

TELEVISION COVERAGE OF ELECTION CAMPAIGNS: DO BROADCASTERS HAVE PUBLIC LAW OBLIGATIONS?

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ABSTRACT: Television networks wield enormous power to influence the public during election campaigns. In the lead up to the 2005 New Zealand General Election the leaders of two minor parties sought to judicially review TV3's decision to exclude them from a televised leader's debate. Ronald Young J held that, regardless of TV3's private status, it wielded such influence in an election campaign that its decision was judicially reviewable under the (so called) 'public impact' test. He ordered TV3 to invite the leaders to participate. The decision raises important questions about how media freedom should be weighed against the public interest in balanced election coverage, and whether broadcasters should ever be susceptible to judicial review for editorial decisions. This paper reviews the decision, the regulatory scheme for election broadcasting, the history and place of the public impact test for susceptibility of private bodies to judicial review, and compares how Courts in the UK, Canada and the US have dealt with similar issues.

"[a] broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations."

*Office of Communication of United Church of Christ v Federal Communications Commission*¹

I INTRODUCTION

The New Zealand General Election took place on 17 September 2005. During the campaign two urgent applications for judicial review were brought in respect of election campaign coverage by broadcasters. In both cases the Plaintiffs were candidates for political office disgruntled at their treatment by the networks. The first case, *Dunne & Anderton v Canwest*,² involved the leaders of two minor parties seeking a mandatory injunction against TV3, a privately owned free to air television broadcaster, requiring it to include the Plaintiffs in a televised leaders' debate from which they had been excluded. The second, *Mangu v Television New Zealand Ltd*,³ involved an independent candidate standing in a Maori electorate seeking a declaration against TVNZ, a statutorily created free to air television broadcaster, that it had unfairly omitted reference to her in a news item about the campaign. TV3's decision was held to be susceptible to judicial review whilst TVNZ's was not.

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¹ 123 US App DC 328, 337 (1966) per Burger J.

² (11 August 2005, High Court Wellington, Ronald Young J – CIV 2005-495-1596) noted at [2005] NZLJ 314.

³ (5 September 2005, High Court Auckland, Lang J – CIV 2005-404-4875).

Although attempts by candidates to use the Courts to control media coverage of elections are not new internationally, they are in New Zealand. These two decisions squarely raise the issue of the extent to which broadcasters are, and should be, subject to public law obligations in the way in which they cover elections. They also highlight a conflict between a number of competing public and private interests. In *Dunne* Ronald Young J emphasised the “fundamental right” of the electorate to be informed, while the Plaintiff party leaders highlighted their right to participate in a political debate forum. TV3 responded by emphasising its status as a private company and the public interest in freedom of the media to report current affairs, including election coverage, as it sees fit – a theme adopted by Lang J in *Mangu*.

After exploring the legitimacy of those competing interests this article concludes that private broadcasters such as TV3 are not susceptible to judicial review and that, while TVNZ is in principle susceptible to judicial review for important editorial decisions, a high threshold that properly defers to its editorial freedom should be adopted. This article will deal with the public obligations of broadcasters, particularly during election campaigns. It will also use the *Dunne* ruling to explore the basis of the so-called ‘public impact’ basis for holding purely private bodies susceptible to judicial review.

A *Dunne & Anderton v Canwest*

As part of its election coverage TV3 planned a televised leaders’ debate on 11 August 2005. It decided to invite the leaders of only six political parties. The Plaintiffs were the leaders of two of the excluded parties, the ‘United Future Party’ and the ‘Progressive Party’. Prior to the election there had been eight parties represented in the New Zealand Parliament, including the Plaintiffs. TV3’s justification for not inviting the Plaintiff leaders was that eight was too unwieldy a number for a one-hour debate format. Its choice of leaders was made on the basis of an opinion poll published on 28 July 2005 in which the bottom four parties obtained support ranging from 0.4% to 1.6%. The Plaintiffs’ parties polled at 7th and 9th respectively. The 8th placed party did not challenge TV3’s decision.

The Plaintiffs sought judicial review of the decision claiming that TV3 had acted arbitrarily and irrationally in excluding them. They argued that when TV3 engaged in coverage of an election campaign, it took on public law obligations because of the constitutional importance of a general election, and the power that a broadcaster has to influence public opinion.

Whilst I am critical of aspects of the reasoning in *Dunne* I acknowledge that the Judge was placed in the invidious position of having to deliver an important judgment, on an urgent basis, which would effectively determine the dispute between the parties. Nonetheless the judgment is expressed in clear terms and warrants proper analysis.

Ronald Young J found that TV3’s decision was susceptible to judicial review. He recognised the significance of that finding by noting that⁴:

⁴ See n2 above, paragraph [36].

...this is one of those comparatively rare cases where a private company is performing a public function with such important public consequences that it should be susceptible to review.

The Judge adopted what he described as the ‘public impact’ test as enunciated in *Royal Australasian College of Surgeons v Phipps*.⁵ He asserted the broad proposition that private companies can be susceptible to judicial review when what they do has a significant enough impact on the public to warrant it.

With regard to the status of TV3, the Judge relied on two factors: that TV3 is a public free to air broadcaster subject to statutory control by way of s4of the Broadcasting Act 1989 and that all broadcasters need some form of government authority to broadcast. With regard to TV3’s decision he held, firstly, that television coverage of an election campaign has the ability to significantly influence the outcome of the election, and secondly, that a televised leaders’ debate is particularly influential.

The Judge took the view that any decision that substantially impacts on the democratic process is amenable to review. It is most clearly put in the following passage:⁶

Its decision...will have important public consequences. It does so with a background that it is a national free to air broadcaster. It covers virtually all of New Zealand. The effect of what it chooses to do regarding election coverage is significant in a national context. What it does can influence voters’ decisions and this is a vital part of democracy. And the Broadcasting Act makes it clear that broadcasters are not free to do as they choose. They have public responsibilities relating to fairness and balance. This is especially highlighted at this sensitive time given democratic rights are being exercised.

One wonders whether on Ronald Young J’s analysis *all* decisions about election coverage taken by a free to air broadcaster are reviewable. This particular leaders’ debate was part of a series organised by both TV3 and TVNZ, with various formats. It was to be broadcast more than a month before the election. It is at least arguable that election campaign coverage in an ordinary news programme the day before the election would likely have a greater impact on an election result than a leaders’ debate as early as this one. This point highlights one of the principal difficulties of Ronald Young J’s ‘likely impact on the election’ test: the difficulty in proving it.

Ronald Young J described TV3 as having: “thrust itself into the public arena”⁷. Describing the decision to host a leaders’ debate in such apparently pejorative terms is unfortunate. TV3 has, since its creation in 1993, operated as a news media broadcaster. Covering elections is properly part of its core function, as is covering all major newsworthy events.

The Judge concluded that TV3 is susceptible to judicial review, albeit in the limited context of election coverage, and held that TV3 had breached its public law obligations by excluding the Plaintiffs arbitrarily and failing to take into account relevant considerations.

⁵ [1999] 3 NZLR 1.

⁶ See n2 above, paragraph [34].

⁷ Ibid, paragraph [35].

In deciding upon the standard of review to be applied the Judge considered that the decision impacted upon “fundamental rights”. On that basis he applied a lower threshold of review although he did not articulate precisely what that was. The “fundamental right” identified was⁸:

...a fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote and to ensure the electoral outcome is as far as possible not subject to the arbitrary provision of information.

Having noted that the error rate for the poll used exceeded the difference between the 5th and 8th ranked parties, the Judge concluded that there was no meaningful basis of distinguishing the electoral support for each and therefore no way of choosing between them in anything other than an arbitrary fashion.

He granted a mandatory injunction against TV3 requiring it to invite the Plaintiffs to participate in the debate. Whilst he expressed reluctance about taking the unusual step of directing TV3 how to run its business, he considered that it would cause “no more than inconvenience to TV3”.⁹ The Judge decided that where there was no rational basis to distinguish between the electoral support for political parties, all should be invited to participate. In a statement seemingly designed to irritate the media the Judge commented that a debate format with eight participants “may not make for ideal television but that may be the least important consideration here”.¹⁰

The debate went ahead with eight participants, each allowed, on average, three minutes speaking time, reinforcing the point made by counsel for TV3 that it was the Defendant not the Judge that was in the better position to make editorial judgments and that less than ideal television also made for less than ideal political debate.¹¹ One may wonder – and it is entirely possible in a proportional electoral system – what the Judge would have done if there had been no rational basis for choosing between ten or 15 party leaders on the basis of electoral support. The argument that Ronald Young J ultimately found persuasive, that the difference in support between the parties invited and those excluded was less than the margin of error, will always apply to small parties falling below about 4%. Thus it may be, as TV3 found in this instance, impossible to draw a line without being accused of being (and in fact being) arbitrary.

The media responded with predictable outrage. The New Zealand Herald’s editor described the judgment as demonstrating a “cavalier disregard for fundamental issues of media freedom and private company rights”.¹² He claimed it would set a dangerous precedent requiring the print and broadcast media to apply a policy of unadorned equal time or print space, rather than “the judgment normally applied by the media in dissecting and deciding what readers, listeners and viewers want and need to know.”¹³ As we will see the United States Supreme Court has upheld as constitutional an ‘equal

⁸ Ibid, paragraph [43].

⁹ Ibid, paragraph [51].

¹⁰ Ibid.

¹¹ Although some media commentators declared Mr Dunne the ‘winner’ of the debate. See *NewstalkZB News* 12 August 2005, 5.13pm at <http://www.irnnewsop.asp?pagenum=2&nutc=1123780392> (accessed 26/08/2005).

¹² *New Zealand Herald* 12 August 2005, “Judge Gets it Wrong”.

¹³ Ibid.

time' doctrine in respect of legally qualified candidates in federal election campaigns. Nonetheless the New Zealand media continues to strongly resist any level of control over its editorial freedom even during the constitutionally critical period leading up to a general election during which the nature of the coverage that a candidate receives could well determine his or her success. TV3 has announced that it will, on principle, appeal the decision and the Commonwealth Press Union has announced that it will apply to intervene in support of the appeal, commenting that:¹⁴

CPU members fear that editors may be reduced to counting the number of articles or lines or minutes of air time allocated to each political party, undermining the rights of editors to make their own decisions as to what is or is not newsworthy.

B *Mangu v Television New Zealand Ltd*

One of the principal concerns of the media in the wake of the *Dunne* decision was a floodgates argument. Whilst the decision in *Dunne* related to an organised debate in which notions of equality and fair treatment were easy to assess, the reasoning in the judgment arguably applies with equal force to election coverage more generally, including news and current affairs coverage, one on one interviews with party leaders or spokespeople and documentary style coverage of particular issues. On 9 September 2005 the floodgates argument was tested when Mere Mangu, an independent candidate in the Maori electorate seat of Te Tai Tokerau, applied for judicial review of TVNZ's coverage of the contest in that electorate and, in particular, for failing to mention her candidacy when running a piece about the contest between the two main candidates (neither of whom was Ms Mangu).

Whilst counsel for both parties disavowed reliance on the *Dunne* decision,¹⁵ it is inconceivable that it did not influence the decision to bring the proceedings. This was only the second time in New Zealand history that a challenge had been made by way of judicial review to an editorial decision by a broadcaster during an election campaign, and the first had been less than a month earlier. The apparent agreement between counsel that "the principles applied by Ronald Young J do not assist in determining the issues raised by the present application"¹⁶ is explicable for tactical reasons only, given that Ronald Young J had found a distinctly more 'private' body in TV3 susceptible to judicial review for editorial decisions during an election campaign.

