Law and New Zealand’s 2014 election campaign

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1 Introduction

New Zealand held its general election on September 20, 2014. The result was as decisive as it seems possible under the nation’s proportional representation voting system. The governing National Party won 60 seats after gaining 47 per cent of the vote, just one short of an outright majority in the 121 seat House of Representatives. With the voters also returning three possible support parties to the House, no question arose as to whether National would be able to obtain the majority on confidence and supply matters necessary to remain in office. Furthermore, even supporters of the unsuccessful political parties generally accepted this outcome. Admittedly, some 9,300 individuals put their name to an online petition requesting that the chair of the Electoral Commission recount the votes because: “Something doesn’t seem right with recent the (sic) New Zealand election.” However, such feelings probably reflected the signatories’ immediate post-election disappointment at losing rather than any real belief that the final result somehow failed to capture the true preferences of those who had cast ballots. There certainly have been no widespread or ongoing claims that electoral error (or worse) calls into question the National Government’s right to govern.

New Zealand’s 2014 election thus “did its job”, in the sense that it produced an outcome that permitted a government to form and function in a way that those who then are governed by it broadly consider legitimate. The next part of this article will look at why elections are given this function. Before doing so, however, it should be noted that the 2014 election campaign and voting process did not proceed without any controversies or complications. Indeed, I argue that the very role that elections play inevitably produces disputes over the rules that should apply. The chief purpose of this article then is to consider a number of those disputes from 2014, explain what they were and why they arose, as well as analyse what they tell us about how New Zealand understands what democracy ought to mean for it. The article does so by first making some general points about why elections, and the law that governs how elections operate, matter in our contemporary constitutional environment. Against that background, part two addresses a number of specific electoral law issues. Part three looks at how New Zealand’s electoral law operates to define a set of political “ins” and “outs” in relation to the rules governing how television broadcasters must choose who to include in their leaders’ debates, the ban on sentenced prisoners voting and the prohibition on individuals enrolling to vote on polling day itself. Part four looks at the legal rules that govern electioneering

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activities with respect to the prohibition on various activities on polling
day and the regulation of those who publish “election advertisements”.
I conclude in part five with some brief comments about how the various
matters raised in this article may be responded to—and why this response
will never represent a conclusive resolution.

2 Electoral law as a distinct field of study

The process of voting for elected representatives following a campaign
in which a wide range of interested individuals and groups subject
the voters to various persuasive communication techniques—what
I have termed the “electoral moment”¹—is critical to New Zealand’s
constitutional order. While there may be some disagreement about how
sovereign our Parliament really is,² the lack of any express higher law
constraints upon its lawmaking power give it extraordinarily broad
legislative reach. That lawmaking power may then be used in accordance
with the views of a simple majority of those members of Parliament
whom the people have chosen at the electoral moment to represent them.
Furthermore, New Zealand’s Westminster legacy allocates executive
power to those elected representatives who enjoy majority support on
confidence and supply in the House of Representatives. That majority
support, bolstered by strong norms of internal party discipline, allows
those individuals holding executive power to exert a great deal of control
over the legislative process. All of which is quite basic and familiar
terrain for anyone who has been habituated to New Zealand’s way of
governing itself; indeed, so familiar that it is often taken for granted. What
I wish to do here is pause and consider the electoral moment’s function
in both allocating public decision making power and legitimising that
allocation within New Zealand, along with the role that electoral law
plays in enabling it to do so. That investigation requires beginning with
the talismanic role that “democracy” plays in our system of government.

It is now pretty much a given that democracy matters a lot in the
discussions about constitutional theory that occur in WEIRD³ countries
like New Zealand. To co-opt Jeremy Webber’s turn of phrase, it stands as
“the first principle of contemporary constitutionalism”.⁴ Of course, this
claim can only be made because the term “democracy” is flexible enough

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² See, eg, J Goldsworthy, “Is Parliament Sovereign?: Recent Challenges to
the Doctrine of Parliamentary Sovereignty” (2005) 3 NZJPIL 7; S Elias,
³ The acronym stands for “Western, Educated, Industrialised, Rich,
Democratic”, and was coined by J Henrich, S Heine S & A Norenzayan,
“The weirdest people in the world?” (2010) 33 Behavioral and Brain
Sciences 61.
⁴ J Webber, “Democratic Decision Making as the First Principle of
Contemporary Constitutionalism”, in R Bauman and T Kahana (eds), The
Least Examined Branch: The Role of Legislatures in the Constitutional State
to be deployed in theoretical approaches as diverse as those espoused by (for example) Ronald Dworkin,5 Jeremy Waldron6 and Richard Posner.7 Yet in spite of deep disagreement about the exact interpretation and application of the term as such thinkers use it, there exists a minimal (or thin)8 core of meaning common to each. That is to say, all democratic constitutionalists—by which I mean pretty much everyone operating in WEIRD countries like New Zealand where the orthodox tradition of liberal constitutional thinking enjoys hegemony—accepts that some degree of lawmaking authority ought to be reposed in the hands of representatives selected by those people who will thereafter be subject to laws made by their representatives. Obviously disputes exist over how much lawmaking authority elected representatives ought to hold. Should it be untrammelled by any formal legal limits (as is the case in New Zealand)? Should it be divided amongst more than one set of elected representatives (as is the case in the United States, Australia, Canada and (to a lesser extent) the United Kingdom)? Should it be subject to override by the judiciary in the name of individual rights (as is the case in the United States, Canada and (arguably) the United Kingdom)? Or, should it be subject to override by the voters themselves (as in jurisdictions that permit binding direct democracy initiatives)? But these non-trivial matters aside, the common starting point is that in a properly constituted society the people, at the very least, ought to be able to choose who will get to write the first draft of a great many of the laws under which they subsequently must live.

Having identified this (albeit quite narrow) common ground, we then immediately are confronted with a range of further issues. For what does it mean for the people to choose representatives to make (at least some) law on their behalf? First, it requires a decision as to who is and who is not a part of “the people” for the purposes of making the choice. Is it only citizens who get to participate, or all persons entitled to reside permanently in the country? What about citizens (or permanent residents) who reside overseas? At what age ought a person be entitled to take part? Should persons suffering from some mental incapacity be permitted to join in? Do we include persons who are presently imprisoned (or even have been imprisoned in the past) for committing some criminal offence?

Second, given that the “people” (however this is defined) of a country will never unanimously agree that any one particular individual, much less a group of individuals, should wield lawmaking authority over

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them, there needs to be some way that they can choose from amongst the various individuals and groups competing for that right. Even if we accept as a basic principle that this selection ought to occur by way of voting at elections (and not by, say, lottery or the like), there is a plethora of voting systems that then could be adopted. For whom should those entitled to vote be able to vote for: an individual candidate of their choice; a number of candidates of their choice; a political party that chooses who will represent it; or some mix of the above? Is the support of a majority of those voting or a mere plurality required before the people are deemed to have chosen some individual to serve as their representative? Should the choices of voters be represented in a proportionate fashion, or should we adopt a winner takes all approach?

And third, given that there will be a number of competing individuals and groups seeking to have the people choose them as their lawmaking representatives, there also need to be rules to govern the way in which that competition is conducted. How should money be given to, and spent by, those seeking to be elected as representatives (or other individuals or groups interested in the outcome of that process)? What information may be placed before the people, and in what form, and at what times? How should proper (or, at least, acceptable) inducements to vote in a particular way be distinguished from improper (or, at least, unacceptable) ones?

