

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: 2008-46

Initiated by

PAM WHEELER ON 5 SEPTEMBER 2008

In relation to

Election advertisements

THE NATIONAL PARTY OF NEW ZEALAND

Findings and Determination

Flyer distributed by Nicky Wagner MP did not contain a promoter statement and its publication does not appear to have been authorised in writing by the financial agent for the National Party. 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

Flyer distributed by Nicky Wagner MP at a meet the candidates meeting in August 2008 at the George Hotel in Christchurch. The flyer contains six slides with the sixth slide captioned "Time for a change!" and containing the words and graphics:

- ✓ National
- ✓ Wagner

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 the National Party

Nicky Wagner and the financial agent for the National Party were invited to comment.

The National Party financial agent responded that the MP did not see this as a breach of the Electoral Finance Act as she did not see the handout as electioneering, the handout simply outlined the work she has been doing as a local list Member of Parliament.

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 believes it is essential to democratic elections that parties can inform the public of the policies which will be implemented if elected and that, particularly in light of New Zealand Bill of Rights Act considerations, it would not be reasonable to regard mere statements of policy as election advertisements and subject to the restraints of the Electoral Finance Act. Therefore the Commission is of the view that items which are accounts or reasoned criticisms of policy, or accounts or reasoned criticisms of actions or inactions, generally are not 'reasonably' regarded as election advertisements as they are essential to informed democratic elections.

The Electoral Commission considers that accompanying identification of the proponents of such items does not of itself convert the items into election advertisements, but 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 slogans, self promotion or unreasoned criticism of opponents, and exhortations to vote in a particular manner.

Notwithstanding the MP's views on the flyer, the Electoral Commission is of the view that the combination of the words and graphics in the sixth slide of the flyer can reasonably be regarded as encouraging or persuading voters to vote for the National 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.

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 flyer does not contain a visible promoter statement, and the National Party financial agent did not indicate that he authorised the publication of the flyer. The Electoral Commission considers the failure to set out the name and address of the promoter contravenes sections 63(2)(a) and 65(1)(b) of the Act, and absence of written authorisation from the financial agent contravenes 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 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 flyer was deliberately published and distributed at a meet the candidates meeting 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 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:

- **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

A handwritten signature in black ink that reads "Helena Catt". The signature is written in a cursive style with a large initial 'H'.

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. letter 5 September 2008 from Pam Wheeler raising the issue
2. copy of the flyer
3. email 26 November 2008 from the financial agent for the National Party