

P O Box 2160, Wellington 6140
Level 8, 138 The Terrace, Wellington

Ph +64 4 499 8990, Fx +64 4 499 8992

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Office of the Ombudsmen
PO Box 10-152
WELLINGTON 6143

Dear Ombudsmen

Complaint by Myles Thomas of the "Save TVNZ 7 Campaign" regarding the decision by Television New Zealand to halt production of the TVNZ 7 television channel

- 1 We are writing on behalf of Myles Thomas of the "Save TVNZ 7 Campaign" to complain under the Ombudsmen Act 1975 about the decision by Television New Zealand Limited ("TVNZ") to halt the production of the TVNZ channel "TVNZ 7".

Summary

- 2 Mr Thomas considers that the decision to halt production of TVNZ 7 by TVNZ appears to have been made contrary to law and is wrong. On the information made available to him to date, Mr Thomas is of the view that **either**:
- (a) TVNZ has effectively surrendered its discretion and acted under the dictation of Cabinet and the Minister of Broadcasting;
 - (b) In combination with Cabinet's decision to decline additional funding, the Shareholding Ministers' demands for a substantial dividend from TVNZ left it with no choice but to cancel TVNZ 7. This is tantamount to an unlawful direction as to content; or
 - (c) TVNZ has not adequately **assessed** alternative options that would have allowed TVNZ 7 to be retained.
- 3 The decision to cancel production of TVNZ 7 appears to be inconsistent with TVNZ's statutory obligation to provide high-quality content that "is relevant to, and enjoyed and valued by, New Zealand audiences" and "encompasses both New Zealand and international content and reflects Maori perspectives".
- 4 Mr Thomas requests that you investigate TVNZ's decision as a matter of urgency.

Jurisdiction

- 5 We consider that TVNZ's decision to halt the production of TVNZ 7 is a "matter of administration" under section 13 of the Ombudsmen Act 1975. As TVNZ is a Crown

Entity Company listed in Part 2 of Schedule 1 of the Act, the Ombudsmen may investigate its decisions.

- 6 We consider that there is currently no adequate remedy available to Mr Thomas. The decision by TVNZ is not subject to appeal. Mr Thomas has not been provided with sufficient information about TVNZ's decision to be satisfied that a legal challenge would succeed. In light of this and the considerable expense involved in an application for judicial review, making a complaint to the Ombudsmen is Mr Thomas' only available option.
- 7 We appreciate that you cannot recommend that TVNZ 7 continue and merely seek assurance that TVNZ's decision has been made independently and after a proper assessment of all relevant matters.

Background

- 8 In 2005, in order to encourage the take-up of 'free-view' digital television, the then Government decided to provide TVNZ with \$79 million dollars over six years to fund two commercial free public broadcasting channels, named TVNZ 6 and TVNZ 7.
- 9 The \$79 million dollar cost was offset by a special dividend paid by TVNZ of \$70 million. The \$79 million dollar funding arrangement was to continue until 30 June 2012.
- 10 In March 2011, TVNZ decided to commercialise TVNZ 6 and its children's programming was transferred to TVNZ 7. TVNZ 7 continued to operate as a commercial free public broadcasting channel.
- 11 On 23 February 2011, a Cabinet paper was put to Cabinet by the then Minister of Broadcasting, the Hon Jonathan Coleman ("the Minister"). The Minister recommended that funding for TVNZ 7 not be extended past 30 June 2012 and that the future use of TVNZ 7 be a decision left to TVNZ.
- 12 The paper noted that the cost of continuing TVNZ 7 in its then current form was \$16 million.
- 13 The paper also noted that the combined monthly cumulative audience figure for both TVNZ 6 and TVNZ 7 was 2.1 million.
- 14 In April 2011, the TVNZ Board announced its decision to halt the production of TVNZ 7 on 30 June 2012.

