

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: 2008-45

Initiated by

ANDY MOORE ON 26 OCTOBER 2008

In relation to

Election advertisements

ACT NEW ZEALAND

Findings and Determination

Rodney Hide's jacket bearing an embroidered logo and slogan did not contain a promoter statement and its publication does not appear to have been authorised in writing by the financial agent for ACT New Zealand. The offence 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 display a promoter statement, and contravention of 65(1)(a) by failure to obtain written authorisation from the party financial agent, amounting to offences under sections 63(4) and 65(4) of the Act. The facts will be reported to the Police in accordance with section 70.

The Electoral Commission made no determination about whether any contravention of section 63(2)(b) occurred.

This headnote does not form part of the decision.

Subject

Yellow jacket worn by Rodney Hide bearing an embroidered logo similar to the ACT logo and the slogan "the guts to do what's right".

The jacket does not display a promoter statement.

Issues raised

The Electoral Commission considered whether:

- the words and graphics on the jacket are an election advertisement within the meaning of the Electoral Finance Act 2007 and, if so, they contain 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 ACT New Zealand

Rodney Hide and the financial agent for ACT were invited to comment.

The ACT financial agent responded that the logo on the jacket is not the ACT logo as it does not have the words "the liberal party", that the slogan "the guts to do what's right" is not identifiable to ACT, and that the jacket has been worn throughout the country but is not an election advertisement.

The financial agent advised that Mr Hide has rectified any misunderstanding by affixing, before polling day, an authorisation inside the jacket that can be shown to anyone who asks to see it.

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 ACT financial agent suggested that the graphics on the jacket are not the registered logo for ACT New Zealand, and that the slogan is not identifiable to ACT. However the jacket contains the graphics (only) of the ACT logo along with the slogan "the guts to do what's right" as they appear on the ACT Facebook webpage and an ACT bumper sticker, both of which contain the ACT financial agent's promoter statement.

The Electoral Commission has indicated in previous decisions that, while accompanying identification of the proponents of publications does not of itself convert the publications into election advertisements, disproportionate display of photographs, names or logos could do so. Other matters that might bring such items within the definition of an election advertisement include the addition of persuasive content which lack an information base, such as party election slogans or self promotion.

In respect of the slogan and graphics on Mr Hide's jacket, the same combination of slogan and graphics have been applied in other advertising for the party. The Electoral Commission is of the view that, under those circumstances, the combination of the slogan and graphics on the jacket can reasonably be regarded as encouraging or persuading voters to vote for ACT 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 Electoral Commission considers that the jacket bearing an embroidered logo and slogan was published within the meaning of section 4 of the Act, in that it was displayed to the public. No promoter statement was visible on the jacket and the 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 financial agent advised that Mr Hide has rectified any misunderstanding by affixing an authorisation inside the jacket that can be shown to anyone who asks to see it. The Commission is not satisfied that such concealed promoter statement is sufficient to satisfy the requirements of the Act. The Commission considers that a promoter statement should be accessible to viewers as part of a displayed election advertisement, and the onus should not be on the viewer to ask to see the promoter statement. As a result the Commission formed the view that the publication of the jacket bearing an embroidered logo and slogan, in both the original form and also with a promoter statement inside the jacket, contravenes sections 63(2)(a) and 65(1)(b) of the Act.

The ACT financial agent did not indicate that he authorised in writing the publication of the party election advertising on the jacket, prior to the promoter statement being added (which the Electoral Commission has not viewed), and it therefore appears that the jacket was also originally published in contravention of section 65(1)(a). An issue also arises in respect of whether the promoter was entitled to promote the advertisement, within the meaning of section 63(2)(b) and (3) of the Electoral Finance Act, however in the absence of any relevant information to assist it the Electoral Commission makes no finding on this issue.

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.

It appears to the Electoral Commission that the embroidery on the jacket was deliberately designed and displayed to the public and, as such, could be viewed as wilful contraventions of the requirements of the Act.

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).

The jacket bearing an embroidered logo and slogan was widely publicised and noticed, and Mr Hide continued to display the jacket despite the risks that had been drawn to his attention. In those circumstances, the Electoral Commission considers there is a degree of seriousness to the offending and a public interest element. As a result, the Commission is of the view that the offences are 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.

The Electoral Commission has reason to believe that the original complaint that brought the jacket to the Commission's attention was made for an ulterior motive, including highlighting perceived

difficulties with the Electoral Finance Act, however the Commission is required to administer the Act regardless of the motives for drawing the Commission's attention to potential contraventions of the Act. The Electoral Commission therefore considered the words and graphics on Mr Hide's jacket in the same manner as any other potential election advertisement that comes to its attention.

For the above reasons it is the view of the Electoral Commission that Rodney Hide's jacket bearing an embroidered logo and slogan:

- **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**
- **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 an 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

3 December 2008

Exhibits

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

1. email 26 October 2008 from Andy Moore raising the issue
2. photos of the jacket
3. East and Bays Courier article 18 July 2008
4. email 11 November 2008 from the financial agent for ACT
5. ACT registered logo
6. NZPA article 4 November 2008
7. webgrabs from ACT website November 2008
8. scan of ACT bumper sticker
9. emails 19 November 2008 with the financial agent for ACT