

Kristina Temel

From: Clare Bradley [mailto:clare@mediaworks.co.nz]
Sent: Tuesday, 11 October 2011 12:47 p.m.
To: Kristina Temel
Subject: Complaint Radio Live - PM Hour programme
Attachments: 11 October 2011 Letter to EC response to complaint PM Hour.pdf; #1 Labour Party BSA complaint.pdf; #2 Letter PM CoS to BSA 5 October 2011.pdf; #3 Letter from National Party to BSA 5 Oct 2011.pdf

Dear Kristina

Here is the response from the broadcaster regarding this complaint plus attachments. I shall also forward the response to the BSA which should be read alongside the response to the complaint to the Commission.

Please acknowledge receipt of both emails and let me know if you need anything more from me.

Kind regards
Clare

CLARE BRADLEY | LEGAL COUNSEL/COMPANY SECRETARY | MEDIAWORKS | PHONE (049) 928 9004 | MOBILE 021 447 262
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Thank you.

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5 October 2011

Mary Putnam
Producer
RadioLive
By e-mail to: [redacted]

Dear Mary Putnam

COMPLAINT RE RADIOLIVE SHOW HOSTED BY PRIME MINISTER


The Electoral Commission ('the Commission') has received a complaint that the RadioLive Show hosted by the Prime Minister on Friday 30 September 2011 was:

- an election programme and a prohibited broadcast under section 70 of the Broadcasting Act 1989, and
- an election advertisement that did not comply with the requirements of the Electoral Act 1993.

Please provide the Commission with a written transcript of the show as soon as possible.

Please also provide, no later than **5pm Wednesday 12 October 2011**, any other information that you believe to be of relevance to the Commission's consideration of the complaint. Please include your comments on the application of the factors set out on page 3 of the Commission's letter to you dated 29 September 2011 to the programme.

Yours sincerely


Robert Peden
Chief Electoral Officer

11 October 2011

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TV | RADIO | INTERACTIVE

Robert Peden
Chief Electoral Officer
Electoral Commission
Wellington

By email

Complaint re Radio Live Show hosted by the Prime Minister

I refer to your letter of 5 October 2011. As requested a full transcript of the show has been provided and the audio is available if you require it.

As you are aware the Labour Party has also lodged a complaint with the Broadcasting Standards Authority. I do not know whether you have seen this complaint but a copy is enclosed (#1) with this letter and I will forward separately the broadcaster's response (and attachments) that has been sent to the BSA today. You may not have had a copy of the response provided on behalf of the Prime Minister (#2) and that is attached together with a response from the National Party (#3).

The response to the BSA sets out in some detail the background to the show and provides a specific response to both the Labour Party complaint and comments on the application of the factors set out on pg 3 of your 29 September Advisory Opinion to Radio Live.

I have not seen a copy of the Labour Party complaint to the Electoral Commission so I am not able to respond to any other specific matters that may have been raised by the complainant.

The only other relevant aspect of this matter relates to the specific provisions of the Electoral Act. These provisions are set out on pg 2 of your Advisory Opinion and relate to whether this show could be said to be an election advertisement.

The first question is whether the show could [my paraphrasing] **reasonably be regarded as encouraging or persuading voters to vote or not vote for a candidate or party. Candidates or parties may be "indicated" by reference to views or positions associated with either the candidate or party.**

In light of the legislative requirements the broadcaster was very careful to excise from the content of the programme not only any content that referenced the election or voting but also any reference to National Party policy on the basis that at some level that might be said to be a reference to views or positions associated with Mr Key or the National Party.

It is the broadcaster's position that the PM's Hour was editorial content in a radio programme that at all times was under the editorial control of Radio Live; it was not an election advertisement and nor was it an electoral programme as defined by the Broadcasting Act.

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The broadcaster did exercise a high degree of caution in the manner in which it prepared and presented this programme; it satisfied itself and its advisers that it could proceed with the programme and is confident that it had strong controls in place to ensure compliance with legislative provisions which restrict political speech associated with an election campaign. The broadcaster does not consider that it has acted in breach of the provisions of the Broadcasting Act or the Electoral Act relating to election advertisements or election programmes.

If you require any further information about this please do not hesitate to contact me.

Yours sincerely

Clare Bradley

Clare Bradley
Legal counsel on behalf RadioWorks Limited

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NEW ZEALAND LABOUR PARTY

Fraser House, Labour Party Head Office



3 October 2011

Broadcasting Standards Authority
PO Box 9213
Wellington 6141

Attention: Patricia Windle

Re: Complaint in relation to the Prime Minister's Hour on Radio Live on 30 September 2011

This is a formal complaint that the Prime Minister's Hour radio programme hosted by the leader of the National Party, John Key, on Radio Live on 30 September 2011 breached the Election Programmes Code of Broadcasting Practice ("the Election Programmes Code"). For the reasons set out below we believe this complaint constitutes an 'urgent' complaint and should be dealt with along those lines (i.e. in accordance with the three working day timeframe the BSA has set itself for dealing with urgent Election Programme complaints).

Our complaint consists of two key parts.

First, we argue that the programme was an 'election programme' in accordance with the Broadcasting Act 1989.

Second, we argue that the programme was a breach of the Election Programmes Code.

1. Why the Prime Minister's Hour was an 'election programme'

Section 69 of the Broadcasting Act defines an 'election programme' as one which:

- (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

We believe the very act of installing the Prime Minister as sole host of an hour long talk programme, less than two months from the date of a general election, will encourage people to vote for him and the National Party and advocates support for him. While it is unlike a typical advertisement, where the encouragement is achieved through the content of the advert, here the encouragement is achieved principally by giving Mr Key an entire hour. While Mr Key notes that it was an 'election free zone' early on in the programme, the very act of noting that there is an election serves to link Mr Key with the act of voting at the election.

Standard 6 – Fairness - Broadcasters should deal fairly with any person or organisation taking part or referred to.

