

BROADCASTING AMENDMENT BILL (NO. 2)

AS REPORTED BY THE COMMERCE COMMITTEE

COMMENTARY

Recommendation

The Commerce Committee has examined the Broadcasting Amendment Bill (No. 2) and recommends that it be passed with the amendments shown in the bill.

Conduct of the examination

The Broadcasting Amendment Bill (No. 2) was referred to the Commerce Committee on 4 November 1998. The closing date for submissions was Friday, 29 January 1999. We received and considered ten submissions, from the Churches Broadcasting Commission, Radio Broadcasters Association, Television New Zealand Limited (TVNZ), the Broadcasting Standards Authority (BSA), the Broadcasting Commission (NZ On Air), Sky Network Television (SKY), the Privacy Commissioner and individuals. A letter was also received from the Office of the National Māori Organisations. We heard six submissions orally. Hearing of evidence took two hours and consideration took two hours and ten minutes.

We received advice from the Ministry of Commerce.

This commentary sets out the details of our consideration of the bill and the major issues we addressed.

Purpose of the bill

The bill expands or clarifies a number of provisions in the Broadcasting Act 1989. Some submissions raised issues relating to the application of these provisions in practice.

The bill makes several amendments to the Broadcasting Act 1989 that:

- simplify the administration of aspects of the broadcasting standards regime by the BSA
- reduce compliance costs on broadcasters
- clarify and ensure consistency in the application of broadcasting standards by the BSA and funding policies by the Broadcasting Commission

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- ensure a clearer focus on the funding of Māori language programming by Te Reo Whakapuaki Irirangi
- provide for a power of direction to be exercised jointly by the Ministers of Communication and Māori Affairs regarding the functions and duties of Te Reo Whakapuaki Irirangi.

Some submissions suggested that the bill focuses on these matters at the expense of more substantive broadcasting policy issues which should first be addressed. Examples include increased funding for the Broadcasting Commission, changes to the broadcasting standards regime in order to differentiate between free to air and pay television services, and a review of the broadcasting regulatory regime in light of changing technology.

We consider that these broad policy issues would need to be the subject of further detailed consideration and consultation before any such legislative changes are introduced. This bill is not an appropriate vehicle for this purpose.

Consultation with the Privacy Commissioner

The intent of the bill in clauses 2 and 3 is to enable the BSA to draft, or encourage broadcasters to prepare, codes of practice on the privacy of the individual. Clause 3 includes the requirement that in carrying out this function the BSA must consult with the Privacy Commissioner. The requirement is only to consult, and it would not impact on the statutory functions and independence of the BSA. It is important in the preparation of any code that interested parties be consulted.

The BSA supported the proposal to provide for a code of broadcasting practice relating to the “privacy of the individual”. However, it questioned the need to impose a requirement for compulsory consultation with the Privacy Commissioner, when doing so as the main focus of its work relates to privacy issues outside the ambit of the Privacy Act 1993. The BSA said this requirement assumes a convergence of interest between the Privacy Commissioner and the BSA that does not exist, as the concept of privacy differs in each case. There is every reason to assume that the BSA would consult in the absence of a mandatory provision.

The Privacy Act 1993 specifies the obligations of “agencies” in relation to the handling of personal information and the role of the Privacy Commissioner in that regard. “Agency”, as described in the Act, excludes any news medium, in relation to its news gathering activity. The requirement to consult was intended to ensure consistency in approach to privacy issues where there is a potential overlap in the jurisdictions of the BSA and the Privacy Commissioner. Examples are a consumer issues programme or reality television. A code of practice would not stop a programme going to air, but it would enable complaints to be assessed against a code which set clear expectations for broadcasters on privacy issues.

On balance, we consider a mandatory provision to consult to be undesirable. We note that the BSA and the Privacy Commissioner agree on the need to consult on the development of codes of broadcasting practice on the privacy of the individual but differ on the need to reflect this in legislation. We note that other mechanisms such as a Memorandum of Understanding could be used to define consultation processes. The majority of the committee recommended that clause 3(2) be deleted from the bill.

Retention of recordings

Clause 4 amends section 30, which enables the BSA to make rules requiring broadcasters to retain recordings of programmes broadcast by them. The amendment in clause 4 allows rules to be made which would either require broadcasters to retain recordings or obtain copies if required by the BSA. The intent of the amendment is to allow more flexible rules to be made in order to reduce compliance costs on broadcasters where possible. SKY suggested that clause 4 would increase compliance costs on broadcasters and that changing technology would make rules on the retention of recordings unworkable.

