

Members present

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

Dated: 26 November 2008

Decision Number: 2008-44

Initiated by

IAN WILSON AND ANOTHER ON 5 AND 7 NOVEMBER 2008

In relation to

Election advertisements

ACT NEW ZEALAND

Findings and Determination

Flyer distributed in Hunua electorate promoting Roger Douglas and ACT New Zealand is an election advertisement in favour of ACT, did not contain a promoter statement, and its publication was not authorised in writing by the financial agent for ACT. The failure to provide a promoter statement was not wilful and therefore no offence was committed in respect of that oversight, however the failure to obtain written authorisation from the party financial agent 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 promoter statement. No offence committed under sections 63(4) and 65(4) of the Act as the failure was not wilful.

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

Flyer captioned "From 1840 to 1960 we rose to a living standard of 3rd in the world Today we are 38th" delivered in the Hunua Electorate. The flyer overviews a range of legislative developments and states "Don't get mad – Get Roger Douglas back into parliament! Vote for Roger Douglas and the ACT Party." It also indicates "Vote National to change the government. Vote ACT to change the government AND change the direction of New Zealand towards prosperity and growth", and goes on to discuss a variety of voting options under MMP and suggest the outcomes of some of those options.

The flyer does not contain a promoter statement.

Issues raised

The Electoral Commission considered whether:

- the flyer is a party 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.

The Chief Electoral Office is responsible for administering the candidate advertising provisions of the Electoral Finance Act.

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 ACT New Zealand

The ACT financial agent responded that he knew nothing about the flyer and it was not one the party put together in campaigning for the party vote. He understands that it was put together by Roger Douglas' team. The financial agent submitted that therefore any breach by the party was not willful.

The ACT campaign manager for Hunua responded that he produced much of the election material including the flyer in question. He advised that the ACT party in Hunua produced a number of advertisements and all contained the necessary authorisation but that unfortunately the authorisation on this flyer was overlooked. He outlined personal reasons for the final proof-readings being carried out under pressure and difficult personal circumstances. He indicated a hope that no one was misled and apologised for the inconvenience.

Electoral Commission's Determination

The Electoral Commission has considered the requirements of the Electoral Finance Act and 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. Such approach is consistent with the aims of the New Zealand Bill of Rights Act.

The Electoral Commission is of the view that the contents of the flyer, particularly the exhortation to vote for ACT, can reasonably be regarded as encouraging or persuading voters to vote for the ACT party 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. The Commission also considered the phrase "Vote National to change the government" and formed the view that, in its contextual setting, this phrase does not amount to an election advertisement in favour of the National Party.

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 campaign manager admitted that the promoter statement had been overlooked on this publication, and the Electoral Commission considers that this failure to set out the name and address of the promoter contravenes sections 63(2)(a) and 65(1)(b) of the Act.

The campaign manager did not produce any evidence that the party advertising in the flyer was authorised by the financial agent for ACT, and the financial agent indicated that he had not authorised the publication. As a result, the Electoral Commission considers that the flyer 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 campaign manager explained that personal reasons lead to completing the flyer under pressure and difficult circumstances, and the Electoral Commission accepts that the failure to include a promoter statement under those circumstances was a mere oversight and not wilful and therefore does not amount to the commission of an offence. The Commission is not satisfied however that the circumstances excuse the failure to obtain the required written authorisation from the party financial agent, and formed the view that this failure amounts to the commission of an offence under section 65(4).

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 failure to obtain written authorisation from the party financial agent, the Electoral Commission 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 flyer in question:

- **in respect of the failure to include a promoter statement, was not 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**
- **in respect of publication without written authorisation from the financial agent for ACT New Zealand, was published in circumstances amounting to the commission of an offence for the purposes of section 65(4) of the Electoral Finance Act 2007 and 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

A handwritten signature in black ink that reads "Helena Catt". The signature is written in a cursive, slightly slanted style.

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

3 December 2008

Exhibits

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

1. letters 5 and 7 November 2008 raising the issue
2. copy of the flyer
3. email 17 November 2008 from ACT financial agent
4. letter 14 November 2008 from ACT Hunua Campaign Manager