Thus, whilst *Dunne* may have influenced the decision to bring the case, the judgment itself was referred to solely to explain why it was not being referred to. Thus *Mangu* approaches the issue of susceptibility to review in an entirely different way and reaches the conclusion that:¹⁷

...at the micro level of gathering news and presenting the news item that is the subject of this proceeding, TVNZ was carrying out a function that is not amenable to judicial review. Had it been necessary for me to do so I would also have held...that in carrying out that function TVNZ is not carrying out a public function in terms of s 3(b) of the New Zealand Bill of Rights Act 1990.

¹⁴ *Dominion Post* 13 September 2005.

¹⁵ See n3 above, paragraph [54].

¹⁶ *Ibid.*

¹⁷ *Ibid.*, paragraph [19].

The essence of the argument advanced by the Plaintiff in *Mangu* was that TVNZ is a Crown Entity with its own empowering statute,¹⁸ carrying obligations under the Broadcasting Act 1989, thus making it a statutory body and rendering its decisions judicially reviewable. Lang J noted that, notwithstanding the statutory underpinning of TVNZ, not all of its decisions would be reviewable. His conclusion that the “micro level” of news gathering and presentation is not reviewable was based on the public policy of deference to editorial discretion. He appears to hold that editorial decisions are non-justiciable, although that terminology is not used.

Lang J held that TVNZ had a “fundamental constitutional right to gather and present news in the way that it sees fit”¹⁹ and that broadcasters had “traditionally operated on the basis that their right to freedom of speech and editorial independence entitles them to gather news and present news items free from influence and interference by any other party including the Court”.²⁰ By comparison there was only one reference to the “countervailing public interest [in] ‘ensuring that government elections are free fair and democratic’”.²¹

The judgment reviews the statutory and regulatory context in which TVNZ operates,²² particularly those aspects of the scheme which emphasise the editorial independence of TVNZ from commercial and political pressure and influence:²³

The consistent reference in the above legislation to TVNZ’s editorial independence is, in my view, a strong indicator that its day to day operational decisions in those spheres, divorced as they are from political influence, should not readily be susceptible to judicial review.

That reasoning is highly contestable. There is no logical link between the clear statutory goal that TVNZ be free from political and commercial influence, and the conclusion that it is not judicially reviewable. That implies that the involvement of the Court is in itself a form of political interference. The only other tenable interpretation of the above passage is that the availability of review would provide a vehicle to those seeking to improperly influence TVNZ’s editorial discretion. However the Judge’s comment – discussed earlier – that TVNZ should be able to operate “free from influence and interference by any other party *including the Court*”²⁴ tends to indicate that it is the Court rather than those seeking to use it that should be kept out of the equation.

It can also be powerfully argued that the prime legislative importance placed on freedom from political and commercial influence serves only to highlight the public power wielded by broadcasters and the countervailing necessity to ensure that they are not captured or improperly influenced by vested interests. The High Court, through judicial review, provides a mechanism to protect the public interest in the event that editorial independence is threatened. What if there was a tenable case that, in

¹⁸ Television New Zealand Act 2003.

¹⁹ See n3 above, paragraph [20].

²⁰ *Ibid*, paragraph [27].

²¹ *Ibid*, paragraph [21].

²² Ss12 and 28 of the Television New Zealand Act 2003 and the TVNZ Statement of Intent (year ending June 2006).

²³ See n3 above, paragraph [43].

²⁴ See n20 above (emphasis added).

broadcasting a news item at the “micro level”, TVNZ had been the subject of political or commercial influence? On the basis of the reasoning in *Mangu* judicial review would be unavailable. Given that, as we will see, the Broadcasting Standards Authority regime is retrospective there would be no available remedy. Thus the legislative and regulatory insistence on editorial independence points to the availability of judicial review, at least to the extent that review will be available if it is shown that such a decision was influenced in a prohibited manner.

Lang J noted that all broadcasters are subject to programming standards pursuant to the Broadcasting Act 1989 enforceable by the Broadcasting Standards Authority whose decisions are appealable to the High Court. He considered that the existence of a “structured complaints and appeals process”²⁵ was a further indicator that judicial review should not be available in relation to programming standards and presentation. Lang J also considered it undesirable for the Court to become a “parallel arbiter of programming standards”.²⁶ The treatment of Broadcasting Standards Authority regime and its relevance to the amenability of broadcasters to judicial review for programming decisions was dealt with in *Dunne* and *Mangu* in a relatively cursory fashion. The regime will be dealt with in some detail below.

II *DUNNE* AND *MANGU* – A COMPARISON

In summary Ronald Young J proceeded on the basis that TV3 was a private company not exercising statutory powers of decision, but that its decision on the format of this debate had sufficient public and constitutional importance to render it amenable to review. In contrast Lang J considered that TVNZ was exercising statutory powers but that its programming decisions were not reviewable on public policy grounds. Yet both judgments were given in the context of an election campaign and against claims that flawed editorial decisions would influence the electorate. As well as the philosophical difference between the judgments as to the weight to be attached to editorial freedom of broadcasters there is also a practical difference in the approach to the cases on their merits. Ronald Young J was not prepared to view the impact of the decision to exclude the Plaintiff party leaders in the context of the election campaign as a whole. He saw as irrelevant both TV3’s intention to include the excluded leaders in other programmes, and the fact that other broadcasters (most notably TVNZ) intended to run similar debates including the Plaintiffs. Nor did he give any weight to the timing of the debate, which took place more than a month prior to the election.

In contrast Lang J described the ten days that had passed since the offending broadcast as a “lifetime in terms of the electoral contest”.²⁷ He made reference to the Plaintiff’s appearance on other broadcasts since the news item and her ongoing campaigning in the electorate.

Had Ronald Young J placed any weight on these factors it would have reduced the significance of the leaders’ debate in issue, and therefore made his reliance on its public impact more difficult to justify. Indeed one senses in the judgment an overplaying of the likely significance of one debate a long way out (in election campaign terms) from

²⁵ Ibid, paragraph [48].

²⁶ Ibid, paragraph [51].

²⁷ Ibid, paragraph [76].

the election. Recent electoral history appears to have been a strong underlying factor with two references in the judgment to the 2002 election in which Mr Dunne's United Future party rose from 0.4% in the polls to an election night result of 6.9% on the back of his performance in a televised leaders' debate. The format of the 2002 debate included 'the worm', a graphical representation during the debate of the response of an audience of undecided voters to the individual leaders. The 'worm' had responded very positively to Mr Dunne in that debate and was largely credited with his party's surge in electoral support.²⁸ The proposed TV3 debate in 2005 also incorporated a 'worm' like feature into its format.

Reference to that 2002 performance by Mr Dunne appeared to convince the Court that a single leaders' debate was capable of having a significant effect on the outcome of an election. It is telling that the judgment puts the TV3 leaders' debate as if it was the only one: "*the* leaders' debate has in the past been described as a 'turning point on the campaign', and one that has produced a 'dramatic change' in voting patterns".²⁹ There is no reference in the judgment to the fact that the 2002 leaders' debate had been broadcast by TVNZ not TV3, nor that TV3's equivalent debate in 2002 had only five participants, none of whom was Mr Dunne. His absence from that debate in 2002 did his campaign no appreciable harm.

Arguably Ms Mangu's claim of poor treatment by TVNZ was at least as strong on the facts as the *Dunne* complaint. She claimed that TVNZ had treated the contest in her electorate as being effectively between two candidates on the basis of a TVNZ/Colmar Brunton poll which indicated she was out of the running. TVNZ based its decision not to mention Ms Mangu in its news article on the fact that she had insufficient support in the poll to "cross the threshold for significance for mention".³⁰ Ms Mangu contended that the reason for her apparent lack of support in the poll was that the question asked of respondents to the poll did not genuinely allow for an independent candidate to be nominated. The question is worthy of reproduction:³¹

Now thinking about your other vote, the electorate vote for your local MP in the Te Tai Tokerau electorate, when you choose your local MP, which party, if any, is this candidate likely to come from?

Why the polling company did not simply list the candidates and their parties (if any) and ask the respondents who they intended to vote for is difficult to understand. The question seems designed to obtain flawed data. As is noted in the judgment 16% of the respondents indicated that their preferred candidate would come from two parties who did not even have candidates standing in that electorate. Ms Mangu was well known in the electorate and had garnered 15% of the vote in the previous election when she had also stood as an independent candidate. The news article would, at least arguably, have been likely to minimise Ms Mangu's election prospects on the basis of what was apparently flawed data. Using Ronald Young J's test of the impact of a broadcasting decision on the election campaign, Ms Mangu could have expected a better result. That

²⁸ The United Future logo used in television advertising for the 2005 election campaign even had a picture of the 'worm' graph incorporated into it.

²⁹ See n2 above, paragraph [13] (emphasis added).

³⁰ See n3 above, paragraph [6].

³¹ *Ibid*, paragraph [69].

is particularly so given that the body she was seeking to review was, as a Crown Entity and statutorily created body, ‘public’ in a way that TV3 is not. The real issue is whether in the context of election coverage the editorial freedom of the news media, and the traditional willingness of the courts to recognise and defer to that freedom, should give way to greater scrutiny given that an election campaign is an intensely important constitutional time over which the news media wield significant power.

Having reviewed and compared the two cases I will now consider whether public and private broadcasters should be susceptible to judicial review for broadcasting decisions during election campaigns, and if so on what basis and to what standard.

III SUSCEPTIBILITY TO JUDICIAL REVIEW - TVNZ

The *prima facie* susceptibility of TVNZ to judicial review can be dealt with straightforwardly. By reference to its history and status it is clearly susceptible to some level of public law scrutiny. Between 29 November 1988 and 28 February 2003 TVNZ was subject to the State Owned Enterprises Act 1986.³² The Television New Zealand Act 2003 provided for TVNZ to be split into two entities. The first was a transmission company that would continue to be a State Enterprise and the second a television broadcaster that would be a Crown entity³³ (to continue to be called TVNZ). TVNZ became a Crown Entity Company registered under the Companies Act 1993 but wholly owned by the Crown.³⁴ A principal purpose of the reforms was to provide a charter for TVNZ imposing programming responsibilities on it to reflect its position as a publicly owned national broadcaster.³⁵ The content of the charter is set out in the Act³⁶ and includes requirements that TVNZ will:

- (ii) strive always to set and maintain the highest standards of programme quality and editorial integrity;
- (v) feature programming that serves the varied interests and informational needs and age groups within New Zealand society, including tastes and interests not generally catered for by other national television broadcasters;
- (ix) play a leading role in New Zealand television by complying with free-to-air codes of broadcasting practice, in particular any code with provisions on violence.

The Act also sets out the ways in which TVNZ is to fulfil its charter goals including to:³⁷

- (i) provide independent, comprehensive, impartial, and in-depth coverage and analysis of news and current affairs in New Zealand and throughout the world and of the activities of public and private institutions.

The reforms are significant to the susceptibility of TVNZ to judicial review. Prior to the reforms TVNZ was subject to s4 of the State Owned Enterprises Act 1986 and had to be as “profitable and efficient as comparable businesses that are not owned by the

³² S3(2) State-Owned Enterprises Amendment Act 1988 and s30 Television New Zealand Act 2003.

³³ S3(a) Television New Zealand Act 2003.

