

8 February 2012

Detective Inspector I
Crime Group
Police National Headquarters
PO Box 3017
Wellington 6140

Dear Detective Inspector

**Referral of alleged breach of section 70 of the Broadcasting Act 1989 -
MediaWorks 'Prime Minister's Hour'**

Between 2:09 pm – 3:00 pm on 30 September 2011, Mediaworks broadcast the "Prime Minister's Hour with John Key" on RadioLive. In the Commission's view, this item was an election programme for the purposes of section 69 of the Broadcasting Act ("the Act"). It was broadcast in breach of section 70 of the Act, which is an offence under section 80 of the Act. I am required to refer such breaches to Police under section 80A of the Act.

This unusual case raised difficult legal questions about the ambit and application of the statutory tests and possible conflict between them. It is of a type that has not been covered in the Commission's general guidance for candidates, parties, or broadcasters to date.

RadioLive sought an advisory opinion from the Commission on the eve of the planned broadcast of the programme. The Commission's advice - necessarily general because, as the show was to be unscripted and live, it only had a brief outline of its likely content - said, in summary

"In the Electoral Commission's view broadcasters need to exercise a high degree of caution with regard to party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority."

RadioLive must ensure that the programme is not an election programme for the purposes of the Broadcasting Act as the broadcast of an election programme that encourages or appears to encourage voters to vote for the National Party or the Rt Hon John Key as a candidate is prohibited before writ day (26 October 2011 for the 2011 General Election). There are serious penalties for broadcasters that breach these rules.

The Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If RadioLive was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the

election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act."

RadioLive decided to proceed with the broadcast notwithstanding the risks identified in the Commission's opinion. However, the Commission has no reason to believe that RadioLive did not carefully consider the Commission's opinion and it modified the programme in an attempt to accommodate the advice.

The Commission will be making the decision public including guidance to broadcasters on its implications.

I have attached a file containing:

- The Commission's decision including detailed explanation of the background to the complaint and the reasons for the decision
- Copies of correspondence with RadioLive prior to the broadcast
- A transcript of the broadcast
- Copies of the complaints received
- Response from RadioLive
- Crown Law advice provided to the Commission (Note that in providing the opinion the Commission is not waiving privilege in it)
- A copy of the Broadcasting Standards Authority's decision on the show
- A copy of the Electoral Commission's General Election and Referendum 'Media Handbook',
- The relevant provisions of the Broadcasting Act.

Please feel free to contact Kristina Terrel on () if you have any questions about this referral.

When you have completed your inquiries, I would appreciate being advised of the outcome.

Yours sincerely


Robert Peden
Chief Electoral Officer

Encl.

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

INDEX

File referred to police: referral of alleged breach of section 70 of the Broadcasting Act 1989 - MediaWorks 'Prime Minister's Hour'

1. The Electoral Commission's decision
2. Copies of correspondence with RadioLive prior to the broadcast
3. A transcript of the broadcast
4. Copies of the complaints received
5. Response from RadioLive
6. Crown Law advice provided to the Commission
7. A copy of the Broadcasting Standards Authority's decision on the show
8. A copy of the Electoral Commission's 'General Election and Referendum 'Media Handbook'
9. The relevant provisions of the Broadcasting Act.

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Decision of the Electoral Commission on the Prime Minister's Hour RadioLive complaint

Executive summary

1. The Electoral Commission ("the Commission") has received complaints that the RadioLive Show hosted by the Prime Minister on Friday 30 September 2004 (the show) was:
 - a. an election programme and a prohibited broadcast under section 70 of the Broadcasting Act 1989, and
 - b. an election advertisement that did not comply with sections 204F and 204H of the Electoral Act 1993.
2. Having considered the content of the show as whole, and the views of the complainants and RadioLive, the Commission has concluded that the show was:
 - a. an election programme for the purposes of section 69 of the Broadcasting Act; and
 - b. not an election advertisement for the purposes of section 3A of the Electoral Act because it falls within the editorial exemption; and
 - c. not an electoral advertisement for the purposes of section 221A of the Electoral Act.