Consequences

- 15 On 30 June 2012 TVNZ 7 ceased screening. In its place TVNZ decided to air a "TV One plus 1" channel that replays the broadcast of TVNZ's TV One channel – delayed by one hour.
- 16 As a result, the public can no longer access TVNZ 7's commercial free public broadcast content. TVNZ 7 screened a wide range of programmes that covered both national and international issues of direct relevance to New Zealanders. For example, TVNZ 7 produced and screened:

- 'Media 7' – a weekly panel show that provided critical analysis of the preceding week's media stories, and provided viewers with an opportunity to be critically informed on issues in the public interest. We note that the popularity and relevance of Media 7 has resulted in it now being screened by TV3 (albeit at the graveyard time slots of Saturday morning with a repeat late Sunday night);
 - 'Backbenchers' – a weekly panel show featuring four or five politicians from across the political spectrum who debated current political issues, and which exposed viewers to a range of different view points on topical political issues; and
 - 'The Court Report' – a weekly panel show that interviewed legal practitioners and academic experts on legal issues that were of public importance.
- 17 The cancellation of TVNZ 7 has meant that there is now no longer a nationwide commercial-free public television channel in New Zealand.
- 18 As stated in a Cabinet paper dated 10 October 2010,¹ public service broadcasting "aims to provide information and entertainment for all sections of the broadcasting audience rather than the 20-50-year-old cohort favoured by advertisers" and is "characterised by: innovation in content, in-depth news and current affairs, and high levels of quality in genres such as drama and documentary."
- 19 TVNZ has faced persistent criticism for the quality of its content² and the cancellation of TVNZ 7 has arguably severely compromised its ability to meet its obligation under section 12(2) of the Television New Zealand Act 2003 ("**the Act**") to provide high-quality content that:
- "is relevant to, and enjoyed and valued by, New Zealand audiences"; and
 - "encompasses both New Zealand and international content and reflects Maori perspectives".

Attempts to resolve complaint

- 20 The options available to Mr Thomas to resolve his complaint have been limited. The Act establishes TVNZ as a Crown Entity, but does not provide individuals with the ability to review or appeal decisions made by TVNZ.
- 21 Mr Thomas has sought legal advice on whether TVNZ's decision can be judicially reviewed. However, the information available to Mr Thomas is not sufficient to determine if a judicial review application would, or would not, have merit.

¹ Options for Public Service Television, Hon Dr Jonathan Coleman, Minister of Broadcasting, paper to the Cabinet Domestic Policy Committee, at paragraph 6.

² Options for Public Service Television, Hon Dr Jonathan Coleman, Minister of Broadcasting, paper to the Cabinet Domestic Policy Committee, at paragraph 10.

- 22 Mr Thomas has repeatedly asked TVNZ for further information about the decision. On 19 July 2011, Mr Thomas asked TVNZ to provide him with a breakdown of viewer figures for TVNZ 7 and any research about viewer perceptions of TVNZ 7. On 20 September 2011, Mr Thomas sent a reminder email to TVNZ regarding his request. On 8 November 2011, Mr Thomas sent a further email to TVNZ further requesting an update on the progress of his request.
- 23 On 1 December 2011 TVNZ informed Mr Thomas that his request for information was refused pursuant to section 9(2)(b)(ii) of the Official Information Act, as the information was commercially sensitive. On 7 December 2011, Mr Thomas lodged a complaint with the Ombudsmen regarding TVNZ's refusal.
- 24 Other members of the Save TVNZ 7 campaign have received information under the Official Information Act that is subject to significant redactions.
- 25 We recognise that these concerns are distinct from Mr Thomas' complaint in this letter. However, the refusal by TVNZ to provide Mr Thomas or his associates with further information has negatively impacted on his ability to remedy his complaint without recourse to the Ombudsmen.
- 26 Mr Thomas has also attempted to resolve his complaint through the assistance of Members of Parliament. Labour MP Clare Curran has advocated on behalf of Mr Thomas and the Save TVNZ 7 campaign to the Government and has asked oral questions of the Minister of Broadcasting.
- 27 Mr Thomas has organised a parliamentary petition requesting that the House urge the Government to continue funding TVNZ 7 at its current levels beyond 2012. This petition was signed by 36,155 people and was presented to Parliament on 28 June 2012.

Substance of Complaint

- 28 Mr Thomas is concerned with the lawfulness and accuracy of TVNZ's decision and considers that it may be flawed for the following reasons.

