

THIRD PARTY ELECTIONEERING ON NEW ZEALAND'S BROADCAST MEDIA

In 2014, Darren Watson and Jeremy Jones released a satirical song and video that mocked and criticised New Zealand's then Prime Minister, John Key. New Zealand's Electoral Commission promptly warned the country's television and radio stations that playing this song over the airwaves opened them up to prosecution and potential fines of NZ\$100,000. Over two years later, the Court of Appeal not only ruled that the song and video could be played freely, but that the law regulating the use of broadcast media for partisan electoral purposes had been misunderstood for the past 27 years. This comment explains the background to the Court's decision, describes an experiment conducted to determine the meaning of that ruling and then outlines why Parliament will have to revisit the issue after the 2017 general election.

HOW "PLANET KEY" CAME TO COURT

Until October 2016, there was general consensus regarding how New Zealand's law regulated the use of television and radio for partisan political purposes. That consensus was as follows:

New Zealand's election broadcasting regime places extensive restrictions on the use of the broadcast media for election related advertising. All broadcast media in New Zealand, whether privately owned or State run, are regulated by the *Broadcasting Act 1989*. This legislation prohibits any broadcaster, at any time, from broadcasting an "election programme". An election programme is defined as being one which encourages or persuades (or appears to encourage or persuade) the voters to vote for (or not to vote for) some individual candidate or political party, or which advocates support for or opposes a candidate or political party, or which notifies that a meeting is to be held in conjunction with an election. There are only a few specific exceptions made to this blanket ban on using the broadcast media for partisan political ends, of which the most important ... are those allowing registered political parties and individual candidates some limited access to the broadcast media during an election campaign.¹

Consistent with this understanding of the law, the Electoral Commission quite frequently reported to the police advertisements or other programs it believed breached the legislative prohibition on airing "election programmes".² Although the police routinely failed to prosecute the matter, the mere threat of facing possible investigation (and potential fine of up to NZ\$100,000) was sufficient to cause broadcasters to refuse to air material that appeared to meet the statutory test.

Consequently, those wishing to engage in partisan electioneering activities were substantially denied direct access to television and radio. The broadcast media, of course, intensively covered political issues and candidates as items of news or current affairs.³ And in the weeks preceding polling day the Electoral Commission allocated registered political parties free time to broadcast opening and closing statements, as well as money with which to purchase advertising slots from broadcasters.⁴ Individual electorate candidates also are permitted to run messages that promote their candidacy in the weeks before polling day,⁵ albeit subject to the quite tight spending restrictions that apply to electorate contests.⁶ All other persons and groups, however, were limited to broadcasting general issue-focused

¹ Andrew Geddis, "Reforming New Zealand's System of Election Broadcasting Regulation" (2003) 14 PLR 164, 165–166 (internal citations omitted). See also Andrew Geddis, *Electoral Law in New Zealand: Practice and Policy* (LexisNexis, 2nd ed, 2014) 196–197.

² Such referrals are statutorily required: *Broadcasting Act 1989* (NZ) s 80A. See, eg Electoral Commission, "Electoral Commission Decision on Election Advertising and Broadcasting Matters", 12 January 2009 <<http://www.elections.org.nz/news-media/electoral-commission-decisions-election-advertising-and-broadcasting-matters>>; Electoral Commission, "Decision of the Electoral Commission on the Prime Minister's Hour RadioLive Complaint", 8 February 2012 <http://www.elections.org.nz/sites/default/files/media/attachments/Electoral_Commission_decision.pdf>; Electoral Commission, "Referral to the Police 11 September 2013" <<http://www.elections.org.nz/news-media/referral-police-11-september-2013>>.

³ As permitted by the *Broadcasting Act 1989* (NZ) s 70(3).

⁴ As permitted by the *Broadcasting Act 1989* (NZ) s 70(2)(a) and (b).

⁵ As permitted by the *Broadcasting Act 1989* (NZ) s 70(2)(c).

⁶ *Electoral Act 1993* (NZ) s 205C(1)(a).

advertisements that did not name any particular party or candidate, or even *appear* to encourage or dissuade voters from supporting a particular party or candidate.