We note that late in the programme Mr Henry says 'the Labour Party are furlous that you're on and they're not, you know that'. Mr Key replies 'Radio Live asked me and I haven't talked at all about politics. I've talked to some fascinating New Zealanders though'. We believe this made the programme unfair to the Labour Party because Mr Henry's assertion that Labour Party members were furious created the impression that the Labour Party should not have expected to be given the same opportunity as Mr Key and the National Party, leading listeners to have a lesser view of the Labour Party. Further, Mr Key subsequently replies that 'Radio Live asked me' inferring that Labour were not as worthy of hosting a programme as he was.

We further note that Radio Live has refused to allow Labour leader Phil Goff to host a similar programme. While the Radio Code says that it applies to content that has been broadcast we note that s4(1)(e) of the Broadcasting Act states "Every broadcaster is responsible for maintaining in its **programmes and their presentation**, standards that are consistent with any approved code of broadcasting practice applying to the programmes" (our emphasis).

Therefore, Radio Live are required to be fair in the way they have presented this programme to the audience. Radio Live has breached the standard because in presenting this programme it has refused to offer Labour an equal opportunity to host an hour long programme where Phil Goff is able to present himself, unchallenged, to the nation. The unfairness was made worse when this issue was raised by Radio Live (through Paul Henry) in the programme. Mr Henry's derisive tone of voice painted the expectation of equal timing as childish.

Standard 8 – Responsible Programming - Broadcasters should ensure that programme information and content is socially responsible.

We believe it is socially irresponsible to allow the leader of the ruling political party to host an entire hour of programming on a popular radio programme so close to an election. Election coverage is based on ensuring all parties are given reasonable and fair opportunities to present their views to the voters. We have an expectation that when any broadcaster covers an election issue, or profiles an electoral candidate, that they will do so with rigour and in the spirit of fair and free elections.

Here, Mr Key was given editorial control of a programme without rigour or impartiality. Radio Live handed over an hour of free broadcast time to the Prime Minister and no one else.

Further this was an hour long advertisement disguised as an ordinary talk radio programme (guideline 32). It featured all the hallmarks of a typical hour of entertainment, including celebrity guests and chat about issues of interest. Mr Key played the role of a Radio Live host, reading the weather, updating time, reading listener feedback, and introducing the upcoming programme. However, for all the reasons noted above in our allegation that this was an 'election programme' this hour was an advertisement designed to promote Mr Key as a likeable, capable leader.

Standard E3 – Denigration

We consider that the breach of Standard 6 of the Radio Code is also a breach of Standard E3 of the Election Programmes Code because (in particular) the prominence given to Mr Key and the specific comment raised by Paul Henry amount to denigration of the Labour Party.

Standard E4 – Misleading Programmes

Further, Radio Live has refused to allow Labour Party leader Phil Goff to host a similar programme. This is blatant favouritism of one party leader over another and serves to further emphasise that Mr Key is somehow special and deserving of support/votes.

During the programme Mr Key was given an uninterrupted hour to promote his brand and personality. He chatted to various celebrities, including Ritchie McCaw, Richard Branson and Peter Jackson, and emphasised his personal connection with them. Late in the programme he read out listener feedback which he had selected including 'John Key you're a bloody legend' and 'my two favourite men on the radio, it is Ritchie McCaw and John Key'. Mr Key says 'who's home at 5:30, not me' (in reference to Coronation St being moved to 5:30pm) and subsequently promises he will 'speak to someone important enough to see if [the show can be moved from 5:30pm]'.
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These two comments were designed to encourage voters to see Mr Key as an effective leader. When asked late in the programme by Radio Live host Paul Henry if he still watches Coronation Street, Mr Key says 'I don't know, I'm working for the nation' – the message being that Mr Key is working too hard to be home at that time. All of this served to drive home that listeners should view Mr Key in a positive light and encourages voters to vote for him and advocated support for him and the National Party.

We understand that the BSA considers that 'election programmes' usually consist of paid advertisements. We note the BSA's General Guidance around election programme complaints notes that "for the purposes of making a broadcasting standards complaint 'election programmes' typically consist of paid advertisements for political parties or candidates".

We argue that this was an atypical example of where an ordinary programme constituted an 'election programme' because of its particular nature. To our knowledge Radio Live has never run a Prime Minister's Hour before, nor installed Mr Key as the host of a programme. Therefore, this programme is, in itself, very atypical.

In fact, by installing Mr Key as host of the programme, Radio Live handed over editorial control of the programme to Mr Key/the National Party. Radio Live was no longer in control of the content, Mr Key was able to ask questions unchallenged and present himself in the way he chose. This is what happens in a typical, paid election advertisement. The issue of whether Radio Live told Mr Key to discuss 'election' issues is irrelevant. By allowing Mr Key to control an hour of programming Radio Live had already turned this into an 'election programme'.

Also, political issues were actively covered at the end of the programme when Paul Henry says he will be asking the following question in the next hour 'Is it [Standard and Poors downgrading our credit rating] your fault?' Mr Key answers 'No, private sector debt' and is able to offer his explanation of why the downgrade occurred. Mr Henry does not challenge his answer. We also note that Paul Henry prompted the 'working for the nation' remark and did not challenge it in any way, indicating once again that Radio Live had surrendered editorial control to Mr Key.

2. Why this programme breached the Election Programmes Code

We believe that this programme breached Standards E1, E3 and E4 of the Election Programmes Code.

Standard E1 – Election Programmes Subject to Other Codes

We allege the Prime Minister's Hour breached Standards 6 and 8 of the Radio Code of Broadcasting Practice.

We allege that viewers would have been misled because this was an election advertisement that imitated a typical talk radio programme. Mr Key played the part of an ordinary Radio Live host. For example, he uses 'we' and 'our' (rather than 'I' and 'their') throughout the programme to pretend that he was a part of the Radio Live organisation, not an independent, outside host.