While these various issues are controversial in the sense that there are different possible answers that may be given to each of them and the inherent conceptual fuzziness attached to the term “democracy” means there is no precise metric that allows us to declare one solution to be the indisputably right one, they nevertheless require a single generally accepted (even if not universally agreed upon) answer before an election can be held. We simply cannot have a representative selection process in which each individual participant gets to decide for him or herself who is or is not a part of the people for the purposes of exercising that choice, or what constitutes a choice of one particular individual or set of individuals over another, or how such choices legitimately may be influenced. Or, rather, we could have such a process, but it would not be fit for the desired purpose of allocating lawmaking authority according to the people’s expressed preferences because it would not be capable of producing a result other than chaos. Consequently, in order to put the first principle of contemporary constitutionalism into practice, any country must have in place before an election is held a quite detailed set of laws that govern everything from who can vote through how they will vote to how those votes will be translated into the right to represent and the means by which the electorate’s votes may be influenced. So when we say that the people of a country have chosen a person or set of persons as their representatives to wield lawmaking authority over them, what we really mean is that the election process as it is constituted under that country’s laws has produced a particular outcome (while understanding that a different election process constituted under a different set of laws very well may have produced another result).
None of which is to assert that a given election is immune to criticism for failing to produce a properly democratic outcome. So, for example, an electoral process containing laws that exclude serving prisoners from voting, or that seek to restrict campaign spending by candidates or other participants, or that fail to provide representation to minority groups, or that require prospective voters to present particular forms of identification at the polling station may be claimed to fall short of allowing the “people” (properly understood) to “choose” (properly understood) who will act as their lawmakers. However, such criticisms amount to a claim that the outcome of some alternative electoral process conducted under a different set of laws would be a better (in the sense of more consistent with “democracy”, properly understood) way for the people to choose their lawmakers. Resolving such a claim then involves debating what is the best understanding of democracy in a particular societal context, as well as the rules and institutions then required to instantiate that understanding. Those are important questions that warrant serious discussion. Nevertheless, the relevant point for present purposes is that however they are answered, the resultant electoral process requires a pre-existing set of laws that both defines the people’s choice of legislators and thereby confers some measure of lawmakers’ authority upon those individuals in constitutional terms.

It is against this backdrop that electoral law has emerged as a distinct field of study. It seeks to bring together the normative aspects of democratic theory as a means of legitimising public power with the factual role the law plays in establishing the rules, procedures and processes that make up the electoral moment. Or, to put it another way, it combines asking what a properly operating democratic electoral process ought to look like with an examination of how the law shapes the way that elections actually take place. This combination then means that the field of electoral law is not a stable one, but rather is subject to continual re-evaluation and change. As explained elsewhere:

[E]lections—along with the legal rules that govern the electoral process—will always produce disagreement, even as they resolve the question

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9 We also should note that debates over what is the “best” understanding of democracy for a given society include the fact that “elections should be understood as rituals conducted with their own inbuilt rhythms”; G Orr, *Ritual and Rhythm in Electoral Systems: A Comparative Legal Account* (Ashgate, Farnham 2015) at 9. In other words, the look and feel of the electoral process is just as important a consideration as whether the rules that govern it match up with abstract notions such as “equality”, “fairness” or “freedom”.

of who will govern the country. In part, this is because elections are unavoidably partisan political affairs. Different electoral participants may well favour a set of legal rules that they believe will improve their chances of gaining a mandate through the election process, thereby granting them public decision-making power. There simply is no avoiding this basic political reality. Yet, at a deeper level, disagreement over the appropriate legal rules for our electoral process reflects the diversity of interpretations in our society as to exactly what, as a normative matter, justifies our decision to treat the majority’s preferences as conclusively determining who should gain public decision-making power. It comes from the very fact that we will have different visions of what the concept of democracy should mean for us as a particular society.\textsuperscript{11}

Furthermore, law’s role in determining as a matter of fact how an election should be held itself creates potential conflicts. Law is not like a Lego instruction booklet that comprehensively sets out one and only one right way to assemble the pieces into a final pre-determined product. It inevitably contains ambiguities, gaps and uncertainties that must be resolved in order for it to do its job of establishing commonly binding rules, procedures and processes. Various institutions then play different roles in resolving those ambiguities, filling those gaps and settling those uncertainties. The way that they do so often is subject to choice; choice that is exercised in accordance with what the institution believes is the best understanding of what the law means. In turn, such best understandings are in part shaped by background understandings of what a properly operating democratic election process ought to look like, which is (as already noted) a matter of some disagreement. The consequence is that these various institutions may then reach diverging conclusions as to how the law ought to be interpreted and applied to particular facts. For this reason, inter-institutional arrangements also are a part of the picture; which institution gets to decide how matters of dispute will be resolved and what forms of oversight is it subject to?

The rest of this article examines how the kinds of issues canvassed above emerged in respect of New Zealand’s 2014 general election. It does not seek to give any sort of overarching, grand narrative analysis of that event and the role that law played in it. Rather, it explores a number of issues at a more granular level by explaining how they arose and were resolved—as well as what the choice to resolve them in that particular way reveals about how elections are conceived of in this country. These issues are dealt with under two broad heads. First, the role that the law plays in defining political “ins” and “outs” is examined by reference to the specific issues of accessing televised leaders’ debates, prisoner voting and polling day enrolment. Second, how the law regulates forms of electoral campaigning is addressed through looking at the controls on polling day behaviour, as well as the restrictions placed on those publishing “election advertisements”.

3 Defining the political “ins” and “outs”

One of law’s key functions in relation to the electoral moment is defining who may participate and who is excluded. This separation of the political “ins” from “outs”, to co-opt John Hart Ely’s terminology, is both necessary and fraught with difficulty. It is necessary because elections are designed to allow the members of a defined political community—the nation of New Zealand—to select their political leaders and societal lawmakers. That requires establishing some sort of membership criteria: who is considered to be a part of that community, and who is not? Furthermore, the act of voting is predicated upon individuals being able to understand their own interests and communicate their considered views on who is best placed to serve them as representatives: which members of the community are believed to possess the requisite capabilities and which are not?

Casting a ballot also is but one part of the broader electoral moment. Prior to the polls opening, extensive and often frenzied communicative attempts are made to convince voters to support (or not to support) a particular person, party or set of policies. Access to this “marketplace of ideas” must then be regulated: which sets of voices are allowed to participate in what sorts of communicative activities and which are not?

Nevertheless, creating legal rules of inclusion/exclusion involves certain inherent problems. Insofar as our constitutional system is legitimated by mechanisms requiring the governing to account to the governed, excluding some individual or groups from participating in the electoral moment removes this most direct method of “checking” governmental action. To amend the old adage somewhat, there is no point complaining if you cannot vote (or tell people how they should vote based on your complaints). Furthermore, as Ely again noted, there is an ever-present risk that the ins may maintain their privileged position against challenge from the outs by deliberately crafting rules of participation that continue to exclude them. This risk is magnified in a system of parliamentary supremacy, where the form and content of electoral law ultimately depends upon the views of a majority of those elected under such laws. These problems then raise questions as to the appropriate institutional response, in particular that of the courts.

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15 Ely, above n 12 at 77–88; 102–103.
How actively should they (to once again quote Ely) “polic[e] the process of representation”\(^\text{17}\) by exercising oversight over other institutions’ decisions regarding who is (and is not) permitted to participate in the electoral moment?

The sorts of matters addressed above emerged in respect of the 2014 election in three different ways. First of all, the High Court had to decide whether to intervene in a television station’s decision to exclude a political party leader from one of its pre-election leaders’ debates—a decision that takes on particular importance given the very tight controls that New Zealand places on accessing the broadcast media for electioneering purposes. Second, the courts were invited to scrutinise Parliament’s decision to prevent sentenced prisoners from voting in three different cases. And third, the generally liberal rules around voter enrolment and advance voting conflicted with a statutory prohibition on individuals enrolling to vote on polling day itself. Each of these matters is discussed in turn.

A Determining who is (and is not) allowed on the broadcast media

New Zealand’s laws governing the use of broadcast media for partisan political purposes provide one example of how political ins are distinguished from outs.\(^\text{18}\) The Broadcasting Act 1989 prohibits any broadcaster, at any time, from broadcasting an “election programme”,\(^\text{19}\) the definition of which encompasses all messages that “encourage or persuade (or appear to encourage or persuade) voters to vote for (or not to vote for) a candidate or political party”.\(^\text{20}\) Some specific exceptions apply to this blanket ban, thereby allowing certain chosen groups use of the broadcast media for partisan political ends. Two of these exceptions are particularly important. The first is the limited access provided to qualifying political parties by way of the broadcasting allocation,\(^\text{21}\) which enables them to purchase broadcast time direct from the broadcasters to put their election messages before the voting public.\(^\text{22}\) The Electoral Commission is responsible for apportioning this money (as well as free time donated by the state-owned broadcasters for the purpose of broadcasting opening and closing election addresses) amongst those

\(^{17}\) Ely, above n 12 at ch 4.

