

Y27 YARDLEY, M. Tipping the Scales against Freedom...

MICHELLE YARDLEY

**TIPPING THE SCALES AGAINST  
FREEDOM OF EXPRESSION?  
THE APPLICATION OF THE BALANCE  
STANDARD BY THE BROADCASTING  
STANDARDS AUTHORITY**

LLM RESEARCH PAPER  
FREEDOM OF EXPRESSION AND FREEDOM OF  
INFORMATION (LAWS 520)

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Network Services ("Corvax")<sup>1</sup> decision which received a lot of attention due to the involvement of the Prime Minister, the high profile of the programme in question and the pro-pressman derogatory atmosphere in which it was decided. Other politicians criticised the BSA for being too harsh in its application of the standards and deputy minister Stephen Franks of a Liberal government (conservative) expressed his disapproval to the ACT party and that "the law uses fine-sounding words like 'balance' and 'fairness' to judge interviews in hindsight, but the effect is to squelch debate in the future".<sup>2</sup> He felt the tactics used by the interviewer in this case were justified and New Zealanders could make up their own mind about whether such methods

<sup>1</sup> Yvonne Dawson (Chair), Joe Atkinson, Bill Salmons, Judy Maloney and Peter Hastings "The News Gone Too Far Towards Involvement, Celebrity and Triviality" in New Zealand Broadcasting School Back to the Future: A one-day conference on the future of New Zealand Broadcasting (Christchurch Institute of Technology, Christchurch, 2001), 10.  
<sup>2</sup> Yvonne Dawson (Chair), Joe Atkinson, Bill Salmons, Judy Maloney and Peter Hastings "The News Gone Too Far Towards Involvement, Celebrity and Triviality" in New Zealand Broadcasting School Back to the Future: A one-day conference on the future of New Zealand Broadcasting (Christchurch Institute of Technology, Christchurch, 2001), 10.  
<sup>3</sup> The Prime Minister (Dr John Key) "TFF Newsweek Interview" (1 July 2001) Broadcasting Standards Authority Decision number 2001-002 at 2001-001.  
<sup>4</sup> ACT Party "BSA should be free to freedom of speech" (14 July 2001) Press Release.



I. ABSTRACT

In recent times the Broadcasting Standards Authority (BSA) has been criticised by broadcasters and politicians for being too restrictive towards freedom of expression. This paper assesses the validity of this criticism in relation to one standard, the balance standard. This is achieved firstly by a study of the BSA and, as a comparison, broadcasting regulators from Canada, Australia and the United Kingdom. In particular the focus is on the balance requirement in two of the BSA's main Codes looking in detail at the BSA's interpretation of the standard and the interpretation of similar standards by overseas regulators. There is also consideration of the adequacy of this standard's drafting in these two Codes in light of the balance standards that are in place overseas.

The BSA's interpretation of the balance standard has generally been good but there are some instances of decisions that are contradictory and lack clarity. Overall the balance standard itself is well drafted when compared with standards in other jurisdictions although it lacks a clear distinction between news and current affairs-type programmes. Both the balance standard itself and the BSA's interpretation of the standard are reasonable limits within section 5 of the Bill of Rights Act (BORA) meaning that in relation to balance the BSA is not overly restricting freedom of expression. In borderline cases its decisions often favour the broadcaster over the complainant which is an approach that is consistent with freedom of expression under BORA. However the BSA should set out how they have applied BORA, at least in borderline decisions, rather than just stating that they have.

Word Length

The text of this paper (excluding abstract, table of contents, footnotes, bibliography and appendices) comprises approximately 16,300 words.



## II. INTRODUCTION

There has been some criticism from members of the media that the decisions of the Broadcasting Standards Authority (BSA) are too restrictive towards freedom of expression, in particular concerning the standards of balance, fairness and accuracy. Bill Ralston, the Head of News and Current Affairs at Television New Zealand (TVNZ) has accused the BSA of “putting out, quite frankly, barking mad decisions”. He felt that when their decisions criticised an interviewer’s manner that the BSA was trying to dictate the way in which interviews are conducted. In his opinion “the BSA and its decision making processes....are one of the worst things affecting the New Zealand media”.<sup>1</sup> Likewise Mark Jennings the Director of News and Current Affairs at TV3 has said “broadcasters are being railroaded by this body [the BSA] make no doubt about that...We don’t mind if we get something seriously wrong...If you get it wrong, that’s fair enough, but when you go down for a robust interview with Helen Clark, that’s rubbish”.<sup>2</sup>

Mr Jennings's remarks relate to the controversial *Prime Minister v TV3 Network Services ("Corngate")*<sup>3</sup> decision which received a lot of attention due to the involvement of the Prime Minister, the high profile of the programme in question and the pre-election politically-charged atmosphere in which it was decided. Other politicians criticised the BSA for being too harsh in its application of the standards and thereby threatening freedom of speech. Stephen Franks of the ACT party said that “the law uses fine aspirational words like ‘balance’ and fairness’ to judge interviews in hindsight, but the effect is to squelch debate in the future”.<sup>4</sup> He felt the tactics used by the interviewer in this case were justified and New Zealanders could make up their own mind about whether such methods

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<sup>1</sup> Yvonne Densem (Chair), Joe Atkinson, Bill Ralston, Judy McGregor and Mark Jennings “Has News Gone Too Far Towards Infotainment, Celebrities and Trivia?” in New Zealand Broadcasting School *Back to the Future: A one-day conference looking at the future of New Zealand Broadcasting* (Christchurch Institute of Technology, Christchurch, 2004) 12.

<sup>2</sup> Yvonne Densem (Chair), Joe Atkinson, Bill Ralston, Judy McGregor and Mark Jennings “Has News Gone Too Far Towards Infotainment, Celebrities and Trivia?” in New Zealand Broadcasting School *Back to the Future: A one-day conference looking at the future of New Zealand Broadcasting* (Christchurch Institute of Technology, Christchurch, 2004) 24

<sup>3</sup> *The Prime Minister (Rt Hon Helen Clark) v TV3 Network Services Limited* (3 July 2003) Broadcasting Standards Authority Decision numbers 2003-055 to 2003-061.

<sup>4</sup> ACT Party “BSA threat to freedom of speech” (4 July 2003) Press Release.



were appropriate. He felt the effect of the decision was that Ministers could just refuse to take part in programmes and then the media would be too frightened to run the story in case they are accused of lack of balance.<sup>5</sup>

Of course not everyone is critical of the BSA and its application of the balance and fairness requirements. In contrast to the views discussed above Judy McGregor, a former member of the BSA, has stated that "if you look back at recent decisions, there have been some landmark decisions that have promoted the public's right to balance, fairness and accuracy in the news".<sup>6</sup> If anything she felt that the BSA should be able to do more but that it is "constrained by its empowering legislation, and the degree to which it can handle what happens when it finds a breach is contained in the Act".<sup>7</sup>

In this essay I will look at the BSA and, as a comparison, broadcasting regulators from Canada, Australia and the United Kingdom. In particular I will focus on the balance requirement in two of the BSA's main Codes; looking in detail at the BSA's interpretation of the standard and the interpretation of similar standards by overseas regulators. I will also consider the adequacy of this standard's drafting in these two Codes in light of the balance standards that are in place overseas. From this analysis I hope to be able to judge whether this standard, and the BSA's interpretation of it, are at odds with freedom of expression.

### III. THE BROADCASTING STANDARDS AUTHORITY

The Broadcasting Standards Authority (BSA) is an independent Crown Entity that was set up by the Broadcasting Act 1989. That Act also set out the

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<sup>5</sup> ACT Party "BSA threat to freedom of speech" (4 July 2003) Press Release.

<sup>6</sup> Yvonne Densem (Chair), Joe Atkinson, Bill Ralston, Judy McGregor and Mark Jennings "Has News Gone Too Far Towards Infotainment, Celebrities and Trivia?" in New Zealand Broadcasting School *Back to the Future: A one-day conference looking at the future of New Zealand Broadcasting* (Christchurch Institute of Technology, Christchurch, 2004) 14.

<sup>7</sup> Yvonne Densem (Chair), Joe Atkinson, Bill Ralston, Judy McGregor and Mark Jennings "Has News Gone Too Far Towards Infotainment, Celebrities and Trivia?" in New Zealand Broadcasting School *Back to the Future: A one-day conference looking at the future of New Zealand Broadcasting* (Christchurch Institute of Technology, Christchurch, 2004) 25.



functions of the BSA; among these is the duty to receive and determine complaints against broadcasters when there is an alleged breach of a programme standard.<sup>8</sup> The standards are set out in Section 4(1) and include a requirement that a broadcaster maintain, in programmes and their presentation, standards consistent with “any approved code of broadcasting applying to the programmes”.<sup>9</sup> There are currently four Codes of Broadcasting.<sup>10</sup>

Generally complaints are made first to the broadcaster concerned.<sup>11</sup> Complainants must specify which standard they believe was breached by the broadcast in question.<sup>12</sup> Complaints must be made in writing and be received within 20 working days of the broadcast concerned.<sup>13</sup> The broadcaster must then notify the complainant of its decision. If it finds the complaint to be justified it must take appropriate action (which the complainant will be notified of).<sup>14</sup>

The complainant may refer the complaint on to the BSA if he or she are not satisfied with the decision or action taken (within 20 working days of the broadcaster’s decision), or the broadcaster has not responded to their complaint (within 60 days of the broadcast).<sup>15</sup> The BSA may determine a complaint without a formal hearing (and usually does) but must give the complainant and the broadcaster a reasonable opportunity to make written submissions.<sup>16</sup> In all cases the BSA is required to consider the complaint with as little formality and technicality as the law permits.<sup>17</sup>

If the BSA decides that a complaint is justified it has a number of enforcement powers including directing the broadcaster to publish a statement

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<sup>8</sup> Broadcasting Act 1989, s21.

<sup>9</sup> Broadcasting Act 1989, s4(1)(e).

<sup>10</sup> Covering Free-to-air Television, Pay Television, Radio and Election Programmes.

<sup>11</sup> Broadcasting Act 1989, s8.

<sup>12</sup> See *Free-to-Air Television Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2004), 2; and *Radio Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2004), 4.

<sup>13</sup> Broadcasting Act 1989, s6(2).

<sup>14</sup> Broadcasting Act 1989, s7(1).

<sup>15</sup> Broadcasting Act 1989, s8.

<sup>16</sup> Broadcasting Act 1989, s10(1).

<sup>17</sup> Broadcasting Act 1989, s10(2).



and stopping the broadcaster from showing advertising programmes for up to 24 hours.<sup>18</sup>

The BSA must notify both the complainant and the broadcaster of its decision.<sup>19</sup> The broadcaster is required to comply with any order made, and notify the BSA in writing of how they have done so.<sup>20</sup> Decisions of the BSA can be appealed to the High Court, where decisions are treated as if they were made in the exercise of discretion.<sup>21</sup> This appeal right is only a narrow one; it is not a rehearing of the case and the Court cannot substitute its view for that of the BSA.<sup>22</sup> The court has the power to confirm, modify or reverse a whole decision or order (or any part of it).<sup>23</sup> It may also send the decision back to the Authority for reconsideration.<sup>24</sup> However, when considering appeals from the BSA the High Court gives due weight to the expertise of the Authority as a specialist tribunal.<sup>25</sup>

The BSA is not bound by its previous decisions but often complaints will cite previous decisions and the BSA will follow or distinguish these where appropriate.<sup>26</sup>

Section 4(1)(d) of the Broadcasting Act sets out the standard for balance that is required. However this balance standard is also incorporated into the Codes which are made through the power of section 4(1)(e). I will concentrate on the balance standards in the Free-to-Air Television Code (the Free-to-Air Code)

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<sup>18</sup> Broadcasting Act 1989, s13.

<sup>19</sup> Broadcasting Act 1989, s13(2).

<sup>20</sup> Broadcasting Act 1989, s13(3).

<sup>21</sup> This means that the appellant must establish that the Authority acted on a wrong principle, failed to take into account a relevant matter or had regard to an irrelevant matter, or was plainly wrong; see *TV3 Network Services Ltd v The Prime Minister (Rt Hon Helen Clark)* (10 February 2004) HC WN CIV-2003-485-1816 & 1655, para 8.

<sup>22</sup> *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2 NZLR 709, 716.

<sup>23</sup> Broadcasting Act 1989, s18.

<sup>24</sup> This power has been implied in s18 by the High Court *TV3 Network Services Ltd v The Prime Minister (Rt Hon Helen Clark)* (10 February 2004) HC WN CIV-2003-485-1816 & 1655, paras 27-30.

<sup>25</sup> *Jardine Insurance Brokers Ltd v Television New Zealand* (3 November 1995) HC AK HC 176/94 & HC 189/94, 10; and *Television New Zealand v Ministry of Agriculture and Fisheries* (13 February 1997) HC WN AP 89/95, 20.

<sup>26</sup> John Burrows & Ursula Cheer (eds) *Media Law in New Zealand* (5 ed, Oxford, Melbourne, 2005) 582.



and the Radio Code of Broadcasting Practice (the Radio Code). These Codes expand on and provide guidance for the interpretation of the balance standard in s4(1)(d) as it relates to these particular mediums. The High Court has considered and approved this expansion of the balance standard in the Codes, saying it is not inconsistent with section 4(1)(d).<sup>27</sup> The sections of these Codes dealing with balance are set out in full in Appendix I.

#### IV. OVERSEAS REGULATION OF BROADCASTING

##### A. The United Kingdom

The Office of Communications (Ofcom) is the sole regulator for the United Kingdom communications industries including radio and television broadcasting.<sup>28</sup> Ofcom resulted from a review and reform of the British Communications sector and in December 2003 it inherited the duties of several previous regulators including the Broadcasting Standards Commission (BSC) and Radio Authority.<sup>29</sup> Each of these regulators had previously operated from their own individual codes and Ofcom was required to draw up its own code condensing the predecessors.<sup>30</sup> Ofcom has published its Broadcasting Code for Television and Radio (the "Ofcom Code"), which came into effect on the 25<sup>th</sup> July 2005; on this date the old Codes were completely superseded.<sup>31</sup> Because this Code is so new very few cases have been decided under it and none that deal with balance. However the Code itself is quite detailed and I have looked at cases decided by Ofcom under the old codes which dealt with very similar provisions and which will probably act as a guide for Ofcom when ruling on complaints.

Complaints to Ofcom should be made within a reasonable time after the relevant broadcast (usually three months).<sup>32</sup> When a broadcaster breaches the Code Ofcom will usually publish a summary of the complaint and its findings;

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<sup>27</sup> *Radio New Zealand Ltd v McCully* [1998] NZAR 293, 301.

<sup>28</sup> Communications Act 2003 (UK).

<sup>29</sup> Communications Act 2003 (UK) (Explanatory notes).

<sup>30</sup> Communications Act 2003 (UK), s319; and Broadcasting Act 1996 (UK), s107.

<sup>31</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005).

<sup>32</sup> *Guidelines for the handling of standards complaints and cases (in programmes and sponsorship)* (Office of Communications, London, 2005).



but where the broadcaster deliberately, seriously or repeatedly breaches the Code they may impose statutory sanctions.<sup>33</sup> It suggests that complainants contact the broadcaster first but they can initially complain straight to Ofcom.<sup>34</sup>

The main sections of the Ofcom Code that are relevant to the requirements of the New Zealand balance standard are sections 5 and 7, both of which are set out in Appendix II. Section 5 puts in place a requirement for due impartiality and Section 7 deals with fairness issues.

### B. Canada

There are four main bodies involved in regulating broadcasting standards in Canada. They are the Canadian Broadcasting Standards Council (CBSC), the Canadian Association of Broadcasters (CAB), Canadian Radio-Television and Telecommunications Commission (CRTC) and the Radio Television News Directors Association of Canada (RTNDA). The two main standards that apply to television and radio broadcasters are the CAB Code of Ethics (the "CAB Code") and the RTNDA Code of (Journalistic) Ethics (the "RTNDA Code"). The CAB Code sets out the minimum standards to be met by broadcasters, although these guidelines are only voluntary.<sup>35</sup> The RTNDA Code sets out requirements specifically for journalists.<sup>36</sup> At present there is no conflict between the CAB Code and the RTNDA Code; they use different phraseology to establish the fundamental principles of news reporting.<sup>37</sup>

The CRTC is the governmental body mandated with overseeing the entire broadcasting industry, pursuant to the Broadcasting Act 1991. It hears complaints made by listeners or viewers, and determines whether the broadcaster has breached the conditions of their licence (which can include the requirements of

<sup>33</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), p5.

<sup>34</sup> *Guidelines for the handling of standards complaints and cases (in programmes and sponsorship)* (Office of Communications, London, 2005).

<sup>35</sup> Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), background.

<sup>36</sup> See Radio Television News Directors Association of Canada *Code of Ethics* (Radio Television News Directors Association of Canada, Ontario, 2000).