Other host-like duties include when Key reads the weather at the start of the show, gave time updates, introduces listener feedback and introduces the upcoming programme. He also gives station branding by stating 'Go Radio Live' before he departs.

We also consider that the points raised above in relation to the breach of Standard 3 of the Radio Code contribute further to the misleading nature of the programme.

Urgency

We believe this complaint should be handled in line with the BSA's policy of urgency (i.e. within three days of this complaint being received) for the following reasons.

The programme received major publicity in the press and Mr Key's remarks on the show were reported subsequent to the programme. Further, the novel nature of the programme makes it memorable and Mr Key will no doubt be referring to his stint as a radio host in the coming weeks.

The programme is also available online at the Radio Live website. While the BSA has no jurisdiction over on-demand content online it effectively means that this 'advertisement' is able to be repeatedly listened to.

Further, the BSA could, if it upheld this complaint, order Radio Live to put a statement on its website noting its finding.

Therefore, this complaint should be handled urgently.

Yours faithfully,


Chris Flatt
General Secretary

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Office of the Prime Minister

Prime Minister
Minister of Tourism

Ministerial Services
Minister in Charge of the
NZ Security Intelligence Service
Minister Responsible for the GCSB

5 October 2011

The Chairman
Broadcasting Standards Authority
PO Box 9213
WELLINGTON 6141

Dear Mr Radich

I write in regard to your minute dated 4 October 2011, which has been forwarded to the Prime Minister's Office for comment.

The Prime Minister appears regularly in various media in a variety of formats at the request of broadcasters.

With regard to Radio Live, I can confirm that for some time the Prime Minister has had a regular scheduled appearance approximately every four months, usually as a guest of talkback hosts Willie and JT. This is booked and confirmed many months in advance.

Prior to last Friday's regular appearance, Radio Live requested a change in format. They asked the Rt Hon John Key to host the show as the Prime Minister in what they called "The inaugural Prime Minister's Hour".

Radio Live made it clear that the show was neither an election advertisement nor an election programme, and that the show would be editorial material. They approved the show's content and provided a detailed written brief that made it clear that the Prime Minister must not tell listeners who to vote for. Following a suggestion from this office, they sought and obtained advice from the Electoral Commission.

Before the show started, the Prime Minister was informed by the show's producers that political discussion was off limits, as was any reference to political parties, voting, or election policies. I understand that he took great care to follow these instructions.

I hope that this has helped to clarify things. If you have any questions or would like any further input from the Prime Minister's Office, please call me on 04 817 9365.

Yours sincerely

Wayne Eagleson
CHIEF OF STAFF

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5 October 2011

The Chairman
Broadcasting Standards Authority
PO Box 9213
Wellington 6141

Dear Sir

I acknowledge receipt of the Minute of Chair PJ Radford dated 4 October 2011 enclosing a copy of the New Zealand Labour Party complaint dated 3 October 2011 inviting the National Party to comment by noon tomorrow in respect of the complaint.

The National Party was not involved in the 'Prime Minister's Hour' broadcast referred to. I believe the show was undertaken by John Key in his capacity as the Prime Minister and not as leader of the National Party.

I have forwarded your letter to the Prime Minister's office as they may wish to comment.

I presume the broadcaster will reply to you directly with a copy of the full transcript.

Should you require any further clarification in respect of the National Party's involvement, please do not hesitate to contact me.

Yours sincerely


Greg Hamilton
General Manager
04 894 7016
021 976 988
greg.hamilton@national.org.nz

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11 October 2011

Patricia Windle
Legal Manager
Broadcasting Standards Authority
Wellington

By email

Response to the Labour Party complaint letter 3 October 2011

1 Summary

This programme is not an election programme and the complaint should therefore proceed as a normal formal broadcasting standards complaint.

2 Is the programme an election programme?

2.1 Statutory definition & relevant authority -

2.1.1 The Broadcasting Act 1989 defines an election programme

S 69 Interpretation

(1) In this Part, unless the context otherwise requires,—

election programme means, subject to subsection (2), 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

2.1.2 An Election Programme, as defined, includes election advertisements. Broadcasters cannot broadcast election programmes (including advertisements) except in very limited circumstances set out in the Act.

S 70 Prohibition on paid election programmes

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- (1) Except as provided in subsections (2) and (2A), no broadcaster shall permit the broadcasting, within or outside an election period, of an election programme.
- (2) Nothing in subsection (1) applies in respect of—
- (a) an opening address or closing address that is broadcast—
 - (i) for a political party or group of related political parties; and
 - (ii) by TVNZ or RNZ during time allocated to that political party or group of related political parties under section 73(1); or
 - (b) an election programme broadcast for a political party or group of related political parties and paid for with money allocated to that political party or group of related political parties under section 74A; or
 - (c) an election programme—
 - (i) broadcast for a fee or other consideration; and
 - (ii) relating solely to 1 named constituency candidate at an election; and
 - (iii) used or appearing to be used to promote or procure the election of the candidate; and
 - (iv) broadcast by the candidate or with the candidate's authority within the election period; or
 - (d) any advertisement placed by the Electoral Commission or by the Chief Registrar of Electors, a Registrar of Electors, a Returning Officer, or other official for the purposes of the Electoral Act 1993; or
 - (e) any non-partisan advertisement broadcast as a community service, by the broadcaster.
- (2A) Nothing in subsection (1) restricts the amount of money that a political party or group of related political parties may spend on the production costs of an election programme.
- (2B) Nothing in this Act derogates from section 214B of the Electoral Act 1993.
- (3) Nothing in subsection (1) restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.
- (4) For the purposes of subsection (2)(c)(ii), the term constituency candidate includes a person who has declared his or her intention of becoming a constituency candidate.

2.1.3 The definition of election programme does not seem to have been considered by the BSA. However its website provides some relevant information.