We consider that the BSA will need to have regard to the practical application of any rules it develops, particularly in relation to changing technology and programmes broadcast by satellite. The concept of reasonableness should also be taken into account in the drafting of rules. We do not recommend any changes to clause 4.

Functions of the Broadcasting Commission

“Youth” to be included in the bill

Clause 5 amends section 36 of the Broadcasting Act 1989 by requiring NZ On Air to ensure that broadcasts are available to provide for the interests of youth. NZ On Air commented that including youth in section 36 would not have any material effect as it faces funding constraints in terms of the amount of public broadcasting fee revenue that it is able to collect. Section 36 does not impose any obligation on NZ On Air to provide a specific amount of services to any of the target groups listed. The amendment does provide NZ On Air with a mandate to allocate funding for the benefit of these groups. It aligns the Act with NZ On Air’s current funding practices, which includes programmes with a youth focus.

Beliefs and ethics to be included in the bill

The Churches Broadcasting Commission requested that “spirituality/wairuatanga and all the associated values, aspirations and practices” be included in clause 5. It also suggested a fairly detailed monitoring regime to enforce the broadcasting of such programming. The implementation and monitoring proposals run counter to the current broadcasting regulatory regime in that they would impose a form of programme quota and would alter substantially the role of NZ On Air from a funding agency to an enforcement body. We questioned whether there was justification for the concept of spirituality to be included and how it would be defined.

The issue of definition is difficult. It could range from traditional religious programming to a much wider concept of programmes instilling values. Establishing an effective and meaningful legal definition to encompass this broad concept would be difficult. However, the majority of the committee agreed to include a further function for NZ On Air, being to encourage a range of broadcasts that reflects the diverse religious and ethical beliefs of New Zealanders. NZ On Air currently funds television and radio programmes both with a religious and ‘values’ focus. Programming is also provided by broadcasters without funding support from NZ On Air.

The majority considered that the new function be included in the bill.

Māori culture

Clauses 6 and 7 clarify that the function of Te Reo Whakapuaki Irirangi (Te Māngai Pāho) is to promote Māori language. Māori culture may be promoted when carrying out the function of promoting Māori language but the promotion of Māori culture is not a separate function. NZ On Air and TVNZ commented that the effect of removing Māori culture from the definition of Te Māngai Pāho's statutory functions will be to increase pressure on NZ On Air to fund Māori cultural programmes. Te Māngai Pāho's funding is already directed at programming that is predominantly in the Māori language. The Office of the National Māori Organisations, which comprises the Māori Women's Welfare League, the New Zealand Māori Council and the Māori Congress opposed the amendment. We do not consider it appropriate for this amendment to be made at this time. Therefore, we recommend that clauses 6 and 7 be deleted from the bill.

Clause 8 Te Reo Whakapuaki Irirangi to have regard to Government policy

Clause 8 inserts a new section 53s into the Broadcasting Act 1989 enabling the Minister of Communications and the Minister of Māori Affairs to give government policy directions to Te Reo Whakapuaki Irirangi in relation to the broadcasting of Māori language or the function, duties, powers, rights, and authorities of Te Reo Whakapuaki Irirangi. Section 44 of the Broadcasting Act 1989 contains similar provisions enabling the Minister of Communications to issue government policy directions to the Broadcasting Commission.

KEY TO SYMBOLS USED IN REPRINTED BILL

AS REPORTED FROM A SELECT COMMITTEE

Struck Out (Unanimous)

Subject to this Act,

Text struck out unanimously

New (Unanimous)

Subject to this Act,

Text inserted unanimously

Struck Out (Majority)

Subject to this Act,

Text struck out by a majority

New (Majority)

Subject to this Act,

Text inserted by a majority

Hon Maurice Williamson

BROADCASTING AMENDMENT (NO. 2)

ANALYSIS

| | |
|---------------------------------|---|
| Title | 4. Rules in relation to retention of recordings of programmes |
| 1. Short Title and commencement | 5. Functions of Commission |
| 2. Interpretation | 8. Te Reo Whakapuaki Irirangi to have regard to Government policy |
| 3. Functions of Authority | |

A BILL INTITULED

An Act to amend the Broadcasting Act 1989

BE IT ENACTED by the Parliament of New Zealand as follows:

5 **1. Short Title and commencement**—(1) This Act may be cited as the Broadcasting Amendment Act (No. 2) 1998, and is part of the Broadcasting Act 1989* (“the principal Act”).