<sup>37</sup> *CIII-TV re First National Newscast (Premiers' Conference)* (26 February 1998) Canadian Broadcasting Standards Council Decision number 96/97-0246.



the CAB and RTNDA Codes).<sup>38</sup> The CBSC is an independent, voluntary organisation created and funded by Canada's private broadcasters, including radio and television services;<sup>39</sup> its members include nearly all of Canada's private broadcasters.<sup>40</sup> The CBSC can hear complaints that its members have breached industry codes and does so with a self-regulatory approach.<sup>41</sup> The CRTC is the ultimate authority in the area of viewer and listener complaints, but customarily the CBSC determines complaints in relation to Canadian private broadcasting. The CBSC operates with full approval of the CRTC; when complaints are made to CRTC it refers to CBSC those dealing with their members and decides the other cases itself.<sup>42</sup> I am going to look almost exclusively at the decisions of the CBSC as the main regulator of private broadcasting in Canada.

All complaints must be in writing to CBSC by someone who personally saw or heard the offending material. The CBSC forwards the complaint to the broadcaster giving it an opportunity to resolve the issue with the complainant independently. When the broadcaster makes a decision the CBSC provides the complainant with a Ruling Request form, which the complainant can return to the CBSC if unsatisfied with the broadcaster's response. Only when receiving a Ruling Request form will the CBSC will begin any substantive review of any given matter. Decisions are made by one of the CBSC's five regional Adjudicating Panels or two national Adjudication Panels depending on the substance and scope of the programme complained of. Decisions are "evergreen" in nature in that they apply to all CBSC broadcaster members and all programming of a similar nature which may be broadcast in future.<sup>43</sup> If a Code violation is found the broadcaster must announce the decision on air twice and write a letter to the complainants within fourteen days indicating announcements

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<sup>38</sup> Broadcasting Act C 1991 c B-9.01, Part II.

<sup>39</sup> For an outline of the CBSC's complaint procedure see the *CBSC Website* - <http://www.cbsc.ca/english/main/role.htm>.

<sup>40</sup> For a list of current members see the *CBSC Website* - <http://www.cbsc.ca/english/members/index.htm>

<sup>41</sup> For an outline of the CBSC's complaint procedure see the *CBSC Website* - <http://www.cbsc.ca/english/main/role.htm>.

<sup>42</sup> Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1991-90* (CRTC, Ottawa, 1991).

<sup>43</sup> For an outline of the CBSC's complaint procedure see the *CBSC Website* - <http://www.cbsc.ca/english/main/role.htm>.



have been made.<sup>44</sup> The CRTC acts as an “appellate” body for anyone (not just the complainant) who is dissatisfied with a decision rendered by the CBSC and would like to have that decision reconsidered. The CRTC’s reviews are “de novo” meaning the matter will be reinvestigated and looked at afresh with further submissions from both sides.<sup>45</sup>

The main relevant sections of the CAB Code and the RTNDA Code are set out in Appendix III. Clause 5 of the CAB Code applies to news programmes only and specifies that broadcasters must ensure that news is represented with accuracy and without bias. Clause 6 of the CAB Code requires full, fair and proper presentation of news, opinion, comment and editorial. Clause 7 of the CAB Code deals with controversial public issues and the need to present both sides of such issues. Article 1 of the RTNDA Code requires broadcast journalists to inform the public in an accurate, comprehensive and fair manner about events and issues of importance.

### C. Australia

In Australia the Australian Communications and Media Authority (ACMA) primarily undertakes the regulation of television and radio programmes. This organisation decides complaints concerning television or radio programmes that are covered by a code of practice.<sup>46</sup> The ACMA inherited this regulatory power from the Australian Broadcasting Authority (ABA) on 1 July 2005 when the ACMA was formed from a merger of the ABA and the Australian Communications Authority.<sup>47</sup> However the applicable codes of practice and procedure governing complaints have remained the same as under the ABA so I will consider and analyse the decisions of the ABA in this paper.

The Broadcasting Services Act 1992 allows the various broadcasting industry sectors to set their own programme guidelines in the form of codes of

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<sup>44</sup> Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1991-90* (CRTC, Ottawa, 1991).

<sup>45</sup> Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1991-90* (CRTC, Ottawa, 1991).

<sup>46</sup> Australian Communications and Media Authority Act 2005 (Cth), s10.



practice, which the ACMA regulates. The Act empowers the ACMA to impose a condition on a licensee requiring it to comply with the Code.<sup>48</sup> A licensee who does not comply with such a condition may be subject to a range of penalties under the Act.<sup>49</sup> There are two relevant Codes which I will focus my analysis on – one covering Commercial Television (the Australian Television Code) and one that governs Commercial Radio (the Australian Radio Code). Complaints of breaches of these Codes must first be made directly to the relevant broadcaster in writing (within 30 days or the broadcaster has no duty to reply).<sup>50</sup> If complainants are dissatisfied with the station's response, or the station does not answer within 60 days, they may then complain to the ACMA.<sup>51</sup> Complaints must be in writing<sup>52</sup> but there is no requirement that complainants refer to the Code or specify the section of the Code to which the complaint relates.<sup>53</sup>

The relevant sections of the Australian Radio and Television Codes are set out in Appendix IV. Section 4 of the Television Code applies to news and current affairs programmes. Of particular interest is section 4.3.1 which specifies that such programs “must present material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program”. Also section 4.4.1 requires that licensees “must present news fairly and impartially”. Code of Practice 2 of the Radio Code sets out the requirements for news and current affairs shows on radio. Under section 2.1(a) news programs must present news accurately and under 2.2(c) in the preparation and presentation of current affairs programs a licensee must ensure that “reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public

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<sup>47</sup> Australian Communications and Media Authority Act 2005 (Australia), s2.

<sup>48</sup> Broadcasting Services Act 1992 (Cth), s44(2).

<sup>49</sup> *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 1.2.

<sup>50</sup> *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 7.9.

<sup>51</sup> *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 7.14-7.15.

<sup>52</sup> *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 7.2.

<sup>53</sup> *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 7.2.1.



importance, either within the same program or similar programs, while the issue has immediate relevance to the community”.

**V. INTERPRETATION OF THE BALANCE STANDARD BY THE BSA AND COMPARISON WITH OVERSEAS JURISDICTIONS**

Below I have split up the New Zealand balance standard into its main components. Under each section I have summarised the interpretation of the BSA and interpretation of similar provisions by overseas regulations. It is good to keep in mind that the BSA does not usually break up the standard like this so the issues will overlap to some extent.

*A. Definition of ‘news, current affairs and factual programmes’*

*1. BSA interpretation*

Under the Free-to-Air Code there is a requirement that the balance standard only apply to news, current affairs and factual programmes (this same obligation is not present in the Radio Code). The BSA has stated that fictional programmes do not come within this phrase<sup>54</sup> and that whether an item is news depends on the facts of the particular case.<sup>55</sup> There is not much discussion in the decisions of what distinguishes a news programme from a current affairs programme but the distinction may be important. The BSA has noted that a current affairs and commentary programme is allowed more latitude in respect of the balance standard.<sup>56</sup> The BSA has stated that it accepts that editorial or other opinion pieces usually are not “news, current affairs or factual programmes” as contemplated under the standard.<sup>57</sup>

<sup>54</sup> *Banks v Television New Zealand Ltd* (15 December 2003) Broadcasting Standards Authority Decision numbers 2003-141 to 2003-158.

<sup>55</sup> *McDonald v Television New Zealand Ltd* (6 June 2002) Broadcasting Standards Authority Decision numbers 2002-071 to 2002-072. Decision noted that if a programme uses “familiar journalistic techniques” and otherwise has all the features of news broadcasts, then it is a news programme.

<sup>56</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.

<sup>57</sup> *Shenken v The Radio Network Ltd* (1 July 2004) Broadcasting Standards Authority Decision number 2004-071.



The BSA has recently provided some guidance on what is meant by 'factual programme'. They are considered to be a subset of news and current affairs programmes in that they are based on or concerned with facts; and are not the kind of programme that is designed to be partial or subjective. To determine whether a programme is factual one should look at its content in a particular case. Opinion programmes, or those that promote the expression of a particular ideology, are not factual programmes. For example the BSA found that Destiny Television could not be subject to balance requirements because the programmes' sermons were clearly based on the religious beliefs of Pastor Tamaki therefore the programme was expressing opinion and did not come within the category of a 'factual programme'.<sup>58</sup>

## 2. *Overseas Interpretation*

When looking at the standards and decisions of overseas broadcasting regulators some patterns emerge of how and when the codes and standards will be applied to programmes. These differ from the New Zealand approach in a number of ways. Firstly there is often a higher standard placed on "news" programmes separate from current affairs type shows and unlike New Zealand this higher standard is written into the codes themselves. For example under section 5 of the Ofcom Code in the United Kingdom the 'due impartiality and due accuracy' requirements apply to ALL news programmes<sup>59</sup> but only to other programmes, such as current affairs shows, when they deal with certain specific controversial issues.<sup>60</sup> Likewise in Canada and Australia there are greater requirements placed on news programmes by clause 5 of the CAB Code and section 4.4 of the Australian Television Code.

Secondly parts of the balance standard overseas are sometimes applied more broadly to all programmes not just to news and current affairs shows. For instance in the United Kingdom the requirements of fairness under section 7 of the Ofcom Code apply to all broadcasters and shows. Also the requirements of

<sup>58</sup> *Banks v Television New Zealand Ltd* (15 December 2003) Broadcasting Standards Authority Decision numbers 2003-141 to 2003-158.

<sup>59</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.1.



'due impartiality and due accuracy' under section 5 apply to any programme, not just current affairs or news, as long as they deal with certain controversial issues. In Canada the requirements of clause 7 of the CAB Code apply to all programmes dealing with a "controversial public issue".

However some aspects of overseas standards and their interpretation are similar to this part of the New Zealand balance standard. For instance clause 6 of the CAB Code in Canada applies to "news, opinion, comment and editorial"<sup>61</sup> which is a fairly similar requirement as that under the Free-to-Air Code. Also in Australia although there are different standards for news and current affairs, the standards of balance are not extended beyond these types of programme.

#### *B. Definition of a 'controversial issue of public importance'*

##### *1. BSA interpretation*

Both the Radio and Free-to-Air Codes require that a programme deal with a controversial issue of public importance for the balance requirement to apply. The BSA has stated that a controversial issue can be something "not finally resolved".<sup>62</sup> What constitutes a controversial issue of public interest seems to depend quite heavily on the circumstances. For instance decisions have questioned whether euthanasia and evolution are controversial issues<sup>63</sup> but another decision easily classified the debate around whether fish feel pain as coming within the standard.<sup>64</sup>

The controversial issue discussed in the programme must also be of public importance. Therefore a contractual dispute between two parties with no

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<sup>60</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5.

<sup>61</sup> Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 6.

<sup>62</sup> *Sawyers v Television New Zealand Ltd* (14 November 1996) Broadcasting Standards Authority Decision numbers 1996-155 to 1996-157.

<sup>63</sup> See *Armstrong v Television New Zealand Ltd* (27 June 1996) Broadcasting Standards Authority Decision number 1996-065; and *Fox v Radio New Zealand Ltd* (18 February 1999) Broadcasting Standards Authority Decision number 1999-010.

<sup>64</sup> *Blue Water Marine and New Zealand Big Game Fishing Council v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-223.



profile of being publicly important does not come within the standard.<sup>65</sup> Also an item looking at the competence of one particular doctor is not of public importance but would have been had it raised the wider issue of doctors' competence or professional accountability.<sup>66</sup>

A programme may not have to show balance where a controversial issue is dealt with only briefly and was not the main focus of the item.<sup>67</sup> The BSA has noted that it does not expect that every time a news item refers to a controversial issue that it is necessary to provide a summary of the debate.<sup>68</sup> Whether something is a 'periphery' issue is obviously a matter of degree; a cooking segment of one show was found to breach the balance standard by promoting the health benefits of soy without acknowledging that this was a controversial issue.<sup>69</sup>

Another situation that has arisen is where the overall programme deals with a controversial issue but the part of the programme subject to the complaint does not. For example a comment that President Bush was "leading the free world" was unrelated to the wider controversial issue of the programme, which dealt with pay rises of New Zealand MPs.<sup>70</sup>

Sometimes the boundaries of the controversial issue may be defined quite narrowly making it harder for the broadcaster to show balance within the period

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<sup>65</sup> *Topline International Ltd v Television New Zealand* (30 January 2003) Broadcasting Standards Authority Decision number 2003-002; and *Rupa v Television New Zealand* (11 July 2005) Broadcasting Standards Authority Decision number 2005-034.

<sup>66</sup> *Fraser v Television New Zealand* (4 May 2005) Broadcasting Standards Authority Decision number 2004-203.

<sup>67</sup> See for example: *Genet v Television New Zealand Ltd* (15 October 2004) Broadcasting Standards Authority Decision number 2004-147; *The New Zealand Pure Water Association v Television New Zealand Ltd* (22 February 1996) Broadcasting Standards Authority Decision number 1996-015; *Hooker v Television New Zealand Ltd* (30 June 2005) Broadcasting Standards Authority Decision number 2005-037; and *Baxter v Television New Zealand* (18 February 2005) Broadcasting Standards Authority Decision number 2004-221.

<sup>68</sup> See *New Zealand Pure Water v Television New Zealand Ltd* (22 February 1996) Broadcasting Standards Authority Decision number 1996-015; and *Baxter v Television New Zealand Ltd* (18 February 2005) Broadcasting Standards Authority Decision number 2004-221.

<sup>69</sup> *James v TVNZ Ltd* (16 September 1999) Broadcasting Standards Authority Decision number 1999-148.

<sup>70</sup> *Stone v Television New Zealand Ltd* (18 February 2005) Broadcasting Standards Authority Decision number 2004-210.



of current interest. In the *Peter Ellis*<sup>71</sup> decision Radio New Zealand argued that the controversial issue was the entire “Peter Ellis controversy” and balance had been achieved through the extensive media coverage of the issue. However the BSA defined the controversial issue as only the new allegations brought up in the interview in question. Therefore wider media coverage of Peter Ellis’ court battles did not provide balance.

## 2. *Overseas Interpretation*

Most of the overseas broadcasting codes and standards I looked at had some kind of similar requirement for a controversial issue to be involved in order for the balance standard to apply, at least for some parts of the standard. However the scope and interpretation of this obligation was sometimes different.

In the United Kingdom the requirements of ‘due impartiality’ in section 5 of the Ofcom Code apply to all news programmes, but only to other programmes when they deal with either “political or industrial controversy” or “matters relating to current public policy”.<sup>72</sup> The former of these is defined as political or industrial matters which politicians, industry and/or media are debating; and the latter is characterised as matters of policy being debated or discussed or already decided by local, regional or national government; these need not be subject to debate.<sup>73</sup> Under the same section there is also a greater standard of impartiality placed on programmes that deal with “matters of major political or industrial controversy and major matters relating to current public policy”.<sup>74</sup> Such matters concern subjects of a significant level or importance and are likely to be of the moment;<sup>75</sup> they are defined as being of national and often international importance, or are of similar significance within a smaller broadcast area.<sup>76</sup> This controversial issue standard is much more restricted than New Zealand and there

<sup>71</sup> *Ellis v Radio New Zealand Ltd* (13 September 2004) Broadcasting Standards Authority Decision number 2004-115.

<sup>72</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5.

<sup>73</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), p25.

<sup>74</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.11.

<sup>75</sup> *The Ofcom Broadcasting Code: Guidance Notes Issue Three: Section 5 - Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions* (28 September 2005) (Office of Communications, London, 2005), p4.

<sup>76</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), p28.



is much more detail within the Code itself as to what situations will fall within the controversy standard.

In Canada the requirements of Clause 5 of the CAB Code apply to all news programmes whatever topic they deal with; however within the clause it is specified that when dealing with a “controversial public issue” the news specifically cannot be selected for the purpose of furthering or hindering either side; there is an obligation on the broadcaster to present various points of view fairly.<sup>77</sup> What is a controversial public issue may not always be clear; as an example the CSBC has stated that the reporting of an arrest is non-controversial and requires no counterpoint arguments.<sup>78</sup> Clause 7 of the CAB Code specifically looks at and deals with “controversial public issues” which the Code itself extends to “any controversy which contains an element of public interest”;<sup>79</sup> and Article One of the RTNDA Code of Ethics applies to “events and issues of importance”.<sup>80</sup> These are quite a wide standards seemingly meant to include as many programmes within the scope of the standards as possible.

Under the Australian Television Code there is no requirement that the issue under discussion be ‘controversial’ or of ‘public importance’. The Code simply requires that the programme be defined as news or current affairs for the particular provisions to apply. Under the Australian Radio Code the standards for news programmes also apply regardless of the topic under discussion; however the requirement for balance in radio current affairs programmes is very similar to the New Zealand balance standard. The Radio Code requires that current affairs programs ensure that “reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial

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<sup>77</sup> Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 5.

