

Members present

Hon Andrew McGechan (President)
Ms Belinda Clark – *ex officio* (Secretary for Justice)
Dr Helena Catt (Chief Executive)

Dated: 11 November 2008

Decision Number: 2008-43

Initiated by

**TERRY BICKNELL, OTAKI ELECTORATE CHAIR
FOR NEW ZEALAND FIRST, ON 22 OCTOBER 2008**

In relation to

Election advertisements

COBB & CO PARAPARAUMU

NATIONAL PARTY OF NEW ZEALAND

Findings and Determination

Advertisement in the Kapiti Observer sponsored by Cobb & Co Paraparaumu is an election advertisement in favour of the National Party, did not contain a satisfactory promoter statement, and its publication was not authorised in writing by the National Party. The defects in the promoter statement are so inconsequential to the public interest that the matter will not be reported to the Police, however the failure to obtain written authorisation of the Party will be reported to the Police.

Contravention of sections 63(2)(a) and 65(1)(b) of the Electoral Finance Act 2007, by failure to provide a satisfactory promoter statement, amounting to an offence under sections 63(4) and 65(4) of the Act. For the purposes of section 70 the offences are so inconsequential there is no public interest in reporting the facts to the Police.

Contravention of section 65(1)(a) of the Electoral Finance Act 2007 by publication of an advertisement in favour of a party without written authorisation of the financial agent of that party. The facts will be reported to the Police in accordance with section 70.

This headnote does not form part of the decision.

Subject

Advertisement for the National Party in Kapiti Observer, captioned "THE TICK ✓", sponsored by Cobb & Co Paraparaumu.

The advertisement does not fully specify the name and address of the promoter.

Issues raised

The Electoral Commission considered whether:

- the advertisement is an election advertisement within the meaning of the Electoral Finance Act 2007 and, if so, it contains a promoter statement that satisfies the criteria in the Act and its publication is authorised as required by the Act
- any offence has been committed and, if so, the offence should be reported to the Police.

Electoral Finance Act 2007

Section 5 of the Electoral Finance 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.

Sections 63 and 65 also impose requirements in relation to who may promote, or be authorised to promote, an election advertisement.

Sections 63(4) and 65(4) provide that it is an offence to wilfully contravene the above requirements. If the Electoral Commission believes an offence has been committed under those sections, section 70 requires the Commission to report to the Police the facts that belief is based on unless the Commission considers that the offence is so inconsequential there is no public interest in reporting those facts to the Police.

Comments from Cobb & Co Paraparaumu

The manager of Cobb & Co commented that he did not know he was not allowed to put an advertisement in the paper at his own cost, the National Party had no idea he was running the advertisement, and it was run in the local paper at his own cost. Owning a business on the Kapiti Coast and running advertisements all the time, it never entered his head that such an advertisement is not permitted and he is surprised that the Observer did not inform him of this when he placed the advertisement.

Electoral Commission's Determination

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

The Electoral Commission is of the view that advertisement, captioned "THE TICK ✓" and indicating that now is the time for readers to do a tick for the National Party, can reasonably be regarded as encouraging or persuading voters to vote in a particular manner within the meaning of election advertisement in section 5(1) of the Electoral Finance Act and within the meaning of section 65(1) of the Act.

Sections 63 and 65 provide that a promoter must not *publish, or cause or permit to be published, an election advertisement* unless the requirements of those provisions are met, including that the advertisement contains a statement setting out the name and address of the promoter and that the publication of the advertisement is authorised in writing by the financial agent of a party the advertisement encourages voting for.

The advertisement indicated that it was "proudly sponsored by Cobb & Co Paraparaumu". The Electoral Commission considers that this statement does not sufficiently set out the name and address of the promoter and therefore contravenes sections 63(2)(a) and 65(1)(b) of the Act.

The Manager of Cobb & Co admitted that he had published the advertisement without the written authorisation of the financial agent of the National Party, and indicated that the National Party had known nothing about the advertisement prior to its publication. As a result, the Electoral Commission considers that the advertisement was also published in contravention of section 65(1)(a).

Section 63(4) and section 65(4) provide that *every promoter is guilty of an illegal practice who wilfully contravenes* section 63(2) or section 65 respectively.

The Manager of Cobb & Co explained that he did not know that such advertisements could not be published and was surprised that the Kapiti Observer had not advised him of this when placing the advertisement. Notwithstanding the Manager's ignorance of the requirements, it appears to the

Electoral Commission that the advertisement was deliberately designed and published and, as such, the publication could be viewed as being a wilful contravention.

Where the Electoral Commission believes that an offence has been committed under Part 2 sub-part 6 of the Electoral Finance Act, section 70 requires the Commission to report to the Police the facts that belief is based on unless the Commission:

considers that the offence is so inconsequential that there is no public interest in reporting those facts to the New Zealand Police.

The Electoral Commission is required to make a value judgement in relation to the nature and extent of the public interest and the level of seriousness involved in the concept of "inconsequential" (see the case of *Judith Kirk v The Electoral Commission* unreported, 9 June 2008, Mackenzie J, HC Wellington CIV 2008-485-805).

In respect of the defective promoter statement, as the advertisement was published in a community newspaper and the circumstances are such that the readers are likely to be able to identify the promoter, the Electoral Commission is of the view that the offence is so inconsequential that there is no public interest in reporting the facts of the matter to the Police.

In respect of the failure to obtain written authorisation from the National Party, the Electoral Commission considers this contravention to be of greater consequence in light of the purposes of the Act and is of the view that the offence is not so inconsequential that there is no public interest in reporting the matter. Therefore the Commission will report to the New Zealand Police the facts upon which it bases its belief that an offence has been committed.

The Electoral Commission has formed its view on the basis of the information available to it, and is not the final decision maker in respect of contraventions of electoral laws and any offences which may arise from such contraventions. Other agencies, including the Police, may reach a different conclusion as a result of their different investigative mandate and wider discretion. Therefore the Commission acknowledges that whether a prosecution should follow, and who should be the subject of any such prosecution, is a matter for the Police.

For the above reasons it is the view of the Electoral Commission that the advertisement in the Kapiti Observer sponsored by Cobb & Co Paraparaumu was published in circumstances amounting to the commission of an offence for the purposes of section 63(4) and section 65(4) of the Electoral Finance Act 2007 and:

- **In respect of the defective promoter statement, the offence is so inconsequential that there is no public interest in reporting the facts to the Police**
- **in respect of publication without written authorisation of the National Party, the offence is not so inconsequential that there is no public interest in reporting the matter**

and in accordance with section 70 of the Electoral Finance Act the Electoral Commission will report to the New Zealand Police the facts upon which it bases its belief that the reportable offence has been committed

Signed for and on behalf of the Electoral Commission



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

26 November 2008

Exhibits

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

1. email 22 October 2008 from New Zealand First Otaki raising the issue
2. copy of the advertisement in the Observer
3. email 5 November 2008 and earlier, from the financial agent for the National party
4. email 6 November 2008 from the manager of Cobb & Co Paraparumu