

## Members present

Hon Andrew McGechan (President)  
Acting Chief Judge Wilson Isaac – *ex officio* (Maori Land Court)  
Ms Belinda Clark – *ex officio* (Secretary for Justice)  
Dr Helena Catt (Chief Executive)

Dated: 18 September 2008

Decision Number: 2008-33

Initiated by

**CAMERON SLATER ON 3 AUGUST 2008**

In relation to

**Election advertisement**

**THE NEW ZEALAND NATIONAL PARTY (anti-National)**

### Findings and Determination

Items displayed and handed to members of the public during a protest outside the National Party conference, "authorised" by Clinton Smith, did not display promoter statements. No offence committed because the contravention was not wilful.

No offence committed under sections 63(4) or 65(4) of the Electoral Finance Act 2007 because Mr Smith did not wilfully publish, or cause or permit to be published, an election advertisement in contravention of section 63 or section 65.

**This headnote does not form part of the decision.**

### Subject

Protestors outside the National Party conference displayed rosettes and a banner with a symbol similar to the National Party logo, and handed out leaflets. The rosettes and the banner contain the slogan "New Zealand for sale", and "National Ambitious for Corporate Australia". The items did not display promoter statements.

### Issues raised

The Electoral Commission considered whether:

- any of the items are election advertisements within the meaning of the Electoral Finance Act 2007 and, if so, they contain promoter statements as required by the Act
- any offence has been committed.

The Electoral Commission sent a general advisory to party and third party financial agents, about ensuring that election advertisements contain visible promoter statements, and published it on the Elections New Zealand website on 30 June 2008.

### Electoral Finance Act 2007

Section 5 of the Act defines an election advertisement to be, in summary, any form of words and/or graphics that could reasonably be regarded as encouraging or persuading voters to vote or not to vote in a particular fashion.

Section 63 of the Act requires any election advertisement published during the regulated period to contain a statement of the name and address of the promoter of the advertisement.

Section 65 applies both within the regulated period and at other times, but only to election advertisements that encourage voters to vote in favour of the subject of the advertisement. This section also requires such election advertisements to contain a statement of the name and address of the promoter of the advertisement and, for advertisements in favour of a party, the financial agent of the party must authorise the promoter to promote the party.

Sections 63(4) and 65(4) provide that it is an offence to wilfully contravene either of the above requirements.

### **Comments from Clinton Smith**

Three of the alleged protesters were invited to comment. Mr Smith responded that he participated in the protest and "authorised" the protest and the material used in it at the beginning, and when he later realised the banner had no authorising statement he stated in the presence of number of National members, fellow protesters, journalists, and members of the public, "this electoral advertisement and all material associated with it are authorised for the purposes of the EFA by Clinton Smith, 16A Highbury Rd, Wellington". He suggested that this meets the requirements of the Act in allowing the public to know who is attempting to influence their vote and this is evidenced by the complainant forwarding his details to the Electoral Commission.

Mr Smith stated the sign and rosettes were satirical and no reasonable person would mistake them for the National Party logo or as being a National advertisement, and there was no intention to try to pass these off as genuine National advertisements, therefore they do not need to be authorised pursuant to section 65. He further stated there was no intention to hand out any of the material, which related to past events and were intended as a prop, but that in the heat of the moment some were handed out to the crowd.

Mr Smith advised that his participation was not as part of a formal group or listed third party, that he authorised the skit and believes the materials would not cost more than \$20.00.

### **Electoral Commission's Determination**

The Electoral Commission has considered the requirements of the Electoral Finance along with the items listed as exhibits (below).

Whether any particular item is an election advertisement within the meaning of section 5 of the Electoral Finance Act is a question of circumstances and degree. In the Electoral Commission's view the statutory test is not whether an item "can be regarded" as encouraging or persuading voting in a particular way – as a matter of logic, almost anything "can" be so regarded – the test is whether the item "can reasonably" be so regarded, allowing inclusion within the definition only when it is objectively reasonable to do so.

In respect of the items displayed and handed out at the protest, the Electoral Commission is of the view that they can reasonably be regarded as encouraging or persuading voters not to vote for the National Party. The Commission therefore considers that those items are election advertisements within the meaning of section 5 of the Electoral Finance Act.

Section 63 provides that a promoter must not during the regulated period *publish, or cause or permit to be published, an election advertisement* unless the requirements of that provision are met, including that the promoter is entitled to promote the advertisement and that it contains a promoter statement.

The Electoral Commission is satisfied that Mr Smith is entitled to promote the advertisements in that the expenses incurred would not exceed the \$12,000 maximum provided in section 63(3)(d).

Mr Smith claims to have made a verbal promoter statement. The Electoral Commission considers that such statement would only be heard by those members of the public who were present at the time the statement was made and, in the circumstances of a performance in an open public place, members of the public are likely to come and go. Furthermore, section 63(2) provides that an election advertisement must *contain* a promoter statement and it is the view of the Commission that a tangible item can not contain a verbal statement. As a result, the Commission is not satisfied that the

items contained a promoter statement that satisfies the requirements of section 63(2)(a) and is therefore of the view that the items were published in circumstances that contravene section 63(2).

Section 65 applies only to election advertisements in favour of a party or candidate. The Electoral Commission is of the view that, considered in context, the content of the items cannot reasonably be regarded as encouraging or persuading voters to vote for a party or candidate. Therefore the Commission considers that section 65 does not apply to the items in question.

Section 63(4) provides that *every promoter is guilty of an illegal practice who wilfully contravenes* section 63(2).

The Electoral Commission is satisfied that Mr Smith thought he had done what was necessary to comply with the promoter statement requirements of the Act by providing a verbal promoter statement for the materials, and when he realised the banner did not contain a promoter statement he attempted to rectify the situation by again stating publicly who the promoter was. Under the particular circumstances of this event, the Commission is of the view that the contravention of section 63(2) was not wilful and therefore no offence has been committed.

**For the above reasons it is the view of the Electoral Commission that the materials displayed or handed out outside the National Party conference were not published in circumstances amounting to the commission of an offence for the purposes of section 63(4) or section 65(4) of the Electoral Finance Act 2007**

Signed for and on behalf of the Electoral Commission



Dr Helena Catt  
Chief Executive and Commission Member  
New Zealand Electoral Commission

9 October 2008

### **Exhibits**

The following items were received and considered by the Electoral Commission when it determined this matter:

1. email 3 August 2008 from Cameron Slater raising the issue
2. photographs of persons allegedly participating in the event
3. mock \$100 note
4. leaflet "no money, no vote"
5. web page from [www.thestandard.org.nz](http://www.thestandard.org.nz)
6. email 29 August 2008 from Clinton Smith
7. email 9 September 2008 from Clinton Smith