2.1.4 The BSA advises visitors to its website that even programmes that cover election issues are **not** election programmes if they fall within the provisions of s70(3) of the Act and are news, comments or current affairs programmes. It also states that programmes broadcast to inform, enlighten or entertain an audience are not election programmes.

At <http://www.bsa.govt.nz/general-guidance/>

What if a news or current affairs shows covers election issues – is that an election programme?
 No, news or current affairs programmes relating to elections (or any programmes broadcast to inform, enlighten, or entertain an audience) are not 'election programmes' for the purposes of broadcasting standards and not subject to the Election Programmes Code (see Broadcasting Act 1989, s70(3) and Electoral Finance Act s5(2)(c)).

However, news, current affairs and other programmes that cover the election or election issues will still be subject to all the standards of the relevant Code that covers the medium it was broadcast on (ie. Radio, Free-to-Air TV or Pay TV). Remember that complaints made under the other Codes will be dealt with by the broadcaster in the first instance, but election programme complaints must come directly to the BSA.

2.1.5 The Electoral Commission has considered the issue. It held, in Decision 2008-34 (#1), that comments made by Winston Peters and Shane Jones "told listeners to vote for their respective parties" and the programmes were therefore election programmes.

- 2.1.6 These comments included the following Winston Peters "We don't mind who you vote for in your first vote but buy yourself some insurance and give New Zealand First your party vote, your second vote" and Shane Jones "Vote Labour – see you in November".
- 2.1.7 The Commission decided that these statements encouraging listeners to vote and soliciting support for these parties meant that the programmes were within the meaning of s69 and were not of the character contemplated by s70(3).
- 2.1.8 In Decision 2008-54 (#2), it held that an episode of the Alliance Party Red and Green Show was an election programme as the programme extolled the merits of the Alliance Party and strongly criticised the policies of other parties.
- 2.1.9 Again these comments took the programme within the scope of s69 because of its advocacy for or against a political party and because it was a paid programme, and was broadcast outside the election period.
- 2.1.10 None of these advocacy features are present in this case as the broadcaster was mindful of the issue and took care to avoid the programme being caught by the definition either of election advertisement in the Electoral Act or election programme in the Broadcasting Act.

2.2 The Programme

- 2.2.1 This was not a paid election programme nor was it a paid advertisement. The complainant does not claim that it fell into either category rather it says that this programme "was an atypical example of where an ordinary programme constituted an "election programme" because of its particular nature" as "the very act of installing the Prime Minister as sole host of an hour long talk programme less than two months from the date of a general election, will encourage people to vote for him and the National Party and advocates support for him".
- 2.2.2 The complainant points to the following as supporting this contention
- Reference to the hour being an election free zone
 - Refusal to allow Labour Party leader Phil Goff to host a similar programme
 - The PM having an uninterrupted hour to promote his brand and personality
 - Listener feedback referring to him as a 'bloody legend'
 - Referring to Coronation St and talking to someone important about the time at which it screens
 - His comment that at 5.30pm he is working 'for the nation'
 - His editorial control of the programme
 - Coverage of political issues with Paul Henry at the end of the programme eg credit downgrade
- 2.2.3 This was radio programming involving the PM - a public figure. The broadcaster proceeded cautiously before moving forward with this programme. It was cautious because it was aware of the Electoral Commission decisions (referred to above) and the requirements of the Broadcasting and Electoral Acts. It provided a clear outline of the programme and sought an advisory opinion from the Electoral Commission. Both documents are attached marked #3 & #4. Both the programme outline and the Electoral Commission Advisory Opinion were adhered to.
- 2.2.4 The Radio Station provided a brief to the Electoral Commission. The Radio Station went further than this brief to ensure that it complied with the Electoral Commission's advisory opinion and to

ensure compliance with relevant legislation. In the brief the Radio Station included the following "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". Further, "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".

- 2.2.5 The Radio Station went further than this brief and ensured that all listener feedback was non-political. As such, the Radio Station went further than the Electoral Commission's advisory opinion to ensure compliance with that advice, and with relevant legislative requirements.
- 2.2.6 While initially it was intended to allow listeners to ask the PM any questions (which may have included policy issues), this was reviewed in light of advice that any reference to the election or even party policy may contravene the Act so, the programme stayed away from discussion of any political issues or any material that could be said to be political advocacy. A transcript of the programme is attached #5 and audio of the entire hour has been provided.
- 2.2.7 The comments that have concerned the Labour Party do not have relevance and nor do they make reference to the election and/or a voting decision by listeners there is no advocacy of which party or candidate to vote for or against.
- 2.2.8 Taking each of the specific matters to which the complainant refers in turn we comment as follows:

- *Reference to the hour being an election free zone*

Making it clear that election issues would not be canvassed was important to ensure the broadcaster (and the Prime Minister) complied with legislative requirements. By ensuring that election issues were not canvassed and explicitly stating this the broadcaster was doing all it could to adhere to the legal construct created by relevant legislation

- *Refusal to allow Labour Party leader Phil Goff to host a similar programme*

The idea for the programme was born out of similar formats that exist in overseas markets. The motivation was to build awareness of the Radio Live brand and attract listeners to the station – having the Prime Minister as host of his own show was unique and the Radio station hoped there would be publicity around the unique idea and the guests who agreed to come onto the show. It wanted to present something new and interesting for listeners. The programme is intended to be an annual event for the Radio station for whomever is the incumbent PM – this could be Mr Goff should he become PM. If that were to happen he would be invited to conduct the second PM's Hour programme in 2012.

Mr Goff could not host a programme called the *Prime Minister's Hour* as he is self evidently not the Prime Minister but he (and all other politicians) have a standing invitation to be on Radio Live in this early afternoon slot and indeed some times following this programme were set aside to see if they would suit Mr Goff to be on Radio Live with the regular hosts of that time slot. Discussions continue to finalise these arrangements. These hour long time slot/s regularly allow Mr Goff opportunity to engage with Radio Live hosts, guests and callers. While the format of the programme may be a little different he enjoys a similar opportunity to engage with listeners.