³⁴ S7(1)(b) and Schedule 2 Crown Entities Act 2004.

³⁵ *Ibid*, s3(b).

³⁶ *Ibid*, s12(2).

³⁷ *Ibid*.

Crown”³⁸ and be “an organisation that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates and by endeavouring to accommodate or encourage these when able to do so”.³⁹ The Privy Council in *Mercury Energy Ltd v Electricity Corp of New Zealand*⁴⁰ held that State Owned Enterprises were in principle amenable to judicial review because, inter alia, they are statutorily created public bodies carrying on business in the public interest. That conclusion applies with greater force to TVNZ since the 2003 reforms given the increased emphasis on its public obligations and the decreased emphasis on commercial success.⁴¹ Interestingly, in light of Lang J’s apparent conclusion that TVNZ’s editorial decisions are non-justiciable, the increased public obligations on TVNZ are in the main directed towards its editorial decisions at the “micro level”, although both the Television New Zealand Act 2003 and the charter strongly maintain the importance of TVNZ’s editorial independence from commercial and political influence.⁴² Mention needs to be made of the decision of Blanchard J in *TVNZ Ltd v Newsmonitor services Ltd*⁴³ in which he held that TVNZ’s trading and copyright decisions were not subject to s3(b) of the New Zealand Bill of Rights Act 1990. However, that conclusion was based on the Court of Appeal decision in *Auckland Electric Power Board v Electricity Corporation of New Zealand*⁴⁴ in which it had been held that the trading activities of State Owned Enterprises were not susceptible to judicial review, a decision overruled by the Privy Council in *Mercury Energy Ltd*⁴⁵ discussed above. Whether editorial decisions are justiciable and, if they are, what standard of review should apply are different issues that will be dealt with later.

IV SUSCEPTIBILITY TO JUDICIAL REVIEW – TV3

It is much harder to argue that TV3 is susceptible to judicial review for its editorial decisions. It is a paradigmatically private body. It was New Zealand’s first privately owned national television network. In 1997 CanWest, a Canadian company, acquired 100% ownership of TV3, having acquired a 20% stake in the network in 1991 when TV3 was in receivership.⁴⁶ There is no element of public ownership in TV3, nor has there ever been. TV3’s frequency coverage reaches 98% of New Zealand households and it claims to achieve a 25% share of the national Television Audience.⁴⁷

Ronald Young J described TV3 as a “public free to air broadcaster”.⁴⁸ The use of the word “public” in that description is unnecessary and self-serving. TV3 is a broadcaster and its programmes are free to watch with its revenue coming from advertising. In order to broadcast, TV3 requires licences to provide it with exclusive access to the

³⁸ S4(1)(a) State Owned Enterprises Act 1986

³⁹ Ibid, s4(1)(c).

⁴⁰ [1994] 2 NZLR 385.

⁴¹ S5 Television New Zealand Act 2003 requires TVNZ to be no more than “financially viable” and a “going concern”.

⁴² See text at n23 above.

⁴³ [1994] 2 NZLR 91.

⁴⁴ [1994] 1 NZLR 551.

⁴⁵ See n40 above.

⁴⁶ See *TV3 – History* at <http://www.tv3.co.nz/corporate/index.cfm> (accessed 2 October 2005).

⁴⁷ Ibid.

⁴⁸ See n2 above, paragraph [29].

bandwidth frequency upon which it transmits. Licences are issued under the Radiocommunications Act 1989 and are not used to regulate content. The exception is s180 which incorporated conditions into TV3's licences until 31 December 1992 requiring it to have the interests of Maori as a prominent element of its programming and to achieve certain percentages of New Zealand "identity and culture"⁴⁹ focussed programming within its first three years of broadcasting. However, since 1992 TV3's licences have not been used to regulate content.

How then to subject TV3 to judicial review? Ronald Young J placed some weight on aspects of TV3's status as a "public free to air broadcaster" and the obligations imposed by s4 of the Broadcasting Act 1989 (which will be analysed in some depth later). However, he did not consider that those factors would be sufficient on their own to render TV3 susceptible to review. He also relied upon Cooke P's obiter comments in his separate concurring judgment in *TV3 Network Ltd v Eveready New Zealand Ltd*⁵⁰ to the effect that TV3 could be subject to the New Zealand Bill of Rights Act 1990 through s3(b) which applies to "acts done by any person or body in the performance of any public function, power or duty conferred or imposed on the person or body by or pursuant to law". Cooke P relied on the fact that TV3 was a licensed broadcaster, with obligations under the Broadcasting Act 1989 and that it claimed to be broadcasting in the public interest, to conclude that the Bill of Rights *may* apply to it. There is a recognised consonance between the test for susceptibility to judicial review for private bodies and the public function test under s3(b) of the Bill of Rights⁵¹ (and in an English context under s6(3)(b) of the Human Rights Act 1998 (UK)⁵²).

The application of s3(b) of the Bill of Rights to private broadcasters was considered in more detail by Randerson J in *Ransfield v Radio Network Ltd*⁵³ in the context of a claim by talkback radio callers who had been banned by a number of radio stations from participating in radio programmes. The Judge held that as a result of being licensed the broadcasters were performing a "function or power conferred by law" and that they were acting in the public interest by facilitating and promoting freedom of expression. Nonetheless they were paradigmatically private bodies regulated only in a "light handed"⁵⁴ way through s4 of the Broadcasting Act 1998 and the retrospective complaints procedure of the Broadcasting Standards Authority. A distinction was drawn with the state ownership of public radio broadcasters and the much greater degree of control exercised over them by Government. He held that the State has left private radio broadcasters comparatively alone and so should the Courts. Randerson J concluded that the defendant private radio broadcasters were not subject to the Bill of Rights. The reasoning applies with equal force to the identical distinctions in ownership and control between private and public television broadcasters.

⁴⁹ S180(2)(c) Radiocommunications Act 1989.

⁵⁰ [1993] 3 NZLR 435.

⁵¹ See *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, 245-246.

⁵² See, e.g., *Hampshire County Council v Beer* [2003] LLR 681 but see also Professor Oliver's concern that the development of judicial review jurisprudence in the UK may have been influenced by the Order 53 procedures so as to make such comparisons less helpful: *Frontiers of the State: Public Authorities and Public Functions Under the Human Rights Act* (2000) PL 476, 492.

⁵³ See n51 above.

⁵⁴ *Ibid*, 248.

V THE ‘PUBLIC IMPACT’ TEST

Ransfield dealt with the exclusion of talkback callers. Whilst it dealt with issues of freedom of expression and rights of public access to the media, it did not deal with the public impact of broadcasting decisions in the specific context of an election campaign, which was the decisive factor in *Dunne*. Ronald Young J relied upon the “exceptional” category of case in which purely private decisions may have such a significant public impact that they become amenable to review. In support of the existence of that test he cited a passage from *Constitutional and Administrative Law in New Zealand*⁵⁵ in the following form:⁵⁶

The Courts may also review commercial bodies whose decisions have public impact. It is a question of degree the point at which a private commercial operation may merge into a public one attracting review.

Unfortunately the passage quoted omitted the word “public”, which appears before the words “commercial bodies” in the original text, thus rather changing the meaning. In the passage cited Joseph is principally concerned with the availability of judicial review for commercial decisions of public or quasi-public authorities, noting immediately after the above passage that:⁵⁷

Whereas it was once thought that commercial bodies were a priori exempt from review, recent courts have been sensitive to the impact of commercialised public functions and to the public consequences of commercial decisions by public bodies. Applications for review may lie against state-owned enterprises, Crown Entities and non-statutory industry bodies exercising public regulatory functions. Wholly voluntary or private organisations may be reviewable on ordinary public law principles.

The final sentence of this passage was specifically relied upon by Ronald Young J, as was the decision of the Court of Appeal in *Royal Australasian College of Surgeons v Phipps*⁵⁸ cited in support of the proposition that the Courts have been increasingly willing to review:⁵⁹

...exercises of power that in substance are public or have important public consequences, however their origins and the persons exercising them might be characterised.

However the Court in *Phipps* prefaced that statement by saying that:

...the attention of the parties and of the Court should be focussed on the issues of substance, especially the issues of what actual exercises of power are reviewable and on what grounds. In that inquiry the origins of the power and the various characteristics of the decider would often be very important, indeed frequently decisive.

Phipps involved judicial review of the Royal College of Surgeons in respect of a report into the competence of a surgeon at the request of his employer. The comments quoted above were ultimately obiter because the Court held that the College was reviewable as

⁵⁵ Joseph (2nd Ed, Brookers, Wellington, 2001).

⁵⁶ See n2 above, paragraph [33]. The original quotation appears in *Joseph* *ibid*, 750.

⁵⁷ *Joseph* *ibid*, 750,751.

⁵⁸ See n5 above.

⁵⁹ See n2 above, paragraph [33]. The original quotation appears in *Phipps* (see n5 above) at 11.

against its own articles of association on the basis of the extended definition of “statutory power” in the Judicature Amendment Act 1977.

Cases in which private bodies have been held judicially reviewable because of the public consequences of their decisions are rare.⁶⁰ Most of the case law in New Zealand that refers to the liberalisation of the susceptibility of private bodies to judicial review has concerned bodies that have been corporatised/privatised,⁶¹ to whom public functions have been given by public authorities by contract⁶² or who regulate with the implied consent of the state.⁶³ So whilst it is often said that the focus for review has shifted away from the source of the power being exercised⁶⁴ in reality the status of the decision maker remains an often decisive factor. The threshold test for amenability to judicial review has had to become more subtle and responsive to deal with the grey areas created by corporatisation, privatisation and contracting out of public services, but it does not herald the use of administrative law to control the exercise of power generally. Rather the province of administrative law in this context remains the supervision of *public* power.⁶⁵ That is, power wielded by the state, or because of some level of relationship with the state, or because the subject matter is ‘public’, for example because it relates to monopoly control of public resources or utilities.⁶⁶ The thrust of the judgments from the Court of Appeal (UK) in *R v Disciplinary Committee of the Jockey Club ex parte Aga Khan*⁶⁷ also emphasise the necessity for the power being exercised to be in some way governmental.

The watershed case of *R v Panel & Take-Overs and Mergers, ex P Datafin plc*⁶⁸ heralded a shift away from the previous focus on the source of the power and towards the nature of it. It is in *Datafin* that the seeds of the ‘public impact’ test relied upon by Ronald Young J are to be found. The decision was cited in *Phipps* and in the passages in Joseph relied upon in *Dunne*. The principle arising out of *Datafin* and affirmed in the New Zealand context in *Electoral Commission v Cameron*⁶⁹ and *Phipps*⁷⁰ was most recently put by the Court of Appeal in *Wilson v White*⁷¹ in this way:

The principle is that the Courts, in considering the amenability of administrative action to judicial review, are less concerned with the source of the power exercised by decision maker (and in particular whether or not it was statutory) and now more readily in the past to treat as reviewable the exercise of *any power having public consequences*. *This is so even if the power is exercised by a private organisation*. In all such cases the power must be exercised on public law principles. (emphasis added)

⁶⁰ See the discussion in Sinclair *Companies and Judicial Review* Comp. Law. 1994, 15(8), 235-241 and Sinclair *Judicial review of the exercise of public power* Denning L.J. 1992, 193-224.

⁶¹ E.g. *Mercury Energy Ltd v Electricity Corporation of New Zealand* see n40 above and *Pacific Towing Ltd v Ports of Auckland Ltd* (High Court Auckland, 7 August 1997, CL13/97)

⁶² E.g. *Challis v Destination Marlborough Trust Board Inc* [2003] 2 NZLR 107, 126-127.