<sup>78</sup> *CITY-TV re Newscast (Toronto Humane Society)* (21 October 1996) Canadian Broadcasting Standards Council Decision number 95/96-0226.

<sup>79</sup> Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 7.

<sup>80</sup> Radio Television News Directors Association of Canada *Code of Ethics* (Radio Television News Directors Association of Canada, Ontario, 2000), art 1.



issues of public importance”.<sup>81</sup> This is the same standard as New Zealand but it is not yet clear if it will be interpreted in the same way.

C. What is required by the phrases ‘reasonable efforts’ or ‘reasonable opportunities’

1. *BSA interpretation*

This requirement deals mainly with the amount and quality of coverage that a broadcaster gives to other sides to an argument or a story. The BSA has listed some general factors that they may take into account when assessing balance; they include the use of opposing spokespeople and press releases, quality and length of time given to contributors, and the tone and emphasis of the reporting. They have stated that how these factors interact and whether balance has been achieved will depend on the facts of a particular situation.<sup>82</sup> In particular when advancing arguments from an opposing view in order to provide balance the arguments are required to be presented in such a way to “enable a viewer to arrive at an informed and reasoned opinion”.<sup>83</sup> The BSA also seems to have suggested that more balance may be required of programmes that have a “high impact”.<sup>84</sup>

In most cases there is a basic requirement that a balance of perspectives is aired.<sup>85</sup> There is no strict measurement of time that should be spent on either side of a debate; it could be that one side is given less time but is forcefully argued so balance is achieved.<sup>86</sup> However in an appeal the High Court has questioned

<sup>81</sup> *Commercial Radio Australia Codes of Practice and Guidelines* (Commercial Radio Australia, Sydney, 2004), para 2.2(c).

<sup>82</sup> *McDonald v Television New Zealand Ltd* (6 June 2002) Broadcasting Standards Authority Decision numbers 2002-071 to 2002-072.

<sup>83</sup> *The Prime Minister (Rt Hon Helen Clark) and others v TV3 Network Services Ltd* (3 July 2003) Broadcasting Standards Authority Decision numbers 2003-055 to 2003-061.

<sup>84</sup> *The Prime Minister (Rt Hon Helen Clark) and others v TV3 Network Services Ltd* (3 July 2003) Broadcasting Standards Authority Decision numbers 2003-055 to 2003-061.

<sup>85</sup> *Smith v TV3 Network Services Ltd* (13 February 2003) Broadcasting Standards Authority Decision number 2003-006.

<sup>86</sup> *Lawton v Television New Zealand Ltd* (28 November 2002) Broadcasting Standards Authority Decision number 2002-192. Also see *Blue Water Marine and New Zealand Big Game Fishing Council v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-223 - in this decision two advocates were interviewed on either side of a debate and one scientist expressed his view on one side of the debate. This was found to be balanced because the scientist’s views were sufficiently qualified.



whether this is right as a general proposition, feeling that in some cases the length of time could be a very good index of balance.<sup>87</sup> In particular the BSA seems to frown on programmes that uncritically accept the view of one side to a debate.<sup>88</sup> In the case of live interviews the broadcaster needs only to offer the same opportunities to different sides of a debate; they are not responsible if one side argues better than the other.<sup>89</sup> The BSA has noted that broadcasting standards do not preclude a current affairs programme approaching an issue from a particular perspective or posing challenging questions for an organisation that has come under the spotlight.<sup>90</sup>

When someone gives his or her views in an interview there can be issues with the way the interview is conducted as to whether the programme is balanced. The BSA seems to look at the practical outcome of the programme; for example if there was unbalanced interviewing of two subjects this might not lead to imbalance if the person who was interviewed more critically conducts themselves well and manages to fully explain their point of view.<sup>91</sup> Interviews can be conducted in a vigorous and confrontational manner;<sup>92</sup> however the BSA frowns upon an interviewer treating one side in a conciliatory manner, and the other in a confrontational style.<sup>93</sup> It may be relevant whether the interviewee was aware or warned of the type of interview they would be subject to.<sup>94</sup>

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<sup>87</sup> *Hackwell v Television New Zealand* (13 September 2001) HC WN AP 212/00, para 6.

<sup>88</sup> For example see: *Ellis v Radio New Zealand Ltd* (13 September 2004) Broadcasting Standards Authority Decision number 2004-115; *The Diocese of Dunedin and others v TV3 Network Services Ltd* (9 September 1999) Broadcasting Standards Authority Decision numbers 1999-125 and 1999-137; and *Boyce v Television New Zealand* (7 June 2001) Broadcasting Standards Authority Decision numbers 2001-049 to 2001-050.

<sup>89</sup> *Watkins v The Radioworks Ltd* (22 November 2001) Broadcasting Standards Authority Decision numbers 2004-138 to 2004-204.

<sup>90</sup> *Dujmovic v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-216.

<sup>91</sup> *McDonagh v Television New Zealand Ltd* (13 February 1996) Broadcasting Standards Authority Decision number 1997-007.

<sup>92</sup> *Hooker v Television New Zealand Ltd* (4 March 2004) Broadcasting Standards Authority Decision number 2004-010.

<sup>93</sup> *Boyce v Television New Zealand* (7 June 2001) Broadcasting Standards Authority Decision numbers 2001-049 to 2001-050; and *The Prime Minister (Rt Hon Helen Clark) and others v TV3 Network Services Ltd* (3 July 2003) Broadcasting Standards Authority Decision numbers 2003-055 to 2003-061.

<sup>94</sup> *Hood v Television New Zealand* (19 December 2003) Broadcasting Standards Authority Decision number 2003-169.



One issue that arises is the opportunity afforded to a person to respond to critical comments and accusations made about them in the course of a programme. The BSA has stated that it would be “absurd” for a broadcaster to show balance every time critical comments were made about someone. However where comments have been of a serious nature, are highly relevant to the controversial issue being dealt with, and it was fairly easy for the broadcaster to obtain balancing comments then the BSA has found it reasonable to expect the broadcaster to seek a response from the person concerned.<sup>95</sup> Even if someone has earlier refused to comment on such issues their views should still be sought on any new material.<sup>96</sup> However the BSA also has said that those “who advocate illegal practices...do not have legitimate grounds to object to being criticised for their views”.<sup>97</sup>

In most decisions where a broadcaster has approached someone to comment and they have refused the BSA has found that there is still a requirement for balance.<sup>98</sup> They have recognised that there are times when an interested party or individual may have a legitimate reason that prevents them from making any comment<sup>99</sup> (although an item is not necessarily unbalanced if it does not make known to its audience the reasons why the person or organisation chose not to comment.)<sup>100</sup> In such a situation other experts can demonstrate this person or organisation’s point of view to some extent<sup>101</sup> or when interviewing a

<sup>95</sup> *McCully v Television New Zealand Ltd* (25 September 1997) Broadcasting Standards Authority Decision number 1997-130.

<sup>96</sup> *New Zealand Police (Otago District) v TV3 Network Services Ltd* (4 December 1997) Broadcasting Standards Authority Decision number 1997-160.

<sup>97</sup> *Moonen v Radio New Zealand Ltd* (20 June 1996) Broadcasting Standards Authority Decision number 1996-062.

<sup>98</sup> For example: *Egg Producers Federation of New Zealand v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-220; *Minister of Housing (Hon Murray McCully) v New Zealand Public Radio Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-088; and *Ellis v Radio New Zealand Ltd* (13 September 2004) Broadcasting Standards Authority Decision number 2004-115.

<sup>99</sup> See *Egg Producers Federation of New Zealand v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-220. Other examples are where they are awaiting an inquiry decision (*Maternity Services Consumer Council v Television New Zealand Ltd* (30 April 1998) Broadcasting Standards Authority Decision numbers 1998-041 to 1998-042) or seeking legal advice (*Ellis v Radio New Zealand Ltd* (13 September 2004) Broadcasting Standards Authority Decision number 2004-115).

<sup>100</sup> *New Zealand Maritime Safety Authority v TV3 Network Service Ltd* (30 September 2004) Broadcasting Standards Authority Decision number 2004-116.

<sup>101</sup> *The Prime Minister (Rt Hon Helen Clark) and others v TV3 Network Services Ltd* (3 July 2003) Broadcasting Standards Authority Decision numbers 2003-055 to 2003-061.



'devil's advocate' technique can be utilised.<sup>102</sup> Also if there is an obvious organisation that could be approached to provide the person's view such an approach should be made.<sup>103</sup> Conversely to this general trend, in some decisions the BSA has stated that where a reasonable opportunity is given to someone to participate, which is not fully taken advantage of, then this may discharge the broadcaster's obligations.<sup>104</sup>

Sometimes a refusal to comment will result from the person or organisation in question saying the broadcaster approached them with very little time until broadcast and thus did not give them an adequate opportunity to prepare a response. If this is shown to be true it can count against the broadcaster when the BSA looks at balance.<sup>105</sup> However the BSA will consider this in practical terms; while the amount of time given to respond might seem unreasonable normally, in the particular situation it could be sufficient. For example if the organisation or person in question deals with the media on a regular basis, or the topic was one they were familiar with or had recently given similar comments about.<sup>106</sup>

When a response is provided through the form of a statement or even a videotape what obligation is there on the broadcaster to include these and to what extent can they be edited? In one decision the BSA said that a refusal to broadcast a video tape either in part or in whole, or to verbatim read a statement do not in themselves constitute a breach of the standard.<sup>107</sup> However if the response advances quite a different point of view on the issue than what the broadcaster has shown in the programme this places an onus to at least provide a

<sup>102</sup> *Ellis v Radio New Zealand Ltd* (13 September 2004) Broadcasting Standards Authority Decision number 2004-115.

<sup>103</sup> *Ngaei v Television New Zealand Ltd* (21 December 2004) Broadcasting Standards Authority Decision number 2004-135.

<sup>104</sup> For example: *De Hart v TV3 Network Services Ltd* (10 August 2000) Broadcasting Standards Authority Decision numbers 2000-108 to 2000-113; and *Shaw v Television New Zealand Ltd* (4 September 1997) Broadcasting Standards Authority Decision number 1997-112.

<sup>105</sup> For example see *McCully v Television New Zealand Ltd* (25 September 1997) Broadcasting Standards Authority Decision number 1997-130.

<sup>106</sup> *Capital Coast Health (2) v Radio New Zealand Ltd and the Radio Network Ltd* (21 April 1996) Broadcasting Standards Authority Decision numbers 1997-049 to 1997-050; and *Hide v Television New Zealand* (7 November 2002) Broadcasting Standards Authority Decision number 2002-178.



brief summary of the opposition argument.<sup>108</sup> A summary of the response will be sufficient if the extracts are a true reflection of the person or organisation's position.<sup>109</sup>

The identity and status of the person who is approached by a broadcaster to give an opposing view may affect balance; it seems balance is easier to show if the opposing views are put across forcefully and well. Whether someone was authorised to represent the views of a particular group is usually a question of accuracy but if someone more appropriate could have been approached by the broadcaster this may count against them achieving balance.<sup>110</sup>

It is not entirely clear whether a broadcaster can rely on the coverage of the issue by other media. In one decision the BSA seemed to hedge their bets on the issue by saying that the broadcaster could not avoid its obligations by referring to balancing material contained elsewhere in the media. But they then acknowledged in its decision the "relevance to informed viewers that the issue was reported comprehensively throughout the media".<sup>111</sup>

## 2. *Overseas Interpretation*

Some of the issues that have come up under this part of the balance standard have been addressed by parts of the overseas codes and the way they have been interpreted. Below I will go through the main points that have arisen overseas in turn and how each country has dealt with these aspects.

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<sup>107</sup> *Canterbury Health Ltd v Television New Zealand Ltd* (10 September 1998) Broadcasting Standards Authority Decision number 1998-104.

<sup>108</sup> *Canterbury Health Ltd v Television New Zealand Ltd* (10 September 1998) Broadcasting Standards Authority Decision number 1998-104. The minority of the BSA in this decision felt that the broadcaster provided enough balance by reading some of the statement provided and conducting interviews in a 'devil's advocate' style.

<sup>109</sup> *Strata Title Administration Ltd v Television New Zealand Ltd* (11 May 2005) Broadcasting Standards Authority Decision number 2004-214.

<sup>110</sup> *Ngati Pukenga Iwi v Television New Zealand Ltd* (29 September 2003) Broadcasting Standards Authority Decision number 2003-109.

<sup>111</sup> *Centre for Psycho-Sociological Development v Television New Zealand Ltd* (22 February 1996) Broadcasting Standards Authority Decision number 1996-014.



The issue of how someone should be presented when they contribute to a programme has been considered in all the overseas jurisdictions to some extent. In Canada under clause 7 of the CAB Code the CBSC has stressed, similarly to the BSA, that there is not necessarily a breach because one side presents their case better in an interview type situation.<sup>112</sup> In the United Kingdom section 7 of the Ofcom Code does not set out how a contributor should be presented but does set out how broadcasters should deal with contributors. This includes requirements that they make clear to contributors what parts of the interview will be used, and that they be made aware of any significant changes to the programme as it develops which might affect their consent to participate.<sup>113</sup> This means that the contributor will be more aware when they contribute how they will be portrayed and will be able to make a more informed decision as to whether to contribute or not. The section also requires that incidents in a programme not be placed out of context; if they are and this materially affects viewers' opinions then this will be a breach.<sup>114</sup> In Australia under 4.3.1 of the Television Code there are general obligations not to misquote viewpoints or use them out of context;<sup>115</sup> viewpoints that are shown should not be misrepresented.<sup>116</sup>

Both the United Kingdom and Australia have considered in some form when and how someone should be given an opportunity to respond to allegations made against them. In the United Kingdom section 7 of the Ofcom Code says the subject of an allegation should be given an appropriate and timely opportunity to respond (as well as sufficient information with which to do so) when allegations are made of wrongdoing or incompetence,<sup>117</sup> but not when a programme is just a

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<sup>112</sup> *CTV re an episode of The Shirley Show* (18 August 1995) Canadian Broadcasting Standards Council Decision number 93/94-0261.

<sup>113</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s7.3.

<sup>114</sup> *Vardon Adjudication* (9 May 2005) Ofcom Broadcast Bulletin - Issue number 34 (Office of Communications, London, 2005).

<sup>115</sup> *Channel Seven Sydney Pty Limited* (12 June 2003) Australian Broadcasting Authority Investigation Report number 2003/1045.

<sup>116</sup> *Queensland Television Ltd* (13 April 2000) Australian Broadcasting Authority Investigation Report number 1999/0231.

<sup>117</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s7.11. See also *Al Faisal Adjudication* (23 August 2004) Ofcom Broadcast Bulletin - Issue number 16 (Office of Communications, London, 2004); *Blower Adjudication* (14 April 2005) Ofcom Broadcast Bulletin - Issue number 30 (Office of Communications, London, 2005); *Edmonston Adjudication* (9 May 2005) Ofcom Broadcast Bulletin - Issue number 34 (Office of Communications, London,



straightforward, factual report.<sup>118</sup> Whether opportunity should have been provided will depend on the circumstances including the seriousness of the allegations, the context in which they were made and the strength and tone in which they were expressed;<sup>119</sup> Ofcom will not look at the truth of the allegations.<sup>120</sup> In Australia there has been no specific consideration of what to do when allegations are made, but under section 4.4.1, in the context of news programmes, unfairness can arise from the failure to include the viewpoint of one side of a debate (which would include an accused).<sup>121</sup> If someone has shown a willingness to contribute to a programme it will count against the broadcaster if they refuse to include the salient points of this contribution.<sup>122</sup>

Australia and the United Kingdom have both also looked at what a broadcaster's responsibility should be when someone refuses to contribute when asked to respond to allegations. Under section 7 of the Ofcom Code when someone is given the opportunity and adequate time to respond to the criticism made and choose not to then a broadcaster should make this clear in the programme and give the person's reasons if it would be unfair not to do so. Anyone has the right to refuse to participate in a programme, but the refusal of an individual or organisation to take part need not normally prevent the programme from going ahead or inhibit debate on the issue.<sup>123</sup> In Australia, under section 4.3.1 of the Television Code, if someone is approached for comment but refuses or cannot be contacted it cannot be claimed that the broadcaster has misrepresented their views. Also importantly, and taking a stronger position than the BSA, the ACMA has stated that where someone has refused to comment the

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2005); *Toffel Adjudication* (9 May 2005) Ofcom Broadcast Bulletin - Issue number 34 (Office of Communications, London, 2005); and *The Ofcom Broadcasting Code: Guidance Notes Issue Three: Section 7 - Fairness* (28 September 2005) (Office of Communications, London, 2005), p3.

