IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2014-485-11152
[2014] NZHC 666

	UNDER	the Declaratory Judgments Act 1908 and Part 18 of the High Court Rules
	BETWEEN	DARREN HAMISH WATSON First Plaintiff
		JEREMY THORNTON JONES Second Plaintiff
	AND	ELECTORAL COMMISSION Defendant

Hearing: 11 September 2014

Appearances: W L Aldred and J S McHerron for plaintiffs
A M Powell and S J Humphrey for defendant

Judgment: 2 April 2015

JUDGMENT OF CLIFFORD J

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Introduction

[1] In the lead up to the 2014 general election, Darren Watson, the first plaintiff, wrote and recorded a song entitled "Planet Key" (the Song). Jeremy Jones, the second plaintiff, then created a video to accompany the song (the Music Video).

[2] In early August 2014 Mr Watson released the Song on iTunes (for paid download) and Mr Jones uploaded the Music Video to the Vimeo and YouTube video websites (for free viewing). Mr Watson also offered free downloads of the Song to some smaller radio stations he thought might play it.

[3] It cost $1.79 to download the Song from iTunes. Of that, 80c would be paid to "the artist". Messrs Watson and Jones agreed to share equally any money generated that way. Any royalties earned from the Song being broadcast on radio would be retained by Mr Watson.

[4] The Song came to the attention of the defendant, the Electoral Commission (the Commission), as the result of an enquiry from the Programme Director of FreeFM Hamilton on 5 August 2014. She asked whether it was okay for the station's volunteer broadcasters to play the Song on their radio shows. The Commission listened to the Song. On 7 August 2014 the Commission responded, saying in part:

> The Electoral Commission's view is this track is an 'election programme' and its broadcast on radio or television would be unlawful. The only exemption would be if the section 70(3) applied to the broadcast i.e. if it was part of a news item.

[5] The Commission advised a number of other broadcasters[1] by email that 'the Planet Key track cannot be broadcast on radio or television because it is an election

[1] Sky TV, Mediaworks, Radio NZ (RNZ), TVNZ, Newstalk ZB and Radio Active.

programme" and that the Commission was also considering whether it was an election advertisement.

[6] Mr Watson became aware of that advice on 12 August. That same day he asked the Commission for its official view on the status of the Song and the Music Video. The Song, Mr Watson noted, was for sale digitally at iTunes and that it was currently no. 13 on the Top 20 New Zealand Singles Chart. On 14 August the Commission provided an advisory opinion[2] that:

(a) the Song and the Music Video were election advertisements for the purposes of the Electoral Act 1993; and

(b) if the Song and the Music Video were broadcast on television or radio the broadcast would be an election programme for the purposes of the Broadcasting Act 1989.

[7] At the same time as Mr Watson received the Commission's advisory opinion, he also received an accompanying letter headed "Compliance with the Electoral Act". In that letter, the Commission summarised its views and concluded with the request that he advise it as soon as possible, and no later than 5.00 pm on 21 August 2014, that he had taken corrective action to ensure compliance with the Electoral Act. Messrs Watson and Jones obtained legal advice. Their lawyer wrote to the Commission asking it to reconsider its position. The Commission responded on 21 August 2014, confirming its original advice. That exchange of correspondence anticipated the arguments that I heard.

[8] Messrs Watson and Jones then decided to remove the Song and the Music Video from iTunes and the video websites. Mr Watson, who travels internationally as a performing musician, did not want to run the risk of the Commission referring the matter to the police and the possible consequences of such action. At the same time, he was not prepared to put a promoter statement on the Song or the Music Video because that would detract from the impact of the work and add a note of formality that would clash with its style and content.

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[2] As provided for under s 204I of the Electoral Act 1993.

[9] The significance of the Commission's advisory opinion can be seen from the following brief summary of the effect of the relevant statutory provisions of the Electoral Act and the Broadcasting Act:[3]

(a) Under the Electoral Act, no person may cause an election advertisement to be published (to publish includes to broadcast) at any time unless it contains a promoter statement. The Song and the Music Video do not contain promoter statements. Therefore, if the Song and the Music Video are election advertisements they cannot be published at any time. To do so would be an illegal practice, punishable by a maximum fine of $40,000.

(b) Under the Broadcasting Act, broadcasters may only broadcast election programmes for or on behalf of political parties or candidates, and then only during an election period during either:

(i) free time made available by TVNZ and RNZ for opening and closing addresses; or

(ii) time purchased by political parties with state funding.

Therefore, if the Song and the Music Video are election programmes they may not be broadcast at any time, as they would not be being broadcast for any political party or candidate. To do so would be a summary offence by the broadcaster involved, punishable by a fine of $100,000.

[10] There are exceptions to the restrictions on the publication of election advertisements and the broadcast of election programmes that, as the Commission noted in its advisory opinion, may be of relevance here.

[11] The Electoral Act provides that the editorial content of radio and television programmes, and the publication by an individual on electronic media of personal

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[3] I set out the relevant statutory provisions in full at [32] and following of this judgment.

political views where no payment is made or received in respect of the publication of those views, are not election advertisements.

[12] The Commissioner's advisory opinion was that, because Mr Watson was paid royalties when the Song was downloaded, the publication of the Song on iTunes did not come within the Electoral Act's "individual publication" exception. The Commission did not at that time have enough information to determine whether the exception applied to the free download of the Music Video. That would depend on the extent of the collaboration between Mr Watson and Mr Jones in the production of that video and whether, therefore, it could be regarded as Mr Watson's "individual" views. In these proceedings, the Commission took the view that that exception did not apply on the facts.

[13] Under the Broadcasting Act, news, comments and current affairs programmes in relation to an election are excepted from the restrictions on the broadcast of election programmes. The Commission did not, in its advisory opinion, express a view on whether that exception applied. Rather, it noted:

> Broadcasters can broadcast, in relation to an election, news, comments or current affairs programmes.
>
> The broadcast of the video on television or the song on radio outside of the 'news, comments or current affairs' is prohibited under section 70 of the Broadcasting Act. It is a serious offence for a broadcaster to breach these rules.

[14] The Commission's advice to FreeFM that it would be unlawful to broadcast the Song except as "part" of a news programme necessarily reflects, however, a conclusion that the Broadcasting Act exception for "comments programmes" does not apply to the broadcast of the Song and the Music Video themselves. That is the view the Commission expressed in these proceedings. The Commission took the same view as regards the Electoral Act's "editorial content of radio and television programmes" exception.

[15] Against that background, Messrs Watson and Jones seek declarations that neither the Song nor the Music Video is an election advertisement or an election programme or, if they are, that:

(a) under the Electoral Act, they may lawfully be published on electronic media as their personal political views and broadcast as the editorial content of a television[4] or radio programme; and

(b) under the Broadcasting Act, they may lawfully be broadcast as "comments programmes".

[16] They do so with particular reliance on the implications of ss 4 to 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) for the proper interpretation of the relevant provisions of the Electoral Act and the Broadcasting Act.

[17] As will become apparent, the relationship between those two Acts is complex. That complexity has affected both the length of this judgment and the time it has taken me to produce it. The following remarks of Professor Geddis in *Electoral Law in New Zealand: Practice and Policy*, reflect that complexity:[5]

> Consequently, a programme relating to an election may be an "election programme" but not an "election advertisement", or an "election advertisement" but not an "election programme", or it may be both, or it may be neither.

[18] For my part, I think it is helpful at the outset to note three elements of that relationship. First, the Electoral Act controls on election advertisements are broader in scope than the Broadcasting Act controls on election programmes. That is, the Electoral Act restricts the *publication* of election advertisements, while the Broadcasting Act only restricts the *broadcast* of election programmes.

[19] The term "publish" is defined in s 3D of the Electoral Act in the following way:

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4 There was no suggestion, in fact, that the Music Video would be broadcast.

5 Andrew Geddis *Electoral Law in New Zealand: Practice and Policy* (2nd ed, LexisNexis, Wellington, 2014) at 198. The Electoral Commission has recommended that Parliament consider further the desirability of having different statutory tests in two Acts. Parliament's Justice and Electoral Committee has recommended that the Government align the two. At the same time, that Committee noted that the 2009 review of electoral finance did not find cross-party consensus on the point, so that "given the lack of political consensus, it may be difficult to endorse the Commission's recommendation". (Justice and Electoral Committee *Inquiry into the 2011 General Election* (April 2013) at 39).

Meaning of publish

In this Act, unless the context otherwise requires, **publish**, in relation to an election advertisement, means to bring to the notice of a person in any manner—

(a) including—

(i) displaying on any medium:

(ii) distributing by any means:

(iii) delivering to an address:

(iv) leaving at a place:

(v) sending by post or otherwise:

(vi) printing in a newspaper or other periodical:

(vii) broadcasting by any means:

(viii) disseminating by means of the Internet or any other electronic medium:

(ix) storing electronically in a way that is accessible to the public:

(x) incorporating in a device for use with a computer:

(xi) inserting in a film or video; but

(b) Excluding addressing 1 or more persons face to face.

[20] The term "broadcasting" is defined in s 2 of the Broadcasting Act 1989 in the following terms:

broadcasting means any transmission of programmes, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus but does not include any such transmission of programmes—

(a) made on the demand of a particular person for reception only by that person; or

(b) made solely for performance or display in a public place

[21] Second, the controls in the Electoral Act directly affect a wider range of people than do those in the Broadcasting Act. Any person who publishes, or causes to be published, an election advertisement is subject to the Electoral Act. The Broadcasting Act regulates the activities of broadcasters and restricts the circumstances in which they may broadcast election programmes. Of course, the Broadcasting Act indirectly affects any person who might otherwise have wanted to have an election programme broadcast.

[22] Third, whether or not the subject matter, as it were, of the Electoral Act and the Broadcasting Act – namely election advertisements and election programmes – are functionally equivalent for all purposes is, in effect, an issue that is raised by these proceedings.

[23] Given that relationship, I will consider the issues raised by these proceedings under the Electoral Act first, and then those raised under the Broadcasting Act.

The Song and the Music Video

[24] The affidavits filed by Messrs Watson and Jones set out the background to the creation of the Song and the Music Video. The Song and the Music Video have their origins in the following exchange between the Prime Minister, John Key, and the co-leader of the Green Party, Metiria Turei, in Parliament on 18 September 2012, during questions arising out of the police investigation into electoral returns filed by John Banks:[6]

> **Metiria Turei**: Will homeowners on "Planet Key" now be allowed to default on their mortgages and then claim it is OK because they did not read the documents; will business people on "Planet Key" now be allowed to sign illegal contracts under his new "don't read, don't care" defence?
>
> **Right Hon JOHN KEY:** 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. But I would expect people on such a place – referred to as nirvana – to comply with the law, and that is what Mr Banks did.

[25] The concept for the Song occurred to Mr Watson when he became aware of those comments by Mr Key. The Song is a blues-style satirical protest song with lyrics reflecting Mr Watson's own political views. The words of the Song are:

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

[6] (18 September 2012) 684 NZPD 5269.

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
I don't believe in nothing
I never cared for the fools
who want to ruin this country
with all their taxes and rules.

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

I never believed in nothing
but now I'm livin' it big
I marvel how much you trust me
I hide the truth like this wig.

People and I'm up here on Planet Key
in the land where the rich are free.
I'm up here on Planet Key
Immune to GSCB
I'm up here on Planet Key
you want compassion don't vote for me.
I'm up here on Planet Key
the clock is tickin'…

[26] Mr Watson is a professional song writer and musician. He wrote the music and the lyrics with no input from anyone else. He says he was motivated to write the Song because he wanted to express his own personal views and strong feelings about the way the Prime Minister had presented himself in the media over the last few years, as opposed to what Mr Watson perceived to be the reality. He comments:

> In the lyrics I am commenting about greed, obfuscation and wilful dishonesty in New Zealand politics in general, as well as the policies that I believe are an anathema to a healthy future for the country I live in. The song is highly satirical in nature.

[27] Mr Watson paid for the production of the Song himself, incurring total expenses of $721.63 to do so.

[28] Mr Watson is a member of the New Zealand Labour Party, but has never been an active member of that or any other party. He did not have contact with anyone

from any political party or interest group about the Song or the Music Video and did not receive any offer to fund their production.

[29] Mr Jones runs a multi-media graphics and video production business and is an old friend of Mr Watson. He became aware of the Song from a post on Mr Watson's Facebook page which indicated Mr Watson was hoping to make a video to accompany the Song. He and Mr Watson have similar political views. He saw the Music Video as a light-hearted way of conveying his own personal views about New Zealand politics. He discussed the style and content of the Music Video with Mr Watson and based his ideas for the Music Video on his interpretation of the Song. He spent approximately a month to five weeks on the Music Video, and did not receive any funding from any person or organisation for that work.

[30] The Music Video is 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 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.

[31] The Music Video finishes with a final shot of an industrial complex and then zooms back out to show planet Earth, with New Zealand clearly visible, and with white text attributing the Song and the Music Video to their respective authors and indicating its availability on iTunes. That "shot" is reproduced in the Appendix to this judgment.

The law – an overview

The Electoral Act 1993

[32] Parts 6AA and 6A of the Electoral Act respectively regulate the publishing of election advertising and the incurring of election (advertising) expenses in the regulated period, that is, in general terms, the three month period before the polling day for an election.[7]

[33] The term "election expenses" is defined to mean advertising expenses incurred by candidates, parties and registered promoters during the regulated period in respect of the election advertisements they promote.[8]

[34] The term "advertisement" is not defined. The term "election advertisement" is defined in s 3A(1) as follows:

> **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); and
>
> (b) includes—
>
> (i) a candidate advertisement; and
>
> (ii) a party advertisement.

[35] The terms "candidate" and "party" advertisement, as defined, apply the concept of an election advertisement to individual candidates and particular political parties.[9]

[36] Section 3A(2) provides:

> (2) None of the following are election advertisements:

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7 Electoral Act 1993, s 3B.
8 Section 205.
9 Section 3(1).

(a) an advertisement that—

… [advertisements relating to electoral matters]

(b) contact information [as defined in subsection (3)][10] published in any medium by a member of Parliament that satisfies all of the following requirements:

…

(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.

[37] Part 6AA provides substantive controls over election advertisements. To do so it:

(a) Limits the types of persons who may promote election advertisements to party secretaries and candidates, registered promoters, and unregistered promoters who do not incur advertising expenses of more than $12,500 in relation to election advertisements published during the regulated period.[11] A promoter is defined as "a person who initiates or instigates an election advertisement".[12]

(b) Requires election advertisements to include a statement (a promoter statement) of the name and address of the promoter of the advertisement.[13]

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10 Contact information, as defined, must include the name of the member of Parliament, contact details and the name of the electoral district or reference to Party list and may include a photograph and a website address, s 3A(3).

