

## Members present

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

Dated: 18 September 2008  
Decision Number: 2008-34

Initiated by  
**JOHN BOSCAWEN ON 3 JULY 2008**

In relation to  
**Election advertisements**  
**Election programmes**  
**RADIO NETWORK**

## Findings and Determination

NewsTalk ZB talkback programme hosted by Winston Peters MP is not an election advertisement within the meaning of section 5 of the Electoral Finance Act.

NewsTalk ZB talkback programme hosted by Shane Jones MP is an election advertisement within the meaning of section 5 of the Electoral Finance Act, and did not contain a promoter statement. The offence will be reported to the Police.

Contravention of sections 63(2)(a) and 65(1)(b) of the Electoral Finance Act 2007, by failure to provide a promoter statement, amounting to an offence under sections 63(4) and 65(4) of the Act. The facts will be reported to the Police in accordance with section 70.

NewsTalk ZB talkback programmes hosted by Winston Peters MP and Shane Jones MP are prohibited election programmes within the meaning of the Broadcasting Act. The offences will be reported to the Police.

Contravention of section 70(1) of the Broadcasting Act 1989, by broadcasting prohibited election programmes, amounting to offences under section 80 of the Act. The facts will be reported to the Police in accordance with section 80A.

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

## Subject

Newstalk ZB talkback broadcasts were hosted by Winston Peters and Shane Jones in June 2008. In each of the programmes the hosts told listeners to vote for their respective parties, and there was no evidence that either programme contained a promoter statement at any time.

## Issues raised

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

- the radio broadcasts are election advertisements within the meaning of the Electoral Finance Act 2007 and, if so, whether the provisions of that Act have been complied with
- any offence has been committed under the Electoral Finance Act and, if so, the offence should be reported to the Police
- the radio broadcasts are prohibited election programmes within the meaning of the Broadcasting Act 1989
- any offence has been committed under the Broadcasting Act.

## **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.

## **Broadcasting Act 1989**

Section 69 of the Broadcasting Act defines an election programme 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, and section 80 provides that it is an offence to fail to comply with section 70.

If the Electoral Commission believes an offence has been committed against section 80, section 80A requires the Commission to report to the Police the facts that belief is based on.

Other requirements of the Act, including the standards that apply to broadcasting, are administered by the Broadcasting Standards Authority.

## **Comments from Radio Network**

(Comments were not sought from the MPs who hosted the programmes)

Radio Network advises that on the four days following Queen's Birthday they ran their morning talkback hosted by four politicians who replaced the normal host (who was on leave). The selection of the MPs was on ability and not political allegiances. The MPs appearances attracted political questions but also topics not associated with politics, and they had no brief to advance their own political parties.

Radio Network says the broadcasts were designed as entertainment and the content bore this out.

## **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 statements made by the two MP hosts, such as "We don't mind who you vote for in your first vote, but buy yourself some insurance and give New Zealand First your party vote, your second vote" (Winston Peters, 5 June 2008) and "Vote Labour – see you in November" (Shane Jones, 6 June 2008) 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 accepts that the hosts were selected by the broadcaster as people who the broadcaster thought would be entertaining, and the hosts were provided with a brief for the programmes. The brief did not contain substantial instructions however the Commission considers it was within the brief to respond to questions – and that would include questions about the election – and if the hosts conducted themselves within the parameters of the brief then it would be reasonable to conclude that the content was selected by or with the authority of the broadcaster.

In the view of the Electoral Commission, Mr Peters made his statements in response to questions posed by a caller including a question about whether the best way for pensioners to vote for New Zealand First would be by way of party vote or voting for the candidate. As a result, the Commission considers that the statements made by Mr Peters come within the terms of section 5(2)(c) and therefore do not amount to an election advertisement.

