

Members present

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

Dated: 11 November 2008

Decision Number: 2008-42

Initiated by

CLINTON BOWERMAN ON 30 SEPTEMBER 2008

In relation to

Election advertisement
TREVOR MALLARD MP
JIM ANDERTON MP

Findings and Determination

National Party policies released by Trevor Mallard MP and Jim Anderton MP are not election advertisements within the meaning of section 5 of the Electoral Finance Act 2007 and therefore their publication is not governed by the requirements of the Act.

This headnote does not form part of the decision.

Subject

National Party policy documents released by Trevor Mallard MP and Jim Anderton MP. It was asserted that the MPs released, and therefore advertised, National Party policies without being authorised to do so by the financial agent for the National Party as required by the Electoral Finance Act.

The policy documents in question were:

- National Party Research, Science and Technology Policy
- National Party conservation Policy
- National Party Environmental Policy
- National Party Health Policy

The Electoral Commission was provided versions of the policies as published on the internet, which contain promoter statements by the financial agent of the National Party.

Issues raised

The Electoral Commission considered whether the policy documents are election advertisements for the National Party within the meaning of the Electoral Finance Act 2007 and, if so, whether the provisions of the Act have been complied with.

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.

Comments from Trevor Mallard MP

Mr Mallard commented that the three policies "were issued by the National Party, but initially the party did not publish them widely. It later published them extensively. No doubt they complied with any promoter or publication requirements, but that is not a matter I know about or am responsible for." He also commented that he distributed a copy of the policies with his comments and does not agree that this is publication on his part and he was not the person on whose initiative the National Party issued the policies.

Comments from Jim Anderton MP

Mr Anderton's office indicated that he answered questions about the policy in Parliament and tabled a copy of the draft policy in Parliament, and therefore Parliamentary privilege applies.

Electoral Commission's Determination

The Electoral Commission has considered the requirements of the Electoral Finance along with the 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.

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.

In this instance the Electoral Commission considers the policy documents released amount to statements of policy which were accompanied by comments on those policies. They do not contain any words or graphics that could reasonably be regarded as encouraging or persuading voters to vote or not to vote for in a particular manner, notwithstanding the inclusion of the National Party promoter statements on the documents. Therefore in the Commission's view the policy documents do not contain election advertising for the purposes of the Electoral Finance Act and, as a result, their publication is not governed by the requirements of the 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 release of the National Party policy documents in question by Trevor Mallard MP and Jim Anderton MP did not contravene the election advertisement provisions of the Electoral Finance Act

2007 as the documents are not election advertisements within the meaning of section 5 of the Act

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

26 November 2008

Exhibits

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

1. letter 30 September 2008 from Clinton Bowerman to the CEO, with media attachments
2. letter 21 October 2008 from Clinton Bowerman, with copies of the polices