⁶³ E.g. *Electoral Commission v Cameron* [1997] 2 NZLR 421.

⁶⁴ E.g. *Wilson v White* [2005] 1 NZLR 189, 196 (CA) per McGrath J.

⁶⁵ For a contrary view see *Jones v Sky City Auckland* [2004] 1 NZLR 192 paragraph [27].

⁶⁶ *Ibid*, paragraph [20].

⁶⁷ [1993] 2 All ER 853.

⁶⁸ [1987] QB 815.

⁶⁹ See n63 above, 433.

⁷⁰ See n5 above, 11.

⁷¹ See n64 above.

As well as begging the question: What amounts to “public consequences”? - the formulation arguably misrepresents and oversimplifies the reasoning in *Datafin*. *Datafin* involved a challenge by way of judicial review to a decision of the Panel on Take-Overs and Mergers in relation to the conduct of parties to a particular take-over on the London Stock Exchange. An urgent judgment was given by the Court of Appeal upholding the reviewability of the Panel but refusing to do so on the facts.

Donaldson MR placed substantial weight on the legal structures that surround the Panel allowing it to act without legal authority but with immense de facto power:⁷²

The picture that emerges is clear. As an Act of government it was decided that, in relation to take-overs, there should be a central self-regulatory body which would be supported and sustained by a periphery of statutory powers and penalties wherever non-statutory powers and penalties were insufficient or non-existent or where EEC requirements called for statutory provisions.

He noted in respect of the jurisdiction to judicially review that:⁷³

In all the reports it is possible to find enumerations of factors giving rise to the jurisdiction, but it is a fatal error to regard the presence of all those factors as essential or as being exclusive of other factors. Possibly the only essential elements are what can be described as a public element, which can take many different forms, and the exclusion from the jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction.

...

I should be very disappointed if the Courts could not recognise the realities of executive power.

It is Lloyd LJ's judgment which provides the foundation of the ‘public impact’ test. He coined something of the phraseology that is now revealed in the New Zealand cases such as *Wilson* and *Dunne*. Given its historical importance it is repeated in full:⁷⁴

I do not agree that the source of the power is the sole test whether a body is subject to judicial review...Of course the source of the power will often, perhaps usually, be decisive. If the source of the power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If at the other end of the scale, the source of the power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review.

...

But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. *If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may...be sufficient to bring the body within the reach of judicial review.* It may be said that to refer to ‘public law’ in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other. (emphasis added)

The first point to note about the above passage is the way in which the formulation has changed in the citation. Without any judicial discussion the *Datafin* formulation of “public law consequences” has become, in the New Zealand case law, “any power

⁷² See n68 above, 835.

⁷³ *Ibid*, 838.

⁷⁴ *Ibid*, 847.

having public consequences”. The difference between the formulations is significant. The first (although arguably tautological) when read in context focuses on the existing public duties of the body in question. The second removes the test from the confines of public duties to an assessment of actual effect on the public, thus widening the potential scope of judicial review significantly. Just what “public consequences” are is highly contestable. The formulation also ignores the comments in *Ex p Walsh*⁷⁵ in which Donaldson MR said that he could not find “any warrant for equating public law with the interest of the public”.

Datafin is also directed to the particular context of tribunals, or bodies exercising quasi-judicial functions, rather than private companies making particular decisions having significant consequences. All of the judgments emphasise that the source of the power and the legal status of the body exercising it remain often decisive factors in determining whether its decisions are amenable to judicial review, just as they were with the Panel itself.⁷⁶ As Birkenshaw puts it, the court in *Datafin* showed “an awareness of the compenetration of state and society and the willingness of the courts to use public law tests to review the actions of ostensibly private law bodies where such bodies are a cipher for state institutions...”⁷⁷.

Notwithstanding the breadth of the expression of the test of ‘public consequences’ the New Zealand case law is limited.⁷⁸ The cases cited by Joseph in support the proposition that “Wholly voluntary or private organisations may be reviewable on ordinary public law principles”⁷⁹ do not, on proper analysis, justify the breadth of the test as it has been put.

In *Electoral Commission v Cameron*⁸⁰ the Court of Appeal (hearing the case at first instance) held that the Advertising Standards Complaints Board was amenable to judicial review on the basis that it was exercising public regulatory powers akin to those discussed in *Datafin* and on the basis of the extended definition of “Statutory Power” in s3 of the Judicature Amendment Act 1972. The Board itself is an unincorporated body formed under the auspices of the Advertising Standards Authority, an incorporated body formed consensually by participants in the advertising industry. Whilst private in formation the Board had promulgated a regulatory code in relation to the content of advertisements and enforces that code through a complaints procedure. It proceeds on the assumption that its rulings are binding. The role of the Board has statutory recognition through s8 of the Broadcasting Act 1989 which demarcates the respective jurisdictions of the Board and the Broadcasting Standards Authority, which is a creature of statute. The amenability of the Board to review was not seriously challenged by the

⁷⁵ [1984] 3 All ER 425,430 cited with approval in *R v Football Association Ltd, ex parte Football League Ltd* [1993] 2 All ER 833.

⁷⁶ See discussion in Lowe *Public Law and Self-Regulation* [1987] 2 WLR 669.

⁷⁷ Birkinshaw *Corporatism and Accountability* in Cox and O'Sullivan (eds), “The Corporate State: Corporatism and the State Tradition in Western Europe” (Edward Elgar Publishing Ltd, Aldershot, 1988), chapter 3, 51.

⁷⁸ One of the difficulties in analysing the New Zealand case law relating to the public impact test is the longstanding misapprehension that judicial review was only available by bringing a decision within the confines of the Judicature Amendment Acts 1972 and 1977 corrected in *Mercury Energy* (see n40 above). See also Taggart *Administrative Law Review* (2000) NZ Law Rev 439, 459.

⁷⁹ See n55 above, 751.

⁸⁰ See n63 above.

parties and understandably so. The Board is a clear example of a private tribunal exercising a public regulatory function with statutory support.

As already discussed *Phipps v Royal Australasian College of Surgeons* was also determined on the basis of the extended definition of “Statutory Power” and is not an example of the public consequences of private decisions rendering a body subject to review.

*Finnigan v NZ Rugby Football Union*⁸¹ involved a challenge by members of rugby clubs to a decision taken by the NZRFU to accept an invitation for the All Blacks to tour South Africa. The claim was struck out at first instance on the grounds that the Plaintiffs did not have standing to bring the claim as they had no contractual relationship with the Union. Therefore they could not, on traditional private law principles, challenge an internal decision of an incorporated society on the grounds that the decision failed to comply with the society’s objects⁸². The strike out order was successfully appealed and Cooke J held that a more liberal approach needed to be taken to standing because the crucial public importance of the decision to tour required it to be treated on more of a public, rather than private, law basis:⁸³

While technically a private and voluntary sporting organisation, the Rugby Union is in relation to this decision in a position of major national importance, for the reasons already outlined. In this particular case, we are not willing to apply to the question of standing the narrowest of criteria that might be drawn from private law fields. In truth the case has some analogy with public law issues. This is not to be pressed too far. We are not holding that, nor even discussing whether, the decision is the exercise of a statutory power – although that was argued. We are simply saying that it falls into a special area where, in the New Zealand context, a sharp boundary between public and private law cannot be drawn.

That theme was taken up by Casey J in the High Court when he granted an application for an interim injunction preventing the All Blacks from touring. Given that the Court of Appeal had upheld the Plaintiffs’ standing to bring the claim Casey J was concerned with whether there was an arguable case that the decision to tour failed to comply with the Union’s objectives. He required a greater level of responsibility from the Union because of the unique public importance of the decision it was making:⁸⁴

But I feel that I must have regard to the unique importance of this decision in the public domain and the effect it could have on New Zealand’s relationships with the outside world and on our community at large...I am satisfied that such a situation requires that body (or any other in a similar position) to exercise more than good faith in reaching its decision; it must also exercise that degree of care which it has been found appropriate to impose on statutory bodies in the exercise of their powers affecting the legal rights or legitimate expectation of the public.

...It is the nature of the decision and the elements of great public interest which give rise to this extra obligation to be careful in reaching it...

⁸¹ [1985] 2 NZLR 159 (CA), discussed in Eagles *Public Law and Private Corporations* CLJ 1986, 45(3), 406-412.

⁸² *Finnigan v NZ Rugby Football Union* [1985] 2 NZLR 159, 167-172. (per Davidson CJ).

⁸³ *Ibid*, 179.

⁸⁴ *Ibid*, 186.

So whilst *Finnigan* itself was pleaded on private law grounds the decision is authority for the proposition that there are circumstances in which a wholly private body will have public law obligations by virtue of the public importance of a particular decision that it makes.⁸⁵ Caution needs to be exercised in taking that proposition too far. The facts of *Finnigan* represent a particular moment in New Zealand history. As McMullin J put it in the decision refusing leave for the Union to appeal to the Privy Council:⁸⁶

Such has been the intensity of feeling on this matter, and so great its affect upon the community, that only those who lived in New Zealand and experienced the impact on this country of the 1981 tour can fully appreciate the importance of the 1985 tour as a public issue in New Zealand and the divisions of opinion and differences of feeling it which it engendered within the country.

Given the lengths that the Court of Appeal went to in *Finnigan* to highlight the unique circumstances of the case, it must be said that to subject wholly private bodies to public law obligations because of the importance of a particular decision is a genuinely exceptional proposition requiring real and acute public importance,⁸⁷ the sort of decision, such as that in *Finnigan*, that must be made in the public interest notwithstanding that by quirk of history it has fallen to be made by a private body.⁸⁸

The remaining authority cited by Joseph is *Peters v Collinge*⁸⁹ which involved a challenge to a clause in a nomination form for electoral candidates standing for the National Party that purported to restrict unsuccessful candidates from standing for Parliament either independently or for another party. Fisher J recognised the exceptional nature of, what he called, “non-contractual” judicial review of private bodies, and the proper nature of the respective categories in *Datafin* and *Finnigan*:⁹⁰

The National Party is an unincorporated society. Fundamentally, the jurisdiction to review steps taken by such a society is to be found in contract. In some special situations a private body may be subject to non-contractual judicial review, for example where it exercises quasi-public functions (see for example, *R v Panel on Take-overs and Mergers, ex parte Datafin Plc*), or contemplates an action of significant direct impact upon the public (*Finnigan v New Zealand Rugby Football Union Inc*). In some trade cases, exclusion powers or their exercise can also be struck down as unreasonable restraints of trade. Time constraints permit me to say only that in my view this is not one of those exceptional cases which fall outside the scope of contract.

There has been a substantial body of recent case law in the United Kingdom addressing when a private body is sufficiently public to acquire obligations under the Human Rights Act 1998 (UK) through s6(3)(b) which extends the definition of a “public authority” (to which the Act applies) to include “any person certain of whose functions are of a public nature.” In *Poplar Housing and Regeneration Community Association*

⁸⁵ Although see Cooke J’s possible reservations of Casey J’s approach in the judgment refusing leave to appeal, *ibid*, 193.

⁸⁶ *Ibid*, 203.

⁸⁷ In *Football Association Ltd* (see n75 above) jurisdiction to review was not established because the decision at issue was not sufficiently public.

⁸⁸ Although see the discussion of *Finnigan* in relation to incorporated societies by Richardson J in *Walker v Mount Victoria Residents Association Inc* [1991] 2 NZLR 520.

