

**IN THE HIGH COURT OF NEW ZEALAND**  
**WELLINGTON REGISTRY**

**AP268/96**

**IN THE MATTER of the Broadcasting Act 1989**

**A N D**

**IN THE MATTER of an appeal under Section 18  
of the Act**

**BETWEEN RADIO NEW ZEALAND LIMITED**

**Appellant**

**A N D MURRAY STUART McCULLY**

**Respondent**

**Coram:** Ellis J.  
McGechan J

**Hearing:** 25 March 1998

**Counsel:** J.W. Tizard for Appellant  
N McAteer for Respondent

**Judgment:** - 8 APR 1998

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**JUDGMENT OF THE COURT**

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**Solicitors:**  
Oakley Moran, Wellington for Appellant  
Crown Law Office, Wellington for Respondent

An appeal against the decision of the Broadcasting Standards Authority under s18 of the Broadcasting Act 1989. The respondent was the Minister of Housing when New Zealand Public Radio Limited (Radio New Zealand) broadcast in its Morning Report of 26 February 1996 an interview with Mr Paul Swain MP, the Labour spokesperson on housing. The interview related to the proposed bill Mr Swain was to present to Parliament which, if passed, would result in rental for State houses being calculated by reference to the income of the tenant rather than the market rental. This was obviously a controversial and political measure aimed at changing Government policy of which the Minister was in charge. There is no reference to the Minister by name or portfolio, but it is obvious that the Government's policy on State housing rentals was being attacked by Mr Swain. The Minister complained to Radio New Zealand, claiming it was in breach of Rules 5 and 9 of the Code of Broadcasting. As no response was received within 60 days, the Minister referred his complaint to the Authority, which upheld his complaint in a written decision dated 15 August 1996. It is convenient now to set out part of s4 of the Act and Rules 5 and 9 of the Code:

**"4. Responsibility of broadcasters for programme standards - (1)** Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with -

- (a) The observance of good taste and decency; and
- (b) *The maintenance of law and order; and*
- (c) The privacy of the individual; and
- (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
- (e) Any approved code of broadcasting practice applying to the programmes.”

“R5 To deal justly and fairly with any person taking part or referred to in any programme.

R9 To show balance, impartiality and fairness in dealing with political matters, current affairs and *all questions of a controversial nature, making* reasonable efforts to present significant points of view either in the same programme or in other programmes within the period of current interest.”

### **The Basis of an appeal**

Section 18(4) expressly provides that the appeal is to be treated as being from the exercise of a discretion. In *Comalco New Zealand Limited v Broadcasting Standards Authority* (CA148 and 159/95, unreported, 14 December 1995) McKay J said,

“Under s18 of the Act there is a right of appeal to this Court. The section provides that the Court is to deal with the appeal as if the decision appealed against has been made

in the exercise of a discretion. This means that the appellant needs to show the Authority based its conclusion on some error of principle (including an error of law, for example, an error in the interpretation of the statute), that it took irrelevant considerations into account or failed to consider appropriate ones, or was plainly wrong. What the Court is not allowed to do is simply substitute its own view for the Authority's ”

and in *TV3 Network Services v Broadcasting Standards Authority* [1995]

2NZLR720, Eichelbaum CJ said at page 727:

“Secondly, having regard to the scheme of the Act, especially ss5, 6 and 21 (particularly paras (d) and (e) of s21(1)), and the terms of the appeal provision (s18) on my reading of the Act the Authority is intended to have a central role in establishing and maintaining broadcasting standards.”

### **The complaint by the Minister**

We set out extracts from the Minister's letter of complaint to Radio New Zealand dated 5 March 1996:

“In summary, I was asked at short notice by Morning Report to appear live on air during the programme on Monday 26 February, to respond to comments and claims by the Labour housing spokesperson, Paul Swain. Because of the short notice I was given, I had to be briefed by phone by my Press Secretary while I was travelling, and therefore, I suggested the fairest way to handle the matters raised was for Mr Swain to be interviewed first and then I would be interviewed immediately afterwards and be able to respond

to what he had to say. Morning Report staff, apparently under Mr Walley's direction.

