

Members

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

Dated: 19 August 2008

Decision Number: 2008-25

Initiated by
KEES KEIZER

In relation to
Election advertisements
EMPLOYERS AND MANUFACTURERS ASSOCIATION (NORTHERN) INC

Findings and Determination

Employers and Manufacturers Association (EMA) display advertisement in newspapers with the headline "Stop Mallard's Attack On Workers" is an election advertisement. The EMA is not listed as a third party, and it appears that the cost of the item exceeds \$12,000. The offence will be reported to the Police.

Contravention of section 63(2)(b) of the Electoral Finance Act 2007, by exceeding the election expense limit of \$12,000 specified in section 63(3)(d), amounting to an offence under section 63(4) of the Act. The facts will be reported to the Police in accordance with section 70.

This headnote does not form part of the decision.

Subject

A large display advertisement by the EMA in the New Zealand Herald on 23 July 2008 and the Dominion Post on 24 July 2008. The item has the headline "Stop Mallard's Attack On Workers", includes graphics with "stop" signs and placards saying "unfair", "discriminatory", "wrong", and raises objections to proposed changes to the Kiwisaver legislation. It then says "TELL OUR POLITICIANS IT IS WRONG. CALL" and lists a number of MPs and their telephone numbers.

According to Mr Kiezer the ratecard value of the advertisement in the New Zealand Herald is \$14,965.16.

Issues raised

The Electoral Commission considered whether:

- the newspaper items are election advertisements within the meaning of the Electoral Finance Act 2007 and, if so, the EMA is entitled to promote the advertisements
- 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 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, and regulates who may promote an election advertisement.

Section 63(4) provides 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 EMA

The EMA provided substantial submissions about the aims of the item and contending that the item is not an election advertisement, but did not comment on the suggested value of the advertisement in the Herald.

The EMA contends that the item is nothing to do with the election, and that it focuses on proposed changes to the Kiwisaver legislation which were likely to be the subject of parliamentary debate a few days after the item was published. Rather than encouraging or persuading voters to vote or not to vote in a particular manner, the item encourages readers to make their views known to the policymakers and legislators if they agree that the proposed changes advocated by Trevor Mallard are wrong.

The EMA submits that changes to the definition of election advertisement in the Electoral Finance Bill during its passage were made expressly to address concerns that the original definition would catch issues-based advocacy by NGOs. The EMA also refers to the New Zealand Bill of Rights Act and submits that interpretation of the Electoral Finance Act must be consistent with the freedoms protected in that Act.

The EMA also requested to attend the Commission meeting and make oral submissions.

Electoral Commission's Determination

The Electoral Commission has considered the requirements of the Electoral Finance Act along with the Report of the Justice and Electoral Committee on the Electoral Finance Bill, the New Zealand Bill of Rights Act, and items listed as exhibits (below). The Commission had before it a copy of the item as it appeared in the Dominion Post.

In the view of the Electoral Commission the impact of the newspaper item is a primary consideration in determining whether it is an election advertisement. The headlines, associated with the graphics which include 'stop' signs, give an overall perception of wanting to stop Trevor Mallard and/or his party. The Commission concluded that the item is therefore an election advertisement within the meaning of section 63 of the Act (as defined in section 5), as it can reasonably be regarded as encouraging voters not to vote for the Labour Party and it was published in the regulated period.

The Electoral Commission considered the submissions of the EMA, including the stated aims of the EMA of encouraging the public to act in relation to a current issue, the protection of fundamental freedoms in the Bill of Rights Act, and the Report of the Select Committee. The Commission was not persuaded by those submissions in light of the overall impact of the item in the regulated period.

Section 63 provides that a promoter must not *publish, or cause or permit to be published, an election advertisement* unless the requirements of that section are met, including that the advertisements contain a promoter statement. The item contained a satisfactory promoter statement.

Section 63(2)(b) further provides that during the regulated period a promoter must be *entitled* to publish an election advertisement, and section 63(3) specifies who is so entitled. Unless a promoter is the financial agent of the relevant party, third party, or candidate, the promoter is limited to promoting election advertisements in respect of which the expenses incurred do not exceed \$12,000 in total.

The EMA is not registered as a political party and is not listed as a third party. The Electoral Commission was informed that the value of the advertisement in the New Zealand Herald was

\$14,965.16 (and has no information about the cost of the advertisement in the Dominion Post). On that basis the Electoral Commission concluded that the EMA appears to have exceeded the statutory spending limits in section 63(3)(d) and consequently contravened section 63(2)(b) of the Electoral Finance Act 2007.

Section 63(4) provides that *every promoter is guilty of an illegal practice who wilfully contravenes section 63(2)*. It appears to the Electoral Commission that the items were deliberately published in the newspapers and as such could be viewed as being a wilful contravention.

Where the Electoral Commission believes that an offence has been committed under Part 2 sub-part 6 of the 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 considered all the information currently available in relation to this case and 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.

Before making the above determinations, the Electoral Commission considered the EMA's request to provide oral submissions in support of its position and, in light of the substantial written submissions the EMA provided, determined that further oral submissions would not assist at this stage of the process. The Commission was merely required to form or not form a belief that an offence has occurred, and is not the final decision maker in respect of matters referred to the Police and, potentially, to a court. Consequently, it is anticipated that the EMA would have further opportunities to make submissions in support of its position, should the matter proceed further.

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

- **the item promoted by the Employers and Manufacturers Association (Northern) Inc and published in the New Zealand Herald and Dominion Post under the headline "Stop Mallard's Attack On Workers" is published in circumstances amounting to the commission of an offence for the purposes of section 63(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 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

26 August 2008

Exhibits

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

- 1 Email 23 July 2008 from Kees Keizer
- 2 Display advertisement in the Dominion Post on 24 July 2008
- 3 Email 25 July 2008 to EMA inviting comment
- 4 Faxed letter 8 August 2008 from Russell McVeagh on behalf of EMA
- 5 Letter 12 August 2008 to Russell McVeagh