11 Section 204B.

12 Section 204A.

13 Section 204F.

(c) Requires candidate and party authorisation for election advertisements that encourage or persuade voting for a candidate or a party.[14]

(d) Establishes, and provides for the administration of, a public register of registered promoters.[15]

[38] Part 6A imposes limits on election expenses. Those limits are, in the case of a general election, currently:

(i) Candidates: $26,100;[16]

(ii) Parties: $1,108,000 and $26,100 for each electoral district contested by a candidate;[17] and

(iii) registered promoters: $313,000.[18]

[39] Part 6A also provides a framework for ensuring compliance with the restrictions on the incurring of election expenses, including requirements for record keeping and the provision and auditing of returns of election expenses.[19]

[40] Taken together, Parts 6AA and 6A provide that only candidates, parties and registered promoters may spend more than $12,500 on election advertising during the regulated period. Any person who publishes an election advertisement at any time must include a promoter statement in it, and must keep records of their election expenses incurred during the regulated period. Election advertisements supporting candidates or parties must be authorised by the candidate or party in question. The editorial content of radio and television programmes, and the expression of personal views on electronic media, are not, subject to the specific terms of the Electoral Act, election advertisements and accordingly do not require promoter statements and are not otherwise regulated by that Act.

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14 Sections 204G and 204H.
15 Sections 204K-204X.
16 Section 205C(1)(a).
17 Section 206C(1)(a) and (b).
18 Section 206V(1).
19 Sections 205J-205R, 206H-206R and 206ZB-206ZH.

[41] Various offences support that regulatory framework.

[42] The plaintiffs do not agree with the Commission that the Song and the Music Video are election advertisements. They say the Song and the Music Video are not advertisements at all. But, if the Commission is right on that point, the plaintiffs say that the Song and the Music Video, as broadcast or published via iTunes and the YouTube and Vimeo websites, are nevertheless not election advertisements by dint of the editorial content and personal political views exceptions found in s 3A(2)(c)(ii) and (e) respectively.

The Broadcasting Act

[43] Part 6 of the Broadcasting Act gives effect to the object of that Act, which is "to enable political parties to broadcast election programmes for Parliamentary elections free of charge".

[44] As described by the Court of Appeal in *Alliance Party v Electoral Commission*:[20]

> [13] Legal recognition and regulation of New Zealand political parties is a comparatively recent phenomenon. Under New Zealand's current electoral regime, a political party cannot contest what many commentators consider to be the all important party vote unless and until it is registered. Access to broadcast media electioneering is forbidden, save in the case of registered political parties.
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> …
>
> [16] Part 6 of the Broadcasting Act requires the Commission to allocate time and money to political parties contesting a general election. The broadcasting of election programmes outside those allocation parameters is prohibited. Accordingly, Part 6 is the only recourse political parties can have to the broadcast media for elections.
>
> [17] The way the Broadcasting Act scheme works is as follows. First, the two publicly owned broadcasters, TVNZ and RNZ, must provide time free of charge for the broadcasting of the opening addresses and closing addresses of political parties in an election period. The Commission must require TVNZ and RNZ to supply a statement of the amount of time that each of them will provide for this purpose. Secondly, a sum of public money is made available in respect of the costs of broadcasting election programmes. For the 2008 election the amount contributed by the government was $2,855,000 excluding GST, or $3,211,875 including GST.

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[20] *Alliance Party v Electoral Commission* [2010] NZCA 4, [2010] NZAR 222.

> [18] Part 6 significantly constrains the ability of political parties to communicate their messages directly to voters. Failure to abide by the regulatory constraints in Part 6 gives rise to offences under the Broadcasting Act … (citations omitted)

[45] Section 70 is, for these purposes, the central provision. As relevant, it reads:

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

[46] In the Broadcasting Act, the term "programme" is defined in very wide terms:[21]

> **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.

[21] Section 2(1).

[47] The breadth of that definition reflects the centrality of that term to the regulatory regime created by the Broadcasting Act. In my view it simply means, subject to the "alphanumeric" exception, anything broadcast.

[48] The term election programme is defined as follows:[22]

> **election programme** means … 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.

[49] Section 80 provides:

> **Offences**
>
> Every person commits an offence and is liable on summary conviction to a fine not exceeding $100,000 who—
>
> (a) fails to comply with section 70 or section 77(1)[23] … or section 79A[24] or section 79B[25] or section 79C[26] of this Act; or
>
> (b) in an election period,—
>
> (i) broadcasts an election programme for or on behalf of a political party; or
>
> (ii) arranges for the broadcasting of an election programme for or on behalf of a political party—
>
> other than pursuant to, and in conformity with, this Part.

[50] The parties agree that, if broadcast, the Song and the Music Video would be programmes. The plaintiffs do not agree with the Electoral Commission that any broadcast of the Song and the Music Video would come within the prohibition on the

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22 Section 69(1).

23 The Electoral Commission's allocation of the free time for opening and closing addresses.

24 Restriction on times for the broadcasting of election programmes, e.g. including Christmas Day, Good Friday and Easter Sunday.

25 All candidates and political parties to be offered equal terms for the purchase of time for broadcasting election programmes.

26 Broadcasters to file returns of election programmes broadcast by political party, length of programme, time and date of programmes and the amounts paid or rates charged.

broadcast of election programmes as, by reference to the heading of s 70, they would not have paid for that broadcast. But, if the Commission is right on that point, the plaintiffs say that the Song and the Music Video as broadcast would come within the exception provided by s 70(3) as regards the broadcasting, in relation to an election, of "comments programmes".

The New Zealand Bill of Rights Act 1990

[51] Part 2 of NZBORA affirms the human rights and fundamental freedoms, and civil and political rights, of all New Zealanders. As directly relevant to the issues raised here, under the heading "Democratic and civil rights"[27] it provides:

> **12 Electoral rights**
>
> Every New Zealand citizen who is of or over the age of 18 years—
>
> (a) has the right to vote in genuine periodic elections of members of the House of Representatives, which elections shall be by equal suffrage and by secret ballot; and
>
> (b) is qualified for membership of the House of Representatives.
>
> **13 Freedom of thought, conscience, and religion**
>
> Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.
>
> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[52] As can be seen, therefore, the Electoral Act and the Broadcasting Act work together to promote, in the interests of the NZBORA right to vote in genuine elections, the objects of participant equality and transparency. In doing so, they restrict the NZBORA right to freedom of expression, including as that right relates to the right to adopt and hold opinions without interference.

[53] This case involves the determination of the proper extent of those restrictions. That calls for an exercise of statutory interpretation. Hence, in addition to the usual

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[27] Other, related, civil and political rights are the right to manifest religion and belief, and the rights to freedom of peaceful assembly, association and movement.

principles of statutory interpretation, ss 4, 5 and 6 of NZBORA are called into play. They provide:

> **4 Other enactments not affected**
>
> No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—
>
> (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
>
> (b) decline to apply any provision of the enactment—
>
> by reason only that the provision is inconsistent with any provision of this Bill of Rights.
>
> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[54] An important preliminary issue will be how those provisions are to be applied in this case.

The Commission's advisory opinion

[55] As the Commission submitted, whilst these proceedings have been brought under the Declaratory Judgments Act, they are unmistakably a challenge to the correctness of the Commission's advisory opinion. In a helpful affidavit, the Chief Electoral Officer and Chief Executive of the Commission provided general and specific background to the advisory opinion. In addition to matters which are reflected in the submissions from the Commission, he explained that:

> (a) One of the statutory functions of the Commission was to make available information to assist parties, candidates, and others to meet their statutory obligations in respect of electoral matters administered by the Electoral Commission.[28]

[28] Electoral Act 1993, s 5(e).

(b) Consistent with this function, the Commission provided information on the election advertising and expenditure rules in handbooks for parties, candidates, third parties, Members of Parliament, and media that were made publicly available.

(c) The Commission was required under s 204I of the Electoral Act to provide, on request, advice on whether, in the opinion of the Commission, an advertisement constitutes an election advertisement.[29]

(d) Although the Commission had no express statutory function to provide advisory opinions under the Broadcasting Act, the Commission provided advice on request to parties, candidates, third parties and broadcasters on the election broadcasting rules – just as it provided advice on request about any other electoral issue that the Commission was responsible for administering.

(e) The Commission was frequently asked for its views on proposed radio shows and advertisements.[30] Candidates and third parties often provide proposed transcripts and ask the Commission about whether they comply with the rules. As at 1 September 2014, the Commission had issued 550 advisory opinions on 834 items for the then-current parliamentary term. Nineteen of those advisory opinions had involved advice on the Broadcasting Act, including advice on 26 separate items to be broadcast on radio.

[56] Mr Peden explained the Commission's approach to the recognition of NZBORA rights in the following terms:

> In making any decisions about what is an 'election advertisement' under the Electoral Act or an 'election programme' under the Broadcasting Act, the Commission is cognisant of the importance of the New Zealand Bill of Rights Act 1990, the right to freedom of expression and the contextual imperative of political speech. But the

[29] Section 204I(1).

[30] This is not surprising as s 80A of the Broadcasting Act requires the Commission, where it believes any person has committed an offence under the Broadcasting Act, to report to the police the facts upon which that belief is based.

> Commission is also cognisant of the contextual imperative that elections are as fair as possible. If the plain meaning of the legislation restricts the rights of freedom of expression of third party participants in elections, we have to give effect to Parliament's intention. Parliament seems to have considered restrictions on the freedom of expression of third party participants in elections to be reasonable and justifiable limitations in the interests of creating a level playing field for participants in the election process and ensuring that New Zealanders' right to vote in 'genuine' elections is preserved.

[57] I comment later on the Commission's "plain meaning" approach.[31]

The plaintiffs' submissions

General approach

[58] The Commission's advisory opinion was that the Song and the Music Video constituted election advertisements and election programmes because they both encouraged or appeared to encourage voters not to vote for the National Party and for John Key as a candidate.

[59] As regards the Song, the Commission relied on content such as the lyrics:

> … never cared for the fools
> who want to ruin this country
> with all their taxes and rules
> Up here on Planet Key
> you got the money that's enough for me.
> …
> I marvel how much you trust me,
> I hide the truth like this wig.
> Up here on Planet Key
> in the land where the rich are free.
> Up here on Planet Key, immune to the GCSB.
> If you want compassion don't vote for me.

[60] As regards the Music Video, the Commission relied on the visual images portraying negative views of John Key and senior National Party ministers on issues such as offshore drilling, asset sales, the GCSB and the sale of New Zealand farms to foreign investors.

[61] Messrs Watson and Jones do not challenge the Commission's conclusion on the likely effect of the Song and the Music Video on voters. Moreover, referring to

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[31] At [112].

the views of the 1986 Royal Commission on the Electoral System, they accept that economic inequalities in election spending must be minimised.[32] But, quoting Professor Geddis, they emphasise the importance of a second goal, participant freedom:[33]

> Before an election can be considered legitimate, all those seeking to influence the electorate must be entitled to express their views publically. Not only does a failure to recognise and respect this right to freedom of expression prevent those seeking election from making their pitch to the electorate, it also deprives the electors of the opportunity to consider and evaluate the soundness of those arguments for themselves.

[62] They submit that the restrictions imposed in the interests of participant equality need to be balanced against the need to protect participant freedom, which should be limited no more than is reasonably necessary.

[63] They say that, on a proper interpretation of the Electoral Act and the Broadcasting Act, the Song and Music Video are neither election advertisements nor election programmes. But, if they are, the exceptions in:

(a) the Electoral Act for the editorial content of a radio or television programme and for the publication on the Internet, or other electronic medium of personal political views by an individual who did not make or receive a payment in respect of that publication; and

(b) the Broadcasting Act for the broadcasting of comments in relation to an election,

apply.

Electoral Act

Not election advertisements

[64] The plaintiffs first argued that the Song and the Music Video are not advertisements within the ordinary meaning of that term, hence they are not election advertisements. The Commission's interpretation of an advertisement, being any

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[32] Royal Commission on the Electoral System *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (December 1986) at 190.

[33] Geddis, above n 5, at 135.

notice or announcement in a public medium, or making something known to the public, was too broad.

[65] The purpose of Part 6AA was to create a level playing field for participants in the election process, as the Commission itself had commented. That level playing field was achieved through restrictions on advertising expenditure and the requirement for promoter statements. The ultimate aim was to control "shadow" or "parallel" campaigning.

[66] Including the Song and the Music Video within the meaning of an election advertisement was not a justified limit on the right to freedom of expression because it involved a disproportionate means to achieve a justified end. A rights-consistent meaning was available: the meaning of "advertisement" should be confined to material that has been placed "in any medium" at the request of the person promoting the advertisement, and usually for a fee paid by that person. Again, the approach of defining advertising in terms of "paid advertising" was one the text was capable of bearing, and was rights-consistent. It reflected the Part 6A control on advertising expenses. The requirement for promoter statements, which themselves were a restriction on freedom of expression, also indicated the type of "advertisement" intended to be caught. It made little sense to include a promoter statement in a video or a song where authorship would generally be acknowledged publically.

[67] Mr Watson did not have to pay to publish (broadcast) the Song on radio or television. The payment he received after the Song was downloaded from the Internet was a royalty paid for access to his artistic expression, and not a payment for the publication of the Song. The Music Video was made available free online. Neither the Song nor the Music Video were, therefore, advertisements.

If election advertisements, editorial content or personal political views

[68] If, however, the Court found the Song and the Music Video were, according to a rights-consistent natural meaning, advertisements, or if a rights-consistent meaning of "advertisement" was not available, then they were, the plaintiffs argue, not election advertisements because:

(a) when broadcast on radio and television, they would be the editorial content of a programme (Electoral Act; s 3A(2)(c)(ii)); and

(b) when made available online, they would be the publication of personal political views (Electoral Act, s 3A(2)(e)).

Editorial content of a programme

[69] The plaintiffs noted that the term "editorial content" is not defined, and that the Commission had previously accepted it should be broadly interpreted to include any part of a relevant publication except advertising or advertorial.[34]

[70] The plaintiffs also referred to the Commission's decision on the "Prime Minister's Hour" programme broadcast on Radio Live before the 2011 election. Notwithstanding the fact that the show had the effect of encouraging or persuading voters to vote for John Key and the National Party, the Commission concluded it came within the editorial content exception because it was broadcast under the editorial control of Radio Live.[35]

[71] The plaintiffs said legislative history also suggests that the term should be interpreted broadly.