- declined my suggestion of straight-forward interviews (Mr Swain's and then mine) back-to-back;
- threatened to broadcast on air that I had refused to come on the programme;
- interviewed only Mr Swain,
- afterwards, offered me the option of being interviewed by a Radio New Zealand press gallery journalist for a response to be broadcast on the Midday Report programme later that day."

and

"It was clear to me that to accept the invitation to debate with Mr Swain would have been to accept a 'set-up', in that:

- I had no notice
- I had no copy of his press release
- I had no opportunity to be briefed

Radio New Zealand could have rectified all of the above but it chose not to. Under those circumstances, I refused a live debate but made it very clear that I was available to comment on what Mr Swain said, having heard him interviewed.

By offering Mr Swain a five minute interview, but refusing me identical treatment, in the circumstances Radio New Zealand failed to meet its obligations of fairness, impartiality, and balance.

The offer of an interview by Radio New Zealand to be broadcast on Midday Report was merely an offer to perpetuate the issue, and thus compound the offence

Mr Swain's press release received no coverage by the New Zealand Herald or the Dominion that morning. It was not covered by IRN (nor incidentally by either television channel that evening).

While I accept that Radio New Zealand is entitled to a different editorial line to every other major news outlet in New Zealand, it cannot pretend to be offering me the opportunity for balance, when in reality it is merely seeking to compound its earlier offence

I await your response in due course before, no doubt, seeking recourse to the Broadcasting Standards Authority in what is rapidly becoming the time-honoured fashion ”

### **The Grounds of this appeal**

#### **First Ground**

Mr Tizard referred to the following statements made by the Authority

- (a) “With respect to the complaint that standard R5 was breached, the Authority does not agree with NZPR that it was inapplicable ..nevertheless, the Authority decides to subsume the complaint that standard R5 was breached under standard R9 which, it consider encapsulates the essence of the Minister’s complaint that the item lacked balance, impartiality and fairness ”
- (b) “Turning first to the standard R5 aspect of the complaint, NZPR argue that because the Minister neither participated in the item, nor was he referred to, the standard did not apply It therefore declined to accept the complaint that standard R5 was breached”(p3)...”With respect to the complaint that standard R5 was breached, the authority does not agree with NZPR that the standard was inapplicable. It considers that the Minister, as the government’s spokesperson on housing policy, was the appropriate person to respond the proposals to change state housing rental policy, and to deal with the criticisms of the

government's current policy. Furthermore, as Minister of Housing, the Authority believes he was impliedly the subject of the criticism of the current regime."

The appellant submits that these findings are erroneous because the programme did not refer expressly to the Respondent either by name or description; and the programme was a report of the proposal by a Member of Parliament, Mr Swain, to introduce into the House of Representatives a Private Member's Bill which would have had the effect of changing the basis upon which rentals for residential properties owned by the Housing Corporation should be assessed. The programme included an interview with the Member introducing the Bill and included his explanations of the content of the proposed Bill and the reasons for its introduction

In our view, as the Minister was not referred to in the programme, R5 does not apply to the present situation. Even if it is interpreted so as to cover the Minister as being indirectly referred to or implicated, we consider he will be dealt with justly and fairly if R9 is complied with. The Authority dealt with the complaint in this way and we see no reason for disagreeing with this approach

## **Second Ground**

Mr Tizard next submitted the Authority in stating as quoted in para 1(a) above, erred in law in finding the complaint in respect of R5 could be subsumed under the complaint in respect of R9. Mr Tizard submitted the two rules cover different issues, the former being concerned with fairness in regard to individuals, whereas the latter is concerned with balance, impartiality and fairness when dealing with issues. We agree with Mr Tizard's analysis of the two rules, however we agree that the case was to be dealt with under R9.