The legislation

The Broadcasting Act 1989

3. Section 69 of the Broadcasting Act defines an election programme as "a programme that—
 - (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party or the election of any person at an election; or
 - (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party or the election of any person at an election; or
 - (c) advocates support for a candidate or for a political party; or
 - (d) opposes a candidate or a political party; or
 - (e) notifies meetings held or to be held in connection with an election".

Section 70 of the Broadcasting Act provides a general prohibition for the broadcasting of an 'election programme' except in the circumstances allowed in the section.

5. Section 70(2) sets out the circumstances in which the broadcast of election programmes are permitted. They include broadcasting by parties using time and money allocated by the Commission through the broadcasting allocation, broadcasting for candidates during the election period, non-partisan broadcasts as a community service by the broadcaster, or broadcasts by the electoral agencies. It is not claimed that the show falls under any of these exceptions.
6. Section 70(3) provides that section 70(1) does not restrict the broadcasting, in relation to an election, of news, comments or current affairs programmes. It is not claimed that the show falls under this exemption.

7. Section 80 provides that it is an offence to fail to comply with section 70. If the Commission believes an offence has been committed against section 80, section 80A requires the Commission to report the matter to the Police.

The Electoral Act 1993

8. Under section 3A of the Electoral Act, an election advertisement means
- a. an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
 - i. to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated);
 - ii. to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated) and
 - b. includes
 - i. a candidate advertisement; and
 - ii. a party advertisement.
9. A party advertisement means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
- a. to vote for a party (whether or not the name of the party is stated);
 - b. not to vote for a party (whether or not the name of the party is stated).
10. There is a broad exemption in section 3A(2)(h) of the Act to the definition of election advertisement for the editorial content of a periodical, a radio, or television programme, or news media Internet site. The Electoral Act does not define 'editorial content' but it is not limited to news, comment, or current affairs as is the exemption under the Broadcasting Act or news or comment as is the exemption under section 221A of the Electoral Act.
11. Section 204F of the Electoral Act requires all election advertisements to contain a promoter statement.
12. The promoter of the advertisement is the person who initiates or instigates the advertisement. The radio programme was initiated by RadioLive, not by Mr Key. This is a matter that is not in issue.
13. Where an advertisement is a party advertisement the party secretary must give written authentication before the advertisement is published (section 204H of the Electoral Act).
- Section 221A provides that no person may ... broadcast or cause or permit to be broadcast over any radio station, any advertisement relating to an election (not being an election advertisement as defined in section 3A) unless the advertisement contains a statement setting out the true name of the person for whom or at whose direction it is published and the address of that persons place of business.
15. There is a broad exception in section 221A(4) for 'news or comments' relating to an election. RadioLive does not expressly claim that the show falls under this exemption but the Commission must consider it.

Relationship between the two Acts

16. The tests in section 69 in the Broadcasting Act and section 3A of the Electoral Act are similar in that they both require an assessment to be made about whether the programme or advertisement appears to encourage voters to vote or not vote for a party or candidate or both.
17. Where the tests differ, however, is the scope and nature of the exemptions. In section 70(3) of the Broadcasting Act, the exemption is for broadcasting, in relation to an election, of news, comments or current affairs programmes.
18. By contrast, the exemption in section 3A(2)(c)(ii) of the Electoral Act is not limited to news, comment, or current affairs as is the exemption under the Broadcasting Act but to all editorial content of a periodical, a radio, or television programme, or news media Internet site.
19. Section 221A of the Electoral Act is a different test again. It requires an 'advertisement' to be election related. There is no reference to words such as "may reasonably be regarded as" or "appears to". Further the exemption in section 221A(4) of the Act is for news or comment relating to an election.
20. For this reason, the application of the contrasting statutory tests to the same programme can yield different results. This may warrant reconsideration by Parliament.