Such was the legal environment into which Messers Watson and Jones released their satirical song and accompanying video, “Planet Key”.⁷ As later described by the High Court, “[t]he Song is a blues-style satirical protest song with lyrics reflecting Mr Watson’s own political views”;⁸ while “[t]he 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”.⁹ The Court of Appeal additionally noted that:

The song and video were artistic and satirical, but they also conveyed political messages sharply hostile to the National Party and several of its senior Ministers, particularly the Prime Minister. Notably, the song advised the audience not to vote for Mr Key if they wanted compassion and the video portrayed negative views of Mr Key and several Ministers on contentious issues of the day.¹⁰

Insofar as the song and video gained any public attention on release, it was regarded as a relatively harmless bit of fun. Even its chief target, then-Prime Minister John Key, described it as “quite professionally done. It was anti-us but as a parody it was ok. I take all that sort of stuff in the spirit it’s intended”.¹¹

However, a public access radio station was concerned about the song’s political content and approached the Electoral Commission for advice before playing it. In response, the Commission released a statement outlining its belief that the song and video constituted “election programmes”, and so broadcast by way of either radio or television breached the *Broadcasting Act 1989* (NZ).¹² This statement effectively dissuaded all radio or television stations from airing the song. Understandably upset that their creation had been strangled in its cradle, Mr Watson and Mr Jones sought a declaration under the *Declaratory Judgments Act 1908* (NZ) that neither the song nor video were “election programmes”.¹³

THE COURT RULINGS ON “PLANET KEY”

The High Court began its analysis by noting that “neither the definition of election programme nor the terms of [the prohibition on broadcasting election programmes] restrict the application of its control over the broadcasting of election programmes to programmes broadcast for political parties”.¹⁴ However, it then noted that the heading of s 70 of the *Broadcasting Act 1993* (NZ), which contains the prohibition on broadcasting election programmes, refers to “paid election programmes”.¹⁵ Given Parliament’s apparent intention to control wealthy participants’ access to the airwaves for partisan political purposes,¹⁶ the Court ruled:

[Section] 70, construed in light of its text, its purpose and the [*New Zealand Bill of Rights 1990* (NZ) interpretative] mandate, does not extend to a situation where, as here, a broadcaster may decide to

⁷ See <<https://vimeo.com/102441715>>.

⁸ *Watson v Electoral Commission* [2015] NZHC 666, [25]

⁹ *Watson v Electoral Commission* [2015] NZHC 666, [30]

¹⁰ *Electoral Commission v Watson* [2017] 2 NZLR 6; [2016] NZCA 512, [8]

¹¹ Adam Bennett, “Satirical Election Song Planet Key Banned”, *NZ Herald*, 12 August 2014.

¹² Electoral Commission, “Electoral Commission Statement on Planet Key Video”, 13 August 2014 <<http://www.elections.org.nz/news-media/electoral-commission-statement-planet-key-video>>.

¹³ Additionally, a declaration was sought that the song and video were not “election advertisements” under the *Electoral Act 1993* (NZ) s 3A.

¹⁴ *Watson v Electoral Commission* [2015] NZHC 666, [196].

¹⁵ *Watson v Electoral Commission* [2015] NZHC 666, [197].

¹⁶ *Watson v Electoral Commission* [2015] NZHC 666, [208].

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.¹⁷

Consequently, while the “Planet Key” song and video could be freely played by broadcasters,¹⁸ all paid partisan political advertising remained prohibited.

However, the Electoral Commission’s concern that aspects of this decision conflicted with an earlier High Court ruling¹⁹ led it to seek clarification from the Court of Appeal. The appeal decision then was much more far-reaching. A unanimous Court noted that “the long title to the [Broadcasting] Act states that its purpose, relevantly, is to enable political parties to broadcast election programmes for Parliamentary elections free of charge”,²⁰ while the legislation does not mention so-called “third parties” at all. This fact, the Court believed, reflected the legislation’s genesis in a report by the Royal Commission on the Electoral System,²¹ which it thought primarily concerned the risk that wealthy political parties or candidates could gain unfair access to broadcast advertising. As a consequence:

[The Court] concluded that the prohibition [on broadcasting election programmes] in s 70 is indeed confined to programmes broadcast for political parties or candidates, being those entitled to benefit from an allocation of broadcasting time under pt 6.²²

Not only did the Court believe that this interpretation advances Parliament’s intent for the legislation, it was “also available on the statutory language, and preferable to the alternative, especially given the otherwise substantial impact on freedom of expression”.²³

