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Television New Zealand Amendment Bill 2009

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Published: 15 February 2010 Prepared by John McSoriley BA LL.B, Barrister Legislative Analyst P: (04) 471-9626 (Ext. 9626) F: (04) 471-1250	Caution: This Digest was prepared to assist consideration of the Bill by members of Parliament. It has no official status. Although every effort has been made to ensure accuracy, it should not be taken as a complete or authoritative guide to the Bill. Other sources should be consulted to determine the subsequent official status of the Bill.

Purpose

The aim of the Bill is to amend the Television New Zealand Act 2003 (the Act) to:

- replace the TVNZ charter;
- amend the prohibition on Ministerial direction to TVNZ;
- enable the screening of "TVNZ archived works"; and
- repeal " ... provisions of the Act that are spent"¹.

Background

The TVNZ charter

The Government aims to replace the TVNZ charter " ... with a briefer, and less prescriptive, statement of functions which enables Television New Zealand ... to determine its own priorities against a general

¹ Television New Zealand Amendment Bill, 2010 No 89-1, Explanatory note, General policy statement, p. 1.

set of functions. It also specifies that TVNZ is to provide content through a range of media, in addition to the conventional television channels"².

Broadcasting of TVNZ archived works

"The other purpose of the Bill is to allow for the rescreening of television programmes that were produced before the establishment of the Broadcasting Commission (NZ On Air) in 1989. These works, which are held in the TVNZ Archive, are not currently able to be shown in their entirety because, with the passage of time, some rights holders cannot be located. It is in the public interest that they be seen again, as part of New Zealand's screen heritage. The Bill therefore creates a new Part 4A (TVNZ archived works) to make provision for the rescreening of such works while recognising the interests of rights holders. This new Part specifies that TVNZ may rescreen the works in question without charge to the public, while giving notice to potential rights holders.

"As part of the recognition of the interests that are held in these works, the Bill requires a fund to be established from which compensatory payments may be made to rights holders. Those who believe they have an interest in an archived work will be given the opportunity to register their interest. Those who do so will be eligible to receive compensatory payment in accordance with an assessment made of that interest. Provision is made for assessment according to the role played by a person in the production.

"A review process is provided for those whose registration is declined or who are dissatisfied with the calculation of the payment allocated to them, or who, through no fault of their own, were not able to register their interest during the period allowed, and wish to pursue that interest"³.

Main Provisions

Functions of TVNZ

The Bill replaces the existing Section 12 of the Act with the following:

"The functions of TVNZ are to be a successful national television and digital media company providing a range of content and services on a choice of delivery platforms and maintaining its commercial performance.

"In carrying out its functions, TVNZ must provide high quality content that:

- is relevant to, and enjoyed and valued by, New Zealand audiences; and
- encompasses both New Zealand and international content and reflects Māori perspectives.

"TVNZ's services must include the provision of channels that are free of charge and available to audiences throughout New Zealand" (*Part 1, Clause 6, substituting Section 12 of the Act*).

Comment

The existing Section 12 provides *inter alia* that "in carrying out its functions, TVNZ's principal objective is to give effect to its Charter set out ([in detail in the Section]) while maintaining its commercial performance" (*Section 12(2) of the Act*).

² *ibid.*

³ *ibid.*, pp. 1 and 2.

Powers of shareholding Ministers

The existing Section 27(1) of the Act generally provides that shareholding Ministers may, by written notice to the TVNZ board:

- direct the board to include in, or omit from, its statement of intent any provision or provisions of a kind referred to in Section 23 of the Act (i.e. qualitative and quantitative performance measures for measuring performance against its Charter and a statement of how it will involve the public in measuring performance against its Charter); and
- determine the amount of dividend payable by TVNZ to the Crown in respect of any financial year or years (*Section 27(1) of the Act*).

The Bill provides that the Ministers may merely determine the amount of the dividend to be paid in any year and removes the other power of direction (*Part 1, Clause 8, amending Section 27 by substituting subsection (1)*).