The broadcast

21. Between 2:09 pm – 3:00 pm on 30 September 2011, New Zealand's current Prime Minister, Mr John Key, acted as the radio host on the "Prime Minister's Hour with John Key" on RadioLive.
22. The show consisted of Mr Key first reading the weather and then the balance of the show consisted of interviews with high profile celebrities previously advertised as being amongst his favourite people including:
 - a. Richie McCaw, captain of the All Blacks in the then current Rugby World Cup 2011.
 - b. Sir Richard Branson, a successful and high profile international businessman,
 - c. Sir Peter Jackson, the Director of "Lord of the Rings" trilogy and then engaged in making "The Hobbit" film, and
 - d. Mr Lewis Brown, a player for the Warriors' rugby league team which had won the right to play in the NRL Grand Final to be played on the weekend after the show.
23. The interviews were interspersed with advertisements and towards the end of the show the usual host, Mr Paul Henry, and Mr Key engaged in light hearted exchange and briefly discussed more serious topics.
24. The interviews were conducted on a first name, affable basis centring on the interviewees, their achievements and the hurdles facing them.
25. Although the show was described by Mr Key as "election-free" he described himself - and was described by interviewees - on several occasions as the "Prime Minister". Both Sir Richard Branson and Mr Henry referred to the "Leader of the Opposition" and the "Labour Party", but these references were not developed.

26. Towards the end Mr Key read what he said were "tweets and texts", one of which said of Mr Key "You're a bloody legend" – something he laughed off, and another spoke of the rescheduling of "Coronation Street" in respect of which Mr Key said:

"I think it has got to be moved and I'm going to speak to somebody important enough to see whether that can happen".

27. During the last section of the show when he and Mr Henry were talking, Mr Key spoke of "working for the nation" and, in response to questioning about the recent downgrading of New Zealand's credit rating, Mr Key responded that the problem was "private sector debt" and that the credit rating agencies have "been quite positive about the Government's approach to debt". He spoke of being a "bit disappointed" about the downgrades.

The complaints

28. The overriding concern of the complainants is that the show was an opportunity for Mr Key to promote himself and his party in a way that other parties have not been afforded at a critical time just 2 months out from the election scheduled for 26 November 2011.
29. Whilst the show was introduced as an "election free zone", the complainants contend that some content within the show was political in nature.
30. In response, RadioLive has asserted that the Prime Minister operated within strict editorial guidelines specified by the station to ensure that any content relating to the election, voting or to National Party policy was excluded.

Was the show an election programme under the Broadcasting Act?

31. The circumstances of this case are uncommon. It is unusual for broadcasters to provide a person contesting an election as a party leader and candidate with the opportunity to host a radio programme in the lead up to that Parliamentary election. During an election period, party leaders and candidates usually appear on radio or television either as the guests of news, comment, or current affairs programmes in which they are typically the subject of question and challenge or they are the subject of election programmes paid for by an allocation of election broadcast funding.

32. The question is how the definition of election programme is to be applied to such a case. It is clear that the motivation of the broadcaster in broadcasting the programme or the politician in participating in it is irrelevant. The test in section 69 is objective. What matters is whether objectively a listener would regard the programme as encouraging or persuading or appearing to encourage or persuade voters to vote for or against a party or candidate.

33. Given the novel circumstances in this case, it is appropriate to consider what we understand to be the policy behind the election broadcasting regime. The legislation imposes strict restrictions on the broadcast of election programmes because of the supposed power and influence of broadcasting compared to other media. The objective is first, to provide candidates and parties with a fair opportunity to present themselves to the electorate and secondly, to avoid candidates, parties and third parties, particularly those with deep pockets, obtaining unfair levels of access through the broadcast media. Importantly, media freedom is protected through an exemption for news, comment and current affairs broadcasts relating to an election.