- *The PM having an uninterrupted hour to promote his brand and personality*

See response above.

- *Listener feedback referring to him as a 'bloody legend'*

Positive listener feedback indicating listeners had enjoyed the show and appreciated and supported the PM and his guests is not indicative of this being an election programme, there was no advocacy about how to vote. Talkback callers commonly express their personal opinions of both radio hosts and guests in their calls or feedback to the station.

- *Referring to Coronation St and talking to someone important about the time at which it screens*

The timing of the screening of Coronation St, while topical, is not political – it is not a reference to the election nor is it a reference to National Party policy.

- *His comment that at 5.30pm he is working 'for the nation'*

This comment, in the context of the programme, simply records the unsurprising fact that the PM is not usually watching TV at 5.30pm because he is at work – the light hearted bantering "working for the Nation" was simply a way of expressing that his work is not a personal pursuit. Again, this comment cannot be said to be a reference to the election or National Party policy.

- *His editorial control of the programme*

The PM was not in editorial control of the programme – at all times, as the outline of the programme confirms, the PM was operating within strict guidelines specified by the Radio station.

- *Coverage of political issues with Paul Henry at the end of the programme eg credit downgrade*

These comments, on topical issues did not trespass into areas of political debate or policy.

2.2.9 The Electoral Commission Advisory Opinion (Attachment # 4, bottom pg 2 top pg 3) indicated that it considers a number of factors when assessing whether a programme is election advertising and/or an election programme. These are set out below together with comments on the factors as they relate to this programme.

A *The format, nature and content of the programme eg*

(a) *Whether the format is chosen by the broadcaster;*

The format was developed by the broadcaster and was based on similar, overseas formats.

(b) *The extent to which the broadcaster retains control over the content of the programme;*

The broadcaster retained total control over the content of the programme specifying run down and selecting all linking portions of the show – freedom to ask a range of questions of interview subjects was permitted but it was made clear that issues of political policy were for "another day".

A number of emails with various versions (updated to reflect advice received as it was received) of the outline and the script and notes were sent to the PM's advisors. The final version of the script and notes is attached #6 – the radio station maintained complete editorial control.

(c) *Are candidates and political parties subject to question and challenge?*

This was not a question and answer session on topical issues of political policy – it was a magazine type format that did not lend itself to question and challenge, indeed any opportunity for this was constrained to ensure compliance with the format agreed.

(d) *Is the reporting objective and impartial*

This was a magazine type programme that did not deal with issues. There was no reporting in this sense (beyond weather – non contentious and presented by the PM - and news bulletins which were presented by the normal news reader).

(e) *Does the programme aim to inform the public by presenting a range of viewpoints (not encourage or persuade)*

The aim of the programme was not to inform the public (or to encourage or persuade them) but to entertain them by allowing them to listen to the PM as radio host interviewing subjects who had agreed to talk to him about a range of topics. There was no attempt to encourage or persuade listeners to any particular point of view or voting behaviour.

B Whether the format, nature or content of the programme has changed;
This was first ever Prime Minister's Hour programme – it is intended to be an annual event for the Radio station and will take place around the same time of year each year.

C Who initiated the programme and when?
The Radio station initiated the programme. The GM of the Radio station heard about a similar programming overseas when she was overseas in May 2011. Planning and development continued through to July 2011. Radio Live then pitched the idea to the PM's office explaining that the idea was to do an interesting show for Radio Live listeners featuring guests and Q & A – it was to be an annual show with the invitation extended to whomever was PM at the time – it is to become an annual event for Radio Live. In August the PM agreed to the programme which was scheduled for late September 2011 as this was the first date that was mutually convenient. The format of the show was changed to reduce the capacity for Q & A as advice was received concerning the legal constraints and to ensure the Electoral Commission's Advisory Opinion was adhered to.

D Who has control of the programme production?
Radio Live.

E Whether payment has been made to the broadcasters for the broadcast time or production costs
No payment was made in respect of this time or programme.

F If the programme has a regular schedule and if that schedule is being maintained
The PM has had a regular scheduled appearance, which occurs roughly every four months. During these regular scheduled appearances, the PM usually appears as a guest for talkback hosts Willie and JT. Prior to the PM's regular appearance, the Radio station requested a format change - to "the inaugural PM's Hour".

This "inaugural PM's Hour" was the first such programme. The Radio station intends to repeat the programme on an annual basis.

2.2.10 The Labour Party appears to be arguing that any programme or publicity, two months out from an election that might, at some level, engage the hearts and minds of voters can only be an election advertisement or election programme. The broadcaster does not agree. In order to trigger the legislative restrictions there must be some direct reference to or relevance to the election process.

2.2.11 Many radio brands set aside a specific time to engage with the PM as Prime Minister (eg Radio Live 7.40 Monday morning; Newstalk ZB similarly). If this complaint is upheld these points of engagement would also require to be reviewed as would any other occasion on which media engage just with the Prime Minister – the chill impact would be widespread.

2.2.12 The legislative restrictions on freedom of speech cannot have been intended to have such a far reaching chill effect that they impact even this magazine style of radio programming. The purpose of the legislative provisions is, in our submission, to protect political speech and ensure a free and fair election not to restrict non political speech in the way contended for by the Labour Party in this complaint.

2.2.13 In our submission there must be some clear connection between the election, or election policy and the programme in order to trigger the provisions of the Broadcasting Act and/or the Electoral Act. If this was not the case then within two months of an election any engagement with a politician on any topic would be deemed an election programme (and would be illegal), this would severely and adversely impact media freedom and freedom of speech generally.

2.2.14 In the event that this submission is not accepted we have gone on to consider the second question.

3 Was the programme a breach of the Radio Code / Election Programmes Code?

3.1 Relevant standards

3.1.1 E1- subject to other codes & Standard 6 – Fairness & 8 – Responsible programming

The contention is that the programme was unfair to the Labour Party and Mr Goff its leader and therefore socially irresponsible. The broadcaster does not agree.