⁸⁹ [1993] 2 NZLR 554

⁹⁰ *Ibid*, 566 (citations omitted).

*Ltd v Donaghue*⁹¹ the Court of Appeal noted that the test had been inspired by the approach of the Courts since *Datafin* to the question of amenability of private bodies to judicial review. Lord Woolf said:⁹²

What can make an act, which would otherwise be private, public, is a feature or combinations of features which impose a public character or stamp on the act. Statutory authority for what is done can at least help to mark the act as being public; so can the extent of control over the function exercised by another body which is a public authority. The more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public. However, the fact that the acts are supervised by a public regulatory body does not necessarily indicate that they are of a public nature.

He noted that the fact that a body is charitable and therefore sees itself as acting in the public interest does not point to the body being a public authority. Further “even if such a body performs functions, that would be considered to be of a public nature if performed by a public body, nevertheless such acts may remain of a private nature for the purposes of section 3(b) and 6(5)”.⁹³ In *Poplar* itself the fact that the defendant effectively stood in the shoes of a core public authority was sufficient to render *Poplar* itself a public authority. Nonetheless it was described as a “borderline case”.⁹⁴

In *Aston Cantlow v Wallbank*⁹⁵ the House of Lords made some limited comment on the test to determine when private bodies are performing public functions. Lord Nicholls of Birkenhead said:⁹⁶

Clearly there is no single test of universal application. There cannot be, given the diverse nature of governmental functions and the variety of means by which these functions are discharged today. Factors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.

As earlier noted Randerson J in *Ransfield* (the talkback radio case) considered that private radio stations were not subject to the New Zealand Bill of Rights as they were not performing a “public function” in accordance with s3(b). The Judge concluded that there was no single test for ‘publicness’ but rather:

In a broad sense, the issue is how closely the particular function, power or duty is connected to or identified with the exercise of the powers and responsibilities of the state. Is it ‘governmental in nature’ or is it essentially of a private character?

As Rishworth notes, this formulation has something of “the ‘I know it when I see it flavour, famous as United States Supreme Court Justice White’s test for hard core pornography”.⁹⁷ That criticism is probably unavoidable. However, the formulation does recognise that the purpose of the test is to identify when what looks like private

⁹¹ [2001] 4 All ER 604.

⁹² *Ibid*, paragraph [65].

⁹³ *Ibid*.

⁹⁴ *Ibid*, paragraph [66].

⁹⁵ [2003] 3 WLR 283.

⁹⁶ *Ibid*, paragraph [12], but see the criticism of this test as wrongly limiting the application of the Human Rights Act by Sunkin, *Pushing Forward the Frontiers of Human Rights Protection: The Meaning of Public Authority Under the Human Rights Act* [2004] PL 643.

⁹⁷ Rishworth, “Human Rights Review” [2005] NZ Law Review 87, 91.

power is actually public, not to seek back door control of purely private power. Randerson J considered that factors relating both to the status of the body concerned and the nature of the function being exercised were relevant including ownership, source of the power, governmental control, public funding, whether the function is exercised in the public interest and whether the body exercises monopoly powers.⁹⁸ As Rishworth argues this contextualised approach is necessary as there are extremely few functions which when viewed in isolation from the actor are intrinsically public.⁹⁹

In summary, to hold broadcasters' editorial decisions susceptible to judicial review requires an assessment of status, the regulatory and legislative scheme, and the public impact (in a *Finnigan* sense) of broadcasting decisions made during election campaigns.

I have already discussed TV3's legal status. In light of the factors that have emerged from the decisions reviewed above it is possible to make some additional comments. TV3 is licensed and to that extent is subject to some form of regulatory control. However, the licensing regime is designed to ensure that broadcasters have exclusive control of radio frequencies to allow them to broadcast without interference. It is not (any more) used to impose conditions as to content. Thus in terms of licensing TV3 is in no different in position to any number of other people who require licenses to operate, for example, liquor distributors, heavy machinery drivers, doctors and teachers. The licensing regime does not create legal or de facto monopolies, as for example casino licenses can do.¹⁰⁰ TV3 has never been in public ownership and it has not stepped into the shoes of any public body. TV3 is not an example of the State using corporate mechanisms to further governmental goals.¹⁰¹ The fact that TVNZ, as a publicly owned national broadcaster with specific public service obligations under its Act and charter, exists in the same market as TV3 is a strong argument for not holding TV3 to public law obligations. The public interest in public service broadcasting, generally and at election time, can be served with a ready made vehicle in TVNZ.

VI LEGISLATIVE AND REGULATORY FRAMEWORK

The use of radio and television broadcasts as an election campaign tool is a relatively new phenomenon. Until the election of 1938 broadcasting rules promulgated by the Broadcasting Board prohibited the airing of programmes which concerned "politics or other controversial matters". Until the 1935 election candidates for office were expressly banned from radio. The first Labour Government passed the Broadcasting Act 1936 which removed the ban on the broadcasting of political speech and moved the ownership of New Zealand's four radio stations to the Crown under the control of the Minister of Broadcasting.¹⁰² Private ownership of broadcasters was permitted under the Broadcasting Corporation Act 1961. The first election campaign to involve television

⁹⁸ See n51 above, 247, 248.

⁹⁹ See n97 above, 92.

¹⁰⁰ See e.g. *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621.

¹⁰¹ As discussed in Taggart, *Corporatisation, Privatisation and Public Law* (Legal Research Foundation, No 31, Auckland 1990), 28.

¹⁰² *Broadcasting and Television*, "An Encyclopaedia of New Zealand", edited by McLintock (1966) – now *Te Ara - The Encyclopedia of New Zealand* at <http://www.TeAra.govt.nz/1966/B/BroadcastingAndTelevision> (accessed 2 October 2005).

coverage was in 1963¹⁰³ and television has become the single most important medium for political candidates seeking office since then.

The regulation of broadcasters generally is relatively light-handed. Broadcasters are subject to obligations pursuant to s4 of the Broadcasting Act 1989 which provides that each broadcaster is responsible for maintaining 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

The Act creates the Broadcasting Standards Authority which determines complaints about broadcasters and encourages broadcasters to develop codes of broadcasters' practice which include the "Free to Air Television" and "Election Programmes" codes. The "Free to Air" code recognises the particular importance of "balance and impartiality"¹⁰⁴ when dealing with political issues, and that "no particular formula can be advanced for the allocation of time to interested parties on controversial public issues"¹⁰⁵. Those specific guidelines follow the general statement that in relation to controversial issues of public importance¹⁰⁶:

...reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme *or within the period of current interest.* (emphasis added)

Complaints about breaches of s4 must be made first to the broadcaster concerned and then, if a complainant is dissatisfied, to the Broadcasting Standards Authority.¹⁰⁷ The complaints procedure is retrospective in that a complaint can only be made once a programme has been aired.¹⁰⁸ If a complaint is found to be justified the Authority can order the broadcaster to publish a statement relating to the complaint (s13(1)(a)), order the broadcaster to refrain from broadcasting for a period not exceeding 24 hours¹⁰⁹ (s13(1)(b)(ii)), order the broadcaster to reconsider the complaint (s13(1)(c)) or order the payment of up to \$5000 to the complainant if the breach relates to privacy (s13(1)(d)). Section 13A provides greater powers to the Authority where it upholds a complaint about a programme considered to be injurious to the public good and which is part of a series. The Authority can order the production of material relating to the rest of the series and can order that any particular programme in the series, or the series as a whole, not be broadcast. The jurisdiction of the Authority is exclusive in that s4(3) provides

¹⁰³ New Zealand Electoral Commission *History of the Vote* at <http://www.elections.govt.nz/study/history/history-media.html> (accessed 28 August 2005).

¹⁰⁴ *Free to Air Television Code of Broadcasting Practice* Broadcasting Standards Authority, 1 July 2005, Standard 4a.

¹⁰⁵ *Ibid*, Standard 4b.

¹⁰⁶ *Ibid*, Introduction.

¹⁰⁷ S8 Broadcasting Act 1989.

¹⁰⁸ *Ransfield* see n51 above, paragraph [30].

¹⁰⁹ There are no reported cases of this penalty being considered by the Authority.

that “No broadcaster shall be under any civil liability in respect of any failure to comply with any of the provisions of this section.” Section 18 gives a right of Appeal to the High Court against decisions of the Authority with such appeals being dealt with as if they were appeals against the exercise of a discretion.

Section 13A is the only provision that provides the Authority with powers in respect of programmes that have yet to be broadcast. This, as Ronald Young J noted, meant that the *Dunne* Plaintiffs had no immediate redress through the Authority. The absence of any such redress was considered to be a policy reason supporting the jurisdiction to review. There is support for that approach in *Scottish National Party v Scottish Television PLC & Anor*¹¹⁰ in which Lord Eassie held that the absence of regulatory power to prohibit programmes in advance indicated that the Court’s supervisory jurisdiction remained. The alternative argument is that Parliament has set down standards in s4 and granted the Authority exclusive jurisdiction to maintain those standards, but only on a retrospective basis. That structure indicates a policy decision not to subject broadcasters to pre-broadcast scrutiny, presumably because of the practical difficulties associated with it and the need to respect editorial freedom of broadcasters to the greatest extent possible. This also reflects the long standing public policy against prohibiting speech in advance of publication.¹¹¹ It is unconvincing to say that the absence of an administrative remedy therefore strengthens the jurisdiction of the Court to intervene.

Part 6 of the Broadcasting Act 1989 was not referred to in *Dunne*. It provides a comprehensive set of rules for the broadcasting of “election programmes” during an election campaign.¹¹² An “election programme” is defined as:¹¹³

...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:

“Election programmes” are prohibited¹¹⁴ unless they fall into one of the following highly regulated categories:¹¹⁵

1. Opening or closing addresses by political parties which TVNZ and Radio New Zealand are obliged to broadcast free.¹¹⁶ The time allocated to each party for such addresses is determined by the Electoral Commission.¹¹⁷

¹¹⁰ (unreported, 15 April 1997, Outer House Cases).

¹¹¹ See, e.g., in the context of injunctions in defamation proceedings: *Ron West Motors Ltd v Broadcasting Corporation of New Zealand (No 2)* [1989] 3 NZLR 520, *Auckland Area Health Board v Television New Zealand Ltd* [1992] 3 NZLR 406 and discussed in Burrows and Cheer *Media Law in New Zealand* (4th Ed) (Oxford University Press, Auckland, 1999), 47.

¹¹² See also *Elections Programmes Code of Broadcasting Practice* Broadcasting Standards Authority, 1 July 2005, although the Code adds little to the statutory regime.

¹¹³ S69(1) Broadcasting Act 1989.

¹¹⁴ *Ibid*, s70(1).

¹¹⁵ *Ibid*, s70(2)(a).

2. Election advertising by political parties only if paid for with money allocated for that purpose by the Electoral Commission.¹¹⁸
3. Election advertising for a single constituency candidate broadcast with the candidate's authority.¹¹⁹
4. Advertisements for the public bodies responsible for administering the election.¹²⁰
5. Non-partisan advertising broadcast as a community service.¹²¹

TVNZ is heavily regulated in the way in the way in which opening and closing addresses must be broadcast. For example pursuant to s77A opening and closing addresses must be broadcast between 7pm and 9pm on a weekday evening and without advertising. In allocating time and money to political parties the Electoral Commission is obliged to take into account the criteria contained in s75 which include support at previous general elections, current representation in Parliament and the results of opinion polls. The public policy underlying Part 6 is best expressed in s75(2)(f), which records the need for the Electoral Commission to take into account:

The need to provide a fair opportunity for each political party to which [[subsection (1)]] of this section applies to convey its policies to the public by the broadcasting of election programmes on television.