\(^{18}\) See generally Geddis, above n 11 at 195–211.

\(^{19}\) Broadcasting Act 1989, s 70(1). Doing so is an offence punishable by a fine of up to $100,000; Broadcasting Act 1989, s 80.

\(^{20}\) Broadcasting Act 1989, s 69(1).

\(^{21}\) Individual candidates also enjoy a limited exception to the blanket ban on using the broadcast media for political advertising. A candidate may purchase time to broadcast an election programme, so long as it solely relates to the promotion of his or her candidacy, and is broadcast in the three months prior to the election occurring Broadcasting Act 1989, s 70(2)(c). However, any such spending by a candidate constitutes an “election expense”, and must therefore be counted towards the maximum of $20,000 that each candidate may spend on advertising his or her campaign: see Electoral Act 1993, s 205B.

\(^{22}\) Broadcasting Act 1989, s 74.
qualifying political parties that request a share.\textsuperscript{23} In order to qualify for this distribution, a party simply needs to have asked to be included by the due date, be registered as a party with the Electoral Commission at the time Parliament is dissolved for a general election, and then submit a party list of candidates by nomination day.\textsuperscript{24}

The statutory regime thus prevents every group and individual wishing to influence the voting public’s choices from directly using the broadcast media to do so, other than those political parties that qualify for a share of state provided access. The rationale for imposing such strict controls lies “in the greater immediacy and impact of television and radio advertising”\textsuperscript{25} as compared to other forms of communication. Not only does this regulatory approach effectively preclude broadcasters from giving favourable (or unfavourable) direct access to particular electoral contestants, it also permits rationing of that access in an effort to achieve “fair” electioneering outcomes.\textsuperscript{26} When the Electoral Commission allocates time and money, it is required to consider five factors that indicate each party’s relative size and popularity with the voters,\textsuperscript{27} while also making provision for “the need to provide a fair opportunity for each political party … to convey its policies to the public by the broadcasting of election programmes on television”.\textsuperscript{28} The concrete result of this distributive mechanism is that the larger, established political parties receive the lion’s share of the allocation, whilst smaller, newer political parties receive far less.\textsuperscript{29}

\textsuperscript{23} Broadcasting Act 1989, ss 73, 74A. The Court of Appeal has emphasised that the Commission’s allocation decision is not reviewable except where “absolutely necessary to determine lawfulness”; Alliance Party v Electoral Commission [2010] NZAR 222 (CA) at [43]. See also Bullock, above n 16.

\textsuperscript{24} The main impediment to a party registering is the requirement it have at least 500 current financial members and pay a fee of $500; Electoral Act 1993, ss 63(2)(c), 63A, 66(1). There were 19 registered parties at the 2014 election, of which 14 requested and received a share of the broadcasting allocation.


\textsuperscript{26} Whether the present legal regime achieves this goal is, however, highly contestable; see A Geddis, “Reforming New Zealand’s System of Election Broadcast Regulation” (2003) 14 PLR 164 at 176–182.

\textsuperscript{27} Broadcasting Act 1989, s 75(2)(a)–(e).

\textsuperscript{28} Broadcasting Act 1989, s 75(2)(f).

\textsuperscript{29} For example, at the 2014 election the National Party received $1,087,902 in funding and 16’30” of free broadcast time. The four smallest parties that applied each received $34,729 in funding and 1’05” of free broadcast time.
For this reason, the second exception to the ban on using the broadcast media for partisan political ends becomes very important for electoral contestants. The general statutory prohibition does not apply to “the broadcasting, in relation to an election, of news or of comments or of current affairs programmes.”30 Starved of meaningful direct access to the broadcast media to communicate their electoral messages, such indirect “free” coverage represents the smaller, newer parties primary means of reaching the voters via television or radio. However, decisions as to what or who is newsworthy lie with individual reporters and editors in each media organisation. These individuals thus are able to decide who is included in the electoral narrative and who is left out of it, at least as far as the broadcast media are concerned. Reporters and editors then operate under the lightest of statutory direction; broadcasters are obligated to “present significant points of view” if discussing “controversial issues of public importance”,31 but are under no requirement to include any particular individual or party’s views as a part of any given news story. In contrast to the tightly controlled direct access regime, allowing lightly constrained editorial freedom to determine how election-related issues are reported to the public is considered to be an important component of the sort of vibrant, diverse and informative communicative environment that underpins a legitimate election process.

Editorial discretion nevertheless presents a particular problem in respect of the party leaders’ debates that television and radio stations hold prior to each election, as illustrated in the case of Craig v MediaWorks Ltd.32 This decision followed the exclusion of Colin Craig, the leader of the Conservative Party, from a televised debate on TV 3 between the leaders of so-called minor parties. Mr Craig sought an interim injunction preventing the debate from proceeding without him, arguing that the basis for his exclusion—that his party did not win a seat at the last election—was “unreasonable” in a Wednesbury sense. He noted that the Act Party, which was included in the debate, also had no current representation in Parliament and that recent opinion polls showed his party was registering greater public support than four of the invited parties. This injunction application proved successful, although the reasons for granting it were minimal at best. In his oral judgment, Gilbert J found it was “arguable” both that the matter was reviewable due to the public interest involved33 and that TV3’s basis for selecting participants in the debate had failed to consider relevant factors (and so could “arguably” be unreasonable).34 Having found that Mr Craig had an at least arguable case,35 Gilbert J then considered whether the

30 Broadcasting Act 1989, s 70(3).
31 Broadcasting Act 1989 (NZ), s 4(1)(d). For a discussion of these obligations in relation to elections, see Bullock, n 16 at 480–484.
33 Craig v MediaWorks [2014] NZHC 1875 at [7].
34 Craig v MediaWorks [2014] NZHC 1875 at [10].
balance of convenience warranted granting the injunction sought. The consequences for TV3 were dismissed as minimal; it would, at worst, have to find a larger studio in which to host the debate. By comparison, the potential harm to Mr Craig’s campaign (and thus, assumedly, the election contest generally) was assessed as being great as “the public would gain the impression that MediaWorks has determined that Mr Craig does not ‘make the cut’ …”.

Given the scant justification for granting Mr Craig his injunction (thus compelling TV3 to either include him in the debate or abandon it altogether), the case’s most interesting aspect is that it keeps alive the precedent set in Dunne v CanWest TV Works Ltd. Decided prior to the 2005 election, Dunne resulted in an injunction positively requiring TV3 to include two minor party leaders in a leaders’ debate. In making that order, Ronald Young J concluded that a broadcaster’s decision to host a debate that could have an influence on the election contest’s outcome created a public duty to ensure that participants are not chosen in an arbitrary and unreasonable fashion. However, the basis for the decision in Dunne had been somewhat questioned in two subsequent cases, where the courts instead focused both on the rights of media organisations to make their own editorial judgments and the difficulties involved with judicial oversight of such decisions. Those cases raised the possibility that the decision in Dunne was sui generis in nature, or at least restricted to only the most “exceptional and compelling cases”.

