IN THE COURT OF APPEAL OF NEW ZEALAND

CA239/2015
[2016] NZCA 512

BETWEEN	THE ELECTORAL COMMISSION Appellant
AND	DARREN HAMISH WATSON First Respondent
	JEREMY THORNTON JONES Second Respondent

Hearing:	18 May 2016
Court:	Miller, Cooper and Winkelmann JJ
Counsel:	A M Powell and A L Dixon for Appellant W L Aldred and J S McHerron for Respondents A S Butler and E M Watt for Broadcasting Standards Authority as Intervenor
Judgment:	20 October 2016 at 11.30 am

JUDGMENT OF THE COURT

A The application for leave to amend the grounds of appeal is granted.

B The appeal is dismissed.

C The appellant must pay the respondents costs for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] Electoral law protects both the right to vote and the right to free expression. The two rights are complementary, but a full and effective right to vote also requires that political parties and candidates compete transparently and under rules applicable to all. So the legislation regulates election advertising on the premise that the public interest justifies the resulting restrictions on free speech. It also confers advisory and policing functions upon the Electoral Commission.

[2] Planet Key was a satirical song and video that but for the intervention of the Electoral Commission would have been broadcast in the lead up to the 2014 general election. The Commission is said to have overreached by interfering in the expression of personal political views. Planet Key itself is now of historical interest, but the legal controversy that it engendered is not; the controversy concerns the

meaning of the legislation that the Commission administers and it has significant implications for future elections.

[3] The Commission has brought this appeal to settle a difference of opinion in the High Court about the meaning of "election advertisement" in the Electoral Act 1993, and to clarify the meaning of "election programme" in the Broadcasting Act 1989. The High Court judgments concerned are those of Clifford J in this case (*Planet Key*)[1] and Mander J in *Greenpeace of New Zealand Inc v Electoral Commission.*[2] Both were delivered in judicial review applications argued shortly before the 2014 election.

[4] The first and second respondents created the song and video respectively. The Broadcasting Standards Authority appears as intervenor to support the respondents.

The making of Planet Key

[5] On 18 September 2012 the Prime Minister responded to a Parliamentary question from Metiria Turei, the Green Party co-leader, about what life would be like on "Planet Key". He responded:[3]

> I do not know so much about "Planet Key", but my expectations are it would be a lovely place to live, it would be beautifully governed, golf courses would be plentiful, people would have plenty of holidays to enjoy their time, and what a wonderful place it would be.

[6] The first respondent, Darren Watson, is a professional songwriter and musician with a bleak view of New Zealand politics, which he thinks tainted by greed, obfuscation and wilful dishonesty. The Prime Minister's answer inspired him to write the song Planet Key to express those views in the lead up to the 2014 general election. The music intersects blues and rock genres, and these are the lyrics:

> Never had much of nothing
> Never had much to show

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1 *Watson v Electoral Commission* [2015] NZHC 666 [High Court judgment].
2 *Greenpeace of New Zealand Inc v Electoral Commission* [2014] NZHC 2135, [2014] 3 NZLR 802.
3 (18 September 2012) 684 NZPD 5269

All I wanted when I was growing up
Was to be the boss of you all
Never believed in nothing
Never took a stand
I owe it all to my mother
Now that I'm almost a man … and I'm

Up here on Planet Key
It's all for one and it's all for me
Up here on Planet Key
You think I'm faking?
You're not mistaken.

I am a new politician
The kind you long to believe
You see yourself in my story
You see my heart on my sleeve
Never believed in nothing
Never cared for the fools
Who want to ruin this country
With all their taxes and rules.

And I'm up here on Planet Key
You got the money that's enough for me
Up here on Planet Key
You think I'm jokin'?
This gun is smokin'.

Never had much of nothing
But now I'm livin' it big
I marvel how much you trust me
I hide the truth like this wig.

I'm up here on Planet Key
In the land where the rich are free
I'm up here on Planet Key
We're immune to GCSB
Up here on Planet Key
You want compassion don't vote for me
Up here on Planet Key
The clock is tickin'.

[7] The second respondent, Jeremy Jones, is a designer who offered to make a video to accompany the song. He saw the exercise as a light-hearted way to express his own political views. Clifford J neatly described the video as:[4]

> … a Monty Python-style animated video satirising a wide range of issues relating to the Prime Minister personally, and to the National Government and other senior politicians, to the words and music of the song. Issues such as the Prime Minister's state house upbringing, his reported lack of memory

4 High Court judgment, above n 1, at [30].

> of the 1981 South African rugby tour, and his early career as a banker, are addressed in what is intended to be a humorous manner. For example, Mr Key is shown dressed as a cowboy, riding the "Charging Bull" statue on Wall Street whilst holding United States bills in his hands. In terms of policy issues, visual references are made to the close relationship that the Prime Minister has fostered with the United States, the SkyCity casino transaction, the funding of Hollywood projects, fracking, asset sales, the Christchurch rebuild, surveillance issues, the Prime Minister's relationship with Cameron Slater and a wide range of other matters.

[8] The song and video were artistic and satirical, but they also conveyed political messages sharply hostile to the National Party and several of its senior Ministers, particularly the Prime Minister. Notably, the song advised the audience not to vote for Mr Key if they wanted compassion and the video portrayed negative views of Mr Key and several Ministers on contentious issues of the day. The respondents conceded before us, as in the High Court,[5] that the song and video were likely to encourage voters not to vote for the National Party or for Mr Key.

[9] Messrs Watson and Jones acted alone, not for any political party or interest group. Mr Watson paid the production expenses — some $721.63 — himself. He intended to publish the song on iTunes for paid download, with royalties to be shared with Mr Jones.

Publication

[10] On 4 August 2014, within the three-month regulated period before the general election, Mr Watson released the song on iTunes and Mr Jones uploaded the video to the YouTube and Vimeo websites for free viewing. Mr Watson also sent free downloads of the song to radio stations that he thought might play it. No question arose of paying them to play the song.

The Electoral Commission's intervention

[11] An independent radio station, Free FM Hamilton, learned of the song through Facebook and one of its volunteer programme-makers decided to include the song in what the evidence describes, without elaboration, as a politics-based radio show.

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5 High Court judgment, above n 1, at [61].

The station's programme director emailed the Commission as a precaution, to confirm it could be broadcast.

[12] The Commission responded with the advice that the song was an election programme under the Broadcasting Act; and that being so, its broadcast on radio or television would be unlawful unless part of a news item. It will be seen that the Commission treated the song as a programme in itself, notwithstanding that Free FM planned to play the song as part of another programme.

[13] In response to the Commission's advice, Free FM chose not to broadcast the song.

[14] The Commission confirmed its view in an advisory opinion given to Mr Watson on 14 August 2014, adding that the video was also an election programme. Both met the definition because they might reasonably be thought to encourage voters not to vote for the National Party or Mr Key. For similar reasons, it advised that both the song and the video were election advertisements for the purposes of the Electoral Act. It advised that individual political views published on a medium such as the internet were exempt, but that exception would not apply to the song if it was available for paid download or to the video if it was a collaboration between two people rather than the work of one. That being so, Mr Watson must comply with the obligations of an unregistered promoter, meaning that he must publish a promoter statement with the song and video and he must keep records of any election expenses incurred. The Commission warned that the omission of a promoter statement was an illegal practice.

[15] Mr Watson protested but the Commission was unmoved. It contacted other broadcasters to advise them that the song and video could not be broadcast on radio or television because it was an election programme. Mr Watson responded by withdrawing the song and video from circulation. In his view a promoter statement would detract from the song's impact and clash with its style and content. He claims that the Commission effectively prevented him from expressing his own political views through his music.