[72] Read purposively, the editorial content exception applies according to its natural meaning to the Song and Music Video. In the Song and the Music Video, the plaintiffs comment on their perception of key political figures and recent events in New Zealand. That they do so humorously, or in a satirical form, does not make them any less "editorial content" or "comments" than if they were explaining their views to the hosts of a radio programme, or appearing on a television chat show. The plaintiffs were doing no more than what callers to and hosts of talk-back radio programmes do often. Similarly, the plaintiffs submit that the Song and Music Video were akin to the everyday satirical content of newspapers and of broadsheets that publish political cartoons and humorous articles that mock political parties or

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[34] Electoral Commission *Media Handbook for Publishers and Broadcasters: Parliamentary Elections* (April 2014) at 11.

[35] Electoral Commission *Decision of the Electoral Commission on the Prime Minister's Hour RadioLIVE Complaint* (8 February 2012) at [42].

candidates. There is, the plaintiffs submitted, no principled reason to distinguish between that kind of material and the Song and the Music Video, which are cast in a similarly humorous tone.

[73] The plaintiffs say that this broad approach is consistent with the purposes of the Electoral Act. It is also a rights-consistent interpretation in accordance with the NZBORA.

[74] Thus, following the sequence of analysis under *Hansen*,[36] the natural meaning of editorial content is broad enough to include the Song and the Music Video. If the natural meaning of editorial content is too narrow to include the Song and Video, then a rights-consistent, broader meaning is available.

Personal political views published online

[75] The plaintiffs make a similar argument as regards the availability of the Song on iTunes and the Commission's interpretation of the application of the exception for the publication of personal political views on electronic media. In determining that Mr Watson was receiving payment, the Commission had failed to read the words of s 3A(2)(c) in light of their legislative purpose. As before, Mr Watson did not receive payment *in respect of* publication. He received payment for his artistic work. Moreover, the use of the words "in respect of the publication of those views" indicated that payment was to be received prior to, and in exchange for, the act of publication. That was not the type of payment Mr Watson received.

[76] In the case of the Music Video and its publication on Vimeo and Youtube, the Commission's approach to the application of the individual views exception was overly literal and too narrow. Words in the singular include the plural, and vice versa. Two individuals publishing personal political views on a combined song and video do not cease to be individuals publishing their views. Accordingly, the plaintiffs argue, the exception applied.

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36 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

The Broadcasting Act

Not election programmes

[77] Pointing to the heading of s 70 of the Broadcasting Act, which reads "Prohibition on paid election programmes", the plaintiffs argue that because they did not pay to have the Song and the Music Video broadcast, the Song and the Music Video should not be regarded as election programmes. The outcome of applying the Commission's interpretation that the Song and the Music Video were election programmes, and therefore were absolutely prohibited from being broadcast except as part of a news programme, was inimical to freedom of political expression in a democracy. Taking that approach, the broadcast of a "protest song" with anything more than purely historic relevance would be unlawful.

[78] Applying the *Hansen* approach, such a broad interpretation of s 70 would be an unjustified limit in terms of s 5 of NZBORA because it would involve a disproportionate means (banning such protest songs) to achieve a justified end (ensuring participant equality).[37] Hence that meaning of s 70 was not rights consistent and the Court should, if possible, proceed to determine a rights consistent meaning under s 6 of NZBORA. There were two such meanings. The first would adopt the "paid" election programme interpretation. The second would apply the "comments" exception in s 70(3) more broadly than the Commission was prepared to do.

If election programmes, comments

[79] The plaintiffs submit that as the focus of the prohibition is on paid political broadcasts, the reference to "comments" was obviously intended to relate to something different from news and current affairs programmes: comments are a form of editorial reflection on events of the day. The Song and the Music Video are satirical comments on news and current affairs contained in a programme. Thus a rights consistent meaning would include them within the s 70(3) exemption.

[80] The declarations sought should issue accordingly.

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[37] *R v Hansen*, above n 36.

The Commission's submissions

[81] By convention, judicial and quasi judicial decision-makers do not oppose reviews of challenges to their decisions when the High Court is asked to exercise its supervisory jurisdiction. Very properly, the Commission participated in these proceedings not to defend its advisory opinion, but to assist the Court. The Commission's submissions were of considerable assistance to me.

General approach

[82] The following extract from the written submissions filed on behalf of the Commission summarises the overall approach it took:

> The relevant provisions of the Electoral and Broadcasting Acts seek to regulate and in some instances curtail what might conveniently be referred to as "electoral speech": a subset of political speech. In doing so, Parliament was pursuing an important objective in any free and democratic society: preserving the integrity of the general elections that determine the constitution of Parliament itself. In doing so, it limits the exercise of freedom of expression in an area where that speech is itself of high value to the proper functioning of a democracy.
>
> The challenge for the Court in this proceeding, just as it was for the Commission, is to find the point on the continuum between these important values where the limitation can be demonstrably justified. If the limitation is over-inclusive, it will chill protected political speech. If it is under-inclusive, it will deprive the electoral process, and voters, of the protection that Parliament found to be necessary.

[83] In terms of the proper interpretation of the key phrases "advertisement", "election advertisement" and "election programme", the Commission submitted that the approach taken by Mander J in *Greenpeace of New Zealand Inc v Electoral Commission* was the correct one.[38] That is, the terms must be interpreted objectively, on a broad and inclusive basis, to ensure they caught what Parliament intended. At the same time, the protection against the enactments reaching too far into protected political speech was achieved by taking a robust view of what could objectively "reasonably be regarded" as encouraging or persuading voters to vote for or against a candidate or party.

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[38] *Greenpeace of New Zealand Inc v Electoral Commission* [2014] NZHC 2135, [2014] 3 NZLR 802.

The Electoral Act

Election advertisements

[84] The Commission submitted that the preferred, natural meaning of the word "advertisement" in s 3A(1) is a general one: namely "a notice or announcement made to the public".

[85] Justice Mander had agreed with that approach, when he reasoned:[39]

> [50] The parties' competing contentions as to whether the publication itself must be more than a notice or announcement, or must promote some form of conduct does not, in my view, advance the issue. Whether a publication is caught by the definition depends on the particular effect of the material. I accept that Parliament's use of the term "advertisement" rather than "publication" may be an indicator which favours a requirement that the effect of the material to encourage or persuade needs to be clear. I am not sure however why that adds any gloss on what is plain from the text of the statutory definition, that the publication be capable of being "reasonably regarded" as encouraging or persuading. Such an assessment must therefore be one which is reasonably capable of being reached on an objective basis.

[86] Thus, the use of the term "advertisement" in the definition of "election advertisement" was not to be seen as imposing a preliminary fetter.

[87] On that basis, the plaintiffs' arguments that the Song and the Music Video are not advertisements because: (i) by definition, songs and music videos are not advertisements; (ii) satirical works are not advertisements; and (iii) usually promoters of advertisements pay someone to publish the advertisement, misunderstand the statutory scheme. It is the action of making known to the public a communication which encourages or persuades voters to vote that constitutes an advertisement.

[88] That "reasonably be regarded" requirement was the crux of the s 3A(1) definition, and the principal filter for distinguishing whether a publication is an election advertisement or not. To put a specific gloss, that is, anything more or less than a public announcement, onto the preliminary word "advertisement" would be inconsistent with Parliament's intent. The words "encouraging and persuading" allow for a continuum of meaning. An advertisement may demonstrate some

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[39] *Greenpeace of New Zealand Inc v Electoral Commission*, above n 38.

tendency to encourage, but may not necessarily be regarded as encouraging voters to vote in a particular way. At the other end of the spectrum, an advertisement may be the functional equivalent of express advocacy.[40]

[89] Here, the Commission acknowledged, there was room for adopting the open-textured approach to applying NZBORA preferred in *Brooker*.[41] A reasonable person, one cognisant of NZBORA rights, including the rights to vote in genuine elections and to freedom of expression, would, mindful of those interests, determine whether a particular form of words was an election advertisement.

[90] Interpreted in that way, the Commission submitted, the definition of election advertisement did not create any categorical ban on satire, or similar speech, as the plaintiffs had characterised its interpretation. Satirical speech might or might not be an election advertisement, depending upon the "may reasonably be regarded" assessment. The width of the definition of election advertisement in s 3A(1) was confirmed by the list of specific exceptions in s 3A(2). Taking the plaintiffs' approach to the meaning of advertisement would render the general definition of election advertisement under-inclusive and, in effect, duplicate those exceptions.

[91] Finally, adopting that broad interpretation of election advertisement was consistent with the equivalent definition in the Broadcasting Act of election programme. Given that the definitions do similar work, the explicit breadth of "programme" in the Broadcasting Act requires a similar definition to be given to "advertisement".

[92] Consideration of the purpose of the Electoral Act, the Commission argued, confirmed that approach. Overall, the purpose of the Act in this area was to ensure participants in elections participate on the same or fair terms, and that the public was fairly informed of all competing points of view. Third party spending limits helped to ensure the voices of the main participants in elections were not drowned out by third parties. The promotion of transparency, by requiring promoter statements, was another equally important purpose. The interpretation of "election advertisement"

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40 This phrase has its origins in *Federal Election Commission v Wisconsin Right to Life Inc* 551 US 449 (2007) at 481, per Roberts CJ.

41 *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91.

advocated by the Commission and adopted by Mander J best promoted those purposes, and struck the right balance between equality of access and freedom of expression.

[93] Whilst that preferred meaning did place limits on freedom of expression, they were reasonable and demonstrably justifiable in a free and democratic society. Applying the *Oakes* justification methodology,[42] the objectives of the regulation of election advertising were a "pressing social concern". A degree of deference should therefore be owed in relation to the intended meaning of s 3A. There was a rational connection between the restrictions and the objective they sought to promote. The limits imposed on free speech were not more than was reasonably necessary to achieve those objectives.

[94] The actual restrictions:

(a) imposing a limit on expenditure, but not otherwise controlling speech;

(b) requiring a promoter statement; and

(c) requiring authorisation for an advertisement which supports a party or candidate,

were relatively limited and rational restrictions. The limits were minor and proportionate. Therefore s 6 of the NZBORA was not engaged and it was the job of the Court to undertake the "may reasonably be regarded" test.

Not editorial content or personal political views

[95] The Commission, in arguing that neither of these exceptions applied, adopted the reasoning from its advisory opinion and its subsequent correspondence with the plaintiffs and their lawyers, in which the Commission stated the following:

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[42] *R v Oakes* [1986] 1 SCR 103, approved and applied by the Supreme Court in, for instance, *R v Hansen*, above n 36, at [42], [64], [103]-[104].

(a) The Commission did not agree with the plaintiff's interpretation of the word "comment" in s 70(3), as it had to be interpreted in light of the other words in the list, according to the *ejusdem generis* rule.

(b) The natural and ordinary meaning of the term "advertisement" is simply a "notice or announcement in a public medium" or making something known to the public.

(c) The plaintiffs' contended meaning of the word "individual" and the phrase "who does not make or receive a payment in respect of the publication of those views" was not a meaning that the words could reasonably bear.

Broadcasting Act

Election programmes

[96] The Commission submitted that there was simply no statutory support for the plaintiffs' argument that election programmes meant "paid" election programmes. The s 70 heading could not bear the weight the plaintiffs were trying to put on it. The Broadcasting Act, as enacted in 1989, and the Broadcasting and Radiocommunication Reform Bill as introduced in 1990,[43] had only prohibited the broadcasting of "paid" election programmes. That limitation was removed at the select committee stage of the latter bill, but the heading was not changed. The heading was, therefore, not a persuasive aid to interpretation.

[97] Just as with the definition of election advertisement, the words "encourages or persuades", "advocates", and "opposes" were all capable of a continuum of meaning. The approach required was an objective one, just as for the Electoral Act. That was implicit in the words "appears to encourage or persuade" found in the s 69 definition.

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[43] That Bill, as relevant, became the Broadcasting Amendment Act (No 2) 1990. I consider the relevant legislative history at [114] and following.

Not comments

[98] The Commission acknowledged that, consistently with its approach to the exemption in s 3A(2)(c) of the Electoral Act, the term "comments" could mean editorial content. But the Commission had a different understanding of the meaning of that term than the plaintiffs. In the Commission's submission, the ordinary meaning of editorial content, and therefore of comments, is opinion material written or selected by, or with the authority of, the editor of a publication, and presented as the opinion of the publication. That interpretation of s 70(3) was supported by reference to the principles of *noscitur a sociis* and *ejusdem generis.* It was also consistent with the legislative history of the equivalent exemption in s 3A(2)(c), as reflected in the provisions of the Electoral Finance Act 2007 and the Electoral (Finance Reform and Advance Voting) Amendment Act 2010. To adopt the plaintiffs' meaning of "comments" would be to exclude virtually all critical "election programmes" from regulation under the Broadcasting Act. That was hard to reconcile with that element of the definition of election programme which referred to programmes opposing the candidate or a political party. It was not tenable that the same criteria which rendered a programme an election programme, was also a criterion for exemption. The Song and the Music Video did not come within the s 70(3)(c) "comments" programme exemption. They were, therefore, election programmes which may not be broadcast.

Analysis

Statutory interpretation and NZBORA

[99] Determining this application involves applying recognised principles of statutory interpretation and ss 4 to 6 of NZBORA.

[100] The principles of statutory interpretation are well established. In terms of s 5 of the Interpretation Act 1999, the meaning of an enactment must be ascertained from its text and in the light of its purpose. Indications provided in the enactment such as preambles, headings, marginal notes, examples and explanatory material may be considered in ascertaining that meaning.

[101] In *Commerce Commission v Fonterra Cooperative Group Ltd*, the Supreme Court observed:[44]

> [22] It is necessary to bear in mind that s 5 of the Interpretation Act 1999 makes text and purpose the key drivers of statutory interpretation. The meaning of an enactment must be ascertained from its text and in the light of its purpose. Even if the meaning of the text may appear plain in isolation of purpose, that meaning should always be cross-checked against purpose in order to observe the dual requirements of s 5. In determining purpose the court must obviously have regard to both the immediate and the general legislative context. Of relevance too may be the social, commercial and other objective of the enactment (citations omitted).

[102] In my view, the need to cross-check plain meaning against purpose, the need to have regard to both the immediate and the general legislative context and to the social objective of an enactment, are all of particular relevance here. The Commission's approach, as described by Mr Peden in his affidavit, of determining the plain meaning and then applying it, regardless of the restrictions on the right of free speech that would result, is therefore not adequate on general principles of statutory interpretation. I acknowledge, however, that that was not the approach the Commission took in these proceedings.