The ruling in Craig demonstrates that the Courts are still prepared to intervene to overturn a broadcaster’s decision where it appears to be applying the selection criteria for a party leader’s debate “unreasonably”. The judiciary’s message to broadcasters thus appears to be that if they are going to hold an election-related debate with participants chosen according to particular objective measuring stick, they then must make sure they use it consistently. Of course, nothing in these decisions requires broadcasters to hold such debates in the first place. Equally, if a broadcaster were to eschew any pretence at objectivity and instead invite only those participants that the broadcaster’s political journalists

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36 Craig v MediaWorks [2014] NZHC 1875 at [13]–[14].
37 Craig v MediaWorks [2014] NZHC 1875 at [10].
39 Dunne v CanWest TV Works Ltd [2005] NZAR 577 (HC) at [43].
41 Mangu v Television New Zealand Ltd [2006] NZAR 299 (HC) at [20]; Alp v Television New Zealand Ltd [2011] NZAR 515 (HC) at [40].
42 Mangu v Television New Zealand Ltd [2006] NZAR 299 (HC) at [51].
43 Alp v Television New Zealand Ltd [2011] NZAR 515 (HC) at [40].
subjectively believe (based on their personal experience and judgment) are likely to be elected at the forthcoming election, it is difficult to see how a court could second-guess such a decision.\textsuperscript{44} However, making such explicit predictions about the expected success or otherwise of individual parties would open a broadcaster up to allegations of bias, so it is understandable why they are loathe to do so. As broadcasters are thus likely to continue to issue invites to debate participants based on indicia such as opinion polling, past electoral success and the like, the courts will retain a role as final overseers of the guest list.

B Barring prisoners from the ballot box

Representative democracy’s core commitment is that all members of society have a basic, equal right to take part in selecting those who will make the laws for that society. Even though each person in reality has differing capacities and qualities—some are more intelligent than others, some have received more education than others, some are wealthier than others, etc—individuals should still be treated as presumptive equals when it comes to participating in the electoral process.\textsuperscript{45} In the New Zealand context, this commitment is reflected in the current legal rule that most citizens (as well as permanent residents)\textsuperscript{46} who have attained the age of 18 are legally entitled to enrol to vote,\textsuperscript{47} while every validly enrolled elector is legally entitled to cast one (but only one)\textsuperscript{48} ballot at each election.\textsuperscript{49} Nevertheless, a number of exclusions apply to the legal right to enrol to vote (and thus cast a ballot at election time). In addition to the obvious—those who are neither citizens nor permanent residents and those under 18—these exclusions are:

- New Zealand citizens or permanent residents who have never lived in New Zealand for 12 months continuously;\textsuperscript{50}
- New Zealand citizens who have lived outside of New Zealand for more than three years continuously (or permanent residents who have done so for more than 12 months);\textsuperscript{51}
- Persons convicted of a criminal offence who are subsequently compulsorily detained in hospital for treatment of a mental illness for

\textsuperscript{44} See Mangu v Television New Zealand Ltd [2006] NZAR 299 (HC) at [66] (“If the Court is to interfere with the exercise of freedom of expression by the media, it should only do so where it is reasonably sure of the factual basis underpinning the application for restraint”); Alp v Television New Zealand Ltd [2011] NZAR 515 (HC) at [48].


\textsuperscript{46} A permanent resident is a person lawfully in New Zealand who is not subject to any immigration restriction; Electoral Act 1993, s 73.

\textsuperscript{47} Electoral Act 1993, s 74(1).

\textsuperscript{48} Electoral Act 1993, s 215.

\textsuperscript{49} Electoral Act 1993, s 60. See also New Zealand Bill of Rights Act 1990, s 12.

\textsuperscript{50} Electoral Act 1993, s 74(1).

\textsuperscript{51} Electoral Act 1993, s 80(1)(a) and (b).
a period of three years or more;\textsuperscript{52}

- Individuals whose names appear on the “corrupt practices list”;\textsuperscript{53}
- Persons detained in a prison facility under a sentence of imprisonment imposed after 10 December 2010.\textsuperscript{54}

Two of these exceptions attracted some attention during the 2014 campaign. The first is the effective disenfranchisement of New Zealand citizens who have resided outside of New Zealand for three years or more. This issue was highlighted by a group of expatriate New Zealanders living in Australia who claimed to be forming an “Expatriate Party” with the primary policy objective of removing the relevant disqualification provision from the \textit{Electoral Act 1993}.\textsuperscript{55} In the end, the promised organisation did not register with the Electoral Commission, and no more was heard from it.

The second issue to gain attention was the disenfranchisement of sentenced prisoners whilst they are incarcerated. Some background context is necessary here. Varying restrictions have applied to incarcerated prisoners’ right to vote over time.\textsuperscript{56} There has been an ongoing dispute between those who view voting as a fundamental right that all adult members of the community (including prisoners) possess and those who believe that criminal offending serious enough to warrant a jail sentence represents a sufficiently grievous breach of the social contract to warrant disenfranchisement.\textsuperscript{57} The latest iteration of this debate took the form of the \textit{Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010}, which amended the \textit{Electoral Act} to disqualify all future sentenced prisoners from enrolling to vote while they remain incarcerated. Previously this sanction had applied only to those individuals serving sentences of three or more years imprisonment. Parliament’s change to the law was made over the top of the Attorney General’s warning under s 7 of the \textit{New Zealand Bill of Rights Act 1990} that the measure represented an unjustified limited on the right to vote, primarily due to its largely arbitrary effects.\textsuperscript{58} The process by which the

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\item \textit{Electoral Act 1993}, s 80(1)(c).
\item \textit{Electoral Act 1993}, s 80(1)(e). A person is placed on this list for a period of three years if found by a court to have committed such practices (essentially serious offences against the electoral process itself); \textit{Electoral Act 1993}, s 100(1).
\item \textit{Electoral Act 1993}, s 80(1)(d). This provision also encompasses any prisoner currently serving a term of imprisonment of more than 3 years that was imposed prior to 10 December 2010.
\item See Geddis, above n 11 at 70–72.
\item C Finlayson, \textit{Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Electoral (Disqualification of Convicted Prisoners) Amendment Bill} (J4, published by order of the House of Representatives,
law change passed through the various stages of parliamentary debate and scrutiny also was subject to criticism. Nevertheless, the consequence of its passage seemed clear: any sentenced prisoner who is behind bars on election day may not legally be enrolled as an elector, and so cannot legally cast a vote.

In the run-up to the 2014 election, however, a number of prisoners led by Mr Arthur Taylor brought a series of legal challenges to this legislation. Amongst the various grounds for disputing its application, three were particularly important. First, the prisoners alleged that the enactment containing the disenfranchisement provision was invalid law as it had not been passed in accordance with the process required by s 268 of the Electoral Act, which serves to entrench certain aspects of New Zealand’s electoral laws. Second, they claimed that the disenfranchisement provision ought to be read using s 6 of the New Zealand Bill of Rights Act as applying only to those prisoners who were serving the “punishment” component of their sentence (ie who were not yet eligible for parole). And third, they argued that the law change was inconsistent with the New Zealand Bill of Rights Act and should be declared as such by the courts. These claims were made in three separate actions: one seeking general declarations from the High Court, a second that sought specific injunctive relief in respect of the 2014 election, and a third that challenged the outcome of that election in two particular electorates.

The latter two challenges proved unsuccessful. While Ellis J apparently was quite sympathetic to Mr Taylor’s criticisms of the prisoner disenfranchisement legislation—her Honour spends 10 paragraphs recounting these at length before describing the measure as “constitutionally objectionable”—her Honour refused the requested injunctive relief allowing prisoners to enrol and vote at the 2014 election. In short, Ellis J found the legislation was properly enacted and clear in its intent, meaning that there was no basis to even consider whether an injunction ought to be granted:

Parliament has (for now) spoken. And what Parliament has said is that no prisoner who is serving a sentence of imprisonment and who happens to be incarcerated on 20 September 2014 may vote in this year’s general election. The applicants therefore have no position to preserve and the Court is unable to intervene.

2010) at [15].


Taylor v Attorney General [2014] NZHC 2225 at [80].


Taylor v Attorney General [2014] NZHC 2225 at [80]. The Court of Appeal subsequently refused leave for an urgent appeal from this decision, Taylor
Similarly, Mr Taylor’s attempt to challenge the election results in both of the electorates of Helensville and Te Tai Tokerau by way of electoral petitions also foundered. With respect to Te Tai Tokerau, the required $1000 as security for costs was not paid into court in time, leading the High Court to dismiss the petition at a preliminary stage. The petition challenging the result in Helensville was heard but was rejected by the Court on the grounds that Mr Taylor did not possess the requisite standing to lodge the petition (because even if prisoners were permitted to cast a vote, he could not have been enrolled in the electorate in question). 