[16] Ironically but unprofitably from Mr Watson's perspective, the Commission's intervention earned the song a good deal of publicity, got him some interviews on television and radio, and resulted in the song being played as part of news programmes.

The definitions of election advertisement and election programme

[17] We begin with a concise overview of the two Acts, so far as relevant. The Electoral Act regulates publication of election advertisements at any time and limits what can be spent on them in the regulated period of three months before polling day.[6] Election advertisement means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to vote, or not to vote, for a type of candidate or party by reference to views or positions adopted or not adopted.[7] The definition excludes, inter alia, editorial content and personal political views published on the internet.[8]

[18] No one may initiate or instigate an election advertisement who is not a party secretary or candidate, a registered promoter or an unregistered promoter, and every advertisement must include a promoter statement disclosing the promoter's name and address.[9] The legislation sets limits on what may be spent during the regulated period by candidates, parties, and registered and unregistered promoters respectively.[10] Consistent with these limits, advertisements encouraging voters to vote for a party or candidate must be authorised by the party or candidate,[11] and records must be kept of all election expenses incurred.[12] The Act polices these limits with a number of offences.

[19] The Commission has a supervisory role; it must advise any person who asks whether in its opinion an advertisement is an election advertisement, and it must also report to the police the facts on which it believes an offence has been committed.[13]

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6 Electoral Act 1993, s 3B.
7 Section 3A.
8 Section 3A(2)(c) and (e).
9 Sections 204B and 204F.
10 Sections 205C, 206C, 206V and 204B(1)(d) respectively.
11 Sections 204G and 204H.
12 Section 204E.
13 Sections 204I and 204J.

It is in this supervisory capacity that the Commission reluctantly but properly brings this appeal.

[20] The Broadcasting Act regulates the broadcast of election programmes by broadcasters. A broadcaster is a person who broadcasts programmes and broadcasting relevantly means the transmission on television or radio of programmes for reception by the public using broadcasting receiving apparatus.[14] An election programme is a programme that encourages or persuades or appears to encourage or persuade voters to vote for, or not to vote for, a person or political party, or which advocates support for or opposes a political party or candidate.[15]

[21] The Broadcasting Act provides for funding, which the Commission allocates, for political party broadcasts within election periods,[16] and it authorises election programmes broadcast for a named constituency candidate for a fee.[17] The publicly owned broadcasters must provide time at no cost for the broadcast of the opening and closing addresses of eligible political parties.[18] It otherwise generally prohibits broadcasting of election programmes at any time.[19] The prohibition does not extend to news, comments or current affairs programmes.[20]

[22] An election programme may also be an election advertisement, but the coverage of the two statutes is not entirely co-extensive. As we go on to explain, the Electoral Act covers all forms of publication and the definition of election advertisement extends to types of parties or candidates, while the Broadcasting Act is confined to broadcasters and the definition of election programme does not extend to issues advocacy unless it supports or opposes a party or candidate. The qualifications to the definition of election advertisement and the prohibition on broadcasting election programmes are not identical; the former excludes editorial content and unpaid publication on electronic media of an individual's personal

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14 Broadcasting Act 1989, s 2(1), definitions of "broadcaster" and "broadcasting".
15 Section 69(1), definition of "election programme".
16 Sections 74–76B. For a useful explanation, see *Alliance Party v Electoral Commission* [2010] NZCA 4, [2010] NZAR 222 at [16]–[23].
17 Section 70(2)(c). The fee is an election expense for Electoral Act purposes, counted towards the spending limit on election advertising: Electoral Act, s 205.
18 Broadcasting Act, ss 71–71A, 73, 75–76 and 77A.
19 Section 70(1).
20 Section 70(2B).

political views, while the latter excludes news, comments and current affairs programmes.

Protected rights engaged

[23] It is common ground that, as Clifford J put it, the Electoral Act and Broadcasting Act work together to promote participant equality and transparency, so protecting the right to vote by restricting free expression, and that restrictions of this kind can be justified in a free and democratic society.[21] Parliament intended to limit the influence of money on the electoral process, so preserving equality of voice among participants, and to promote transparency by requiring that parties, candidates and promoters be identified with their election advertisements.

[24] These objectives are sufficiently evidenced by the purpose statement in the Electoral Finance Act 2007, which introduced the definition of election advertisement to regulate parallel campaigners — by which we mean persons or organisations who are not themselves candidates or parties but commit resources to campaigning in co-operation with them — and limited the amount that could be spent on advertising during the regulated period. The amendments were motivated, as Clifford J explained, by reaction to two events in the 2005 general election: a religious group, the Exclusive Brethren sect, spent large sums on parallel campaigning for the National Party, and the National and Labour Parties may have circumvented spending caps.[22] The purpose statement provided that:[23]

> The purpose of this Act is to strengthen the law governing electoral financing and broadcasting, in order to—
>
> (a) maintain public and political confidence in the administration of elections; and
>
> (b) promote participation by the public in parliamentary democracy; and
>
> (c) prevent the undue influence of wealth on electoral outcomes; and
>
> (d) provide greater transparency and accountability on the part of candidates, parties, and other persons engaged in election activities in order to minimise the perception of corruption; and

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21 High Court judgment, above n 1, at [52].
22 At [143]–[144].
23 Electoral Finance Act 2007, s 3.

(e) ensure that the controls on the conduct of election campaigns—

(i) are effective; and

(ii) are clear; and

(iii) can be efficiently administered, complied with, and enforced.

As Clifford J explained,[24] the 2007 Act was repealed in 2009 and replaced by the Election (Finance Reform and Advance Voting) Amendment Act 2010, but the purpose statement from the 2007 Act remains relevant because the 2010 Act restored its controls on parallel campaigners, reinstating the definition of election advertisement and extending it to internet publications.[25]

[25] Clifford J did not find it necessary to undertake a full analysis under ss 4 to 6 of the New Zealand Bill of Rights Act 1990 (NZBORA).[26] He interpreted the legislation by examining the Commission's preferred meaning and, if the meaning imposed unreasonably on the right, inquiring whether a more rights-consistent interpretation was available. A challenge to his methodology was abandoned before us, the Commission sensibly recognising that nothing turned on it. The NZBORA question that remains is simply whether the Commission's preferred interpretation of the Electoral and Broadcasting Acts limits the right to free expression no more than reasonably necessary to achieve the legislative objectives.

The issues

[26] We turn to the issues, which are outlined in amended grounds of appeal. Ms Aldred resisted the amendment but she could point to no prejudice and we think it necessary to allow the amendment if we are to address the issues squarely.

[27] Counsel helpfully listed the issues for decision in a joint memorandum. Our list does not correspond exactly to theirs because we do not find it helpful to identify ordinary and natural meanings before considering alternative rights-consistent

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24 High Court judgment, above n 1, at [145].

25 As to the extension to internet publications, see (4 May 2010) 662 NZPD 10716–10717.

26 At [106]. New Zealand courts have taken a variety of approaches to the New Zealand Bill of Rights Act interpretive exercise, see *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA) and *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

meanings under NZBORA. Interpretation always addresses language and purpose,[27] and in this case the legislation aims to strike a balance between protected rights. That being so, it would be artificial to begin by interpreting the language without reference to those rights.

[28] The first issue concerns the meaning of advertisement in the Electoral Act. Clifford J held that the term means a commercial; that is, a radio or television advertisement.[28] For that reason, the song and video were not advertisements at all.[29] The Commission says, pointing to the decision in *Greenpeace*, that an advertisement is simply a notice or announcement to the public in any medium. It contends that a rights-consistent interpretation of the legislation is achieved by taking a robust view of what can reasonably be regarded as encouraging or persuading voters to vote in particular ways.