<sup>118</sup> *Kenyon Adjudication* (4 October 2004) Ofcom Broadcast Bulletin - Issue number 19 (Office of Communications, London, 2004).

<sup>119</sup> *Flanigan Adjudication* (18 October 2004) Ofcom Broadcast Bulletin - Issue number 19 (Office of Communications, London, 2004).

<sup>120</sup> *Al Faisal Adjudication* (23 August 2004) Ofcom Broadcast Bulletin - Issue number 16 (Office of Communications, London, 2004).

<sup>121</sup> *Channel Seven Sydney Pty Ltd* (18 November 2004) Australian Broadcasting Authority Investigation Report number 2004/0165.

<sup>122</sup> *General Television Corporation Pty Ltd* (14 January 2003) Australian Broadcasting Authority Investigation Report number 2003/0466/1.

<sup>123</sup> *Mills Adjudication* (20 September 2004) Ofcom Broadcast Bulletin - Issue number 18 (Office of Communications, London, 2004); and *The Ofcom Broadcasting Code: Guidance Notes Issue Three: Section 7 - Fairness* (28 September 2005) (Office of Communications, London, 2005), p3.



broadcaster is also not obliged to acknowledge their point of view.<sup>124</sup> However when the broadcaster has tried to contact the person for comment and failed, it is inaccurate to say in the programme that that person has "refused" to comment.<sup>125</sup>

Australia and the United Kingdom also both look at how a broadcaster can edit the comments of a contributor. In the United Kingdom section 7 of the Ofcom Code covers when someone's contribution, such as a statement or interview, is edited. Such editing can occur but the broadcaster must still cover the salient points and fairly represent the views that were expressed<sup>126</sup> otherwise the viewer could be left with an unfair conclusion.<sup>127</sup> In Australia, under section 4.3.1 of the Television Code, there has only been consideration of the situation where previous footage is re-edited and pasted into a new segment. This was seen as possibly being misleading and amounting to not representing a viewpoint fairly unless clearly signalled.<sup>128</sup>

#### *D. What is a significant point of view?*

##### *1. BSA interpretation*

There may be an issue as to what views are considered 'significant' within the requirements of the standard. The BSA has recognised that it is impossible to represent every viewpoint on an issue; for instance when debating race relation issues in New Zealand a programme could not cover every issue and perspective but could offer a range and be balanced in the opportunities it gave to both sides.<sup>129</sup> However the BSA has said that although it is fine to examine one theory thoroughly, if there is another theory of sufficient credibility and significance then it should at least be mentioned. For instance in one case a

<sup>124</sup> *Queensland Television Ltd* (13 April 2000) Australian Broadcasting Authority Investigation Report number 1999/0231.

<sup>125</sup> *Queensland Television Ltd* (13 April 2000) Australian Broadcasting Authority Investigation Report number 1999/0231.

<sup>126</sup> *Jones Webb Ltd Adjudication* (4 October 2004) Ofcom Broadcast Bulletin - Issue number 19 (Office of Communications, London, 2004); and *Harding Adjudication* (31 January 2005) Ofcom Broadcast Bulletin - Issue number 27 (Office of Communications, London, 2005).

<sup>127</sup> *Hall Adjudication* (19 April 2004) Ofcom Broadcast Bulletin - Issue number 7 (Office of Communications, London, 2004).

<sup>128</sup> *Queensland Television Ltd* (31 March 2003) Australian Broadcasting Authority Investigation Report number 2002/1325.



programme examined one particular theory for explaining a plane crash, that the pilot had committed suicide, without even considering the alternative and feasible explanation of plane malfunction.<sup>130</sup>

In another decision the BSA indicated that burying another theory at the end of an item and not bringing any real attention to it is not sufficient to bring about balance. For example one decision involved a Holmes item that looked at the issue of rugby coverage changing from free-to-air to Sky television. The show presented the issue as though the only option was that there would be no free-to-air coverage of rugby at all. This was found to be unbalanced; it did not matter that the possibility of delayed free-to-air coverage was mentioned briefly at the end of the item.<sup>131</sup>

The BSA has stated that it is not necessary for the broadcaster to speak to every party with a strong opinion to encapsulate an overview of a debate; sometimes portraying the views of one party on each side of a debate can be sufficient. So an item considering the debate over the Civil Union Bill was balanced because it included views from Destiny Church, opposing the Bill, and several views in favour of the law change. The views of other opponents to the Bill, unconnected with Destiny Church, were not needed to achieve balance.<sup>132</sup>

In many cases there are obviously two sides to a story but in some decisions there are issues about what is a credible opposing theory. In one decision the BSA found that when talking about evolution the broadcaster did not need to bring up the opposing Christian Creationist viewpoint.<sup>133</sup> Conversely a programme looking at homosexuality breached the standards by only looking at

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<sup>129</sup> *Cross v Television New Zealand Ltd* (4 November 2004) Broadcasting Standards Authority Decision number 2004-138.

<sup>130</sup> *Su-Wuen v Television New Zealand Ltd* (4 November 2004) Broadcasting Standards Authority Decision number 2004-151.

<sup>131</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.

<sup>132</sup> *Trimble v Canwest TVWorks Ltd* (21 December 2004) Broadcasting Standards Authority Decision number 2004-175.

<sup>133</sup> *Walker v Television New Zealand Ltd* (11 February 1999) Broadcasting Standards Authority Decision numbers 1999-004 to 1999-006.



the view that people's sexual orientation can be changed without exploring the opposing view that homosexuality is genetic.<sup>134</sup>

## 2. *Overseas Interpretation*

Overall the overseas jurisdictions do not seem to have this same requirement to expressly include significant points of view in order to achieve balance. In the United Kingdom section 7 of the Ofcom Code only states that broadcasters need to offer an opportunity to contribute when the omission of such an offer would be unfair. This seems to relate more to the situation where someone is accused of something rather than where there is an alternative point of view to a debate that could be expressed. However Ofcom has indicated that if a programme presents a misleading portrayal or distortion of events that are referred to or if there is an omission of significant facts, then it will be considered unfair.<sup>135</sup> Arguably under this approach if a significant view was not included then the programme would be misleading or distorted.

In Canada there is no express requirement to include significant views and conversely there has been emphasis placed on the need for broadcasters to be able to choose what views to include in their programmes. This has been expressed in the news context, in relation to clause 5, the reasoning being that decisions generally have to be made quickly and are restrained by factors such as the length of time available in a slot, and the need to make material newsworthy and appealing to viewers.<sup>136</sup> Also under article 1 of the RTNDA Code it is recognised that no broadcaster can be expected to cover every aspect raised in the course of a hearing or other newsworthy event; broadcasters must be selective in juggling the limited time available to them to report on all the events of the day.<sup>137</sup> If a broadcaster does not include all the facts and facets of the case

<sup>134</sup> *Sawyers v Television New Zealand Ltd* (14 November 1996) Broadcasting Standards Authority Decision numbers 1996-155 to 1996-157.

<sup>135</sup> *Edmonston Adjudication* (9 May 2005) Ofcom Broadcast Bulletin - Issue number 34 (Office of Communications, London, 2005); and *Ritchings Adjudication* (9 May 2005) Ofcom Broadcast Bulletin - Issue number 34 (Office of Communications, London, 2005).

<sup>136</sup> *CFMT-TV re South Asian Newswave* (21 October 1996) Canadian Broadcasting Standards Council Decision number 95/96-0160

<sup>137</sup> *CFMT-TV re News Report (Sexual Assault)* (22 June 1994) Canadian Broadcasting Standards Council Decision number 93/94-0215.



this can mean the report was inaccurate but not necessarily. Such comprehensiveness in news and current affairs is not seen as being required or even reasonable in some cases particularly when one takes into account the limited time available to put together programmes.<sup>138</sup> However despite this focus on broadcaster choice the requirement for significant points of view to be included can still be seen in Canada to some extent. For instance clause 7 of the CAB Code makes it the responsibility of broadcasters to treat fairly all subjects of a controversial nature by presenting all sides of a public issue.

In Australia the Television Code does have a requirement that significant points of view are required but it is considered more of an aspect of accuracy than balance. Section 4.3.1 does not require that all viewpoints be represented, only that those that are do not misrepresent the opinion of the person to whom they are ascribed. However a programme can be found to be inaccurate if it is too partial and omits the salient points of contrary arguments.<sup>139</sup> As in New Zealand and Canada it is recognised that there are limitations of time in presentation of material on television.<sup>140</sup> The decision of whether omitting a viewpoint breaches accuracy standards is decided on a case-by-case basis<sup>141</sup> but current affairs programmes in particular will not be expected to be neutral on every issue or present all possible viewpoints on a topic.<sup>142</sup>

*E. How long does the 'period of current interest' last?*

*1. BSA interpretation*

The standard for balance does not require that a broadcaster always provide balance within the programme itself. Other material shown in the 'period

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<sup>138</sup> *CFTM-TV (TVA) re J.E. "Crusade for a Presbytery"* (24 September 1998) Canadian Broadcasting Standards Council Decision number 97/98-0555.

<sup>139</sup> *General Television Corporation Pty Ltd (GTV)* (12 April 2000) Australian Broadcasting Authority Investigation Report number 1999/0584.

<sup>140</sup> *General Television Corporation Pty Ltd (GTV)* (12 April 2000) Australian Broadcasting Authority Investigation Report number 1999/0584

<sup>141</sup> *Channel Seven Sydney Pty Ltd* (18 November 2004) Australian Broadcasting Authority Investigation Report number 2004/0165.

<sup>142</sup> *Channel Seven Sydney Pty Ltd* (9 May 2003) Australian Broadcasting Authority Investigation Report number 2002/1436.



of current interest' can achieve balance and a programme can simply be part of the ongoing story.<sup>143</sup> When a case is ongoing the BSA has recognised that it is neither possible nor desirable to cover every angle each time the subject is raised.<sup>144</sup> As long as a programme presents the issue in a questioning manner and does not purport to be a comprehensive overview of the debate or the final word on the issue it can be balanced by later programmes.<sup>145</sup> However when a broadcaster shows an unbalanced programme this imbalance cannot just be "fixed" by offering the party involved another interview.<sup>146</sup> In the *McCully* case the Court indicated that no matter how unbalanced the original programme was the BSA should always consider the effect of any other programmes shown by the broadcaster within the period of current interest.<sup>147</sup>

Most news items might have a period of current interest stretching over days, months or years. However depending on the circumstances the period may be even longer than this. For example the BSA felt that the debate surrounding the origins of life (i.e. evolution) was over an infinite period.<sup>148</sup>

Similar items in the news and in a following current affairs show can affect balance requirements. In one case the fact that a current affairs show expanded on the issues raised in a news item did not provide balance for that item because the material in the following current affairs show was not sufficient to provide balance.<sup>149</sup> Conversely the juxtaposition of a news item and current affairs show both looking at the same story from the same view point can serve to make each item more unbalanced.<sup>150</sup>

<sup>143</sup> For example: *Owen v Television New Zealand Ltd* (20 July 2000) Broadcasting Standards Authority Decision number 2000-086; and *Ministry of Health v Television New Zealand Ltd* (2 March 2000) Broadcasting Standards Authority Decision numbers 2000-030 to 2000-031.

<sup>144</sup> *McCully v Television New Zealand Ltd* (25 September 1997) Broadcasting Standards Authority Decision number 1997-130.

<sup>145</sup> *Bercic v Canwest TVWorks Ltd* (19 August 2005) Broadcasting Standards Authority Decision number 2005-057.

<sup>146</sup> *TV3 Network Services Ltd v The Prime Minister (Rt Hon Helen Clark)* (10 February 2004) HC WN CIV-2003-485-1655 & 1816, para 54.

<sup>147</sup> *Radio New Zealand Ltd v McCully* [1998] NZAR 293.

<sup>148</sup> *Fox v Radio New Zealand Ltd* (18 February 1999) Broadcasting Standards Authority Decision number 1999-010.

<sup>149</sup> *Turney v Television New Zealand Ltd* (14 November 1996) Broadcasting Standards Authority Decision number 1669-154.

<sup>150</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.



## 2. *Overseas Interpretation*

In overseas interpretations of balance standards the requirements are usually allowed to be achieved over time to at least some extent, however this varies. In the United Kingdom there seems to be a much more restrictive approach that requires more linkage between the programmes that will achieve the balance than the BSA does. Under section 5 of the Ofcom Code due impartiality is required for programmes that deal with "matters of political or industrial controversy and matters relating to current public policy". However this impartiality requirement can be achieved not just within the programme itself, but over a series of programmes.<sup>151</sup> By creating a series the broadcaster is more likely to not misrepresent views and facts, as 'views must be presented with due weight over appropriate timeframes.<sup>152</sup> There is quite a narrow definition of what a series is; the programmes must deal with the same or related issues, they must be "editorially linked" and "aimed at like audience".<sup>153</sup> Also it should normally be made clear to the audience on air that the programmes are linked and part of a series.<sup>154</sup>

The Canadian approach seems less restrictive than the United Kingdom and closer to that of the BSA. Under clause 7 of the CAB Code a programme dealing with a controversial issue is not required to have built-in balance. Broadcasters are entitled to balance biased programming by presenting the other side of the issue on other programmes scheduled to deal with the same topic.<sup>155</sup> This is seen to be important when assessing compliance with clause 7 but not determinative.<sup>156</sup> If an individual programme is not internally balanced, the CBSC will look at the overall programming provided by the broadcaster in their

<sup>151</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5.

<sup>152</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.7.

<sup>153</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), p26.

<sup>154</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.6.

<sup>155</sup> *CKCO-TV re Provincewide (Education Reform in Ontario)* (28 July 1998) Canadian Broadcasting Standards Council Decision number 97/98-0412; and the CRTC's interpretation of the balance requirement in regard to controversial issues is found in Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1988-121* (CRTC, Ottawa, 1988).

<sup>156</sup> *CTV re an episode of The Shirley Show* (18 August 1995) Canadian Broadcasting Standards Council Decision number 93/94-0261.



assessment.<sup>157</sup> Also under article 1 of the RTNDA Code issues of balance and comprehensiveness are able to be judged over time, with the expectation that, over the course of the extended coverage, most if not all points of view connected with the issue will be addressed.<sup>158</sup>

In Australia there has been very little discussion of balance being achieved over time; however the Radio Code allows for balance to occur "within the same programme or similar programmes".<sup>159</sup> This indicates that there is some leeway for balance to be achieved by the broadcaster over a period as in New Zealand at least for radio programmes.

#### *F. Application of Guideline 4c of the Free-to-Air Television Code*

##### *1. BSA interpretation*

Under the Free-to-Air Code factual programmes and those that approach a topic from a particular perspective (for example authorial documentaries) may not "be required to observe to the letter" the balance requirement. What is a factual programme was discussed above under Heading A. The BSA has also indicated in its decisions some of the factors that lead it to classify a programme as authorial. These include statements that indicate a programme was the view of one person and the use of subjective language which makes it clear that the programme maker is expressing his or her personal view on the information.<sup>160</sup> In some cases Guideline 4c seems to have been applied judging by the language of the decision but the BSA has not explicitly stated that it has done so.<sup>161</sup> In a recent decision the BSA seemed to indicate that Guideline 4c could only apply to

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<sup>157</sup> The CRTC's interpretation of the balance requirement in regard to controversial issues is found in Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1988-121* (CRTC, Ottawa, 1988).

<sup>158</sup> *CTV re W5 ("Lawn Wars")* (21 October 1996) Canadian Broadcasting Standards Council Decision number 95/96-0187.

<sup>159</sup> *Commercial Radio Australia Codes of Practice and Guidelines* (Commercial Radio Australia, Sydney, 2004), para 2.2(c).

<sup>160</sup> For example: *Anderson v Television New Zealand Ltd* (15 October 2004) Broadcasting Standards Authority Decision number 2004-127A; and *Anderson v Television New Zealand Ltd* (15 April 2003) Broadcasting Standards Authority Decision numbers 2003-028 to 2003-030.

<sup>161</sup> For example see *Walker v Television New Zealand Ltd* (11 February 1999) Broadcasting Standards Authority Decision numbers 1999-004 to 1999-006.



“factual programmes which have been deliberately constructed to present a particular perspective”.<sup>162</sup> This view seems to ignore the actual language of the guideline, which indicates a wider range of programmes than just factual ones.

