

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

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV-2021-404-1046
[2022] NZHC 597**

BETWEEN TELEVISION NEW ZEALAND LTD
Appellant

AND NOLA WICKS & ANOR
Respondent

Hearing: 30 September 2021

Appearances: J Edwards, H Soar and T Whale for the appellant
A Scott-Howman for the Broadcasting Standards Authority
F Pilditch QC as counsel assisting

Judgment: 31 March 2022

JUDGMENT OF ROBINSON J

*This judgment was delivered by me on 31 March 2022 at 11.00am
pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

Solicitors:
Russell McVeagh

Counsel:
F Pilditch QC
A Scott-Howman, Barrister

Introduction

[1] On 22 September 2021 Television New Zealand Ltd (TVNZ) broadcast a news item on *I News* concerning boy-racers who were reported to be “terrorising residents in a damaged quake suburb in Christchurch” (broadcast). On 13 May 2021 the Broadcasting Standards Authority (Authority) upheld Ms Wicks’ complaint that the depiction of an interviewee included in the broadcast breached Standard 10 (Privacy) of the Free-to-Air Television Code of Broadcasting Practice (Code).¹

[2] TVNZ appeals. It says the Authority acted on the wrong principle; failed to take relevant matters into account; and was plainly wrong.

[3] Ms Wicks is not the interviewee, and she is unknown to the interviewee. Her complaint to the Authority was a “third party complaint”. Ms Wicks took no steps in this appeal.

[4] The Authority is represented in the appeal but emphasised through counsel that it abides the decision of the Court. It took no steps to support or defend its decision. Its submissions were brief, neutral, and limited to matters of legislation and factual background.

[5] Given the importance of the substantive and procedural issues that arise, and in the absence of an effective contradictor, the Court appointed Mr Pilditch QC to assist. TVNZ had responsibly suggested at the outset that such an appointment might be appropriate.

Statutory and Procedural Framework

[6] The statutory and procedural context to this appeal is uncontentious but highly relevant. I summarise it in some detail below before dealing with: Ms Wicks’ complaint; the Authority’s decision; and TVNZ’s appeal.

¹ *Wicks v Television New Zealand Limited* (BSA Decision number 2020-126, 13 May 2021) [Decision].

Programme Standards

[7] The first stated object of the Broadcasting Act 1989 (Act) is “to provide for the maintenance of programme standards in broadcasting in New Zealand”.²

[8] Section 4 of the Act imposes responsibilities on broadcasters to maintain programme standards. These standards are to be consistent with, amongst other things, the privacy of the individual³ and any approved code of broadcasting practice applying to the programmes.⁴

[9] The Code was issued by the Authority in May 2020. Standard 10 deals with Privacy (Privacy Standard). It repeats the words of section 4(1)(c) of the Act and prescribes Guidelines relevant to the application of the Privacy Standard (Privacy Guidelines). In its Codebook the Authority also provides Guidance which is intended to elaborate on the Privacy Guidelines (Privacy Guidance). The Privacy Standard, Privacy Guidelines and Privacy Guidance are central to this appeal. Relevant provisions of each are set out at paragraphs [19]–[22] below.

The Authority

[10] The second stated object of the Act is “to establish the Broadcasting Standards Authority and to define its functions and powers”.⁵ Section 26 of the Act provides that the Authority’s board of four members must include a representative from the broadcasting industry, and a public interest group representative, each to be appointed after consultation with the responsible Minister.⁶ The Chairperson must be a lawyer, if not a judge.⁷ The Authority is to act independently.⁸ I agree with Mr Pilditch that the statutory composition of the Authority confirms Parliament’s intention that it is to reflect community values and have the benefit of relevant industry expertise.

² Broadcasting Act 1989, title.

³ Broadcasting Act 1989, s 4(1)(c).

⁴ Broadcasting Act 1989, s 4(1)(e).

⁵ ⁵ Broadcasting Act 1989, title.

⁶ Broadcasting Act 1989, ss 26(1A) and 26(1B).