## **Third Ground**

The real issue in our opinion is Mr Tizard's third submission. He quoted from the Authority

“Standard R9 requires the observance of balance, impartiality and fairness and the making of reasonable efforts to present significantly points of view either in the same programme or in other programmes within the period of current interest. The Authority notes that the standard repeats and expands on the requirement in s4(1)(d) to which NZPR referred. While the section in the act accepts that giving reasonable opportunities may be sufficient to comply with an alleged breach of s4(1)(d), standard R9 adopts and gives more substance to the phrase ‘reasonable efforts’ which is also used in the Act. Standard R9, in the Authority's opinion, is not subsumed by s4(1)(d) of the Broadcasting Act 1989.”

Mr Tizard submitted that the Authority is saying that even though a broadcaster complies with s4(1)(d), it may nonetheless be in breach of R9. In our view, R9 does expand on s4(1)(d) as stated by the Authority.

Mr Tizard accepts that an approved Code might expand on s4(1)(d), but may not be inconsistent with it. He submits R9 is inconsistent and therefore ultra vires. His reasoning is that in s4(1)(d) the requirement to present other significant points of view arises only when controversial issues of public importance are discussed. Under R9 the requirement is extended to “political matters and current affairs”. Under s4(1)(d) a broadcaster is obliged either to make reasonable efforts, or to give reasonable opportunities to present significant points of view, whereas under R9 a broadcaster is required to make reasonable efforts to present such other views, regardless of whether reasonable opportunities are given. Further, s4(1)(d) imposes on a broadcaster an obligation to present other significant points of view only when controversial issues of public importance are discussed, whereas R9 imposes such whether or not they are discussed, that is to a situation where they are only mentioned or reported.

In our view, R9 does extend “controversial issues of public importance” to “political matters, current affairs, and questions of a

controversial nature” and the verb “discussed” to “dealing with”. Here the question of State Housing rentals is plainly within both descriptions. In our view s4(1)(e) is authority for the Rules promulgated by the industry and approved by the Authority. R9 being in wider terms than s4(1)(d) cannot thereby be inconsistent with it. The public benefit is in fact enhanced and promoted by a wider requirement for fairness and balance. The allegation that R9 is ultra vires fails accordingly.

Counsel agree that Radio New Zealand requested the Minister to appear on Morning Report on 26 February 1996, that he refused because the producer declined to meet his stipulations, and that the producer offered him an interview to be reported on Midday Report, but he declined.

In terms of s4(1)(d) the question is did Radio New Zealand make reasonable efforts to present the Minister’s views on the issue or give the Minister a reasonable opportunity to do so. In terms of R9 the question is did Radio New Zealand make reasonable efforts to present the Minister’s views. What was done was to offer the Minister either an appearance during the interview with Mr Swain or an interview with a reporter who would put the Minister’s response in Midday Report. The Minister’s reasons for refusing the first is that he was not briefed. The Authority held that such a requirement by the Minister was reasonable, and we can only

agree. The Minister's offer to be interviewed after the interview with Mr Swain was rejected by Radio New Zealand and the Authority held that Radio New Zealand's refusal to "let the Minister have the last say" was also reasonable. We agree with that too. This leaves only the final matter of the slot in *Midday Report*

The Authority said:

"The Authority accepts NZPR's insistence that it had the right to make the editorial decisions as to how the item was to be structured and understands why it did not wish to permit the Minister to have the final word on the subject. Nevertheless, it believes that when it became apparent that the Minister was unable or unwilling to appear, the onus to achieve balance in the item shifted back to the editor and the interviewer to ensure that all sides of the debate were addressed. The Authority agrees with the Minister that the offer of time on *Midday Report* did not suffice to provide the necessary balance

The Authority does not consider unreasonable the Minister's insistence on being briefed prior to appearing on the programme, and similarly that it was not unreasonable for NZPR to dictate the format of its items. However, it believes the onus falls squarely on the broadcaster, when direct comment from the proponents is unavailable, to provide its own balance, by challenging questions from the interviewer.