That then left Mr Taylor’s third action in play. It survived a strike out application, in which the Crown argued that the High Court has no jurisdiction to formally declare legislation to be incompatible with the New Zealand Bill of Rights Act. Justice Brown rejected this proposition, but also warned that “my view of the Court’s current jurisdiction to grant declarations of inconsistency is: in theory ‘yes’ but in practice ‘no’.” In particular, Brown J feared that such a declaration could upset the principle of comity between the legislative and judicial branches, especially in situations where the Attorney-General already has drawn Parliament’s attention to the rights consequences of proposed legislation by way of a section 7 notice. However, in his substantive ruling on the application, Heath J rejected this concern and issued the sought-after relief:

The purpose of a formal declaration is to draw to the attention of the New Zealand public that Parliament has enacted legislation inconsistent with a fundamental right. It does so in a manner that is more accessible to them than a report to Parliament by the Attorney-General. Again, this is a matter of function. When reporting under s 7, the Attorney’s responsibility is to Parliament. When determining questions of public law, this Court’s responsibility is to all New Zealanders.

Acting on that responsibility, Heath J formally declared that: “Section 80(1)(d) of the Electoral Act 1993 (as amended by the Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010) is inconsistent with the right to vote affirmed and guaranteed in s 12(a) of the New Zealand Bill of Rights Act 1990, and cannot be justified under s 5 of that Act.”

Justice Heath’s view in the High Court thus mirrors that of the judiciary

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68 Taylor v Davis [2014] NZHC 2648 at [27].
69 Taylor v Key [2015] NZHC 722 at [83]–[86]; Electoral Act 1993 (NZ) s 230(1).
70 Taylor v Attorney General [2014] NZHC 1630 at [82].
71 Taylor v Attorney General [2014] NZHC 1630 at [83].
72 Taylor v Attorney General [2014] NZHC 1630 at [79]–[81].
73 Taylor v Attorney General [2014] NZHC 1630 at [85]–[86].
74 Taylor v Attorney General [2015] NZHC 1706 at [77].
75 Taylor v Attorney General [2015] NZHC 1706 at [78].
Australia, Canada, South Africa and the Republic of Ireland, as well as in Europe generally. In each of these jurisdictions, courts have concluded that prisoner disenfranchisement provisions unjustifiably limit the individual right to vote. By formally noting that the Electoral Act s 80(1)(d) also has this effect, Heath J has drilled a hole in the tall fence that traditionally protects the reasons for Parliament’s decisions on electoral matters from scrutiny by the judicial gaze. It now remains to be seen what, if anything, Parliament chooses to do in response to his pointed remarks about its actions.

C Elector registration, advance votes and special votes

As noted, before an individual may cast a valid vote at election time, she or he must be legally entitled to enrol as an elector and then actually have enrolled (or applied to enrol). New Zealand’s law on enrolling and subsequently obtaining a ballot is comparatively liberal. First, there is no requirement to provide any proof of identity when enrolling to vote. It can be done simply by filling in, signing and returning by hand or by post a form that is made widely and freely available. Second, no proof of identity is required when requesting a ballot paper. All an individual must do is give (or affirm by word or action) their name to the polling place officials. And third, voters have a wide time frame in which to cast their votes. While “polling day” commonly is viewed as the point at which the electorate exercises its collective choice as to who will govern, in 2014 the Electoral Commission was required to make polling places available in each electorate some 17 days before polling day. Following changes made in 2010, during this time period any enrolled elector is permitted to receive and cast their ballot at these places just as if it were polling day. Because casting an “advance vote” is now so straightforward, doing so proved to be very popular in 2014; by polling day some 717,579 ballot papers had been received, amounting to 29.7 per cent of the total votes cast.

This regulatory regime contains two points of note. First, it reflects a general principle that voting should be made easily and freely accessible.
Although this is a relatively (but not, as shall be seen, completely) uncontroversial position in the New Zealand context, it is not the case in other jurisdictions where various identification requirements must be met before a voter may receive a ballot. Such requirements are putatively imposed in order to protect the integrity of the electoral process, by limiting the possibility of voting fraud. They also may have partisan political motivations, as the groups most likely to be disadvantaged by restrictions on ballot access tend to support one side of the political spectrum. Consequently, overseas rules on voter identification have been the subject of often-intense debate in both legislative and judicial arenas.

In comparison, there have been relatively few calls for requiring New Zealand electors to show identification before receiving a ballot paper. Concerns over voter fraud largely are addressed during the process of scrutinising the rolls prior to the official vote count. To summarise, each elector is given an individually numbered ballot (which is recorded next to the elector’s name), allowing any cases of “double voting” or votes cast by improperly registered persons to be remedied by removing the invalid ballot from the final tally. In spite of this safeguard, a faint echo of overseas disputes was heard in the run-up to the 2014 election. A proposal to amend the Electoral Act to permit EasyVote cards to be used as proof that an elector had received a ballot paper was rejected by Parliament’s Justice and Electoral Committee, which feared it “would in effect lower the threshold for casting a vote, increasing the potential for fraud and harming the integrity of the voting process.” Instead, the Committee amended the Bill to positively require all electors to “verbally give or verbally confirm” their name before receiving a ballot. Labour Party MPs subsequently attacked this change as “a retrograde measure” with partisan overtones as it could impede certain groups from participating at the polls. It therefore passed into law on a party-line basis.

92 Geddis, above n 11 at 237–240.
93 *Electoral Act 1993*, s 176.
94 The Electoral Commission mails EasyVote cards to all enrolled electors prior to polling day. They contain information that allows polling officials to quickly and easily locate an elector’s details on the printed electoral roll.
96 See, eg, the comments made by the Hon Phil Goff during the Committee Stage debate:
vote of 65-55, with the governing parties supporting the measure and opposition parties registering their dissatisfaction. Whether this episode represents an end to the previous consensus over voting access issues remains to be seen.

The second point of note is that New Zealand’s electoral enrolment regime contains something of an anomaly. Anyone who is not registered as an elector (or, who is unsure if he or she is properly registered) can apply to do so at any point during the 17-day-long advance voting stage simply by filling out and submitting the relevant form. Having done so, she or he immediately may cast a ballot in the form of a “special vote”. However, in order to cast a valid ballot, prospective voters must be registered as electors (or have applied to register as electors) before polling day itself. There is no provision for polling day enrolment in New Zealand. Consequently, at every election a not-insignificant number of special votes are rejected because those casting them are not properly enrolled to vote. In 2014, this amounted to some 27,467 ballots; or around 1 per cent of the total valid votes cast. Furthermore, these disallowed votes are unevenly distributed across electorates. The highest numbers are found in the Maori electorates and those South Auckland seats with a large proportion of voters who are from Maori or Pacifica communities. In contrast, the lowest numbers of disallowed votes tend to occur in the South Island rural seats, which have a quite different ethnic makeup.

In the absence of a clear explanation, we must assume that the Republican Tea Party faction has started to infiltrate the thinking of the National Party. The EasyVote card, as the Minister said in the first reading debate, makes it easier for people to participate and it improves the efficiency of the system. Does the National Party not want more people to participate? Does the National Party realise that more people participating counts against the self-interest of that party? Is the National Party putting the self-interest of its electoral benefit ahead of the right of people and the encouragement and promotion of people to perform their civic duty of casting a vote?

NZPD, 11 March 2014, Volume 697; Page 16476.

97 Any person whose name does not appear on an electoral district’s printed electoral roll must cast a “special vote”; Electoral Act 1993, s 61. This requires the voter to complete and sign a witnessed declaration indicating “the ground or grounds on which that person is claiming a special vote”, Electoral Regulations 1996, reg 25(1).

98 Electoral Act 1993, s 60(b)(ii).

99 A total of 4911 special votes were disallowed across the 7 Maori electorates because the person casting it was not properly enrolled, which equates to about 3.3 percent of the valid votes cast in those electoral districts.

100 For example, Mangere, Manukau East and Manerewa each saw over 1000 special votes disallowed because the person casting it was not properly enrolled, which equates to about 4 percent of the valid votes cast in each electoral district.