With respect, the Court’s conclusion seems somewhat forced.²⁴ First, an interpretation of s 70 that allows everyone except political parties and candidates to place partisan political advertisements does not fit well with the *Broadcasting Act*’s overall concern to ensure that New Zealand’s television and radio operate in a fair and politically balanced manner. This is encapsulated in the legislation’s general requirement that broadcasters ensure that:

when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest.²⁵

Furthermore, there are strong textual indications that Parliament did mean the s 70 prohibition to apply generally, rather than just to political parties and candidates. Section 70 explicitly exempts from its coverage “any advertisement placed by the Electoral Commission, a Registrar of Electors, a Returning Officer, or other official for the purposes of the *Electoral Act 1993*”, as well as “any non-partisan advertisement broadcast, as a community service, by the broadcaster”.²⁶ Although the Court waived these provisions aside as “explicable by a desire to clarify the Act’s application to those participating in the electoral process as a public duty or service”,²⁷ this is unconvincing. For if Parliament really meant for s 70 *only* to apply to political parties and candidates, then why is it

¹⁷ *Watson v Electoral Commission* [2015] NZHC 666, [210].

¹⁸ The High Court also found that the song and video were not “election advertisements” under the *Election Act 1993* (NZ), and so that legislation’s obligation to include a promoter statement did not apply: *Watson v Electoral Commission* [2015] NZHC 666, [191]–[194].

¹⁹ *Greenpeace of New Zealand Inc v Electoral Commission* [2014] 3 NZLR 802; [2014] NZHC 2135.

²⁰ *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [90].

²¹ Royal Commission on the Electoral System, *Towards a Better Democracy* (Government Printer, 1986) 202–210.

²² *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [95].

²³ *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [96].

²⁴ It is worth noting that the Court’s interpretation was not one urged on it by any of the counsel appearing before the Court: *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [94].

²⁵ *Broadcasting Act 1989* (NZ) s 4(1)(d).

²⁶ *Broadcasting Act 1989* (NZ) s 70(2)(d) and (e).

²⁷ *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [97].

necessary to “clarify the Act’s application” in relation to anyone else at all? The better reading is that the s 70 prohibition on broadcasting election programmes really was meant to be a blanket one, but for the specific exceptions provided.

Perhaps the best evidence for this proposition is the fact that Parliament was quite content for that understanding of its legislation to apply for 27 years. In that time, some nine elections took place at which only political parties and candidates were able to broadcast electioneering messages. Following each of those elections, a parliamentary select committee held an inquiry into its operation. While the manner in which time and money is allocated to political parties for election programmes under the *Broadcasting Act* has repeatedly been raised at those inquiries,²⁸ none of them mentioned the fact that the electoral authorities apparently were interpreting and applying s 70 inconsistently with parliamentary intent. And although s 70 has been amended by five different pieces of legislation since 1989, none of these legislative vehicles were used to further clarify the provision. As such, the claim that Parliament always meant for s 70 to apply solely to the electoral messages of political parties and candidates seems highly unlikely. The better understanding is that the Court of Appeal, in an effort to minimise the effect that s 70 has on political discourse, has given this provision an entirely new meaning from the one originally intended.

TESTING THE MEANING OF THE COURT OF APPEAL’S RULING

Irrespective of whether it was correct to do so, the Court of Appeal has now concluded that the *Broadcasting Act* does not impose a blanket ban on using television and radio for partisan political ends (apart from a limited exception for political parties and candidates). Rather, it believes the legislation prohibits *only* political parties and candidates from using television and radio for partisan political ends outside of the limited exceptions provided for them. If that indeed is what the Court’s ruling means, it represents a fundamental change to the way that election campaigning can occur in New Zealand. Determining exactly what the judgment means for the ability of individuals and groups to access the broadcast media for electioneering purposes is thus important for New Zealand’s democratic processes.

To resolve this question, in late February 2017 I went to the University of Otago’s student-owned station, Radio One, and purchased a 30-second advertising slot. I then recorded the following proposed advertisement:

The following is a paid advertisement, authorised by Andrew Geddis, [residential address redacted]. The Aotearoa Legalise Cannabis Party wants to legalise the smoking of marijuana. If elected to government, the Aotearoa Legalise Cannabis Party would stop the police being able to arrest people who possess marijuana. If, like me, you want the law to keep marijuana illegal, then you need to vote against the Aotearoa Legalise Cannabis Party at the 2017 election. Don’t legalise it, don’t vote ALCP.

My name and address were included as a “promoter’s statement” as per s 204F of the *Electoral Act 1993* (NZ). The overall tone was a negative “attack” advertisement in order to avoid the Act’s s 204H requirement that any message which “may reasonably be regarded as encouraging or persuading voters to vote for a party” must first obtain the written permission of that party’s secretary. And the ALCP was chosen as the advertisement’s target as they are a registered political party that stands candidates at every election, so the message clearly “encourages or persuades ... voters not to vote for a political party ... at an election”.