[29] The second issue concerns the meaning of election programme in the Broadcasting Act. Clifford J held that the term means an election programme that has been procured by a political party or others who are electioneering.[30] The Commission says that an election programme is anything broadcast by a broadcaster that has the effect or apparent effect of encouraging voters to vote for, or not to vote for, or otherwise supports or opposes, a candidate or party.

[30] The third issue concerns the meaning of editorial content in s 3A(2)(c) of the Electoral Act, and the fourth concerns the meaning of comments in s 70(3) of the Broadcasting Act. Clifford J held that these terms have a broad meaning, reflecting an underlying distinction between participation in the election process and commentary upon it.[31] The song and video could be seen as comment or editorial content.[32] The Commission says this interpretation would leave wholly unregulated any advertisements or programmes that seek to persuade voters but are not the work of a party or candidate.

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27 Interpretation Act 1999, s 5(1).
28 High Court judgment, above n 1, at [190].
29 At [191].
30 At [208].
31 At [222].
32 At [226].

[31] The fifth issue concerns the meaning of the phrase "publication on the Internet … of personal political views by an individual who does not make or receive a payment in respect of the publication …" in s 3A(2)(e) of the Electoral Act. Clifford J held that this exception allows more than one person to express their views collectively on electronic media but excludes views espoused and published by groups of people engaged in parallel campaigning; and further, the reference to payment is intended to capture those who pay to procure publication, rather than someone, such as the respondents, who might receive payment from anyone who chose to purchase the song after its publication.[33] The Commission says that because Messrs Watson and Jones collaborated, publication on YouTube and Vimeo did not qualify as personal political views, and because Mr Watson was paid for downloads the song was not exempt either.

[32] Having catalogued the issues, we approach them in a slightly different way. We do so for two reasons.

[33] First, we consider that the Electoral Act must be read as a whole, including the exceptions or qualifications, and so too the Broadcasting Act. Implicit in this Act-by-Act approach is an acceptance that, as Clifford J explained in a thorough survey of the legislative history that we gratefully adopt, the two statutes were not enacted as a package but rather reflect circumstances prevailing when they were enacted and from time to time amended. Of course this is not to suggest that they should be read without reference to one another. They overlap and we must seek to reconcile them.

[34] Second, our approach better isolates the real dispute. At its heart the appeal is less a disagreement about interpretation than a difference of philosophy. The Commission readily accepts that the legislation must be interpreted so that normal political discourse among citizens is not inhibited. That objective is achieved, as the Commission sees it, by casting a wide net but exercising judgement when assessing the effect of any given advertisement or programme upon voters' behaviour. As the respondents see it, the Commission aspires to regulate too much political speech and is inappropriately inclined to see compliance as costless; in the exercise of its

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[33] High Court judgment, above n 1, at [230].

advisory and policing powers it is a man with a hammer to whom every problem resembles a nail. They want to interpret the definitions and exceptions to limit the Commission's discretion to intervene.

[35] As we will explain, we see merit in both perspectives. Part of the solution to the interpretive puzzle is that the Commission should assess effect in a rights-sensitive manner: more so, as will be seen, than it did here. The definitions and exclusions also limit the Commission's capacity to intervene. We sympathise with the Commission, which has a difficult mandate and must work with patchwork legislation that is difficult to make sense of and only partly adapted to the disruptive, unruly and increasingly powerful medium of communication that is the internet. We will take interpretation so far as we can, acknowledging Mr Butler's caution that there comes a point where the legislature must be left to change the law if it thinks fit.

[36] We turn to the issues, which we preface by identifying the difference of approach to election advertisement in the High Court decisions in *Planet Key* and *Greenpeace*.

Planet Key **and** ***Greenpeace***

[37] *Greenpeace* addressed two separate publications. The first was a website encouraging the public to become "climate voters" by voting on the basis of climate change policies in the 2014 election. The site was avowedly non-partisan but it advised that as the election approached political parties would be asked to respond to questions about their positions on key elements of climate change policy. Mander J accepted that issue advocacy was not election advertising in itself, even if the advertisement took a position with which a given party or candidate happened to be associated.[34] But because the site identified party positions on those issues and established a yardstick for evaluating such positions, it had the "inevitable overall effect", when read with Greenpeace's wider campaign, of encouraging voting for or against parties.[35] Accordingly, the website was an election advertisement.[36]

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34 *Greenpeace of New Zealand Inc v Electoral Commission*, above n 2, at [46]–[47].
35 At [89].
36 At [91]–[93].

[38] The second publication was another website run by Greenpeace. It opposed offshore oil drilling, and it depicted what appeared to be the website of the Minister of Energy and Resources being flooded by a rising tide of oil. Although it was accessible during the regulated period, the website had been created some time earlier and it contained nothing specific that linked the website to the election or how voters should vote.[37] Mander J held that the website could not reasonably be regarded as encouraging or persuading voters to vote or not for a type of candidate or party.[38]

[39] Conflict is said to arise because Mander J held that advertisement in the definition of election advertisement should be given its ordinary meaning of a notice or announcement to the public,[39] while Clifford J held that advertisement has commercial connotations and hence a narrower meaning.[40] He had the benefit of Mander J's judgment, which was delivered three days before *Planet Key* was argued. He noted that it had not been necessary for Mander J to examine the exceptions and their implications for the definition.[41] Because he concluded that Planet Key was not an advertisement, for his part Clifford J was not required to consider its effect upon voters.

Election advertisements

The legislation

[40] The operative provision is s 204B(1) of the Electoral Act, which identifies those who may promote election advertisements:

> **204B Persons who may promote election advertisements**
>
> (1) A person is entitled to promote an election advertisement if the person is—
>
> (a) a party secretary:
>
> (b) a candidate:

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37 *Greenpeace of New Zealand Inc v Electoral Commission*, above n 2, at [123]–[124].
38 At [124].
39 At [24] and [79]–[80].
40 High Court judgment, above n 1, at [190]–[191].
41 At [180].

> (c) a registered promoter:
>
> (d) an unregistered promoter who does not incur advertising expenses exceeding $12,600 (or such other amount as is prescribed by the Governor-General by Order in Council under section 266A) in relation to election advertisements published during the regulated period.

[41] It is an offence wilfully to promote an election advertisement unless authorised under this provision:[42]

> (3) Every person who wilfully promotes an election advertisement without being entitled to do so under subsection (1) is guilty of an illegal practice.

[42] A promoter is a person who "initiates or instigates" an election advertisement that is published, or is to be published.[43] An election advertisement may be published only if it includes a promoter statement giving the promoter's name and address.[44]

[43] Promoters may be registered or unregistered. An unregistered promoter is, speaking generally, a promoter who does not have official status as a registered promoter or candidate or party or person involved in the affairs of a candidate or party.[45] An unregistered promoter may not incur advertising expenses exceeding $12,600 during the regulated period.[46] Advertising expenses relevantly include the costs of preparation, design, composition, printing, postage and publication of an election advertisement.[47]

[44] Publish has an extended meaning, in relation to an election advertisement, of bringing to the notice of a person in any manner.[48] It includes displaying on any medium and distributing by any means including disseminating on the internet or other electronic medium. However, this definition applies only to an election advertisement as defined, and then unless the context otherwise requires. It also

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42 Electoral Act, s 204B(3).
43 Section 204A, definition of "promoter".
44 Section 204F.
45 Section 204A, definition of "unregistered promoter".
46 Section 204B(d). A different limit on advertising expenses can be prescribed by the Governor-General by Order in Council: s 266A(1)(a).
47 Section 3E(1)(a).
48 Section 3D.

expressly excludes addressing one or more persons face to face. A person who brings an election advertisement to notice by addressing others face to face is not for that reason a promoter as defined and he or she does not promote the advertisement for purposes of s 204B.