101 Of the ten electoral districts that had less than 200 special votes disallowed
One possible reason for this discrepancy can be swiftly discounted. The Electoral Commission does not act in a haphazard or inconsistent fashion when deciding whether to allow or disallow special votes. This possibility was explored after the 2014 election in relation to the result in the Te Tai Tokerau electorate, which had the highest proportion of rejected special votes in the country. A losing candidate, Mr Hone Harawira, sought a judicial recount of the votes in order to ensure that the Electoral Commission was acting in a proper and lawful manner. After a sample of the disallowed special votes were checked in front of a District Court Judge and scrutineers from both the challenger and the successful candidate, all involved accepted that the Commission had acted as the Electoral Act requires. Consequently, the unequal effect of the existing rules is not due to how they are applied by the administrating agency, but rather because of how different social groups respond to them. Simply put, Maori and Pacifika people disproportionately fail to meet the law’s requirement to enroll before voting, meaning that they effectively are disenfranchised in greater numbers than other New Zealanders.

Allowing individuals to both enroll and vote on polling day itself represents one obvious and apparently simple, albeit partial, response to this problem. Parliament’s Justice and Electoral Committee considered this proposal as a part of its inquiry into the 2011 general election. It noted that research showed the move would increase enrolment and voter turnout rates, but that:

[The Electoral Commission argued] that it might act as a disincentive to enrolling before election day, and would require more staff and resources on election day. It could also delay the official count, as voters enrolling on election day would need to cast special votes, which are much more time-consuming to process than routine votes, and registrars would need to complete such voters’ enrolment before their special votes could be validated.

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because the person casting it was not properly enrolled, eight were in the South Island and seven were predominantly rural seats. The 947 special votes disallowed in that electoral district because the person casting it was not properly enrolled equated to some 7.94% of the total valid votes cast.

Te Tai Tokerau Recount, unreported, District Court, Kaitaia, CIV 2014-029-126, 16 October 2014.

Te Tai Tokerau Recount, unreported, District Court, Kaitaia, CIV 2014-029-126, 16 October 2014 at [39].

It is only a partial solution as it appears that a number of voters remain confused over the basic requirement to enroll. See, eg, Memorandum of Judge TJ Broadmore, Te Tai Tokerau Recount, unreported, District Court, Kaitaia, CIV 2014-029-126, 20 November 2014 at [9]: “I consider it likely that some Maori voters thought that by completing the special vote declaration, they were both being enrolled to vote and voting. I consider it likely that voters on the general roll who made special declaration votes on Election Day had the same belief.”

Justice and Electoral Committee, Inquiry into the 2011 General Election, AJHR I.7A, April 2013 at 11.
Of course, since this advice was provided, the number of advance votes cast has more than doubled, with a corresponding fall in the number of electors casting a ballot on polling day itself. As such, the Justice and Committee’s conclusion on this issue from 2013 ought to be revisited: “We accept the commission’s advice, but believe that we should continue to monitor this issue. In principle, any mechanism that allows these voters to be enfranchised should be encouraged.”\(^{107}\) Principle should take priority over administrative concerns, especially as those concerns are becoming less pressing as the voting process expands to encompass a wider time period.

4 Regulating forms of participation

After the participants in the electoral process have been identified, questions still arise as to how they may participate. That is to say, the law’s regulation of forms of electoral campaigning is an important part of structuring the electoral contest. In part, such regulation is concerned with setting the ground rules for a generally accepted “fair” or “clean” political competition. It reflects notions of what forms of behaviour or kinds of messages are acceptable as a means of persuading electors to support one candidate or party over another. In the New Zealand context, it also reflects cultural commitments to ensuring a measure of participant equality by controlling the way wealth can be used to pay for electoral advertising. But legal regulation of electoral participation in New Zealand is not only concerned with such instrumentalist matters. It also seeks to shape the very experience of casting a ballot. By restricting the way that electors may be influenced as they go to the polling places, the law seeks to create a zone of calm repose. Not only is this intended to inculcate a mood of calm reflectiveness on the part of the elector, but also it gives polling day a very particular feel. This section first examines these controls on polling day behaviour and the problems that they face, before discussing two important cases that clarify the legal rules governing the publication of election advertisements.

A Enforcing polling day decorum

Section 197 of the Electoral Act contains provisions designed to eliminate any effort to sway voters’ intentions in close proximity to the act of voting. There is a general prohibition, punishable by a fine of up to $20,000, on “in any way interfer[ing] with any elector, either in the polling place or while the elector is on the way to the polling place with the intention of influencing the elector or advising the elector as to the elector’s vote.”\(^{108}\) Furthermore, on polling day itself it is an offence to engage in a broad

\(^{107}\) Justice and Electoral Committee, Inquiry into the 2011 General Election, AJHR I.7A, April 2013 at 11.

\(^{108}\) Electoral Act 1993, s 197(1)(a). Note that this prohibition applies at all times, so covers activities involving advance voting as well as polling day itself.
range of behaviours, including:\footnote{Electoral Act 1993, s 197(1)(b)–(i).}
\begin{itemize}
\item in or in view or hearing of any public place holding or taking part in any demonstration or procession having direct or indirect reference to the poll by any means whatsoever;
\item making any statement having direct or indirect reference to the poll by means of “any loudspeaker or public address apparatus or cinematograph or television apparatus”;
\item printing or distributing or delivering to any person any card or paper (whether or not it is an imitation ballot paper) that contains the names of the candidates or the parties or any of them.
\end{itemize}

The most relevant of these provisions for contemporary New Zealand elections is found in the \textit{Electoral Act’s} s 197(1)(g), which makes it an offence to:
\begin{quote}
exhibit in or in view of any public place, or publish, or distribute, or broadcast,—

(i) any statement advising or intended or likely to influence any elector as to the candidate or party for whom the elector should or should not vote; or

(ii) any statement advising or intended or likely to influence any elector to abstain from voting; or

(iii) any party name, emblem, slogan, or logo; or

(iv) any ribbons, streamers, rosettes, or items of a similar nature in party colours.
\end{quote}

This prohibition forces candidates and their supporters to engage in a frantic election-eve rush to take down all the various hoardings, billboards and posters that were so carefully erected over the previous weeks of campaigning. What is more, the \textit{Electoral Act} empowers returning officers to “remove or obliterate” any remaining campaign material left in public view on polling day.\footnote{Electoral Act 1993, s 198.}

At first blush it might appear that the purpose of these regulatory measures is to prevent voters being illegitimately pressured into voting for some particular candidate or party. However, a separate offence provision deems the use of such “undue influence” to compel a voter to be a corrupt practice that is punishable by up to two years imprisonment.\footnote{Electoral Act 1993, ss 218, 224(1).} Consequently, the above provisions instead are intended to prohibit almost all forms of electioneering activity, no matter how mild or innocuous, as voters go to the polls. The reason for such rules cannot then be concerns that voters will somehow be intimidated or coerced into voting one way or the other, but rather a desire to inculcate a particular kind of mood or voting experience. Graeme Orr notes the linkage
between 19th Century moves to adopt the secret ballot and broader efforts to cloak the electoral moment with decorum,\(^\text{112}\) citing one contemporary observer as rhapsodising that with the introduction of secret balloting:

An elector … instead of running a desperate gauntlet through corruption, drunkenness, violence, and uproar, walks, as it were in an even frame of mind, through a smooth, private avenue to discharge the political duties of citizenship. In a contested election under the ballot there is nothing to indicate the existence of tumult or angry passion – nothing to disturb the ordinary current of business – nothing to superinduce discord in neighbourly relations – nothing to provoke intestine broils; everything proceeds with the same tranquil placidity as if the community was undergoing a trying operation under the influence of chloroform, waking up to consciousness on the declaration of the poll.\(^\text{113}\)

As such, provisions such as s 197 “are best seen as an attempt to encourage a calm repose in any electors who remain undecided on some questions and to erect an aesthetic of quietude consonant with the secret ballot reforms … .”\(^\text{114}\)

Of course, this aesthetic choice in the mode of legal regulation comes at the cost of imposing quite draconian (albeit short-lived) restrictions on freedom of expression. Merely walking down the street on polling day while wearing a T-shirt emblazoned with a political party logo is an offence that could attract a fine of $20,000. Furthermore, attempts to enforce decorum upon electoral proceedings face at least two significant contemporary challenges. The first results from the growing popularity of advance voting. As noted above, in 2014 nearly thirty per cent of the total ballots were cast before polling day began. Section 197’s various prohibitions on polling day activities did not apply during this seventeen day long advance voting period; only the general offence of interfering with voters in, or on their way to, the polling place. Therefore, in 2014 some 3-in-10 voters cast their ballots even as the full hurly-burly of the election campaign raged around them unabated, while the rest did so during the enforced quietude of polling day itself. It seems odd that different rules would apply to each set of votes. Furthermore, s.197(1)(a)’s generic injunction against interfering with voters while on their way to cast their votes is difficult to interpret and apply in an advance voting situation while campaigning is still in full swing. It appears that its application in 2014 largely was at the whim of individual polling place managers, who exercised their own discretion as to what sort of election-related activities and advertising was permitted in the vicinity of the voting booths.