⁷ Broadcasting Act 1989, s 26(2). The current Chairperson is a District Court Judge and was previously the Chief Censor appointed under the Films, Videos, and Publications Classification Act 1993.

⁸ Broadcasting Act 1989, s 21(5).

[11] The Authority's functions include receiving and determining complaints;⁹ and encouraging and/or devising the development of codes of broadcasting practice, including in relation to the privacy of the individual.¹⁰ The Authority issued the Code in exercise of that function.

Complaints

[12] Part 2 of the Act requires broadcasters to have proper procedures to receive and address complaints about their broadcast. Section 6 requires broadcasters to consider complaints and section 7 sets out how broadcasters are to make decisions in relation to those complaints. Section 8 allows a person who is dissatisfied with a broadcaster's decision to refer the complaint to the Authority. Section 8(1A) provides that complaints about breaches of privacy standards may be made directly to the Authority. That is how Ms Wicks made her complaint in the present case.

[13] As noted, Ms Wicks is a third party complainant. The facility for a person to complain about a perceived breach of the privacy of another reflects that the legislation is focused on the maintenance of standards, not the enforcement of rights. Counsel for the Authority refers to annual report data showing that: in 2021 four out of nine privacy complaints were made by third parties; in 2020 three out of fifteen; and in 2019 six out of thirteen (not counting multiple complaints about one particular broadcast).

[14] It is significant that when the Authority is dealing with complaints the Act provides it with the broad powers set out in ss 4B, 4C, 5, 6, 7, 8 and 9 of the Commissions of Inquiry Act 1908. Amongst other things, the Authority may: receive any evidence in any form whether admissible in a Court of Law; take evidence on oath; conduct investigations and require production of documents and other things; and summons witnesses.

[15] In terms of procedure, the Authority may deal with complaints, with or without a hearing, as it sees fit.¹¹ Even if there is no hearing the complainant and broadcaster

⁹ Broadcasting Act 1989, s 21(1)(a)-(b).

¹⁰ Broadcasting Act 1989, s 21(1)(d)-(e).

¹¹ Broadcasting Act 1989, s 10(1).

must each have a reasonable opportunity to make written submissions. In considering complaints the Authority is to “provide for as little formality and technicality as is permitted by – the requirements of the Act...a proper consideration of the complaint; and the principles of natural justice.”¹²

Appeals

[16] Section 18 of the Act provides a right to appeal the Authority’s decisions to this Court. Significantly, the Court is to hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.¹³ This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, failed to consider a relevant matter or took into account something irrelevant, or is plainly wrong.¹⁴ The determination of the High Court on any appeal under s 18 is final.¹⁵

[17] Subject to s 18 of the Act, the procedure in respect of an appeal shall be in accordance with rules of Court.¹⁶ Part 20 of the High Court Rules applies to statutory rights of appeal. Rule 20.16 permits further evidence to adduced with the leave of the Court, which may be granted only if there are special reasons to hear the evidence. Leave has previously been granted for TVNZ to adduce further evidence here, as discussed further below.

[18] In terms of remedies, s 18(5) provides that the Court may: confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order; or exercise any powers the Authority could have exercised in the proceedings to which the appeal relates. High Court Rule 20.19(1)(b) empowers the Court to direct the Authority to rehear the proceedings, or to consider or determine (whether for the first time or again) any matters the court directs. The Court must state its reasons for any such direction.¹⁷

¹² Broadcasting Act 1989, s 10(2).

¹³ Broadcasting Act 1989, s 18(4).

¹⁴ *Kacem v Bashir* [2010] NZSC 112, 2 NZLR 1, at [32]; *May v May* [1992] 1 NZFLR 165 (CA)

¹⁵ Broadcasting Act 1989, s 19.

¹⁶ Broadcasting Act 1989, s 18(7).

¹⁷ High Court Rules 2016, r 20.18(2).

