

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: 12 February 2009

Decision Number: 2009-02

Initiated by

A MEMBER OF THE PUBLIC ON 5 November 2008

In relation to

**Election advertisement
RICHARD GREEN**

Findings and Determination

Mr Green displayed a hedge pruned in a manner that the word "Green" is visible. No determination made as to whether the hedge is an election advertisement but, if it is an election advertisement, any potential contravention was not wilful and therefore no offence committed. Even if an offence had been committed, the matter is so inconsequential to the public interest that the matter would not be reported to the Police.

No offence committed under sections 63(4) or 65(4) of the Electoral Finance Act 2007 in respect of a hedge displaying the word "Green" because the owner did not wilfully publish, or cause or permit to be published, an election advertisement in contravention of sections 63 or 65. Furthermore, if an offence had been committed, for the purposes of section 70 the offence would be so inconsequential there would be no public interest in reporting the facts to the Police.

This headnote does not form part of the decision.

Subject

A hedge outside a residential property in Auckland is pruned in a manner that displays the word "Green" similar to the Green Party logo. No promoter statement is visible.

Issues raised

The Electoral Commission considered whether:

- the hedge is an election advertisement within the meaning of the Electoral Finance Act 2007 and, if so, it complies with the requirements of 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 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 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.

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 Mr Richard Green

The financial agent for the Green Party and the occupier of the address were invited to comment.

The occupier, Richard Green, responded that he has had the hedge fronting his property shaped into the word "Green", his surname, for the past 8 years. The property bearing the hedge contains the studio from which he teaches singing and the hedge assists in identifying his property on an extremely busy and dangerous road for visitors searching for street numbers.

Mr Green says that the hedge is not an advertisement for the Green Party, it is his professional plaque which might be somewhat overstated but he is a theatrical performer by profession and a little flamboyance goes with the territory. He further indicated that until receiving a letter from the Electoral Commission he was not aware that the Electoral Finance Act could possibly apply to his hedge. He suggests that no offence has been committed, or that in accordance with section 70, any "offence" that the hedge has led to is so inconsequential that there is no public interest in reporting the matter to the Police.

Electoral Commission's Determination

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

The Electoral Commission accepted Mr Green's explanation about the hedge displaying his surname and advertising his address, and considered whether in those circumstances the display of the word "Green" can reasonably be regarded as encouraging or persuading voters to vote or not to vote in a particular way as contemplated by section 5 of the Electoral Finance Act. The Commission postponed reaching a final conclusion on this issue until the remaining issues had been considered.

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 promoter is authorised to promote a party and that advertisements contain promoter statements.

The hedge does not appear to contain a promoter statement, and there is no evidence that the publication of the hedge was authorised by the financial agent for the Green Party. Therefore if the hedge is an election advertisement then the failure to provide a promoter statement and to have authorisation in writing for that publication would appear to contravene sections 63(2) and 65(1).

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.

Mr Green explained that he had pruned his hedge to display his surname for eight years, to publicise his location to his students, and was not aware that the provisions of the Electoral Finance Act could apply to it. He acknowledged that such might be somewhat overstated but suggested that as he is a theatrical performer by profession a little flamboyance goes with the territory. The Electoral Commission accepts this explanation and is satisfied that the hedge was not wilfully published in contravention of sections 63 or 65.

As a result of the above, and without reaching a final conclusion on whether the hedge as displayed amounts to an election advertisement for the purposes of section 5 of the Act, the Electoral

Commission is of the view that the hedge was not published in circumstances amounting to the commission of an offence for the purposes of sections 63 and 65 of the Electoral Finance Act.

For completeness the Electoral Commission considered the requirement of section 36 to report to the Police the facts of any offence the Commission believes has been committed, unless the Commission considers that the offence is so inconsequential there is no public interest in reporting those facts to the 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 this instance the Commission considers that, even if an offence had been committed, under the circumstances the offence would be so inconsequential there is no public interest in reporting the matter.

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 prosecutorial discretion.

For the above reasons the Electoral Commission did not determine whether the hedge is an election advertisement for the purposes of section 5 of the Electoral Finance Act 2007, but it is the view of the Commission that if the hedge is an election advertisement:

- **the hedge was 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**
- **even if an offence had been committed, any such offence is so inconsequential there is no public interest in reporting the matter to the Police**

Signed for and on behalf of the Electoral Commission



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

24 February 2009

Exhibits

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

1. email 5 November 2008 from initiator
2. photos of the hedge 21 December 2008
3. webpage from Goggle Maps (viewed)
4. email 29 January 2008 from Richard Green