

## 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: 3 November 2008

Decision Number: 2008-41

Initiated by

**PHIL THOMSON**

**ANN ROBBIE**

**PHILIP WARD**

**DAVE WINEFIELD**

**on 12 to 15 September 2008**

In relation to

**Election advertisements**

**Election programmes**

**TVNZ**

**RADIO NEW ZEALAND**

**RADIO NETWORK**

**MEDIA WORKS**

## Findings and Determination

Live broadcast of the Prime Minister's election date announcement is not an election advertisement within the meaning of the Electoral Finance Act, and is not a prohibited election programme within the meaning of the Broadcasting Act.

The live broadcast was selected by or with the authority of the broadcasters for the purpose of informing their audiences within the meaning of section 5(2)(c) of the Electoral Finance Act 2007 and is therefore not an election advertisement within the meaning of section 5 of that Act.

The live broadcast was a news programme within the meaning of section 70(3) of the Broadcasting Act 1989 and is therefore not a prohibited election programme within the meaning of section 70 of that Act.

**This headnote does not form part of the decision.**

## Subject

On 12 September 2008 the Prime Minister called a press conference and announced the date of the 2008 general election. The announcement was broadcast live by Newstalk ZB, Radio Live, Radio New Zealand, TV One and TV3.

The announcement included a summary of activities the Labour government has undertaken and what it proposes to do, suggested this election is all about trust and that the Prime Minister will be asking New Zealanders to cast a positive vote for a future they can trust, and indicated that the National Party has attacked all Labour's policies and cannot be trusted.

The announcement did not contain a promoter statement, and it was not broadcast using the allocations of time and money made to political parties under the Broadcasting Act.

## **Issues raised**

The programmes raise issues under the Electoral Finance Act and the Broadcasting Act. The Electoral Commission considered whether:

- the broadcasts are election advertisements within the meaning of the Electoral Finance Act 2007
- the broadcasts are prohibited election programmes within the meaning of Part 6 of the Broadcasting Act 1989.

Comments were not sought from the broadcasters, the Prime Minister's Office, or the Labour Party as the Electoral Commission was, at this stage, merely considering whether such a broadcast could come within the regulated categories in the respective Acts.

## **Electoral Finance Act 2007**

Section 5(1) 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 5(2) provides a list of items that are not election advertisements.

## **Broadcasting Act 1989**

Section 69 of the Broadcasting Act defines an election programme for the purposes of Part 6 of the Act to be, in summary, any programme that:

- encourages or persuades, or appears to encourage or persuade, voters to vote or not to vote for a political party or candidate
- advocates support for, or opposes, a political party or candidate
- notifies of meetings in connection with an election.

Section 70 prohibits the broadcasting of election programmes, with certain exceptions. Section 70(3) excludes news, comments, and current affairs programmes from the prohibition.

The Electoral Commission is responsible for administering Part 6 of the Act. Other requirements of the Act, including the standards that apply to broadcasting programmes and the definition of "election programme" that applies for purposes other than Part 6 of the Act, are administered by the Broadcasting Standards Authority.

## **Electoral Commission's Determination**

The Electoral Commission has considered the requirements of the Electoral Finance Act and Part 6 of the Broadcasting Act, and items listed as exhibits (below).

### **Electoral Finance Act**

The Electoral Commission is of the view that the content of the Prime Minister's election date announcement can, in the absence of other factors, reasonably be regarded as encouraging voters to vote or not to vote in a particular manner within the meaning of election advertisement in section 5(1) of the Electoral Finance Act.

Section 5(2) contains a list of items that are not election advertisements, including:

*(c) any content of a radio or television programme, other than advertising material, that has been selected by, or with the authority of, a broadcaster (within the meaning of the Broadcasting Act 1989) solely for the purpose of informing, enlightening, or entertaining its audience:*

The Electoral Commission considers that, in the circumstances of the live broadcast, the content was selected by or with the authority of the respective radio and television broadcasters for the purpose of informing their audiences. As a result, the Commission formed the view that the live broadcast comes within the meaning of section 5(2)(c) and is therefore not an election advertisement for the purposes of the Electoral Finance Act.

### **Broadcasting Act**

The definition of "election programme" in section 69 of the Broadcasting Act, which applies for the purposes of Part 6 of the Act, includes a programme that:

- (a) encourages or persuades or appears to encourage or persuade voters to vote for a political party ...*
- (b) encourages or persuades or appears to encourage or persuade voters not to vote for a political party ...*
- (c) advocates support for a candidate or political party*
- (d) opposes a candidate or political party.*

The Electoral Commission is of the view that the content of the announcement was an election programme within the meaning of section 69 in that it encourages or persuades, or appears to encourage or persuade, voters to vote for the Labour Party and not to vote for the National Party and/or it advocates support for the Labour Party and opposes the National Party.

Section 70(1) of the Act provides that *no broadcaster shall permit the broadcasting of an election programme* except in the circumstances provided for in section 70.

Section 70(2) provides the circumstances in which broadcasters may broadcast election programmes and, in summary, those circumstances relate to broadcasts resulting from the allocation to parties made by the Electoral Commission, broadcasts for candidates during the election period, and non-partisan community service broadcasts or broadcasts by electoral agencies. The Commission is satisfied that the programme in question does not fall into these categories.

Section 70(3) provides that section 70(1) does not restrict:

*the broadcasting, in relation to an election, of news or comments or current affairs programmes.*

Whether a programme comes within the protected category in section 70(3) is a question of fact. The Electoral Commission has considered the facts surrounding the programme's broadcast including that the press conference was held in the Beehive theaterette where news conferences are frequently held, that it was broadcast live at short notice and the broadcasters did not appear to be forewarned as to the content of the announcement, that the media and the public were anticipating and speculating about an election date announcement, and that many of the major broadcasters shared the view that the announcement was a newsworthy event and therefore elected to broadcast it live. The Commission reached the conclusion that in those circumstances it was reasonable for the broadcasters to have a genuine expectation and make a *bona fide* decision that the press conference called by the Prime Minister was in respect of a newsworthy event about a national occasion.

As a result, the Electoral Commission is of the view that the programme was a news programme within the meaning of section 70(3) and therefore is not prohibited by section 70 of the Broadcasting Act.

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 it is the view of the Electoral Commission that the live broadcast of the Prime Minister's election date announcement:**

- **is not an election advertisement within the meaning of section 5 of the Electoral Finance Act 2007 as it was selected by or with the authority of the broadcasters for the purpose of informing their audiences within the meaning of section 5(2)(c) of that Act**
- **is not a prohibited election programme within the meaning of section 70 of the Broadcasting Act 1989 as it was a news programme within the meaning of section 70(3) of that Act**

Signed for and on behalf of the Electoral Commission



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

11 November 2008

#### **Exhibits**

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

1. Transcript of the Prime Minister's announcement 12 September 2008
2. Transcripts of the broadcast introductions to the live announcement
3. Crown Law Opinion received 6 October 2008
4. Letter from Broadcasting Standards Authority received 7 October 2008
5. Memo from Deidre Brookes, Statutory Relationships Manager, 20 October 2008
6. Crown Law Opinion received 29 October 2008