The broadcaster refers to the comments made above and says that this was not an election programme but a programme to inform and entertain listeners of the Radio station.

The broadcaster points to the fact that the programme was not about the election or questions of electoral party policy – that while it dealt to some very limited extent, with topical issues eg Rugby World Cup, Coronation St, NZ credit downgrades none of these brief discussions crossed into areas of electoral significance.

The reference to the Labour Party being "furious" was simply a rather colloquial way of the Radio host reflecting views already made public by spokespeople for the Labour Party. By this time it was already known that the Labour Party was unhappy about the programme; the broadcaster does not consider that it was unfair to the Labour Party to refer to these public views in these terms.

Nor does the broadcaster agree that there was any inference that the Labour Party was in any way "unworthy of hosting a [similar] programme" or that it was behaving *childish[ly]*. The Radio host was expressing his views on the issue in a relatively mild manner and the broadcaster does not accept that his comments could be characterised as "*derisive*". The Labour Party had made its views public and there was no reason why those views could not be referred to in the context of the programme in this manner.

The broadcaster does not accept that it had any obligation to offer the exact same opportunity to Mr Goff in order to comply with the requirements of these standards. In any event, it says that it has allowed Mr Goff generous access to time on the Radio station and continues to do so.

3.1.2 E3 – Denigration

Denigration requires the blackening of the reputation of "a political party or candidate": The broadcaster does not accept that the comments made in this programme approached, let alone crossed, this threshold which the BSA has established when dealing with complaints alleging denigration under the general code.

[See Practice Note at <http://www.bsa.govt.nz/denigration-and-discrimination/>]

3.1.3 E4- Misleading Programmes

The complainant contends that this programme was misleading because it was an election advertisement masquerading as a talk back programme. The broadcaster does not accept that the programme was anything other than what it appeared to be – a radio programme intended to attract listeners to the station by presenting entertaining material. It did not, to any extent, attempt to advocate for either the PM or the National Party in a manner which suggested support for them nor did it encourage listeners to vote for them. Any reference to voting, the election or National Party policies was explicitly forbidden and did not take place.

3.2 Election Programmes Code (EPC)

For all the reasons set out above the broadcaster does not accept that the Election Programmes Code has any application as the programme was not an Election Programme and was not in any event a breach of the code.

3.3 Radio Code of Broadcasting Practice

If the EPC has no application. The Radio Code applies to formal broadcast complaints. The broadcaster has treated the complaint as being a formal complaint pursuant to that code and has responded accordingly and (subject to the complainant wishing to amplify its complaint) is content for the BSA to treat this response as being its last response to the complaint. The broadcaster has found no breach of the code standards referred to by the complainant.

If you have any further issues or questions do not hesitate to say. Thank you for allowing the time necessary to respond to this complaint.

Yours sincerely

Clare Bradley
Clare Bradley
Legal counsel for RadioWorks Limited

Copied:
Chief Electoral Officer
Electoral Commission
Attn: Robert Peden

Complainant
NEW ZEALAND LABOUR PARTY

Broadcaster
RADIOWORKS LTD
broadcasting as Radio Live

Members¹

Peter Radich, Chair
Mary Anne Shanahan
Te Raumawhitu Kupenga

Complaint under section 8(1) of the Broadcasting Act 1989

Prime Minister's Hour – Prime Minister John Key hosted Radio Live for an hour – stated that it was an “election-free zone” – Mr Key interviewed Richie McCaw, Sir Richard Branson and Sir Peter Jackson – allegedly in breach of the Election Programmes Code

Findings

Standards E1 (election programmes subject to other Codes), E3 (denigration), and E4 (misleading programmes) – broadcast did not amount to an “election programme” for the purposes of the Broadcasting Act 1989 or the Election Programmes Code – in any event the nominated standards were not breached.

This headnote does not form part of the decision.

Introduction

- [1] Media Works broadcasts in New Zealand through two television stations and many more radio stations. One of its radio stations is Radio Live. This station has coverage across New Zealand.
- [2] Radio Live reached an arrangement with the Prime Minister, John Key, for him to host a one hour live radio programme on 30 September 2011. The format of the programme had Mr Key acting as if he were a radio host. He gave comments about the weather, he interacted with music being played, he interviewed guests and he did all of the sorts of things that a radio host would typically do. Mr Key stated, early in the programme, that he was not going to discuss election issues. It is likely that the programme would have attracted a lot of listener interest on account of the unusual situation where a Prime Minister was playing radio host.

The Complaint

- [3] The New Zealand Labour Party has made a formal written complaint to this Authority. It says that:
- The programme was an “election programme” as defined in the Broadcasting Act 1989; and

¹ Leigh Pearson declared a conflict of interest and took no part in the deliberations.

- The Code of Broadcasting Practice in relation to election programmes was breached.

What is an "Election Programme"?

[4] An "election programme" is defined in section 69 of the Broadcasting Act. The relevant part of the definition is as follows:

election programme means, subject to subsection (2), a programme that—

- 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
- 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
- advocates support for a candidate or for a political party; or
- notifies meetings held or to be held in connection with an election

[5] Labour considers that the very act of installing the Prime Minister as sole host of an hour long talk programme less than two months from the date of a general election would encourage people to vote for him. Labour considers that while the content of the programme may not overtly come within section 69, the presence of the Prime Minister in a programme of this kind would bring the programme within some parts of the definition in section 69. While Labour acknowledges that ordinarily, in the past, election programmes have been seen as being paid advertisements, this new type of programme is nevertheless within the definition.

[6] Section 70(1) of the Act which is headed "Prohibition on paid election programmes" states:

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

It is to be noted that while the heading to the section refers to a *paid* election programme the definition of election programme does not require that the programme be a paid programme. Section 70 imposes a qualifier on the expression *election programmes* in relation to payment. That qualifier is not repeated in subsection (2) itself, although in subsection (2) there are various references to election programmes which have been paid for.