“Election programmes” in the form of paid political advertising *can* be broadcast on any network although no private broadcaster has an obligation to broadcast them. However, if a broadcaster chooses to do so it is subject to s79B which prohibits it from offering more favourable terms to one political party than another. Complaints about “election programmes” must be dealt with within 48 hours once received by the broadcaster and within the same period of time once received by the Authority. Notwithstanding that recognition of the time constraints of election campaigns the Authority’s powers remain retrospective. Even in this context Parliament has not chosen to mandate pre-publication control of broadcasters.

Most interesting is the type of programming excluded from the definition of “election programme”. Plainly the definitional factors listed in s69(1) must be assessed against the programme as a whole rather than any part of it. The fact that, for example, a debate between party leaders, or news coverage of a campaign speech, will involve broadcasting partisan words designed to garner electoral support does not make the broadcast an “election programme”.¹²² The policy of excluding election coverage generally is made plain in s70(3):

Nothing in this...section restricts the broadcasting, in relation to an election, of news or comments or of current affairs programmes.

¹¹⁶ Ibid, s71.

¹¹⁷ Ibid, s73(1).

¹¹⁸ Ibid, ss 70(1)(b) & 74A.

¹¹⁹ Ibid, s70(1)(c).

¹²⁰ Ibid, s70(1)(d).

¹²¹ Ibid, s70(1)(e).

¹²² The same conclusion was reached against similar provisions in Scotland in *Grieve v Douglas-Home* 1965 SC 315, and Ontario in *Vezina v Canadian Broadcasting Corporation & Ors* 1992 Ont. Sup. CJ LEXIS 2445.

The Electoral Commission also includes the following relevant comment in its published material on the broadcasting rules for “Election Programmes”:

The rules do not apply to broadcaster’s news, comment or current affairs programmes but broadcasters must ensure that such programmes do not appear to encourage voters to vote for or against particular parties or candidates.

The statutory framework for election broadcasting draws a sharp distinction between public and private broadcasters. As a matter of policy Parliament has elected to advance its objective of fairness in election broadcasting through the vehicle of TVNZ. Equally the statutory scheme strongly regulates certain forms of election broadcasting yet leaves others (e.g. current affairs) completely alone. In fulfilling its policy objectives Parliament has delineated a particular area of broadcasting and heavily regulated it. Arguably what *Dunne* does is to shift that heavy regulation onto TV3 in circumstances where the Act expressly and impliedly does not. The point is strengthened by the factors which Ronald Young J said should have been taken into account, including current Parliamentary representation, which are similar to factors that the Electoral Commission is obliged to consider when allocating time and money for political advertising.¹²³ The public policy objective of ensuring that the electorate is fully informed and on a fair basis is met with the comprehensive publicly funded system set out in Part 6 of the Act.

In terms of the statutory framework TV3’s obligation in relation to the leaders’ debate was simply to comply with the fairness requirements of s4 by ensuring that “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”.¹²⁴ It is by no means clear that TV3 fell short of that standard given the extent of its proposed election coverage generally (including the Plaintiff party leaders) and the other opportunities that the Plaintiffs had for expressing their views through election advertising and coverage by other broadcasters.

VII THE ‘PUBLIC IMPACT’ OF ELECTION BROADCASTING

I have argued that there is very little in the status of TV3, or in the statutory framework that underpins broadcasting in election campaigns, that justifies subjecting it to judicial review in respect of election campaign broadcasting decisions. What though of the ‘public impact’ of the decision to exclude party leaders from a television debate? A preliminary answer is to say that, in the absence of anything in TV3’s status or its statutory obligations warranting the availability of review, something in the nature of a *Finnigan* type public impact is required.

Television leaders’ debates are not uncommon and would have been known by Parliament to exist when the Broadcasting Act 1989 was passed. If they have the ability to affect the outcome of an election to the extent claimed by Ronald Young J then the sorts of obligations that he has placed on them would have been imposed through the Act using similar provisions to those that control “election programmes”. As I have

¹²³ See n2 above, paragraphs [38], [39] and [43], indeed the Plaintiffs submitted that the s75 factors should have governed TV3’s decision.

¹²⁴ S4(1)(d) Broadcasting Act 1989.

already argued, one senses that Ronald Young J may have overplayed the public significance of this particular debate given its timing and the other campaign coverage still to come both from TV3 and other media.

However, to leave it at that would not do justice to the important competing interests that the issue raises. What if, for example, the facts involved TV3 (or TVNZ) excluding the leader of a major party from a debate two days before the election, because it did not like her policies (or her paisley tie)? A comparative review of other common law jurisdictions assists in analysing and weighing the competing interests. Although the underlying regulation and ownership of broadcasters differs, the treatment of broadcasting obligations during election campaigns raises the same fundamental issues as it does in New Zealand. Care needs to be taken because of the different constitutional frameworks within which the issues are dealt with, although as Cooke P has noted in the context of retraction and reply statutes:¹²⁵

In a matter such as the basic duties of broadcasters, it would seem that democracies can move through their legislative and judicial decision making towards common standards.

VIII THE UNITED KINGDOM

In the United Kingdom the British Broadcasting Corporation is the principal public broadcaster having been established by Royal Charter in 1927. A number of private broadcasters operate under licences issued previously by the Independent Television Commission (“ITC”) in England and the Independent Broadcasting Authority in Scotland. All regulation now occurs through the Office of Communications¹²⁶ (“Ofcom”). The licenses themselves provide that broadcasters must comply with certain standards relating to content and severe penalties are available for non-compliance. Clause 4.3 of the ITC guidelines on programming during elections (since adopted by Ofcom) provides that:¹²⁷

There is no expectation that the time devoted to all parties and candidates in an election will be equal. Licensees must exercise their judgment, based on factors such as significant levels of previous electoral support, evidence of significant current support, and the number of candidates being fielded by a party...

Scotland has provided fertile ground for cases in this area. In 1979 in *Wilson & Ors v Independent Broadcasting Authority*¹²⁸ a challenge was mounted to a decision by the IBA to televise four party political broadcasts in relation to a referendum on the constitution where three of the broadcasts would advocate a “yes” vote while only one would advocate a “no” vote. Lord Ross held that the decision was in breach of the IBA’s duty to provide proper balance in broadcasting on controversial matters, as required by s2(2) of the Independent Broadcasting Authority Act 1973. He emphasised the likely impact of the programmes on the electorate, the crucial constitutional importance of the referendum and the absence of any remedy in the Act for breach of

¹²⁵ See n50 above, 441.

¹²⁶ Established pursuant to the Communications Act 2003. See also the discussion of the regulation of television in the United Kingdom in Carey & Sanders *Media Law* (3rd Ed) (Sweet & Maxwell, London, 2004) chapter 10.

¹²⁷ *Ibid*, *Media Law*, 377.

¹²⁸ 1979 SC 351.

the section. He considered that the fact that the referendum could be answered only “yes” or “no” made it different from broadcasting at a general election:¹²⁹

I accept that, when arranging party political broadcasts in connection with a General Election all possible political viewpoints cannot be covered and, for example, some participants ...and some minor parties may be excluded.

In *Lynch v British Broadcasting Corporation*¹³⁰ the Northern Ireland Workers Party sought an injunction to prevent the BBC from proceeding with a series of programmes each focussing on a particular party, but not the Workers’ Party. The BBC had set two criteria: number of candidates nominated and percentage of the first preference votes in the election for the Assembly a year earlier. The Workers’ Party met the first criterion but not the second. The BBC led evidence that it intended to ensure that the Workers’ Party obtained coverage in other programmes. The principle issue was whether the BBC was under a legal duty to be impartial as between political parties in the context of an election campaign. Notwithstanding that its Royal Charter included as one of its objects to provide broadcasting “as a public service”, nor the evidence of many occasions upon which the BBC had expressed its impartiality, it was held to be under no such legal duty. That conclusion is difficult to reconcile with the comment of Lord Denning in *Marshall v BBC*.¹³¹

It is important to observe that the BBC has accepted a duty to be impartial in their programmes. This is especially important during an election campaign. They are not to favour one candidate or party more than another candidate or party.

Lord Reid also observed that even had he found that an enforceable duty to be impartial existed he would not have intervened with the BBC’s discretion unless it was shown that “the BBC had exercised its discretion in a manner in which no responsible broadcasting authority could reasonably have exercised it”¹³². By the time the matter came to be considered again in 1997 a duty of impartiality had been inserted into the agreement between the BBC and the Home Secretary. In *R v BBC ex parte Referendum Party*¹³³ the Court discussed but did not determine the susceptibility of the BBC to judicial review because it found no basis to intervene. In allocating broadcast time to a new party in accordance with a set of objective criteria the Court considered that the BBC’s discretion should not be interfered with unless it was irrational.

A series of cases involving Scottish politicians challenging their treatment by broadcasters took place in the mid 1990’s. The first involved a successful application for an interdict preventing the BBC from broadcasting a 40 minute interview with the Prime Minister on its *Panorama* programme planned for 2 April 1995, until after the Scottish local elections to be held on 6 April 1995. Counsel for the BBC conceded that it had a legal obligation to act impartially¹³⁴ (a surprising concession in light of *Lynch*)

¹²⁹ *Ibid*, 353.

¹³⁰ [1983] NI 193.

¹³¹ [1979] 3 All ER 80, 81h.

¹³² See n130 above.

¹³³ [1997] EMLR 605.

¹³⁴ *Houston v BBC* [1995] SC 433.

and the interdict was granted, there being an arguable case that showing the programme shortly before the election could breach that obligation. However, as Munro puts it:¹³⁵

...One wonders if the Court of Session did not act rather precipitously in banning a single programme of uncertain influence when, apart from other considerations there was still a period of two clear days in which perceived imbalances partiality might have been redressed. In the result the Courts have cast themselves in the role of censors, and their actions have formed an unattractive precedent.

An attempt to obtain an interdict against the BBC for claimed imbalanced coverage of party conferences failed in 1996 on the grounds that a prima facie case for irrationality in the decision had not been established.¹³⁶ More detailed consideration was given to a claim in 1997 by the Scottish National Party for interdicts against broadcasters in *Scottish National Party v Scottish Television PLC & Anor*.¹³⁷ As in *Dunne* the Plaintiff complained about his exclusion from a televised leaders' debate which included the leaders of the three (other?) major parties. The application was dismissed primarily on the ground that no final decision had been made to broadcast such a debate and accordingly the question was hypothetical. Nonetheless Lord Eassie went on to consider the merits of the application concluding that the obligation of impartiality needed to be applied in the round. He observed that:¹³⁸

...an interview with one political spokesman must by definition involve partiality and that where several viewpoints obtain, a programme which gives scope only to some if them, will, in isolation, also be partial. For that very practical reason also it is in my view plain that in judging whether a licensee is observing due impartiality, particularly in the context of political broadcasting in an election campaign, it is the generality or entirety of the broadcasting output in the relevant field to which one must look, rather than a single programme in isolation.