(2) This Act comes into force on **1 November 1998**.

10 **2. Interpretation**—Section 2 (1) of the principal Act is amended by inserting, in its appropriate alphabetical order, the following definition:

“ ‘Individual’ has the same meaning as in section 2 (1) of the Privacy Act 1993.”.

15 **3. Functions of Authority**—Section 21 (1) (e) of the principal Act is amended by adding the following subparagraph:

“(vii) The privacy of the individual.”.

*1989, No. 25

Amendments: 1989, No. 69; 1990, Nos. 2, 103; 1991, No. 21; 1993, No. 69

Struck Out (Majority)

(2) Section 21 of the principal Act is amended by adding the following subsection:

“(4) When performing its functions under **subsection (1) (e), (f), or (g)** in relation to a code of practice of the kind described in **subsection (1) (e) (vii)**, the Authority must consult with the Privacy Commissioner appointed under the Privacy Act 1993.”

4. Rules in relation to retention of recordings of programmes—(1) Section 30 of the principal Act is amended by repealing subsection (1), and substituting the following subsection: 10

“(1) The Authority may from time to time make and promulgate rules in relation to broadcasters to ensure that recordings of programmes broadcast by them are retained by the broadcaster or some other person, and are able to be obtained by the broadcaster when required to do so by the Authority.” 15

(2) Section 30 of the principal Act is amended by repealing subsection (3), and substituting the following subsection:

“(3) Any rules made under this section may require a broadcaster, when requested to do so by the Authority, to obtain recordings of programmes broadcast by that broadcaster and to make suitable arrangements to enable the Authority to view or hear any recordings held or obtained by the broadcaster.” 25

5. Functions of Commission—(1) Section 36 of the principal Act is amended by repealing paragraph (c), and substituting the following paragraph:

“(c) To ensure that a range of broadcasts is available to provide for the interests of— 30

“(i) Women; and

“(ii) Youth; and

“(iii) Children; and

“(iv) Persons with disabilities; and

“(v) Minorities in the community including ethnic minorities; and” 35

New (Majority)

(2) Section 36 of the principal Act is amended by inserting, after paragraph (c), the following paragraph:

5 “(ca) To encourage a range of broadcasts that reflects the diverse religious and ethical beliefs of New Zealanders; and”.

Struck Out (Majority)

6. Function of Te Reo Whakapuaki Irirangi—The principal Act is amended by repealing section 53B, and substituting the following section:

10 “53B. (1) The function of Te Reo Whakapuaki Irirangi is to promote Māori language by making funds available, on such terms and conditions as Te Reo Whakapuaki Irirangi thinks fit, for broadcasting and the production of programmes to be
15 broadcast.

“(2) When carrying out its function, Te Reo Whakapuaki Irirangi may also promote Māori culture.”

7. Matters to be taken into account in relation to funding proposals—Section 53E(c) of the principal Act is amended by omitting the words “and Maori culture”.

8. Te Reo Whakapuaki Irirangi to have regard to Government policy—The principal Act is amended by inserting, after section 53R, the following section:

25 “53s. (1) When carrying out its function, duties, powers, rights, and authorities under this Act, Te Reo Whakapuaki Irirangi must comply with any direction given to it jointly by the Minister and the Minister of Maori Affairs in accordance with this section in relation to the general policy of the Government on the broadcasting of Māori language or the
30 function, duties, powers, rights, and authorities of Te Reo Whakapuaki Irirangi.

“(2) The Minister and the Minister of Maori Affairs may not give a direction in respect of—

35 “(a) A specific programme; or
“(b) The gathering or presentation of news or the preparation or presentation of current affairs programmes.

“(3) The Minister and the Minister of Maori Affairs, acting jointly, must—

“(a) Give the direction to Te Reo Whakapuaki Irirangi by notice in writing; and

“(b) As soon as practicable after giving the written notice,— 5

“(i) Publish a copy of it in the *Gazette*; and

“(ii) Present a copy of it to the House of Representatives.”