had playlisted his recording but a large number had not. Among private radio stations more had playlisted it than not.

He noted that some, if not most, of those stations which had not playlisted the recording had probably played it once or twice. He cannot vouch for the accuracy of his list.

On 17 October 1986 Mr Brooking wrote to the Director-General of Radio New Zealand referring to previous efforts to persuade Radio New Zealand that his song was worthy of air-play.

In response, the Director-General sent a long letter quoting comments from a number of station programme directors. Several stations had played the song and many had also interviewed Mr Brooking to promote the song. According to the Director-General's letter it had apparently proved not to be popular with the audience. Some programme directors considered the recording lacked commercial appeal and was unsuitable to be added to their particular station's playlist. Some referred to research that had been undertaken. Earlier correspondence had taken place between the complainant and Radio New Zealand's Director-General and station executives.

Mr Brooking complained to the Broadcasting Corporation and also to the Broadcasting Complaints Committee, a statutory body.

On 6 July 1987, the Broadcasting Complaints Committee ruled that, while it had jurisdiction to deal with unjust and unfair treatment in programmes broadcast by any broadcasting body, in this case the complaint was that the recording had not been broadcast. The Committee considered it had no jurisdiction. The complainant was advised that, if he wished to proceed further, the proper course was to go to the Broadcasting Tribunal.

Mr Brooking said that the sense of injustice he felt was considerable and the interpretation of the Complaints Committee incorrect. A formal complaint was lodged with the Tribunal. The complainant considered that the recording should have been played more widely by Radio New Zealand stations because most independent stations played it. He considered it unfair that some stations would not play it when he thought a number of them were not achieving the 10 percent quota of local music that they had voluntarily adopted. He also considered it unfair if stations played only 10 percent local content. He considered the relative dominance of Radio New Zealand over independent radio to be unfair and a further limitation on his chances of success.

Mr Brooking also considered it unfair that, despite the enormous effort he had put into promoting his record, Radio New Zealand would not give him the benefit of the doubt in deciding whether or not to play it. He considered it did measure up, that some Radio New Zealand programmers were notorious for not knowing a potentially popular record when they heard one, and his record was not being played because he had antagonised some people within Radio New Zealand.

Mr Brooking submitted that the Act did not say that it was impossible to make a formal complaint about something that was not broadcast. He argued that it was possible to make complaints about unfair and unjust treatment in programmes and that he was unfairly treated by every single Radio New Zealand programme on each of the stations which did not include his record for a period of approximately 4 months after it was released.

The complainant later made further lengthy submissions to the Tribunal which we briefly touch upon now. In addition to the reasons already referred to he argued that the Broadcasting Act required that Radio New Zealand ensure that a New Zealand identity was maintained in its programmes, that there were deficiencies in the research that led to the decisions and that there was subjective decision making. He claimed the result was that he had been effectively denied the chance to make a living, having spent over $8,000 in producing the record but receiving only about $700 in royalties.

In response to Mr Brooking the Corporation argued that there was no right for the Tribunal to review the decision of the Broadcasting Complaints Committee but said it would offer no objection to the Tribunal reviewing the Committee's interpretation of section 95O (1) (b) in relation to the complaint.

The Corporation argued that section 95O (2) prevented the Committee from entertaining a complaint that did not fall within subsection (1) (b) namely: "To receive and consider formal complaints of—

(i) Unjust and unfair treatment in programmes broadcast by any broadcasting body; or

(ii) Unwarranted infringement of privacy in, or in connection with the obtaining of material included in, programmes broadcast by any broadcasting body:"

The Corporation pointed out that section 95Z (1) provides that if a complainant who has made a formal complaint for the purposes of section 95O (1) (b) of the Act is dissatisfied—

"(a) With the decision made under section 95Q or section 95X of this Act by the Committee . . . the complainant may refer the complaint to the Tribunal to be dealt with under section 67 of this Act."

The BCNZ argued that although the words "for purposes of section 95O (1) (b)" could be ambiguous, the Broadcasting Complaints Committee had ruled that it was not a complaint for the purposes of section 95O (1) (b). Even if it were, the Committee's decision was plainly not given under section 95Q or 95X and therefore there was not right to refer the complaint to the Tribunal.

Ruling

The Tribunal does not consider it should consider the substance or the purported complaint. The Tribunal should first decide on whether or not either the Broadcasting Complaints Committee or the Tribunal has jurisdiction to deal with the purported complaint. To that end it is necessary to examine the relevant elements of the complaints procedure.

It is to be noted that the responsibilities of the Corporation for programme standards set out in section 24 include a number of matters which the Corporation shall have regard to. One of these (section 24 (1) (b)) is the need to ensure that a New Zealand identity is developed and maintained in programmes.

The complaints procedure in so far as it relates to complaints about standards is contained in section 95B. The section sets out a procedure for dealing with complaints about several of the standards but specifically excludes from the procedure the standard relating to New Zealand identity. There is therefore no jurisdiction to deal with a complaint based on the failure to have regard to the need to ensure a New Zealand identity is developed and maintained as set out in section 24 (1) (b).

In Decision No. 16/82 the Tribunal ruled that the jurisdiction was to deal with complaints about programmes broadcast by the Corporation.

As was there pointed out, the interpretation is reinforced by the provision permitting the Minister to refer to the Tribunal a programme which has not yet been broadcast. The Minister must first consider that the intended broadcast which has been recorded or filmed will be in breach of one of the provisions of sections 24 (1) (c) to (g) or of the programme rules. (As was then the case, and is here the case again, there is no suggestion that, if the material it is desired to have broadcast were broadcast, that would constitute a breach.) Also, the Minister must consider that, in the special circumstance of the case, it is in the public interest that the question be referred to the Tribunal.

These would appear to be the only circumstances in which the Tribunal can consider any material before it is broadcast. We therefore cannot deal with a complaint that some material has not yet been broadcast except as set out above.