Prohibition on Ministerial direction

The existing Section 28 of the Act provides that:

(1) No shareholding Minister or any other Minister, and no person acting by or on behalf of or at the direction of a shareholding Minister or any other Minister, may give a direction to TVNZ or to any of its subsidiaries, or to any director or officer or employee of TVNZ or of any of its subsidiaries, in respect of:

- a particular programme or programmes or a particular allegation or a particular complaint; or
- the gathering or presentation of news or the preparation or presentation of current affairs programmes; or
- programme standards.

(2) No director of TVNZ or of any of its subsidiaries may be removed for any reason relating to:

- a particular programme or a particular allegation or a particular complaint relating to a particular programme; or
- the gathering or presentation of news or the preparation or presentation of current affairs programmes; or
- the responsibility of TVNZ or any of its subsidiaries for programme standards.

The Bill amends this section to read as follows:

(1) No shareholding Minister or any other Minister, and no person acting by or on behalf of or at the direction of a shareholding Minister or any other Minister, may give a direction to TVNZ or to any of its subsidiaries, or to any director or officer or employee of TVNZ or of any of its subsidiaries, in respect of:

- any programme or other content; or
- any allegation or complaint relating to a programme or other content; or
- the gathering or presentation of news or the preparation or presentation of any current affairs programme or content; or
- standards administered under the Broadcasting Act 1989.

(2) No director of TVNZ or of any of its subsidiaries may be removed for any reason relating to:

- any programme or other content; or
- any allegation or complaint relating to a programme or other content; or
- the gathering or presentation of news or the preparation or presentation of any current affairs programme or content; or
- the responsibility of TVNZ or any of its subsidiaries for compliance with standards administered under the Broadcasting Act 1989.

(2A) This section applies regardless of the type of delivery platform TVNZ uses to deliver any programmes or other content. *(Part 1 Clause 9, amending Section 28 of the Act).*

TVNZ archived works

Definitions of "archived work" and "TVNZ Archive"

The Bill defines the term "archived work" as " ... a programme made by or on behalf of the Broadcasting Corporation of New Zealand or its predecessors on or at any time before 27 May 1989 and held in the TVNZ Archive, and includes an archived work that comprises a series of episodes". The term "TVNZ Archive" is defined as " ... the archive that is a wholly owned subsidiary of TVNZ" *(Part 1, Clause 10, inserting New Part 4A into the Act, inserting Subpart 1, inserting New Section 29A, definitions of "archived work" and "TVNZ Archive").*

"Person with an interest in an archived work"

The Bill defines this term to mean " ... a person contracted to provide services of a kind specified in clause 1 of Schedule 3 [(of the Act)] for the purpose of making the work and includes the estate of such a person".

The ownership interests specified in Clause 1 of Schedule 3 are those of:

- creator, writer, producer, or director of the archived work; or
- choreographer or composer; or
- leading or solo performer, artist, or presenter; or
- supporting artist *(New Part 4A, inserting Subpart 1, New Section 29A, definition of "person with an interest in an archived work"; Schedule to the Bill, inserting New Schedule 3 into the Act, subclause 1).*

TVNZ's right to screen archived works

The Bill sets out the circumstances in which TVNZ may screen archived works and provides for it to grant to the Māori Television Service the right to screen archived works and for TVNZ to enter into arrangements with NZ On Screen to screen archived works. Works screened under this section must be screened free of charge *(New Part 4A, New Subpart 2, New Section 29C).*

Displacement of interests of persons with an interest

The Bill provides that the rights and privileges of persons with an interest in an archived work cease, and are replaced by the rights set out in New Part 4A of the Act. However, if an archived work is screened other than free of charge, the normal legal rights and privileges (if any) of those persons continue *(New Part 4A, New Subpart 2, New Section 29D).*

Notices of screening of archived works

The Bill requires TVNZ to give public notice of its intention to screen an archived work and to invite persons with an interest in a specified archived work to participate in the scheme set up by this Bill (*New Part 4A, Subpart 3, New Section 29F*).