[103] The interpretive exercise must also be undertaken consistently with ss 4 to 6 of NZBORA. Courts in New Zealand have taken a variety of approaches to that exercise as seen, for example, in *Moonen*, *Hansen* and *Brooker*.[45] Judges have also emphasised that the approach to be taken will depend on context as shown. In *Hansen*, Tipping J observed, with reference to the different approach he had earlier taken in *Moonen:*[46]

> [94] There is a difference between a case in which there are two conceptually distinct meanings and a case in which the issue concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. In the continuum type of case, there may be good reason to adopt the approach set out in *Moonen*, if only because it will usually be difficult to determine where Parliament intended the meaning to fall on the continuum. The point at which a tenable meaning ceases to limit or least limits the right or freedom may well represent the appropriate point at which to fix the meaning. But in a case like the present, where the two potential meanings are conceptually quite different and distinct and, as I

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44 *Commerce Commission v Fonterra Cooperative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767.

45 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA); *R v Hansen*, above n 36; *Brooker v Police*, above n 41.

46 At [61] per Blanchard J, [92]-[94] per Tipping J, [192] per McGrath J; *Moonen*, above n 45.

> shall shortly indicate, there is only one candidate for Parliament's intended meaning, I consider that the approach earlier outlined is the one which will best serve the relationship between ss 4, 5 and 6.

[104] By my assessment, one way of describing the overall effect of ss 4, 5 and 6 of the NZBORA is that Parliament is telling the courts that where it imposes limitations on NZBORA rights and freedoms that cannot (in terms of s 5) be demonstrably justified, it will endeavour to do so clearly. That is, it will express itself in such a way that, notwithstanding the s 6 directive, a rights-consistent meaning[47] cannot be given to the relevant provision.[48] There, the prohibition in s 4 prevails. Where Parliament does not legislate in that clear way, s 6 directs the courts to an NZBORA rights consistent interpretation and, in adopting that interpretation, a Court is not acting contrary to the prohibition found in s 4. Sections 4, 5 and 6 direct the Court to take an analogous approach to the interpretation of legislation passed before the enactment of NZBORA.

[105] I find support for this assessment of the effect of ss 4, 5 and 6 in a recent article by Professor Paul Rishworth, who puts it this way:[49]

> I think s 6 is best regarded as Parliament's message to assist courts in determining the meaning of its enactments and does not contemplate a level of interpretive impact that is different from the conventional approach. On the other hand, the idea of seeking rights-consistency may enliven the conventional approach, and generate interpretive possibilities that would otherwise not be appreciated.

[106] On that basis, Professor Rishworth suggests a synthesis of the *Hansen/Brooker* approaches reflecting the approach that he argues the courts, including the Supreme Court in *Hansen,* the Court of Appeal in *Noort* and *Drew* and this Court in *Schubert,* have actually taken.[50] That is where, as here, it is clear an NZBORA right is implicated, the Court should start with the claimed meaning and ask whether that meaning (here that the Song and the Music Video are election advertisements and election programmes, and do not come within the editorial

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47 On this approach, a rights-consistent meaning includes one which recognises demonstrably justifiable limitations.

48 As the Chief Justice, in her dissent in *Hansen*, above n 36, at [8], found to be the case as regards s 6(6) of the Misuse of Drugs Act 1975.

49 Paul Rishworth "Human Rights" [2012] NZ L Rev 321 at 330-331.

50 Rishworth, above n 49, at 331; *R v Hansen*, above n 36; *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA); *Schubert v Wanganui District Council* [2011] NZAR 233 (HC); *Drew v Attorney-General* [2002] 1 NZLR 58 (CA).

content/personal expression of view, comments programmes exceptions) would impose an unreasonable limit on that right. If that is the case, the Court then asks if there is another properly available meaning (in terms of the principles of statutory interpretation, including the interpretational mandate in s 6) that does not unreasonably limit that right.

[107] At the heart of the provisions I am concerned with are two complementary NZBORA rights,[51] namely the right to participate in genuine elections and the right to freedom of expression.

[108] In the context of Parliamentary elections, it has been long recognised that those two sets of rights must accommodate each other. As the majority in the Canadian Supreme Court in *Harper v Canada* acknowledged:[52]

> While the right to political expression lies at the core of the guarantee of free expression and warrants a higher degree of constitutional protection, there is nevertheless a danger that political advertising may manipulate or oppress the voter. Parliament had to balance the rights and privileges of all the participants in the electoral process … In promoting the equal dissemination of points of view by limiting the election advertising of third parties who are influential participants in the electoral process, the overarching objective of the spending limits is electoral fairness.

[109] That Parliamentary exercise of balancing or accommodating related rights is reflected very explicitly in both the Electoral Act and the Broadcasting Act in the "exceptions" to the definitions of the terms "election advertisement" and "election programme".

[110] In the Electoral Act, s 3A(2) provides that, as relevant, the editorial content of a radio or television programme, and the publication on electronic media of personal political views by an individual who does not make or receive a payment in respect of the publication of those views, are *not* election advertisements. Such editorial content and personal political views may reasonably be regarded as "encouraging or persuading". But that is not the point. The point is that those types or instances of political speech are not restricted by the Electoral Act.

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51 All NZBORA rights are of fundamental importance and I do not think it is necessary here to emphasise the importance of the rights of political speech and of genuine elections.

52 *Harper v Canada* [2004] 1 SCR 827 at 828-829.

[111] Similarly, in the Broadcasting Act, whatever the scope of the definition of election programme may be, s 70(3) provides that the prohibition on broadcasting election programmes does not apply to restrict broadcasting, in relation to an election, of news, comments or current affairs programmes. In other words, news, comments or current affairs programmes may "encourage or persuade" or "support" or "oppose" candidates and parties. But that is not the point. The point is that the types of political speech which come within the phrase "news or comments or current affairs programmes" are not restricted by the Broadcasting Act.

[112] Given these conclusions, one available approach here would be to take the unitary, or one-step approach, taken by the Court of Appeal in *Drew* and the Supreme Court in *Brooker*. That would simply ask whether the meaning contended for by the plaintiffs is the correct interpretation of the relevant provisions. However, and as Professor Rishworth suggests, where there is one contested meaning – that adopted by the Commission in its advisory opinion – a helpful starting point is to first ask whether adopting that meaning would give rise to the right to freedom of expression being limited in a way that was not demonstrably justifiable in a free and democratic society. If the meaning adopted by the Commission would have that effect, the second question then becomes whether the statutory provisions can reasonably be given a more rights-consistent meaning, as the plaintiffs say the declarations they seek here, in effect, would do.

[113] To answer those questions, I will first consider the legislative history. I think what that history tells us about the mischiefs the restrictions on freedom of expression found in the Electoral Act and the Broadcasting Act are designed to address provides considerable help in determining what Parliament intended the extent of those restrictions to be, and hence helps answer both the first and second of those questions.

Legislative history

Overview

[114] The 1986 Report of the Royal Commission on the Electoral System, *Towards a Better Democracy*,[53] played an important role in the enactment of the provisions of the Electoral and the Broadcasting Act at issue here. That report is in many ways the starting point of the relevant legislative history. To understand that report, it is helpful to place it in the context of the legislative scheme over time and, most particularly, New Zealand's long history of government control and ownership of the broadcasting industry.

Electoral law in 1986

[115] Spending by candidates in general elections on electioneering has long been controlled.[54] It is only relatively recently, however, that such controls have been applied to political parties and, even more recently, directly to third parties.

[116] The first enactment to reflect the broader scheme now found in Parts 6AA and 6A of the Electoral Act 1993 was s 147A of the Electoral Act 1956, introduced in 1977. Section 147A(1) provided:

> (1) No person shall publish or cause or permit to be published in any newspaper, periodical, poster, or handbill, or broadcast or cause or permit to be broadcast over any radio or television station, any advertisement used or appearing to be used to promote or procure the election of any candidate at an election unless—
>
> (a) The publication of that advertisement is authorised in writing by the candidate, or, in the case of an advertisement relating to more than one candidate, the candidates or the party to which they belong; and
>
> (b) The advertisement contains a statement setting out the true name of the person for whom or at whose direction it is published and the address of his place of residence or business.
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> …

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53 Above, n 32.

54 Restrictions on the overall campaign spending of individual candidates were first enacted in 1895.

[117] The term "advertisement" was not defined. The cost of any such advertisements were, in certain situations, part of the candidates' controlled election expenditure. Subsection (5) of s 147A provided:

> (5) Nothing in this section shall restrict the publication of any news or comments relating to an election in a newspaper or other periodical or in a radio or television broadcast made by [the broadcaster].

Broadcasting law in 1986

[118] Wireless telegraphy, originally a point to point form of communication, was first regulated by the Wireless Telegraph Act 1903.[55] From 1908 onwards a series of Post and Telegraph Acts controlled the licensing of wireless telegraphy stations. The advent of the possibility of radio broadcasting, a one-to-many form of communication, was reflected in 1920 when provision was made for wireless receivers to be licensed separately from transmitters.[56]

[119] Section 203(5) of the Post and Telegraph Act 1928 is an early example of a definition of the term "broadcasting":

> (5) For the purposes of this section "broadcasting" means the transmission by wireless telegraphy of approved programmes of matters of entertainment, instruction, or information of general interest capable of being received by apparatus of a kind for the installation and use of which licenses have been issued under this Act.

[120] Whilst private radio flourished in the 1920s, the passage of the first Broadcasting Act, the Broadcasting Act 1931, signalled a move to state ownership. The New Zealand Broadcasting Board, the first of many similarly-named institutions, was established. The Broadcasting Act 1936 effectively nationalised the radio industry. The Broadcasting Board was abolished. The Broadcasting Minister would thereafter carry on a national broadcasting service. "Programme" was defined in s 2:

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55 Section 2 of the Wireless Telegraph Act 1903 defines wireless telegraphy as including "every method of transmitting messages by electricity otherwise than by wires whether such method is in use at the time of the passing of this Act or is hereafter discovered or applied".

56 Post and Telegraph Amendment Act 1920, s 6.

> "Programme" includes any signal, announcement, item, communication, or other matter transmitted or intended to be transmitted from a broadcasting station for reception by the public:

[121] The Minister could establish stations that transmitted programmes including "advertising matter". Such stations were called commercial stations. The transmission of programmes (or parts thereof) "intended to serve as an advertisement for the pecuniary benefit of any person" was otherwise prohibited.[57]

[122] That remained the position until 1961.

[123] The Broadcasting Corporation Act 1961 established the New Zealand Broadcasting Corporation and transferred the Minister's functions to the new corporation. The Broadcasting Corporation could, on the other hand, broadcast advertising programmes from any commercial (radio) station and any television station it operated. Advertising programmes could only be broadcast by private broadcasting stations pursuant to specific warrant authorisation. The terms "advertising programme" and "commercial station" were defined as follows:[58]

> "Advertising programme" means a programme or part of a programme intended to serve as an advertisement for the pecuniary benefit of any person.
>
> "Commercial station" means a broadcasting station established or operated by the Corporation from which advertising programmes are broadcast; but does not include a television station.

[124] The Broadcasting Authority Act 1968 established the New Zealand Broadcasting Authority. The provisions of that Act suggest a possible liberalisation of private broadcasting. The Broadcasting Corporation's regulatory functions were transferred to the Broadcasting Authority.

[125] Further change occurred in 1973, reflecting a move away from private broadcasting. The Broadcasting Act 1973 abolished both the Broadcasting Corporation and the Broadcasting Authority. The Broadcasting Corporation was replaced by the Broadcasting Council of New Zealand and three new corporations, Radio New Zealand, Television Service One (TV-1) and Television Service Two

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57 Broadcasting Act 1936, s 14(1).
58 Broadcasting Corporation Act 1961, s 2.

(TV-2). The Broadcasting Council inherited the regulatory functions of the Broadcasting Authority. No new warrants were to be granted for private broadcasting stations. The broadcast of advertising programmes was restricted as before.

[126] In 1976 the legislative pendulum swung back. One of the purposes of the Broadcasting Act 1976 was to provide for the establishment and operation of private radio broadcasting stations.[59] The prohibition on the grant of any further licences to private broadcasting stations was abolished. The Broadcasting Council's regulatory functions, relating to the issue of warrants, were transferred to the newly established Broadcasting Tribunal. Advertising programmes could be broadcast by any broadcasting station if the station's warrant so provided. A new definition of the term "advertising programme" was provided. It read:[60]

> "Advertising programme" means a programme or part of a programme intended to promote the interests of any person, or to promote any product or service for the commercial advantage of any person, and for which, in either case, payment is made, whether in money or otherwise.

There was no statutory framework in the Broadcasting Act 1976 relating to political broadcasting. The Broadcasting Corporation had, however, established arrangements in that regard. First, free time was allocated by the Broadcasting Corporation to political parties at general elections pursuant to s 22 of the Broadcasting Act 1976. Section 22(a) required the Broadcasting Corporation to provide and produce programmes which "inform". There was no other statutory framework for those arrangements. The allocation of that time as between parties was problematic. Secondly, paid advertising by political parties was controlled by the rules made by the Broadcasting Rules Committee. Prior to 1983, such advertising had been accepted only "for the purpose of advertising the availability of candidates to call on electors, public meetings and addresses, permitting the date, time and place of the event, names and affiliation of speakers, and a brief non-controversial indication of the subject matter to be covered".[61]

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59 Broadcasting Act 1976, s 3(e).
60 Section 2.
61 *Towards a Better Democracy*, above n 32, at [8.85].

[127] In 1983 those rules were amended to bring them into line with those applied to general advertising. Those 1983 rules relevantly provided:[62]

> 1.18.2
>
> (a) The advertisement must include a statement setting out the true name of the person for whom or at whose direction it is published and the address of his/her place of residence or business;
>
> (b) Advertisements for candidates must be authorised in writing by the candidate or, in the case of an advertisement relating to more than one candidate, the candidate or the party to which they belong.

[128] In applying those rules, the Broadcasting Corporation adopted policies which saw it only run election advertising during the period of the official general election campaign, and then only for (ie on behalf of) political parties. Such advertisements were described by the Broadcasting Commission as "commercials".[63] Slightly different rules applied as to television and radio broadcasting. In each, the amount of time available was, however, restricted. On radio a discounted rate would be provided. On television normal advertising rates applied.

[129] The Broadcasting Corporation's approach can be seen as distinguishing between the provision of free time for the broadcast of programmes and the acceptance, subject to a range of restrictions, of paid advertising in connection with general elections. In that way, the Corporation itself controlled "political broadcasting".

Towards a Better Democracy

[130] The Royal Commission on the Electoral System had wide-ranging terms of reference, the most significant being those relating to alternative voting systems that ultimately resulted in the adoption of the MMP system. At the same time, the Royal Commission was charged with considering whether the "present limits on election expenses are appropriate", whether those limits should be extended to political parties and to the amount of donations paid to candidates and parties, and whether such expenses should be defrayed wholly or in part by state grants.