It is not entirely clear how the standards should be applied when a programme falls within guideline 4c. The BSA has found that programmes which are clearly just one person’s view on an issue do not need to be balanced at all<sup>163</sup> as long as this is clear and perhaps there is acknowledgement of the existence of other views.<sup>164</sup> For example such a show could have an introduction identifying the item as “one side” of a debate.<sup>165</sup> In one decision concerning an authorial documentary the BSA stated that absolute neutrality on every issue is not achievable, that no mathematical formula can be advanced and that there needed to be reasonable efforts in the programme to present alternative points of view.<sup>166</sup> These views seem almost identical to how the standards have been applied in some other cases not falling within this guideline. In another decision the application of the standards to an authorial documentary was more lenient.<sup>167</sup>

## 2. *Overseas Interpretation*

The only overseas jurisdiction that specifically deals with the idea of authorial programmes is the United Kingdom under section 5 of the Ofcom Code. This section requires due impartiality in certain circumstances but gives some leeway to authorial presenters and reporters. Under section 5.9 presenters and reporters (excluding those on news programmes), presenters of “personal view” or “authored” programmes and chairs of discussion programmes are able to express their own views on programmes looking at “matters of political or

<sup>162</sup> *Hooker v Television New Zealand Ltd* (30 June 2005) Broadcasting Standards Authority Decision number 2005-037.

<sup>163</sup> *Aitchison v Television New Zealand Ltd* (23 January 1997) Broadcasting Standards Authority Decision number 1997-003.

<sup>164</sup> *Werry v Radio New Zealand Ltd* (25 November 2004) Broadcasting Standards Authority Decision number 2004-132.

<sup>165</sup> *Le Bas v Radio New Zealand Ltd* (24 September 1998) Broadcasting Standards Authority Decision number 1998-106.

<sup>166</sup> *Anderson v Television New Zealand Ltd* (15 April 2003) Broadcasting Standards Authority Decision numbers 2003-028 to 2003-030.



industrial controversy and matters relating to current public policy". However there is still a requirement that alternative views are represented in that programme or series of programmes. "Personal view" programmes are defined as programmes presenting a particular view or perspective. They can range from outright expression of highly partial views, for example, by a person who is a member of a lobby group and is campaigning on the subject, to the considered "authored" opinion of a journalist, commentator or academic, with professional expertise or a specialisation in the area which enables him or her to express opinions which are not necessarily mainstream.<sup>168</sup> A personal view or authored programme must be clearly signalled to the audience at the outset, although this is a minimum requirement and it may not be sufficient in all the circumstances.<sup>169</sup>

The definition of "personal view" or "authored" programmes within this standard seems similar to the way the BSA has defined "authorial" programmes although the whole standard in the United Kingdom seems to have a much wider application as it applies to all "presenters and reporters" outside of news programmes which is quite a wide application. This part of the Ofcom Code is new so there is currently no guidance on how it will be applied but it seems to differ from New Zealand by only allowing the presenter of such a programme to express their views, it does not seem to affect the overall application of the standard to the programme. Although there is similarity in the emphasis on "personal view" or "authored" programmes being identified clearly as such from the outset.

Neither Canada nor Australia have any express standard relaxation for authorial type programmes. However the overall interpretation of balance standards in both jurisdictions indicates there could be some leeway for interpretation of the standards to allow for this. For example under clause 5 of the CAB Code the CBSC has referred to the ability of journalists in news to take

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<sup>167</sup> *Anderson v Television New Zealand Ltd* (15 October 2004) Broadcasting Standards Authority Decision number 2004-127A. However the BSA split on this decision with the minority not feeling balance had been achieved.

<sup>168</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), p27.

<sup>169</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.10.



editorial positions as long as subjective commentaries are separated from news reading.<sup>170</sup> Also under clause 6 there has been reference to programmes that do not purport to be objective and make this clear in their introduction;<sup>171</sup> such programmes are recognised, by their very nature, as involving the presentation of opinions and presuppose a moral bias. Such programmes should not be judged using the criteria of accuracy and fairness that would be applied to news or current affairs programming.<sup>172</sup> Similarly under 4.3.1 of the Australian Television Code it has been recognised that there is no requirement that current affairs programmes suppress opinions or be neutral on every issue and that the Code does not prevent a current affairs programme from taking a point of view.<sup>173</sup>

*G. How the balance requirement is applied to talkback radio*

*1. BSA interpretation*

The Radio Code does not require the standard to apply only to “news, current affairs or factual programmes”. However despite this the BSA has said that the standard should mainly apply to, and be more strictly observed by, news and current affairs programmes and topics.<sup>174</sup> Also the standard should not be applicable at all to comments which are satirical or glib editorial observations.<sup>175</sup>

The BSA has indicated that balance is achieved in talkback radio by providing open phone lines and by giving listeners the opportunity to make their

<sup>170</sup> *CKNW-AM re Journalistic Controversy* (18 December 1998) Canadian Broadcasting Standards Council Decision number 94/95-0175.

<sup>171</sup> Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 6.

<sup>172</sup> *CHCH-TV re Life Today with James Rodison* (30 April 1996) Canadian Broadcasting Standards Council Decision number 95/96-0128.

<sup>173</sup> *General Television Corporation Pty Ltd* (26 October 2001) Australian Broadcasting Authority Investigation Report number 2000/0668.

<sup>174</sup> *Smith v The Radio Network Ltd* (19 December 2003) Broadcasting Standards Authority Decision numbers 2003-174 to 2003-183; and *Clydesdale v The Radio Network Ltd* (2 September 2004) Broadcasting Standards Authority Decision number 2004-100.

<sup>175</sup> *Shenken v The Radio Network Ltd* (1 July 2004) Broadcasting Standards Authority Decision number 2004-071; and *Craig v The Radio Network Ltd* (4 December 2003) Broadcasting Standards Authority Decision number 2003-132.



views known.<sup>176</sup> In one case it was found relevant that the Chief Executive of an organisation being criticised was listening to the programme in question and thus had an opportunity to call-in and provide balancing views, which he did not.<sup>177</sup> However in another decision the host and his guest both held similar strong views on a topic and because of this the BSA felt that more was required for balance than just the availability of open lines. In particular, participation should have been sought from those holding an opposing view.<sup>178</sup>

## 2. *Overseas Interpretation*

The overseas application of balance to radio talkback programmes shows high appreciation for the value of talkback in the media especially as a tool for encouraging debate in a democratic society. For instance in the United Kingdom the importance of such shows is reflected in the fact that radio hosts of programmes with phone-in callers are not required to exercise the requirements of due impartiality under section 5 of the Ofcom Code as long as their personal view is clear.<sup>179</sup> There has been emphasis placed on the important ability that presenters have to enliven discussion and generate debate.<sup>180</sup> This leeway to talkback hosts is not absolute though and is quite dependant on the host's particular behaviour and the circumstances of the case. Therefore Ofcom will determine whether listeners would have understood the host's remarks to have breached the relevant code,<sup>181</sup> and the presenter is not allowed to use their position unfairly to put forward their own views on an issue.<sup>182</sup>

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<sup>176</sup> *Moonen v Radio New Zealand Ltd* (20 June 1996) Broadcasting Standards Authority Decision number 1996-062.

<sup>177</sup> *Colman v Radio New Zealand Ltd* (1 July 2004) Broadcasting Standards Authority Decision number 2004-072.

<sup>178</sup> *Department of Conservation v Radio Pacific Ltd* (23 April 1998) Broadcasting Standards Authority Decision number 1998-035.

<sup>179</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.10.

<sup>180</sup> *Sloly Adjudication* (15 November 2004) Ofcom Broadcast Bulletin - Issue number 22 (Office of Communications, London, 2004).

<sup>181</sup> *Sloly Adjudication* (15 November 2004) Ofcom Broadcast Bulletin - Issue number 22 (Office of Communications, London, 2004).

<sup>182</sup> *Mansfield 103.2* (17 May 2004) Ofcom Broadcast Bulletin - Issue number 9 (Office of Communications, London, 2004); and *World in Focus* (28 June 2004) Ofcom Broadcast Bulletin - Issue number 12 (Office of Communications, London, 2004).



Decisions in Canada under clauses 6 and 7 of the CAB Code have considered open line programmes like talkback radio and stressed their importance. The CBSC has recognised that open-line programmes are a vital part of Canadian broadcasting because they present an opportunity for lively public discussion and provide a chance for the expression of conflicting passions which makes for exciting radio.<sup>183</sup> The CRTC has also stressed the importance of such programmes which "have evolved as the most instantaneous forum for free expression of views on matters of public concern. In our view they represent an important expression and reinforcement of true democracy and as such are characteristic of only the most secure and mature democratic societies".<sup>184</sup> The ability of these programmes to fulfil their democratic function is recognised as being very dependant on the host who has a delicate role in weighing freedom and restriction by providing interesting debate but also ensuring responsible broadcasting.<sup>185</sup> There is recognition of the fact that there is a spectrum of different open line programmes where the hosts will have differing roles but that all hosts must ensure full, fair and proper presentation under clause 6 and no one host has more licence than another to abuse guests or callers.<sup>186</sup> The importance of free debate means the host is entitled to express politically contentious points of view on air but this liberty does not extend to the "expression of gross and multiple misstatements of fact which are calculated to distort the perspective of the listener".<sup>187</sup> The hosts' role is important in determining the quality of such a programme and can be abused if callers with differing views are cut-off<sup>188</sup> (although the host must have latitude to determine when a caller has gone too far).<sup>189</sup> If a programme and its host's approach and aggressive style are well known in a market then the CBSC has said it will apply the standards more

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<sup>183</sup> *CKTB-AM re the John Michael Show* (15 February 1994) Canadian Broadcasting Standards Council Decision number 92/93-0170.

<sup>184</sup> Canadian Radio-television and Telecommunications Commission *Public Notice CRTC 1988-213* (CRTC, Ottawa, 1988).

<sup>185</sup> *CKTB-AM re the John Michael Show* (15 February 1994) Canadian Broadcasting Standards Council Decision number 92/93-0170.

<sup>186</sup> *CFRA-AM re The Lowell Green Show ("New World Order")* (30 April 1996) Canadian Broadcasting Standards Council Decision number 95/96-0012.

<sup>187</sup> *CKTB-AM re the John Michael Show* (15 February 1994) Canadian Broadcasting Standards Council Decision number 92/93-0170.

<sup>188</sup> *CFRA-AM re the Steve Madely Show* (15 November 1994) Canadian Broadcasting Standards Council Decision number 93/94-0295.

<sup>189</sup> *CHOG-AM re Connections* (8 May 1997) Canadian Broadcasting Standards Council Decision number 96/97-0040.



leniently.<sup>190</sup> Overall in relation to these programmes it is accepted that some rough-and-tumble on the airwaves is acceptable but that the host should not excessively put down individuals as this goes against the value and virtue of open-line radio as a market place of ideas.<sup>191</sup>

The value of talkback shows has been recognised in Australia but not to the same extent. The nature of talkback has been discussed and characterised by the forthright presentation of personal viewpoints which may offend listeners, discussion of a wide range of controversial topics and the individual style of the programme presenter which can often result in a robust debate and presentation of views.<sup>192</sup> In Australia such shows are characterised as current affairs programmes and are therefore subject to section 2.2(c) of the Australian Radio Code which allows them to still be critical of a particular set of circumstances or point of view.<sup>193</sup> There has been no particular special status or leeway given to talkback shows under this standard other than a recognition that listeners must be able to determine for themselves what weight to put on statements made by radio announcers.<sup>194</sup> This may reflect the fact that there have been very few cases dealing with the issue of talkback shows under the Australian code in comparison to other jurisdictions.

#### *H. The overlap between fairness and balance*

##### *1. BSA interpretation*

Often in BSA decisions the balance standard overlaps with the fairness standard. This is especially true of the issues that came up when considering what is meant by 'reasonable efforts' and 'reasonable opportunities'. Often the

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<sup>190</sup> *CFTM-TV re "Mongrain"* (6 December 1995) Canadian Broadcasting Standards Council Decision numbers 93/94-0101 to 93/94-0102.

<sup>191</sup> *CKTB-AM re the John Michael Show (Middle East Commentary)* (7 June 2002) Canadian Broadcasting Standards Council Decision number 01/02-0651.

<sup>192</sup> *6PR Southern Cross Radio Pty Ltd* (26 June 2000) Australian Broadcasting Authority Investigation Report number 2000/0792.

<sup>193</sup> *6PR Southern Cross Radio Pty Ltd* (26 June 2000) Australian Broadcasting Authority Investigation Report number 2000/0792.

<sup>194</sup> *6PR Southern Cross Radio Pty Ltd* (26 June 2000) Australian Broadcasting Authority Investigation Report number 2000/0792.



BSA will subsume balance issues of this kind under the fairness standard.<sup>195</sup> The BSA has commented that when it considers balance it generally looks at the over-arching controversial issue and that individual particulars are addressed as issues of fairness and accuracy.<sup>196</sup> In the case of *Radio New Zealand Ltd v McCully* the appellant argued that the BSA should not have subsumed one standard under another because they are two rules which cover different situations; the High Court did not accept this argument.<sup>197</sup>

## 2. *Overseas Interpretation*

The only overseas jurisdiction that I dealt with that considered in any depth the overlap between fairness and balance is Canada. This was expressed through discussion of the overlap between clauses 6 and 7 of the CAB Code. It was felt that although clauses 6 and 7 offer different nuances the CBSC considers it appropriate to combine their effects for a specific purpose. Their combined effect is to require balanced programming when dealing with controversial issues, and that rather than considering each provision individually, the CBSC believes that it may deal with the “balance requirement” as a whole.<sup>198</sup> This practice of combining the two Canadian standards may be comparable to New Zealand's procedure of often subsuming balance under fairness but the two situations are also hard to compare because of the difference in the relevant standards.

## VI. ANALYSIS OF THE BSA'S INTERPRETATION OF THE BALANCE STANDARD

When adjudicating on complaints the BSA has a certain amount of discretion as to how to interpret and apply the standards set out in the Codes including the balance requirement. In this section I will set out discrepancies and

<sup>195</sup> For example: *The Warehouse Group Ltd v Canwest TVWorks Ltd* (3 June 2005) Broadcasting Standards Authority Decision number 2004-202; and *Mahurangi Christian Community Trust v Television New Zealand Ltd* (2 June 2005) Broadcasting Standards Authority Decision number 2004-212.

<sup>196</sup> *Egg Producers Federation of New Zealand v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-220.

<sup>197</sup> *Radio New Zealand Ltd v McCully* [1998] NZAR 293.

<sup>198</sup> *CHOG-AM re The Shelley Klinck Show* (30 April 1996) Canadian Broadcasting Standards Council Decision number 95/96-0063.



problems I have identified with the BSA's interpretation of the balance standard based on my preceding summary of it approach.

A. The distinction between 'current affairs' and news programmes

While the BSA has recently included discussion of how it defines 'factual programmes' when applying the balance standard,<sup>199</sup> there is very little analysis in its decisions of what is meant by a 'current affairs' programme, and more importantly the distinction between current affairs and news. This is especially important as the BSA has indicated that current affairs programmes have more latitude when it comes to applying balance.<sup>200</sup> If this is the case then it will be important for viewers and broadcasters to understand where the line will be drawn between the two in order to know what standards are required of the programme in respect of balance.

In most cases the distinction between the two will be obvious but this may not always be the case. There has been criticism of the way that news programmes are increasingly sensationalising the news and incorporating editorial comment into news stories instead of simply stating facts.<sup>201</sup> This trend towards more comment and opinion in news could create problems under the balance standard. For instance, if the BSA based its distinction between news and current affairs on the content of the particular item or story in question this could mean that more editorial or current affairs type segments within a news segment could be subject to lower balance standards. Such an approach might lead to confusion for viewers and more blurring of the line between editorial comment and fact-based news reporting. Conversely the BSA could base their decision of how to apply the standard on the category of programme ensuring that news is always subject to a high standard whatever its content. The BSA has tended to

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<sup>199</sup> *Banks v Television New Zealand Ltd* (15 December 2003) Broadcasting Standards Authority Decision numbers 2003-141 to 2003-158.

<sup>200</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.

<sup>201</sup> See for example M Comrie *News with an attitude, an analysis of TV headlines 1985-1990* (Palmerston North, Massey University, 1994); B Edwards "The Cootchie Co News revisited" in J McGregor and M Comrie (eds) *Whats News? Reclaiming Journalism in New Zealand* (2002, Dunmore, Palmerston North); B Edwards "The Cootchie Co News" in M Comrie and J McGregor (eds) *Whose News* (1992, Dunmore, Palmerston North).



concentrate on the particular circumstances of the case. Also the drafting of section 4 of the Free-to-Air Television Code, where no different standards are applied for news and current affairs, lends itself to this sort of interpretation. This means it could be easy for the BSA to make their analysis too focussed on a particular item without considering the larger issue that perhaps news should be subject to higher standards overall.

*B. What is a controversial issue of public importance?*

There are some cases where the BSA has decided that issues that involve conflicts between just two parties do not come within the standard because they are not of public importance.<sup>202</sup> This seems slightly problematic considering that these issues have been publicised to a national audience by television or radio. The first example<sup>203</sup> of such a case concerned an item on 'Fair Go' which discussed a commercial dispute between parties that was at the disputes tribunal at the same time. The company featured complained to the BSA that the programme breached the requirements of fairness, balance and law and order (by broadcasting the issue while it was at court). Interestingly the company argued the item should not have been included on the show as it had no "consumer content" and, when defending themselves, TVNZ stressed that the matter was of public interest even though it was a contractual dispute between just two parties. The BSA found that none of the standards complained of had been breached, and felt that the balance standard did not apply due to there being a lack of a controversial issue of public importance, stating:<sup>204</sup>

"Before the item was screened there was no evidence that it had a profile such as to have any public importance or for that matter anything controversial, as required by the standard."