[7] It is our view that the legislature appeared to be envisaging that election programmes would usually be programmes of a paid advertisement kind but the definition of *election programme* does not limit such a programme to something that has been paid for.

[8] Ordinarily, advertisements are not within our jurisdiction. If however a paid advertisement falls within the definition of an election programme it does come within our jurisdiction. The programme to which the present complaint relates was not a paid advertisement.

Consequences of a Broadcast being Categorised as an Election Programme

[9] In terms of section 70 an election programme is not, subject to certain exceptions, permitted to be broadcast within or outside an election period. If such were to happen then the offences provisions in sections 80 and 80A of the Act apply. This Authority does not have any prosecutorial role, nor any determinative role in relation

to prosecutions. The jurisdiction of this Authority is limited to broadcasting standards.

- [10] In terms of the Election Programmes Code of Broadcasting Practice, subject to a few exceptions, the relevant provisions of the Codes of Broadcasting Practice for television and radio apply to election programmes. The position which Labour is taking in relation to the present complaint is that this was an election programme and that a number of standards in the Election Programmes Code and the Radio Code have been breached.

Interpretation of the Definition of an Election Programme

- [11] The questions which this complaint raises include:

- Does a programme which does not directly through its content encourage, persuade, advocate or oppose a political outcome nevertheless come within section 69?
- Does section 69 encompass indirect incidental encouragement, persuasion, advocacy or opposition?
- Does section 69 limit the freedom of broadcasters to present or expose politicians in broadcasts, where there is no direct or overt encouragement, persuasion, advocacy or opposition?

- [12] We are satisfied that the intention of section 69 is to capture those programmes which overtly and directly encourage, persuade or advocate voters to vote for a particular party or a candidate, or which overtly and directly set voters against a particular political party or candidate. We consider that programmes which may in an incidental, resultant, secondary or consequential way amount to encouragement, persuasion, advocacy or opposition for or to a particular political outcome are not captured by section 69. We emphasise that the categorisation of a particular programme as one which offends section 69 and one which does not will always be heavily dependent upon the particular programme. We will now set out the reasons which have led us to the interpretation of section 69 which we have reached.

- [13] The words "encourage", "persuade", "advocate" or "oppose" are verbs which are associated with activity. They can be used to connote something which is passive but the usual use associated with the words is one involving activity. In the ordinary use of language in this particular context, we consider that the words have been used as active verbs.

- [14] Section 4 of the New Zealand Bill of Rights Act 1990 states:

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.

Section 5 states:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 of that Act states:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

- [15] The freedom to express oneself is a fundamental freedom. The freedom of people to express political views is a fundamental freedom of expression. We need to be very wary of constraining rights of expression including rights of expression in a political context.

- [16] The Act, as already noted, has penal provisions in Sections 80 and 80A. These provisions apply not just to broadcasters but also potentially to others involved in any broadcast which does not comply. The penalties although only monetary, are towards the higher end of the scale. We are influenced by the commonly understood principle of statutory interpretation that penal provisions should be construed narrowly.
- [17] Here, the Prime Minister was engaged in the expression of information of a kind that was not directly political and he was also involved in a type of entertainment and personal interest programme.
- [18] If the legislature had intended to prohibit politicians from having any exposure in a broadcasting context of a kind that may encourage, or persuade voters, then we would have expected the definition of election programme to have been much more definitive. This is especially so where it is being used to limit important freedoms.
- [19] If the legislature had intended to prevent politicians from being presented or exposed in a broadcasting context when they are not accompanied by any direct political type statements, we would expect there to have been direct provision to such effect, rather than, at best, a possible interpretation to such effect. We recognise the difficulties in trying to achieve a workable limitation.

Was the Prime Minister's Hour an Election Programme?

- [20] Having formed a clear view of the meaning of section 69, we have then moved to determine whether this particular programme was an election programme in terms of section 69. We have listened to the programme and we have considered the views of Labour, the Prime Minister's department and the broadcaster. We have reached the conclusion that this particular programme did not come within the definition of an election programme as we have interpreted that definition.
- [21] Labour has argued that the very act of installing John Key as the host of the programme, and the "overall nature of the programme", turned this broadcast into an election programme. What Labour is saying is that when a politician is exposed as such in a broadcast this amounts to encouragement or persuasion to vote for him or her or his or her party and to vote against opposing candidates or opposing political parties.
- [22] We do not believe that this is the type of encouragement, persuasion or opposition that section 69 contemplates. What appears to have happened here is that a commercial broadcaster has achieved the presence of a well known political figure. We do not believe that on this occasion the mere presence of the Prime Minister made the programme into an election programme. We can of course see that some political advantage will accrue to the Prime Minister and the party to which he belongs from exposures of this kind. It is not for us to say whether this should or should not be permitted; we are required to deal with the law as it stands. In our view, the law as it stands, and which produces consequences when election programmes are broadcast, does not apply to this particular programme. If a different outcome is seen as being desirable, then this is a matter for the legislature and not for us.
- [23] In reaching the conclusion that this programme did not actively encourage, persuade, advocate or oppose a political outcome we have also taken into account that it was expressly stated in the programme that election and political issues would not be spoken about or responded to (although, as we will observe later, this promise at the start of the programme was not fully kept).
- [24] We have considered the submission of Labour that the very act of noting that there is an election, and we presume the very statement of saying that election issues would not be addressed, has the effect of making those statements election or

political statements. We disagree. We think that it goes too far to say that when somebody makes it clear that they will not discuss what can broadly be called political issues, this statement is a political statement.

[25] This programme was about an hour long. Labour has identified within it, some parts which it says have some political content. These are:

- comments about re-scheduling *Coronation Street*
- the broadcasting of listener feedback which was favourable to the Prime Minister
- a comment by the Prime Minister that he was "working for the nation"
- a discussion about the European economic situation and the Standard and Poors credit downgrade.