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62 *Towards a Better Democracy*, above n 32, at [8.86].

63 *Towards a Better Democracy,* above n 32, [8.86] at 206-208.

[131] The Royal Commission considered those matters, and the wider question of the use of the broadcast media for electioneering, in Chapter 8 of its 1986 Report, *Towards a Better Democracy*, entitled "Political Finance". It first made a number of general observations, including:

> 8.1 This chapter concerns the proper place of money and other resources in influencing the political process. Our primary focus is the use of these in influencing parliamentary elections. Elections are central to our democracy in that they are the occasions when the people choose their Governments and their political representatives. That choice must be free and fair. It must also be well informed. …
>
> 8.2 It is perfectly legitimate and, indeed, highly desirable that those interested in the political process raise and spend money to further their political objectives. Those activities should not, however, be completely uncontrolled. It is neither fair nor conducive to an informed electorate if wide discrepancies in access to resources mean some parties or groups are denied the chance to communicate their views effectively. Nor is it fair if some in the community use their relative wealth to exercise disproportionate influence in determining who is to govern and what policies are to be pursued. Moreover, the particular uses to which "political" money and resources are put should not themselves be unfair or likely to distort the proper working of a democracy. So that the electoral process is seen to be fair, and so that the voters may make informed judgments, it is important that the electorate is fully informed both about significant sources of political finance and about the uses to which it is put.

[132] In Part 1 of Chapter 8, the Royal Commission considered issues relating to the control and disclosure of political income and expenditure. A key recommendation was that expenditure limitations should be extended to political parties.

[133] In Part 2 of Chapter 8, the Royal Commission considered the issue of political broadcasting. It noted:

> 8.73 Political broadcasting in democracies like New Zealand has 2 key elements. First, the coverage of political parties, candidates and polices in news, current affairs and talk back programmes; second, the allocation of broadcasting facilities to political competitors at election times for direct communication with the electorate. While of considerable importance, the issues raised by the first of these areas fall outside the terms of reference of this Commission. …
>
> 8.74 It is the second element of political broadcasting, that concerning the allocation of paid and free television and radio time to political parties, that we address here.

[134] On the issue of free broadcasting time generally, the Royal Commission concluded:[64]

> that the [Broadcasting Corporation] should be *legally* obliged to continue to provide free time to political parties. (emphasis added)

[135] The Royal Commission had no concerns with the Broadcasting Corporation's rules relating to paid advertising time on radio. Television was, the Commission observed, both much more expensive and a more powerful medium than radio. The Corporation's greatest concerns about paid political advertising related to the purchase of television time.

[136] As relevant, the Commission was concerned that:[65]

> … under present laws which place no expenditure limitations on political parties, … a trend toward the purchase of substantial television time could, in our view, significantly increase the advantage which parties which the greatest level of financial support have over those without substantial resources. …

[137] Given that broadcasters would be legally obliged to provide free broadcast time, the majority view was that no paid political advertising should be allowed on either public or private television. The minority view was that political parties should, subject to expense limits, be able to purchase television time as they saw fit. On that basis, the Royal Commission's majority recommendation was that "paid political advertising should be prohibited during the 3-month election campaigning period".[66]

[138] Changes to the Electoral Act and the Broadcasting Act since the delivery of *Towards a Better Democracy* have responded to the Royal Commission's recommendations and to developments not anticipated by the Royal Commission, such as third party electioneering.

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64 At [8.75].
65 At [8.88].
66 At [8.90] and recommendation 39 at 210.

The Electoral Act 1993

[139] The legislative history of the current terms of the Electoral Act 1993 is complex.

[140] It was not until 1993 that Parliament responded to the Royal Commission's unanimous recommendation of MMP in *Towards a Better Democracy*. The Electoral Referendum Act 1993 provided for the taking of a binding referendum, together with the 1993 general election, on proposed changes to the electoral system. At the same time, Parliament passed the Electoral Act 1993 to reform the electoral system to provide for MMP if that proposal was carried in that referendum, and for the establishment of the Electoral Commission.

[141] When enacted in 1993, Part 6 of the Electoral Act regulated the conduct of elections generally. However, Part 6 only controlled expenditure on election advertising by candidates, on terms essentially the same as those found in s 147A of the 1956 Act.

[142] Parties' election expenses were regulated for the first time by the Electoral Amendment (No. 2) Act 1995. That Act limited list parties' expenditure to $1,000,000, plus $20,000 per candidate, and required parties to file audited returns of their election expenses. A scheme for the disclosure of donations was also established.

[143] It was events surrounding the 2005 general election that prompted calls for a broader response. Professor Geddis described what happened, in somewhat colourful terms, as follows:[67]

> During that regulated period in 2005, both the Labour and National Parties spent close to their maximum allowed election expenses for the first time. Indeed, Labour probably exceeded its spending cap, by using parliamentary funds to pay for a "pledge card" distributed to voters shortly before election day – an action that caused it a measure of political embarrassment in the subsequent parliamentary term. The source of the parties' private funding for their campaigns largely remained hidden from public view, as Labour and National took advantage of loopholes in the law to shield the identity of donors who contributed hundreds of thousands of dollars. Finally, members of the Exclusive Brethren religious sect attempted to swing the election

[67] Geddis, above 5, at 138.

> outcome in National's direction by spending upwards of a million dollars on producing and distributing pamphlets attacking the Labour and Green Parties. This represented an unprecedented degree of third-party involvement in a New Zealand election campaign.

[144] As a result, Parliament enacted the Electoral Finance Act 2007 to regulate third party participation. The defined term "election advertisement"[68] was central to the scheme of that regulation.

[145] The Electoral Finance Act 2007 became an election issue in the 2008 general election. The National Party committed to its repeal. That commitment was effected by the passage of the Electoral Amendment Act 2009 which restored, on an interim basis, the old Electoral Act status quo. Subsequently, the Electoral (Finance Reform and Advance Voting) Amendment Act 2010 was passed, bringing into force Parts 6AA and 6A in their current form. In doing so, however, a number of features of the Electoral Finance Act 2007 were restored, including that Act's basic architecture for regulating third party participation in elections and, for that purpose, the definition of "election advertisement".

[146] The relevant legislative history therefore involves a consideration of the current provisions of the Electoral Act 1993 in light of the Election Finance Act 2007 and the Electoral (Finance Reform and Advance Voting) Amendment Act 2010.

[147] The purpose of the Electoral Finance Act was expressed as follows:

> **Part 1**
>
> **Preliminary provisions**
>
> 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
>
> (e) ensure that the controls on the conduct of election campaigns—
>
> (i) are effective; and

[68] Electoral Finance Act 2007, s 5.

(ii) are clear; and

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

[148] To achieve that purpose the Electoral Finance Act:

(a) Repealed the provisions of Part 6 of the Electoral Act dealing with candidates' and parties' election expenses, and the restrictions on advertisements promoting candidates and parties found in ss 221 and 221A.

(b) Replaced those provisions with a scheme for the control of election campaigns, similar to that now found in Parts 6AA and 6A of the Electoral Act, including the concept of the regulated period within which election campaigning activity was controlled.

(c) Introduced a broad definition of election advertisement.

(d) Controlled election campaign expenditure by reference to money spent in relation to election advertisements during the regulated period.

(e) Provided exceptions to the definition of election advertisements.

(f) Restricted those who could incur election expenses to candidates, parties and listed third parties, subject to an exception for persons who incurred election expenses of less than $12,000.

(g) Provided for a list of third parties, and for the keeping of records, and the provision of and audit of returns, of election expenses.

[149] Following the 2009 election, the coalition Government established a cross-party committee to engage in public consultation. That resulted in the introduction in 2010 of the Electoral (Finance Reform and Advance Voting) Amendment Bill. Introducing the bill the Acting Minister of Justice commented in Parliament:[69]

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[69] (4 May 2010) 662 NZPD 10716-10717.

> [This bill] aims to improve the understanding and application of electoral law. To recognise the impact of new technology and media, the bill updates the definition of election "advertisement" to cover advertising by all forms of media.
>
> The bill also sets up a regulatory regimen for third party promoters that emphasises transparency, rather than restrictions on the freedom of expression. …

[150] The reference to emphasising transparency, rather than restricting freedom of expression, can be understood as reflecting the fact that, as introduced, the Bill contained no limit on third party expenditure on election advertising – a matter of much controversy at the time.

[151] Notwithstanding the form in which the bill had been introduced, by the time it came to be reported back, the National/Labour bipartisan majority recommended an expenditure cap for third party promoters of $300,000. The Select Committee described the rationale for limiting third party expenditure in the following terms:[70]

> The regulation of third-party expenditure is a matter of balancing public confidence in the electoral system with upholding the right to freedom of expression.
>
> Ensuring there can be no perception of "big money" interests having undue influence in New Zealand's electoral system is a critical part of maintaining public confidence. However, we are equally cognisant of the need to maintain the ability of third parties to take part in public debate in a meaningful way and on a nationwide basis.

[152] The Regulatory Impact Statement similarly observes that the 2010 amendments to the Electoral Act were intended to impose:[71]

> … stricter disclosure requirements for parallel campaigners, increasing transparency. Parallel campaigners who spend, or intend to spend, over $20,000 in the regulated period will be required to register with the Electoral Commission, who would publish a register of campaigners.

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[70] Electoral Legislation Committee *Electoral (Finance Reform and Advance Voting) Amendment Bill* (24 November 2010) at 10.

[71] Regulatory Impact Statement, Electoral (Finance Reform and Advance Voting) Amendment Bill, at 8-9.

The Broadcasting Act 1989

[153] Part 6 of the Broadcasting Act 1989 was Parliament's response to the Royal Commission's recommendations on election broadcasting.[72] As enacted in May 1989, Part 6 had two major elements:

(a) A prohibition, in s 70, on the broadcast of paid election programmes at any time.

(b) A requirement, in s 71, for every broadcaster to permit political parties to broadcast election programmes free of charge during election campaigns. The Broadcasting Standards Authority would administer the allocation of that time.

[154] The complete prohibition on broadcasting election programmes for a fee or other consideration, and the compulsory provision of free broadcasting time, were controversial. It was not long before the scheme of Part 6 was changed to address the second of those issues. The Broadcasting and Radiocommunications Reform Bill 1990 was introduced to Parliament in June 1990. Part II of that Bill, which became the Broadcasting Amendment Act (No 2) 1990, repealed and replaced Part 6. There were two fundamental changes made to the Part 6 scheme. Broadcasters would no longer be required to provide free broadcasting time: rather, there would be a scheme whereby such time could be provided on a voluntary basis and, as before, allocated by the Broadcasting Standards Authority. Secondly, public funds would be provided with which political parties could *purchase* time for election broadcasts. The Broadcasting Standards Authority would have the responsibility of administering that expenditure. But political parties could not purchase broadcast time using their own funds.

[155] I return to elements of that legislative history in more detail when considering the specific issues raised by these proceedings. For now, I think it is sufficient to note the particular significance, for the development of the Electoral Act, of Parliament's concern that third party campaigning should be transparent and should

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[72] It was not until the passage of the Electoral Act in 1993 that Parliament responded to the Royal Commission's recommendation on election spending.

be subject to financial control. The history of the Broadcasting legislation reflects the pattern of state control, and of the characterisation as "commercial" of broadcasting stations permitted to broadcast advertising material or programmes.

Justified limitations - the proportionality test

[156] Section 5 of NZBORA provides as follows:

> **Justified limitations**
>
> Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[157] Determining whether the restrictions on (i) the plaintiffs' rights of freedom of expression and on (ii) the general right of New Zealanders to seek, receive, and impart information and opinions of any kind in any form, which arise if the Song and the Music Video are election advertisements and election programmes, are "such reasonable limits" involves a now well-established test. In *Hansen*, that test was set out as follows:[73]

> [64] As Richardson J said in *Ministry of Transport v Noort*,[74] the application of s 5 involves weighing:
>
> (1) the significance in the particular case of the values underlying the Bill of Rights Act;
>
> (2) the importance in the public interest of the intrusion on the particular right protected by the Bill of Rights Act;
>
> (3) the limits sought to be placed on the application of the Act provision in the particular case; and
>
> (4) the effectiveness of the intrusion in protecting the interests put forward to justify those limits.
>
> In deciding what constitutes a justified limitation under s 5, New Zealand Courts have commonly adopted the test used by the Supreme Court of Canada in *R v Oakes*,[75] which was summarised by that Court in the following way in *R v Chaulk*:[76]
>
> 1. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right or freedom; it must relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

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73 *R v Hansen*, above n 36.
74 *Ministry of Transport v Noort*, above n 50, at 283-284.
75 *R v Oakes*, above n 42.
76 *R v Chaulk* [1990] 2 SCR 1303 at 1335-1336.

> 2. Assuming that a sufficiently important objective has been established, the means chosen to achieve the objective must pass a proportionality test; that is to say they must:
>
>   (a) be 'rationally connected' to the objective and not be arbitrary, unfair or based on irrational considerations;
>
>   (b) impair the right or freedom in question as 'little as possible'; and
>
>   (c) be such that their effects on the limitation of rights and freedoms are proportional to the objective.
>
> [65] As will be seen, any limitation on a guaranteed right should be accepted as demonstrably justified only after the Court has worked through a careful process. …

[158] The objective of Parts 6AA and 6A of the Electoral Act, and Part 6 of the Broadcasting Act are, as already acknowledged, the protection of the NZBORA rights of New Zealand citizens to participate in genuine periodic elections of members of the House of Representatives. That is an objective of fundamental constitutional importance. But that does not take the issue very far. More important here is the symbiotic relationship between that right and the right to freedom of expression. *Australian Capital Television Pty Ltd v The Commonwealth* is a case in which the High Court of Australia struck down as unconstitutional federal legislation to similar effect as Part 6 of the Broadcasting Act 1993. There, Mason CJ acknowledged that freedom of communication was an indispensible element of representative government. The Chief Justice said:[77]

> Indispensible to that accountability and that responsibility is freedom of communication, at least in relation to public affairs and political discussion. Only by exercising that freedom can the citizen communicate his or her views on the wide range of matters that may call for, or are relevant to, political action or decision. Only by exercising that freedom can the citizen criticise government decisions and actions, seek to bring about change, call for action where none has been taken, and in this way influence the elected representatives.

[159] In reaching that conclusion, Mason CJ noted a series of Canadian decisions, decided before the adoption of the Charter by Canada.[78] Those decisions held that the grant of representative government in the British North America Act 1867 (Imp) (30 to 31 Vict.c.3), in the form of parliamentary democracy, implied the right to

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[77] *Australian Capital Television Pty Ltd v The Commonwealth* [1992] HCA 45, (1992) 177 CLR 106 at [38].