Privacy Standard/Guidelines/Guidance

[19] The Privacy Standard uses the language of s 4(1)(c) of the Act to simply state that: Broadcasters should maintain standards consistent with the privacy of the individual.

[20] The Authority's Privacy Guidelines relevant to this appeal are:

10a The privacy standard applies only to identifiable individuals. In some cases an individual may be identifiable even if they are not named or shown.

10b Broadcasters should not disclose private information or material about an individual in a way that is highly offensive to an objective reasonable person in the position of the person affected.

10c There must be a reasonable expectation of privacy in relation to the information or material disclosed. Factors to consider include, but are not limited to, whether the information or material is not in the public domain; and/or is intimate or sensitive in nature; and/or the individual could reasonably expect it would not be disclosed.

...

10g It is not a breach of privacy where the person concerned has given informed consent to the disclosure or intrusion.

[21] The Authority's Privacy Guidance elaborates on the Privacy Guidelines. The Authority notes that the Guidance is not exhaustive and may require elaboration or refinement when applied to a complaint. The specific facts of each complaint are especially important when considering whether an individual's privacy has been breached.

[22] The Privacy Guidance in relation to identification, highly offensive intrusions and disclosures, and informed consent is relevant here:

2. Identification required

2.1 Privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast. Individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast.

2.2 Broadcasters that take steps to mask a person's identity to avoid a privacy breach must take care that the masking is effective. In some cases, where there is a unique combination of identifying features within the broadcast, merely masking the person's face will sometimes be inadequate.

2.3 In some circumstances, a combination of information inside the broadcast and other readily available material or information from outside the broadcast may enable identification.

6. Highly offensive intrusions and disclosures

6.1 The means by which private material is gathered affects the offensiveness of the intrusion or disclosure. ...

6.2 Disclosure of private facts is likely to be highly offensive where:

- the material is particularly embarrassing, sensitive or traumatic, or has the potential to impact negatively on reputation
- the person is particularly vulnerable
- the person concerned has made efforts to protect his or her privacy, or has not consented to the broadcast.

...

7. Informed Consent

7.1 Informed consent is provided where a person identifiable in a broadcast:

- is aware he or she is contributing to the broadcast
- understands the true context and purpose of the contribution
- understands the nature of the consent and its duration
- freely agrees to contribute.

7.2 The level of consent required may vary depending on the type of programme and the particular circumstances in each case.

...

7.5 In general, consent must be written, recorded, or obvious from the circumstances. What is 'obvious from the circumstances' will be a matter for interpretation and depend on the specific facts of the case.

7.6 The greater the invasiveness of the broadcast, the more care the broadcaster must take to ensure informed consent is obtained.

Facts

[23] With this legislative and procedural framework in mind I turn now to the substance of Ms Wick's complaint and TVNZ's appeal.

The Broadcast

[24] The broadcast was approximately 2.5 minutes long. It featured interviews with local residents, including the interviewee, who were concerned about boy racers. The interview in issue lasted approximately 30 seconds. The broadcast reported that the interviewee was “too scared to be identified” because she feared retaliation from the boy racers for speaking out.

[25] The broadcast did not mention the interviewee’s name. It did not include front-on coverage of the interviewee’s face, or coverage of the interviewee’s property. However, the Authority found (and TVNZ does not dispute) that coverage of the interviewee included a side-on view of part of her face (unblurred) and revealed her gender, demographic, the length and colour of her hair, the profile of her nose, her voice, clothes, watch, a distinctive ring on her right hand and the side of her glasses.¹⁸ The broadcast also referred to boy racers driving their cars in a named suburb in Christchurch, in a particular “almost abandoned” area, in which only “about 25” occupied houses remain.

The complaint

[26] Ms Wicks watched the article on *I News*. Later that night Ms Wicks complained to the Authority that although the reporter had said the interviewee would not be named to protect her privacy, she had been filmed in such a way that Ms Wicks felt “she may now be in danger for speaking out about the boy-racers”.