[45] Election advertisement is defined in s 3A(1):

> **3A Meaning of election advertisement**
>
> (1) In this Act, **election advertisement**—
>
> (a) means an advertisement in any medium that may reasonably be regarded as encouraging or persuading voters to do either or both of the following:
>
> (i) to vote, or not to vote, for a type of candidate described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the candidate is stated):
>
> (ii) to vote, or not to vote, for a type of party described or indicated by reference to views or positions that are, or are not, held or taken (whether or not the name of the party is stated);
>
> …

The term includes candidate and party advertisements.[49]

[46] Advertisement is not further defined, but s 3A(2) goes on to specify that certain things are not election advertisements:

> (2) None of the following are election advertisements:
>
> (a) an advertisement that—
>
> (i) is published, or caused or permitted to be published, by the Electoral Commission or any other agency charged with responsibilities in relation to the conduct of any official publicity or information campaign to be conducted on behalf of the Government of New Zealand; and
>
> (ii) relates to electoral matters or the conduct of any general election or by-election; and
>
> (iii) contains either—

[49] Section 3A(1)(b).

(A) a statement indicating that the advertisement has been authorised by that officer or agency; or

(B) a symbol indicating that the advertisement has been authorised by that officer or agency:

(b) contact information (as defined in subsection (3)) published in any medium by a member of Parliament that satisfies all of the following requirements:

(i) the information was published by a member of Parliament in the course of performing his or her role and functions as a member of Parliament; and

(ii) the information was prepared for publication and published by the member of Parliament using funding received under Vote Parliamentary Service; and

(iii) the information was routinely published in that medium before the commencement of the regulated period and continues to be published in that medium during the regulated period; and

(iv) the information is published during the regulated period no more often and to no greater extent than before the commencement of the regulated period; and

(v) the information is published during the regulated period in the same form and style as before the commencement of the regulated period; and

(vi) the information is not included, combined, or associated with an election advertisement (as defined in subsection (1)), or with any other information so as to constitute an election advertisement, that is published by—

(A) the member of Parliament; or

(B) the secretary of the party to which the member of Parliament belongs; or

(C) any other person with the authority of the member of Parliament:

(c) the editorial content of—

(i) a periodical:

(ii) a radio or television programme:

(iii) a publication on a news media Internet site:

(d) any transmission (whether live or not) of proceedings in the House of Representatives:

(e) any publication on the Internet, or other electronic medium, of personal political views by an individual who does not make or receive a payment in respect of the publication of those views.

[47] Plainly the legislature had in mind a concept of advertising that encourages or persuades people to vote in particular ways. It specifies the effect that an election advertisement must be apt to have on a target audience when published. As will become apparent, after interpreting the legislation as a whole we do not find it necessary to qualify the definition by seeking further meaning in "advertisement".

[48] The definition declares that "none of the following" is an election advertisement. This language suggests that the list that follows does not comprise exceptions carved out from a broad definition; rather, it informs the meaning of election advertisement. The list includes contact information for a member of Parliament, the transmission of proceedings in the House, editorial content and any publication of personal political views by an individual on an electronic medium provided that person does not make or receive payment for publication.

[49] We make several general points about the legislation. First, it confirms that the legislature was concerned to ensure that wealth did not exercise disproportionate influence on decisions about who is to govern and what policies are to be pursued.[50] It achieves that purpose by limiting the amounts that can be spent on election advertising by various classes of promoter.

[50] Second, the legislature also wanted to ensure that promoters of election advertisements would be identified. The purpose statement in the 2007 Act aimed to strengthen the law by doing a number of things, one of which was to prevent the undue influence of wealth on elections, and another to minimise the perception of

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[50] This objective can be traced to the 1986 report of the Royal Commission on the Electoral System: The Royal Commission on the Electoral System *Towards a Better Democracy* (December 1986) at chapter 8.

corruption by providing greater transparency and accountability on the part of parties, candidates and "other persons engaged in election activities".[51]

[51] This second concern was not limited to those who spend substantial sums on advertising. There is no floor on expenditure below which a person who instigates or initiates an election advertisement is not a promoter. Put another way, a person can be a promoter without spending any money at all on advertising expenses. There is no room for an assumption that election advertisements always involve expenditure as defined in s 3E. In the 2010 amendments the legislature took care to extend the legislation to electronic media, excluding only the dissemination of personal political views, and it must be taken to have appreciated that, as the video illustrates, a brochure or other publication can be put together and disseminated electronically to a mass audience without incurring any direct costs of preparation, design and publication. For this reason we do not think that the term election advertisement can be restricted to paid advertisements.

[52] Third, if interpreted liberally the definitions of promoter — anyone who initiates an election advertisement to be published — and publish — bring to the notice of a person in any manner — together mean that the disclosure and accounting obligations of a promoter may attach to a great deal of political discourse among citizens via electronic and other media. It may be that, as the Commission contends, the obligations of a promoter are not especially onerous, but that is true only for those in the promotion business. We share Clifford J's opinion that for anyone else these obligations may well have a chilling effect that cannot be justified by the legislative objectives.[52]

Effect

[53] The legislation seeks to limit over-inclusiveness in a number of complementary ways. The first is effect. We have mentioned that an election advertisement must be reasonably regarded as encouraging voters to vote, or not to vote, for a type of candidate or party by reference to views or positions adopted or not adopted. We observe that:

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51 Electoral Finance Act, s 3.

52 High Court judgment, above n 1, at [167].

(a) The reasonable observer from whose perspective the decision is made is sensitive to the exceptionally high value of political speech in a democracy. As the Supreme Court held when considering whether a demonstration intended to interrupt an ANZAC service was offensive behaviour:[53]

> A reasonable person, in a context involving freedom of expression or another right guaranteed by the New Zealand Bill of Rights Act, must surely be a person who is sensitive to such values and displays tolerance for the rights of the person whose behaviour is in question. In other words, the hypothetical reasonable person (of the kind affected) is one who takes a balanced, rights-sensitive view, conscious of the requirements of s 5 of that Act, and therefore is not unreasonably moved to wounded feelings or real anger, resentment, disgust or outrage …

(b) It is the effect of the advertisement as a whole that matters. That includes not only its words and images but also its style and apparent purpose. For example, it may be apparent that a publication is intended to be funny or satirical or artistic. It is the advertisement's effect that matters, but the audience's appreciation of the author's purpose may inform effect. For example, readers may have lower expectations of factual accuracy in material that is intended to entertain.

(c) The advertisement must be considered in its factual context. Its relationship with other events may inform effect, as may its timing relative to the election.

(d) The relevant effect of the advertisement is its tendency to encourage voting for a type of candidate or party, and then only by reference to views or positions held or taken or not held or taken by that type of candidate or party. Thus advocacy about political issues is not election advertising unless it has the effect of identifying the positions of parties or candidates on those issues and encouraging voters to vote by reference to those positions.

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53 *Morse v Police* [2011] NZSC 45, [2012] 2 NZLR 1 at [64].

Editorial content

[54] Next, the editorial content of certain publications is not an election advertisement. Those publications are periodicals (a term further defined to mean newspapers, magazines and trade or professional journals that were established for purposes unrelated to the conduct of election campaigns and are published at regular intervals and generally available to the public[54]), radio or television programmes, and publications on "news media Internet sites", which presumably refers to internet sites run by news media interests. We make several points about this provision.