The rise of social media poses a second challenge to legal attempts at purging electioneering from polling day. Although s 197(1)(g) was enacted in a pre-internet era, the \textit{Electoral Act’s} definition of “publish”

\(^{112}\) Orr, above n 9 at 100–104.

\(^{113}\) W Kelly, \textit{Life in Victoria or Victoria in 1853, and Victoria in 1858} (Lowden, 1977) p 318, quoted in Orr, above n 9 at 101.

\(^{114}\) Orr, above n 9 at 119.
encompasses “bring[ing] to the notice of a person in any manner”, including through “disseminating by means of the Internet or any other electronic medium”. Consequently, the Electoral Commission considers that polling day communications such as tweets or updated posts on sites like Facebook or Instagram that “advise or [are] intended or likely to influence any elector as to the candidate or party for whom the elector should or should not vote” breach the Act. Following the 2014 campaign, it referred 24 such messages to the Police for investigation and possible prosecution. These referrals included tweets sent by sporting personalities Israel Dagg, Jonah Lomu and Eric Murray. However, such enforcement action appears to be the equivalent of sticking a finger in a crumbling dike. Not only is social media culture an immediate one in which users expect to be able to share everything and anything that they may be doing or thinking, but research indicates that “doing so represents an event with intrinsic value, in the same way as with primary rewards such as food and sex.” Attempts to restrict the use of such media are thus always likely to be limited in their success. What is more, the purpose of such restrictions is unclear. Even if it is still thought desirable to impose a measure of physical decorum on polling day, why should that choice extend to the social media sphere?

Consequently, the time is nigh for a thorough re-examination of New Zealand’s rules around polling day electioneering. It is not immediately obvious that a historical preference for enforced decorum still ought to trump the rights of those who wish to continue to express their partisan preferences right up until the polling places close. And even if this preference is thought to provide sufficient reason to limit expressive rights in theory, it is not clear how it can be actualised in a context where not only does voting extend over a considerably longer period of time but communication now takes place in ways quite different to the Victorian era when the rules first were developed. A better approach would be to adopt the Australian example of creating a buffer zone around polling places in which electioneering activities are prohibited at all times that voting is taking place, but outside of which no special rules apply on polling day.

B Defining “electoral advertisements”

A range of legal controls and requirements apply to any person who publishes an “election advertisement”. All such advertisements

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115 Electoral Act 1993, s 3D(a)(viii).
116 The referred messages read “Just voted for @johnkeypm and the National party all the best for tonight #blueallday #National”; “@johnkeypm All the best Tonight Get in there everyone your last chance to vote and grow NZ go “National” #vote2014nz”; and “Get out & vote NZ! Plenty of time left #decision14 Don’t worry @johnkeypm you got my vote! #sportfunding”.
published at any time must include on them the name and address of the “promoter” responsible for the publication.\(^\text{118}\) Additionally, limits apply to spending on election advertisements during the (usually) three-month long “regulated period” that precedes an election.\(^\text{119}\) These limits are accompanied by a requirement to register with the Electoral Commission and, if more than $100,000 is spent, file a post-election return outlining the nature of that spending.\(^\text{120}\) The purpose of controls is three-fold. First, they require those trying to influence the electorate to identify themselves, which in turn allows the electorate to judge the reliability of the information source. Second, they operate as a kind of “anti avoidance” measure to buttress the spending restrictions applied to the primary participants—candidates and political parties—during the regulated period. And third, they prevent a well-resourced individual or group from being able to “swamp” the election campaign with advertising.

However, the various regulatory restrictions only apply to communications that qualify as being “election advertisements”. The Electoral Act defines these as being:

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).\(^\text{121}\)

Specific exemptions then exist for communications from the electoral agencies, regular advertisements by members of Parliament of their constituency services, the editorial content of media publications, the transmission of parliamentary proceedings and “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”.\(^\text{122}\) Because there may be some uncertainty as to whether any given advertisement has the effect specified in the legislation, or falls under one of the various exemptions, the Electoral Commission has a statutory duty provide advice to anyone who requests it.\(^\text{123}\) Although the Commission’s advice is not a final legal determination of the status of the proposed communication, anyone advised that an advertisement is an electoral advertisement risks prosecution (and possible conviction) if they nevertheless decide to publish it in breach

\(^{118}\) Electoral Act 1993, s 204F(1).

\(^{119}\) Electoral Act 1993, ss 204B(1)(d), 206V(1).

\(^{120}\) Electoral Act 1993, ss 204L, 206ZC.

\(^{121}\) Electoral Act 1993, s 3A(1).

\(^{122}\) Electoral Act 1993, s 3A(2).

\(^{123}\) Electoral Act 1993, s 204I.
of the various regulatory requirements.

This fact then makes the Commission something of a gatekeeper for electoral expression. Its understanding and application of the statutory test has the practical effect of determining whether or not various forms of political communication are able to take place free from special regulatory burdens. That role was subject to judicial scrutiny on two separate occasions in relation to the 2014 campaign. *Greenpeace v Electoral Commission*\(^\text{124}\) was an application for judicial review of the Commission’s determination that two internet-based environmental campaigns qualified as election advertisements. One was specifically targeted at the 2014 election, involving several environmental groups combining to invite voters to sign up as a “Climate Voter” via a dedicated website.\(^\text{125}\) Doing so, voters were told, “means that you want real action on climate change and you’re prepared to use your vote to get it. It says you support strategies to rapidly phase out fossil fuels and grow New Zealand’s clean energy and low-carbon potential.” Although the site was avowedly non-partisan in that it did not formally endorse any party, it did contain a live Twitter feed in which political parties were asked (and were able to answer) various questions about where they stood on climate related issues. The second website was a Greenpeace campaign opposing offshore drilling for oil,\(^\text{126}\) launched some nine months before the election was held. It shows what appears to be the website for the Minister of Energy and Resources, Simon Bridges, which is progressively covered by a rising tide of oil until all that is left is Greenpeace’s logo and a short statement relating to the issue of oil exploration. The second case of *Watson and Jones v Electoral Commission*\(^\text{127}\) involved a satirical song with accompanying video released for sale by a professional blues musician some four months before polling day.\(^\text{128}\) Entitled “Planet Key”, it poked fun at the current Prime Minister, while also containing lyrics such as “if you want compassion, don’t vote for me”. For this reason, the Electoral Commission advised that it constituted an electoral advertisement, a decision that the musician and creator of the video then challenged.

Between them, these two cases addressed three important issues:

1. What is the line between issue-related political advertising that may influence an election and “pure” issue-related political advertising?

2. Can “pure” issue-related advertising change its status as an election nears?

3. What sorts of communications constitute an “advertisement”? 

The first issue involves the need to distinguish between communications that have the effect of influencing voters’ behaviour at the polls and

\(^{124}\) [2014] NZHC 2135.

\(^{125}\) http://www.climatevoter.org.nz.

\(^{126}\) http://www.simon-bridges.co.nz.

\(^{127}\) [2014] NZHC 666.