[27] The respondent submitted her complaint directly to the Authority rather than TVNZ. She was entitled to proceed in that way because her essential complaint is that TVNZ did not maintain standards consistent with the interviewee’s privacy.¹⁹

[28] On 23 September 2020 the Authority referred the complaint to TVNZ. The Authority requested from TVNZ a copy of the broadcast and any relevant correspondence, and it invited TVNZ’s response to Ms Wick’s complaint.

¹⁸ Decision, above n 1, at [2].

¹⁹ Broadcasting Act 1989, ss 8(1)(a), 4(1)(c).

[29] TVNZ did not consider it breached the Privacy Standard. It says the broadcast does not identify the interviewee; and that even if it does she gave her informed consent. In its response to the Authority dated 22 October 2020 TVNZ invoked the language of the Privacy Guidelines in asserting that:

We do not agree that the limited information given about the women [sic] as described, under the programme, would lead to her being identified beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast.

However, even if we were to consider that the woman is identifiable, we note that the woman gave informed consent concerning the way that she would be portrayed in the *I News* item and it is not a breach of privacy where the person concerned has given informed consent to the disclosure or intrusion.

We further note that the woman has not subsequently contacted the Reporter or cameraperson, whom she met with or the TVNZ Complaints Committee; to revoke her consent or voice any displeasure with the way she was depicted in the item.

Accordingly, TVNZ does not agree that the Privacy Standard has been breached.

[30] On 15 January 2021 the Authority advised TVNZ that it would be determining Ms Wicks' complaint on 27 January 2021. It sought further details of TVNZ's submission that 'the woman gave informed consent concerning the way she would be portrayed in the *I News* item'. In particular, the Authority asked TVNZ: "can you please provide details and evidence of the informed consent obtained, to assist the Authority's consideration of applicable defences under the privacy standard". The Authority asked to receive that information by 5pm on Tuesday 19 January 2021 "if at all possible"; but added "if that is not possible just let us know, so we can arrange another date of receipt before the meeting".

[31] On Wednesday 20 January 2021 TVNZ emailed the Authority as follows:

Hi Daniel

Further to your question below, the Reporter has advised that they talked about the shots which would be used – that *I News* would use *close-ups of her hands etc, but nothing showing her front on* and that *she agreed to this depiction*. He also advises *she has not contacted me or the camera man about any concerns*.

Cheers, Andrea

(original emphasis)

The provisional decision

[32] On 22 February 2021 the Authority provided TVNZ with its provisional decision to uphold the complaint. For reasons that it ultimately finalised, and which are discussed further below it found that:

- (a) The interviewee was identifiable in the broadcast;
- (b) The interviewee had a reasonable expectation of privacy in relation to information that was disclosed during the broadcast, namely her identity; and
- (c) The disclosure was be highly offensive to an objective reasonable person in the position of the interviewee. Disclosure of the interviewee’s identity in connection with her concerns about the “boy racers” was particularly sensitive, and she was particularly vulnerable. She had also made efforts to protect her privacy by agreeing to be interviewed on the condition that she would not be identified. She did not consent to the disclosure of her identity.²⁰
- (d) The defence of informed consent did not apply. The Authority concluded that:²¹

In this case, the interviewee clearly did not want to be identified and participated on that condition. Nevertheless she was identifiable for the purposes of the standards. The fact the interviewee reportedly agreed to “close-ups of her hands etc but nothing showing her front on” is not sufficient evidence the interviewee understood and consented to the numerous identifying features ultimately shown in the item. There is no written or recorded evidence the woman gave informed consent to being depicted in the manner shown.

[33] The Authority sought submissions by 8 March 2021 as to what (if any) orders would be appropriate. However, in its response TVNZ went further than that and challenged the Authority’s provisional findings.

²⁰ *Wicks v Television New Zealand Limited* (BSA Provisional Decision number 2020-126, 22 February 2021), at [22]–[23] (Provisional Decision).

²¹ At [29].