[55] First, it extends to a wide and diverse range of media. It is not confined to the traditional editorial content of news publications, or media regulated by the Press Council and the Broadcasting Standards Authority.

[56] Second, it requires that such publications enjoy an existence apart from the conduct of election campaigns. The definition of periodical confirms that, as does the notion of editorial content, which contemplates that such publications have some content other than the editorial. That other content need not be news reportage.[55]

[57] In this regard, we agree with Clifford J that editorial content must be interpreted liberally. It need not convey the opinion of the publication; it may include "op-ed" pieces written by others or any form of comment on the political process — including contributions made by the publication's audience — that the editors have chosen to publish. It remains the case that the publication must exercise some editorial oversight, by creating, permitting or selecting such comment for publication.

[58] Third, it is the association with the editor, rather than the effect of the message, that distinguishes editorial comment from election advertisements published in a newspaper or other periodical.[56] Put another way, the Electoral Act contemplates that editorial content may encourage voters to vote in particular ways

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54 Electoral Act, s 3A(3).

55 Although we note that the exception at s 3A(2)(c)(iii) is specifically for "news media Internet sites".

56 The definition of publish in s 3D includes advertisements published in newspapers or other periodicals.

and nonetheless exempts it. It recognises the importance of free political speech by protecting a long tradition in journalism of speaking truth to power.

Personal political views expressed via the internet

[59] Next is the proviso that any publication on the internet or other electronic media of personal political views by an individual who neither makes nor receives payment for publication is not an election advertisement. In our opinion this proviso is declaratory; it recognises that electronic media allow people to freely disseminate their personal political views to a mass audience and declares that the Electoral Act does not seek to regulate such publication.

[60] The exclusion addresses publication by an individual via the internet or other electronic media and the subject matter must comprise political views that have a personal quality. The policy explanation for this, given by the Electoral Legislation Committee, was that a non-commercial expression of views on the internet should be treated as analogous to the expression of those views in person.[57] Consistent with that, the legislation does not specify that the personal political views must be those of the publisher; that is, the *single* individual who brings the content to the notice of others by disseminating it on the internet. The natural meaning is simply that the political views must be personal in nature, as opposed, for example, to the views of a group or organisation or views expressed for some vested interest. That interpretation is consistent with the legislature's focus on parallel campaigners.

[61] It is necessary that the individual who publishes the political views should not make or receive a payment for the publication of those views. Such payment must be in respect of the act of publication rather than the views themselves. As the Select Committee explained, the objective was that of capturing those who make or receive payment to express political views for publication.[58] It evidences the legislature's focus on parallel campaigners who spend money on election advertising.

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57 Electoral (Finance Reform and Advance Voting) Amendment Bill 2010 (146–2) at 2–3.

58 At 3.

Parallel campaigners as the intended target of regulation

[62] This brings us back to the definition of a promoter as a person who initiates or instigates an election advertisement that is published. The definition is over-inclusive when examined against the objectives of pt 6AA, which was enacted for two distinct purposes. First and foremost, it was intended to identify a class of persons permitted to promote election advertisements. In doing so, the definition supports the Act's limits on amounts that may be spent on advertising.

[63] Consistent with this primary purpose, the Act contemplates that a single promoter may comprise an incorporated or unincorporated association of persons. That is confirmed by s 204L, which provides that a representative of a promoter who is not an individual or company may apply for registration on its behalf and anticipates that a promoter may include a trust. If it were otherwise the Act's monetary limits on election advertising might be readily evaded.

[64] The second purpose of pt 6AA was that of ensuring transparency in election advertising. What distinguishes a parallel campaigner from any citizen who chooses to engage in political advocacy via any medium of communication other than face to face speech is the expenditure of money or the existence of a public interest in knowing the promoter's identity. The latter interest is likely to arise only where the promoter represents some group or vested interest whose identity ought to be disclosed so that voters are not confused or misled; or to put it another way, so they can evaluate what they are being told before exercising their votes. That avoiding confusion is an objective of the legislation is confirmed by s 204M(c)(ii), which allows the Commission to refuse a promoter registration where its name is likely to confuse or mislead voters.

[65] This points to a difficulty with the legislation and a need for reform. The Act regulates the publication of election advertisements by anyone, not just participants and their parallel campaigners. That is why the parties have focused on the definition of election advertisement. But that definition does not fully protect political speech by non-participants in the electoral process. People who are not parallel campaigners or representatives of vested interests, and who do not incur any

or any significant expenses, may publish views that have the effect of encouraging voters to vote for, or not for, some party or candidate by reference to views adopted or not adopted. The exclusions for editorial content and personal political views published on the internet must be interpreted generously, as we have just explained, but they do not protect all political speech by non-participants. There is nothing this Court can do about it, apart from drawing the problem to Parliament's attention. To restrict s 204B(1) and (3) to parallel campaigners would be to go beyond the permissible bounds of interpretation.[59]

The Commission's gatekeeper role

[66] The legislation confers upon the Commission what Professor Geddis describes as the role of gatekeeper for electoral expression.[60] As the facts here confirm, it is practically able to determine what is published on some media. That power comes with a substantial measure of discretion, which is inherent in its advisory function and in its responsibility to report suspected offences to the police;[61] the legislation states that the Commission need not take action if it thinks breaches so inconsequential that there is no public interest in doing so. So far as ss 204B (entitlement to promote advertisements) and 204F (requirement to include promoter statements) are concerned, the legislation contemplates that the Commission will recognise that there may be no public interest in prosecuting those whose publications did not mislead voters about the publisher's identity or involve material expenditure.[62] This means the Commission should not leave the exercise of prosecutorial discretion to the police; rather, it must exercise its own discretion, considering whether the public interest will be served by reporting the matter to them. The Commission's powers should be exercised in a manner that reflects not only its duty to report suspected offences but also its duty not to do so if the matter is inconsequential. The same approach ought to inform the exercise of its advisory powers.

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59 Section 4 of the New Zealand Bill of Rights Act: see, for example, *Hansen v R*, above n 26, at [259]–[261].

60 Andrew Geddis "Law and New Zealand's 2014 election campaign" (2015) 14 Otago L Rev 117 at 141.

61 Electoral Act, s 204J.

62 Section 204J(2).

[67] The Commission should approach its work by asking itself the following questions:

(a) does the public have an interest in knowing the identity of the person instigating a given publication;

(b) is that person committing money or resources to campaigning;

(c) is that person acting for another interest or merely expressing political views that are personal in nature;

(d) would a reasonable person who is sensitive to the importance of free political speech think that in context the publication would have the effect of encouraging people to vote for or against parties or candidates by reference to views or positions adopted or not adopted; and

(e) should the publication be characterised as editorial content of a periodical, radio or television programme or news media internet site in which it appears.

Conclusions

[68] We conclude by recognising that our analysis of the legislation differs from that of both parties and in some respects from that of Clifford J. We readily agree with him that the Commission's interpretation of the legislation limits the right to free expression more than is necessary to achieve the legislative purpose and more than can be justified in a free and democratic society.[63] However, we do not think that in addition to having the prescribed persuasive effect on voters an advertisement must have a commercial quality; the legislation addresses influence as well as money, extending to advertisements for which no payments have been made or expenses incurred. We agree with him that the Act is aimed at a class of persons — participants in the electoral process — but we consider it may well capture those

[63] High Court judgment, above n 1, at [170].

who express personal political views via media other than the internet, and such over-inclusiveness is for Parliament to remedy.