Decision was unlawful

- 29 Mr Thomas considers that TVNZ's decision may be unlawful for two reasons:
- (a) First, Cabinet documents indicate a strong preference for the closure of TVNZ 7, and the apparent inadequate assessment of alternative options by TVNZ suggests that the TVNZ Board may have surrendered/abdicated its discretion; and/or
 - (b) The Shareholding Ministers' demands for TVNZ to pay a substantial dividend have effectively directed TVNZ to close TVNZ 7 in order to do so. This may amount to an interference with content by the Minister, which is illegal.

Surrender of discretion

- 30 Mr Thomas considers that TVNZ's decision has relied too heavily on the Minister and Cabinet's decision to not extend TVNZ 7's funding. This is consistent with the apparent lack of consideration of alternative options by TVNZ (see discussion below).
- 31 Cabinet documents clearly state that no additional funding will be provided to pay for the continuation of TVNZ 7. In addition, the Cabinet documents that Mr Thomas has seen indicate that the cancelation of TVNZ 7 was the Government's preferred option.
- 32 Cabinet made it clear that any decisions about the future operation of TVNZ 7 were to be left to TVNZ. However, Mr Thomas is concerned that Cabinet's decision and the rationale behind it placed undue pressure on TVNZ to exercise their discretion consistently with Cabinet's preferred course of action.
- 33 He asks your office to use your powers to investigate whether TVNZ has effectively surrendered its discretion, thus failing to properly exercise it.

Illegal dictation

- 34 Section 27 of the Act gives TVNZ's Shareholding Ministers (the Ministers of Finance and Broadcasting) the power to determine the amount of dividend to be paid by TVNZ. This must be in writing to the TVNZ Board, must comply with section 115 of the Crown Entities Act 2004, and must have regard to the functions of TVNZ as set out in section 12 of the Act.
- 35 According to TVNZ's Annual Report for 2011, the dividend is set at 70 per cent of TVNZ's profits. In 2011, TVNZ paid a dividend of \$13,827,800 back to the Crown. This is an increase on the \$4,870,000 paid in 2010.
- 36 Mr Thomas can find no evidence of a dividend direction in the New Zealand Gazette, as required by section 115 of the Crown Entities Act. Accordingly, there is also no evidence that the Shareholding Ministers had regard to the functions of TVNZ.
- 37 Mr Thomas considers that the size of the dividend demanded of TVNZ (whether by formal direction or not) has put TVNZ in a position where it cannot correctly exercise its discretion. The dividend requirement has removed the ability of TVNZ to reinvest a greater proportion of its profits back into TVNZ's operations.
- 38 Reinvesting a larger proportion of its profits could have enabled TVNZ to partially fund TVNZ 7. When combined with cross subsidisation from other TVNZ baselines, or with contestable New Zealand on Air Funding from the Platinum fund, TVNZ may have been able to keep screening the channel. The demand for a greater dividend effectively closed TVNZ's mind to this possibility.
- 39 This approach can be contrasted with the \$79 million dollars provided to TVNZ between 2006 and 2012 to establish TVNZ 6 and TVNZ 7. \$70 million was paid for by a special tied dividend from TVNZ, which was given to the Crown and then apportioned back to TVNZ. The current dividend is simply paid to the Crown.

- 40 TVNZ must balance their obligation to provide high-quality content with the need to maintain commercial performance. This includes a requirement to provide an adequate rate of return on shareholders' funds.
- 41 Mr Thomas recognises that this balancing act is a matter for TVNZ to determine. However, Mr Thomas considers that the Minister and Cabinet's actions may have hampered TVNZ's ability to independently strike this balance.
- 42 Cabinet's funding decision ostensibly left the fate of TVNZ 7 in TVNZ's hands, but in combination with the Ministers' demand for a dividend may have forced TVNZ to make a 'Hobson's choice' whereby TVNZ had no realistic option but to cease screening TVNZ 7.
- 43 Mr Thomas is concerned that Cabinet's funding decision and the Ministers' dividend requirement have had the effect of directing TVNZ to cease production of TVNZ 7.
- 44 Section 28(1)(a) of the Act prohibits the Minister from directing TVNZ in respect of any program or content. Mr Thomas considers that the Hobson's choice faced by TVNZ is in effect a direction as to the content (or lack thereof) of TVNZ 7.
- 45 Any direction from Cabinet or the Minister as to content is wrong and unlawful. Mr Thomas therefore asks your office to investigate the Minister and Cabinet's influence over TVNZ's decision-making process to ensure that the decision was made independently.