[34] On 5 March 2021 TVNZ advised the Authority that since receiving the Authority's provisional decision the Reporter (Ryan Boswell) had visited the interviewee and she had provided him with a handwritten note as follows:

TO WHOM IT MAY CONCERN

I was comfortable with the article on TV about the boy racers and how I was portrayed in Sept 2020 I can be contacted directly on [REDACTED] or [REDACTED] if requested thank you.

[35] TVNZ provided the Authority with a copy of that handwritten note. It concluded: "I assume that now that the Authority has this confirmation the complaint will not be upheld. Please let me know if the Authority requires anything further on the complaint".

The final decision

[36] The interviewee's handwritten note did not dissuade the Authority. On 13 May 2021 the Authority released its Decision upholding the complaint for the same reasons set out in its provisional decision.

[37] The Authority noted that the onus is on TVNZ to demonstrate that it had obtained the interviewee's fully informed consent prior to the broadcast to depict her in the manner shown. The Authority did not consider that TVNZ's email (set out at [31] above) to be sufficient evidence of informed consent. As for the interviewee's subsequent handwritten note, the Authority concluded:

[38] The note obtained and provided to us after the fact does not change this view [i.e. that TVNZ had not demonstrated it had obtained the interviewee's informed consent prior to the broadcast]. A statement showing the interviewee confirmed, well after the broadcast and after the risk of identification had likely passed, that she was comfortable with how she was portrayed, is not in our view sufficient evidence she fully understood and consented to the images of her that would be used (as well as the potential ramifications), prior to the broadcast.

[39] We are not suggesting written evidence of consent is required in every case (and the Code Book recognises this). We acknowledge the broadcaster's submissions about the nature of news gathering, the relationships between those involved, and what is reasonable in such circumstances to obtain and demonstrate evidence of informed consent. We are concerned in particular that extra care is taken by broadcasters where members of the public agree to participate in the programme conditional on anonymity.

[40] We therefore stand by our finding the informed consent defence does not apply in this case. We also stand by our decision to uphold the privacy complaint on the basis the interviewee participated on the condition she would not be identified, but ultimately was able to be identified through the combination of features disclosed in the item.

[38] Although the Authority upheld the complaint, it declined to make any orders. It considered publication of its decision to be the most effective and appropriate remedy.²² In reaching this conclusion the Authority considered that the interviewee's confirmation, subsequent to broadcast, that she was comfortable with the footage shown tended to suggest that any actual harm to her privacy interests was minimal. Although this did not ultimately alter its Decision that TVNZ had breached the Privacy Standard, the Authority accepted this to be a relevant mitigating factor.

Issues on Appeal

[39] TVNZ appeals the Authority's decision in its entirety. It says that in determining that the Broadcast breached the Privacy Standard the Authority: acted on the wrong principle; failed to take into account relevant matters either sufficiently or at all; and/or was plainly wrong.

[40] More particularly, TVNZ submits that the Authority erred in some or all of these ways in finding that:

- (a) the interviewee was identifiable in the Broadcast (Issue 1).
- (b) the interviewee had a reasonable expectation of privacy regarding her identity (Issue 2).
- (c) the (alleged) disclosure of the interviewee's identity was highly offensive (Issue 3).
- (d) the defence of informed consent was unavailable to TVNZ (Issue 4).

²² Decision, above n 1, at [44].

TVNZ's further evidence

[41] Shortly after TVNZ filed its appeal it applied for leave to adduce further evidence²³ in the form of affidavits from each of: Phillip O'Sullivan, TVNZ's Editor of Newsgathering; Ryan Boswell, the broadcast journalist who interviewed the interviewee; Michael Fitzgerald, the cameraman who filmed the interview; and the interviewee.

[42] The Authority did not oppose TVNZ's application. The Court dealt with it on the papers.²⁴ In doing so Powell J accepted that the evidence was directly relevant to issues in the appeal. He also accepted TVNZ's submissions that the further evidence provides important context to broader issues; and that the procedure at first instance was such that it would not have been practicable for TVNZ to put the affidavits before the Authority.