[69] We also differ in some respects from Mander J in *Greenpeace*. He held that effect must be gauged by taking an objective view of the facts, partly because he reasoned that a purposive approach would create uncertainty by seeking to distinguish issue advocacy from election advertising.[64] We agree that the test is objective and may capture issue advocacy where it sufficiently identifies party or candidate positions and encourages voting by reference to them. But the legislation must be applied purposively, recognising that it is aimed at participants and parallel campaigners, and from the perspective of the reasonable observer who is sensitive to the importance of free political speech, and in a manner that protects the expression of personal political views. This requires that difficult judgments be made at the margin, but the difficulty is unavoidable. It is why the legislation confers upon the Commission a substantial measure of discretion in the exercise of its advisory and policing functions.

The song and video were not election advertisements

[70] In our opinion Messrs Watson and Jones plainly were not parallel campaigners. There was no public interest in knowing who they were; they represented no group or vested interest whose identity voters might want to know when assessing the song and video. They were simply expressing their own political views. And although Mr Watson incurred production costs that would fall into the definition of advertising expenses, they were not substantial.

[71] As noted, the respondents conceded that the song and video were likely to encourage voters not to vote for Mr Key or the National Party. Nothing now turns on it between the parties, but because this judgment will guide the Commission and others in future we record that we do not wish to be seen to adopt this concession. We add that the facts of *Greenpeace* are not before us and we express no view about whether the climate voter website had the required effect upon voters.

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64 *Greenpeace of New Zealand Inc v Electoral Commission*, above n 2, at [46]–[60].

[72] We make two points about the effect of the song and video. First, the Commission plainly thought the song, taken alone, had the effect required of an election advertisement, but it is not clear to us why the Commission formed that opinion. The lyrics denigrated Mr Key as uncaring and even venal, and they advised voters who cared about that not to vote for him, but the legislation requires more. As we see it, the lyrics did not encourage voters to vote by reference to views or positions adopted by Mr Key. Any such effect was surely too indirect to count.

[73] Second, although the video did directly evoke political issues of the day, both it and the song clearly had entertainment value. That, presumably, is why the song was offered for sale on iTunes. That being so, voters can be expected to realise that the song and video may not aspire to factual accuracy, meaning that it is open to debate whether the song and video would have the effect of persuading voters to vote against the National Party.

[74] We agree with Clifford J that the exclusion for personal political views published on the internet also applied to the song and video.[65] The Commission was wrong, in our opinion, to assert that the song and video had to be the work of a single individual. What mattered, as explained at [60] above, was that the views expressed were personal in nature. As Clifford J pointed out, there was no question here of Messrs Watson and Jones hiding their identities; as artists they sought to be identified with their work and no other interest was sheltering behind them. In addition, it was common ground that the only relevant payment in respect of publication was the payment Mr Watson would receive each time someone purchased and downloaded the song on iTunes. The fact that the audience had to pay to acquire the song ought to have been a pointer to the Commission that it was not an advertisement.

[75] We take a different view, however, of the editorial content exception. So far as this exception is concerned, the song and video are not one of the publications specified in s 3A(2)(c); as noted at [58] above, a publication must have a separate existence from the electoral advertisement in question and from the conduct of elections. If the exclusion is to apply, it must be done by characterising iTunes and

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[65] High Court judgment, above n 1, at [234]–[235].

the YouTube and Vimeo websites as publications and the song and video as editorial content of those publications. We are prepared to assume that those in control of those publications may occasionally remove material that is illegal or that they find offensive, but there is no evidence that any editorial judgment is exercised. There is substance in the Commission's concern that if interpreted too liberally this exclusion could easily extend to parallel campaigners.

[76] In conclusion, we agree with Clifford J, albeit for different reasons, that the song and video were not election advertisements.

Election programmes

[77] We turn to the Broadcasting Act issues. We approach these by outlining the main provisions, examining the concepts of programme and election programme, considering whether the prohibition is confined to election programmes for which the broadcaster has been paid, considering what "comments" means and, finally, assessing whether the song and video were election programmes.

The legislation

[78] The operative provision is s 70, which prohibits broadcasters from broadcasting election programmes at any time, except as the section allows:

> **70 Prohibition on paid election programmes**
>
> (1) Except as provided in subsections (2) and (2A), no broadcaster shall permit the broadcasting, within or outside an election period, of an election programme.
>
> (2) Nothing in subsection (1) applies in respect of—
>
> (a) an opening address or closing address that is broadcast—
>
> (i) for a political party or group of related political parties; and
>
> (ii) by TVNZ or RNZ during time allocated to that political party or group of related political parties under section 73(1); or
>
> (b) an election programme broadcast for a political party or group of related political parties and paid for with money

allocated to that political party or group of related political parties under section 74A; or

(c) an election programme—

(i) broadcast for a fee or other consideration; and

(ii) relating solely to 1 named constituency candidate at an election; and

(iii) used or appearing to be used to promote or procure the election of the candidate; and

(iv) broadcast by the candidate or with the candidate's authority within the election period; or

(d) any advertisement placed by the Electoral Commission, a Registrar of Electors, a Returning Officer, or other official for the purposes of the Electoral Act 1993; or

(e) any non-partisan advertisement broadcast, as a community service, by the broadcaster.

(2A) Nothing in subsection (1) restricts the amount of money that a political party or group of related political parties may spend on the production costs of an election programme.

(2B) Nothing in this Act derogates from section 214B of the Electoral Act 1993.

(3) Nothing in subsection (1) restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.

…

It will be seen that the heading refers to "paid" election programmes but the section itself does not. Further, the prohibition on broadcasting election programmes does not extend to news, comments or current affairs programmes. These terms inform the meaning of election programme, illustrating the legislature's purpose in prohibiting their broadcast.

[79] The Act regulates broadcasters by, among other things, requiring that they maintain standards, one of which is a principle that when controversial issues of public importance are discussed, reasonable efforts should be made to present significant points of view "either in the same programme or in other programmes

within the period of current interest".[66] Complaints may be made to the Broadcasting Standards Authority, which may order the broadcaster to broadcast a statement about a justified complaint.[67]

[80] Programme is defined to mean sounds and/or visual images "intended" to "inform", to "enlighten", or to "promote the interests of any person", or to promote goods and services:[68]

> **programme**—
>
> (a) means sounds or visual images, or a combination of sounds and visual images, intended—
>
> (i) to inform, enlighten, or entertain; or
>
> (ii) to promote the interests of any person; or
>
> (iii) to promote any product or service; but
>
> (b) does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text

[81] The Broadcasting Act recognises various kinds of programme and two of them, advertising and election programmes, receive further definition. Election programme means:[69]

> **election programme** means, subject to subsection (2), 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

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66 Broadcasting Act, s 4(1)(d) and, relevantly, Broadcasting Standards Authority *Free-to-Air Television Code of Broadcasting Practice* (May 2011) at 6 and *Radio Code of Broadcasting Practice* (July 2008) at 5.

67 Sections 8 and 13.

68 Section 2(1), definition of "programme".

69 Section 69(1), definition of "election programme".

It will be seen that this definition is similar to the Electoral Act's definition of election advertisement insofar as it requires that the programme have the effect or apparent effect of persuading voters to vote for, or not to vote for, a party or candidate. It is narrower in that the effect must relate to a specific party or candidate; as noted above, election advertisements include party and candidate advertisements, but also those that relate to a type of party or candidate. It is wider in that the encouragement or persuasion need not be by reference to views or positions adopted or not adopted by the party or candidate.

[82] It is common ground that the legislation has a very substantial effect on free speech.[70] That being so, a rights-consistent approach must be taken when establishing what is an election programme, when assessing such programme's effect on voters, and when interpreting the exceptions.