The judgment also emphasised the level of discretion necessary for the making of editorial decisions, noting that an assessment of whether the exclusion of a party leader would exhibit such partiality that it could not be remedied by other programming was "primarily a matter for their [the broadcasters] judgment".¹³⁹ On that basis Lord Eassie considered that if a private broadcaster could be judicially reviewed for such decisions (a point not decided given the form of the proceedings) then the standard would be that appropriate to the review of discretionary powers as set out by Lord Diplock in *CCSU v Minister for the Civil Service*.¹⁴⁰

The application of the European Convention on Human Rights to the issue of a claimed right of access to broadcasting time was considered by the Commission in *X and the Association of Z v United Kingdom*.¹⁴¹ The applicants (not a political party) complained that they were denied access to television, particularly during election time, in breach Article 10 of the Convention. The Commission held that the freedom to impart information and ideas protected in Article 10 does not afford an unfettered right of

¹³⁵ Munro *The Banned Broadcasting Corporation* [1995] NLJ 518.

¹³⁶ Munro *SNP v BBC – Round Two* [1996] NLJ 1433.

¹³⁷ See n110 above. Discussed in Munro *Party Politics and the Broadcasters – Round Three* [1997] NLJ 528.

¹³⁸ *Ibid*, p2 of transcript.

¹³⁹ *Ibid*, p3 of transcript.

¹⁴⁰ [1985] 1 AC 374, 410.

¹⁴¹ (1971) 38 CD 86.

access to broadcasting time for members of the public who wish to express an opinion. However, it qualified that conclusion:¹⁴²

...the denial of broadcasting time to one or more specific groups or persons may, in particular circumstances, raise an issue under Art. 10 alone or in conjunction with Art.14 of the Convention. Such an issue would, in principle arise, for instance, if one political party was excluded from broadcasting facilities at election time while other parties were given broadcasting time.

The Commission confirmed the above formulation in *Haider v Austria*,¹⁴³ which was applied by the Privy Council in *Benjamin v Minister of Information and Broadcasting*¹⁴⁴ which held that the appellant, whose broadcast had been suspended by the Government of Anguilla on political grounds, had no right of access to the media to broadcast his programme, but that he did have a right not to be denied access on politically discriminatory grounds.¹⁴⁵ However, it must be recalled that those cases relate to core governmental actions, not those of a private broadcaster. Whilst the development of rights jurisprudence will inform the development of other areas of law it cannot impose public obligations on private organisations that do not otherwise exist.

IX CANADA

In *Trieiger et al v Canadian Broadcasting Corporation et al*¹⁴⁶ the Ontario High Court of Justice considered an application by the leader of the Green Party seeking an order allowing his participation in a televised debate involving three other party leaders. In refusing to grant a mandatory injunction the Court placed a high value on editorial freedom as itself being a crucial feature of a democratic system. After highlighting the importance of free and rigorous political debate as a cornerstone of democracy the Court concluded that to grant the injunction would be to profoundly interfere with that principle:¹⁴⁷

In this case the applicants, in furtherance of their own constitutional rights, seek to interfere with the free right of the public and the other political leaders to uncurtailed political debate. The applicants seek to interfere with the right of the public to hear the scheduled debate and to interfere with the right of the scheduled leaders to debate whom they want and when they want. To grant the order sought would interfere with the freedom of political debate of this country, would interfere with the freely scheduled debates that are about to proceed on Monday and Tuesday and would interfere with the constitutional right of the media to decide what they think is newsworthy without having newsworthiness dictated to them by any court.

As a result of the *Trieiger* decision the Canadian Radio-Television and Telecommunications Commission issued a “public affairs” guideline including televised debates. The guideline required that “if this type of broadcast is to take place, all parties and candidates should be accommodated, even if doing so requires that more than one program be broadcast”.¹⁴⁸ In 1993 the National Party of Canada¹⁴⁹ and the Natural Law

¹⁴² Ibid.

¹⁴³ (1995) 83 DR 66, 74.

¹⁴⁴ [2001] 1 WLR 1040.

¹⁴⁵ Ibid, paragraphs [26]–[27] per Lord Slynn, as cited in *R (on the application of ProLife Alliance) v BBC* [2003] 2 All ER 977, 994.

¹⁴⁶ 66 OR (2d) 273, 278.

¹⁴⁷ Ibid, 281-282.

¹⁴⁸ As cited in *Green Party Political Assn. of British Columbia v CBC* 1991 ACWSJ LEXIS 34689, 5.

Party of Canada¹⁵⁰ sought to compel CBC and other broadcasters to include its leaders in a series of televised debates. Both the Federal Court and the Alberta Court of Appeal refused interim injunctions, adopting the reasoning in *Trieger*, notwithstanding the new guidelines.

X UNITED STATES

The issue of access to the broadcast media for political candidates must be considered in two contexts in the US. First, private broadcasters are heavily regulated by the Federal Communications Commission (“FCC”) in the context of Federal elections. The rules promulgated by the FCC have been challenged on a number of occasions on the basis that they breach the broadcasters’ First Amendment rights. Second, publicly owned broadcasters who exclude candidates from, for example, televised political debates have been challenged on the basis that they breach the candidate’s First Amendment rights. In both contexts the same issues arise as to the balance to be struck between editorial freedom and fair access to the powerful medium of television.

A remarkable feature of the US Supreme Court jurisprudence is the different treatment of print and broadcast media. In *Miami Herald Publishing Co. v Tornillo*¹⁵¹ the Court held unconstitutional a Florida statute requiring newspapers to afford political candidates equal space to reply to attacks on his or her record.¹⁵² The Court considered and rejected arguments that entry into publishing was now heavily controlled by dominant quasi-monopolistic entities and did not therefore facilitate the market-place of ideas upon which the freedom of press guarantees in the First Amendment are predicated. Whilst recognising the validity of those arguments the Court unanimously upheld absolute editorial freedom for newspaper publishers on longstanding public policy grounds best put by White J (concurring):¹⁵³

...the First Amendment erects a virtually insurmountable barrier between government and the print media so far as government tampering, in advance of publication, with news and editorial content is concerned. A newspaper or magazine is not a public utility subject to "reasonable" governmental regulation in matters affecting the exercise of journalistic judgment as to what shall be printed. We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we prefer "the power of reason as applied through public discussion" and remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial rooms of this Nation's press.

Yet broadcasters are not so revered. In *Red Lion Broadcasting v Federal Communications Commission*.¹⁵⁴ The Supreme Court upheld the constitutionality of the FCC’s ‘fairness doctrine’ and component rules which required inter alia broadcasters to provide reply time to people who were attacked during broadcasts. In summary the Court held that the “new” media had different characteristics to the traditional press

¹⁴⁹ *National Party of Canada et al v CBC* 106 DLR (4th) 575.

¹⁵⁰ *Natural Law Party of Canada et al v CBC* 1993 FTR LEXIS 1782.

¹⁵¹ 418 US 241 (1974).

¹⁵² Florida Statute 104.38 (1973).

¹⁵³ See n151 above, 259 (citations omitted).

¹⁵⁴ 395 US 367 (1969).

meaning they could not claim the same First Amendment protections – the principal difference being the need to licence broadcasters because of the limited number of frequencies available for broadcasting without interference.¹⁵⁵

Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount...It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.

Recognising that technological advancements could render the scarcity argument redundant the Court also relied upon the position of advantage gained by existing broadcasters as a result of the current scarcity of frequencies as justifying the FCC's interference with broadcasters' editorial discretion.¹⁵⁶ That position is contrary to *Tornillo*¹⁵⁷ where the reality of quasi-monopolistic ownership of the print media was not sufficient to displace the constitutional protection of that medium.

The FCC issues licences to broadcasters and, unlike New Zealand, it is within the licensing regime that content is regulated.¹⁵⁸ Section 315(a) of the Communications Act 1934 (US) provides that private broadcasters must provide equal time to all legally qualified candidates once they elect to provide time to any one candidate. The rule is not triggered by bona fide news coverage but is, for example, by a candidate debate.

In enacting s315 Congress was anxious to ensure that it did not create an enforceable right of access to broadcasting time by specifically declaring in s3(h) of the same Act that broadcasters were not common-carriers.¹⁵⁹ However, in *CBS v FCC*¹⁶⁰ the Supreme Court affirmed the existence of, and upheld as constitutional, a limited right of access by political candidates to broadcast time for paid political advertisements. Relying on *Red Lion* and *CBS v Democratic National Committee*¹⁶¹ the plurality upheld the provision on the basis that it enhanced, rather than detracted from, the marketplace of ideas. In doing so the Court placed substantial weight on the constitutional significance of an election campaign affirming an earlier statement of the Court that the First Amendment “has its fullest and most urgent application precisely to the conduct of campaigns for political office”.¹⁶² The dissent saw the creation of a right of access, albeit limited, as failing to recognise the significance of Congress' declaration that

¹⁵⁵ Ibid, 390(citations omitted), and see text at n1 above.

¹⁵⁶ Ibid, 400.

¹⁵⁷ See n151 above, 254-256.

¹⁵⁸ See *Telegraphs, Telephones, and Radiotelegraphs* 47 USCS §315 (2005) and *Political Candidate's Right to Equal Broadcast Time Under 47 USCS §315*, 35 ALR Fed 856, for discussion of the 'fairness' and 'equal time' doctrines.

¹⁵⁹ See discussion of the legislative history in *CBS v Democratic National Committee* 412 US 94 (1973), 105-111.

¹⁶⁰ 453 US 367 (1981).

¹⁶¹ See n159 above.

¹⁶² See n160 above, 396 citing *Monitor Patriot Co. v Roy* 401 US 265, 272 (1971).

broadcasters are not common-carriers and an unjustified departure from deference to editorial discretion:¹⁶³

This approach, however, conceals the fundamental issue in these cases, which is whether Congress intended not only to create a right of reasonable access but also to negate the longstanding statutory policy of deferring to editorial judgments that are not destructive of the goals of the Act. In these cases such a policy would require acceptance of network or station decisions on access as long as they are within the range of reasonableness, even if the Commission would have preferred different responses by the networks.

The Supreme Court has therefore been prepared to hold constitutional a remarkable degree of congressional control over the editorial decisions of private broadcasters, the sorts of controls that would be clearly unconstitutional if applied to the print media. The ‘scarcity of bandwidth’ justification for that distinction has failed to account for technological advances and is unconvincing in light of the different treatment of the print media.

Publicly owned broadcasters are subject to particular constitutional obligations when televising candidate debates. In *Arkansas Educational Television Commission v Forbes*¹⁶⁴ the Court considered that public broadcasting generally is not susceptible to the Court’s public forum doctrines, by which rights of access to places where speech occurs can be enforced. It held that to subject broadcasters to public forum doctrines would be antithetical to the importance of editorial freedom. However, the Court was prepared to consider candidate debates as a narrow exception to that broad proposition, first because such debates are facilitative and therefore have a lower editorial content than other broadcasting, and second because:¹⁶⁵

...in our tradition, candidate debates are of exceptional significance in the electoral process. ...Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates.

The Court rejected the appeal court’s finding that the debate was a ‘public forum’ to which any qualified candidate had a right of access noting that such a finding would place intolerable burdens on broadcasters and would be likely to reduce the quality and value of the debate itself. The Court instead designated public broadcaster sponsored debates as non-public fora which, on the basis of the Court’s precedents meant that:¹⁶⁶

To be consistent with the First Amendment, the exclusion of a speaker from a nonpublic forum must not be based on the speaker’s viewpoint and must otherwise be reasonable in light of the purpose of the property.