Funds that must be established for purposes of scheme

The Bill provides for the establishment of the TVNZ Archived Works Fund (the Fund) for the purpose of making payment to those who, under New Part 4A, register their interest in an archived work which is to be screened. TVNZ must ensure that at all times the Fund contains, in relation to an archived work, a sum that:

- amounts to \$300 for each half hour for which the archived work is first screened; or
- is prescribed by regulations, being a sum that is the market value of the archived work, having regard to the uses permitted for that work by the Act.

The Bill provides that a sum of no less than 10% of the amount held in the TVNZ Archived Works Fund must be set aside in a contingency fund for meeting payments required as a result of a review, including the costs of conducting a review and administering the review process (*New Part 4A, Subpart 3, New Sections 29G and 29H*).

Participation in scheme

The Bill sets out the requirements for registration to participate in the scheme under which a person's interest in an archived work is assessed for the purpose of making payment to that person. A determination is to be made and notice given as to whether a person is qualified to register for the scheme. The Bill provides for the timing of, and the basis on which, TVNZ must assess a person's interest, notify the person, and make the payment. A person must be told of their right to apply for a review of the decision of TVNZ (*New Part 4A, New Sections 29I-29K*).

Review

The Bill provides for the chief executive⁴ to appoint reviewers who are recognised as experts with the knowledge, experience, and qualifications relevant to reviewing an assessment by TVNZ of a person's interest in an archived work and quantifying the person's interest for the purpose of establishing an appropriate payment. It also provides for payment of reviewers and for their immunity from liability. The Bill also provides requirements for applying for a review, including the information that must be included with the application for review. The matters that are relevant to a determination of an application for review are also set out. Any payment required by the reviewer is made from the contingency account and the determination of a reviewer is final (*New Part 4A, Clauses 29L-29P*).

Regulations

The Bill provides that the Governor-General may, by Order in Council, on the recommendation of the Minister⁵ (currently the Minister of Broadcasting), make regulations for certain matters including to:

- provide for other platforms or channels or new methods by which archived works may be made available for public viewing;

⁴ Currently, the chief executive of the Ministry for Culture and Heritage: Television New Zealand Amendment Bill, 2010 No 89-1, Explanatory note, clause by clause analysis, p. 5.

⁵ Currently the Minister of Broadcasting, Ibid.

- add new criteria for any assessment under section 29K, or amend or cancel criteria;
- vary the sum that must be held in the Fund for distribution under the scheme in relation to an archived work;
- add to or amend the categories of interest provided for in clause 1 of Schedule 3;
- vary the proportion of the total sum of money available in relation to an archived work for a category of interest, as set out in clause 2 of Schedule 3; and
- vary the method of calculating the share of the total sum of money payable to each person with an interest in an archived work, as set out in clause 3 of Schedule 3 (*New Part 4A, Subpart 5, New Section 29Q*).

Funds left over and review of the scheme

The Bill provides that TVNZ may apply any residual funds in the TVNZ Archived Works Fund to either the contingency account or the maintenance of the TVNZ Archive. It is also provided that the chief executive must initiate a review of the operation of New Part 4A two years after the first notice advising that an archived work is to be screened is given by TVNZ under New Section 29F and to provide a report to the Minister for presentation to the House of Representatives not later than three years after the date of that first notice (*New Part 4A, Subpart 5, New Clauses 29R and 29S*).

"Spent sections of principal Act repealed"

The Bill repeals the following "spent sections":

- Section 7 (TVNZ ceases to be State enterprise);
- Section 8 (transmission business separated from TVNZ);
- Section 9 (separation of transmission business implemented by Order in Council); and
- Section 10 (transitional provision relating to TVNZ ceasing to be State enterprise and separation of transmission business) (*Part 2, Clause 12*).

Amendment to Copyright Act 1994

The Bill amends the Copyright Act 1994 by providing that the communication of an archived work in accordance with New Section 29C of the Television New Zealand Act 2003 does not infringe copyright (if any) in the archived work (*Part 2, Clause 14, inserting New Section 57A into the Copyright Act 1994*).

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