In respect of the statement of Mr Jones, this was delivered unprompted at the end of the programme. In the circumstances the Electoral Commission does not consider that content of the programme was within the brief provided by the broadcaster, and therefore the content was not selected by or with the authority of the broadcaster in terms of section 5(2)(c) of the Act. Therefore in the view of the Commission the statement of Mr Jones amounts to an election advertisement for the purposes of section 5 of the Electoral Finance 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 advertisements contain a promoter statement and the promoter is entitled and/or authorised to publish the advertisement.

There was no evidence that the programme hosted by Mr Jones contained a promoter statement and, under the circumstances of the broadcast, the Electoral Commission leaves open the question of who the promoter was or whether the promoter was authorised and/or entitled to publish the advertisement. However the absence of a promoter statement is of itself a contravention of section 63(2) and, as the advertisement was encouraging a vote for a party, also a contravention of section 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. It appears to the Electoral Commission that the statement of Mr Jones was deliberately made and published, 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 Electoral Finance 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 the programme hosted by Mr Jones 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. The Commission acknowledges that whether a prosecution should follow, and who should be the subject of any such prosecution, is a matter for the Police exercising their different and wider discretion.

### **The Broadcasting Act**

The Electoral Commission is of the view that the statements made by the two MP hosts encouraging listeners to vote for their respective parties are election programmes within the meaning of section 69 of the Broadcasting Act.

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 election programmes may be broadcast and, in summary, these are 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 programmes in question do 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.*

The Electoral Commission considers there is no doubt that the talkback programmes were not news programmes. The Commission noted that, in soliciting support for their respective parties, there were none of the general indicators of a current affairs programme present such as objective and impartial reporting or canvassing a range of viewpoints, or the MPs being interviewed and challenged. The Commission acknowledges that the issue is not straightforward but formed the view that, on balance, the programmes are not of the character of those contemplated by section 70(3).

As a result, the Electoral Commission is of the view that the programmes were broadcast in contravention of section 70 of the Broadcasting Act. Section 80 provides that such contravention of section 70 is an offence.

Where the Electoral Commission believes that an offence has been committed under section 80 of the Broadcasting Act, section 80A requires the Commission to report to the Police the facts that belief is based on. Therefore the Commission will report to the New Zealand Police the facts upon which it bases its belief that an offence has been committed. The Commission acknowledges that whether a prosecution should follow, and who should be the subject of any such prosecution, is a matter for the Police exercising their prosecutorial discretion.

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

- **the talkback programme hosted by Winston Peters MP and broadcast on NewsTalk ZB was not published in circumstances amounting to the commission of an offence for the purposes of section 63(4) and section 65(4) of the Electoral Finance Act 2007**
- **the talkback programme hosted by Shane Jones MP and broadcast on NewsTalk ZB was published in circumstances amounting to the commission of an offence for the purposes of section 63(4) and section 65(4) of the Electoral Finance Act 2007**

- **in respect of the programme hosted by Shane Jones MP, the offence is not so inconsequential that there is no public interest in reporting the matter**
- **the talkback programmes hosted by Winston Peters MP and Shane Jones MP, and broadcast on NewsTalk ZB, were broadcast in circumstances amounting to the commission of offences for the purposes of section 80 of the Broadcasting Act 1989**

**and in accordance with section 70 of the Electoral Finance Act and section 80A of the Broadcasting Act the Electoral Commission will report to the New Zealand Police the facts upon which it bases its belief that the respective offences have been committed**

Signed for and on behalf of the Electoral Commission



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

9 October 2008

### **Exhibits**

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

1. Email 3 July 2008 from John Boscawen raising the issue
2. Transcript of part of the programmes hosted by Winston Peters and Shane Jones, provided by John Boscawen
3. Letter 4 July 2008 to Radio Network
4. Letter 22 July 2008 from Radio Network
5. Media articles about Shane Jones and Winston Peters hosting the programmes, provided by Radio Network
6. Email 13 August 2008 from John Boscawen, with response to him from the Broadcasting Standards Authority
7. Audio files of the programmes
8. Email 5 September 2008 from CEO of the Broadcasting Standards Authority
9. Crown Law opinion 20 September 2002 regarding Election Broadcasting