The plurality concluded that the basis of the decision to exclude Forbes was viewpoint neutral and accordingly not in breach of the broadcaster’s constitutional obligations. In dissent Stevens, Souter and Ginsberg JJ agreed that the debate was a non-public forum but considered that the reasons for the exclusion, while not based on Forbes’ political

¹⁶³ Ibid, 397.

¹⁶⁴ 523 US 666 (1998).

¹⁶⁵ Ibid, 675-676.

¹⁶⁶ Ibid, 682.

viewpoint, were nonetheless arbitrary having not been based on a set of identified objective criteria. It is convincingly put in the following passage:¹⁶⁷

The importance of avoiding arbitrary or viewpoint-based exclusions from political debates militates strongly in favor of requiring the controlling state agency to use (and adhere to) pre-established, objective criteria to determine who among qualified candidates may participate. When the demand for speaking facilities exceeds supply, the State must "ration or allocate the scarce resources on some acceptable neutral principle." *Rosenberger*. A constitutional duty to use objective standards -- i.e., "neutral principles" -- for determining whether and when to adjust a debate format would impose only a modest requirement that would fall far short of a duty to grant every multiple-party request. Such standards would also have the benefit of providing the public with some assurance that state-owned broadcasters cannot select debate participants on arbitrary grounds.

In summary the US has a highly regulated licensing regime for private broadcasters which, particularly in relation to political coverage, involves substantial interference with editorial discretion by the FCC's application of the 'equal time' and 'fair access' doctrines. By contrast public broadcasters' obligations when hosting candidate debates are limited to the requirement that candidates are not excluded on arbitrary or viewpoint based grounds.

Even if the scarcity of bandwidth argument carries weight in a US context, which is itself contentious, it is harder to apply similar arguments in New Zealand, given that there is no bandwidth shortage here because of the population size and technology such as Ultra High Frequency and satellite television.

XI THE COMPETING VALUES

The contest in substance lies between editorial freedom and the public interest in informed debate during election campaigns (including whether candidates have a right of access to the media). Both interests are underpinned by claims that they enhance freedom of expression. In New Zealand that right is protected by s14 of the Bill of Rights which, unlike equivalent provisions in Canada and the United States, does not expressly include the protection of freedom of the press. However, s14 has been held to include, or at least reinforce, editorial freedom. In *Television New Zealand Ltd v Attorney General*¹⁶⁸ the Court of Appeal said:

The freedom of the press is not separately specified in the New Zealand Bill of Rights...but it is an important adjunct to the rights concerning freedom of expression affirmed in s14.

However the weight that Lang J placed on editorial freedom in *Mangu* may be unjustified in a New Zealand context. As Cooke P put it in *TV3 Network v Eveready*:¹⁶⁹

This Court is thoroughly alive to the importance of the freedom of the media, as has been demonstrated in numerous decisions...But we had occasion to point out that some of the argument for the respondent in that case seemed to savour of an attempt to put the media above the law (in the sense of claiming a right to broadcast whatever the respondent chose, subject only to the risk of a subsequent award of damages). Just as that was unacceptable, so I

¹⁶⁷ Ibid, 694.

¹⁶⁸ [1995] 2 NZLR 641, 646

¹⁶⁹ See n50 above, 439.

think it unacceptable to assert a right never in any circumstances to be compelled by the Courts to publish a correction.

And:¹⁷⁰

...the freedoms affirmed in s 14 are to be enjoyed by everyone, not merely the media.

Few would argue against two of Ronald Young J's conclusions: television is a highly influential medium, particularly in the context of an election campaign, and access to broadcasting time for political parties can have an important, if not decisive, effect on elections. In *R (on the application of ProLife Alliance) v BBC*¹⁷¹ the House of Lords considered the interplay between access to television and freedom of political expression in the context of a decision by the BBC to refuse to broadcast a Party Election Broadcast by an anti abortion party on the grounds of decency. Lord Nicholls of Birkenhead said that "freedom of political speech is a freedom of the very highest importance in any country which lays claim to being a democracy",¹⁷² and that "...when television is such a powerful and intrusive medium of communication, party broadcasts are of considerable importance to political parties and to the democratic process".¹⁷³ Mason CJ in the High Court of Australia in *Australian Capital Pty v The Commonwealth of Australia*¹⁷⁴ described the "magnitude of deprivation" of those political aspirants who are excluded from access to television during an election campaign.

There is also strong support for the competing principle of the primacy of editorial discretion in *Trieiger et al v Canadian Broadcasting Corporation et al*¹⁷⁵ earlier discussed:

It is not the function of the government or indeed the Courts to dictate to the news media what they should report. The broadcasters are exercising a function that is very central to the democratic process. But it is a function that they perform quite independently of government.

Indeed the Court in *Trieiger* did not consider that CBC was subject to the Canadian Charter of Rights and Freedoms.¹⁷⁶

Lang J found in *Mangu* that editorial decisions were effectively non-justiciable as review would involve improper interference with editorial freedom. In *Dunne* Ronald Young J considered that the right of the public to be informed was "fundamental" and decisions affecting it should be reviewed on a high standard. In neither judgment is any meaningful balancing exercise between the two important values undertaken. The difficulty in doing so in the context of an interlocutory application is one of the reasons Canadian courts have been unwilling to grant interlocutory relief in such cases. As McKeown J put in *Natural Law Party*: "The Bill of Rights encompasses freedom of the

¹⁷⁰ Ibid, 440.

¹⁷¹ See n145 above.

¹⁷² Ibid, 982

¹⁷³ Ibid.

¹⁷⁴ 1992 AUST HIGHCT LEXIS 59, 51.

¹⁷⁵ See n146 above, 278.

¹⁷⁶ Although the Charter does not have an equivalent to s3(b) of the New Zealand Bill of Rights Act 1990.

press and...the court should not attempt to balance that right with the right of freedom of speech in an interlocutory motion.”¹⁷⁷

Where does Ronald Young J’s fundamental right of citizens to be informed come from? There is support from the Canadian Supreme Court for the view that citizens have a right to information in the context of an election. In *Re Dixon and British Columbia (Attorney General)*¹⁷⁸ McLachlin CJ held that one of the core values of the right to vote in s3 of the Canadian Charter of Rights and Freedoms (for these purposes identical to s12 of the New Zealand Bill of Rights Act 1990) is “the right to sufficient information about public policies to permit an informed decision”.¹⁷⁹ In *Reform Party of Canada et al v Canada*¹⁸⁰ the right was discussed, in the context of the availability of electoral funding, and the Court concluded that “notwithstanding the disparity of time allotment between the parties” the electorate remained properly informed as to the policies of the various parties because of the availability of other means of election campaigning. Thus Ronald Young J’s formulation of the right elevates it above the Canadian position without reference to authority.

A right to be informed does not therefore require equal broadcasting time to be provided to political parties. As discussed above, the existence of a comprehensive scheme for “election programme” broadcasting and funding in New Zealand is the way in which Parliament has chosen to give effect to the right to be informed. More fundamentally if the right to be informed is part of the s12 right to vote then it should only be applied to private broadcasters if they are subject to the Bill of Rights, which I have argued they are not.

Does the above analysis of the competing rights involved change the position as far as susceptibility to judicial review of private broadcasters is concerned? In my view the arguments fall clearly against TV3 being reviewable even for decisions taken in the context of election coverage. If the balance were simply between respect for TV3’s private status against the impact it is capable of having on an election by dint of its broadcasting decisions then it would be right to leave open the possibility of review, albeit with a substantially higher threshold than that adopted by Ronald Young J. His application of a low threshold because the case involved “fundamental rights” failed to take into account the competing constitutional importance of editorial freedom.

However, the following factors already explored in this paper militate against even a limited susceptibility of TV3 to judicial review:

1. The critical part that media editorial freedom plays in upholding freedom of expression in a democratic system, including during election campaigns.
2. The clear distinction between private and public broadcasters in the scheme of the Broadcasting Act 1989 which strongly indicates that the vehicle for achieving public policy goals in the area of election broadcasting is TVNZ.
3. The clear distinction in the Broadcasting Act 1989 between “election programmes” and general reporting.

¹⁷⁷ See n150 above, 15-16.

¹⁷⁸ (1989) 59 DLR (4th) 247

¹⁷⁹ Ibid, 258-259.

¹⁸⁰ 1992 AR LEXIS 4555, 40.

4. The inapplicability of the argument accepted in the United States that television broadcasting is quasi-monopolistic by virtue of the limited range of frequencies available.

How then should the competing values be resolved in the context of *public* broadcasters? Given that TVNZ is in principle amenable to judicial review the remaining issue is whether editorial decisions are justiciable and to what standard. The sliding scale of intensity of judicial review has at its top decisions that are non-justiciable on public policy grounds, through *Wednesbury*¹⁸¹ unreasonableness, to the ‘hard look/substantive unfairness’ threshold.¹⁸² TVNZ was a State Owned Enterprise prior to the 2003 reforms discussed earlier and in respect of commercial decisions State Owned Enterprises are amenable to judicial review although only for bad faith, fraud or corruption. The rationale behind that limitation appears to be deference to a legitimate area of discretion that has been left to those entities by Parliament and which public policy dictates should be left alone by the Courts other than in limited circumstances.

Similar, indeed stronger, arguments apply to editorial discretion. Editorial freedom is important to the functioning of a democratic society. The statutory framework that governs TVNZ specifically, and broadcasting generally, evidences that public policy. However, TVNZ does have specific public obligations that require its editorial decisions to be, at least in principle, reviewable. The first is the extent to which the 2003 reforms have altered TVNZ from a State Owned Enterprise to a genuine public service broadcaster. The second is its obligation to be free from political and commercial influence. Finally, in order to achieve the policy goal of ensuring fair access for political candidates to the media Parliament has placed specific obligations upon TVNZ in the context of the “election programmes” structure.

I would therefore support a standard of review for TVNZ in editorial decisions during election campaigns making it reviewable for irrationality in a *Wednesbury* sense and for politically or commercially influenced decisions, including decisions made on a non-neutral viewpoint basis. This approach is consistent with the non-public fora standards in the US Supreme Court and the standards applied to the BBC in the UK and the CBC in Canada. Whilst, in the constitutionally charged atmosphere of an election campaign the Courts should be able to review the decisions of public broadcasters, it is crucial that they do not step into the editorial shoes of producers unless it is genuinely necessary to protect the integrity of the electoral process. As it was put in *National Party of Canada v CBC*:¹⁸³

Absent cogent evidence of mischief calculated to subvert the democratic process and absent evidence of statutory breach, this court should not enter the broadcasting arena and usurp the functions of the broadcast media. The political agenda is best left to the politicians and the electorate; television programming is best left to the independent judgment of broadcast journalists and producers.

¹⁸¹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All ER 680.

¹⁸² See *Joseph* n55 above, 837.

¹⁸³ (1993) 13 Alta.L.R. (3d) 20, paragraph [27].

XII CONCLUSION

The power that television producers wield in election campaigns is unquestionable. However if the Courts accede too willingly to requests to review the exercise of that power then they will, every three years, find that judicial review proceedings by politicians become more frequent. This is an area in which the floodgates argument is likely to be more real than in many others. The New Zealand media are generally considered to be responsible and, more importantly, neither corrupt nor partisan. They should be treated on that basis. The clear distinction between public and private broadcasters in statute can be carried over into a clear distinction in public and private obligations. The irony in the *Mangu* and *Dunne* decisions is that TV3 were held to significantly higher standards than TVNZ. That might say more about the perceived merits of the respective cases than anything else.