[78] *Re Alberta Legislation* [1938] SCR 100 at 132-135, [1938] 2 DLR 81 at 107-109, 119-120; *Switzman v Elbling* [1957] SCR 285 at 327, (1957) 7 DLR (2d) 337 at 371; *Re Ontario Public Service Employees' Union and Attorney-General (Ontario)* [1987] 2 SCR 2 at 57, (1987) 41 DLR (4th) at 184; *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573 at 584, (1986) 33 DLR (4th) at 184.

freedom of speech and expression, as that right was indispensible to the efficacious working of representative parliamentary democracy. Hence the Parliament of Canada had, by necessary implication, legislative power to protect that right.

[160] The issue here is one of proportionality between the importance of the objective (the protection of the right to vote in genuine elections) and the restriction on the right to freedom of expression, which is itself essential to genuine elections. One way of phrasing the issue here is, somewhat paradoxically, whether the restrictions on the right of freedom of expression in the approach taken by the Commission do no more than is sufficient to protect that right, the exercise of which is a necessary precondition to an election being genuine. That is, there cannot be a genuine election unless all involved – candidates, parties and voting citizens – can freely express their views and seek, receive and impart information and opinions of any kind in any form.

[161] Assessing proportionality here, in my view, depends therefore not so much on a balance of one right against another, because the two rights are very closely related. Rather, it requires an assessment of the extent of the defended restriction (as represented by the advisory opinion) on the right of freedom of expression, in the context of the mischief (the threat or threats to the exercise of that right as indispensible to a genuine election) that the restrictive provisions are designed to address.

[162] As I think the legislative history makes abundantly clear, Parliament's objectives are two-fold. The first of those is to prevent disparities of wealth amongst participants in electioneering, and hence the capacity to "buy" time on broadcast media and otherwise procure the delivery of their electioneering to the voting public, from affecting the fairness of the electoral process.

[163] As the Royal Commission noted, its concerns were the proper place of money and other resources in influencing the political process. It was neither fair nor conducive to an informed electorate if wide discrepancies in access to resources meant that some parties or groups were denied the chance to communicate their views effectively. Nor was it fair if some in the community used their relative

wealth to exercise disproportionate influence. The concern was with "political" money.[79] That objective is reflected in provisions of both the Electoral Act and the Broadcasting Act.

[164] The second principal objective is reflected in the provisions of the Electoral Act designed to promote transparency within the election process. Voters should know the persons who are responsible for political messages so that the voters are receiving information in a truly free way, that is, a way which enhances their ability to critically assess that information.

[165] The controls in the Broadcasting Act reflect a particular concern that the power of broadcasting, and especially television broadcasting, is such that without constraints, the views of the wealthy and powerful (including the broadcasters themselves) could swamp the free expression of ideas by citizens which is a necessary condition of the exercise of the right to participate in general elections. To create a level playing field between political parties, the Broadcasting Act provides for the free, or publicly-funded, broadcast of election programmes by political parties. I think it is fair to say, however, that these provisions of the Broadcasting Act reflect an assessment of the power of broadcast media in the essentially pre-digital age. Deliverability (as previously provided by access to broadcast media) is no longer a scarce commodity. It may, therefore, be that in the digital age unrestricted access to broadcast media no longer carries the risks to freedom of expression and genuine elections that once was thought to be the case. But that is not an issue for me.

[166] Similarly, Parts 6A and 6AA of the Electoral Act, as introduced in 2010, seek to control "parallel campaigners", both to restrict the ability of "big money" to unduly influence New Zealand's electoral system and to provide for transparency.

[167] I acknowledge that there may be some rational connection between those objectives and banning the broadcast of the Song on radio, prohibiting any other publication of the Song and the Music Video in the absence of a promoter statement and, were such a statement to be included, requiring the plaintiffs – at the risk of

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[79] See above at [131].

criminal prosecution – to keep records of their election expenses. I have little difficulty in concluding, however, that the impairment on the plaintiffs' right of freedom of expression that is involved is not one that is "as little as possible", or one that is proportional to the objective of protecting the rights of New Zealand citizens to participate in genuine elections.

[168] Neither Mr Watson nor Mr Jones, alone or together, could be characterised as "big money". Moreover, they quite transparently, as is normal for creative artists, claim – rather than acknowledge – their right to be recognised as the creators of the Song and the Music Video. When songs are broadcast or made available for download, the identity of the artist is invariably communicated. Similarly, and as is shown in the Appendix to this judgment, the Music Video itself displays their claim as the artists involved. In that regard, no issue of non-transparent participation would appear to arise.

[169] It is also, in my view, to give the effect or impact of the Song and the Music Video an unjustified significance to characterise their publication as "parallel campaigning", or Messrs Watson and Jones parallel campaigners, as those terms from the legislative history inform the interpretation of the Electoral Act.

[170] I therefore find that an interpretation of the Electoral Act and the Broadcasting Act, consistent with the Commission's advisory opinion, would impose limits on the right of freedom of expression of the plaintiffs and New Zealand citizens more generally in a manner which, in my view, cannot be demonstrably justified in a free and democratic society.

[171] The Commission argued that, in terms of the Electoral Act, the requirements for a promoter statement and for the keeping of records relating to election expenses did not impact in any significant way on the content of speech. It was a reasonable condition to which the exercise of the right of freedom of expression was made subject. As, again, Mason CJ in *Australian Capital Television* recognised:[80]

> A distinction should perhaps be made between restrictions on communication which target ideas or information and those which restrict an

[80] *Australian Capital Television Pty Ltd v The Commonwealth*, above n 77, at [46]-[47].

> activity or mode of communication by which ideas or information are transmitted. In the first class of case, only a compelling justification will warrant the imposition of [such] a burden … On the other hand, restrictions imposed on an activity or mode of communication by which ideas or information are transmitted are more susceptible of justification.

[172] And yet, as Mason CJ went on to recognise, whether the latter class of restrictions were justified called for a balance of the public interest in free communication against the competing public interest which the restriction is designed to serve.[81] Whilst accepting the validity of the Commission's argument, at the end of the day the analysis required is similar. Whilst on its face the requirement to include a promoter statement may not seem onerous, when taken in conjunction with the need to record an address and to keep records of expenses, all at the risk of criminal sanction, it is significant.

[173] In its submissions, the Commission did point to the degree of difference that should properly be accorded to Parliament when it legislates in this area, particularly – as Mander J acknowledged – given the bipartisan nature of the 2010 electoral reform. I have acknowledged the balance that Parliament obviously sought to draw in this area, and recognise that there is here no challenge to the general scheme of the legislation. Rather, the issues raised here are very specific focussing as they do on two creative artists, and a song and a music video produced by them. These proceedings therefore raise issues of interpretation which, particularly in light of the interpretational mandate given by Parliament to the courts in s 6 of NZBORA, where – in my view – no particular deference is called for.

[174] I therefore move to the second stage of the analysis. Here, that involves asking whether the interpretations argued for by the plaintiffs are ones that are properly available in terms of the interpretational mandate found in s 6 of NZBORA.

[175] I first consider the questions of whether the Song and the Music Video are election advertisements or election programmes. I conclude that they are not. I may, of course, be wrong in reaching that conclusion. I therefore go on to consider the related questions of the applicability of the editorial material and comments programmes exemptions. I consider them together, given their close relationship.

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[81] At [47].

Finally I consider the applicability of the "personal political views" exceptions found in the Electoral Act. I find that, if the Song and the Music Video should – but for those exceptions – properly be seen as election advertisements and election programmes, then the exceptions would apply.

Are the Song and the Music Video election advertisements?

[176] The plaintiffs argue that a rights-sensitive interpretation is that the Song and Music Video are not election advertisements because they are not advertisements, as that word is properly understood, at all. The Commission argues that the natural meaning of the word "advertisement" is simply one of a notice or announcement made to the public. The Commission noted the word "advertisement" derived from the French *avertissement* (warning), and referred to the following definitions of the word found in *The Oxford English Dictionary.*

> 2. The action of calling the attention of others; admonition, warning, precept, instruction
>
> 3. The action of informing or notifying; information, notification, notice
>
> 4. A (written) statement calling attention to anything; a notification, a notice.
>
> 5. A public notice or announcement: *formerly* by the town-crier; *now*, usually, in writing or print, by placards, or in a journal; *spec*. a paid announcement in a newspaper or other print.

[177] Those definitions each contained the essential elements of notification to the public. They did not limit the types of publications which can be advertisements to print media, or conversely exclude "creative" forms of notification such as satire. They also did not require that a publisher of a publication be paid before a publication could be considered an advertisement.

[178] Rather than the concept of "advertisement" having some relevant substantive content that acts as a preliminary and rights-relevant fetter, the crux of the interpretation was the "reasonably be regarded" requirement. That is, the Commission argued that an objective, and rights-sensitive interpretation of the words "may reasonably be regarded as encouraging or persuading" in the definition of election advertisement provides the principal way of balancing the right of free expression with the right to genuine elections. I do not agree.

[179] In my view, that approach unduly narrows the statutory language that needs to be construed to calibrate the relevant NZBORA interests in the way that both the general principles of statutory interpretation and s 6 of NZBORA call for. I also consider that that approach does not give appropriate significance to the structure of the definitions of both election advertisement and election programme. Notwithstanding the application of an objective test to determine the effect on voters of the speech in question, various categories of publications or broadcasts that have the definitional effect (encouraging, persuading and the like) are, nevertheless, not subject to election regulation. Secondly, and as the legislative history in my view shows, those exceptions express an important part of Parliament's obvious balancing of the right of freedom of expression and the right to participate in genuine elections, freedom of expression being a pre-condition for genuine elections.

[180] I acknowledge that Mander J would appear to have adopted in *Greenpeace* that approach taken by the Commission here, which I have not accepted. In doing so, however, the Judge recognised the significance of the exceptions in the legislative scheme.[82] Those exceptions did not directly affect the issues in *Greenpeace,* which concerned Internet-based issues advocacy. The issues raised in *Greenpeace* regarding the significance of the use of the words "advertisement" are, as I read the decision, quite different to those which are raised here. That is particularly the case given that the plaintiffs do not challenge the Commission's assessment of the likely impact of the Song and the Music Video on voters.

[181] Section 5 of the Electoral Finance Act 2007 introduced a very broad definition of election advertisement:

> 5(1) **In this Act, election advertisement—**
>
> (a) means *any form of words or graphics, or both*, that can reasonably be regarded as doing 1 or more of the following:
>
> (i) encouraging or persuading voters to vote, or not to vote, for 1 or more specified parties or for 1 or more candidates or for any combination of such parties and candidates:
>
> (ii) encouraging or persuading voters to vote, or not to vote, for a type of party or for a type of candidate that is described or indicated by reference to views, positions, or

[82] At [71].

> policies that are or are not held, taken, or pursued (whether or not the name of a party or the name of a candidate is stated); … (emphasis added)

[182] The Electoral (Finance Reform and Advanced Voting) Act 2010 replaced those emphasised introductory words with the words now found in s 3A(1) of the Electoral Act 1993,[83] "an advertisement in any medium".

[183] It seems surprising that that approach would have been taken if the reintroduction of the word "advertisement" made no difference to the meaning of the defined term, which in effect was the interpretation the Commission supported. Moreover, it can be observed that if the term "advertisement" incorporates the action of informing or notifying, then a definition of publication – as provided for in s 3D of the Electoral Act would largely be redundant. Section 3D provides:

> **Meaning of publish**
>
> In this Act, unless the context otherwise requires, **publish,** in relation to an election advertisement means to bring to the notice of a person in any manner: including …

In my view, the presence of that definition is a strong indication that the Commission's preferred interpretation of the word advertisement is too broad.

[184] Secondly, and again as the legislative history shows, the term "advertisement" and cognate terms have a history of use by Parliament which reflects that the word advertisement does have a meaning other than simply "an announcement to the public".

[185] From 1936 onward the term advertisement, and cognate terms, have been used in the context of restrictions on commercial broadcasting. Commercial stations were ones which were entitled to broadcast advertising material. The transmission of programmes "intended to serve as an advertisement for the pecuniary benefit of any person" was otherwise prohibited.[84] The terms "advertising programme" and "commercial station" were defined in the Broadcasting Act 1961 as follows:[85]

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83 See [34] above.
84 Broadcasting Act 1936, s 17.
85 Broadcasting Act 1961, s 2.

> "Advertising programme" means a programme or part of a programme intended to serve as an advertisement for the pecuniary benefit of any person.
>
> "Commercial station" means a broadcasting station established or operated by the Corporation from which advertising programmes are broadcast; but does not include a television station.

[186] Similar definitions were provided in the Broadcasting Acts of 1968 and 1976.

[187] The term "advertising programme" is still used in the Broadcasting Act 1989, albeit mostly in the context of complaints about the content of advertising programmes. The term is there defined as follows:[86]

> **advertising programme—**
>
> (a) means a programme or part of a programme that—
>
> (i) is primarily intended to promote—
>
> (A) the interest of any person; or
>
> (B) Any product or service for the commercial advantage of any person; and
>
> (ii) is a programme or a part of a programme for which payment is made, whether in money or otherwise; and
>
> …

In that context, advertising programmes do not include election programmes.

[188] What I think can be drawn from this history is that, in the broadcasting context, whilst all advertisements are programmes, not all programmes are advertisements.

[189] Of note in this context is the Broadcasting Corporation's description of election advertisements as "commercials".[87] In terms of dictionary meanings, the *New Zealand Oxford Dictionary* entry for the word "commercial" provides the following relevant meanings:

> **commercial** *adj.* … **3** (*attrib.*) (of television or radio) funded by the revenue from broadcast advertisements. **4**. (of chemicals) supplied in bulk more or less unpurified. *n.* **1** a television or radio advertisement. …
>
> **commercial break** an interruption in the transmission of a broadcast programme, or an intermission between programmes, during which advertisements are broadcast. **commercial network** *NZ hist.* a connected

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86 Section 2.

87 See [128] above.

> group of state-operated radio stations which carried advertising, established in the late 1930s. **commercial station** *NZ hist*. a radio station forming part of the commercial network.

[190] The description "commercial", as meaning a television or radio advertisement, in my view gives the correct meaning to the term "advertisement" where it is used in the context of mass media broadcasting.