In the Authority's view, the item concerned a controversial subject and was thus required to be balanced. As the item was broadcast, the Authority considers that it failed to satisfy the requirement because the item investigated the subject of state house rental policies from only one perspective and the interviewer did not challenge the views advanced. While it accepts that the Minister's refusal to

appear made it more difficult to achieve balance, there nevertheless remained an obligation on the broadcaster to present another view. Because it failed to do so, the broadcast contravened standard R9.”

The Authority does not say the offer of coverage on Middy Report was not a reasonable effort or a reasonable opportunity, although it has recited these obligations earlier in its decision. It says it agrees with the Minister that the offer did not suffice to provide the necessary balance. We have already set out what the Minister said in his letter of complaint. As we read it, he claims identical treatment to that given Mr Swain - a five minute interview. He claims the offer of exposure on Middy Report would only “perpetuate the issue” and “compound the offence”. These grounds do not address the question of “reasonable efforts” and “reasonable opportunity” directly or at all. A great deal would depend on what the coverage on Middy Report was. It may be that any coverage on Middy Report would be inadequate to provide balance, impartiality and fairness. Any reading of the decision leaves one uncertain as to whether or not the Authority approached the offer in this way or not. We cannot help feeling that it did not, or it would not have simply said it agreed with the Minister. The Minister’s claim for an interview of equal duration (giving him the last word perhaps) must be measured against the content of the interview with Mr Swain. While the topic is obviously controversial, the

interview does little more than allow Mr Swain to say what he is doing, why, and with whose support. It is a matter in the first instance of editorial judgment as to what is required to give the topic balance and fairness. That would be reflected in the interview and extent of report in Midday Report. We would have thought it hard to say that the offer of such coverage by itself was not a reasonable effort or a reasonable opportunity to present the Minister's point of view. The other statements by the Minister about "perpetuating the issue" and "compounding the offence" are hard to understand. Obviously the issue is a continuing one, and the broadcast of the interview with Mr Swain cannot possibly be described as an offence. If offence there be, it can only arise out of what happened or did not happen afterwards.

The Authority is an expert body well able to assess the opportunity afforded by coverage in Midday Report to balance the Morning Report interview, but we cannot read the decision as having addressed the question in this way. It follows that it appears that the Authority has proceeded to its conclusion on a wrong basis.

We refer to Mr Tizard's submission as to the period of current interest, only to say it matters not to the decision, as the subject of the complaint took place within a few hours while the issue was new and alive.

**Fourth Ground**

Mr Tizard submitted that the programme did not discuss the issue, it was simply Mr Swain telling the interviewer what he was doing, why and with whose support. He submitted that only if the Minister had participated would there have been a discussion. The matter is to be assessed not only in terms of s4(1)(d), but also R9, so the verbs “discuss” and “deal” are relevant. Plainly, the interview with Mr Swain dealt with the issue even if Mr Tizard is correct. That being so, there was a duty to give the Minister an opportunity to respond.

**Fifth Ground**

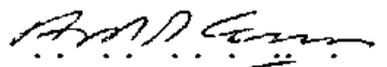
Mr Tizard submitted the Authority considered only the “internal balance” of the programme and not as required by the Act, its balance within the period of current interest. He submitted that a broadcaster is not required to present other significant points of view in each programme, but only within the period of current interest and that period here was plainly ongoing and would continue until the introduction of the Bill at least, and so beyond the time the Minister made his complaint. For the reasons given in treating the third ground of appeal, there is no need for more to be said.

**Decision**

For the reasons given in relation to the Third Ground of appeal, we consider the Authority made an error of law in reaching its decision, and accordingly the appeal must be allowed. After reaching its conclusion, the Authority considered its powers under s13 of the Act and stated:

“Having upheld a complaint, the Authority may make an order under s.13(1) of the Broadcasting Act 1989. It does not intend to do so on this occasion because it is apparent that efforts were made to introduce balance. With respect to the failure to respond within the statutory time period, the Authority accepts the assurance that NZPR’s systems have been improved to ensure compliance with the Act.”

This in our view gives the correct sense of proportion to this matter. Accordingly, the appeal is simply allowed and no consequent order is necessary. There will be no award of costs

**Ellis J.****McGechan J.**