Other options

- 46 In the alternative (in the event that TVNZ was not required to pay a substantial dividend by its shareholding Ministers), there were other options available to TVNZ that did not require the cancelation of TVNZ 7.
- 47 In particular, TVNZ could have reprioritised current revenue and reinvested a greater proportion of its profits to ensure that TVNZ 7 could continue in some form.
- 48 TVNZ could have secured New Zealand on Air Funding which would have enabled the channel to continue screening. TVNZ could have advocated for the New Zealand on Air Platinum fund (which is approximately \$15.1 million) to be reprioritised to pay for TVNZ 7, or could have contested this funding.
- 49 In addition, there is no evidence that TVNZ considered funding TVNZ 7 through cross subsidisation from TVNZ's commercial services. The continuation of TVNZ 7 from TVNZ's own baseline is a primary consideration that does not appear to have been investigated by TVNZ in any depth.
- 50 On the information available to Mr Thomas, it appears that TVNZ has not adequately assessed alternative options for the provision of commercial free public broadcasting. Given the clear public interest in public broadcasting, and TVNZ's obligations under section 12 of the Act, this is wrong.

Requirement for high-quality content

- 51 Mr Thomas also considers that the decision to cancel TVNZ 7 did not adequately take into account TVNZ's obligation under section 12(2) of the Act. Section 12(2) requires TVNZ to broadcast high-quality content that is relevant to, and enjoyed and valued by New Zealand audiences; and encompasses both New Zealand and international content, and reflects Māori perspectives.
- 52 There is a clear policy rationale for the section 12(2) obligation.
- 53 It is the recognition that public broadcasting serves an important role in the development of civic participation. TVNZ 7 enabled a range of viewpoints to be aired, debated and scrutinised by the public. In a pluralist democracy, access to critical public commentary and competing public ideas is directly relevant to civic engagement and democratic participation.
- 54 This is a function that can only be fully exercised by commercial free public broadcasts. In order to be financially viable, commercially driven television channels must provide content that is agreeable to advertisers. Promoting public debate on controversial issues is not as attractive on commercial television channels.
- 55 TVNZ 7 was New Zealand's only nation-wide, commercial free public broadcast channel. TVNZ 7 provided a range of television shows that spanned the genres of current affairs, documentary, entertainment and critical commentary. These shows featured New Zealand and New Zealanders, and enabled indigenous viewpoints to be publicised widely.
- 56 Contrary to initial statements by the Minister of Broadcasting, TVNZ 7 was a highly viewed television channel. An AC Nielsen audience report in June 2012 estimated monthly cumulative audience numbers to be at 1.6 million. This is a significant number of New Zealanders.
- 57 Mr Thomas is of the view that the decision to cease production of TVNZ 7 has undermined the ability of TVNZ to comply with its section 12 obligations. This is wrong and arguably unlawful.

Summary of Complaints

- 58 On the information made available to him to date, Mr Thomas considers that the decision to cancel TVNZ 7 was unlawful and wrong for the following reasons:
- (a) TVNZ has effectively surrendered its discretion and acted under the dictation of Cabinet and the Minister of Broadcasting;
 - (b) In combination with Cabinet's decision to decline additional funding, the Shareholding Ministers' demands for a substantial dividend from TVNZ left it with no choice but to cancel TVNZ 7. This is tantamount to an unlawful direction as to content; or
 - (c) TVNZ has not adequately assessed alternative options that would have allowed TVNZ 7 to be retained.

- 59 The decision to cancel production of TVNZ 7 also appears to be inconsistent with TVNZ's statutory obligation to provide high-quality content that "is relevant to, and enjoyed and valued by, New Zealand audiences" and "encompasses both New Zealand and international content and reflects Maori perspectives".
- 60 We ask that your office conducts an investigation of this matter and makes recommendations in order to address Mr Thomas' concerns. Subject to the difficulties Mr Thomas has faced in obtaining information, we are available to provide any additional material your office may require.

Yours sincerely



Mai Chen
Founding Partner

DDI: +64 471 5795

Email: mai.chen@chenpalmer.com



Nicholai Anderson
Senior Associate

DDI: +64 471 5792

E-mail: nicholai.anderson@chenpalmer.com