[191] I therefore conclude that there is a readily available, and not constrained, meaning for the term "advertisement" where it is used in s 3A(1)(a) of the Electoral Act, that means that the Song and the Music Video, when broadcast, are not advertisements at all. The Song and the Music Video are not "commercials" as that term informs the use of the word advertisement as regards material broadcast on television or radio. The Song and the Music Video are, as the plaintiffs accept, when broadcast a programme or a part thereof: the broadcast of the Song, on radio in particular, would not occur in a commercial break, nor itself be categorised as a commercial. The broadcast of the Song would not fund the revenue of the radio station involved. It would not be an advertisement. In my view that interpretation is a natural and ordinary meaning, it is a meaning supported by a consideration of context and, in terms of the s 5 NZBORA interpretational mandate, is a meaning which conforms to a rights-sensitive purposive interpretation of the statutory language.

[192] I think the same analysis applies where, as here, the s 3A(1) definition of "election advertisement" is to be considered in terms of publication on digital media. I construe that as a reference to revenue generating content which is displayed together with programme content which is either, as in the case of iTunes, behind a pay wall or, in the case of the video websites, available for free download. Thus, the functional content of the term is equivalent to what would be understood, in more traditional media, as an advertisement in a newspaper. Thus, I think the readily available contextual and purposive interpretation is that, when made available for paid download from iTunes, or for free download from the video websites, the Song and the Music Video are not "advertisements" at all, and hence are not election advertisements.

[193] I acknowledge that there may be situations where the element of payment or other consideration (or, rather, the absence thereof) is not determinative in assessing whether a broadcast is to be regarded as an advertisement and hence an election advertisement. An obvious example would be where a broadcaster, or the digital platform provider, uses its own resources to broadcast material that, if it had been broadcast or made available at the initiative of a third party, that third party would have normally "paid" for it. But I do not think that possibility stands in the way of the interpretation I have adopted in this context.

[194] The Commission argued that to so construe the meaning of the term "advertisement", where it appears in the definition of election advertisement, would be to render that term less inclusive than Parliament intended. It would, in effect, make the s 3A(2)(c) "editorial" exception redundant. The answer to the first of those contentions is that, rather than making the scope of the definition of election advertisement under-inclusive, the interpretation properly (for the reasons I have already explained) in this context restricts the scope of that definition relative to that contended for by the Commission. In that context, the exception for "editorial content" can be seen as being declaratory, and to avoid possible ambiguity. The same can be said for s 3A(2)(e). More generally, and subject perhaps to the exception found in subparagraph (b), all of the so-called "exceptions" are ones which, in terms of the definition found in s 3A(1)(a) of election advertisement, can be seen as not coming within the terms of that definition as ordinarily understood. That is, s 3A(2) is designed to avoid possible ambiguity and over-reach, rather than recording meanings that would normally come within the scope of the definition, but which Parliament decided to exclude from that definition.

Are the Song and the Music Video, if broadcast, election programmes?

[195] The legislative history I have set out shows that statutory controls on election broadcasts were introduced following a recommendation from the 1986 Royal Commission. The concerns of the Royal Commission were that the purchase of television time by one or more of political parties could significantly increase the advantage that parties with the greatest level of financial support had over those without substantial resources. Sections 70 and 71 of the Broadcasting Act 1989, as enacted, provided:

> **70. Prohibition on paid election programmes**
>
> (1) Except as provided in subsection (2) of this section, no broadcaster shall, for a fee or any other consideration, permit the broadcasting, within or outside an election period, of an election programme.
>
> (2) Nothing in this section applies in respect of—
>
> (a) An election programme—
>
> (i) Relating solely to one named candidate as a candidate for a particular electoral district; and
>
> (ii) Used or appearing to be used to promote or procure the election of the candidate; and
>
> (iii) Broadcast by the candidate or with the candidate's authority; or
>
> (b) Any advertisement placed by the Chief Registrar of Electors, the Chief Electoral Officer, a Registrar of Electors, a Returning Officer, or other official for the purposes of the Electoral Act 1956; or
>
> (c) Any non-partisan advertisement broadcast, as a community service, by the broadcaster.
>
> (3) Nothing in this section restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.
>
> **71. Obligation to permit political parties to broadcast election programmes free of charge**—Subject to sections 72 to 80 of this Act, every broadcaster shall, in each election period, permit political parties to broadcast election programmes free of charge.

[196] Notwithstanding the Royal Commission's focus on political parties purchasing broadcasting time, and whether or not in 1989 third party participation – as subsequently transpired – was anticipated, neither the definition of election programme[88] nor the terms of s 70 itself restrict the application of its control over the broadcasting of election programmes to programmes broadcast for political parties. The plaintiffs did not argue otherwise.

[197] Rather, the plaintiffs rely on the heading to s 70 which, since its enactment in 1989, has read "Prohibition on *paid* election programmes" (emphasis added). The Commission argues that after 1990 the retention of a reference to "paid" election programmes was inadvertent. It failed to reflect the deletion of references to payment that, before the Broadcasting Amendment Act (No 2) 1990, had appeared in the section. The legislative history is not conclusive.

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[88] See [46]-[48] above.

[198] As introduced in the Broadcasting and Radio Communications Reform Bill 1990 (which removed the requirement for broadcasters to provide free time, and provided for state funding for election programmes and advertisements), s 70 of the Broadcasting Act would have read:

> **70. Prohibition on paid election programmes—**
>
> (1) Except as provided in subsection (2) of this section, no broadcaster shall, for a fee or any other consideration, permit the broadcasting, within or outside an election period, of an election programme.
>
> (2) Nothing in subsection (1) of this section applies in respect of —
>
> (a) An election programme broadcast by a political party in accordance with this Part of this Act; or
>
> (b) An election programme broadcast by a political party and paid for with money paid to that political party under section 74 of this Act; or
>
> (c) An election programme—
>
> (i) Relating solely to one named candidate as a candidate for a particular electoral district; and
>
> (ii) Used or appearing to be used to promote or procure the election of the candidate; and
>
> (iii) Broadcast by the candidate or with the candidate's authority; or …
>
> (3) Nothing in subsection (1) of this section restricts the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.

[199] Section 70(2)(a) implicitly, but over-inclusively, reflected the voluntary provision of free time for broadcasting election programmes. The words "in accordance with this Part of this Act" also implicitly refer to programmes broadcast during time purchased by parties using state funds under the new arrangements. Section 70(2)(b) explicitly cross-referenced those new arrangements.

[200] As reported back to Parliament, subss (1) and (2) of s 70 were amended as shown in this "tracked" version of the text:

70. Prohibition on paid election programmes—

(1) Except as provided in subsection 2 of this section, no broadcaster shall~~, for a fee or any other consideration,~~ permit the broadcasting, within or outside an election period, of an election programme.

(2) Nothing in subsection (1) of this section applies in respect of—

(a) ~~An election programme broadcast by a political party in accordance with this Part of this Act;~~ An election programme broadcast *by* a political party during broadcasting time allocated to that political party under s 73(1) of this Act; or

(b) An election programme broadcast *by* a political party and paid for with money paid to that political party under section 74 of this Act; or

(c) An election programme—

(i) Broadcast for a fee or other consideration;

(ii) Relating solely to one named candidate as a candidate for a particular electoral district; 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; or

…

[201] Subsection (3) was not amended.

[202] As can be seen, the heading, **Prohibition on paid election programmes**, was not amended.

[203] During the third reading debate, the Minister explained the changes to s 70 in the following way, reflecting comments made at earlier stages in the legislative process:[89]

> Sections 69 and 70 of the Broadcasting Act have been amended to tighten the prohibition on candidates or parties either buying election time or advertising free of charge outside an election period, when there are no limits on campaign spending.

[89] (21 August 1990) 510 NZPD 3637.

[204] I find that explanation a little difficult to follow, given that the phrase "within or outside an election period" appears in both versions of the draft section and that there is no change to s 70(2)(c) in that regard. Be that as it may, the legislative history is clear: Parliament wanted to restrict the extent to which parties and candidates could buy time to broadcast election programmes and election advertisements.

[205] The provisions of Part 6 have been amended on several occasions since 1989. Those amendments reflect ongoing political differences in this area, especially as regards the prohibition on political parties purchasing broadcast time otherwise than with public funds. As introduced and reported back, amendments to s 70 of the Broadcasting Amendment Act in 1993 and 1996 would have allowed political parties to spend, from their own funds, up to 50 per cent (1993) or 25 per cent (1996) of the largest allocation of public funds to a single political party, to buy broadcasting time for election programmes. That outcome would have been achieved by the introduction of a new subsection 2A in the following terms:[90]

> (2A) Nothing in subsection (1) of this section applies in respect of election programmes broadcast in an election period by a political party or group of related political parties if—
>
> (a) Those election programmes are paid for with money raised by that political party or group of related political parties; and
>
> (b) The total amount spent on the cost of the broadcasting time of all election programmes broadcast by that political party or group of related political parties in that election period and paid for with money raised by that political party or group of related political parties does not exceed by more than 50/25 percent the largest amount allocated to any one political party or group of political parties under **section 74A** of this Act in respect of that election period.

[206] At a very late stage in the Parliamentary process that provision was removed on both occasions. On both occasions, the heading of s 70 continued to refer to "paid" election programmes.

[207] I am hesitant, given the number of occasions on which the reference to the word "paid" has been retained, to put that down completely to inadvertence. In my

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[90] This is the version from the 1995 Bill as reported back. It reflects changes from the 1993 version to accommodate MMP.

view, the retention of that reference over time can be understood as reflecting Parliament's principal explicit concern, perhaps up until the events of the 2005 general election, as to the implications of political parties being able, without restriction, to purchase broadcast time for electioneering. At the same time, I recognise a need for a degree of caution in placing too much reliance on the heading alone.

[208] In my view, following the s 6 NZBORA interpretation mandate involves, again, a consideration of the purpose of the restriction. What Parliament is concerned about is the ability of political parties and, less obviously at this point, others, to procure the broadcast of electioneering material. Whether that procurement involves the payment of money (which, given the realities of the broadcasting industry, it generally will) or is achieved in some other manner, the concern is with is the use of broadcast media, and particularly television, to enable political parties and others who are electioneering to speak directly to the public. The broadcaster "permits" the programme to be broadcast: that is, the broadcaster agrees to broadcast the programme at the request of the political party or other electioneering group.

[209] In terms of the broadcasting of the Song, what Mr Watson did is quite different. He did not procure the broadcasting of the Song at all. Rather, he made the Song freely available to a very limited number of broadcasters, who could – if they chose to do so – broadcast the Song as a programme or part thereof.

[210] It is for that reason, in my view, that s 70, construed in light of its text, its purpose and the s 5 NZBORA mandate, does not extend to a situation where, as here, a broadcaster may decide to publish a programme or part thereof, but has no contractual or other prior agreement with the producer or person responsible for the programme to do so.

[211] I therefore conclude that in the circumstances in which the Song was or would have been broadcast, that broadcast would not have offended the prohibition on the broadcast of election programmes found in s 70.

Editorial content/comments programmes?

[212] The Commission submits that the Song and the Music Video cannot be regarded as "editorial content" for the purposes of s 3A(2)(c) of the Electoral Act, or "comments" for the purposes of s 70(3) of the Broadcasting Act, because those phrases both mean "opinion material which is written or selected by, or with the authority of, the editor of a publication, presented as the opinion of the publication". The need for the material to be "presented as the opinion of the publication" would, I note, be determinative here. In my view, neither the text nor the purpose of the enactments construed particularly in light of the legislative history and the s 5 mandate, supports that interpretation.

[213] The editorial content exception in the Electoral Act was first enacted in 1977 as part of the new s 147A of the Electoral Act 1956.[91] That section was re-enacted, without material amendment, as s 221 of the Electoral Act 1993. The Electoral Finance Amendment Act (No. 2) 1995, responding to the Royal Commission's recommendations, extended the s 221 controls to political parties, and also in the new s 221A, required promoter statements in all "advertisements relating to an election". There continued to be exceptions, in both s 221 and 221A, for "the publication of news or comments relating to an election in a newspaper or other periodical or in a radio or television broadcast".

[214] The Electoral Finance Act 2007 introduced, as part of its definition of "election advertisement", a more complex set of editorial content exceptions. As relevant, s 5(2) provided:

> (2) The following are not election advertisements:
>
> …
>
> (b) any editorial material, other than advertising material, in a periodical that is written by, or is selected by or with the authority of, the editor solely for the purpose of informing, enlightening, or entertaining readers:
>
> (c) any content of a radio or television programme, other than advertising material, that has been selected by, or with the authority of, a broadcaster (within the meaning of the Broadcasting Act 1989) solely for the purpose of informing, enlightening, or entertaining its audience:

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[91] See [116] above.

(d) any editorial material, other than advertising material, published on a news media Internet site that is written by, or selected by or with the authority of, the editor or person responsible for the Internet site solely for the purpose of informing, enlightening, or entertaining readers:

…

(g) the publication by an individual, on a non-commercial basis, on the Internet of his or her personal political views (being the kind of publication commonly known as a blog).

[215] In other words, content that was:

(a) editorial material in a periodical, or published on a news media Internet site, or editorial content of a radio or television programme; and

(b) not advertising material; and

(c) written by, or selected by or with the authority of, the editor, broadcaster or person responsible for the Internet site solely for the purpose of informing, enlightening, or entertaining readers or its audience,

was not an "election advertisement".

[216] The Electoral Amendment Act 2009 temporarily reinstated the s 221 "editorial comments" exception. As introduced in 2010, the Electoral (Finance Reform and Advance Voting) Amendment Bill sought largely to reintroduce the editorial content exceptions found in the Electoral Finance Act 2007, as set out above. On the Select Committee's recommendations, those provisions were replaced by comparatively simple editorial content exception now found in s 3A(2)(c) namely:

(c) the editorial content of—

(i) a periodical:

(ii) a radio or television programme;

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

[217] That change was intended, the Select Committee reported, to:[92]

(a) align the bill more closely with the original exception for the publication of news or comments in a newspaper or other periodical found in the Electoral At 1993;

(b) address concerns that the phrase "solely for the purpose of informing, enlightening, or entertaining the programme's audience" was too narrow or could capture unintended content; and

(c) be comparable with overseas jurisdictions.

[218] That change, and its rationale, are not consistent with the Commission's argument that editorial content is required to be the opinion of the publication. Editorial content in the Electoral Finance Act 2007, and the 2010 bill as introduced, was expressly required to be "written by or selected by or with the authority of, the editor, broadcaster or person responsible". But it was not required to be the opinion of the publication. The "sole purpose" of the editorial content had to be to inform, enlighten or entertain. There was no additional requirement that the informational, enlightening or entertaining content had to have the dual purpose of conveying the opinion of the publication. Indeed, such a position is inconsistent with the statutory language of "sole purpose". Nor is there any indication that when the Select Committee recommended the simpler approach now found in s 3A(2)(c), it had in mind the restriction the Commission suggests.

