

Watson & Jones v Electoral Commission

[2015] NZHC 666

SYNOPSIS / MEDIA RELEASE

In the lead up to the 2014 general election, Darren Watson wrote and recorded a song entitled “Planet Key” (the Song). Jeremy Jones then created a video to accompany the song (the Music Video). 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.

The Song came to the attention of the Electoral Commission. The Electoral Commission advised a number of broadcasters by email that the Song could not be broadcast on radio or television because it was an election programme.

Mr Watson became aware of that advice. He asked the Commission for its official view on the status of the Song and the Music Video. On 14 August the Commission provided an advisory opinion 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.

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.

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:

- (a) free time made available by TVNZ and RNZ for opening and closing addresses; or
- (b) 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.

Messrs Watson and Jones sought declarations from the High Court that the Song and the Music Video were not election advertisements or election programmes.

In this judgment, the High Court has made the declarations sought by Messrs Watson and Jones. In doing so, the Court emphasised the importance of the rights to freedom of expression and to participate in genuine elections for Parliament, confirmed by the New Zealand Bill of Rights Act 1990. The High Court also acknowledged and applied the requirement of s 6 of the New Zealand Bill of Rights Act, namely that whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in the Bill of Rights, that meaning is to be preferred to any other meaning.

The High Court concluded that, under the Electoral Act, the concept of an advertisement does not, as the Electoral Commission suggested, simply mean any form of announcement to the public. In the context of broadcast media, that is radio and television, the term was best understood by reference to the word “commercial”, as describing advertisements broadcast on radio and television.

On that basis, the High Court concluded that neither the Song nor the Music Video should, when and if broadcast, be regarded as “advertisements”.

The High Court also found that the restrictions in the Broadcasting Act in the broadcast of “election programmes” would not apply to the Song and the Music Video. In doing so, the High Court considered that the purpose of those restrictions was to ensure that political parties, and others, with access to significant financial resources should not be able to purchase or obtain broadcast time so as to make an election unfair. Mr Jones had made the Song available to a small number of broadcasters. None of those broadcasters had agreed with Mr Jones that they would play the Song on air. Mr Jones had not procured the broadcast of the Song. Hence the purpose of those restrictions was not engaged. An interpretation consistent with the right of freedom of expression, as required by s 6 of NZBORA, was that broadcast of the Song (and the Music Video, although as a matter of fact it was never suggested that the Music Video would be broadcast on television) did not come within the prohibition.

The High Court also decided – for similar reasons– that, even if the Song and the Music Video were election advertisements or election programmes, relevant exceptions in the Electoral Act and the Broadcasting Act applied so that their publication or broadcast would not be illegal.