Programme

[83] We begin with the concept of programme. As noted, this term receives a definition that is very broad in that it speaks of sound and/or visual images but also requires that there be an intended objective of informing, enlightening, entertaining or promoting.

[84] Clifford J held that a programme is "anything broadcast",[71] and before us Mr Powell argued that s 70 captures "any sound or image or combination thereof" that has the effect of promoting or opposing a party. We do not agree that the Act uses the term in this very expansive sense.[72] In our view it is a term of art. We make three points about it.

[85] First, the Act expressly recognises programmes of different types — notably, advertising, election, news, and current affairs. These are distinctions based on purpose, content, effect and style. For example, the further definitions of advertising and election programmes refer respectively to a primary intention to promote

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70 See generally Geddis "Law and New Zealand's 2014 election campaign", above n 60, at 125.

71 High Court judgment, above n 1, at [47].

72 Clifford J may have been led to that conclusion by the fact the parties did not argue that election programmes are confined to those broadcast by a political party or candidate: at [196].

something, and an effect upon voters. The Act does not preclude other types of programme.

[86] Second, as noted above, broadcasters must make reasonable efforts to achieve balance within a programme or within close proximity to it.[73] This requirement has been modified for election programmes by a code of practice issued by the Broadcasting Standards Authority,[74] but it applies to other politically controversial programmes that do not qualify as election programmes, such as current affairs or news programmes.

[87] Third, the Act presumes that broadcasters control the type and content of programmes. This suggests that for purposes of definition it is likely to be the broadcaster's intention for the programme that matters. Of course, this is not to assume that the broadcaster must endorse the content.

Election programme

[88] It follows that when characterising a programme as an election programme, or comment, or current affairs, or news, or none of these, one must first begin by establishing where the programme begins and ends. We recognise that an election advertisement broadcast for a party or candidate will always be an election programme; such advertisements are by nature discrete, in that they stand alone and promote the advertiser's interests, and because the Act regulates broadcasting time bought by parties and candidates, it contemplates that advertisements will be treated as discrete programmes. In any other case, judgment is required and the parameters of the programme are likely to correspond to a decision made by the broadcaster.

[89] This leads to the important point that it is the effect of the programme as a whole that matters under s 69. It must encourage or persuade, or appear to encourage or persuade, voters to vote or not to vote for a party or candidate, or advocate support for or oppose a party or candidate. In a similar vein to our point at

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73 Section 4(1)(d) and *Free-to-Air Television Code of Broadcasting Practice*, above n 66, at 6 and *Radio Code of Broadcasting Practice*, above n 66, at 5.

74 Section 79 and Broadcasting Standards Authority *Election Programmes Code of Broadcasting Practice* (May 2011) at 6. The Code excludes the requirement for balance in the interests of robust debate and advocacy, but only for election programmes as defined.

[55(a)] above, the effect of a programme must be assessed from the perspective of the reasonable observer who is sensitive to the importance of free speech and the exceptionally high value of political speech in a democracy. This calls for a robust approach. The programme's effect may be influenced by the context, and its style and apparent purpose, and any attempt by the broadcaster to achieve balance.

[90] Section 70 controls broadcasts by reference to this s 69 definition, which addresses the content of such programmes rather than the identity of their promoters. This might indicate that the Act regulates anyone who might broadcast a programme having the prescribed effect.[75] But the long title to the Act states that its purpose, relevantly, is to enable political parties to broadcast election programmes for Parliamentary elections free of charge. The central objective was that of allocating time and money to political parties for election advertising on a fair basis,[76] and that is what pt 6 is addressed to. Section 70 supports that regime by prohibiting other advertising. The absence of any reference to promoters, third parties or parallel campaigners may indicate that the legislature did not have anyone other than political parties in mind.

[91] The legislative history confirms this point. Part 6 can be traced to the 1986 Royal Commission on the Electoral System. Its terms of reference included whether the then limits on election expenses were appropriate and whether any limits on such expenses should be extended to political parties and the amount of individual or total donations received, whether those expenses should be defrayed solely or partly by state grants, and what conditions should apply to such grants.[77]

[92] Chapter 8, part 2 of the Commission's Report addressed broadcasting, discussing "the allocation of paid and free television and radio time to political parties".[78] The Royal Commission identified television as the primary means of communication between "political competitors and their electorate", and adopted the

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75 Professor Geddis takes that view: see Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at [10.2.3]. Professor Cheer takes the opposing view: Ursula Cheer *Burrows and Cheer: Media Law in New Zealand* (7th ed, LexisNexis, Wellington, 2015) at [10.4.1].

76 See s 74 for the appropriation of funding, s 74A for the power to allocate among parties to fund the costs of broadcasting election programmes, and s 75 for the allocation criteria.

77 The Royal Commission on the Electoral System, above n 50, at xiv.

78 At [8.74].

premise that controls on "political broadcasting" were necessary to fairness in the electoral system.[79] By political broadcasting the Royal Commission meant coverage of political parties, candidates and policies in news, current affairs and talkback programmes, and the allocation of broadcasting facilities to political competitors at election times for direct communication with the public.[80] It focused on what it saw as the very important question of allocating radio and television time for political parties, addressing both the allocation of free time and restrictions on paid time. The Report contained just one peripheral reference to parallel campaigning in Australia.[81]

[93] Part 6 had two major elements when first enacted in May 1989 — a prohibition in s 70 on the broadcast of paid election programmes at any time, and a requirement that every broadcaster permit political parties to broadcast election programmes free of charge during election campaigns. It was amended in 1990 because of controversy about the compulsory provision of free broadcasting time by broadcasters. As first drafted, the Broadcasting and Radiocommunications Reform Bill 1990 would have amended s 70 to state that nothing in the prohibition applied to election programmes broadcast by a political party under pt 6 or paid for with money allocated to that party under s 74 of the Act. As amended, the Bill led to parties being allocated funds with which they could purchase broadcast time.[82] The amendments confirm that, as the then Minister of Communications, the Hon Jonathan Hunt, said during the debates, the aim was to place broadcasting on a voluntary basis while prohibiting parties and candidates from buying election time or advertising free of charge.[83] These amendments left unchanged the prohibition in s 70 on otherwise broadcasting election programmes within or outside election periods, except to remove the words "for a fee or other consideration", to which we refer below at [102]. They tend to confirm that the legislature focused in 1990, as it had in 1989, on the use of broadcast media by political parties.

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79 The Royal Commission on the Electoral System, above n 50, at [8.72].

80 At [8.73].

81 At [8.88]. The Commission noted that almost 35% of all reported candidate, party and interest group expenditure in the 1984 Australian elections went toward the purchase of broadcasting time.

82 See the summary provided by Clifford J, High Court judgment, above n 1, at [154].

83 (21 August 1990) 510 NZPD 3637. See also the High Court judgment at [154].

[94] As noted, the point that for the purposes of pt 6 election programmes means programmes broadcast for parties or candidates was not taken before Clifford J. We raised it with counsel. On reflection, Mr Butler took the point. Ms Aldred submitted that while such interpretation is attractive from a policy perspective, the text and context suggest that the legislation applies more broadly. Mr Powell submitted that it would seem surprising if the broadcast of election programmes by third parties was left "unregulated", but conceded that this interpretation would be a more justifiable limitation on rights.

[95] We have concluded that the prohibition in s 70 is indeed confined to programmes broadcast for political parties or candidates, being those entitled to benefit from an allocation of broadcasting time under pt 6.[84]

[96] As just explained, this interpretation accurately reflects the purpose of the legislation. It is also available on the statutory language, and preferable to the alternative, especially given the otherwise substantial impact on freedom of expression. Section 70 excepts from its scope s 70(2) and (2A), indicating that those exceptions — including opening and closing addresses, for example — would otherwise likely fall within the definition of election programme. By contrast, it declares in s 70(3) that nothing in s 70(1) restricts the broadcasting of news, comments and current affairs programmes.