[43] The further evidence is considerably more extensive than that which TVNZ placed before the Authority. Messrs Boswell and Fitzgerald both give evidence concerning the interview. Mr Boswell says that the interviewee told him she would be comfortable sharing her views on camera but that she did not want to be identifiable to the boy racers. He says he talked her through some options of camera shots that could be used to protect her identity, including that the broadcast could show only close-ups of the side of her face, back of her head and her hands instead of showing her face front on. Mr Boswell says the interviewee told him she was comfortable with this. He says that based on his conversation with the interviewee it was clear to him that she understood what was being asked and he explained it was her choice.

[44] Mr Boswell explains that the interview followed TVNZ's standard and thorough process for conducting interviews with members of the public for news broadcasts. Mr Boswell remains of the view that he took appropriate steps to protect the interviewee from being identified by boy racers.

²³ High Court Rules 2016, r 20.16

²⁴ *Television New Zealand Ltd v Wicks* HC Auckland CIV-2021-404-001046, 5 July 2021 (Minute no 2 of Powell J).

[45] Mr Fitzgerald essentially confirms Mr Boswell's evidence. He says that the interviewee told him and Mr Boswell that she was comfortable with them using shots only of her hands and the sides and back of her face. Mr Fitzgerald thinks that he and Mr Boswell protected the interviewee and her identity. He does not think that the shots that were used in the interview would enable the interviewee to be identified by strangers such as the boy racers.

[46] As noted, Mr O'Sullivan is the editor of news gathering at TVNZ. He had read Mr Boswell's and Mr Fitzgerald's affidavits and confirms that their engagement with the interviewee was in accordance with TVNZ's expectations of news reporters and operations staff when conducting interviews. Mr Fitzgerald considers that the steps taken by Mr Boswell and Mr Fitzgerald were appropriate to protect the interviewee's identity, and also to ensure she was fully aware that she was contributing to the interview and understood how she would be portrayed on *I News*.

[47] Mr O'Sullivan says he was shocked at the Authority's Decision. He says the Decision has had a "chilling effect" on TVNZ's ability to gather news. Mr O'Sullivan thinks the decision will also adversely affect other news gatherers because a number of them follow the same processes that Messrs Boswell and Fitzgerald followed in order to protect members of the public who contribute to news stories. He says the Decision will therefore affect everyone in the news industry because the Decision:

- (a) Makes it difficult to show any images of anyone being interviewed even where they are happy for certain footage and shots to be shown and that they will not be identified by certain groups of people.
- (b) Hinders TVNZ's ability to do public interest stories. Viewers want to know things like the age group or gender of a person being interviewed and this can be provided without revealing the interviewee's identity to certain groups.
- (c) Mr Fitzgerald considers the Decision makes it seem as though TVNZ does not protect its sources when in fact it does. He says TVNZ is a

highly trusted news organisation and the Decision will reduce that trust and hinder its ability to gather news in the future.

[48] In her affidavit the interviewee confirms that she told Messrs Boswell and Fitzgerald that she was not concerned about her family, friends or neighbours recognising her, but she did not want the boy racers to know who she was because they could cause damage. She discussed with them how her identity could be protected. Her main concern was that she did not want Mr Fitzgerald to film any shots of her face front on.

[49] The interviewee says that she watched *I News* item and was happy with the interview. She says the way she was shown matched the way she was expected to be shown and she felt she could not be identified by any boy racers. She says she remains happy with the interview and how she was portrayed.

Discussion

[50] As noted, the appeal is to be treated as though it were an appeal from a discretion. TVNZ must show that the Appellant acted on a wrong principle; gave undue weight to one factor or insufficient weight to another; or was plainly wrong. This recognises the specialist expertise that qualifies the Authority to deal with complaints such as those made by Ms Wicks. It is not for this Court to substitute its view of the merits of such complaints.

Issue 1 – Was the interviewee identifiable?