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<sup>202</sup> See for example *Topline International Ltd v Television New Zealand* (30 January 2003) Broadcasting Standards Authority Decision number 2003-002; *Rupa v Television New Zealand* (11 July 2005) Broadcasting Standards Authority Decision number 2005-034; and *Fraser v Television New Zealand* (4 May 2005) Broadcasting Standards Authority Decision number 2004-203.

<sup>203</sup> *Topline International Ltd v Television New Zealand* (30 January 2003) Broadcasting Standards Authority Decision number 2003-002.

<sup>204</sup> *Topline International Ltd v Television New Zealand* (30 January 2003) Broadcasting Standards Authority Decision number 2003-002.



As I have already said this finding seems strange and problematic. Most items on 'Fair Go' concern smaller contractual disputes which have not "had a profile such as to have any public importance" prior to the show. There is not much guidance in the case about what this item in particular concerned; the only distinction that might be relevant here is the dispute concerned an employment issue rather than the normal consumer-related disputes that 'Fair Go' deals in. However it is arguable that just by including the item on the programme TVNZ has elevated the issue to one of public importance. If the issue were of so little public importance that the balance standard could not even apply, then the BSA should have considered whether TVNZ had breached the fairness standard to "deal justly and fairly" with any person referred to in a programme by even showing the item. It might be hard to fit the situation in this standard but the BSA could have at least considered doing so; the way the case has been treated seems unfair to the complainant and contradictory.

There are other questionable cases where the BSA has stated that there is no controversial issue of public importance. One<sup>205</sup> dealt with a reality television show called *Renters* which follows several rental agents as they go about their jobs and deal with particularly problematic tenants. The complainant here felt there was imbalance in the programme's treatment of an argument between one rental agent and a tenant. The fact that the BSA decided the balance standard did not apply is not surprising; that they based this decision on there being no controversial issue of public importance is. Much more obviously questionable was whether the programme was a "news, current affairs or factual programme".

Another decision<sup>206</sup> looked at a *One News* item about a woman due to have a mastectomy. She told her story of how she had twice seen her doctor about a lump on her breast and he had told her not to worry and that she planned on making a formal complaint against him. Here the issues complained of were subsumed under fairness with the BSA saying that there was no controversial

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<sup>205</sup> *Rupa v Television New Zealand* (11 July 2005) Broadcasting Standards Authority Decision number 2005-034.



issue of public importance because the programme did "not address the issues of wider doctors' competence or professional accountability generally". This again seems strange, whether a particular doctor is incompetent would be of importance to at least a section of the public (such as the doctors' other patients) and was obviously of enough importance that TVNZ included it in the 6pm news.

In comparison to the above cases there are many examples where the BSA has applied the balance standard to a programme that dealt with an issue of arguably equally low 'public importance'. For instance another case involved an item on Fair Go looking at a family who in order to buy a house became involved in a family trust arrangement that went wrong. This case was similar to the other Fair Go decision mentioned in that it involved a transaction between two parties but the BSA considered that "the level of public interest in unusual and questionable finance deals is such that the issue can be categorised as one of controversial public interest".<sup>207</sup>

In another case the BSA easily found the issue of whether fish feel pain to be within the standard of public importance.<sup>208</sup> This decision could possibly distinguished from the ones discussed above, as it does not deal with a transaction between only two parties. However it arguably would be an issue of public importance to as small a section of the public as those who might be concerned about one doctor or businessman, and thus is of comparable 'public importance'.

I think that by excluding the cases I have referred to above the BSA has unnecessarily narrowed the scope of the balance standard and been somewhat contradictory. Such issues should at least be able to fall within the gateway of "controversial issues of public importance" even if they fall short of breaching the standard on some other point. Although the BSA's cases are not binding they do provide guidance to future complainants and the media on what the balance

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<sup>206</sup> *Fraser v Television New Zealand* (4 May 2005) Broadcasting Standards Authority Decision number 2004-203.

<sup>207</sup> *Nottingham v Television New Zealand* (11 May 2005) Broadcasting Standards Authority Decision number 2004-141.



standard requires. Therefore in the future complainant's whose cases deal with similar issues, but more clearly concern unbalanced reporting, may not bother to complain, and the media may feel that they can treat similar smaller scale disputes with less balance in the future.

### *C. Allowing opportunities to respond*

There is some discrepancy in the BSA's decisions as to the requirements for broadcasters to seek responses from those they make accusations about on their programmes. This is illustrated in one particular case that I quoted from earlier. The decision<sup>209</sup> concerned a radio talkback show where the host described the complainant as "a loon and a weirdo" because of his comments in a newspaper article about paedophilia. The BSA considered the issue of balance and despite finding that balance was achieved by open phone lines they went on to say balance was not required here since "it does not believe that those who advocate illegal practices, especially morally abhorrent ones which involve children, have legitimate grounds to object to being criticised for their views". This comment indicates firstly that the BSA was taking a moral position against the views of the complainant, which seems at odds with their quasi-judicial role. It is not the BSA's role to say what issues deserve to be debated by society and who can put forward their views on such issues. Also the BSA's comment is phrased too broadly even if their position against paedophilia can be accepted. If the complainant's comments had concerned euthanasia or the legalisation of cannabis, both of which are "illegal practices", it is highly doubtful they would have expressed a similar sentiment. Such a strongly worded and unnecessary statement seems an irresponsible act by the BSA even if it would not bind their decisions in the future.

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<sup>208</sup> *Blue Water Marine Research Ltd v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-223.

<sup>209</sup> *Moonen v Radio New Zealand Ltd* (20 June 1996) Broadcasting Standards Authority Decision number 1996-062.



*D. Requirements of broadcasters when opportunities to respond are refused*

There is also some discrepancy in the decisions as to whether balance is still required when someone has refused an opportunity to respond. The BSA has stated that "a decision by an interested party not to participate does not absolve a broadcaster of the responsibility for ensuring balance";<sup>210</sup> this same proposition has been repeated in several other decisions as well.<sup>211</sup> However some decisions have gone against this overall principle and the BSA has itself recognised a competing principle in its decisions that "where reasonable opportunity is given, but not fully taken advantage of, then that may discharge the broadcaster from further obligation".<sup>212</sup>

Two of the cases where this competing requirement for balance has been put forward have involved those accused of misconduct who have been asked to comment and participate but have also been treated in a fairly hostile way by the programme in question. In the *De Hart* decision<sup>213</sup> the accused had been confronted in his office by his accuser wearing a hidden video camera and in *Shaw*<sup>214</sup> the accused was confronted at his car by reporters with cameras. In both these cases the BSA has shown almost a bias against the accused when perhaps they should have been harsher towards the broadcasters involved who used hostile techniques when requesting responses to allegations.

This does not mean that these programmes were necessarily unbalanced; the BSA could have retained the general principle that the broadcaster must still provide balance (perhaps at a lower level) and then decided that this balance was provided through treatment of the story overall. For example in the *De Hart*

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<sup>210</sup> *Egg Producers Federation of New Zealand Inc v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-220.

<sup>211</sup> For example *Minister of Housing (Hon Murray McCully) v New Zealand Public Radio Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-088; and *Ellis v Radio New Zealand Ltd* (3 September 2004) Broadcasting Standards Authority Decision number 2004-115.

<sup>212</sup> *De Hart v TV3 Network Services Ltd* (10 August 2000) Broadcasting Standards Authority Decision numbers 2000-108 to 2000-113.

<sup>213</sup> *De Hart v TV3 Network Services Ltd* (10 August 2000) Broadcasting Standards Authority Decision numbers 2000-108 to 2000-113

<sup>214</sup> *Shaw v Television New Zealand Ltd* (4 September 1997) Broadcasting Standards Authority Decision number 1997-112.



decision the broadcaster had published the doctor's recorded statement arguably providing balance for their story. Again I would stress that by putting forward two contradictory propositions, which may have seemed the right decisions in the particular cases, the BSA is only creating confusion and uncertainty for everyone as to how the balance standard will be applied.

Uncertainty is also created by the BSA's interpretation of how much time is reasonable to give to someone when asking for their response to allegations. The BSA has taken a practical approach, which focuses on the ability of the person or organisation being asked to respond to do so.<sup>215</sup> This approach is favourable in some ways in that it stops the person or organisation hiding behind the fact that they did not have reasonable time to respond when in reality a response was not difficult to formulate. However whether someone is in reality able to respond is something that might only be clear in hindsight; the broadcaster would therefore need to assess every situation as to what is a reasonable time and would base a lot of this on guess work. A clearer approach would be to set clear guidelines in their decisions as to what is a reasonable time and then allow exceptions to this in certain circumstances. For example if the broadcaster could clearly show, and had evidence, that a response would not have taken more than the time they allowed, or if the issue was of extreme public importance and there was limited time in preparing the programme.

#### *E. Reliance on coverage in other media*

In one case the BSA dealt with the issue of whether a broadcaster can rely on the coverage of other media of the controversial issue in question, within the period of interest.<sup>216</sup> The decision is an example of the BSA not clearly taking a stance on a particular issue. There was no real decision made by the BSA which said firstly that the broadcaster could not avoid its obligations in this way but then acknowledged the relevance of coverage by other media. It is confusing for

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<sup>215</sup> For example *Capital Coast Health (2) v Radio New Zealand Ltd and the Radio Network Ltd* (21 April 1996) Broadcasting Standards Authority Decision numbers 1997-049 to 1997-050; and *Hide v Television New Zealand* (7 November 2002) Broadcasting Standards Authority Decision number 2002-178.



the BSA to basically say that broadcasters cannot rely on this material but then still advance its relevance thereby indicating that it could be relied on to some extent. Again I would stress that being vague in its decisions makes the limits of the standard unclear; thus it is harder for broadcasters to comply with properly and for potential complainants to know where there has been a breach.

F. What is a significant point of view?

As I indicated earlier the BSA has said that where there is another theory opposing the one advanced in a programme that is of sufficient credibility and significance then it should at least be mentioned.<sup>217</sup> There are some situations where what is a credible theory may not be obvious. In particular there have been several cases where complainants have argued that when a broadcaster shows a programme that involves evolution that they should have to refer to the Christian creationist theory in order to achieve balance.<sup>218</sup> In the cases that this has been an issue the BSA has not found any breach of the standard and it has used different ways to justify this. I agree that the Christian view should not have to be mentioned every time evolution is explained or referred but it is a hard issue to exclude from the balance standard.

Sometimes the BSA's decisions dealing with this issue seemed like it was searching for an excuse and this has meant it has made remarks and decisions that could be wrong when applied in other contexts. For example the BSA said that the period of current interest in the origin of life is "infinite"<sup>219</sup> and thus the standard could not apply. The comment seems unnecessarily broad; presumably the origin of life will be of current interest until it is fully explained, it seems a little presumptuous for the BSA to assume this will definitely never happen. Also there are other situations where an issue may never fully be resolved and will

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<sup>216</sup> *Centre for Psycho-Sociological Development v Television New Zealand Ltd* (22 February 1996) Broadcasting Standards Authority Decision number 1996-014.

<sup>217</sup> *Su-Wuen v Television New Zealand Ltd* (4 November 2004) Broadcasting Standards Authority Decision number 2004-151.

<sup>218</sup> *Walker v Television New Zealand Ltd* (11 February 1999) Broadcasting Standards Authority Decision numbers 1999-004 to 1999-006; and *Fox v Radio New Zealand Ltd* (18 February 1999) Broadcasting Standards Authority Decision number 1999-010.

<sup>219</sup> *Fox v Radio New Zealand Ltd* (18 February 1999) Broadcasting Standards Authority Decision number 1999-010.



have a very long period of current interest, but where a balance of issues may still be desirable. For example the issue of whether sexual orientation is genetic or is a behavioural trait that can be changed. This issue has come up in a BSA decision where they considered that a programme looking at the idea that sexual orientation can be changed, was obliged to mention the opposing view to ensure balance.<sup>220</sup>

G. The interaction between current affairs and news programmes

When a programme is unbalanced the broadcaster can avoid breaching the standard by providing balancing material within the period of current interest. A situation where this has caused problems for the BSA is the relationship between a news programme and a current affairs programme that follows on from it. How the BSA deals with this situation could become particularly important with the increasing numbers of current affairs shows that follow on directly from the news.

In two cases where the BSA has approached this problem they have dealt with the issue in what could be seen as contradictory ways.<sup>221</sup> On one hand a current affairs show that expanded on an issue that was raised and dealt with in an unbalanced way in the news, did not provide balance.<sup>222</sup> Conversely when a news item and a following current affairs show both took the same point of view on an issue this served to make each more unbalanced.<sup>223</sup>

Although the decisions may seem at first glance to be in opposition to each other I think that both decisions are justifiable and can be reconciled. On the one hand a news programme has a greater requirement to be balanced and this is less likely to be rectified by other programmes in the period of current interest, even a closely following and linked current affairs show. However where both

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<sup>220</sup> *Sawyers v Television New Zealand Ltd* (14 November 1996) Broadcasting Standards Authority Decision numbers 1996-155 to 1996-157.

<sup>221</sup> The two cases were described as "in contrast" to one another in John Burrows & Ursula Cheer (eds) *Media Law in New Zealand* (4 ed, Oxford, Melbourne, 1999) 444.

<sup>222</sup> *Turney v Television New Zealand Ltd* (14 November 1996) Broadcasting Standards Authority Decision number 1669-154.



the news and current affairs show are unbalanced and focus on the same issue this means the balance is not being achieved within the period of current interest at all. I think that the BSA should be careful when this issue comes up again to not confuse the issue further and to stick to the principles it has established in these cases unless there are exceptional circumstances.

#### H. Application of Guideline 4c

In a recent case the BSA said that this guideline only applied to “factual programmes which have been deliberately constructed to present a particular perspective”.<sup>224</sup> This seems to ignore the wording of the guideline which says it refers to “factual programmes and those that approach a topic from a particular perspective”.<sup>225</sup> The interpretation of the BSA seems to ignore the clear inference of the guideline, which says it applies to more than factual programmes.

The case in question concerned a political talk show where the host debated with several political figures in a panel type situation.<sup>226</sup> The broadcaster argued unsuccessfully that the host was well known to advance his own partial point of view and thus should be subject to the guideline and the lesser standards of balance. There is some merit in this argument considering the wording of the guideline as discussed above. Just because the guideline is found to apply does not have to mean the BSA must be hugely lenient in its application of the standard. However a slight leniency in the operation of the standard might not be unreasonable for such a programme, especially considering the leniency the BSA can show towards similar type hosts on radio<sup>227</sup> (although such hosts will often have the benefit of open-lines to provide balance).

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<sup>223</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.

<sup>224</sup> *Hooker v Television New Zealand Ltd* (30 June 2005) Broadcasting Standards Authority Decision number 2005-037.

<sup>225</sup> *Free-to-Air Television Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2004), guideline 4(c).

<sup>226</sup> *Hooker v Television New Zealand Ltd* (30 June 2005) Broadcasting Standards Authority Decision number 2005-037.

<sup>227</sup> For example *Smith v The Radio Network Ltd* (19 December 2003) Broadcasting Standards Authority Decision numbers 2003-174 to 2003-183; *Craig v The Radio Network Ltd* (4 December 2003) Broadcasting Standards Authority Decision number 2003-132; and *Canterbury District Health Board v The Radio Network Ltd* (4 November 2004) Broadcasting Standards Authority Decision number 2004-133.



### *I. Standard required by Guideline 4c*

How this guideline is actually applied when it is relevant is not altogether clear from the cases. As indicated one of the cases looking at authorial documentaries applied the balance standard in the normal way the BSA would for any case;<sup>228</sup> the reason for this may be that the programme was clearly balanced within the normal standards despite being authorial so relaxation of the standard was not required.

However in another situation the BSA showed more leniency.<sup>229</sup> The documentary looked at the arguments for the innocence of a man convicted of double murder; the arguments of the prosecution were not fully outlined. The majority felt this was balanced, partly because it was clearly indicated to be authorial and the view of one journalist, but also because there was balance provided by coverage over the current period of interest.

The minority were concerned about the amount of time that had passed since the actual trial and that therefore the period of current interest was smaller and there was not enough balancing material provided. Both the minority and majority seemed to agree that the programme, despite being clearly authorial, could not achieve balance without the addition of other material in the period of current interest. However the majority in this case have relaxed the standard required for this programme because it was 'authorial'. As pointed out by the minority it had been a long time since the original court case discussed in the documentary had occurred and it was unlikely that the public remembered all the details of the prosecution's arguments.