\(^{128}\) The song and video can be viewed at https://vimeo.com/102441715.
general policy-oriented discussion or advocacy. Only the former are intended to be subject to regulation under the \textit{Electoral Act}. This issue was critical in the \textit{Greenpeace v Electoral Commission} case. Greenpeace argued that as the Climate Voter website represented a non-partisan effort to encourage \textit{all} parties to adopt climate-friendly policy and did not specifically identify or endorse the policy of any given party, it should fall outside the statutory definition. Greenpeace thus urged the High Court to adopt an interpretation of election advertising that excluded all communications that referred to policy issues without it being “objectively apparent” which party or candidate the advertisement intends to support or oppose.\textsuperscript{129} However, while the High Court endorsed the general principle that “pure” issue advocacy is not captured by the legislation,\textsuperscript{130} it disagreed that the Climate Voter website was of this nature. The Court noted that the \textit{Electoral Act} is worded in a way that includes advertisements that only refer to issues, provided that they also objectively have the effect of encouraging or persuading voters to vote for or against some party.\textsuperscript{131} It also accepted that making such communications subject to regulation was a justifiable limit on the right to freedom of expression guaranteed by the \textit{New Zealand Bill of Rights Act}.\textsuperscript{132} And because the Climate Voter website provided a “yardstick” by which parties’ policies could be judged (“support strategies to rapidly phase out fossil fuels and grow New Zealand’s clean energy and low-carbon potential”), while several parties had expressed their endorsement or rejection of that goal on the site, the objective effect of the website as a whole was to encourage voters to support or oppose those parties.\textsuperscript{133} The High Court thus agreed with the Electoral Commission’s advice that the Climate Voter website was an election advertisement.

However, the Court then found that the Electoral Commission had erred in advising that the second website—the “Simon Bridges” protest page—also was an election advertisement. The Commission had accepted that when the website first appeared it was pure issue advertising as it formed a part of a wider campaign against a particular governmental policy that made no reference to any election. But it claimed that with the announcement of the election and onset of the campaign the website transformed into an election advertisement in that it then objectively appeared to encourage or persuade people not to vote for Simon Bridges personally, or his National Party generally. In rejecting the Commission’s position, the Court noted that it was important to protect a space for free discussion of policy matters even as the electoral campaign commenced, not least because Parliament could still be sitting and debating legislative issues in this period.\textsuperscript{134} The fact that the website was part of a long-

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\item \textsuperscript{129} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [48].
\item \textsuperscript{130} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [47].
\item \textsuperscript{131} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [60].
\item \textsuperscript{132} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [79].
\item \textsuperscript{133} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [91]–[93].
\item \textsuperscript{134} \textit{Greenpeace v Electoral Commission} [2014] NZHC 2135 at [121].
\end{itemize}
running advocacy campaign,\(^{135}\) that it targeted Simon Bridges in the context of his role as responsible Minister and made no overt mention of the election at all\(^ {136}\) were all considered part of the relevant context in which an objective observer would decide whether the website could “reasonably be regarded” as advocating support or opposition to him at the polls. And given that context, the Court declared that the website did not have the required effect, and so was not an election advertisement.\(^ {137}\)

In comparison, the critical issue in *Watson and Jones v Electoral Commission* was not whether the message at issue reasonably could be regarded as encouraging or persuading voters not to support the National Party and its leader, John Key. The song and video’s creators freely acknowledged that it could do so.\(^ {138}\) Instead, the court had to determine whether a song and video made by individuals as a personal artistic statement was an “advertisement” in the context of the legislation. In a lengthy judgment\(^ {139}\) that traversed the history of why electoral speech came to be regulated in New Zealand, Clifford J concluded that it was not. It was possible to read the word “advertisement” in the context of the Act as meaning a “commercial” or “paid announcement” rather than giving it the dictionary definition of “the action of calling the attention of others”.\(^ {140}\) And because applying the various *Electoral Act* regulations to Messers Watson and Jones’ work would be an unjustifiable limit on their right to free expression,\(^ {141}\) Clifford J found that s 6 of the *New Zealand Bill of Rights Act* required him to prefer the meaning that avoided this outcome. Given that the song and video were a personal creation—no-one had paid the creators to produce the item—and that they were made available for free play on the radio or television and free viewing on the internet, it therefore was not an “advertisement” that fell under the *Electoral Act’s* regulatory ambit.\(^ {142}\)

These twin cases help to better define exactly what sorts of messages relating to electoral politics are and are not captured by the *Electoral Act*’s regulatory reach. Reviewing them, two points emerge. The first is that the Electoral Commission has taken a somewhat conservative,

\(^{135}\) *Greenpeace v Electoral Commission* [2014] NZHC 2135 at [124].

\(^{136}\) *Greenpeace v Electoral Commission* [2014] NZHC 2135 at [123].

\(^{137}\) *Greenpeace v Electoral Commission* [2014] NZHC 2135 at [123].

\(^{138}\) *Watson & Jones v Electoral Commission* [2014] NZHC 666 at [180].

\(^{139}\) Part of the reason for the judgment’s length was that the Electoral Commission had also warned that the song and video were “election programmes” under the *Broadcasting Act 1989* (NZ), and so could not be played on either television or radio. Clifford J also found this advice to be wrong, as the ban only applied to paid election programmes; *Watson & Jones v Electoral Commission* [2014] NZHC 666 at [195]–[211].

\(^{140}\) *Watson & Jones v Electoral Commission* [2014] NZHC 666 at [176]–[194].

\(^{141}\) *Watson & Jones v Electoral Commission* [2014] NZHC 666 at [167]–[170].

\(^{142}\) Clifford J also found that even if the song and video was an “election advertisement”, the statutory exemptions for “editorial content” and “personal political views through an electronic medium” also applied; *Watson & Jones v Electoral Commission* [2014] NZHC 666 at [226] & [236].
literalist approach to the legislative provisions. There is a perhaps understandable institutional reason for it doing so. If electoral contestants were to rely on the Commission’s advice that some message is not an election advertisement and a court were to later disagree with this assessment, then the contestant may have been led to commit potentially quite serious criminal offences that have the capacity to overturn an election result. So the Commission has erred on the side of caution in its interpretation and application of the statutory tests. However, that inherent conservatism carries costs. There will have been a number of individuals or groups wishing to say things during the 2014 campaign who will not have done so after being advised by the Commission that their speech actions will attract liability under the Electoral Act’s reach. At least some of those speech actions will have posed no real threat to the election process, in terms of being the kinds of electoral messages that Parliament intended to regulate in order to protect against the influence of large-scale wealthy interests. Consequently, the courts’ intervention to pare back the legislation’s reach into the realm of public discourse is to be welcomed.\textsuperscript{143}

5 Conclusion

This article has sought to outline a range of legal issues that arose during New Zealand’s 2014 general election and place them in some sort of broader context. A concluding question then is, what (if anything) might occur in response to them? New Zealand has developed two institutional avenues for addressing the sorts of issues discussed in this article. First, the Electoral Commission is required to produce within six months of the election a report to the Minister of Justice outlining any issues that the Commission has identified with the electoral process and making recommendations for change.\textsuperscript{144} Second, by convention Parliament’s Justice and Electoral Committee holds an inquiry to examine the law and administrative procedures for the conduct of parliamentary elections in light of the previous general election. This inquiry has already commenced, with public submissions to it closing at the end of March. Taken together, these processes provide an established means of reviewing electoral law and changing it if and when it is felt necessary. However, any such changes are a temporary and contingent response to an basic fact about how elections function. For the next electoral cycle inevitably will reveal new and different disputes about the application of the nation’s electoral laws, which will in turn demand yet more changes to them. This recurrence is because, as noted already, “elections—along

\textsuperscript{143} The Electoral Commission has sought guidance from the Court of Appeal on several points emerging from these two cases. That matter had not been resolved as at the time of writing.

with the legal rules that govern the electoral process—will always produce disagreement, even as they resolve the question of who will govern the country.” That is a basic and inescapable feature of the electoral law field; one that keeps it an ever fresh and continually interesting topic for study.

145 Geddis, above n 11, p 17.