[51] TVNZ says that the Authority was plainly wrong to determine that the interviewee was identifiable by people other than her family, friends and neighbours who were already aware of the issues. It points out that the broadcast did not include the interviewee's name, front on coverage of the interviewee, or coverage of her property. It says the interviewee was visible for less than 30 seconds of a 2.5-minute broadcast and submits that a viewer would not be likely to ascertain her identity unless the viewer already knew the interviewee and her concerns as dealt with in the broadcast. The appellant relies on the Authority's earlier decision in *Moore v TV Works* in which the Authority declined to uphold a privacy complaint in relation to a

woman who had been a hostage in an armed robbery at her workplace.²⁵ In that case the Authority found that the Complainant's appearance had been sufficiently masked and that she would not be identifiable to anyone beyond those who already knew her, and were aware of the incident.

[52] I do not accept TVNZ's submission. The Authority's finding that the interviewee could be identified in this way was reasoned, reasonable and available to it on the evidence. Nine features of the interviewee's identity could be seen in the broadcast.²⁶ The broadcast included a detailed description of the thinly populated area where she lived.

[53] There was nothing in the evidence before the Authority to contradict the Authority's findings. In fact, there is nothing in the further evidence on this issue beyond the deponents' statements that they disagree with the Authority. I agree with Mr Pilditch's submission that TVNZ's submissions are largely directed at offering an alternative interpretation of the evidence, rather than identifying how the Decision is plainly wrong.

[54] For these reasons I dismiss TVNZ's appeal in so far as it relates to the first issue concerning identification.

Issues 2-4: Reasonable expectation of privacy – highly offensive disclosure – defence of informed consent

[55] In relation to the other issues, TVNZ's submissions rely heavily on the further evidence. In an attempt to bring its submissions within the principles that apply to appeals from the exercise of a discretion, TVNZ submits that the Authority failed to take further evidence into account, and that as a result its decision is plainly wrong. In making that submission TVNZ acknowledges, as it must, that the Authority did not take TVNZ's evidence into account because TVNZ had not placed that evidence before the Authority.

²⁵ *Moore v TV Works Limited* (BSA Decision 2009-036, 8 July 2009), referred to in the Privacy Guide in the Code Book at 61.

²⁶ Decision, above n 1, at [2] and [14].

[56] It is hardly a failure by the Authority not to consider evidence it did not have. TVNZ's submission illustrates the difficulties that arise when an appeal Court receives further evidence. The appeal Court becomes a first instance decision maker in respect of that evidence. These difficulties are particularly acute in the context of an appeal from the exercise of a discretion by a specialist body.

[57] But for the further evidence, I would also dismiss the balance of TVNZ's appeal. The Authority's findings were reasoned, reasonable and available on the evidence before it. In my view it was open to the Authority to find on the evidence before it that the interviewee had a reasonable expectation of privacy; that disclosure of her identity would have been highly offensive to an objective reasonable person in the interviewee's position; and that she had not given her informed consent to any such disclosure.

[58] Mr Pilditch submits that even taking the further evidence into account there are good grounds upon which I might dismiss the appeal. That may or may not be so. I will not express a view on that because I consider it is appropriate that the Authority consider the second, third and fourth issues in light of the further evidence TVNZ has filed on appeal.

[59] In *Telecom Corporation of New Zealand Limited v Commerce Commission* the Court of Appeal declined to grant leave to Telecom to appeal the High Court's discretionary decision not to allow Telecom to adduce further evidence in an appeal from a decision of the Commerce Commission.²⁷ The Court of Appeal observed that:²⁸

But in exercising these powers [i.e. to allow further evidence] the Court must be alert against the danger of allowing what the Legislature intends to be a genuine appeal against a decision of an expert body – and a decision reached, it may be added, after a somewhat distinctive procedure of investigation, draft determination, and conference – to be converted into a new trial, the prior proceedings being but a prelude or, as some counsel put it in argument, a dummy run. This consideration must weigh strongly against the allowance of any evidence which is little more than an improvement on, or a revised version of, material that was before the Commission.