I think that this case is the outer limit of how much the BSA should relax the standard for this sort of documentary; the fact that detailed attention was paid to one side of the debate and almost none to the other makes the programme

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<sup>228</sup> *Anderson v Television New Zealand Ltd* (15 April 2003) Broadcasting Standards Authority Decision numbers 2003-028 to 2003-030.



quite unbalanced. It is arguable that even here there should have been a requirement that the prosecution's main arguments be outlined at least generally. However it was clear from the introduction and throughout the programme that it was intended to be one journalist's view. If this same sort of unbalanced view were presented with even slightly less clarity over its 'authorial' nature then it would be unwise for the BSA to relax the balance standard.

*J. Talkback - the value of open lines*

Talkback radio is given a fair amount of latitude by the BSA concerning the balance standard; the hosts are also given a lot of leeway in their behaviour and ability to make editorial comment.<sup>230</sup> The availability of open-lines for conflicting views is emphasised by the BSA but it is good to see they have generally not overvalued this.<sup>231</sup> There tends again to be a practical approach and the BSA will often look to see if anyone has actually put forward an opposing view, and if they did, how the host treated them. Overseas jurisdictions have emphasised the importance of the host in controlling and achieving the best out of an open-line show;<sup>232</sup> the BSA tends to be following this approach which is good.

One case that could be criticised is where the BSA found that the Chief Executive of a particular organisation was actually listening to the programme in question and did not take advantage of the ability to ring up and make a comment.<sup>233</sup> Although this seems fair in hindsight I think this is taking the

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<sup>229</sup> *Anderson v Television New Zealand Ltd* (15 October 2004) Broadcasting Standards Authority Decision number 2004-127A.

<sup>230</sup> For example *Smith v The Radio Network Ltd* (19 December 2003) Broadcasting Standards Authority Decision numbers 2003-174 to 2003-183; *Craig v The Radio Network Ltd* (4 December 2003) Broadcasting Standards Authority Decision number 2003-132; and *Canterbury District Health Board v The Radio Network Ltd* (4 November 2004) Broadcasting Standards Authority Decision number 2004-133.

<sup>231</sup> For example open lines were not sufficient for balance to be achieved in *Department of Conservation v Radio Pacific Ltd* (23 April 1998) Broadcasting Standards Authority Decision number 1998-035.

<sup>232</sup> For example see *Soly Adjudication* (15 November 2004) Ofcom Broadcast Bulletin - Issue number 22 (Office of Communications, London, 2004); and *CKTB-AM re the John Michael Show* (15 February 1994) Canadian Broadcasting Standards Council Decision number 92/93-0170.

<sup>233</sup> *Colman v Radio New Zealand Ltd* (1 July 2004) Broadcasting Standards Authority Decision number 2004-072.



practical approach too far as the broadcasters would not have known who was listening. Again the BSA should ensure that the standards are clear for broadcasters to make sure that they comply; it seems very inconsistent that this exact same situation could occur again, minus the fact that the Chief Executive was listening, and the broadcaster would have presumably breached the standard.

*K. Overlap between fairness and balance*

The High Court has indicated that it is acceptable for the BSA to subsume complaints under other standards<sup>234</sup> and this happens especially with the accuracy, fairness and balance standards. The BSA will often subsume balance under the fairness standard when looking at issues that come within the requirement of “reasonable efforts” and “reasonable opportunities”.<sup>235</sup> However the interpretation of the two standards by the BSA makes them quite different; fairness looks at the particular programme and the way contributors are treated and balance looks at the wider context of the programme within the period of current interest.<sup>236</sup>

I cannot understand why the BSA subsumes complaints like this rather than just ruling that the balance standard is not breached; it seems to only confuse the issue. If a case deals mainly with issues and breaches of the fairness standard then the BSA has two options. It can decide either that these breaches mean the particular programme breaches fairness but that within the period of current interest breaches within the programme are balanced so the balance standard is not breached. Alternatively it can find that the breaches of fairness also amount to a breach of the balance standard because they are so severe or they are not balanced by later programmes. By making a decision either way on the issue of balance it provides more guidance to viewers and broadcasters on what the standards are; there does not seem to be any justification for not dealing with the balance standard at all, if the complainant does not raise balance issues

<sup>234</sup> *Radio New Zealand Ltd v McCully* [1998] NZAR 293.

<sup>235</sup> For example: *The Warehouse Group Ltd v Canwest TVWorks Ltd* (3 June 2005) Broadcasting Standards Authority Decision number 2004-202; and *Mahurangi Christian Community Trust v Television New Zealand Ltd* (2 June 2005) Broadcasting Standards Authority Decision number 2004-212.



then the BSA should expressly find there is no breach. The way balance is subsumed by fairness seems more like the Canadian approach of combining the two standards.<sup>237</sup> I think this should be avoided; they are separate standards, which should be applied separately.

## VII. THE DRAFTING OF THE BALANCE STANDARD

### A. Application to news and current affairs shows

As I already emphasised while considering the BSA's interpretation there is no distinction made in the balance standard in New Zealand between news and current affairs shows (or factual programmes). Although the BSA seem to have put a greater standard on news programmes in some decisions<sup>238</sup> this is not clear from the sections of the codes or uniformly imposed.

All the overseas jurisdictions I considered have had at least some distinction for news programmes where a greater standard of balance is placed upon them.<sup>239</sup> This makes sense when considering the different purposes that news and current affairs provide in informing the public. The news should be presenting facts and where comment is included it should be clear and more carefully balanced; whereas it is perfectly acceptable, and even expected, that current affairs shows present issues from certain perspectives.<sup>240</sup> It may be of value to have such a distinction written into the Code itself, especially when the BSA's interpretation has not been completely clear on the matter.

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<sup>236</sup> *Egg Producers Federation of New Zealand v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-220

<sup>237</sup> *CHOG-AM re The Shelley Klinck Show* (30 April 1996) Canadian Broadcasting Standards Council Decision number 95/96-0063.

<sup>238</sup> *Frewen v Television New Zealand Ltd* (15 August 1996) Broadcasting Standards Authority Decision number 1996-089.

<sup>239</sup> See *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5; *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 2.1; *Commercial Radio Australia Codes of Practice and Guidelines* (Commercial Radio Australia, Sydney, 2004), para 4.4; and Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 5.

<sup>240</sup> For example see *Channel Seven Sydney Pty Ltd* (7 June 2005) Australian Broadcasting Authority Investigation Report number 2004/0962.



There also seems to be discrepancy between the Radio and Free-to-Air Codes in that the balance standard for television only applies to "news, current affairs and factual programmes"<sup>241</sup> while the Radio Code balance section has no such requirement. The BSA's interpretation of the Radio Code seems to have only really applied the standard to news and current affairs anyway<sup>242</sup> making it unclear why the Code was not limited to such programmes to begin with.

### *B. Controversial Issues of Public Importance*

The approach from the overseas jurisdictions seems to emphasise that there should be at least some requirement for a programme to be dealing with a sufficiently important issue for the balance requirement to apply. The one particular way this differs to New Zealand is that when there is a separate standard for news programmes there is no such requirement.<sup>243</sup> It would make sense in New Zealand also to not only have a separate news standard but to ensure that this standard did not look at the content. This would escape the issue I considered earlier where the news looks at a very particular situation which may not have national or wide spread importance but is arguably elevated to public importance by its very inclusion on a news show.

In regards to current affairs and factual programmes where a standard is needed to regulate the topic of the show that needs to be balanced; I think the requirement of a "controversial issue of public importance" is a good one. In particular when looking at the United Kingdom's requirements for due impartiality<sup>244</sup> the topic matters are very restricted and more complicated making the standard much less likely to apply in many situations. I think it is preferable to not be too strict in what programmes come within the ambit of the balance

<sup>241</sup> *Free-to-Air Television Code of Broadcasting Practice* (Broadcasting Standards Authority, Wellington, 2004).

<sup>242</sup> *Smith v The Radio Network Ltd* (19 December 2003) Broadcasting Standards Authority Decision numbers 2003-174 to 2003-183; and *Clydesdale v The Radio Network Ltd* (2 September 2004) Broadcasting Standards Authority Decision number 2004-100.

<sup>243</sup> See *Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5; *Commercial Television Industry Code of Practice* (Free TV Australia, Mosman, 2004), para 2.1; *Commercial Radio Australia Codes of Practice and Guidelines* (Commercial Radio Australia, Sydney, 2004), para 4.4; and Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002), clause 5.

<sup>244</sup> *Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5 and s5.11.



standard, this allows greater BSA regulation of programmes without being too restrictive; just because the programmes come within the standard does not mean they will always contravene it but it will allow the BSA to be able to consider if they did.

### C. Need for a significant issue

The issues that arise under the New Zealand balance standard concerning what is a significant issue do not seem to arise to the same extent under the Codes of overseas jurisdictions.<sup>245</sup> For instance the sometimes pedantic arguments that Christian views must be raised every time evolution is talked about on a programme. This could be due to the differences in the way the different Codes are drafted, particularly the fact that most of the overseas standards are not as detailed as to what is required for balance, and instead they set out a more generalised standard.<sup>246</sup> This could possibly support the idea of a more generalised section on balance in New Zealand but there would also be corresponding difficulties with more vagueness, not least of which would be that the BSA would have to establish more detailed guidelines through its decisions. The precise wording of the balance section can lead to these sorts of difficulties of interpretation but I think that overall the more detailed provision in New Zealand requiring a significant issue is to be preferred.

### D. Period of Current Interest

The New Zealand requirement that balance occur within the period of current interest can be contrasted with the United Kingdom's approach in section 5 of the Ofcom Code where there is a very detailed description of when impartiality can be achieved "over a series of programmes".<sup>247</sup> The definition is

<sup>245</sup> See for example *Walker v Television New Zealand Ltd* (11 February 1999) Broadcasting Standards Authority Decision numbers 1999-004 to 1999-006; and *Fox v Radio New Zealand Ltd* (18 February 1999) Broadcasting Standards Authority Decision number 1999-010.

<sup>246</sup> See in particular Radio Television News Directors Association of Canada *Code of Ethics* (Radio Television News Directors Association of Canada, Ontario, 2000); *Commercial Radio Australia Codes of Practice and Guidelines* (Commercial Radio Australia, Sydney, 2004); and Canadian Association of Broadcasters *Code of Ethics* (Canadian Association of Broadcasters, Ontario, 2002).

<sup>247</sup> *Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5.



very limited and seems to only be applicable to an actual "series" of programmes that were planned together in a group, not just programmes dealing with the same issue shown by the same broadcaster over a period of time.<sup>248</sup> This restrictive approach puts more onus on broadcasters and this may be because this section of the Ofcom Code covers programmes dealing with certain controversial matters. New Zealand's requirement is probably more practical and consistent with the reality that the aspects of a controversial issue will usually unfold in various programmes as they are revealed not just in planned programme series.

#### *E. Necessity of Guideline 4c*

In some ways this specific requirement is quite unusual although the United Kingdom's Ofcom Code has a similar sort of obligation. Despite not having such a requirement in Australia and Canada it seems that they would probably follow the same sort of idea. The only real difference is that this guideline can make the BSA focus specifically on the way the programme is put forward; it sort of presents an 'out' for a broadcaster concerning the code as long as it is very clear that the programme in question is 'authorial'. This is not necessarily a bad thing as there can be a need for partial programmes in the overall scheme of debating an issue and the BSA is very unlikely to abandon all requirements for balance for any programme that comes within the standard judging from their decisions to date.

### *VIII. THE BALANCE STANDARD'S COMPLIANCE WITH FREEDOM OF EXPRESSION*

Freedom of Expression is an important human right that is considered to be an integral concept in modern liberal democracies. It is recognised in international instruments, most notably article 19 of the Universal Declaration of Human Rights, and is also recognised in New Zealand's own Bill of Rights Act 1990 (BORA). Section 14 of BORA guarantees that "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".

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<sup>248</sup> *Ofcom Broadcasting Code* (Office of Communications, London, 2005), s5.5.



However the right to freedom of expression is not generally considered unlimited; governments may still prohibit certain damaging types of expression. This is recognised in section 5 of BORA, which enables the right to freedom of expression to be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.<sup>249</sup>

The BSA is a public body meaning BORA is applicable to it<sup>250</sup> however the extent that section 5 should be applied to the Broadcasting Act, and the BSA's codes and decisions has been debated. In *TV3 Network Services Ltd v Holt*<sup>251</sup> the judge observed that in his opinion the BSA does not need to apply BORA to its decisions, only to the standards in the codes themselves. Conversely in *Television New Zealand v Viewers for Television Excellence Ltd*<sup>252</sup> the judge held that BORA applied only to the Broadcasting Act and to the decisions of the BSA. He considered that the codes were only industry standards developed by broadcasters for themselves and therefore BORA did not apply to them. The latter case should probably be followed because the findings relating to the BSA and BORA were integral to the decision whereas in *Holt* the observations by the judge on this area were not necessary for the decision.

The judge in *Viewers for Television Excellence Ltd* also recognised that most of the decisions of the BSA will pass the section 5 requirement of BORA because of the content of the codes and the nature of the penalties that can be imposed. However the judge stressed it is necessary in each case for the BSA to consider the impact of its decision on freedom of expression.

Recently the BSA has begun to consider BORA in its decisions and whether there is a good reason to limit freedom of expression in a particular case. In set out its preferred approach in *MacDonald v Television New Zealand*<sup>253</sup>

<sup>249</sup> Bill of Rights Act 1991, s5.

<sup>250</sup> Bill of Rights Act 1991, s3.

<sup>251</sup> *TV3 Network Services Ltd v Holt*[2002] NZAR 1013.

<sup>252</sup> *Television New Zealand v Viewers for Television Excellence Ltd* (23 July 2004) HC WN CIV 2003 485 2658.

<sup>253</sup> *MacDonald v Television New Zealand* (6 June 2002) Broadcasting Standards Authority Decision numbers 2002-071 to 2002-072.



where it accepted that it must interpret its decisions and the Broadcasting Act consistently with BORA. The BSA accepted that the Broadcasting Act is a limit on freedom of expression but that the limitation is reasonable because of the social objective involved, broadcasters' involvement in developing the codes, and the similarity between the standard and those in other countries. When considering whether a decision is reasonable the BSA felt that there must be proportionality and a rational connection between the societal objective of the Act and the limit imposed on freedom of expression in each case.

BSA decisions now routinely refer to section 14 of BORA often stating at the end of a decision that the limits they are imposing in the particular case are consistent with BORA.<sup>254</sup> However these references to BORA do not usually include any actual analysis or balancing exercise to explain why the decision is a reasonable limitation on freedom of expression and thus feel a little bit like window dressing of the issue. This does not necessarily mean that the BSA is not complying with BORA requirements or that a BORA type analysis is not occurring in their decision making.<sup>255</sup> However by not including more detail of their BORA analysis the BSA makes their process unclear and is limiting the ability of complainants and broadcasters to appeal on these issues.

Part of my objective in this research has been to assess whether the balance standard and its application by the BSA is a reasonable limitation on freedom of expression under BORA. The balance standard itself is perhaps more open to BORA analysis due to its inclusion in the Broadcasting Act itself and not just in the codes. I would agree with the analysis of the BSA that the balance standard itself is a reasonable limitation on freedom of expression that ensures the societal goal of "guarding against broadcasters behaving unfairly, offensively

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<sup>254</sup> For example see *OK Gift Shop Ltd v Canwest TVWorks Ltd* (4 May 2005) Broadcasting Standards Authority Decision number 2004-199; *Adfit Membership Services Ltd v Television New Zealand* (11 March 2004) Broadcasting Standards Authority Decision number 2004-020; *Cronin v Canwest TVWorks Ltd* (31 March 2005) Broadcasting Standards Authority Decision number 2004-140; and *New Zealand Maritime Safety Authority v TV3 Network Service Ltd* (30 September 2004) Broadcasting Standards Authority Decision number 2004-116 to name a few.

<sup>255</sup> In *TV3 Network Services Ltd v Holt* [2002] NZAR 1013 the judge noted that just because the BSA tends to use the same or similar words when dealing with the BORA in its decisions this doesn't necessarily mean their approach is inadequate.



or otherwise excessively".<sup>256</sup> The standard has achieved its goal of ensuring balance by broadcasters in news and current affairs type programmes in most decisions I have looked at. When comparing the standard to those applied in overseas jurisdictions I think it is one of the clearest and easiest to apply; it also gives the BSA some ability to encourage freedom of expression by applying the standard in favour of broadcasters.