[97] We acknowledge Ms Aldred's point that the exceptions at s 71(2)(d) and (e), relating to Electoral Commission advertisements and non-partisan community service broadcasts together indicate that pt 6 was intended to apply more broadly than to political parties only. But this is not a strong point. These exceptions are explicable by a desire to clarify the Act's application to those participating in the electoral process as a public duty or service.

[98] We say more about comments in s 70(3) at [103]–[105] below. We note here that by excluding comments the Act recognises what Clifford J characterised as an underlying distinction between participation in and commentary upon the electoral

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[84] Candidates are not allocated funds directly but they benefit from allocation to their parties and they are permitted to broadcast candidate advertisements, so long as they do not contribute to the campaign of his or her party: s 70(2)(c).

process.[85] To interpret election programme as we have done is consistent with that distinction.

[99] As noted, the legislative history shows that Parliament did not have parallel campaigners in mind. We discount Ms Aldred's submission that the legislation contemplated them because political parties were not required to register as such at the time; parties advertise their existence in a democracy, and there is no reason to think that Parliament anticipated any difficulty in identifying them.[86]

Prohibition not confined to paid programmes

[100] We turn to the question whether the legislation controls only paid programmes. As noted at [79] above, the heading to s 70 refers to paid election programmes but the text does not. After a careful survey of the legislative history, Clifford J took the heading as some support for his view that the legislature was concerned to prevent political parties purchasing broadcast time for electioneering.[87]

[101] We accept the Commission's submission that the prohibition is not limited to paid programmes. The word paid appears to be an oversight, perhaps attributable to the Broadcasting and Radio Communications Bill being passed through its second and third readings under urgency.[88] The Bill originally proposed to maintain the 1989 prohibition on the broadcast of election programmes "for a fee or any other consideration", but that provision was removed during the legislative process, leaving the heading unchanged. Further, the model eventually adopted involved an allocation of broadcast time that was either free (for opening and closing statements) or paid from public funds, with other broadcasting being prohibited to support that allocation regime; that being so, there was no need to focus on prohibiting paid programmes. We agree with Clifford J that in practice commercial broadcasters are

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85 High Court judgment, above n 1, at [222].

86 They are required to register now, but that is because the electoral system under MMP is based explicitly on the existence and effective organisation of parties.

87 High Court judgment at [207].

88 Urgency was accorded on 21 August 1990 and the second and third readings took place on the same day, the original Bill having been split into the Broadcasting Amendment Bill (No 2) 1990 and the Radiocommunications Amendment Bill (No 2) 1990.

likely to require payment,[89] but it cannot be assumed that they will always do so and the legislation itself does not adopt that assumption. Section 70(1) regulates broadcasters too, precluding them from participating in electioneering by broadcasting election programmes free of charge for their preferred parties or candidates.[90]

Comments

[102] We turn to the exceptions for comments. Clifford J held that the song and video were comments for the same reasons that they were editorial content under the Electoral Act.[91] He noted that comments may extend to talkback programmes and comments that listeners or viewers are invited to post on broadcasters' websites, reasoning that such material must be distinguished from participation in the political process.

[103] The Commission submitted that this is to attribute to Parliament an intention to leave unregulated the broadcast of election programmes by non-participants, in marked contrast to the Act's stringent controls on political parties and candidates. But as we have said, nothing in the legislative history suggests that Parliament was concerned when enacting or amending the legislation to regulate broadcasting by non-participants.[92] We add that parallel campaigners are now regulated under the Electoral Act, as amended in 2010, and that extends to their use of broadcast media. It is not self-evident that there remains a gap that needs filling and if there is, it is a policy matter for the legislature. We observe that the Justice and Electoral Committee reported to the House of Representatives on the 2014 general election, recommending that the definitions of election advertisement and election programme be reconciled, having regard to work being done by officials on the convergence of broadcast and digital media.[93]

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89 High Court judgment, above n 1, at [208]. The legislation also insists that parties must be offered the same terms: s 79B.

90 Geddis "Law and New Zealand's 2014 election campaign", above n 60, at 125. Section 79B obliges broadcasters to give comparable terms to all parties and candidates, but only for time that is to be purchased.

91 High Court judgment, above n 1, at [224].

92 Apart from the 1990 amendments, pt 6 was amended in 1993, 1996 and 2004, but there is nothing in those amendments that is inconsistent with the point made here.

93 Justice and Electoral Committee *Inquiry into the 2014 General Election* (1.7A, April 2016) at 33.

[104] Comments is not defined, although the statutory language envisages that it means something different from news or current affairs programmes, and further that a comment need not be a programme in itself; in other words, it may be made as part of a programme, such as a personal political view expressed by a caller to a talkback show. The legislature has chosen not to use the term editorial content, indicating that a comment need not be the opinion of the broadcaster or subject to editorial oversight either. What matters is that it is the comment or opinion of someone other than a political party or candidate. As Mr Butler submitted, this interpretation does not strain the statutory language and it is consistent with the legislative purpose of regulating election broadcasting by political parties and candidates while allowing others to comment freely.

The song and video were not election programmes

[105] As noted, the Commission's view is that the song was an election programme and so was the video. Clifford J disagreed, and so do we.

[106] We begin by recalling that the song was to be broadcast on Free FM Hamilton as part of a "politics based radio show". In our opinion the Commission was wrong to characterise the song as an election programme without regard to context. It was not a party or candidate advertisement, and if it was to be broadcast as part of another programme, a judgment had to be made about that programme. The responsibility for making that judgment lay with the broadcaster, but the Commission should not have offered a firm opinion without knowing more.

[107] The evidence is silent about the programme's content. Without knowing anything about it, we cannot predict what impact the programme would have had upon voters. We acknowledge that the song amounted to advocacy against Mr Key,[94] but that is not the end of the matter; for all we know, the presenter may have planned to castigate Mr Watson for the extravagance of his opinions, or to balance the song with an opposing perspective.

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[94] It will be recalled that an election programme, unlike an election advertisement, need not advocate by reference to views or positions adopted or not adopted.

[108] As noted, the video was never broadcast by a broadcaster, except as part of news or current affairs programmes, after the Commission's intervention. That being so, we cannot know whether any programme in which it appeared would amount to advocacy against the National Party or encourage voters not to vote for the party.

[109] What can be said, however, is that if viewed in isolation the song and video were comments for purposes of s 70. That is so because they were personal political views offered by people who were neither candidates nor party representatives.

[110] In the result, we agree with Clifford J, but for different reasons, that on the evidence the song and video were not election programmes and were properly characterised as comments for purposes of s 70.

Overview

[111] We have examined the two Acts separately, but we find that the interpretation we have adopted reconciles them so far as we can while remaining faithful to what we understand to have been Parliament's objectives. We have tried to provide the Commission with the guidance that it sought.

Decision

[112] The appeal is dismissed and the declarations made by Clifford J are upheld in this Court, though for different reasons:

(a) The song is not an election advertisement for the purposes of s 3A of the Electoral Act.

(b) The video is not an election advertisement for the purposes of s 3A of the Electoral Act.

(c) The song is not an election programme for the purposes of s 70 of the Broadcasting Act.

(d) The video is not an election programme for the purposes of s 70 of the Broadcasting Act.

[113] The appellant must pay the respondents costs for a complex appeal on a band A basis and usual disbursements. We certify for second counsel.

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