34. The show was promoted in advertising as the "Prime Minister's Hour". It was subject to the editorial control of the broadcaster because the broadcaster directed Mr Key, as host, to keep the programme "an election free zone".
35. The complainants argued that some of the show's content was political in nature and pointed to the fact Mr Key was referred to throughout the programme as the Prime Minister, to references to the "leader of the opposition" and the Labour Party, to Mr Key's comments on what he intended to do about the scheduling of Coronation St, and to the exchange between Mr Henry and Mr Key towards the end of the programme about New Zealand's credit rating. In the Commission's view these references of themselves would not ordinarily be sufficient to constitute broadcasting an election programme.
36. The Commission accepts that politicians will in the course of their official duties appear in the media to different extents. That type of exposure will not be an election programme without more. However, this show was atypical and did not appear to be related to the Prime Minister's official duties. In the Commission's view it is unrealistic for a programme hosted by the Prime Minister or any other prominent politician to be "election free", irrespective of its content, when the host is in the midst of contesting a Parliamentary election as party leader and candidate.
37. In the case in question, listeners would have been aware there was an election pending and that Mr Key was contesting the election as a party leader and candidate. Whilst Mr Key was prohibited by the broadcaster from referring to his Government's performance or his or other parties' policies, the show did provide an opportunity for Mr Key to raise his personal profile unfettered by the questioning or challenge typically present in a news, comment or current affairs programme. Moreover, the show involved an opportunity for Mr Key to associate himself on a friendly basis with high profile individuals of whom many New Zealanders would have high opinions.
38. In all the circumstances it is reasonable to conclude listeners would regard the show as appearing to encourage or persuade voters to vote for Mr Key's party and for him. In the Commission's view, this conclusion would be consistent with the policy of the statutory scheme to limit parties and candidates exposure through the broadcast media in the lead up to the election to paid political broadcasts or to news, comment and current affairs programmes.
39. In the Commission's view, therefore, RadioLive has breached the Broadcasting Act in broadcasting the "Prime Minister's Hour".

Was the show an election advertisement for the purposes of section 3A of the Electoral Act 1993?

40. The statutory test that the Commission must apply is whether the content and context of the show as a whole can reasonably be regarded as encouraging or persuading voters to vote for John Key and/or the National Party or not to vote for any other party. For similar reasons to those outlined in paragraphs 31 to 39 above and given the two statutory tests are effectively identical, the Commission's view is that it would be an "election advertisement" unless it falls within one of the statutory exemptions.
41. There is a broad exemption in section 3A(2)(c)(ii) of the Act to the definition of election advertisement for the editorial content of a periodical, a radio, or television programme, or news media Internet site. The Electoral Act does not define 'editorial content' but it is not limited to news, comment or current affairs as is the exemption under the Broadcasting Act or news or comment as is the exemption under section 221A of the Electoral Act.

42. The Electoral Commission's view is that because the show was under the control of the broadcaster the editorial content exemption applies to the show and therefore it is not an election advertisement. For this reason, the Commission has concluded that the complaint is not made out in this regard.

Was the show an electoral advertisement for the purposes of section 221A of the Electoral Act?

43. The Commission has also considered whether the show is an electoral advertisement for the purposes of section 221A of the Electoral Act. As set out in paragraph 19 above, to be subject to the requirements of section 221A, the programme must be an advertisement relating to an election and not an election advertisement under section 3A. There is no reference in section 221A to words such as "may reasonably be regarded as" or "appears to".

44. The term "advertisement relating to an election" is not defined, but in the Commission's view, it does require some content directly relating to the election. Having considered the content of the show, the Commission has concluded that it was not an "advertisement relating to an election" for the purposes of section 221A of the Act because there was insufficient reference to the election.

Conclusion

45. Having considered the content of the show as a whole, and the views of the complainants and RadioLive, the Commission concludes that the show was:

- an election programme for the purposes of section 69 of the Broadcasting Act;
- not an election advertisement for the purposes of section 3A of the Electoral Act because it falls within the editorial exemption; and
- not an electoral advertisement for the purposes of section 221A of the Electoral Act.

46. Therefore, RadioLive has breached the Broadcasting Act in broadcasting the "Prime Minister's Hour".

47. Section 80A requires the Commission to refer the matter to the Police and it will do so. It will be for the Police to determine how they exercise their independent prosecutorial function. However, there are some points that the Commission will make in the referral which the Police might take into account.

48. This unusual case raised difficult legal questions about the ambit and application of the statutory tests and possible conflict between them. It is of a type that has not been covered in the Commission's general guidance for candidates, parties, or broadcasters to date.

49. RadioLive sought an advisory opinion from the Commission two days before the planned broadcast of the programme. The Commission's advice - necessarily general because, as the show was to be unscripted and live, it only had a brief outline of its likely content - said, in summary

"In the Electoral Commission's view broadcasters need to exercise a high degree of caution with regard to party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority.

RadioLive must ensure that the programme is not an election programme for the purposes of the Broadcasting Act as the broadcast of an election programme that encourages or appears to encourage voters to vote for the National Party or the Rt Hon John Key as a candidate is prohibited before writ day (26 October 2011 for the 2011 General Election). There are serious penalties for broadcasters that breach these rules.

The Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If RadioLive was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act."

50. RadioLive decided to proceed with the broadcast notwithstanding the risks identified in the Commission's opinion. However, the Commission has no reason to believe that RadioLive did not carefully consider the Commission's opinion and modified the programme in an attempt to accommodate the advice.

51. Having considered this case in depth, the Commission has the following guidance for broadcasters. Programmes that -

- a. are hosted by a party leader or candidate at the invitation of the broadcaster
- b. are broadcast in close proximity to an election
- c. give the party leader or candidate an unfettered opportunity to raise their profile and
- d. are in a format falling outside news, comment or current affairs -

are likely to be election programmes and, therefore, a breach of the Broadcasting Act.

52. As an additional factor, if there is an absence of editorial control, then it will also be an election advertisement under s3A.

53. Broadcasting live shows, particularly unscripted shows, in the lead up to the election featuring party leaders or candidates in formats that go beyond news, comments or current affairs can easily result in the broadcast being an "election programme". As the penalties are significant the Commission advises media to exercise a high degree of caution before allowing party leaders or candidates to host such live shows in the lead up to an election.

signed for and on behalf of the Commission



Robert Peden
Chief Electoral Officer

Dated: 8/2/12

From: [redacted]
Sent: Wednesday, 28 September 2011 10:13 a.m.
To: [redacted]
Subject: FW: PM hosting on Radio Live Friday 30 September 2011
Attachments: PM hour on Radio Live.docx
Importance: High

From: Mary Putnam [mailto:]
Sent: Wednesday, 28 September 2011 9:45 a.m.
To: Natalie McNaught
Cc: Clare Bradley; Willy Trolove
Subject: PM hosting on Radio Live Friday 30 September 2011
Importance: High

Dear Natalie,

"Radio Live has invited the Prime Minister to host a live radio show this coming Friday. We have prepared the attached brief for the Prime Minister. Can you please provide Radio Live with an urgent advisory opinion on whether the show as described in the brief will satisfy the rules in the Electoral Act and the Broadcasting Act. Given that the show is due to be broadcast on Friday, we would appreciate your opinion as soon as possible."

Many thanks and kindest regards,

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330 | +64 275 545 051 |
www.radiolive.co.nz



Attention:

The information contained in this message and/or attachments is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender, and delete the material from any system and destroy any copies.

This e-mail has been virus scanned and cleared by the MediaWorks NZ Ltd IT Department.

Thank you.

OVERVIEW

The Prime Minister of New Zealand will host an hour's show interviewing a couple of guests that are of interest to New Zealanders.

The last half of the show is designed to be question and answer time for listeners to call the PM directly and have a chance to ask him a question without having another host to be a part of the conversation.

The intention of the show is to be interesting, informing, entertaining, and largely non-political. Of course, listener questions may have a political or policy bent and the Prime Minister is likely to address such questions put to him by callers. However, the producer of the show will encourage calls that are entertaining and personal, rather than political, allowing people to see the human side of The Prime Minister rather than the political side.

As this is an election year, it is worth clarifying that Radio Live sees this show as falling outside of election advertising or election programming. We see it as purely editorial content for the Radio Live audience.

Section 3(a)2c of the Electoral Act contains a list of items that are not election advertisements, including (ii) "the editorial content of a radio or television programme".

During his hosting of the show, the Prime Minister must not encourage callers or listeners to vote for the National Party or to vote for John Key as a candidate in the general election.

If the Prime Minister is asked by a caller to tell listeners who they should vote for, he should reply with something non-committal such as "I am not here today to tell you who to vote for. This is just a chance to chat".