In relation to the BSA's actual decisions with regard to the balance standard I also think that overall they are BORA-consistent and impose a reasonable limitation on freedom of expression. Although it is important to note that this analysis is dependent on the facts in each case and the penalty that is imposed by the BSA. The majority of the cases that I had issue with I actually found to overly favour broadcasters which indicates an interpretation of the balance standard by the BSA that encourages freedom of expression. However I think it would be advisable for the BSA, at least in the less obvious and more borderline cases, to include some guidance on how they came to the conclusion that their decision is BORA consistent. Also overall I think that the BSA could in many respects make their decisions clearer and more consistent overall so as to ensure the limits being imposed by the balance standard are clearly understood by all relevant parties.

## *IX. CONCLUSION*

I have found the BSA's application of the balance standard to be fairly well done overall. However there were some specific problems. The main issue is with consistency and clarity in its decisions. Although the BSA is not bound by its previous decisions there would be value in it ensuring that it follows and sticks to consistent principles when applying the Codes and standards. As the Chair of the Ofcom Content Board expressed in his foreword to the Ofcom Code:<sup>257</sup>

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<sup>256</sup> *MacDonald v Television New Zealand* (6 June 2002) Broadcasting Standards Authority Decision numbers 2002-071 to 2002-072.

<sup>257</sup> *The Ofcom Broadcasting Code* (Office of Communications, London, 2005), foreword.



"The setting out of clear principles and rules will allow broadcasters more freedom for creativity and audiences greater freedom to exercise their choices, while securing those objectives set by Parliament."

More recent decisions of the BSA have set out a more clear process of analysis when dealing with the balance issue; sometimes where appropriate going through the different elements of the standard in a similar way to how I have interpreted the standard in my research. This is an improvement and helpful for assessing which standard and which element of the standard the BSA is referring to when they make a decision. However as my research indicates there are still areas where interpretation could be clearer and more consistent.

When looking at the way the balance standard has been drafted and comparing this to similar overseas standards I find that New Zealand's standard does not contain many problems or deficiencies that would warrant changing the sections in question. The only area of real concern is a lack of distinction between news and current affairs shows; such a distinction could be added to the standard perhaps as a guideline so that it would be clear that news programmes need to achieve a higher level of balance.

Through my examination of the balance standard and its interpretation by the BSA I have come to the conclusion that the accusations made against the BSA, at least in relation to this standard, are not justified. I find that the imposition of a balance standard by the broadcasting codes complies with the right of freedom of expression under BORA by only imposing a reasonable limitation. I also think that the BSA's interpretation of the balance standard has generally complied with BORA as well, although there may be exceptions in specific circumstances. It is sometimes difficult to establish how much weight BORA has been given in a decision and I think that, in marginal cases at least, the BSA should set out why they believe their decision is in line with freedom of expression. Overall I think the BSA has tended to favour broadcasters over complainants when faced with a choice of how to interpret the balance standard, which is consistent with the requirements of BORA.



APPENDIX I – New Zealand BROADCASTING STANDARDS – EXTRACTS  
FROM THE FREE-TO-AIR TELEVISION CODE AND THE RADIO CODE

Free-to-Air Television Code – Standard 4: Balance

**In the preparation and presentation of news, current affairs and factual programmes, broadcasters are responsible for maintaining standards consistent with 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.**

*Guidelines*

4a. Programmes which deal with political matters, current affairs, and questions of a controversial matter, must show balance and impartiality.

4b. No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, it being acknowledged that this can be done only by judging each case on its merits.

4c. Factual programmes, and programmes shown which approach a topic from a particular or personal perspective (for example, authorial documentaries and those shown on access television) may not be required to observe to the letter the requirements of standard 4.

The Radio Code of Broadcasting Practice – Principle 4: Balance

**In programmes and their presentation, broadcasters are required to maintain standards consistent with 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.**

*Guidelines*

4a. Broadcasters will respect the rights of individuals to express their own opinions.

4b. Broadcasters may have regard, when ensuring that programmes comply with Principle 4, to the following matters:

- i) an appropriate introduction to the programme;
- ii) any reasonable on-air opportunity for listeners to ask questions or present rebuttal within the period of current interest. Broadcasters may have regard to the views expressed by other broadcasters or in the media which listeners could reasonably be expected to be aware of.



APPENDIX II – UNITED KINGDOM BROADCASTING STANDARDS –  
EXTRACTS FROM THE OFCOM BROADCASTING CODE

Section Two: Harm and Offence

**Meaning of “context”:**

Context includes (but is not limited to):

- the editorial content of the programme, programmes or series;
- the service on which the material is broadcast;
- the time of broadcast;
- what other programmes are scheduled before and after the programme or programmes concerned;
- the degree of harm or offence likely to be caused by the inclusion of any particular sort of material in programmes generally or programmes of a particular description;
- the likely size and composition of the potential audience and likely expectation of the audience;
- the extent to which the nature of the content can be brought to the attention of the potential audience, for example, by giving information; and
- the effect of the material on viewers or listeners who may come across it unawares.

Section Five: Due Impartiality and Due Accuracy and Undue Prominence of Views and Opinions

...

**Principles**

To ensure that news, in whatever form, is reported with due accuracy and presented with due impartiality.

To ensure that the special impartiality requirements of the Act are complied with.

**Rules**

*Meaning of “due impartiality”:*

“Due” is an important qualification to the concept of impartiality. Impartiality itself means not favouring one side over another. “Due” means adequate or appropriate to the subject and nature of the programme. So “due impartiality” does not mean an equal division of time has to be given to every view, or that every argument and every facet of every argument has to be represented. The approach to due impartiality may vary according to the nature of the subject, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience. Context, as defined in Section Two: Harm and Offence of the Code, is important.

**Due impartiality and due accuracy in news**

**5.1** News, in whatever form, must be reported with due accuracy and presented with due impartiality.

....



## **Special impartiality requirements: news and other programmes**

### ***Matters of political or industrial controversy and matters relating to current public policy***

*Meaning of “matters of political or industrial controversy and matters relating to current public policy”:* Matters of political or industrial controversy are political or industrial issues on which politicians, industry and/or the media are in debate. Matters relating to current public policy need not be the subject of debate but relate to a policy

under discussion or already decided by a local, regional or national government or by bodies mandated by those public bodies to make policy on their behalf, for example, non-governmental organisations, relevant European institutions, etc.

....

### ***The preservation of due impartiality***

(Rules 5.5 to 5.12 apply to television programme services, teletext services, national radio and national digital sound programme services.)

**5.5** Due impartiality on matters of political or industrial controversy and matters relating to current public policy must be preserved on the part of any person providing a service (listed above). This may be achieved within a programme or over a series of programmes taken as a whole.

*Meaning of “series of programmes taken as a whole”:* This means more than one programme in the same service, editorially linked, dealing with the same or related issues within an appropriate period and aimed at a like audience. A series can include, for example, a strand, or two programmes (such as a drama and a debate about the drama) or a ‘cluster’ or ‘season’ of programmes on the same subject.

**5.6** The broadcast of editorially linked programmes dealing with the same subject matter (as part of a “series” in which the broadcaster aims to achieve due impartiality) should normally be made clear to the audience on air.

**5.7** Views and facts must not be misrepresented. Views must also be presented with due weight over appropriate timeframes.

**5.8** Any personal interest of a reporter or presenter, which would call into question the due impartiality of the programme, must be made clear to the audience.

**5.9** Presenters and reporters (with the exception of news presenters and reporters in news programmes), presenters of “personal view” or “authored” programmes or items, and chairs of discussion programmes may express their own views on matters of political or industrial controversy or matters relating to current public policy. However, alternative viewpoints must be adequately represented either in the programme, or in a series of programmes taken as a whole. Additionally, presenters must not use the advantage of regular appearances to promote their



views in a way that compromises the requirement for due impartiality. Presenter phone-ins must encourage and must not exclude alternative views.

**5.10** A personal view or authored programme or item must be clearly signalled to the audience at the outset. This is a minimum requirement and may not be sufficient in all circumstances. (Personality phone-in hosts on radio are exempted from this provision unless their personal view status is unclear.)

*Meaning of "personal view" and "authored":* "Personal view" programmes are programmes presenting a particular view or perspective. Personal view programmes can range from the outright expression of highly partial views, for example, by a person who is a member of a lobby group and is campaigning on the subject, to the considered "authored" opinion of a journalist, commentator or academic, with professional expertise or a specialism in an area which enables her or him to express opinions which are not necessarily mainstream.

***Matters of major political or industrial controversy and major matters relating to current public policy***

**5.11** In addition to the rules above, due impartiality must be preserved on matters of major political and industrial controversy and major matters relating to current public policy by the person providing a service (listed above) in each programme or in clearly linked and timely programmes.

*Meaning of "matters of major political or industrial controversy and major matters relating to current public policy":* These will vary according to events but are generally matters of political or industrial controversy or matters of current public policy which are of national, and often international, importance, or are of similar significance within a smaller broadcast area.

**5.12** In dealing with matters of major political and industrial controversy and major matters relating to current public policy an appropriately wide range of significant views must be included and given due weight in each programme or in clearly linked and timely programmes. Views and facts must not be misrepresented.

***The prevention of undue prominence of views and opinions on matters of political or industrial controversy and matters relating to current public policy***

(Rule 5.13 applies to local radio services (including community radio services), local digital sound programme services (including community digital sound programme services) and radio licensable content services.)

**5.13** Broadcasters should not give undue prominence to the views and opinions of particular persons or bodies on matters of political or industrial controversy and matters relating to current public policy in all the programmes included in any service (listed above) taken as a whole.

*Meaning of "undue prominence of views and opinions":* Undue prominence is a significant imbalance of views aired within coverage of matters of political or industrial controversy or matters relating to current public policy.



*Meaning of "programmes included in any service...taken as a whole":*  
Programmes included in any service taken as a whole, means all programming on a service dealing with the same or related issues within an appropriate period.

Section Seven: Fairness

....

**Principle**

To ensure that broadcasters avoid unjust or unfair treatment of individuals or organisations in programmes.

**Rule**

**7.1** Broadcasters must avoid unjust or unfair treatment of individuals or organisations in programmes.

**Practices to be followed (7.2 to 7.14 below)**

**Dealing fairly with contributors and obtaining informed consent**

**7.2** Broadcasters and programme makers should normally be fair in their dealings with potential contributors to programmes unless, exceptionally, it is justified to do otherwise.

**7.3** Where a person is invited to make a contribution to a programme (except when the subject matter is trivial or their participation minor) they should normally, at an appropriate stage:

- be told the nature and purpose of the programme, what the programme is about and be given a clear explanation of why they were asked to contribute and when (if known) and where it is likely to be first broadcast;
- be told what kind of contribution they are expected to make, for example, live, pre-recorded, interview, discussion, edited, unedited, etc;
- be informed about the areas of questioning and, wherever possible, the nature of other likely contributions;
- be made aware of any significant changes to the programme as it develops which might reasonably affect their original consent to participate, and which might cause material unfairness;
- be told the nature of their contractual rights and obligations and those of the programme maker and broadcaster in relation to their contribution; and
- be given clear information, if offered an opportunity to preview the programme, about whether they will be able to effect any changes to it.

Taking these measures is likely to result in the consent that is given being 'informed consent' (referred to in this section and the rest of the Code as "consent").

It may be fair to withhold all or some of this information where it is justified in the public interest or under other provisions of this section of the Code.

.....

**7.6** When a programme is edited, contributions should be represented fairly.



7.7 Guarantees given to contributors, for example relating to the content of a programme, confidentiality or anonymity, should normally be honoured.

7.8 Broadcasters should ensure that the re-use of material, i.e. use of material originally filmed or recorded for one purpose and then used in a programme for another purpose or used in a later or different programme, does not create unfairness. This applies both to material obtained from others and the broadcaster's own material.

### **Opportunity to contribute and proper consideration of facts**

7.9 Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:

- material facts have not been presented, disregarded or omitted in a way that is unfair to an individual or organisation; and
- anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.

....

7.11 If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.

7.12 Where a person approached to contribute to a programme chooses to make no comment or refuses to appear in a broadcast, the broadcast should make clear that the individual concerned has chosen not to appear and should give their explanation if it would be unfair not to do so.

7.13 Where it is appropriate to represent the views of a person or organisation that is not participating in the programme, this must be done in a fair manner.



APPENDIX III – CANADIAN BROADCASTING STANDARDS – EXTRACTS  
FROM THE CAB CODE AND THE RTNDA CODE

Canadian Association of Broadcasters (CAB) Code of Ethics

**Clause 5 – News**

It shall be the responsibility of broadcasters to ensure that news shall be represented with accuracy and without bias. Broadcasters shall satisfy themselves that the arrangements made for obtaining news ensure this result. They shall also ensure that news broadcasts are not editorial.

News shall not be selected for the purpose of furthering or hindering either side of any controversial public issue, nor shall it be formulated on the basis of the beliefs, opinions or desires of management, the editor or others engaged in its preparation or delivery. The fundamental purpose of news dissemination in a democracy is to enable people to know what is happening, and to understand events so that they may form their own conclusions.

Nothing in the foregoing shall be understood as preventing broadcasters from analyzing and elucidating news so long as such analysis or comment is clearly labelled as such and kept distinct from regular news presentations. Broadcasters are also entitled to provide editorial opinion, which shall be clearly labelled as such and kept entirely distinct from regular broadcasts of news or analysis.

Broadcasters shall refer to the Code of Ethics of the Radio and Television News Directors of Canada ("RTNDA") for more detailed provisions regarding broadcast journalism in general and to the Voluntary Code Regarding Violence in Television Programming for guidance with respect to the depiction of violence, graphic reporting of delicate subject matter or the use of explicit language in news and public affairs programming on television.

**Clause 6 - Full, Fair and Proper Presentation**

It is recognized that the full, fair and proper presentation of news, opinion, comment and editorial is the prime and fundamental responsibility of each broadcaster. This principle shall apply to all radio and television programming, whether it relates to news, public affairs, magazine, talk, call-in, interview or other broadcasting formats in which news, opinion, comment or editorial may be expressed by broadcaster employees, their invited guests or callers.

**Clause 7 - Controversial Public Issues**

Recognizing in a democracy the necessity of presenting all sides of a public issue, it shall be the responsibility of broadcasters to treat fairly all subjects of a controversial nature. Time shall be allotted with due regard to all the other elements of balanced program schedules, and the degree of public interest in the questions presented. Recognizing that healthy controversy is essential to the maintenance of democratic institutions, broadcasters will endeavour to encourage



the presentation of news and opinion on any controversy which contains an element of the public interest.

Radio Television News Directors Association of Canada (RTNDA) – Code of Ethics

**Preamble**

Free speech and an informed public are vital to a democratic society. The members of RTNDA Canada recognize the responsibility of broadcast journalists to promote and to protect the freedom to report independently about matters of public interest and to present a wide range of expressions, opinions and ideas.

**Article One (Accuracy)**

Broadcast journalists will inform the public in an accurate, comprehensive and fair manner about events and issues of importance.



APPENDIX IV – THE AUSTRALIAN BROADCASTING STANDARDS –  
EXTRACTS FROM THE COMMERCIAL TELEVISION AND RADIO CODES

Commercial Radio Australia – Codes of Practice and Guidelines

**Code of Practice 2: News and Current Affairs Programs**

**Purpose**

The purpose of this Code is to promote accuracy and fairness in news and current affairs programs.

2.1 News programs (including news flashes) broadcast by a licensee must:

(a) present news accurately;

....

(c) distinguish news from comment; and

....

2.2 In the preparation and presentation of current affairs programs, a licensee must ensure that:

(a) factual material is presented accurately and that reasonable efforts are made to correct substantial errors of fact at the earliest possible opportunity;

(b) the reporting of factual material is clearly distinguishable from commentary and analysis;

(c) reasonable efforts are made or reasonable opportunities are given to present significant viewpoints when dealing with controversial issues of public importance, either within the same program or similar programs, while the issue has immediate relevance to the community;

(d) viewpoints expressed to the licensee for broadcast are not misrepresented and material is not presented in a misleading manner by giving wrong or improper emphasis or by editing out of context;

....

Commercial Television Industry – Code of Practice

**Section 4: News and Current Affairs Programs**

*Objectives*

**4.1 This Section is intended to ensure that:**

4.1.1 news and current affairs programs are presented accurately and fairly;

....

4.1.4 news is presented impartially.

*Scope of the Code*

4.2 Except where otherwise indicated, this Section applies to news programs, news flashes, news updates and current affairs programs. A “current affairs



program” means a program focussing on social, economic or political issues of current relevance to the community.

### ***News and Current Affairs Programs***

#### **4.3 In broadcasting news and current affairs programs, licensees:**

4.3.1 must present factual material accurately and represent viewpoints fairly, having regard to the circumstances at the time of preparing and broadcasting the program;

....

4.3.11 must make reasonable efforts to correct significant errors of fact at the earliest opportunity.

#### **4.4 In broadcasting news programs (including news flashes) licensees:**

4.4.1 must present news fairly and impartially;

4.4.2 must clearly distinguish the reporting of factual material from commentary and analysis.



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