Having ensured that my advertisement complied with other relevant electoral law provisions, I encouraged the radio station to seek the Commission’s advice as to whether playing it would breach the *Broadcasting Act*’s prohibition on broadcasting election programmes. Because despite the Court of Appeal’s ruling, the Commission’s website still was claiming that:

Individuals or organisations who are not parties or candidates (including third parties) may broadcast an advertisement which relates to an election, such as advocating for or against a policy, **but it must not name or directly advocate for or against a party or candidate.**

²⁸ Geddis (2003), n 1, 168–169.

Two days later, the station received a response from the Commission:

The definition of an election programme in the *Broadcasting Act* includes a programme that appears to encourage or persuade voters to vote or not to vote for a political party or the election of any person at an election. However, the courts have held that the election programme rules do not apply to broadcasts initiated by third parties ... Assuming [Andrew Geddis] has initiated the advertising as a third party **the advertisement will not be an election programme and can therefore be broadcast on the radio at any time.**

So contrary to what its website said, the Commission accepted that nothing prevented a broadcaster from airing the recorded advertisement on my behalf. Consequently, my anti-ALCP message was quite legally broadcast that evening.

THE FUTURE OF BROADCAST ELECTORAL ADVERTISING

The point of this little legal experiment is that what is good for me as an individual buying a single ad on student radio is good for a well-funded pressure group willing to spend some hundreds of thousands of dollars on TV spots urging voters to reject a party or candidate that they oppose. Of course, such groups already could tell people how to vote via other forms of media: billboards; newspapers; pamphlets; posters; or the internet. And if a broadcast message constitutes an “election advertisement”²⁹ it will have to include the name and address of the person responsible for its broadcast as a “promoter’s statement”.³⁰ Finally, while there are no restrictions on spending on electioneering outside of the immediate campaign period, the *Electoral Act’s* NZ\$315,000 cap on spending on election advertisements within the three-month pre-election “regulated period” will apply to buying TV and radio spots.³¹

However, New Zealand’s law traditionally has been understood as treating the broadcast media as a special case; more expensive to access and better able to reach voters, so requiring different and more prescriptive forms of regulation in the name of protecting democratic equality. Or, at least, the consensus was that it attracted that kind of special regulation until the Court of Appeal found differently. I have now demonstrated that the specific controls on using the broadcast media for electioneering purposes no longer exist for private individuals and groups. According to the Court of Appeal, however, a general ban on broadcasting election programmes continues to apply to messages from registered political parties and individual candidates.

Therefore, while private individuals and groups now are free to use television and radio to advocate against parties or candidates, those parties and candidates still are limited to responding using the taxpayer-funded allocation given to them in the weeks before each election. Not only might this allocation only become available months after a series of attack ads are run, the amounts distributed under it vary widely. At the 2014 election, the National Party received \$1,087,902 while the New Zealand First Party received \$207,220, the Maori Party \$103,610 and the Act Party \$76,930. Those figures represent all that these parties may spend on television and radio electioneering – even after the Court of Appeal’s ruling, it remains an offence for a broadcaster to air any advertising that a party purchases over and above these distributed amounts.

Consequently, the Court of Appeal’s decision gives us a system of regulating partisan political broadcasting that makes little sense, and certainly would not be enacted into law today. It is irrational to permit individuals or groups to spend freely on television and radio advertisements that tell people how to vote, while tightly constraining political parties’ ability to do likewise. Furthermore, the Court’s ruling leaves it unclear as to what constitute “programmes broadcast for political parties or candidates”³² – which remain subject to the *Broadcasting Act’s* provisions – as opposed to advertisements placed by so-called “third parties”, which do not. For example, if a political party gives

²⁹ *Electoral Act 1993* (NZ) s 3A.

³⁰ *Electoral Act 1993* (NZ) s 204F.

³¹ *Electoral Act 1993* (NZ) s 206V(1).

³² *Electoral Commission v Watson* [2017] 2 NZLR 63; [2016] NZCA 512, [8].

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the required written permission for a supporter to run a television advertisement urging voters to support the party, does that then make the advertisement an “election programme” that cannot be screened? What if party officials actively and openly collude with a group of supporters in planning an advertising campaign that attacks a rival party? It seems inevitable that the Parliament elected by the 2017 election will have to revisit the *Broadcasting Act* and decide just what to do about these sorts of questions.

Andrew Geddis
Professor, University of Otago Faculty of Law