

## 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 2011 ("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 this 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*".
4. 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)(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.
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 authorisation before the advertisement is published (section 204H of the Electoral Act).
14. 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:

- a. an election programme for the purposes of section 69 of the Broadcasting Act;
- 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.

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 it 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