PROGRAMME RUNDOWN

TIME		DURATION
14.00	News	5 min
14.05	Sport	3 min
14.08	Ads	1.5 min
14.09	Weather (national forecast provided to and read by PM)	1 min
14.10	Opening Music – PM's Choice	1 min
14.11	Opening dialogue	1 min
	Show introduction, welcome and tease hour ahead Eg: "This is Radio Live, good afternoon it's eleven past 2, I'm John Key and this is the Prime Ministers Hour, a chance for me to interview a few of my favourite New Zealanders and, a little later, a chance for you to ask me anything you like."	
14.12	INTERVIEW 1 - RICHIE MCCAWE (BY PHONE)	10 min

Additional (optional) questions will be provided

14.22	Wrap up interview, thank Richie and tease next guest	
14.23	Ad break 3 mins	
14.26	News Update 1 min (read by newsreader Debbie Griffiths)	
14.27	Intro next guest	
14.27	INTERVIEW 2 – SIR PETER JACKSON (BY PHONE)	10 min
14.37	Wrap up interview, thanks guest and tease Q and A eg. "Now is your chance to ask me any question you like, call 0800 RADIO LIVE – 0800 723 465)	
14.37	Ad break 2 mins	
14.39	Q AND A – 1 QUESTION PER CALLER	8 min
14.45	Ad Break	3 min
14.48	News Update (read by newsreader Debbie Griffiths)	1 min
14.49	Q AND A – 1 QUESTION PER CALLER	5-6 min
14.55	Wrap up the last caller and start in-studio handover with Paul Henry eg "Up next is Paul Henry Drive on Radio Live, Paul what have you got coming up?" then a discussion on topics of the day	
15.00	News	
NB:	Ph 0800 723 465 - 0800 RADIO LIVE	

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

Natalie McNaught

From: Mary Putnam [mailto:]
Sent: Thursday, 29 September 2011 9:15 a.m.
To: Natalie McNaught
Cc: Willy Trolove
Subject: RE: PM hosting on Radio Live Friday 30 September 2011

Many thanks Natalie,

Would you please also copy Willy Trolove from the PM's office in please as I shall be away from the office and out of email range between 2 and 6pm today.

Kindest regards,

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330 | +64 275 545 051 | www.radiolive.co.nz

From: Natalie McNaught [mailto:]
Sent: Thursday, 29 September 2011 9:12 a.m.
To: Mary Putnam
Subject: RE: PM hosting on Radio Live Friday 30 September 2011

Hi Mary

A response has been prepared and is currently with the Chief Electoral Officer for his approval. I would hope to be in a position to provide you with the Commission's response later on today.

Kind regards

Natalie

Natalie McNaught | Senior Advice Legal | Electoral Commission | Te Kaitiaki Take Kowhiri
Level 9 | 17-21 Whitmore Street | PO Box 3220 | Wellington
Tel: +64 4 498 2312 | Fax: +64 4 495 0031 | Web: www.elections.org.nz

From: Mary Putnam [mailto:]
Sent: Thursday, 29 September 2011 9:05 a.m.
To: Natalie McNaught
Subject: FW: PM hosting on Radio Live Friday 30 September 2011
Importance: High

Hi Natalie,

Have you had a chance to consider this yet?

Kindest regards

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330 | +64 275 545 051 | www.radiolive.co.nz

From: Mary Putnam
Sent: Wednesday, 28 September 2011 9:45 a.m.
To: 'natalie.mcnaught@elections.govt.nz'
Cc: Clare Bradley; 'Willy Trollove'
Subject: PM hosting on Radio Live Friday 30 September 2011
Importance: High

Dear Natalie,

"Radio Live has invited the Prime Minister to host a live radio show this coming Friday. We have prepared the attached brief for the Prime Minister. Can you please provide Radio Live with an urgent advisory opinion on whether the show as described in the brief will satisfy the rules in the Electoral Act and the Broadcasting Act. Given that the show is due to be broadcast on Friday, we would appreciate your opinion as soon as possible."

Mary thanks and kindest regards,

Mary Putnam | Producer Willie and JT | RadioLIVE | Phone: 9 360 0330 | +64 275 545 051 | www.radiolive.co.nz



Attention:

The information contained in this message and/or attachments is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender, and delete the material from any system and destroy any copies.

This e-mail has been virus scanned and cleared by the MediaWorks NZ Ltd IT Department.

Thank you.

CONFIDENTIALITY NOTICE:

This e-mail message and attachments do not necessarily reflect the views of the New Zealand Electoral Commission and may contain information that is confidential and may be subject to legal privilege.

If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this e-mail message or its attachments. If you received this message in error, please notify the Electoral Commission by telephone (call collect: 00-64-4-495-0030) or return the original message to us by e-mail, and destroy any copies. Thank you.

