

Members present

Ms Belinda Clark – *ex officio* (Secretary for Justice)
David Henry (Chief Executive)

Dated: 30 July 2009

Decision Number: 2009-36

Initiated by

RUSSELL NORMAN, GREEN PARTY CO-LEADER

ANNETTER KING, DEPUTY LEADER NEW ZEALAND LABOUR PARTY

In relation to

Election advertisements

Political Party election expense returns

THE NATIONAL PARTY OF NEW ZEALAND

Findings and Determination

Video displayed on YouTube did not contain a statement of the promoter's details and its publication does not appear to have been authorised in writing by the financial agent for the National Party. The facts will be reported to the Police.

The video is not a National Party election expense as it was not an activity undertaken by or with the authority of the party secretary or financial agent.

Contravention of sections 63(2)(a) and 65(1)(b) of the Electoral Finance Act 2007 by failure to display a statement of the promoter's details, and contravention of 65(1)(a) by failure to obtain written authorisation from the party financial agent. No determination as to who the promoter was, whether the contraventions were wilful within the context of sections 63(4) and 65(4) of the Act, or whether any contravention of section 63(2)(b) occurred. The facts will be reported to the Police.

No offence committed under section 109 of the Act as the video is not a National Party election expense within the meaning of section 94.

This headnote does not form part of the decision.

Subject

A video about National Party Asian candidates was displayed on YouTube along with the statement: Authorised by M Oldershaw, 276a Fergusson Dr, Heretaunga, Upper Hutt. The video was not included in the National Party election expenses return.

Issues raised

The Electoral Commission considered whether:

- the video is a party election advertisement within the meaning of the Electoral Finance Act 2007 and, if so whether:
 - it contains a promoter statement that satisfies the criteria in the Act and whether its publication is authorised as required by the Act

- any offence has been committed and, if so, whether the offence should be reported to the Police;
- the election expense return was false in any material particular and, if so, whether any offence has been committed.

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.

Section 109(2) provides that it is a corrupt practise for a financial agent to file a return knowing it to be false in any material particular, and in any other case it is an illegal practice unless the financial agent proves that he or she had no intention to mis-state or conceal the facts and took all reasonable steps to ensure the return was accurate.

Comments from the National Party

The financial agent responded on 12 June 2009 that the video was not made for the National Party, was not officially used as part of the party campaign, and did not appear on the party website. He understands that the video was made by volunteers in their own time using their own equipment. Therefore the party did not attribute a monetary value to the video in its election expense return.

In response to the Commission office seeking further clarification about whether he was the promoter of the YouTube webpage displaying the video (and/or authorised it) and whether the phrase and song used in the video were associated with the party election campaign, the financial agent advised on 30 June 2009 that he was unaware that the YouTube vide contained an authorisation statement or that it displayed the phrase "choose a brighter future". He confirmed that the phrase was the 2008 general election campaign slogan of the New Zealand National Party.

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 content of the video including the display of the party's campaign slogan can reasonably be regarded as encouraging or persuading voters to vote of 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 video does not contain a visible promoter statement but the YouTube page it was published on displayed a statement of authorisation by the financial agent for the National Party. The financial agent advises that the video was not part of the official National Party campaign and he was not aware the webpage contained his authorisation statement. The Electoral Commission accepts that the financial agent was not the promoter of the video and is unable to determine who the promoter was.

The 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. The Electoral Commission has no information from which to ascertain whether the contraventions were wilful, and determined that the facts will be reported to the Police.

The Electoral Commission also considered whether the costs associated with the production and publication of the video are a National Party election expense within the meaning of section 94 of the Act and, if so, whether the party's election expense return was false in a material particular. Party election expense is defined in section 94 as an expense incurred in undertaking a party activity. Party activity is defined in section 93 as an activity undertaken by or with the authority of the party secretary or financial agent. The party's financial agent and party secretary indicates he did not authorise the activity, therefore the Commission formed the view that the video is not a National Party expense and that no offence was committed under section 109 of the Act.

For the above reasons it is the view of the Electoral Commission that:

- **the video in question was published in circumstances amounting to contraventions of section 63 and section 65 of the Electoral Finance Act 2007, and the contraventions will be reported to the Police**
- **the video is not a National Party election expense and therefore no offence was committed under section 109 of the Electoral Finance Act**

Signed for and on behalf of the Electoral Commission



David Henry
Chief Executive and Commission Member

4 August 2009

Exhibits

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

1. letters 14 and 15 May 2009 from Russell Norman, Green Party Co-Leader
2. letter 18 May 2009 from Annette King, Deputy Leader New Zealand Labour Party
3. webgrab from YouTube
4. video as displayed on YouTube
5. letter 12 June 2009 from financial agent for the National Party
6. letter 17 June 2009 to financial agent for the National Party
7. letter 30 June 2009 from financial agent for the National Party
8. New Zealand On Air investigation report
9. National Party election expense return