²⁷ *Telecom Corporation of New Zealand v Commerce Commission* (1991) 3 PRNZ 259.

²⁸ At 260.

[60] This observation was made in the context of an application to adduce further evidence. I consider the reasoning applies equally to my assessment of how best to deal with further evidence that has been admitted. The Court (on appeal) is being asked to make a first instance decision in relation to the further evidence. But the Court does not have the benefit of the Authority’s specialist view; and the unsuccessful party will have no right of appeal. That is undesirable in both respects, and even more so in combination.

[61] I also note that the Authority considered the most appropriate and effective remedy to be publication of its Decision, which it said would “provide guidance to TVNZ and all broadcasters” on the important issues that arise.²⁹ This reinforces my view that it is appropriate for the Authority to consider the further evidence - including Mr Fitzgerald’s evidence that to uphold the complaint will have a “chilling effect” on news gathering, not just for TVNZ but across the news industry. It appears that TVNZ did not make that submission to the Authority previously.

[62] At the risk of labouring the point, I emphasise that by directing the Authority to reconsider these issues in light of the further evidence, I am neither allowing the appeal nor expressing any view as to what the outcome of the Authority’s reconsideration might be. The directions simply reflect my view that the specialist Authority should consider the further evidence before this Court does so on any appeal. I also consider that the Authority should receive a copy of Mr Pilditch’s written submissions. These dealt in part with the further evidence in the context of the issues that the Authority is to reconsider. It is of course for the Authority to decide what it makes of those submissions.

[63] Finally, without wishing to revisit Powell J’s decision to grant TVNZ leave to adduce that evidence,³⁰ it is unclear to me why TVNZ did not provide the further evidence (or equivalent statements) to the Authority during the complaint process. I accept that it may not be appropriate in the context of many (perhaps most) complaints to file affidavits. But here the Authority asked TVNZ to provide evidence of informed

²⁹ Decision, above, n 1, at [44].

³⁰ I note that when he made that decision Powell J had neither the Common Bundle nor the benefit of submissions from counsel to assist.

consent and indicated flexibility as to timing for TVNZ to do so. TVNZ passed on a very brief summary of comments from Mr Boswell. Subsequently, in response to the Authority's provisional decision to uphold the complaint, TVNZ took steps to obtain the handwritten note (but not the more detailed statement/affidavit) from the interviewee. The Authority then took that note into account in reaching its final Decision. All this is consistent with the Authority's obligation pursuant to s 10 of the Act to implement an informal but thorough complaint process that is consistent with the principles of natural justice. That process may differ depending on the particular circumstances of each complaint. The complaint process should always provide broadcasters such as TVNZ with the opportunity to provide the Authority with the evidence and submissions upon which it would rely to respond to a complaint. Factual matters should not be left to be raised for the first time on appeal.

Result

[64] In so far as the appeal concerns the issue of whether the broadcast identified the interviewee, the appeal is dismissed.

[65] Pursuant to High Court Rule 20.19(1)(b)(ii), and for the reasons set out above, I direct the Authority to reconsider the following questions in light of the further evidence that TVNZ has filed in this appeal:

- (a) Whether the broadcast disclosed information about which the interviewee had a reasonable expectation of privacy.
- (b) Whether the disclosure would be highly offensive to an objective reasonable person in the position of the interviewee.
- (c) Whether the defence of informed consent was available to TVNZ.

[66] Counsel for the Authority is to ensure it has received a copy of the written submissions Mr Pilditch filed in this proceeding.

[67] An order is made preventing the publication of any information likely to lead to the identification of the interviewee without leave of the Court, in particular

precluding any person seeking access to the Court file having access to the affidavit or other information such as minutes that may identify the interviewee.

Costs

[68] Mr Pilditch suggests there may be grounds upon which the Court should direct TVNZ to contribute to costs. He is to file a memorandum in that regard within 15 working days of the date of this Judgment. TVNZ is to file any memoranda within a further 10 working days. I will deal with that issue on the papers.

Robinson J