We consider that the *Coronation Street* comments, the listener feedback and the comment about "working for the nation" are the sorts of light flim-flam and triviality that are to be expected on this type of entertainment show. We see these things as harmless and as not changing the character of the programme.

[26] The comments about the European economic situation occurred at the beginning of the Prime Minister's discussion with Sir Richard Branson. Mr Key casually remarked, "we see a lot of bad news coming out of Europe at the moment" and asked Sir Richard, "how do you see that playing out?" Sir Richard made brief comments about his take on the situation, before moving on to discuss his new "galactic travel" business taking tourists into space. In our view, references to the economic crisis could be expected in the context of a discussion between a radio host and a UK business leader who runs one of the biggest airlines in Europe.

[27] The comments about the credit downgrade came at the end of the programme. They arose when a regular radio host, Paul Henry, came to take over from the Prime Minister. Mr Henry engaged with the Prime Minister. Initially this was in a light-hearted way but then, briefly, the questions and comments put by Mr Henry attracted brief serious answers from the Prime Minister.

[28] We have thought carefully about this and have reached the conclusion that neither did these comments or flimsy moments effect a change of character of the programme. We consider that the programme, looked at objectively and in an overall way, remained one which was outside Section 69.

Consideration of Standards in the Election Programmes Code

[29] Our finding on the first issue disposes of the complaint. We will nevertheless proceed to address what the consequences would have been in terms of broadcasting standards had this been an election programme.

[30] If the programme is an election programme then it is, in terms of Standard E1, subject to all relevant provisions of the Codes of Broadcasting Practice for television and radio except for the requirement to present a range of significant viewpoints on issues of public importance. Standard E1 provides that robust debate, advocacy and expression of political opinion are a desirable and essential part of a democratic society and broadcasting standards will be applied in a manner which respects this context.

[31] In relation to the other Codes of Broadcasting Practice which are imported in to the election programmes code, Labour has complained that the programme breached Standards 6 and 8 of the Radio Code in that it was unfair and the programme information and content was not socially responsible.

[32] Additionally, Labour has complained that the programme breached Standard E3 (denigration) and Standard E4 (misleading programmes) of the Election Programmes Code.

Standard E1 (Election programmes subject to other codes)

Fairness

- [33] The fairness standard requires that broadcasters should deal fairly with any person or organisation taking part or referred to. What is fair will depend upon the programme.
- [34] Labour's complaint in relation to fairness has several components. Labour says that a comment by a Radio Live host that "the Labour Party is furious that you [John Key] are on and they're not" was unfair. In our view this sort of banter is to be expected on a programme of this kind broadcast in a robust talkback environment and it is unobjectionable.
- [35] Labour has also said that the broadcaster was unfair in not allowing Labour leader, Phil Goff, to host a similar programme. We note that the fairness standard applies only to individuals "taking part and referred to", and that Mr Goff was not referred to during the broadcast. In any event, we do not think that there is any mandatory requirement for equal time to be given to the Leader of the Opposition – as the broadcaster has pointed out, the premise of the programme was that it was "the Prime Minister's Hour" – and it was not therefore unfair of the broadcaster not to allow such time.
- [36] In an overall sense, we do not consider that this programme was unfair to the Labour Party in the sort of way that becomes objectionable in terms of broadcasting standards. Looking at things objectively we do not see any unfairness of the kind that requires us to intervene. This is particularly so when we have regard to concepts of freedom of expression and the New Zealand Bill of Rights Act.

Responsible Programming

- [37] Standard 8 of the Radio Code requires broadcasters to ensure that programme information and content is socially responsible. The guidelines to that standard refer to the protection of children, the broadcast of violent content, the use of warnings when programmes are likely to disturb, and a requirement that programmes are not presented in a way likely to cause alarm, panic or distress.
- [38] In our view, Labour's concerns about the broadcast of the *Prime Minister's Hour* do not raise the type of issues envisaged by Standard 8.

Standard E3 (Denigration)

- [39] Standard E3 states that an election programme may not include material which denigrates a political party or candidate.
- [40] Labour argued that the comment by the Radio Live host that "the Labour Party is furious that you're on and they're not" denigrated the Labour Party because it suggested that the Party was unreasonable to expect to be given a similar opportunity.
- [41] The term "denigration" has consistently been defined by the Authority as blackening someone's reputation. It is also well-established that in light of the requirements of the Bill of Rights Act 1990, a high level of invective is necessary for the Authority to conclude that a broadcast encourages denigration.
- [42] In other words, in a broadcasting context denigration necessarily involves nasty or harsh invective. In our view, the comment to which Labour has referred does not approach the level of what we regard as denigratory invective.

Standard E4 (Misleading Programmes)

- [43] Standard E4 says that an election programme may not imitate an existing programme, format or identifiable personality in a manner which is likely to mislead. In our view, the programme was clear and obvious in its presentation and content

and we do not consider that listeners would have been misled in the manner envisaged by this standard.

Conclusion

[44] Our opinion therefore is that even if this programme were held to be an election programme, which we do not consider it was, it would not have breached any of the standards raised by the complainant. As we have said, we can understand that Labour is not happy about this but it is another thing altogether to say that what has happened has breached broadcasting standards. We do not believe that it has.

Signed for and on behalf of the Authority



Peter Radich
Chair
14 October 2011

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Appendix

The following correspondence was received and considered by the Authority when it determined this complaint:

- 1 New Zealand Labour Party's formal complaint to the Authority – 3 October 2011
- 2 National Party's response to the complaint – 5 October 2011
- 3 Office of the Prime Minister's response to the complaint – 5 October 2011
- 4 RadioWorks' response to the complaint – 11 October 2011
- 5 New Zealand Labour Party's final comments – 12 October 2011
- 6 RadioWorks' final comments – 12 October 2011

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