Attention:

The information contained in this message and/or attachments is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or

Natalie McNaught

From: Mary Putnam [i z]
Sent: Thursday, 29 September 2011 11:14 a.m.
To: Natalie McNaught
Subject: RE: Radio Live show 30 September 2011

Many thanks Natalie,

Appreciate the Chief Electoral Officer's comments.

Kindest regards

Mary Putnam | Producer Willie and JT | RadioLIVE | +64 9 360 0330 | +64 275 645 051 | www.radiolive.co.nz

From: Natalie McNaught [mailto:Natalie.McNaught@elections.govt.nz]
Sent: Thursday, 29 September 2011 10:12 a.m.
To: Mary Putnam
Cc: Willy Trolove
Subject: Radio Live show 30 September 2011

Dear Mary

Further to your email request of 28 September 2011 seeking advice regarding the Prime Minister hosting a radio show on Radio Live please find attached a response from the Chief Electoral Officer.

Kind regards

Natalie

Natalie McNaught | Senior Adviser Legal | *Electoral Commission* | Te Kaitiaki Take Kowhiri
Level 9 | 17-21 Whitmore Street | PO Box 3220 | Wellington
Tel: +64 4 498 2112 | Fax: +64 4 495 0031 | Web: www.elections.org.nz

CONFIDENTIALITY NOTICE:

This e-mail message and attachments do not necessarily reflect the views of the New Zealand Electoral Commission and may contain information that is confidential and may be subject to legal privilege.

If you are not the intended recipient, you are hereby notified that you must not use, disseminate, distribute or copy this e-mail message or its attachments. If you received this message in error, please notify the Electoral Commission by telephone (call collect: 00-64-4-495-0030) or return the original message to us by e-mail, and destroy any copies. Thank you.

Attention:

The information contained in this message and/or attachments is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or

taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender, and delete the material from any system and destroy any copies.

This e-mail has been virus scanned and cleared by the MediaWorks NZ Ltd IT Department.

Thank you.

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982

29 September 2011

Mary Putnam
Producer
Radio Live

By email to: r

Dear Mary Putnam

PRIME MINISTER HOSTING RADIO LIVE SHOW – 30 SEPTEMBER 2011

Thank you for your email of 28 September, requesting an advisory opinion, pursuant to section 204I of the Electoral Act 1993, on whether a live radio show hosted by the Prime Minister on Friday 30 September 2011 on Radio Live will be an election advertisement as defined in the Electoral Act. You have also asked whether the format of the show as set out in the brief attached to your email will satisfy the rules in the Electoral Act and the Broadcasting Act 1989.

As the proposed show is to be broadcast live you are not in a position to provide the Electoral Commission with a recording or transcript of the show. The Electoral Commission is only able to provide an advisory opinion where a copy of the advertisement accompanies the request, allowing the Commission to take into consideration both the content and the overall effect of the advertisement in the context it will be published. In view of this the Electoral Commission is limited to providing you with general advice about the election advertising rules with regard to the proposed format of the show.

Executive Summary

In the Electoral Commission's view broadcasters need to exercise a high degree of caution with regard to party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority.

Radio Live must ensure that the programme is not an election programme for the purposes of the Broadcasting Act as the broadcast of an election programme that encourages or appears to encourage voters to vote for the National Party or the Rt Hon John Key as a candidate is prohibited before writ day (26 October 2011 for the 2011 General Election). There are serious penalties for broadcasters that breach these rules.

The Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If Radio Live was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act.

Legislation

Section 3A of the Electoral Act provides a definition of election advertisement, which is set out below. In addition, section 3A provides certain exceptions to the meaning of what is an election advertisement which are also summarised below.

Section 204F of the Electoral Act requires that an election advertisement published at any time must include a promoter statement.

An election advertisement

- (a) means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
 - (i) to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated);
 - (ii) to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated) and
- (b) includes
 - (i) a candidate advertisement; and
 - (ii) a party advertisement.

A **candidate advertisement** means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:

- (a) to vote for a constituency candidate (whether or not the name of the candidate is stated);
- (b) not to vote for a constituency candidate (whether or not the name of the candidate is stated).

