sections 69 and 70, which expressly apply "within or outside an election period", take on a different connotation within an election period. I think that goes beyond the bounds of permissible interpretation.

So, after some hesitation, I conclude that consistency with BORA's right of freedom of expression requires that the words "encourage" and "persuade" in section 69 should bear their natural meaning of active incitement to vote for a party or candidate, and that this interpretation applies both within and outside the election period. That is the position arrived at by the BSA.

Strict construction of penal statutes

It is a long-established canon of statutory construction that penal statutes should be strictly construed. This means that in case of ambiguity or doubt the interpretation should be adopted which is most favourable to the person accused of committing the offence. This rule of construction has been much attenuated in recent times as a result of the modern purposive approach to interpretation. But in cases of real doubt it is still applied. (See the cases referred to in Burrows and Carter, *Statute Law in New Zealand, 4th ed* 2009, at 217).

Section 70 of the Broadcasting Act is a penal provision. It carries a fine of up to $100 000 (section 80). In cases of genuine doubt, therefore, it should be interpreted favourably to the broadcaster. That also argues in support of the natural meaning of sections 69 and 70.

Conclusion

I conclude that the BSA interpretation is correct, and that The Prime Minister's Hour was not an election programme because it did not encourage or persuade voters (or appear to encourage or persuade them) to vote for him or his party. This conclusion is based on:

- ***the most natural meaning of the statutory words;***
- ***the relevant supplementary aids to interpretation;***
- ***consistency with the BORA right of freedom of expression;***
- ***the canon of strict construction of penal statutes.***

If it be argued that this interpretation does not fulfil the purpose of Part 6 of the Broadcasting Act, the response must be that purpose can only be given effect to if it is clear, and only then insofar as the text of the legislation allows.

It may well be that in terms of fairness the outcome achieved by the BSA interpretation is not ideal, but the remedy lies in amending legislation. Part 6 of the Act is in urgent need of it.

JONO AND BEN AT TEN

A skit from this show, broadcast on TV3 on June 28 2013, was the subject of a decision by the Electoral Commission, although to my knowledge it has not been subject to a determination by the BSA. This matter illustrates another area of ambiguity in the election programme provisions of the Broadcasting Act.

Jono and Ben at Ten is a late-night comedy programme directed particularly to a young adult audience. The skit in question, which lasted less than 2 minutes, was called "School Terminator". It was about the problematic school payment system Novopay. It featured a Novopay character sucking money from teachers, and a robotic character conveying the message that our education system will cease to exist if Novopay continues unremedied. There was then an entrance by Hon Winston Peters, played by Mr Peters himself, dressed in business attire (in stark contrast to the other characters). On being asked by one of the characters what he could do about Novopay Mr Peters replied that he could not stop it right now. "But if you vote New Zealand First at the next election we can sure set out to fix it up." Orange guy, the Electoral Commission's logo, then entered. There was a voiceover saying "And remember to enrol to vote. This was an authorised electoral message."

The Electoral Commission determined that this was an election programme, and advised Mediaworks that they would refer the matter to the Police. I have been asked by the BSA to comment on this decision as well.

Opinion

News, comments or current affairs programmes

The first question is whether the programme comes within the exemption in section 70(3) of the Broadcasting Act. It provides that nothing in section 70(1)

(the prohibition on election programmes) restricts the broadcasting, "in relation to an election, of news or of comments or of current affairs programmes". This raises problems of interpretation too. "Current affairs" is a well-established, although slightly nebulous, category which generally refers to analysis and discussion of news and recent happenings. *Campbell Live* and *Seven Sharp* would be regarded by most people as current affairs programmes. In a helpful set of guidance on its website, the Electoral Commission gives examples of other programmes which would come within the concept. It indicates, for example, that leaders' debates would be likely to come within the exemption.

It is not quite clear what constitute "comments" for the purpose of section 70(3). Presumably it means comments on news; but if that is so it is not obvious how that differs from current affairs. (There is a similar provision in the section 2 of the Privacy Act 1993 which refers to news, current affairs, and "observations on news".) Perhaps the word "programmes" in section 70(3) qualifies only "current affairs", in which case comments on news would be within the exemption even in cases where they do not constitute a whole programme in themselves?

Does *Jono and Ben at Ten* qualify for this exemption? It would be difficult to categorise it as a current affairs programme, although it might be able (just) to bring itself within the "comments" category, at least if the Novopay skit can be looked at separately from the rest of the show. The skit certainly did comment on a matter of current interest. The fact it was intended to be humorous would not disqualify it from this category. Some of the most incisive comment on matters of current interest uses satire and humour in a devastating way. Without elevating Jono and Ben to quite that level, it is at least arguable that this skit was a "comment" on news. But it is much more difficult to say that the skit overall was "in relation to an election" as section 70(3) requires. Mr Peters' cameo appearance was, but I do not think one can subdivide this short skit into segments in this way.

For present purposes I shall assume that the skit does not fall within the section 70(3) exemption.

Was this an election programme?

The question then is whether the programme "encouraged or persuaded" people to vote for Mr Peters or his party, or appeared to do so, or "advocated support" for himself or his party. Mr Peters clearly told viewers that if they voted him in his party would try to fix Novopay. But such words would only amount to encouragement, persuasion or advocacy if viewers took them seriously. It is true that Mr Peters' demeanour was serious, and that this was in contrast to that of the other characters. But the overall context is crucial. Three things contribute to the conclusion that this was not a serious attempt by Mr Peters to persuade voters. First, despite his demeanour and dress he was an integral part of the skit, and engaged with, and spoke to, the other (comedy) characters. In other words he was part of a comedy programme and not separate from it. Secondly, when the animated "Orange guy" entered he placed his hand on Mr Peters' shoulder. Thirdly, Mr Peters gave the "thumbs up" to end the segment. This all added to the impression of a light-hearted spoof.

Conclusion

It is my opinion that, viewing the skit as a whole, and placing Mr Peters' cameo in that context, a reasonable viewer would not take this as a serious endeavour to encourage or persuade voters to vote for Mr Peters or his party. It was just light-hearted comedy for an audience most of whom well understand the style of Jono and Ben.

The observations on the Bill of Rights Act and the strict construction of penal statutes in the earlier part of this opinion are relevant here as well, and support the conclusion in favour of the broadcaster.

Review of legislation

It seems to me that part 6 of the Broadcasting Act would benefit from review. It would give an opportunity to assess the impact of digital communication on this area, and consider whether the legislation is behind the times. It would also provide a chance to clarify some of the problematic definitions that have

led to the present uncertainty, including the concepts of “election programme”, “comment” and “current affairs”, and to see whether a clearer test can be found for distinguishing programmes within and outside the election period. Consideration is also being given, I understand, to aligning the Broadcasting Act 1989 with the Electoral Act 1993.

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