[219] Given, therefore:

(a) that previous more restrictive versions of the editorial exception did not require that editorial content be the opinion of the publication;

(b) that the Select Committee recommended, and Parliament accepted, that it was desirable to move away from these restrictive definitions and closer to the s 221(6) exception which simply exempted "news or comments relating to an election"; and

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92 Electoral Legislation Committee, above n 70, at 2.

(c) the position of comparable countries which do not require comments to be the opinion of the publication,

that aspect of the Commission's interpretation is not supported by the legislative history.

[220] The Commission also argues for a relatively narrow approach to the interpretation of the term "comment". It noted that the *Oxford English Dictionary* defined comment to mean:

> **1.** An expository treatise, an exposition; commentary. … **4.** The action of commenting; animadversion, criticism, remarks

[221] Thus whilst the term "comments" could include criticism, it did not include all criticism; the words "expository treatise", "exposition", and "animadversion" all suggested criticism of a professional or scholarly nature. That interpretation of "comments" was also consistent with the scheme of s 70(3), and the principles of *noscitur a sociis* and *ejusdem generis*. As the Commission explained, the interpretational principle known as *noscitur a sociis* recommends that the meaning of the word be ascertained from the words around it. The *ejusdem generis* principle recommends that, where a statutory list includes specific words and a general word, the meaning of the general word was to be coloured by the specific word. Hence, as "news" and "current affairs programmes" were specific words, which clearly connoted professional, journalistic reporting, that suggested that the word "comments" must have these characteristics as well.

[222] I find that interpretation more than a little strained and artificial. In my view, s 3A(2)(c) of the Electoral Act and s 70(3) of the Broadcasting Act reflect an underlying distinction between commentary on, and participation in, the election process. In terms of the interpretational principles referred to, I think s 70(3) of the Broadcasting Act is properly interpreted as referring to news programmes, comments programmes, or current affairs programmes. On that basis neither *noscitur a sociis* or *ejusdem generis* are of particular interpretational significance. Rather, the section recognises an essential element of freedom of expression in a Parliamentary democracy at the time of an election. That is, broadcast media provides a method of

communicating and commenting on the election which does not impinge on the genuineness thereof.

[223] Nor do I think the Commission's interpretation is one required by the text of the provision, interpreted in light of the overall statutory context, the purpose of the legislation and its social and political context – particularly given the s 6 mandate. The very scientific "expository treatise/animadversion" approach is not called for.

[224] Rather, and given that the Song and the Music Video are "programmes", then to the extent that they contain or comprise "commentary", that commentary can, in this context, be seen as "editorial content". Similarly, they can be seen as "comments programmes". The "editorial" pages of a newspaper contain, after all, not only the editor's opinion, but also those of letter writers, cartoonists and columnists. In my view, such material is all properly to be seen as "comments" or as "editorial content". I see no reason why the Song and the Music Video should not be seen in the same light. Likewise, the Music Video is akin to a cartoon presenting – albeit it to music – a series of images that in a humorous way reflect the views of the artist. I acknowledge that, as between the Broadcasting Act and the Electoral Act, the Broadcasting Act is underpinned by the recognition of the power and reach of broadcasting. But, as I think Ms Aldred fairly submitted and as I have already more generally acknowledged, talk-back programmes and, more recently I note, the tendency of newscasters to invite and report comments and views conveyed by watchers and listeners by email, Twitter, blogs, and – thus to link broadcasting with digital media – show that the old differences between broadcasting and other forms of publication are blurring. Broadcasting no longer "rules" the airwaves. Digital media promotes a radically individualised form of communication that, over time, may replace the whole concept of "mass" media and mass audiences.

[225] The Commission's further argument was that to take that approach would be to exclude virtually all critical "election programmes" from regulation under the Broadcasting Act. That, the Commission argued, was hard to reconcile with the criterion that an "election programme" "opposes a candidate or a political party". It was not tenable, the Commission submitted, that the same criterion that rendered a programme an election programme was also a criterion for exemption. With respect,

I think that is something of a "Doomsday" argument. Clearly, the exception is not to be construed in a way that would render a rights-consistent approach to the application of the restrictions on the broadcast of election programmes ineffective. But I do not think that is a necessary (or even likely) result of the type of contextual and fact-specific inquiry, informed by s 6 of NZBORA, that is required here. Taking that approach, I suggest, enables an appropriate interpretation to be given to the provisions, whilst at the same time preserving a rights-consistent limit to the associated restrictions on freedom of expression.

[226] In my view, therefore, the Song and the Music Video are properly to be considered – to the extent that they might otherwise be election advertisements or election programmes – as comprising editorial content or comments.

Personal political views?

[227] Turning to the personal political views exception, the Commission had different reasons for concluding that the Song and the Music Video were not to be seen as being the expression of personal political views when they were downloaded.

[228] In the case of the Song, as available on iTunes, the Commission reasoned that the receipt of a royalty by Mr Watson constituted a payment "in respect of publication" of the Song. In the context of that argument, an important element of the legislative history is the change in the expression of the exemption. It changed from an exemption for the publication by an individual of personal political views on a non-commercial basis on a blog to an exemption for 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.

[229] The Select Committee explained that this change was intended to make it clear that the policy intent of this provision was to exempt those who had not been paid to publish a particular view, saying:[93]

> We also recommend replacing new section 3A(2)(c), to make it clear that the publication of personal political views by an individual is excluded from the definition of "election advertisement", *unless the person makes or receives*

[93] Electoral Legislation Committee, above n 70, at 2.

> *payment to express that view for publication.* We consider that the term "non-commercial" is unclear, and that the focus on profit does not accurately reflect the policy intent of capturing *those who have been paid to publish a particular view.* In this regard we have formed the view that a non-commercial expression of political views on the Internet is analogous to the expression of those views in person, and should therefore be similarly protected from regulation. (emphasis added)

[230] Those comments, as the plaintiffs argue, provide strong support for the proposition that a person expressing their personal political views through an electronic medium only falls outside the exception where payment is made in exchange for the act of publishing, rather than after the event from those who happen to pay to download a song from iTunes. The reference to making or receiving a payment "in respect of the publication" is, in my view, a reflection of the concern that money, and as the Select Committee put it, "big money", should not be able to be used to *procure* publication of particular political views at the risk of doing harm to the genuineness of an election. That, depending on whether people do download the Song, Mr Watson might – after the event – receive payment, does not, in my view, come within the behaviour of procuring publication that the controls on election expenditure are aimed at.

[231] As regards the Music Video, the Commission's view was that, because of the "collaboration" between Mr Watson and Mr Jones, publication on Vimeo and YouTube could not properly be regarded as the expression of personal political views by an individual. I acknowledge, as Ms Aldred submitted, the provision of the Interpretation Act which provides that the singular includes the plural and vice versa. I am not attracted to that argument, however, as a basis for disagreeing with the Commission's conclusion. Rather I think that, again, in terms of accepted statutory interpretation principles and the s 6 mandate, the reference to personal political views of an individual is to be seen very much in light of the relevant context and purpose.

[232] The Electoral Finance Act was implemented in the wake of the Exclusive Brethren's third party campaigning. The 2010 amendments, like the Electoral Finance Act, were intended to deal with the issue of third party/parallel campaigners. That is, the amendments were intended to ensure there was greater transparency as to who was funding participation in an election campaign, and to restrict the quantum

of third party funding to ensure participant equality and to protect participant freedom.

[233] An interpretation that allows more than one individual to express their personal political views on electronic media does not damage participant equality and enhances participant freedom.

[234] In my view, the exception is for personal political views, as opposed to views espoused and published by groups of people who participate in parallel campaigning. The affidavits filed by Mr Watson and Mr Jones are of particular relevance in this context. Mr Watson describes the process of creating the Song and Music Video as follows:

> I was happy with the song once it was recorded, and so when it was finished I posted that I had made a new single on my Facebook page. Jeremy Jones (a longstanding friend and motion graphics creator) offered to make the video to accompany the song, without any payment.
>
> Jeremy and I had discussions about the style and content of the video and then Jeremy did all of the graphics work on making the video, consulting with me from time to time about its contents.

[235] Mr Jones, having seen Mr Watson's Facebook message, describes the creative process that led to the creation of the Music Video in the following terms:

> I was motivated to write the song because I wanted to express my own personal views and strong feelings about the way that the Prime Minister has presented himself in the media over the last few years, versus what I perceive to be the reality.
>
> In terms of any political affiliations, I am a member of the New Zealand Labour Party, but have never been an active member of that or any other party. I did not have any contact with anyone from any political party or interest group about the song or video and did not seek or receive any offer to fund their production.
>
> I funded production of the song myself, and paid the following amounts:
>
> (a) $287.50 Drums
>
> (b) $181.13 Recording drums engineer
>
> (c) $115.00 mixing engineer
>
> (d) $138.00 Mastering

[236] This was not, in my view, a situation Parliament intended the Electoral Act to target. Issues of transparency and participant equality are not engaged when individuals collaborate to create a satirical protest song that attributes authorship and represents the personal political views of its creators who did not pay, and were not paid, to express those views.

Outcome

[237] I turn now to the question of whether I should, given the conclusions I have reached, make the declarations that the plaintiffs applied for.

[238] For the Commission, Mr Powell provided a helpful submission as to whether I should do so, given the courts' consistent expression of the need for caution when a declaration concerns whether conduct amounts to a criminal offence. I recognise the need for that caution. However, in my view – and as the Commission recognised – the challenge here is, in reality, to the correctness of the Commission's advisory opinion. The issue of that advisory opinion reflects the exercise of a statutory power. Although brought in the form of an application for a declaratory judgment, these proceedings can be seen as raising the judicial review question as to whether or not the exercise of that power reflected a proper application and interpretation of laws. To that extent, and also given that the facts here are well-established and not in dispute, like Mander J in the *Greenpeace* decision I consider the factors to which Mr Powell pointed do not apply here so as to mean I should not exercise the discretion.

[239] Accordingly, the following declarations are made:

(a) The Song is not an election advertisement for the purposes of s 3A of the Electoral Act 1993.

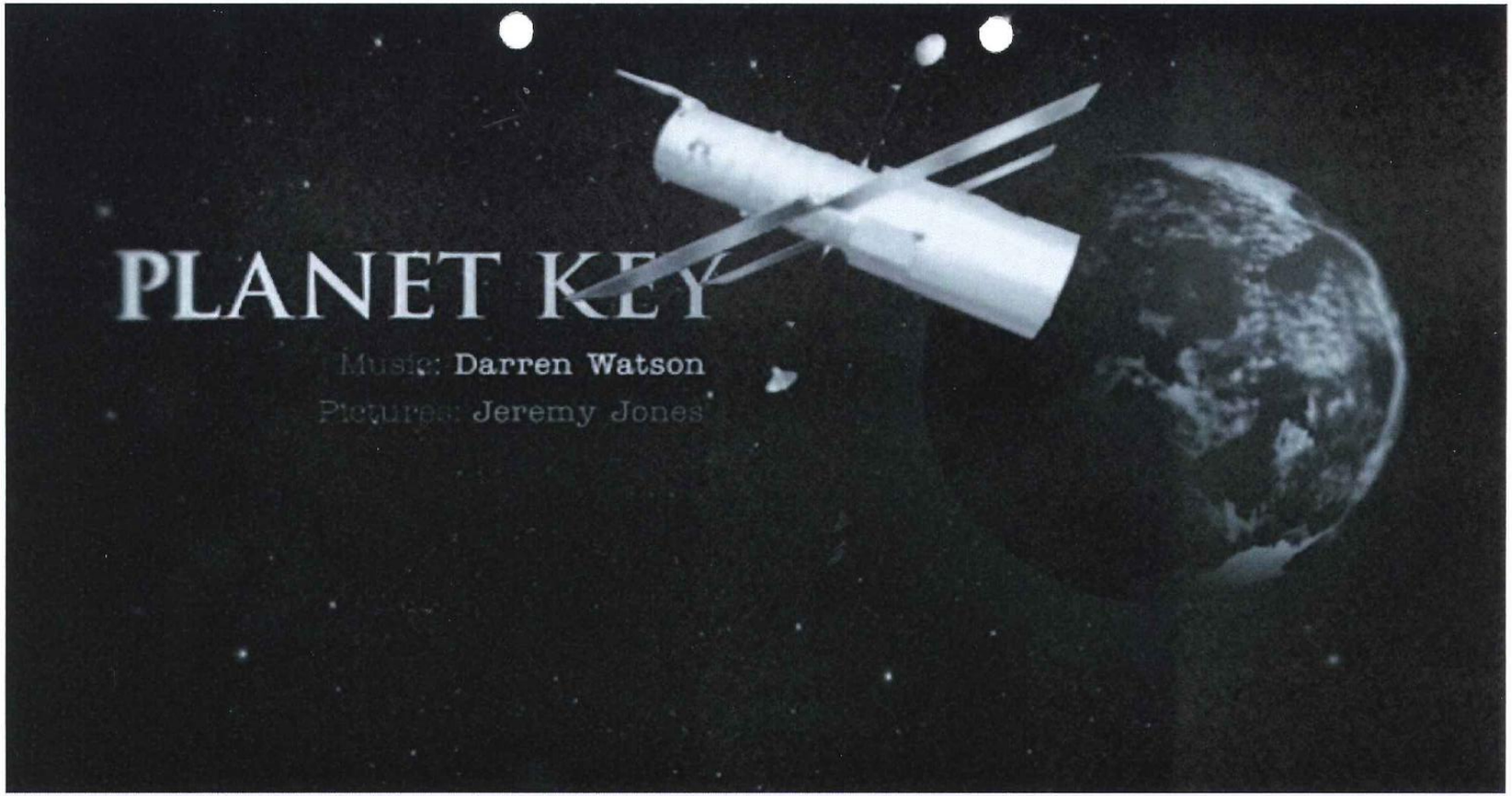
(b) The Music Video is not an election advertisement for the purposes of s 3A of the Electoral Act 1993.

(c) The Song is not an election programme for the purposes of s 70 of the Broadcasting Act 1989.

(d) The Music Video is not an election programme for the purposes of s 70 of the Broadcasting Act 1989.

"Clifford J"

Solicitors:
McCabe & Company, Wellington for plaintiffs.
Crown Law Office, Wellington for defendant.



Planet Key

from **Propeller Motion** PLUS 2 weeks ago ALL AUDIENCES

Planet Key is written and performed by Darren Watson. The video was created by Jeremy Jones from Propeller Motion. This project is entirely self funded so by buying this song you are also contributing to the cost of this work. Think of it as helping with the trickle down.

This song can be purchased at itunes.
itunes.apple.com/nz/album/planet-key-single/id904476293?uo=4&at=10lrHH