The definition of **candidate** means a constituency candidate and includes a person who has declared his or her intention of becoming a constituency candidate.

A **party advertisement** means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:

- (a) to vote for a party (whether or not the name of the party is stated);
- (b) not to vote for a party (whether or not the name of the party is stated).

None of the following are election advertisements:

- contact information published in any medium by a member of Parliament that satisfies certain requirements as set out in section 3A of the Electoral Act, editorial content of a periodical, a radio or television programme, or a publication on a news media Internet site,
- any transmission of proceedings in the House of Representatives,
- personal political views published by an individual on the Internet or other electronic medium, where no payment is made or received.

Section 221A of the Electoral Act provides that no person shall publish or cause to be published in any newspaper, periodical, poster or handbill, or broadcast or cause or permit to be broadcast over any radio or television station, any advertisement relating to an election [not being an election advertisement as defined in section 3A] unless the advertisement contains a statement setting out the true name of the person for whom or at whose direction it is published and the address that person's place of residence or business.

Part 6 of the Broadcasting Act 1989 defines an **election programme** as "a programme that—

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

It includes "visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text."

Electoral Commission's advice

The Electoral Commission is able to provide Radio Live with the following general advice about the election advertising rules taking into consideration the proposed format of the show.

A radio programme will be an 'election advertisement' for the purposes of the Electoral Act if it contains material that encourages or persuades or appears to encourage or persuade voters to vote for or against a party or candidate at an election. A broadcast may be an 'electoral advertisement' for the purposes of section 221A of the Electoral Act if it contains information relating to an election. However, an 'election advertisement' for the purposes of section 3A does not include the editorial content of a radio programme and an 'electoral advertisement' for the purposes of section 221A does not restrict the broadcasting of news or comments by a broadcaster.

Section 70 of the Broadcasting Act provides a general prohibition for the broadcasting of an 'election programme'. It will depend on the content of the show as to whether it falls within the meaning of an election programme. If the programme is an election programme there is a specific exemption to the general prohibition for the broadcasting, in relation to an election, of news, comment or current affairs programmes.

Whether a radio programme is an election or electoral advertisement under the Electoral Act and/or an election programme under the Broadcasting Act is a question of fact which has to be determined on a case by case basis. In terms of general advice, in determining whether a programme is election advertising and/or an election programme or not the Electoral Commission will consider a number of factors including:

- the format, nature, and content of the programme, e.g.:
 - whether the format is chosen by the broadcaster;
 - the extent to which the broadcaster retains control over the content of the programme;
 - are candidates and political parties subject to question and challenge?;
 - is the reporting objective and impartial?;
 - does the programme aim to inform the public by presenting a range of viewpoints (not encourage or persuade)?;
- whether the format, nature, or content of the programme has changed;
- who initiated the programme, and when;
- who has control of the programme production;

- whether payment been made to the broadcaster for the broadcast time, or production costs;
- if the programme has a regular schedule, and if that schedule is being maintained.

In the Electoral Commission's view broadcasters need to exercise a high degree of caution about party leaders and/or candidates hosting radio shows in the lead up to a general election. The broadcaster will be responsible for the content of a broadcast made with its authority.

Broadcasters are only allowed to broadcast election programmes between writ day (26 October) and the day before polling day (25 November) subject to certain requirements being met. It is a serious offence to broadcast an election programme at any other time.

A radio show that is not an election programme or an election advertisement can be broadcast at any time before polling day and there is no requirement to include a promoter statement. However, the Prime Minister hosting a show of this nature is likely to attract close scrutiny at this time in the electoral cycle. If Radio Live was to proceed with the broadcast it would need to be confident it could put in place adequate controls to ensure that the programme did not breach the election advertising rules in the Electoral Act or the rules regarding election programmes in Part 6 of the Broadcasting Act.

The above advice expressed about the application of the Electoral Act and the Broadcasting Act reflects the Electoral Commission's interpretation of the law and does not constitute legal advice. A court of law may reach a different view. You may wish to consider seeking independent legal advice on questions of compliance.

Yours sincerely



Robert Peden
Chief Electoral Officer

cc Willy Trelove, Communications Manager, Government Communications and
Government Research Unit

RELEASED UNDER THE OFFICIAL INFORMATION ACT 1982